



September 10, 2019

Clerk of the Wisconsin Supreme Court  
Attention: Deputy Clerk-Rules  
P.O. Box 1688  
Madison, WI 53701

Also submitted electronically to [clerk@wicourts.gov](mailto:clerk@wicourts.gov)

RE: Rule Petition 19-13, relating to qualifications for appointment as a guardian ad litem in family court

To the Honorable Justices of the Wisconsin Supreme Court:

We file this comment in opposition to Rule Petition 19-13, relating to qualifications for appointment as a guardian ad litem in family court. Tiffany L. Highstrom is a partner at Stafford Rosenbaum LLP. She was a member of the 2018 Legislative Council Study Committee on Child Placement and Support. Gretchen Viney is a distinguished clinical professor at the University of Wisconsin Law School where she teaches, among other courses, Guardian ad Litem Practice in Wisconsin.

As practitioners and educators in this profession, we recognize that family violence is a significant societal problem. We do not discount the seriousness of family violence allegations in all court proceedings. However, we oppose imposing additional training on court-appointed guardians ad litem in family court.

Supreme Court Rule 35.03(1m)(a) lists as subject matters appropriate for approval as family court education: proceedings under chapter 767; child development and the effects of conflict and divorce on children; mental health issues in divorcing families; the dynamics and impact of family violence; sensitivity to various religious backgrounds, racial and ethnic heritages, and issues of cultural and socioeconomic diversity. These topics are all sufficiently important that the Supreme Court chose them as the sole qualifiers for family court education credit. However, the Court did not mandate any of the topics, presumably recognizing the ability of lawyers to choose the topics of greatest interest or need. The pending petition asks the Court now to mandate one of those topics: “the dynamics and impact of family violence.”

We hypothesize that one justification for requiring mandatory training in family violence issues is because the family code itself recognizes domestic violence as having a special status among the sixteen factors the court must consider in determining custody and placement. Sec. 767.41(5)(am), Stats. Certain provisions in chapter 767 depend on a finding of “interspousal battery” or “domestic abuse,” which is number thirteen of the sixteen factors. This subsection relies on cross-referenced definitions. Battery, as defined in cross-referenced sec. 940.19, Stats., occurs then one person “causes bodily harm to another by an act done with intent to cause bodily harm . . . without the consent of the person harmed.” The definition in cross-referenced sec. 940.20(1m) is similar. “Domestic abuse” is defined in cross-referenced sec. 813.12(1)(am), Stats., as intentional infliction of physical pain, physical injury, or illness; intentional impairment of physical condition; 1<sup>st</sup>, 2<sup>nd</sup>, or

3<sup>rd</sup> degree sexual assault, stalking, criminal damage to the other person's property, and threat to engage in any of the listed conduct. Sec. 813.12(1)(am), Stats.

These provisions, largely enacted as part of 2003 Wisconsin Act 130, either direct or allow the court to modify the standard custody and placement provisions if necessary findings are made. For example, if the evidence shows that either party engaged in interspousal battery or domestic abuse, as defined, then a rebuttable presumption arises that the parties will not be able to cooperate in future decision-making with respect to legal custody. Sec. 767.41(2)(b)2.c, Stats. Additionally, if the court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incident of domestic abuse or interspousal battery, then other statutory sections come into play in determining custody, placement, and fashioning placement schedules and rules. *See, for example*, secs. 767.41(5)(bm), 767.41(2)(d)1., 767.41(6)(g) 1-8, Stats. The statutory provisions also require the guardian ad litem to undertake the investigation related to these definitions and to "report" to the court on the results of that investigation. Sec. 767.407(4), Stats.

The special status of a finding of interspousal battery or domestic abuse in the custody and placement statutes does not support the provisions of the pending petition because the training contemplated in the proposal is not tied to those statutory provisions or definitions. Traditional definitions of domestic abuse (or family violence) typically read something like: Domestic abuse is a pattern of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial, and sexual—that adults or adolescents use against their intimate partners. *See Domestic Abuse Guidebook for Wisconsin Guardians ad Litem* (March, 2017), page 22, attached and linked: <https://www.wicourts.gov/publications/guides/docs/galguidebook.pdf>. Types of traditional domestic abuse might include verbal abuse, mental and emotional abuse, physical abuse, sexual abuse, stalking, financial abuse, spiritual abuse, pet and property destruction. Generally, we would expect to see coercion and control in situations involving domestic abuse. The traditional understanding of domestic abuse is much broader than the definitions of domestic violence that become material under the family court code.

If you read all 159 pages of the *Guidebook*, noted above, you will find that while the family code definitions are introduced at the beginning (Section I (A)), the bulk of the training material is directly tied to traditional definitions of domestic abuse and violence. We anticipate that the *Guidebook* will become the centerpiece of the three-hour training that the pending petition contemplates. In the *Guidebook*, the distinction between domestic abuse overall and domestic violence as defined in the statutes is blurred to the point of non-recognition. *See, for example*, page 57, in which "coercive control" is explained without distinguishing it from the type of domestic abuse that is material to the special provisions of the family code. Of course, that distinction is imperative in family court. Even if the *Guidebook* is not the centerpiece of the training, we anticipate that the training will be centered on traditional notions of domestic abuse, not focused on the statutory standards.

We certainly do not minimize the importance or value of training in traditional aspects of domestic abuse, which become relevant under the standard factors for custody and placement in section 767.41, Stats. However, training in traditional domestic abuse cannot be justified on the basis of the special statutory provisions. The facts that implicate the special domestic violence provisions of the family law statutes are limited to interspousal battery and domestic abuse as defined in the statutes. Lawyers do not require three credit hours, plus periodic revisiting of the definitions and

consequences, to understand how to identify those material behaviors. The rest of the training, while useful, cannot be explained by the special statutory status given to domestic violence.

Other aspects of the anticipated “training” are concerning. Were the guardian ad litem to follow the rubrics and outlines in the *Guidebook*, the guardian ad litem would probably not have time to investigate anything *other* than family violence. The aspirational expectations are laudatory but to make those expectations the training focus of what a guardian ad litem would be expected to do is simply not practical for a variety of reasons. Guardians ad litem face a slew of interpersonal, health, psychological, and financial issues when representing a child’s best interest. To be effective, a guardian ad litem needs to be trained in a variety of areas relating to both children, adults, and family dynamics. All of these issues are relevant and important to effectively advocate on behalf of a child’s best interest. Mandatory domestic abuse training, while important, should not be required at the expense of a guardian ad litem’s training in other areas, such as child development, mental health, and other legal skills such as negotiation and rules of evidence. Although the *Guidebook* may not be the only training manual out there, its very presence suggests that domestic violence advocates will use the *Guidebook* to instruct guardians ad litem not only in aspirational best practices but also in required practices. We urge the court to review the provisions of the *Guidebook* and to consider whether this is the type of mandatory training justified under the current statutes because this is, indeed, the kind of training that guardians ad litem will face.

Finally, we need to be realistic about what a guardian ad litem can accomplish. In Wisconsin, the guardian ad litem is a lawyer advocate for the best interests of the child. Sec. 767.407(4); Wiederholt v. Fischer, 169 Wis. 2d 524, 485 N.W.2d 524 (1992); Hollister v. Hollister, 173 Wis. 2d 413, 496 N.W.2d 642 (1992); SCR 20:4.5. The guardian ad litem cannot be a witness. SCR 20:3.7(a). The guardian ad litem’s position must be supported by admissible evidence. In re Paternity of Stephanie R., 174 Wis. 2d 745, 498 N.W.2d 235 (1993); also Metropulos v. Metropulos, unpublished, No. 2006AP3105-FT, released May 1, 2007. The guardian ad litem is not a social worker, private investigator, or law enforcement officer. And, certainly, the guardian ad litem is not an expert witness. The guardian ad litem, no matter how well “trained,” cannot change the rules that apply to all lawyers and all court proceedings. Training about family violence is useful in general, but the guardian ad litem is not in a position to advise the court about the effects of family violence or to make a recommendation based on general knowledge about family violence. We may make better use of training time to teach guardians ad litem how to be litigators, not witnesses.

First and foremost, the guardian ad litem’s role is as an advocate for the children’s best interests in the same manner as an attorney is for a party. *See citations, above.* To that end, we need to be focused on their education and be cognizant of the potential financial cost of any requirements. Guardian ad litem appointments tend to attract younger practitioners, new to practice. Guardian ad litem work offers new attorneys the opportunity to gain courtroom and dispute resolution experience without balancing client demands. Likewise, the county pay rates for guardian ad litem appointments are typically more palatable for younger lawyers. In rural counties, attracting guardians ad litem for appointments can be difficult. For smaller or solo firms, the reduced hourly pay rate may not justify the time requirements of a case. The new domestic violence training requirements would likely increase CLE costs for guardians ad litem. CLEs are expensive. Practitioners in larger counties, with active bar associations, may have more options to obtain these credits. However, in

rural counties, attorneys have fewer CLE opportunities. Under SCR 31.05, on-demand CLE credits are restricted, making it more likely that guardians ad litem will need to travel to a location where a CLE focused on domestic violence training is available. For many solo and small firm practitioners, this is not financially tenable. Hence, the rule change could have the unintended effect of dissuading guardians ad litem from taking appointments.


Finally, the proposed petition expects the Board of Bar Examiners to separately approve the CLE courses that meet the family violence training requirement. At this point in time, BBE is already obligated to separately approve courses for EPR credits, guardian ad litem-adult training (SCR 36), guardian ad litem minor training (SCR 35.03(1)), and guardian ad litem minor training-family court education (SCR 35.03(1m)). We appreciate that BBE can speak for itself, yet we would point out that BBE may not have the resources or staffing to add yet another layer of approvals. The last time the Supreme Court modified SCR 35 (to add the family court education training requirement effective in 2003), the justices assured the appearing parties, including the director of BBE and Ms. Viney, that it would not change or increase the reporting and training requirements again in the future. Although this may be an assurance that has been overwhelmed or forgotten in the fullness of time, the sentiment that “one more thing” would be one thing too many resonates with us and may resonate with BBE.

We request that the Supreme Court reject the proposed changes to SCR 35.015.

Respectfully submitted,



Tiffany L. Highstrom  
SBN 1049895  
Stafford Rosenbaum LLP  
222 West Washington Ave., Suite 900  
P.O. Box 1784  
Madison WI 53703-2744 .



Gretchen Viney  
SBN 1018431  
University of Wisconsin Law School  
975 Bascom Mall, Room 5228  
Madison, WI 53705

Attached: *Domestic Abuse Guidebook for Wisconsin Guardians Ad Litem* (March, 2017)

# Domestic Abuse Guidebook

for

## Wisconsin Guardians Ad Litem

### *Addressing Custody, Placement, and Safety Issues*



Governor's Council on  
Domestic Abuse



*Created by*  
Governor's Council on Domestic Abuse  
*and*  
End Domestic Abuse Wisconsin

March 2017

---

*This project was supported by STOP Grant Award No. 11877 awarded to the Wisconsin Director of State Courts Office by the Office on Violence Against Women, U. S. Department of Justice. The opinions, findings, conclusions, or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the Department of Justice or the Office on Violence Against Women.*

---

This guidebook is a joint project of the Wisconsin Governor's Council on Domestic Abuse and End Domestic Abuse Wisconsin. The guidebook is based on documents created by the Washington State Administrative Office of the Courts and the Battered Women's Justice Project and were adapted with permission.

---

The Wisconsin Governor's Council on Domestic Abuse and End Domestic Abuse Wisconsin wish to thank all of the following:

The Governor's Council on Domestic Abuse - Legislative, Policy and Systems Collaboration Committee, Guardian ad Litem Workgroup

The Battered Women's Justice Project

Washington State Administrative Office of the Courts

The domestic abuse programs and guardians ad litem who helped us compile sample recommendations

The guidebook workgroup that consists of the following members:

Shirley Armstrong, Governor's Council on Domestic Abuse

Cyrus Behroozi, Milwaukee Center on Children and Youth

Maureen Funk, Gundersen Health System

Tony Gibart, End Domestic Abuse Wisconsin

Kevin Hamberger, Ph.D., Medical College of Wisconsin

Darald Hanusa, Ph.D., Midwest Domestic Violence Resource Center & University of Wisconsin-Madison, School of Social Work

Marlys Howe, Dane County District Attorney's Office - Domestic Violence Unit

Rochelle Jones, Legal Action of Wisconsin

Sharon Lewandowski, Department of Children and Families

Bonnie MacRitchie, Department of Children and Families

Tess Meuer, End Domestic Abuse Wisconsin

Amber Peterson, Wisconsin Director of State Courts Office, Office of Court Operations

Gricel Santiago-Rivera, RISE Law Center

Representative Katrina Shankland, Governor's Council on Domestic Abuse

Renee Schulz-Stangl, Personal Development Center

Senator Lena Taylor, Governor's Council on Domestic Abuse

Morgan Young, End Domestic Abuse Wisconsin

**Print copies of the guidebook may be available free of charge. Contact the Director of State Courts Office, Office of Court Operations at 608-266-3121 to ask about receiving a copy.**

# TABLE OF CONTENTS

INTRODUCTION: DOMESTIC ABUSE CASES REQUIRE SPECIALIZED KNOWLEDGE .....	9
I. DEFINITIONS AND FOUNDATIONS .....	13
A. LEGAL DEFINITION OF DOMESTIC ABUSE .....	13
1. Family Law Definitions .....	14
a. Domestic Abuse, as Defined in the Family Law Code .....	14
b. Interspousal Battery .....	16
c. Abuse of a Child .....	16
d. Primary Physical Aggressor, as Defined in the Family Law Code.....	18
2. Criminal Law Terminology.....	19
a. Domestic Abuse, as Defined in the Criminal Law Code.....	19
b. Predominant Aggressor, as Defined in the Criminal Code ..	20
B. BEHAVIORAL DEFINITION AND COMMON CHARACTERISTICS OF DOMESTIC ABUSE .....	22
1. A Pattern of Abusive Tactics .....	22
2. Psychological Attacks Through Verbal Abuse .....	23
3. Learned Behavior .....	24
4. Mistaken Belief that Both the Abuser and the Victim are “Abusive” - One Physically and One Verbally .....	24
C. DISPELLING MYTHS: WHAT DOMESTIC ABUSE IS NOT.....	26
1. Not “Out-of-Control” Behavior .....	26
2. Not About Anger, or Caused by Stress, Alcohol, or Drugs.....	26
3. Not Caused by Problems Inherent in the Relationship Between the Two Individuals or by the Victim’s Behavior .....	29
4. Not the Same as Sustaining Injuries: Mutual Battering is Rare .....	31
D. DISTINGUISHING BETWEEN DOMESTIC ABUSE, HIGH CONFLICT, AND NORMAL CONFLICT OF SEPARATING COUPLES.....	33
1. Normal Conflict vs. High Conflict .....	33



- 2. Key Differences Between Domestic Abuse and Ongoing Conflict..33
  - a. Physical Safety.....34
  - b. Legal Custody Awarded to the Non-Abusive Parent .....34
  - c. Parenting Improves when Domestic Abuse Not Present ....34
  - d. Abusers Deny and Minimize and Victims Generally Take Responsibility .....34

**II. FOUR-STEP FRAMEWORK FOR IDENTIFYING, UNDERSTANDING, AND ACCOUNTING FOR ABUSE IN RECOMMENDATIONS.....35**

- A. STEP ONE: IDENTIFY DOMESTIC ABUSE .....37**
  - 1. Legal Custody and Physical Placement Orders.....38
    - a. Guardian Ad Litem’s Domestic Abuse Inquiry .....38
    - b. Guardian Ad Litem’s Child Abuse Inquiry .....38
  - 2. Methods to Conduct an Investigation.....39
    - a. Importance of a Thorough Investigation.....39
    - b. Investigation Protocols that Increase Safety.....41
  - 3. Steps in an Investigation .....42
    - a. Interview the Adult Parties - Sample Interview Comments and Questions.....42
    - b. Interview the Child Parties - Sample Interview Comments and Questions.....43
    - c. Determine Whether there are Domestic Abuse, Harassment, or Child Abuse Restraining Orders .....44
    - d. Determine Whether There is a Criminal Case Involving Domestic Abuse.....47
    - e. Access to Documents Related to Domestic Abuse .....50
    - f. A Note About Privileged Records.....52
    - g. Interview Additional Parties .....54
- B. STEP TWO: DEFINE THE NATURE AND CONTEXT OF ABUSE .....55**
  - 1. Minor, Isolated Incidents .....55
  - 2. Resistive Violence .....56
  - 3. Coercive Control of the Victim .....57
  - 4. Identifying Coercive Control During Family Court Proceedings ...59
    - a. Using the Guardian Ad Litem to Control the Victim .....59

b.	Attempting to Control Court Process.....	61
5.	Children’s Experience of Abuse .....	62
a.	Assess the Domestic Abuse Risk Posed to Children.....	62
b.	Physical or Psychological Abuse of Children .....	64
i.	Injury or Threat to Child, Pets, or Objects .....	64
ii.	Injury to Child While Attacking the Other Parent...	64
iii.	Using Children to Control Other Parent .....	64
iv.	Assaulting Other Parent in Front of the Children ...	65
c.	Effects of Domestic Abuse on Children According to Age and Developmental Stage.....	65
i.	Infants and Toddlers .....	66
ii.	Preschool Children .....	66
iii.	School Age Children.....	66
iv.	Teenagers.....	67
v.	All Developmental Stages .....	67
6.	Parenting in the Context of Domestic Abuse .....	69
a.	Risks for Children when Raised by an Abusive Parent .....	69
i.	Risk of Rigid, Authoritarian Parenting .....	69
ii.	Risk of Neglectful or Irresponsible Parenting .....	69
iii.	Risk of Psychological Abuse and Manipulation.....	70
iv.	Risk of Abduction.....	70
C.	STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE .....	71
1.	Statutory Presumptions and Paramount Considerations .....	71
a.	Presumption Against Joint and Sole Custody to the Abuser.....	71
b.	Paramount Concern: Safety and Well-Being of the Child and Victim .....	73
	<i>Practice Point:</i> Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors.....	75
c.	Sole Custody When Parties Will Not Be Able to Cooperate..	77
i.	Presumption of Uncooperative Parties When There is Domestic Abuse .....	77

ii.	Presumption Against Joint Custody When There is Evidence of Child Abuse.....	78
2.	Best Interest of the Child Factors .....	78
a.	Past Parenting .....	80
b.	Child Development.....	81
c.	Health and Well-Being.....	81
d.	Predictable and Meaningful Placement.....	81
e.	Cooperation, Communication, and Supporting the Other Party's Relationship with the Child.....	82
f.	Child Abuse.....	83
g.	Domestic Abuse .....	83
h.	Alcohol and Drugs .....	84
i.	Reports.....	84
j.	Other .....	84
	<b>Practice Point:</b> Using the Results of Psychological Testing.....	85
D.	<b>STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR THE DOMESTIC ABUSE.....</b>	88
1.	Statutory Requirement to Investigate Domestic Abuse .....	88
2.	Statutory Requirement to Report Investigative Findings to the Court .....	88
3.	Request the Court to Make a Finding of Domestic Abuse .....	89
4.	Making Recommendations for Custody and Placement .....	89
a.	Categories to Account for Domestic Abuse .....	89
b.	Consider What Conditions the Court Can Order Under Wisconsin Law .....	90
	<b>Practice Point:</b> Anger Management vs. Certified Batterer Treatment.....	92
c.	All Recommendations Must Be Specific .....	95
d.	Presenting the Recommendations to the Court.....	96
e.	Drafting Custody and Placement Recommendations.....	96
f.	Making Culturally Competent Recommendations .....	110
	<b>CONCLUSION: THANK YOU FROM A DOMESTIC ABUSE SURVIVOR .....</b>	111

<b>ADDITIONAL RESOURCES .....</b>	<b>113</b>
<b>APPENDIX .....</b>	<b>115</b>
<b>A.    GUARDIAN AD LITEM RESPONSIBILITIES AND THE FOUR PART     FRAMEWORK.....</b>	<b>116</b>
a.    Wisconsin Guardian ad Litem Statutory Responsibilities in Family Law Cases .....	116
b.    Overview of Four Part Framework.....	117
<b>B.    STEP ONE: IDENTIFY DOMESTIC ABUSE .....</b>	<b>118</b>
a.    Guardian Ad Litem Screening Questions for Domestic Abuse....	118
b.    Guardian Ad Litem Interview Questions - Adult Parties .....	120
c.    Guardian Ad Litem Interview Questions - Child Parties .....	125
d.    Domestic Abuse Checklist .....	128
<b>C.    STEP TWO: DEFINE THE NATURE AND CONTEXT OF THE ABUSE .....</b>	<b>129</b>
a.    Parenting in the Context of Domestic Abuse .....	129
<b>D.    STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE .....</b>	<b>130</b>
a.    A Judicial Guide to Domestic Abuse Issues - Family Law: Legal Custody and Physical Placement When Domestic Abuse is Alleged .....	130
b.    Mandatory Deviations for the Joint Legal Custody Presumption when there is a Finding of Interposal Battery or Domestic Abuse .....	133
c.    Permissive Deviations from the Joint Legal Custody Presumption when it is in the Child’s Best Interests .....	135
<b>E.    STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR     DOMESTIC ABUSE .....</b>	<b>138</b>
a.    Potential Recommendations for Custody and Placement in Family Cases that Involved Domestic Abuse .....	138
b.    Domestic Abuse Scenarios .....	150
i.    Scenario 1: GAL asks the court to make a finding of domestic abuse and the court does so .....	150

- ii. Scenario 2: GAL asks the court makes a finding of domestic abuse and the abusive parent rebuts the domestic abuse presumption ..... 152
- iii. Scenario 3: No finding of domestic abuse, but evidence of coercive control ..... 154
- iv. Scenario 4: Evidence of a high likelihood of lethality.... 157

## INTRODUCTION: DOMESTIC ABUSE CASES REQUIRE SPECIALIZED KNOWLEDGE

As a guardian ad litem, you have an especially important and difficult job, over and above what is expected of advocacy counsel for a party. The fundamental role of an attorney is to carry out the objectives of his or her client. In many situations, lawyers face challenges related to discerning and managing the expectations of their clients and, then, planning and executing a strategy to create the greatest chance for success. As a guardian ad litem, you have an even more complex task. You must determine what is in the best interests of the child you are charged with protecting, make a specific recommendation concerning custody and placement, and advocate for that recommendation in court if necessary.

As an attorney, you have been trained to read and interpret the law and to formulate arguments, and you have likely developed litigation skills. However, this training usually does not provide any special insight on figuring out what is in the best interests of a child. In most other states, guardians ad litem are not required to be licensed attorneys but are rather individuals with specialized training in child development. What is expected of a guardian ad litem goes well beyond legal skill. Nonetheless, the statutes provide a host of factors that you must consider and apply. But statutory language is decidedly opaque when it comes to describing how to discern what is in the best interests of a child who may live his or her formative years according to your recommendation. To make the appropriate recommendation, you will need to employ skills beyond strict legal reasoning. Being a competent guardian ad litem requires just as much empathy, self-reflection, and dedication as it does legal training.

This guidebook addresses cases that are even more challenging than “typical” guardian ad litem cases: family law cases in which domestic abuse is occurring or alleged to be occurring in the family. While domestic abuse is not present in every case you will handle as a guardian ad litem, it is still important that you consider the *possibility* of domestic abuse in every case you handle. You are required in every case to report to the court on evidence of domestic abuse. To accomplish this, you must know how to effectively and safely screen for domestic abuse. This guidebook will give you the tools to follow this requirement.

When you do identify that domestic abuse is an issue, you have an extraordinarily critical and demanding role to play. This guidebook will help you fulfill your obligations. However, before delving into a discussion of domestic abuse dynamics, the substantive law, and techniques for handling domestic abuse cases, it is useful to take a step back and think critically about what it means to determine the best interest of a child in a family that has experienced domestic abuse and what influences that determination.

On some level, your ideas about what children need and what good parenting is will influence your determination. This means you should think critically about the values and assumptions you bring to the work and whether they are being fairly applied to the situation to ensure that the best interest of the child is protected. For example, you may believe that children do best if they spend relatively equal time with both parents and that parents should set their “differences” aside to parent post-divorce. You may also believe that parents should sacrifice for their children by putting their children’s needs ahead of their own. While there is nothing inherently wrong with that view, if that is the only lens through which you view a domestic abuse victim who seeks sole custody and full physical placement, you might tend to see that victim as selfish, putting his or her needs ahead of the child’s relationship with the other parent. As a guardian ad litem, you must think deeply about the needs of the child and the domestic abuse victim. Is it reasonable to expect the victim to want to share custody and placement with the abuser? Even more importantly, would such an arrangement be beneficial or even safe for the children and the victim? To what further danger or trauma could such an arrangement expose the child? These are not always easy questions to answer. This guidebook will give you tools and information to help with this task.

You also must cultivate your ability to empathize. What would it be like to be afraid of your child’s other parent? How might one react to that fear? What would you do if, after you leave an abusive partner, you realize that he or she is now using your child as a means to interfere with and to control your life? What would it be like to be a kid growing up with a domestic abuser as a parent - a parent whom you love but who may be harming you? Can you imagine the conflict and anxiety you might have in these situations? Your belief in how you would act may not always match what you observe in the families with whom you are working, but unlike lawyers who are directed by the objectives of their clients, you have to stretch your capacity to

empathize to fulfill your role as a guardian ad litem.

In addition to internal beliefs about parenting, another value can heavily influence outcomes in family law cases - judicial economy. As guardian ad litem, you are working in a system that has limited resources with which to make life-altering decisions. Most attorneys, and particularly guardians ad litem, feel the pressure of limited resources and time. This pressure has an impact on the judicial system and legal culture. The system prefers parties who agree to settle cases. Part of this preference may be a reaction to our understanding of our own limitations: "How can I possibly know what is best for these children with the limited time and resources I have? The parents would do better deciding, and my job should be to get them to decide." Other times, the preference for settlement might cause a guardian ad litem to align with the parent whose position seems "reasonable" or "typical." "The better parent is the parent who is willing to compromise." Notice that, in situations involving abuse, the person who has been abusive might have the most incentive to appear "reasonable" and that the victim of abuse might have valid reasons for holding firm to specific custody and placement preferences.

These cautions about the tendency to maximize judicial economy is not to say that as a guardian ad litem you can ignore practical reality. Indeed, when cases do not involve domestic abuse and when there is no inherent power imbalance between the parties, encouraging settlement may often lead to the best outcomes. And, any professional working within a system has to be mindful of limitations and practicalities. Simply ignoring these realities would make you less effective and lead to worse outcomes.

However, a guardian ad litem who understands his or her obligation to protect the best interests of the child must be aware of the pressure to achieve efficient resolution and not allow that pressure to distort his or her judgment. The family law system may have a tendency to penalize a parent who refuses mediation or asks for an atypical custody and placement arrangement; yet, in all cases – and especially when that parent is a victim of domestic abuse – the child and parent deserve that you consider the best interests of the child without a bias towards what is preferable to the system. What is in the best interests of a child does not necessarily correspond to what is in the best interests of the legal system.



Therefore, your task is clearly complicated. It requires balancing internal and external pressures, all while keeping your focus on the best interests of a child with whom you will have a limited ability to get to know. In the subset of cases involving domestic abuse, both the pressures you face and the magnitude of your recommendation are elevated. This guidebook can be an important resource as you undertake this incredibly critical task and help you advance the best interests of children in vulnerable and precarious situations.

Finally, thank you for the work you do, and thank you for taking the time to read this guidebook. When you make it to the end of the guidebook, you will be thanked again, thanked by a domestic violence survivor whose story demonstrates how important and valuable the work you do can be.

# I. DEFINITIONS AND FOUNDATIONS

This section details definitions related to domestic abuse. It starts with legal definitions, as these are the specific definitions guardians ad litem apply in their cases. But, statutory language often fails to capture the nuances and contextual significance of human dynamics. Therefore, the second through fourth parts of this section outline behavioral definitions of domestic abuse, dispel myths about domestic abuse dynamics, and distinguish between abusive dynamics and the type of conflict that occurs in non-abusive separations. Because a guardian ad litem seeks to understand not just the law but also the practical, lived reality of the child, these behavioral definitions and information are just as critical to the practice of a guardian ad litem as legal definitions.

## A. LEGAL DEFINITION OF DOMESTIC ABUSE

Guardians ad litem should be familiar with the legal definitions of both domestic abuse and child abuse to properly apply the law to the facts of the case. The following key terms are crucial to understand:

- Domestic Abuse, as defined in the family law code
- Interspousal Battery
- Abuse of a Child
- Primary Physical Aggressor
- Predominant Aggressor
- Domestic Abuse, as defined in the criminal law code

Below are definitions of the most relevant terms directly referenced in the family law code. Often the definitions include or cross-reference criminal conduct. Therefore, guardians ad litem may need to consult Wis. Stat. § 939.22, which contains definitions for terms used in the criminal code.

One complication is that the term “domestic abuse” in the criminal context is slightly different than the definition of domestic abuse referenced throughout the family law code. Because an abusive parent might be involved in the criminal justice system for domestic abuse, a guardian ad litem should also be familiar with the definition

of domestic abuse contained in the criminal code. Understand that the absence of a criminal charge does not end the analysis of whether the parent engaged in abuse nor is the classification of a criminal charge a substitute for applying the facts of the case to the definitions and provisions found in the family law code. Differences in various legal definitions and the inconsistent application of definitions in the criminal justice system could lead a guardian ad litem to faulty legal analysis unless he or she undertakes an independent analysis using the correct definitions and the facts that he or she understands to be supported by the evidence.

## 1. Family Law Definitions

### a. Domestic Abuse, as Defined in the Family Law Code

#### Example:

*The guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of the investigation.<sup>1</sup>*

The definition of “domestic abuse” used in the family law code directs the reader to the definition found in Wis. Stat. § 813.12(1)(am), which provides the following two components: 1) the relationship between the perpetrator and the victim must be a qualifying relationship, and 2) the abusive conduct must be described in the definition of domestic abuse.

Wisconsin Stat. § 813.12(1)(am) specifies the following relationships between the victim and perpetrator:

- An adult family member or adult household member against another adult family member or adult household member
- An adult against his or her adult former spouse
- An adult against an adult with whom the individual has or had a dating relationship
- An adult against an adult with whom the person has a child in common

---

<sup>1</sup> Wis. Stat. § 767.407(4)

- An adult caregiver against an adult who is under the caregiver's care

The terms used to describe these relationships also have specific meanings:

- "Family member" means a spouse, a parent, a child, or a person related by blood or adoption to another person.
- "Household member" means a person currently or formerly residing in a place of abode with another person.
- "Dating relationship" means a romantic or intimate social relationship between two adult individuals, but "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. The statute directs the court to determine if a dating relationship existed by considering the length of the relationship, the type of relationship, and the frequency of the interaction between the adult individuals involved in the relationship.

Wisconsin Stat. § 813.12(1)(am) lists the following types of conduct as domestic abuse, when committed in the context of a relationship listed above:

- Intentional infliction of physical pain, physical injury, or illness
- Intentional impairment of physical condition
- A violation of first, second, or third degree sexual assault [Wis. Stat. § 940.225 (1), (2), or (3)]
- A violation of stalking [Wis. Stat. § 940.32]
- A violation of criminal damage of property [Wis. Stat. § 943.01], involving property that belongs to the individual
- A threat to engage in any of the conduct listed above

A guardian ad litem should be familiar with the criminal conduct referenced in this definition. In general terms, sexual assault in the first, second, or third degree

encompasses any nonconsensual sexual intercourse, certain types of nonconsensual sexual contact, and sexual contact under certain conditions.

The stalking statute, Wis. Stat. § 940.32, describes a number of ways an individual might violate the statute. Guardians ad litem should review the statute. Generally speaking, a perpetrator commits stalking when he or she engages in two or more acts over time that show a continuity of purpose. The acts generally must be directed at a specific person and cause that person to suffer serious emotional distress or induce fear in the person of bodily injury to or the death of him- or herself or a member of his or her family or household. The perpetrator must have known or should have known that at least one of the acts would have a harmful effect on the person, and the act must be such that it would cause a reasonable person under similar circumstances to suffer that effect. Some of these elements are not required when the perpetrator has previously been convicted of certain offenses.

Criminal damage to property is the intentional damage of the physical property of another without that person's consent. "Property of another" includes "property in which a person other than the actor has a legal interest that the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property."<sup>2</sup> Therefore, damage to marital property by one spouse can constitute criminal damage to property if it is done without the consent of the other spouse.<sup>3</sup>

#### **b. Interspousal Battery**

When the family law code uses the term "interspousal battery," it references Wis. Stat. §§ 940.19 and 940.20(1m), the battery statute and the battery statute for individuals protected by injunctions, respectively. Battery occurs when one person "causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed."<sup>4</sup>

#### **c. Abuse of a Child**

##### Example:

*Evidence that either party engaged in abuse, as defined in s. 813.122 (1) (a), of*

---

<sup>2</sup> Wis. Stat. § 939.22(28)

<sup>3</sup> *State v. Sevelin*, 204 Wis. 2d 127, 554 N.W.2d 521 (Ct. App. 1996).

<sup>4</sup> Wis. Stat. § 940.19(1)

*the child, as defined in s. 813.122 (1) (b), or evidence of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required.*<sup>5</sup>

In approximately a dozen instances, the family law code makes reference to abuse of a child as defined in Wis. Stat. § 813.122(1)(a). Wisconsin Stat. § 813.122(1)(a) defines child abuse as the following:

- Physical injury inflicted on a child by other than accidental means
- Sexual intercourse or sexual contact that violates the sexual assault statute or the sexual assault of a child statutes, specifically Wis. Stat. §§ 940.225, 948.02, 948.025, or 948.085
- Sexual exploitation of a child in violation of Wis. Stat. § 948.05
- Permitting, allowing, or encouraging a child to violate Wis. Stat. § 944.30(1m)
- Causing a child to view or listen to sexual activity in violation of Wis. Stat. § 948.055
- Exposing genitals, pubic area, or intimate parts in violation of Wis. Stat. § 948.10
- Manufacturing methamphetamine in violation of Wis. Stat. § 961.41(1)(e) under any of the following circumstances: with a child physically present during the manufacture; in a child's home, on the premises of a child's home, or in a motor vehicle located on the premises of a child's home; or under any other circumstances in which a reasonable person should have known that the manufacture would be seen, smelled, or heard by a child
- Emotional damage for which the child's parent, guardian or legal custodian has neglected, refused, or been unable for reasons other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms

---

<sup>5</sup> Wis. Stat. § 767.41(2)(b)2.c.

**d. Primary Physical Aggressor, as Defined in the Family Law Code**

The family law code uses the term “primary physical aggressor” in situations in which both parties were engaged in a pattern or serious incident of interspousal battery or domestic abuse. When a court finds both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse, it must determine who, if either party, is the primary physical aggressor. The presumption against joint or sole legal custody will be applied to the primary physical aggressor.

If one, but not both, of the parties has been convicted of a crime of domestic abuse under Wis. Stat. § 813.12(1)(am) against the other party, the court shall find the party who was convicted of the crime to be the primary physical aggressor.

If neither or both parties have been convicted of a crime of domestic abuse against the other party under Wis. Stat. § 813.12(1)(am), the court must consider all of the following to determine which party is the primary physical aggressor:<sup>6</sup>

- Prior acts of domestic abuse between the parties
- The relative severity of the injuries, if any, inflicted upon a party by the other party in any of the prior acts of domestic abuse
- The likelihood of future injury to either of the parties resulting from acts of domestic abuse
- Whether either of the parties acted in self-defense in any of the prior acts of domestic abuse
- Whether there is or has been a pattern of coercive and abusive behavior between the parties
- Any other factor that the court considers relevant to the determination

If the court determines that both parties engaged in a pattern or serious incident of

---

<sup>6</sup> Wis. Stat. § 767.41(2)(d)2.a.-f.

interspousal battery or domestic abuse but neither party was the primary physical aggressor, the presumption against sole or joint legal custody will not apply.<sup>7</sup>

## 2. Criminal Law Terminology

It is important to know that the terminology used in criminal domestic abuse cases does not precisely correspond to the terminology used in the family law system. The following are two terms commonly used in the criminal justice system that do not fully align with the parallel terms in family law code.

### a. Domestic Abuse, as Defined in the Criminal Law Code

The definition of domestic abuse in the criminal law code is slightly different than the definition of domestic abuse referenced in the family law code. Wisconsin Stat. § 968.075(1)(a) defines “domestic abuse” as any of the following conduct engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided, or against an adult with whom the person has a child in common:

- Intentional infliction of physical pain, physical injury, or illness
- Intentional impairment of physical condition
- A violation of first, second, or third degree sexual assault [Wis. Stat. § 940.225(1), (2), or (3)]
- A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described above

The key functional differences between these two definitions is that the criminal law code definition does not include abuse between individuals who are only related as dating partners, whereas the definition used in the family law code is inclusive of dating parents. Because both definitions include conduct between individuals with children in common, these differences are not likely to be relevant in family law cases.

---

<sup>7</sup> Wis. Stat. § 767.41(2)(d)4.



More importantly, while the criminal law code contains a definition of domestic abuse, there is not a particular criminal charge or set of charges that are named “domestic abuse.” Rather, many counties will attach a domestic abuse modifier on a particular charge if the underlying facts meet the definition of domestic abuse. For example, the following charge, unlawful phone use, was allegedly committed under circumstances that met the criminal law code definition of the domestic abuse.

**Dane County Case Number 2014CM000191**

**Charge(s)/Sentence(s)**

Charge Detail			
The Defendant was charged with the following offense:			
Count No.	Statute Cite	Description	Severity
1	947.012(1)(a)	Unlawful Phone Use-Threatens Harm	Misd. B
Charge Modifier(s)			
Statute Cite	Description		
968.075(1)(a)	Domestic Abuse		

However, be aware that the domestic abuse modifier is inconsistently used in the criminal justice system. A charge that meets the criminal law code definition of domestic abuse may or may not have the modifier attached to it, depending on the local practices at the time the charge was issued. Therefore, the presence or absence of a domestic abuse modifier on a criminal charge cannot replace a guardian ad litem’s analysis of whether a particular act or set of acts constitutes domestic abuse under the family law code.

**b. Predominant Aggressor, as Defined in the Criminal Law Code**

As previously mentioned, the family law code uses the term “primary physical aggressor.” The criminal code uses a similar but not identical term, “predominant aggressor.” Predominant aggressor replaces the term primary aggressor in the criminal code.

Predominant aggressor is defined in Wis. Stat. § 968.075, commonly referred to as Wisconsin’s mandatory arrest law, to mean “the most significant, but not necessarily the first, aggressor in a domestic abuse incident.” Police officers must consider all of the following to identify the predominant aggressor and whether an arrest must be made as a result of an alleged domestic abuse incident:

- The history of domestic abuse between the parties, if it can be reasonably ascertained by the officer, and any information provided by witnesses regarding that history.
- Statements made by witnesses
- The relative degree of injury inflicted on the parties
- The extent to which each person present appears to fear any party
- Whether any party is threatening or has threatened future harm against another party or another family or household member
- Whether either party acted in self-defense or in defense of any other person under the circumstances described in Wis. Stat. § 939.48

## B. BEHAVIORAL DEFINITION AND COMMON CHARACTERISTICS OF DOMESTIC ABUSE

As previously mentioned, legal definitions often fail to capture the nuances and significance of behaviors in the context of ongoing human relationships. Guardians ad litem need to understand both the law and the lived reality of the family and the child. Therefore, a firm grasp of the legal definitions of abusive behavior must be augmented with an understanding of the behaviors that constitute domestic abuse. Additionally, some legal definitions incorporate concepts included in the behavioral definition of domestic abuse. For example, the definition of primary physical aggressor includes consideration of the potential “pattern of coercive and abusive behavior.”<sup>8</sup>

### 1. Pattern of Abusive Tactics

Domestic abuse is a *pattern* of assaultive and coercive behaviors that operate at a variety of levels—physical, psychological, emotional, financial, and/or sexual—and that abusers use against their intimate partners. The pattern of behaviors is incremental and results in control over the victim. Some of the behaviors may include criminal conduct, such as physical and sexual assaults, as well as other behaviors that function to control, dominate, humiliate, or terrorize, such as emotional abuse or financial control. However, in any given incident, the abuser might only use one or two of these behaviors. Thus, no single behavior defines domestic abuse.

Examples of domestic abuse behavioral tactics include, but are not limited to, the following:

- **Physical abuse:** Spitting, poking, shaking, grabbing, shoving, pushing, throwing, hitting with open or closed hand, restraining, blocking, strangling, hitting with objects, kicking, burning, using weapons, etc.
- **Sexual abuse:** Pressured, coerced, or physically-forced sex.
- **Psychological abuse:** Acts of violence against others, property, or pets;

---

<sup>8</sup> Wis. Stat. § 767.41(2)(d)2.e.

intimidation through threats of violence against the victim, children, others, or self (suicide); stalking; hostage taking; physically or psychologically isolating victims from family, friends, community, culture, or accurate information; attacks against the victim's self-esteem and competence; forcing victims to do degrading things; controlling the victim's activities; alternating use of indulgences such as promises, gifts, or affection.

- **Economic coercion:** Control of funds; withholding funds; control of victim's access to resources, such as money, health insurance, transportation, child care, employment, housing, etc.
- **Use of children to control victim:** Interrogating children about victim's activities; forcing child to participate in the physical or psychological abuse of adult victim; using children as hostages; using visitation with children to monitor adult victim; undermining parenting of adult victim; custody or visitation fights; demonstrably false reports to Child Protective Services.

All incidents or tactics of the pattern of abuse interact with each other and have a profound effect on the victim. For example, the victim learns that when the abuser says certain phrases or performs certain actions, the abuser will likely harm him or her. The abuser need only say these phrases or perform these actions in the future to control the victim's behavior. The use of physical force combined with psychological coercion establishes a dynamic of power and control in the relationship.

Domestic abusers might also alternate their abusive tactics with occasional indulgences, such as flowers, gifts, sweet words, promises to get help, attention to children, etc. Some victims may think that the abuse has stopped, whereas abusers have simply changed control tactics. Early domestic abuse literature sometimes referred to this conduct as part of a "honeymoon phase." In fact, these periods are merely different tactics of control.

## **2. Psychological Attacks Through Verbal Abuse**

Not all verbal insults between intimate partners are necessarily psychological abuse. A verbal insult done by a person who has not also been physically assaultive does not have the same significance as a verbal attack done by a person who has been violent

in the past. The abusers' use, or threat of use, of physical force gives power to their psychological abuse through instilling the dynamic of fear in their victims. The psychological abuse becomes an effective weapon in controlling the victim because victims know through experience that abusers will at times back up the threats or taunts with physical assaults. The reality that the abusers have used violence in the past to get what they want gives them additional power to coercively control the victims in other nonphysical ways. For example, an abuser's interrogation of the victim about the victim's activities becomes an effective nonphysical way to control the victim's activities when the abuser has assaulted the victim in the past. Sometimes abusers are able to gain compliance from the victim by simply saying, "Remember what happened the last time you tried to get a job . . . to leave me?" These reminders of past violence are meant as threats against the victim.

### **3. Learned Behavior**

Domestic abuse behaviors, as well as the rules of when, where, against whom, and by whom domestic abuse is to be used, are learned through observation and reinforcement (e.g., as in cases of a male child witnessing the abuse of his mother by his father, or in the proliferation of images depicting violence against women in the media).

Domestic abuse is learned not only in the family but also in society. It is learned and reinforced by interactions with all of society's major institutions: the familial, social, legal, religious, educational, mental health, medical, child welfare, entertainment, media, etc. In all of these social institutions, various customs perpetuate the use of domestic abuse as a legitimate means of controlling family members at certain times (e.g., religious institutions that state that a woman should submit to the will of her husband, etc.). These practices reinforce the use of violence to control intimates by failing to hold the abuser accountable for the violence and by failing to protect the victim.

### **4. Mistaken Belief that Both the Abuser and the Victim are "Abusive" - One Physically and One Verbally**

While some victims may resort to verbal insults, the reality is that verbal insults are not the same as physical violence. Furthermore, domestic abusers use both physical

and verbal assaults. Early research indicates that domestic abusers are more verbally abusive than either their victims or other persons in distressed/ nonviolent or in non-distressed intimate relationships.<sup>9</sup> It is crucial where there are allegations that both parties are abusive to examine whether the situation involves mutual high conflict or whether there is a pattern of coercive controlling behavior on the part of one party.<sup>10</sup>

---

<sup>9</sup> Margolin, G., Gleberman, L., John, R., & Ransford, T. (1987). Interpersonal Factors Associated with Marital Violence. In Third National Family Violence Research Conference, Durham, New Hampshire.

<sup>10</sup> Jaffe, P. G., Crooks, C. V., & Poisson, S. E. (2003). Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes. *Juvenile and Family Court Journal*, 54, 57.

## C. DISPELLING MYTHS: WHAT DOMESTIC ABUSE IS NOT

### 1. Not “Out-of-Control” Behavior

Domestic abuse being the result of the abuser “losing control” is a misperception. Abusers make deliberate and calculated choices even when they are supposedly “out of control,” which indicates they are actually in control of their behavior. Most domestic abusers have not had ongoing “anger” or “out-of-control” behavioral problems outside of their intimate partner relationships.<sup>11</sup> Some abusers will batter only in particular ways, (e.g., hit certain parts of the body, but not others; use specific methods that do not leave obvious marks; only use violence towards the victim even though they may be angry at others; break only the victim’s possessions and not their own).

Domestic abuse involves a pattern of conduct. Certain tactics require a great deal of planning to execute (e.g., stalking, interrogating family members, etc.). Some abusers impose “rules” on victims, carefully monitoring their compliance and punishing victims for any “infractions” of the imposed rules.<sup>12</sup> Such attention to detail contradicts the notion that abusers “lost” control or that their abusive behavior is the result of poor impulse control.

### 2. Not About Anger, or Caused by Stress, Alcohol, or Drugs

The role of anger in domestic abuse is complicated and cannot be simplistically reduced to cause and effect. Some battering episodes occur when the abuser is upset and others when the abuser is not angry or emotionally charged. Some abusive conduct is carried out calmly to gain the victim’s compliance. Some displays of anger or rage by the abuser are merely tactics used to intimidate the victim and can be quickly altered when the abuser thinks it is necessary (e.g., upon arrival of police).

Research indicates that identified domestic abusers, as well as those identified as

---

<sup>11</sup> Bancroft, L., Silverman, J. G., & Ritchie, D. (2011). *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*. Sage Publications.

<sup>12</sup> Fischer, K., Vidmar, N., & Ellis, R. (1993) The Culture of Battering and the Role of Mediation in Domestic Violence Cases 199). *SMU Law Review*, 46, 2117.

not abusive, exhibit a wide variety of arousal or anger patterns.<sup>13</sup> These studies suggest that there may be different types of abusers. Abusers in one group actually reduced their heart rates during observed marital verbal conflicts, suggesting a calming preparation for fighting rather than an “out-of-control” or angry response. Such research challenges the notion that domestic abuse is merely an anger problem and raises major questions about the efficacy of anger management programs for abusers.

Remembering that domestic abuse is a pattern of behaviors rather than isolated events helps to explain the number of abusive episodes that occur when the abuser is not angry. Even if experiencing anger at the time, abusers still choose to respond to that anger by acting abusively. Ultimately, individuals are responsible for their behavior and for how they try to control adult victims through intimidation or force.

Domestic abuse is also not caused by “stress.” We all face different sources of stress in our lives (e.g., stress from a job, not having a job, marital and relationship conflicts, losses, discrimination, poverty, etc.), but we do not all respond by engaging in domestic abuse. People respond to stress in a wide variety of ways (e.g., problem solving, substance abuse, eating, laughing, withdrawal, violence, etc.).<sup>14</sup> People choose ways to reduce stress according to what has worked for them in the past.

It is important to hold people accountable for the choices they make regarding how to reduce their stress, especially when those choices involve violence or other illegal behaviors. Just as one would not excuse a robbery or a mugging because the perpetrator was “stressed,” one should not excuse the domestic abuser because he or she was “stressed.” Moreover, as already noted, many episodes of domestic abuse occur when the abuser is not emotionally charged or stressed. When domestic abuse

**“Remembering that domestic abuse is a pattern of behaviors rather than isolated events helps to explain the number of abusive episodes that occur when the abuser is not angry. Even if experiencing anger at the time, abusers still choose to respond to that anger by acting abusively.”**

<sup>13</sup> Jacobson, N. S., Gottman, J. M., Waltz, J., Rushe, R., Babcock, J., & Holtzworth-Munroe, A. (1994). Affect, Verbal Content, and Psychophysiology In The Arguments of Couples with a Violent Husband. *Journal of Consulting and Clinical Psychology, 62*(5), 982.

<sup>14</sup> Bandura, A. (1973). *Aggression: A Social Learning Analysis*. Prentice-Hall.



is properly understood as a pattern of behavior consisting of a variety of repeated acts, then citing specific stresses becomes immaterial in explaining the entire pattern.

Alcohol and drugs such as marijuana, depressants, anti-depressants, anti-anxiety medications do not cause nonviolent people to become violent. Many people use or abuse those drugs to help them cope and relax without ever abusing their partners. Alcohol and drugs are often used as an excuse for abuse, although research indicates that the pattern of assaultive behaviors that constitutes domestic abuse is not caused by those particular chemicals.<sup>15</sup>

“Regardless of the exact role of alcohol and drugs, it is important to focus on the violent behavior and not allow substance use or abuse to become the justification for the violence.

While the studies cited have found a high correlation between aggression and the consumption of various substances, no data clearly proves a cause and effect relationship. There are a wide variety of explanations for this high correlation.<sup>16</sup> Some say that the alcohol and/or drugs provide a disinhibiting effect, which means individuals may do things while under the influence of alcohol or drugs they ordinarily would not do. Others point to the increased irritability or hostility that some individuals experience when using drugs and that may lead to violence. Others state that the high correlation may merely reflect the overlap of two widespread social problems: domestic abuse and substance abuse. If domestic abusers claim that the cause of the abuse is alcohol, then they are acknowledging that they have BOTH an alcohol problem and a domestic abuse problem, and they are responsible for the consequences of their actions in either domain.

Regardless of the exact role of alcohol and drugs, it is important to focus on the violent behavior and not allow substance use or abuse to become the justification for the violence.<sup>17</sup>

<sup>15</sup> Critchlow, B. (1986). The Powers of John Barleycorn: Beliefs about the Effects of Alcohol on Social Behavior. *American Psychologist*, 41(7), 751, 764.

<sup>16</sup> Ito, T. A., Miller, N., & Pollock, V. E. (1996). Alcohol and Aggression: A Meta-analysis on the Moderating Effects of Inhibitory Cues, Triggering Events, and Self-Focused Attention. *Psychological Bulletin*, 120(1), 60.

<sup>17</sup> Bancroft, L. (2003). *Why Does He Do That?: Inside the Minds of Angry and Controlling Men*. Penguin.

While the presence of alcohol or drugs does not alter the finding that domestic abuse took place, it is relevant to certain court considerations and in dispositions of cases. The use of substances may increase the lethality of domestic abuse and needs to be carefully considered when weighing safety issues concerning the victim, the children, and the community.<sup>18</sup>

Interventions and recommendations in cases where the domestic abuser also abuses alcohol and/or drugs must be directed at both the violence and the substance abuse. For individuals who abuse alcohol and drugs, changing domestic abuse behavior is highly unlikely without also stopping the substance abuse.

### **3. Not Caused by Problems Inherent in the Relationship Between the Two Individuals or by the Victim's Behavior**

People can be in distressed relationships and experience negative feelings about the behavior of the other person without choosing to respond with violence. Looking at the relationship or the victim's behavior as a causal explanation for domestic abuse takes the focus off the abuser's responsibility for the violence and unintentionally supports the abuser's minimization, denial, externalization, and rationalization of the violent behavior.

Blaming the victim or the relationship for the abuse provides the abuser with excuses and justifications for the conduct. This inadvertently reinforces the abuser's ability to control family members and thus contributes to the escalation of the pattern of abuse. The victim is placed at greater risk, and the court's duties to protect the public, to assess damages, to act in the best interests of children, and to hold abusers accountable are greatly compromised.

Many abusers start using patterns of controlling behavior in their early dating relationships. They bring these patterns into adulthood where they tend to repeat the patterns in all of their intimate relationships, regardless of the significant differences in the personalities or conduct of their intimate partners, or in the characteristics of those particular relationships. These dissimilarities in partners and

---

<sup>18</sup> Campbell, J. C., Webster, D. W., & Glass, N. (2009). The Danger Assessment Validation of A Lethality Risk Assessment Instrument for Intimate Partner Femicide. *Journal of Interpersonal Violence, 24*(4), 653-674. Also see: <http://www.dangerassessment.org>

relationships support the position that, while domestic abuse takes place within a relationship, it is not caused by the relationship.

Research indicates that there are no personality profiles for victims of domestic abuse.<sup>19</sup> Victims are no different from non-victims in terms of psychological profiles or demographics. Once again, this challenges the myth that something about the victim causes the abuser's violence. However, compared to non-victims of domestic abuse, victims have been shown to be more depressed, to have higher rates of post-traumatic stress disorder, to have more anxiety, and to utilize more health services. One longitudinal study showed that women involved in violent relationships were more likely than men involved in violent relationships to develop depression.<sup>20</sup> Research is beginning to show that many of these issues appear *after* the onset of domestic abuse, suggesting that the various problems are likely caused by domestic abuse. Furthermore, one study indicates that no behavior on the part of the victim could alter the abuser's behavior.<sup>21</sup> This also suggests that the victim's behavior is not the determining factor as to whether or not the abuser uses violence and abuse in the relationships.

Domestic abuse in adolescent relationships further challenges the belief that the abuse is the result of the victim's behavior. Often the adolescent abuser only superficially knows his victim, having dated only a few days or weeks before the abuse begins. Such an abuser is often acting out an image of how to conduct an intimate relationship based on recommendations from peers, the media, or models set by family members. The adolescent's abusive conduct is most likely influenced more by that image than by the victim's actions.

Both adult and adolescent abusers bring certain expectations of who is to be in charge and what mechanisms are acceptable for enforcing that dominance into their intimate relationships. These attitudes and beliefs, rather than the victims' behavior, determine whether or not persons are violent.<sup>22</sup>

---

<sup>19</sup> Hotaling, G. T., & Sugarman, D. B. (1986). An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge. *Violence and Victims*, 1(2), 101-124.

<sup>20</sup> Ehrensaft, M. K., Moffitt, T. E., & Caspi, A. (2006). Is Domestic Violence Followed by an Increased Risk of Psychiatric Disorders Among Women but Not Among Men? A Longitudinal Cohort Study. *American Journal of Psychiatry*, 163(5), 885.

<sup>21</sup> Jacobson, N. S., Gottman, J. M., Waltz, J., Rushe, R., Babcock, J., & Holtzworth-Munroe, A. (1994). Affect, Verbal Content, and Psychophysiology in the Arguments of Couples with a Violent Husband. *Journal of Consulting and Clinical Psychology*, 62(5), 982.

<sup>22</sup> Bancroft, L. (2003). *Why Does He Do That?: Inside the Minds of Angry and Controlling Men*. Penguin.

#### 4. Not the Same as Sustaining Injuries: Mutual Battering is Rare

Some argue that “mutual battering” takes place when both individuals use physical force against each other. In most cases, careful fact-finding often reveals that one party is the primary physical aggressor and the other party’s violence is in self-defense (e.g., she stabbed him as he was strangling her) or that one party’s violence is more severe than the violence of the other (e.g., punching/strangling versus scratching).<sup>23</sup> Sometimes the victim uses physical force against the abuser in retaliation for chronic abuse, but this retaliation is not part of a pattern of assaultive and coercive behavior. Research of heterosexual couples indicates that women’s motivation for using physical force is often self-defense, while men use physical force for power and control.<sup>24</sup>

A more recent review of the research on men’s and women’s use of violence in heterosexual clinical samples shows that women’s violence is more likely to be in reaction to their male partner’s violence. Furthermore, women are more fearful than men of their partner’s violence. In addition, men in divorcing couples with domestic abuse have been shown to use more coercive control.<sup>25</sup> When considering domestic abuse as an overall *pattern* of violence and coercive control, women are much more likely to experience sexual domestic abuse than men, and despite the argument that women may be more likely to be verbally abusive than men, research with clinical samples has shown that men make more lethal and specific threats than women.<sup>26</sup> Further, in domestic violence relationships involving gay and lesbian partners,

---

<sup>23</sup> Saunders, D. G. (1986). When Battered Women Use Violence: Husband-Abuse or Self-Defense?. *Violence and Victims*, 1(1), 47-60.; Hamberger, L. K., & Potente, T. (1994). Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice. *Violence and Victims*, 9(2), 125-137.

<sup>24</sup> Hamberger, L. K. (2005). Men’s and Women’s Use of Intimate Partner Violence in Clinical Samples: Toward a Gender-Sensitive Analysis. *Violence and Victims*, 20(2), 131-151;Saunders, D. G., & Browne, A. (1991). “Domestic Homicide,” *Case Studies in Family Violence*, ed. R. Ammerman and H. Michel.

<sup>25</sup> Hamberger, L. K., & Larsen, S. E. (2015). Men’s and Women’s Experience of Intimate Partner Violence: A Review of Ten Years of Comparative Studies in Clinical Samples; Part I. *Journal of Family Violence*, 30(6), 699-717. Letellier, P. (1994). Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence. *Violence and Victims*, 9(2), 95-106..Tanha, M., Beck, CJ, Figueredo, AJ, & Raghaven, C. (2010). Sex differences in intimate partner violence and use of coercive control as a motivational factor in intimate partner violence. *Journal of Interpersonal Violence*, 25, 1836-1854

<sup>26</sup> Hamberger, L. K., & Larsen, S. E. (2015). Men’s and Women’s Experience of Intimate Partner Violence: A Review of Ten Years of Comparative Studies in Clinical Samples; Part I. *Journal of Family Violence*, 30(6), 699-717.

“mutual battering” is also rare. Even if gay and lesbian partners are approximately the same size and weight, one of them is usually the predominant physical aggressor who creates the atmosphere of fear and intimidation that characterizes abusive relationships.<sup>27</sup>

In cases involving domestic abuse committed by and against both parties, a guardian ad litem will generally need to consider whether both parties’ acts of abuse constituted a “pattern” or were “serious” within the meaning of Wis. Stat. § 767.41(2)(d)2. and, if so, which party was the primary physical aggressor. [See sections I.A.1.d. and II.C.1.a. for more information about the requisite legal analysis in these situations.]

---

<sup>27</sup> Letellier, P. (1994). Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence. *Violence and Victims*, 9(2), 95-106.

## D. DISTINGUISHING BETWEEN DOMESTIC ABUSE, HIGH CONFLICT, AND NORMAL CONFLICT OF SEPARATING COUPLES

### 1. Normal Conflict vs. High Conflict

The general consensus among child and family psychologists is that children’s psychological well-being and adjustment may be negatively affected by both parental conflict and domestic abuse.<sup>28</sup> Some conflict is a normal consequence of most parental separations and can be redressed by the passage of time or through parenting classes that help focus the parties on the needs of children.

Often, these are cases that do not involve guardians ad litem, as the parties are able to resolve the conflicts themselves. However, there is frequently confusion over the term “high conflict,” which has been used to describe more extreme and protracted situations that may involve extensive court and community resources.<sup>29</sup> Given the prevalence of domestic abuse in cases before the court system, the term “high conflict” may obscure serious concerns about domestic abuse.<sup>30</sup> In addition, the term reframes the issue to be one of “conflict,” which deflects appropriate attention away from abusive tactics.

“ Given the prevalence of domestic abuse in cases before the court system, the term “high conflict” may obscure serious concerns about domestic abuse.

### 2. Key Differences Between Domestic Abuse and Ongoing Conflict

It is important for guardians ad litem to be able to distinguish between domestic abuse and ongoing conflict because the risks to children and the methods to mitigate those risks are different.

<sup>28</sup> Wolfe, D. A., Crooks, C. V., Lee, V., McIntyre-Smith, A., & Jaffe, P. G. (2003). The Effects of Children’s Exposure to Domestic Violence: A Meta-Analysis and Critique. *Clinical Child and Family Psychology Review*, 6(3), 171-187.

<sup>29</sup> Johnston, J. R., Campbell, L. E., & Wallerstein, J. S. (1999). *Impasses of Divorce: The Dynamics and Resolution of Family Conflict*. Simon and Schuster.

<sup>30</sup> Jaffe, P. & Crooks, C. Assessing the Best Interests of the Child, in Edleson, J. L., & Williams, O. J. (Eds.). (2006). *Parenting by Men Who Batter: New Directions for Assessment and Intervention*. Oxford University Press. The authors recommend that there be distinctions designating individuals who demonstrate a pattern of abusive behaviors that continue over time and that are designed to control, dominate, humiliate, or terrorize their victim as “batterers,” as contrasted with individuals who perpetrate minor, isolated incidents of behavior that are not a part of a pattern of behavior over time.

**a. Physical Safety**

The physical safety of the adult victim and the children after separation should be addressed when the parents' relationship has been physically and/or sexually abusive; this is not necessarily the case if the parents' relationship has been highly, but mutually, conflictual.

**b. Legal Custody Awarded to the Non-Abusive Parent**

When both parents are engaged in ongoing conflict, the participation of each in the conflict, in and of itself, does not provide a basis for choosing one over the other in custody and placement decisions. Rather, other factors will be determinative in that decision. However, when one parent has physically or sexually abused the other, there are strong arguments, as well as legal requirements, for recommending sole legal custody to the non-abusive parent.<sup>31</sup>

**c. Parenting Improves when Domestic Abuse Not Present**

A victim's parenting capacities may be currently diminished as a result of the domestic abuse, making it crucial to look at evidence of past capacity and future potential for parenting once the effects of the domestic abuse have been mitigated. In examining a parent's capacity to meet the children's needs, it is important to recognize and understand the negative impact of an abusive parent's behaviors on the children and the vulnerable parent, as well as understand that a vulnerable parent is often able to meet the children's needs more effectively once safe from further violence or abuse.

**d. Abusers Deny and Minimize and Victims Generally Take Responsibility**

Parents embroiled in conflict are likely to be equally vocal about their differences, and about one another's perceived parenting deficiencies. In an abusive relationship, the primary physical aggressor is likely to deny and minimize his or her abuse; the victim may also have been, or still is, unwilling or afraid to disclose either the abuse, or other concerns about the partner's parenting.

---

<sup>31</sup> See Wis. Stat. § 767.41(2)(d)1.

## II. FOUR-STEP FRAMEWORK FOR IDENTIFYING, UNDERSTANDING, AND ACCOUNTING FOR ABUSE IN RECOMMENDATIONS

This guidebook uses a four-step framework created by the Battered Women's Justice Project. This four-step framework is designed to help guardians ad litem gather, synthesize, and analyze information about the context and implications of domestic abuse in order to improve informed decision making in all cases. The full framework can be found at: <http://bit.ly/FourStep>.

A summary of each part of the framework is described below.

### ◇ **Step One: Identify Domestic Abuse**

The first step is to identify whether domestic abuse is present in a case. Most domestic abuse screening tools are designed for a specific purpose and a specific practice setting. Different tools look for different things for different reasons. Each has its own strengths and limitations. Consequently, it is important for guardians ad litem to know what they are looking for and why, and to use the tools that are designed to get at the needed information. To promote safe and informed disclosure of domestic abuse, it is also important to explain to the people screened why the guardian ad litem is asking about abuse, how the information provided will be used, who will have access to the information, and where the information might appear later in the family court process.

### ◇ **Step Two: Define the Nature and Context of Abuse**

While identifying domestic abuse is an important first step, just knowing that abuse has occurred or is still occurring does not tell guardians ad litem everything they need to know to make informed decisions and to take informed action as to what is in the best interest of a child. Guardians ad litem need to know more specifically what is actually going on - what the nature and context of the abuse is. Guardians ad litem need to know who is doing what to whom, why, and to what effect. In the context of a family law case, guardians ad litem need to know what is going on with respect to



the parenting, health, safety, and wellbeing of the children, as well as the parent who is subjected to abuse.

◇ **Step Three: Evaluate the Implications of the Abuse**

The third step is to evaluate the implications of the abuse. In this step, guardians ad litem address the question, “Now that I know what’s going on, what does it mean for the task or decision at hand?” For instance, if the guardian ad litem is trying to come up with recommendations for the court, he or she needs to ask what the effect of the abuse is on the children. What risks and problems does the abuse create for the parents and for the children? What kinds of things are standing in the way of constructive parenting and healthy childhood development?

◇ **Step Four: Make Informed Recommendations That Account for Domestic Abuse**

The last step focuses on making informed recommendations that fully account for the nature, context, and implications of abuse. Guardian ad litem recommendations to the court should account for post-separation abuse, ongoing coercive control, parenting practices that jeopardize the child’s safety and well-being, and the safety and well-being of the abused parent. The framework encourages the guardian ad litem to directly address the underlying conditions that would otherwise allow the abuse to persist long after the family court case is closed.

## A. STEP ONE: IDENTIFY DOMESTIC ABUSE

In any family case, guardians ad litem must identify whether domestic abuse is present. Domestic abuse is a crucial area of inquiry in addressing custody and physical placement disputes. Domestic abuse can create grave risks for a victim and his or her children. There is no guaranteed method to determine with absolute certainty, especially at the outset, exactly which cases contain or create those risks. Many times, separation increases, rather than reduces, the risks of harm to a victim or to the children.<sup>32</sup> Thus, recommending ongoing contact between children and an abusive ex-spouse may create increased

opportunities for domestic abuse through exchanges of children and periods of physical placement.<sup>33</sup> In extreme cases, domestic abuse may be lethal. The lethality of domestic abuse often increases when the abuser believes that the victim is leaving or has left the relationship.<sup>34</sup> In these extreme cases, children themselves may become victims or be involved as witnesses to homicide.<sup>35</sup>

“Recommending ongoing contact between children and an abusive ex-spouse may create increased opportunities for domestic abuse through exchanges of children and periods of physical placement.”

A guardian ad litem first needs to ask initial screening questions to determine if there are any “red flags” that might indicate domestic abuse in a family. The initial screening questions are listed in Appendix: Step One - Guardian Ad Litem Screening Questions for Domestic Abuse. If red flags are detected, the guardian ad litem must ask the more comprehensive questions, which are discussed below and listed in Appendix: Step One - Guardian Ad Litem Interview Questions - Adult Parties and Child Parties.

<sup>32</sup> DeKeseredy, W. S., Rogness, M., & Schwartz, M. D. (2004). Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge. *Aggression and Violent Behavior, 9*(6), 675-691.

<sup>33</sup> Sheeran, M., & Hampton, S. (1999). Supervised Visitation in Cases of Domestic Violence. *Juvenile and Family Court Journal, 50*(2), 13-25.

<sup>34</sup> Websdale, N. (2003). Reviewing Domestic Violence Deaths. *National Institute of Justice Journal, 250*, 26-31; Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C. R., Campbell, D. W., Curry, M. A., ... & Ulrich, Y. (2003). Assessing Risk Factors for Intimate Partner Homicide. *National Institute of Justice Journal, 250*, 14-19; Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C., Campbell, D., Curry, M. A., ... & Sharps, P. (2003). Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study. *American Journal of Public Health, 93*(7), 1089-1097.

<sup>35</sup> K Starr, K., Fawcett, J., & Violence, E. C. A. D. (2006). *If I Had One More Day. Findings and Recommendations from the Washington State Domestic Violence Fatality Review. In If I Had One More Day. Findings and Recommendations from the Washington State Domestic Violence Fatality Review.* WSCADV.

## 1. Legal Custody and Physical Placement Orders

### a. Guardian Ad Litem's Domestic Abuse Inquiry

Courts are required to consider whether there is a history of domestic abuse when determining the best interests of children. In cases in which the court finds that a parent has engaged in a pattern or serious incident of interspousal battery or domestic abuse, the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse are the paramount concerns in determining legal custody and periods of physical placement.<sup>36</sup> Further, if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.<sup>37</sup>

Wisconsin law requires guardians ad litem to provide information to the court to assist it in determining whether domestic abuse occurred. Specifically, the guardians ad litem “shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of the investigation. The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.405 (12) and on any parenting plan filed under s. 767.41 (1m).”<sup>38</sup>

### b. Guardian Ad Litem's Child Abuse Inquiry

The presence of domestic abuse is also an indicator for the coexistence of child maltreatment. Researchers estimate that the overlap between domestic abuse and child physical or sexual abuse ranges from 30 to 60 percent.<sup>39</sup> In cases in which mothers are assaulted by the father, daughters are five to six times more at risk of

---

<sup>36</sup> Wis. Stat. § 767.41(5)(bm)

<sup>37</sup> Wis. Stat. § 767.41(2)(d)1.

<sup>38</sup> Wis. Stat. § 767.407(4)

<sup>39</sup> Edleson, J. L. (1999). The Overlap between Child Maltreatment and Woman Battering. *Violence Against Women*, 5(2), 134-154; Williams, L. M. (2003). Understanding Child Abuse and Violence Against Women A Life Course Perspective. *Journal of Interpersonal Violence*, 18(4), 441-451.

sexual abuse than daughters in homes without domestic abuse.<sup>40</sup> Some domestic abuse shelters report that the primary reason many victims give for fleeing the home is that the abuser was also attacking the children. Adult victims report multiple concerns about the impact of domestic abuse directly on the children.<sup>41</sup> Furthermore, the more severe and fatal cases of child abuse overlap with domestic abuse.<sup>42</sup>

Evidence of child abuse triggers an important custody presumption - that the parties will not be able to cooperate in future decision making. When this presumption is combined with a request for sole custody and a finding that sole custody is in the child's best interests, it forms the basis for awarding a party sole custody under Wis. Stat. § 767.41(2)(b). Also, evidence of child abuse is a factor that must be considered when determining what periods of physical placement, if any, should be awarded to a parent.<sup>43</sup>

## 2. Methods to Conduct an Investigation

### a. Importance of a Thorough Investigation

If, after asking the initial screening questions, the guardian ad litem suspects domestic abuse may be present, then the guardian ad litem must conduct a more thorough investigation to determine if there is, indeed, a history of abuse. [See Appendix: Step One - Guardian Ad Litem Screening Questions for Domestic Abuse.] Domestic abuse may not be easily detected in relationships where the abuse is unseen, or where most of the abuse is not physical in nature. [See section I. B., "Behavioral Definition and Common Characteristics of Domestic Abuse," for examples of different types of abuse.] It is particularly important in these cases for guardians ad litem to evaluate what the parties say against other available evidence, including patterns of assaultive and coercive behaviors in past relationships, in relationships

---

<sup>40</sup> Bowker, L. H., Arbitell, M., & McFerron, J. R. (1988). *On the Relationship between Wife Beating and Child Abuse*, in Bograd, M. (Ed.). *Feminist Perspectives on Wife Abuse: An Introduction*. Sage Publications.

<sup>41</sup> Hilton, N. Z. (1992). Battered Women's Concerns about Their Children Witnessing Wife Assault. *Journal of Interpersonal Violence*, 7(1), 77-86.

<sup>42</sup> Schechter, S., & Edleson, J. L. (1994, June). In The Best Interest of Women and Children: A Call for Collaboration between Child Welfare and Domestic Violence Constituencies. In Briefing Paper Presented At the Conference on Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, Wingspread, Racine, Wisconsin.

<sup>43</sup> See Wis. Stat. § 767.41(5)(am)12.

with other family members, or in relationships outside the family.<sup>44</sup>

In some cases, there will be public records of violence or abuse (e.g., police reports, 911 calls, criminal court records, or civil restraining order case information). In other cases, there will be explicit allegations of domestic abuse or child abuse, or there will be indications of disturbances in the family that may or may not, upon further investigation, be related to violence or abuse. In many cases, domestic abuse may not be easily detected because it is not formally raised or because other issues, such as allegations of mental illness or substance abuse, may obscure the presence of domestic abuse. However, the lack of witnesses or corroboration does not conclusively prove that domestic abuse did not take place.

Furthermore, the absence of a restraining order or an absence of convictions for domestic abuse does not mean that a parent is not abusive.<sup>45</sup>

“ The lack of witnesses or corroboration does not conclusively prove that domestic abuse did not take place. Furthermore, the absence of a restraining order or an absence of convictions for domestic abuse does not mean that a parent is not abusive.

It can be even more difficult to identify domestic abuse because victims may not acknowledge that the abuse exists for many different reasons: they are ashamed; they feel they are to blame; they think that abuse is normal; cultural norms keep them from discussing the abuse with strangers; they are trying to protect themselves from increased violence and/or loss of their children; they are trying to keep their family together. To ensure that the report to the court regarding the existence of domestic abuse is accurate, a guardian ad litem needs to understand that domestic abuse can affect people of different backgrounds and cultures in different ways.

---

<sup>44</sup> American Psychological Association. Presidential Task Force on Violence, & the Family. (1996). *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family*. American Psychological Association (stating that custody and visitation provide domestic violence abusers with an opportunity to continue their abuse, and that such abusers are twice as likely to seek sole physical custody of their children and more likely to dispute custody if there are sons involved).

<sup>45</sup> Aldarondo, E., & Mederos, F. (2002). Common practitioners' concerns about abusive men. *Programs For Men Who Batter: Intervention And Prevention Strategies in a Diverse Society*, 2-1 (stating that many physically abusive men are never arrested or brought to trial even though they have a long history of violence toward a partner).

## **b. Investigation Protocols that Increase Safety**

The guardian ad litem should strive to shield the parties from any contact or unsafe communication with one another during the process of investigation and developing recommendations. In many cases, the guardian ad litem should be able to seek corroboration of adverse information disclosed by one party about the other without disclosing the source of that information. It is important, however, to ensure that the parties understand the lack of confidentiality in the process. In order to best protect the safety of the parties and children, guardians ad litem should:

- Make initial contact with each party separately
- Attempt to interview the alleged victim first
- Consider the safety needs of each family member when creating any guidelines for contact with both the adult parties and the children
- Respect the terms of existing restraining orders
- Help unrepresented litigants understand the evaluation process, the risks of disclosing information that may be shared with the other party, and the risks of not disclosing information
- Inform the parties of an evaluator's duty to report suspected child abuse (if relevant)
- Whenever possible, avoid identifying one party as the source of negative information about the other
- Seek to corroborate information obtained from the victim or children, so that it appears to have been obtained from multiple sources
- If it is necessary to disclose information that may put one of the parties at risk, the guardian ad litem should alert the at-risk party in advance so he or she may take the necessary safety precautions

- Avoid attributing direct quotes to children
- Use specialized techniques to obtain and interpret information from children. [See section 3. b., “Interview the Child Parties,” below for more information.]

“The guardian ad litem should adhere to any confidentiality protections, such as address confidentiality, that a victim of domestic abuse may have elected to use within the court system.”

The guardian ad litem should adhere to any confidentiality protections, such as address confidentiality, that a victim of domestic abuse may have elected to use within the court system.

This is not limited to only the names or addresses of the parties and children but can also apply to information about other persons interviewed.

### 3. Steps in an Investigation

Guardians ad litem should take the following steps when investigating whether domestic abuse is present. Please note that these steps are not intended to be an exhaustive list, nor are they required to be conducted in this order.

#### a. Interview the Adult Parties - Sample Interview Comments and Questions

The suggested initial screening questions are designed to allow a guardian ad litem to make the threshold determination of whether domestic abuse is present. Although the guardian ad litem needs to make inquiries about physical and sexual abuse, the guardian ad litem also must inquire about the series of controlling and coercive behaviors and tactics that are a part of domestic abuse. [For a complete list of interview questions, see Appendix: Step One - Guardian Ad Litem Interview Questions - Adult Parties.]

#### Helpful Interview Suggestions

Adult victims may be reluctant to talk with guardians ad litem because of fears of being punished by their abusers. By focusing on the safety concerns, guardians ad

litem may be able to build rapport with the adult victim. Also, some adult victims minimize and/or deny the violence as a way to survive the abuse. In interviews with the adult victims and older children, explain that it is likely that the domestic abuser will also be interviewed. Ask adult victims if they will feel endangered by interviews of the abusers. Explain to an adult victim how and when the guardian ad litem will conduct an interview with the domestic abuser. Ask the victims whether they are concerned about possible consequences to them and the children as a result of such interviews with the abuser. If it appears that an interview about domestic abuse with the alleged abuser will endanger adult victims or the children, delay it until their safety is secured.

“ Do not confront the abuser with information provided by a victim.

Interview the alleged abusive party in a way that encourages disclosure of his/her abusive conduct. Do not confront the abuser with information provided by a victim. While guardians ad litem can sometimes use police reports or other agency reports about the domestic abuse in the interviews with abusers, try not use any information from a victim's statements.

If an identified abuser denies the abuse, do not try to force disclosure, but move on to other subjects. Angry confrontations with abusers often result in retaliation against the child or adult victims. The guardian ad litem does not need the abuser's disclosure to confirm that domestic abuse occurred - confirmation can come from adult and child victim statements and other collateral sources. [For more information on interviewing collateral sources, see section g., "Interview Additional Parties."]

#### **b. Interview the Child Parties - Sample Interview Comments and Questions**

In addition to interviewing the adult parties, it is also important to interview the child parties, if possible. However, it is important to note that special considerations apply to interviews of children and the use of information obtained from them.

First, interview strategies should be non-suggestive and appropriate to the age and developmental stage of the child. Second, the guardian ad litem must understand that while children may provide accurate information, their answers may also involve misinterpretations (or developmentally appropriate but immature interpretations) of



events, statements, or dynamics, or be influenced by input from one or both parents. Guardians ad litem should account for these potential misinterpretations in their report. Also, it is important to recognize that children may never feel safe disclosing negative information or feelings about a parent.

At a minimum, children should be interviewed separately in cases with allegations of abuse, even if they are also interviewed or observed with one or both parents. From a safety standpoint, it is critical that the guardian ad litem not attribute direct quotes to children; this reduces the risk that a parent will use the children's words against them or against the other parent. [For a complete list of interview questions, see Appendix: Step One - Guardian Ad Litem Interview Questions - Child Parties.]

**c. Determine Whether there are Domestic Abuse, Harassment, or Child Abuse Restraining Orders**

Records from civil court processes relating to domestic and child abuse may provide useful information regarding the presence and effect of abuse on adults and children. [For information on how to access these court records, see section e., "Access Documents Related to Domestic Abuse."] Wisconsin's restraining orders may come into play in at least five possible ways during a family law proceeding.

First, in a family law action, the court shall inform the parties of their right to file a domestic abuse order and the procedure to follow if the court believes that a temporary restraining order or injunction under Wis. Stat. § 813.12 is appropriate.<sup>46</sup>

Second, under certain circumstances, evidence of domestic or child abuse overcomes the general presumption in favor of joint legal custody. [See section C.1.c., "Sole Custody When Parties Will Not Be Able to Cooperate."] The existence of a restraining order or injunction related to domestic or child abuse against a party likely constitutes "evidence" of domestic or child abuse within the meaning of Wis. Stat. § 767.41(2)(b)2.c.

Third, a finding that one party has engaged in a pattern or serious incident of domestic abuse creates a rebuttable presumption that the court should deny joint or

---

<sup>46</sup> Wis. Stat. § 767.225(3m)

sole legal custody to the offending party.<sup>47</sup> The facts that gave rise to issuance of a restraining order or injunction—or the existence of a restraining order or injunction itself—will likely form a strong basis for a finding by the family court that domestic abuse occurred.

Fourth, three factors in determining the best interests of the child address child abuse and domestic abuse. (See Wis. Stat. § 767.41(5)(am)12., 12m., and 13.) These factors apply when there is “evidence” of the specified abuse.

Fifth, if a restraining order or injunction currently limits contact between the parties or a party and the child or children, the guardian ad litem should take care to ensure that he or she does not condone violations of the order or make any recommendations that would call for the respondent of the restraining order or injunction to violate the order. Violations of restraining orders and injunctions can result in significant criminal penalties. There is no legal authority that a family law order may modify or supersede an existing restraining order or injunction.

#### **Domestic Abuse Restraining Order, Wis. Stat. § 813.12(1)**

A victim may seek a domestic abuse temporary restraining order to protect against a variety of abusive behaviors. In general, a victim will first obtain a domestic abuse temporary restraining order (TRO). The victim/petitioner files the TRO *ex parte* without notice to the abuser/respondent. If granted, the TRO is in effect for up to 14 days or until the date of the injunction hearing. The TRO can order the respondent to any the following:<sup>48</sup>

- Refrain from committing acts of domestic abuse against the petitioner
- Avoid the petitioner’s residence or any other location temporarily occupied by the petitioner or both
- Avoid contacting or causing any person other than a party’s attorney or a law enforcement officer to contact the petitioner unless the petitioner consents in writing

---

<sup>47</sup> Wis. Stat. § 767.41(d)(1)

<sup>48</sup> Wis. Stat. § 813.12(3)

- Any combination of these remedies requested in the petition, or any other appropriate remedy not inconsistent with the remedies requested in the petition.

At the injunction hearing, the respondent has an opportunity to attend and contest the petition. If the court finds evidence of the alleged abuse, the court can grant a longer order known as an injunction. If a domestic abuse injunction is granted, the court is mandated to order the respondent to surrender any firearms in his or her possession and to no longer possess firearms for the duration of the order.

### **Harassment Restraining Order, Wis. Stat. § 813.125(1)**

It is also possible for a petitioner who does not meet the requirements of the domestic abuse order to file a petition for a harassment temporary restraining order. In addition, some petitioners who are eligible for a domestic abuse restraining order choose to seek a harassment restraining order instead. Harassment orders can be filed by either a minor or adult against a minor or adult for any of the following behaviors:<sup>49</sup>

- Striking, shoving, kicking or otherwise subjecting another person to physical contact
- Engaging in an act that would constitute child abuse under Wis. Stat. § 48.02(1)
- Sexual assault under Wis. Stat. § 940.225
- Stalking under Wis. Stat. § 940.32
- Attempting or threatening to do the above behaviors
- Engaging in a course of conduct or repeatedly committing acts that harass or intimidate another person and that serve no legitimate purpose

Harassment restraining orders allow minor victims of domestic abuse (e.g., teens experiencing dating violence) to file a petition against their abuser without first needing permission from an adult and without having a guardian ad litem appointed.

---

<sup>49</sup> Wis. Stat. § 813.125(1)

Once the temporary restraining order is filed and granted for a minor, the court will typically appoint a guardian ad litem to assist the court with a recommendation at the injunction hearing.

#### **Child Abuse Restraining Order, Wis. Stat. § 813.122**

Under Wis. Stat. § 813.122, a child victim or a parent, stepparent, or legal guardian of the child victim may seek a temporary restraining order or injunction to protect the child victim from child abuse. The court will grant the order upon a finding that the respondent engaged in or, based on prior conduct, may engage in child abuse. A child abuse restraining order or injunction can include the following conditions:<sup>50</sup>

- A judge may grant an injunction ordering the respondent to avoid the child victim's residence or any premises temporarily occupied by the child victim or both, and to avoid contacting or causing any person other than a party's attorney to contact the child victim unless the petitioner consents to that contact in writing and the judge agrees that the contact is in the best interests of the child victim.
- If the respondent is the parent of the child victim, the judge shall modify the order to provide the parent reasonable visitation rights, unless the judge finds that visitation would endanger the child's physical, mental, or emotional health. The judge may provide that any authorized visitation be supervised.

#### **d. Determine Whether There is a Criminal Case Involving Domestic Abuse**

In the course of investigations, guardians ad litem may encounter parties with closed or pending domestic abuse criminal cases. [For information on how to access these court records, see section e., "Access Documents Related to Domestic Abuse."] Some typical abusive behaviors are crimes under Wisconsin law. However, it is important to understand that the Wisconsin criminal code does not create a separate crime of domestic abuse. Rather, it relies on other existing criminal laws that define criminal activity.

Understand that a parent who has been charged with a domestic abuse crime may

---

<sup>50</sup> Wis. Stat. § 813.122(5)(a)

feel limited in his or her ability to provide information to a guardian ad litem if doing so will interfere with his or her constitutional right against self-incrimination. In cases involving pending criminal charges, guardians ad litem may seek the parent's or his or her attorney's consent to speak to the parent in order to investigate if there is any evidence of domestic abuse. If the parent asserts his or her Fifth Amendment right against self-incrimination, it probably will not be possible to interview that party within the time frame set by the court. In this situation, guardians ad litem may seek information regarding domestic abuse and its effect on the children through other sources, to the extent possible. Note the inability to interview the party in the report to the court.

Wisconsin's mandatory arrest law, which uses the criminal law code definition of "domestic abuse" [see section 1.A.2.a.], states that law enforcement shall arrest and take a person into custody if the officer has reasonable grounds to believe that the person has committed or is committing domestic abuse, that the person's actions constitute the commission of a crime, and that any of the following apply:

- The officer has a reasonable basis for believing that continued domestic abuse against the alleged victim is likely.
- There is evidence of physical injury to the alleged victim.
- The person is the predominant aggressor.<sup>51</sup>

---

<sup>51</sup> Wis. Stat. § 968.075(1) and (2)

Thus, an officer might arrest a person for any number of domestic abuse-related crimes. The most common in Wisconsin include the following:

Offense	Citation
Homicide Offenses	940.01-940.06
Battery, Battery by Persons Subject to Certain Injunctions, Battery/Threat to a Witness	940.19, 940.20(1m), 940.201
Mayhem	940.21
Sexual Assault	940.225
Reckless Injury	940.23
Strangulation and Suffocation	940.235
Abuse of Individuals at Risk	940.285
False Imprisonment	940.30
Human Trafficking	940.302
Taking Hostages	940.305
Kidnapping	940.31
Stalking	940.32
Intimidation of Witnesses/Victims	940.42-940.45
Violation of Court Orders	940.48
Endangering Safety of Others by Use of Dangerous Weapon	941.20
Recklessly Endangering Safety	941.30
Damage to Property	943.01
Damage or Threat to Property of Witness	943.011
Criminal Trespass to Dwellings	943.14
Entry onto a Construction Site or into a Locked Building, Dwelling, or Room	943.15
Bail Jumping	946.49
Disorderly Conduct	947.01
Unlawful Use of a Telephone	947.012
Unlawful Use of a Computerized Communication System	947.0125
Trafficking of a Child	948.051
Municipal Ordinances Conforming to:	940.201; 941.20; 941.30; 943.01; 943.011; 943.14; 943.15; 946.49; 947.01; 947.012; 947.0125

e. **Access Documents Related to Domestic Abuse**

In the course of a thorough investigation, and depending on the facts of each case, guardians ad litem will look at files and materials related to domestic abuse from a variety of sources, including the following:

- **Court Records:** Check court records as a routine part of every investigation. Wisconsin Court System Circuit Court Access (“CCAP”) can provide some useful information, but not all relevant information is accessible through CCAP. Criminal records from other states, confidential case types, files that have been sealed, and convictions that have been expunged are not available on CCAP. Records of restraining order petitions are generally not accessible by searching under the petitioner’s name; they usually can only be found by searching the respondent’s name. Moreover, beginning April 18, 2014, records of child abuse restraining order petitions and child abuse injunctions are confidential and not on CCAP. Additionally, all child protective cases are confidential and not available on CCAP.

To obtain more complete information about criminal records, request a criminal history background done through the Wisconsin Department of Justice Crime Information Bureau (CIB). For more information, visit <http://www.doj.state.wi.us/dles/cib/background-check-criminal-history-information>

- **Probation Records:** A guardian ad litem may also need to obtain information from the Department of Corrections, Division of Community Corrections. Most probation officers should be able to speak freely with a court-appointed guardian ad litem upon verification of appointment.
- **School Records:** Schools will often share information with after initial contact is made by telephone and the school receives a copy of the order of appointment. Many schools will accept copies via facsimile, so this process can occur fairly quickly.
- **Employment Records:** On some matters, it may be significant to look at an abuser’s or victim’s employment records. Employers are likely to be cautious

about releasing an employee's records, and practices will vary from employer to employer.

- **Miscellaneous Children's Records:** Day care, preschool, safe visitation and exchange center, camp, and extracurricular activity records may also be important to the investigation. Guardians ad litem should be able to access these by providing a copy of the court order.
- **Child Protective Service (CPS) Records:** CPS records may show prior reports of abuse, neglect, or violence in the home. Under Wis. Stat. § 48.981(7)(b), a guardian ad litem may review these child protective services records if one or both parents of the child have signed a release authorizing the disclosure of this information. Inquire with the county CPS agency as to the required form and procedure to avoid an unnecessary delay in obtaining the information. If the parents are unwilling to sign such an authorization, a guardian ad litem also has the option of filing a motion for an order allowing access to specific information. Many judicial officers, while careful to protect confidentiality, will be generous in allowing a guardian ad litem access to relevant information upon a careful showing of need and meeting the overriding standard of in the best interests of the children.

Review CPS records carefully and acknowledge their limitations. At times; agencies will “screen out” or “unsubstantiate” reports of alleged maltreatment and not take any further action. This does not necessarily indicate that the alleged actions did not occur. The Wisconsin Access and Initial Assessment Standards requires the agency to determine whether there are present or impending threats that place the child at risk of harm when determining response times or if a report is to be “screened out.” In addition, the standards allow agencies to “screen out” reports that do not meet the statutory definition of the alleged abuse. For example, if a report indicates that a parent is using inappropriate physical discipline, but the child has not received injuries as a result of this discipline, the report could be screened out as the discipline does not meet the definition of abuse found in the Wis. Stat. § 48.02. However, guardians ad litem can access helpful information related to the family functioning, parenting practices, safety determination, and other



related information in cases where the agency completed an investigation and initial assessment, regardless of the substantiation determination. In cases where the agency screened out and did not investigate a report, the record will only include minimal information regarding an allegation of maltreatment.

**f. A Note About Privileged Records**

While it is natural to want as much information as possible, be thoughtful about the decision to request, and the handling of, privileged records, especially medical records. Guardians ad litem who seek and obtain privileged records without considering the privacy and safety of victims and children may increase victims' and children's risk for physical and emotional harm.

“Guardians ad litem who seek and obtain privileged records without considering the privacy and safety of victims and children may increase victims' and children's risk for physical and emotional harm.”

Mental health and medical records may be an issue in contested custody and placement cases. For instance, courts may consider “[w]hether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being” when determining the best interests of the child.<sup>52</sup> However, medical and mental health records are afforded special protections under state and federal law and medical practitioners' professional ethical obligations. These protections are in place to allow individuals to seek help without fear of exposing themselves to the release of sensitive or embarrassing information or information that could be used against them.

Domestic abuse victims and their children have especially important reasons to limit the distribution of their medical and mental health records. First and foremost, abusers' knowledge of what victims and their children told health providers about the abuse may cause abusers to retaliate. In addition, children and victims who reveal painful details about abuse, in what was thought to be a safe space, are traumatized and victimized when abusers are able to gain access to that information through the court process. Imagine the pain of a child who trusts a therapist enough to talk about what happened to him or her only to later learn the abusive parent was able to find

<sup>52</sup> Wis. Stat. § 767.41(5)(am)7.

out what was said. That violation of trust could make it more difficult for the child to trust again and compromise the child's future relationships with either or both parents.

Abusers also often try to portray victims as “crazy” or “unstable.” Abusers who do this are, many times, exploiting the effects of trauma that they themselves brought about. Abusers' access to mental health information fuels their attempts to marginalize and discredit their victims. These tactics occur in and out of the courtroom. Some abusers use the victims' mental health information revealed in the court process to slander the victims to family, friends, and community members.

Moreover, allowing disclosure of protected information to a third party may result in a loss of the statutory privilege those mental health and other medical records are afforded under the law. Thus, a strong preference exists for no disclosure of medical records. A guardian ad litem should be able to provide a legal reason for needing these records before requesting such a release rather than risk the loss of privilege on behalf of a victim.

For all of these reasons, proceed very carefully when seeking a party's mental health records. It should never be a routine practice for a guardian ad litem to request an authorization for release of information from a victim parent. If the mental health of the victim has been raised as a legitimate issue and there are no less obtrusive means to obtain the information, seek a court order for the release of mental health or other medical records that includes a protective order. The protective order should stipulate to seal the records and prohibit release to anyone other than the guardian ad litem to be used as consideration for his or her recommendations.

If the information under the protective order must be used at trial, seek an in camera inspection. The judge or court commissioner will decide whether the records may be used at trial. Even when records are used at trial (e.g., if the medical records are part of the evidence and, therefore, become part of the court record), request that those records be sealed in the court's file and NOT made available to anyone to view them. Also, ask the court to conduct a closed hearing if these privileged records are going to be used as evidence or discussed in court.

**g. Interview Additional Parties**

In addition to interviewing the adult parties and children, consider whether it will be helpful to interview additional parties in an effort to determine if domestic abuse is present. Additional parties may include the following individuals:

- Family members, friends, neighbors, co-workers (especially of the victim)
- Community members or former partners who have had regular interactions with the family or been involved in particular incidents relevant to the inquiry. Care must be taken in these instances to guard the flow of information so that neither an adult party nor a child is put at increased risk, keeping in mind that the abuse may not yet have been disclosed to others.
- Professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy, or counselors
- Professionals who have become involved with the family because of reported incidents of, or concerns about, domestic abuse or the safety or well-being of the children involved

## **B. STEP TWO: DEFINE THE NATURE AND CONTEXT OF ABUSE**

As you have read, accurately identifying domestic abuse requires attention, skill, and sensitivity. Once the guardian ad litem has gathered the basic facts related to incidents of domestic abuse, consider the nature and context in which that abuse occurred. Understanding the nature and context allows the guardian ad litem to understand the meaning of the abuse to the victim and the children in the family. This analysis is necessary to understand the extent of the abuse and the effect it has with respect to parenting and the health, safety, and well-being of the child and the non-abusive parent. And, as will be discussed in STEP THREE, section C., understanding the nature and context of abuse is necessary to properly apply numerous statutory presumptions and factors.

Explore the following issues to understand the nature and context of the abuse:

- Whether or not the abuse is part of an ongoing pattern of behaviors to control the victim
- Interference with the victim's access to resources, decision-making authority, and freedom from unwanted intrusion
- The child's experience of the violence, including direct harm from the abuse, direct observation of the abuse, and the effects of witnessing the abuse
- The ability of the abusive parent to appropriately parent, including the ability to provide emotional support to the child, to protect the child from emotional or physical harm, to respond to the child's needs, to support the child's relationship with the non-abusive parent, and to support the parental authority of the non-abusive parent

### **1. Minor, Isolated Incidents**

In some cases, a previous incident of domestic abuse may not be part of a pattern or may not have a significant effect on the victim. In these situations, victims

typically do not describe their partners as abusive. The violent incident is not one that they believe will be repeated, and they are not afraid of their partners. Victims of an isolated incident see themselves as capable of making decisions and asserting themselves without fear of reprisals or coercion from the person who committed the violent act.

Proceed with extreme caution when concluding that a violent incident was isolated and minor. Perpetrators and victims of severe abuse often minimize what has occurred and the effects of the abuse, for different reasons. Abusers minimize their behavior to escape accountability. Victims may attempt to portray what has occurred to them as minor or isolated out of fear or shame, or because they do not fully appreciate the danger. [See section II.A.2.a., “Importance of a Thorough Investigation,” for more information about victim interviews and why victims may not disclose a full picture of abuse.]

In addition, guardians ad litem cannot solely rely on the nature or the existence or absence of criminal charges or convictions to make a conclusion about the severity or significance of a domestic abuse incident or incidents. The criminal justice system tends to account for individual incidents and often does not accurately reflect the pattern or meaning of abuse. Understanding the nature and context of abuse in a way that will allow a guardian ad litem to make conclusions about the best interests of the child requires a more comprehensive and fact-specific determination. Moreover, charging decisions in the criminal justice system tend to be influenced by factors such as prosecutor workload, plea bargaining strategies, the prosecutor’s knowledge and understanding of domestic abuse, and whether or not the prosecutor believes the victim will be a strong witness at trial. While these factors can have a large bearing on the outcome of criminal justice processes, they have very little or no relevance to the best interests of a child who has been exposed to domestic abuse, and, therefore, guardians ad litem must dig deeper to understand the nature and context of abuse.

## **2. Resistive Violence**

In some cases, a guardian ad litem may learn about an incident of violence that was committed by an individual who is actually the victim of abuse. Some victims of repeat violence and abuse will use violence to protect themselves or to stand up to the perpetrator. Violence that is committed in response to ongoing abuse has a

different nature and context, and has different implications for a guardian ad litem.<sup>53</sup> Be aware that some abusers are very skillful at bringing victims' acts of resistance to the attention of authorities, while using fear and psychological abuse to conceal or minimize the underlying violence and abuse. [See section I.C.4., "Not the Same as Sustaining Injuries: mutual Battering is Rare," for more information on the resistive use of force.]

In cases involving domestic abuse committed by and against both parties, a guardian ad litem will generally need to consider whether both parties' acts of abuse constitute a "pattern" or are deemed "serious" within the meaning of the statute and, if so, which party was the primary physical aggressor. [See sections I.A.1.d. and II.C.1.a. for more information about the requisite legal analysis in these situations.]

### 3. Coercive Control of the Victim

Most critically, guardians ad litem must understand the effects of coercive control to understand the dynamic that is often present in domestic violence cases. An abuser exerts coercive control by making the victim believe that there is a credible threat that will force the victim to experience negative consequences for noncompliance with the abuser's demands.<sup>54</sup>

“Most critically, guardians ad litem must understand the effects of coercive control to understand the dynamic that is often present in domestic violence cases.”

Generally, the types of abusive behaviors that facilitate and support coercive control include implicit and explicit forms of intimidation, actual physical and sexual violence, property destruction, and threats. In the research done by the Battered Women's Justice Project, other examples of coercive control include the following:

- Interference with access to resources
- Interference with the freedom to manage one's daily affairs

<sup>53</sup> Note that Wis. Stat. § 767.41(2)(d)2.d. directs the court to consider the possibility of self-defense, among other factors, when both parties have engaged in a serious incident or pattern of violence.

<sup>54</sup> Dutton, M. A., & Goodman, L. A. (2005). Coercion in Intimate Partner Violence: Toward a New Conceptualization. *Sex Roles*, 52(11-12), 743-756.

- Interference with economic decision-making authority
- Interference with the victim's or the child's ability to meet daily needs
- Interference with the non-abusive parent's parenting
- Interference with social and cultural connectedness

Within any given relationship, however, the specific behaviors used to intimidate the victim are unique to that given relationship.<sup>55</sup> Specific behaviors used are based on the abuser's knowledge and assessment of the victim's vulnerabilities. The abuser learns about these vulnerabilities from everyday observations of the victim during the relationship.

Coercive control reduces the victim's power to make decisions, places limitations on independence, and diminishes the victim's self-image and strength.<sup>56</sup> Coercive control impacts virtually all dimensions of the victim's life, including everyday actions, use of economic resources, relationships with family and friends, educational and occupational opportunities, sexuality, and general life activities.<sup>57</sup>

Coercive control is a subtype of psychological abuse, which constitutes a broader concept of maltreatment. Not all psychological abuse is controlling per se, even if it is damaging in some way. In the same way, physical violence, per se, is not the same as coercive control, even though physical and other forms of violence (e.g., sexual, property damage, and pet abuse) are intimately related to coercive control because these forms of abuse support and maintain it. Coercive control is

---

<sup>55</sup> Stark, E. (2007). *Coercive Control: How Men Entrap Women in Personal Life*. Oxford University Press.

<sup>56</sup> Ehrensaft, M. K., & Vivian, D. (1999). Is Partner Aggression Related to Appraisals Of Coercive Control By A Partner?. *Journal of Family Violence*, 14(3), 251-266.

<sup>57</sup> Bair-Merritt, M. H., Crowne, S. S., Thompson, D. A., Sibinga, E., Trent, M., & Campbell, J. (2010). Why Do Women Use Intimate Partner Violence? A Systematic Review of Women's Motivations. *Trauma, Violence, & Abuse*, 11(4), 178-189; Beck, C.J., Menke, M., Brewster, K.O., & Figueredo, J. (2009). Beck, C. J., Menke, J. M., Brewster, K. O. H., & Figueredo, A. J. (2009). Validation of a Measure of Intimate Partner Abuse with Couples Participating in Divorce Mediation. *Journal Of Divorce & Remarriage*, 50(5), 295-308; Davis, K. E., Swan, S. C., & Gambone, L. J. (2012). Why Doesn't He Just Leave Me Alone? Persistent Pursuit: A Critical Review of Theories and Evidence. *Sex Roles*, 66(5-6), 328-339; Robertson, K., & Murachver, T. (2011). Women and Men's Use of Coercive Control in Intimate Partner Violence. *Violence and Victims*, 26(2), 208-217.

also differentiated from influence or persuasion<sup>58</sup> in that, with control, victims are constrained as to the choices they have and perceive the control as negative. The victim of coercive control can reliably predict negative outcomes for failure to comply with the demands of the abuser. Influence or persuasion does not constrain the other person's ability to make choices.

#### 4. Identifying Coercive Control During Family Court Proceedings

##### a. Using the Guardian ad Litem to Control the Victim

Guardians ad litem have to be more careful than usual when appointed to cases in which domestic abuse is an issue or a concern. Abusers often use any means of power and control they have available to continue victimizing their former partners. In these cases, guardians ad litem need to have knowledge of what domestic abuse is, what it is not, and the dynamics of domestic abuse. Without this base of information, guardians ad litem can unwittingly become part of an abuser's attempts to control the victim.

The following are some behaviors that an abuser may use to manipulate a guardian ad litem:

- Constantly calling/contacting the guardian ad litem in order to increase the billing
- Not contacting the guardian ad litem until the last minute and then bringing a lot of documentation and information to try and delay the trial
- Giving the guardian ad litem information regarding the abuse that is inaccurate or misleading, which could prompt the guardian ad litem to obtain more information from the victim, thus revictimizing him or her

---

<sup>58</sup> Bair-Merritt, M. H., Crowne, S. S., Thompson, D. A., Sibinga, E., Trent, M., & Campbell, J. (2010). Why Do Women Use Intimate Partner Violence? A Systematic Review of Women's Motivations. *Trauma, Violence, & Abuse, 11*(4), 178-189; Day, A., & Bowen, E. (2015). Offending Competency and Coercive Control in Intimate Partner Violence. *Aggression and Violent Behavior, 20*, 62-71; Ehrensaft, M. K., Langhinrichsen-Rohling, J., Heyman, R. E., O'Leary, K. D., & Lawrence, E. (1999). Feeling Controlled in Marriage: A Phenomenon Specific to Physically Aggressive Couples?. *Journal of Family Psychology, 13*(1), 20.



- Blaming the victim for the abuse
- Highlighting the mental health of the victim in a way that makes it look like the victim cannot parent the children
- Having third parties contact the guardian ad litem with false or misleading information regarding child abuse
- Making demonstrably false CPS reports and telling the guardian ad litem that CPS is investigating the victim
- Getting witnesses to lie for the abuser in order to make the victim look like a bad parent
- Trying to charm or flirt with the guardian ad litem
- Trying to intimidate or bully the guardian ad litem
- Interrogating the guardian ad litem regarding information the victim provided
- Requesting copies of guardian ad litem's files and records
- Insisting that the guardian ad litem speak to specific people or obtain the victim's mental health (or other medical) records
- Twisting the guardian ad litem's words to make it sound like the guardian ad litem is on the abuser's side

Note that these behaviors should not be viewed in isolation but rather considered within the overall context of the relationship between the parties. For example, if one parent makes a child protective services report that is later unsubstantiated and brings that report to the attention of the guardian ad litem, the parent's action may very well be an attempt to protect the child from harm and not an attempt to interfere with guardian ad litem's work. (As noted previously, it is not uncommon for child protective services to be unable to substantiate legitimate reports of child abuse or neglect.) Therefore, the behaviors listed above can rarely be used to identify

someone as abusive. Instead, guardians ad litem should be aware of these behaviors when they have concerns that a parent has been abusive and, therefore, likely has the motivation to use the guardian ad litem against the victim.

**b. Attempting to Control the Court Process**

Be aware of attempts by abusers to control the court process as a means of reinforcing to the victim that the abuser, not the judge, is in control. Domestic abusers are very adept at using the legal system as one more tactic of control against victims. A thorough knowledge about domestic abuse is necessary to identify and counter such attempts. The following are examples of ways abusers may attempt to control the court process:

- Physically assaulting or issuing threats of violence against the victim and others inside or outside the courtroom, threats of suicide, or threats to take the children in order to coerce the victim to change the petition or to recant previously given testimony
- Following the victim in or out of court
- Using information gained through guardian ad litem interviews and court records to stalk or threaten the victim
- Giving long speeches about all the victim's behaviors that "made" the abuser do it
- Making statements of profound devotion or remorse to the victim and to the court
- Dragging out court proceedings over years
- Not keeping appointments with counsel
- Not returning the child at the designated or agreed upon time
- Calling the police or others about trivial issues

“Be aware of attempts by abusers to control the court process as a means of reinforcing to the victim that the abuser, not the judge, is in control.”

- Continually testing the limits of physical placement and custody/support agreements (e.g., arriving late or not showing up at appointed times and then, if the victim refuses to allow a subsequent visit, threatening court action)
- Threatening or implementing custody fights to gain leverage in negotiations over financial issues
- Using any evidence of trauma resulting from the abuse as evidence that the victim is an unfit parent

## 5. Children's Experience of the Abuse

### a. Assess the Domestic Abuse Risk Posed to Children

In making custody and placement recommendations, consider the safety of the children. Given the range of physical and psychological danger to children that exists when domestic abuse is present and the many elements necessary for recovery, assessing the risk of danger to children is complex.<sup>59</sup> Factors to be considered in assessing risk to children include the following:<sup>60</sup>

- Level of physical danger to the non-abusive parent, because the higher the severity or frequency of a domestic abuser's level of violence, the greater the risk of child abuse
- History of physical abuse towards the children
- History of sexual abuse or boundary violations towards the children
- Level of psychological cruelty to the non-abusive parent or the children. Research indicates that the degree of emotional abuse in the home is an important determinant of the severity of difficulties developed by children

<sup>59</sup> Bancroft, L., & Silverman, J. G. (2004). Assessing Abusers' Risks to Children. *Protecting Children from Domestic Violence: Strategies for Community Intervention*, 101-119.

<sup>60</sup> Bancroft, L., Silverman, J. G., & Ritchie, D. (2011). *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*. Sage Publications.

exposed to domestic abuse.<sup>61</sup>

- Level of coercive or manipulative control exercised during the relationship. Research indicates that the more severely controlling individuals are towards their partners, the more likely they are to draw the children in as weapons of the abuse.<sup>62</sup>
- Level of entitlement and self-centeredness, meaning an abuser's perception of him- or herself as deserving of special rights and privileges within the family. Highly entitled and self-centered abusers have been observed to chronically exercise poor parenting judgment and to inappropriately expect children to take care of their emotional and physical needs.<sup>63</sup>
- History of using the children as a weapon, such as manipulating the victim by threatening to abuse or take away the children, hurting the partner by hurting the children, not allowing the partner to comfort the children or have physical contact with them, teaching children to use insulting language towards the non-abusive partner, and undermining the other parent.
- History of placing children at physical or emotional risk while abusing the other parent
- History of neglectful or severely under-involved parenting
- Refusal to accept the end of the relationship, or to accept the other parent's decision to begin a new relationship, as such behavior often is accompanied by severe jealousy and possessiveness, and has been linked to increased dangerousness in domestic abusers<sup>64</sup>
- History of substance abuse

---

<sup>61</sup> Hughes, H. M., Graham-Bermann, S. A., & Gruber, G. (2001). Resilience in Children Exposed to Domestic Violence, in S. Graham-Bermann & J. Edleson (Eds.) *Domestic Violence in the Lives of Children: The Future of Research, Intervention, & Social Policy*. American Psychological Association.

<sup>62</sup> Bancroft, L., & Silverman, J. (2002). *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*. Thousand Oaks, CA: Sage.

<sup>63</sup> Id.

<sup>64</sup> Weisz, A. N., Tolman, R. M., & Saunders, D. G. (2000). Assessing the Risk of Severe Domestic Violence the Importance of Survivors' Predictions. *Journal of Interpersonal Violence*, 15(1), 75-90.

## **b. Physical or Psychological Abuse of the Children**

While the children may not be the specific target of the domestic abuser, the abuser may traumatize children in the process of abusing the victim. Children who live in abusive homes not only witness the abuse, but also are at risk of being victims of physical or sexual abuse by domestic abusers, or of being victimized by the abuser's use of them to control the adult victim.<sup>65</sup> Current research indicates that domestic abuse impacts children in a variety of ways<sup>66</sup> including the following:

### **i. Injury or Threat to Child, Pets, or Objects**

Abusers may intentionally injure or threaten violence against the child, pets, or the children's cherished objects as a way of threatening and controlling the victim. For example, the child may be used as a physical weapon against the victim, is thrown at the victim, or is abused as a way to coerce the victim to do certain things. The children's pets or cherished objects may be damaged, or threatened with damage. Attacks against pets or loved objects are particularly traumatic for young children who often do not make a distinction between their own bodies and the pet or the prized possession. An attack against the pet is experienced by the child as an attack against the child.

### **ii. Injury to Child While Attacking the Other Parent**

Abusers may unintentionally physically injure the child during the abuser's attack on the adult victim, for example, when the child gets caught in the fray (e.g., an infant injured when the mother is thrown while holding the infant), or when the child attempts to intervene (e.g., a small child is injured when trying to stop the abuser's attack against the victim).

### **iii. Using the Children to Control Other Parent**

Abusers may use the child to coercively control the adult victim by isolating the child along with the victim (e.g., not allowing the child to enter peer activities or

---

<sup>65</sup> Jaffe, P. G., Crooks, C. V., & Poisson, S. E. (2003). Common Misconceptions in Addressing Domestic Violence In Child Custody Disputes. *Juvenile and Family Court Journal*, 54, 57.

<sup>66</sup> Edleson, J. L. (1999). The Overlap between Child Maltreatment and Woman Battering. *Violence against Women*, 5(2), 134-154.

friendships), by engaging the child in the abuse of the adult victim (e.g., making the child participate in the physical or emotional assaults against the adult), by forcing the child to watch the abuse against the adult victim, by interrogating the child about the other parent's activities, by taking the child away after each violent episode to ensure that the victim will not flee the abuser, and by asserting that the child's "bad" behavior is the reason for the assault on the victim.

#### iv. Assaulting Other Parent in Front of the Children

Despite what parents say, children have often either directly witnessed the acts of physical and psychological assaults,<sup>67</sup> or have indirectly witnessed them by overhearing the episodes or by seeing the aftermath of the injuries and property damage. There is a common misconception that as long as children are not abused directly, they are not harmed by exposure to domestic abuse. However, the reality is that even though they are not physically or sexually abused, when there is violence at home, children are aware of and affected by it. As a significant and growing body of research attests, exposure to physical violence at home hurts children, although the extent of that injury differs from child to child,<sup>68</sup> even within the same home.

“ There is a common misconception that as long as children are not abused directly, they are not harmed by exposure to domestic abuse. However, the reality is that even though they are not physically or sexually abused, when there is violence at home, children are aware of and affected by it.

#### c. Effects of Domestic Abuse on Children According to Age and Developmental Stage

Domestic abuse affects every child differently, and, therefore, each case needs to be assessed individually. Considering the child's stage of development can help the guardian ad litem ascertain the impact of domestic abuse on a particular child.

<sup>67</sup> Brookhoff, D., O'Brien, K., Cook, C., Thompson, T., & Williams, C. (1997). Characteristics of Participants in Domestic Violence. *Journal of The American Medical Association*, 277(17), 1369-1373.

<sup>68</sup> Edleson, J. L. (2001). *Studying The Co-Occurrence of Child Maltreatment and Domestic Violence In Families*, in S. Graham-Bermann & J. Edleson (Eds.) *Domestic Violence in the Lives of Children: The Future of Research, Intervention, & Social Policy*. American Psychological Association.

### i. Infants and Toddlers

During this stage, the child's development of emotional attachments to others is critical. Being able to make attachments to others provides a foundation for healthy development of the child. This attachment and appropriate stimulation increases infant brain development. Domestic abuse not only interrupts the infant's attachment to the abuser, but also can interrupt the child's attachment to the victim.<sup>69</sup>

The abuser will often interfere in the victim's care of the young child. The abuser may not permit the bonding between the victim and the child. This interference results in the child having difficulty forming future relationships and can block the development of other cognitive, emotional, and relational skills and abilities. Infants and toddlers experiencing domestic abuse may present as fussy, suffer from eating and sleeping disruptions, and experience cognitive delays.<sup>70</sup>

### ii. Preschool Children

Preschool children experiencing domestic abuse may feel guilt for the abuse, and anxiety from the lack of structure in the home.<sup>71</sup> Some children may display aggression, fear, anxiety, and other behavioral problems including post-traumatic stress disorder (PTSD).<sup>72</sup> These preschool children may also struggle in interactions with both adults and other children and present as clingy, overactive, and highly demanding.

### iii. School Age Children

School age children are developing their problem-solving abilities and cognitive skills. The violence and pattern of control by the domestic abuser can impede or derail both

---

<sup>69</sup> Stiles, Melissa M. University of Wisconsin-Madison Medical School, Madison, Wisconsin, Am Fam Physician. (2002) Dec 1;66(11):2052-2067 adapting Jaffe PG, Hurley DJ, Wolfe D. Children's observations of violence: I. Critical issues in child development and intervention planning. Can J Psychiatry. 1990;35:466-70 and Rhea MH, Chafey KH, Dohner VA, Terragno R. The silent victims of domestic violence—who will speak?. J Child Adolesc Psychiatr Nurs. 1996;9(3):7-15

<sup>70</sup> Carlson. B.E. (2000). Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention. *Trauma, Violence & Abuse*, 1(4): 321-342.

<sup>71</sup> Cunningham, A.J., Baker, L.L. & Centre for Children and Families in the Justice System. (2007). *Little eyes, little ears: How violence against a mother shapes children as they grow*. London, Ont: Centre for Children and Families in the justice System.

<sup>72</sup> Carlson (2000). op.cit.

of these tasks. For example, a child may have compromised learning skills because of her or his anxieties about what is happening at home.<sup>73</sup> School age children exposed to domestic abuse may present as anxious, aggressive, disobedient, and depressed.<sup>74</sup> Some will also suffer from low self-esteem and PTSD.

#### iv. Teenagers

The central developmental task of teenagers is becoming autonomous and developing relationships. For teens who are coping with abuse against a parent, there are no positive models within the family for learning the relationship skills necessary for establishing healthy adult relationships.<sup>75</sup>

Teenagers experiencing domestic abuse may exhibit school truancy, delinquency, substance abuse, and early sexual activity.<sup>76</sup> In addition, teens may suffer from depression, PTSD, and enhanced risk of suicide attempts.<sup>77</sup> Teens are more likely to intervene when there is a violent incident in the home.

#### v. All Developmental Stages

The negative effects of the domestic abuser in interrupting childhood development may be seen immediately in cognitive, psychological, and physical symptoms, such as the following:

- Eating or sleeping disorders
- Mood-related disorders, such as depression or emotional neediness
- Over-compliance, clinging, withdrawal
- Aggressive acting out, destructive behavior
- Detachment, avoidance, a fantasy family life

---

<sup>73</sup> Cunningham and Baker (2007) op.cit.

<sup>74</sup> Stiles (2002). op. cit.

<sup>75</sup> Cunningham and Baker (2007) op.cit.

<sup>76</sup> Stiles (2002). op. cit.

<sup>77</sup> Carlson (2000). op.cit.



- Somatic complaints, finger biting, restlessness, shaking, stuttering
- School problems
- Suicidal ideation<sup>78</sup>

The children's experience of domestic abuse may also result in changes in perceptions and problem-solving skills, such as the following:

- Young children incorrectly seeing themselves as the cause of the abuser's violence against the adult victim
- Children using either passive behaviors (withdrawal, compliance, etc.) or aggressive behaviors (verbal and/or physical striking out, etc.) rather than assertive problem-solving skills

There also may be long-term effects as these children become adults, such as the following:

- These children may carry these deficits into adulthood since important developmental tasks are interrupted. They may never recover from getting behind in certain academic tasks or in interpersonal skills. These deficits impact their abilities to maintain jobs and relationships.
- Research indicates there are long-term health effects from experiences of domestic abuse during childhood.<sup>79</sup> Child exposure to domestic abuse is considered an Adverse Childhood Experience (ACE) and has been linked to numerous negative physical and mental health outcomes in adulthood.<sup>80</sup>

---

<sup>78</sup> Barnett, O. W., Miller-Perrin, C. L., & Perrin, R. D. (1997). Children Exposed to Marital Violence. In Barnett, O. W., Miller-Perrin, C. L., & Perrin, R. D. (2010). *Family Violence Across the Lifespan: An Introduction*. Sage Publications.

<sup>79</sup> Coker, A. L., Smith, P. H., Bethea, L., King, M. R., & McKeown, R. E. (2000). Physical Health Consequences of Physical and Psychological Intimate Partner Violence. *Archives of Family Medicine*, 9(5), 451.

<sup>80</sup> O'Connor, C., Finkbiner, C., & Watson, L. (2012). *Adverse Childhood Experiences in Wisconsin: Findings from the 2010 Behavioral Risk Factor Survey*. Wisconsin Children's Trust Fund and Child Abuse Prevention Fund of Children's Hospital & Health System.

- Male children in particular are affected and have a high likelihood of abusing intimate partners in their adult relationships.<sup>81</sup>

## 6. Parenting in the Context of Domestic Abuse

The guardian ad litem must also consider the abuse in the context of the familial and parental relationships between the victim, the abuser, and the child.

### a. Risks for Children when Raised by an Abusive Parent

Parents' capacities to meet children's emotional needs are impacted by the presence of domestic abuse. In many abusive relationships, in addition to the risks of domestic abuse exposure to children, children are also exposed to the risk of irresponsible parenting. Published studies demonstrate that there are various recurring themes that consistently emerge when evaluating parenting behaviors on the part of abusers. For example, in domestic abuse cases, children often face the following risks:

#### i. Risk of Rigid, Authoritarian Parenting

A abuser parent may be severely controlling toward children<sup>82</sup> and is likely to use a harsh, rigid disciplinary style<sup>83</sup> that may intimidate children who have been exposed to domestic abuse and can trigger the reawakening of traumatic memories, setting back post-separation healing.

#### ii. Risk of Neglectful or Irresponsible Parenting

Abusers may have difficulty focusing on their children's needs due to their self-centered tendencies.<sup>84</sup> For example, the domestic abuser may assert his or her needs over the needs of a crying infant or a child who is frightened or hurt, especially

---

<sup>81</sup> Roberts, A. L., Gilman, S. E., Fitzmaurice, G., Decker, M. R., & Koenen, K. C. (2010). Witness of Intimate Partner Violence in Childhood and Perpetration of Intimate Partner Violence in Adulthood. *Epidemiology*, 21(6), 809.

<sup>82</sup> McGee, C. (2000). *Childhood Experiences of Domestic Violence*. Philadelphia, PA: Jessica Kingsley Publishers Ltd.

<sup>83</sup> Margolin, G., John, R. S., Ghosh, C. M., & Gordis, E. B. (1996). Family Interaction Process: An Essential Tool for Exploring Abusive Relations, in D. Cahn & S. Lloyd (Eds.), *Family Violence from a Communication Perspective*, at 37-58. Sage Publications.

<sup>84</sup> Jacobson, N. S., & Gottman, J. M. (1998). *When Men Batter Women: New Insights into Ending Abusive Relationships*. Simon and Schuster.

when the abuser is the source of the fear or injury.<sup>85</sup> In post-separation visitation situations, these parenting weaknesses may come to light as abusers may be caring for children for much longer periods of time than to which they have been accustomed. In some situations, abusers may engage in intentionally lenient parenting as a way to win their children's loyalty (e.g., not imposing appropriate safety or eating guidelines, or permitting the children to watch adult media and movies that may include inappropriate violence or sexuality). Neglectful parenting by domestic abusers may often take the form of intermittently showing interest in their children and then ignoring them for extended periods. Post-separation, domestic abusers with this parenting style tend to drop in and out of visitation, which can be emotionally disruptive to their children.<sup>86</sup>

### iii. Risk of Psychological Abuse and Manipulation

Domestic abusers have also been observed to tend towards verbally abusive parenting styles and towards using the children as weapons against the other parent.<sup>87</sup> Frequently, in abusive relationships, the abuser repeatedly usurps the victim's autonomy and right to independent decision making.<sup>88</sup> As a consequence, children may feel unsafe or that the world is unpredictable. Post-separation, this tendency often increases, with visitation becoming an opportunity for an abuser to manipulate the children in a continuing effort to control the other parent.<sup>89</sup>

### iv. Risk of Abduction

The majority of parental abductions take place in the context of domestically violent relationships and are mostly carried out by abusers or others acting on their behalf.<sup>90</sup>

---

<sup>85</sup> Bancroft, L., Silverman, J. G., & Ritchie, D. (2011). *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*. Sage Publications.

<sup>86</sup> Id.

<sup>87</sup> McGee, C. (2000). *Childhood Experiences of Domestic Violence*. Philadelphia, PA: Jessica Kingsley Publishers Ltd.

<sup>88</sup> E Stark, E. (1999). Failure to Protect: Unravelling the Battered Mother's Dilemma, *Western State University Law Review*, 29.

<sup>89</sup> J Ericksen, J. R., & Henderson, A. D. (1998). Diverging Realities: Abused Women and Their Children. *Sage Series on Violence Against Women*, 10, 138-155.

<sup>90</sup> Greif, G. L., & Hegar, R. L. (2010). *When Parents Kidnap*. Simon and Schuster.

## **C. STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE**

Wisconsin law recognizes and reflects that domestic abuse can have significant implications on what custody and placement arrangements are in the best interests of the child. Therefore, equipped with the knowledge about the existence of domestic abuse and an understanding of the nature and context of that abuse, guardians ad litem should look to Wis. Stat. § 767.41 to evaluate the implications of the abuse.

### **1. Statutory Presumptions and Paramount Considerations**

Because domestic abuse can have far-reaching implications on the health, safety, and welfare of children and adult victims, Wisconsin's custody and placement statutes lay out overriding principles that should guide guardians' ad litem decision-making in these cases. In both practical and legal terms, guardians ad litem and other decision makers come to a given custody and placement case with the presumption that both parties will share legal custody and that significant amounts of placement time with each parent will be in the child's best interest. Wisconsin law contains several provisions that reflect that these presumptions should not apply when there is evidence of domestic abuse or child abuse.

#### **a. Presumption Against Joint and Sole Custody to the Abuser**

When a court is able to find that one party has engaged in "a pattern or serious incident of interspousal battery ... or domestic abuse ... there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party."<sup>91</sup>

As discussed in sections B.5., "Children's Experience of Abuse," and B.6., "Parenting in the Context of Domestic Abuse," coercive and controlling abuse has far-reaching implications on a child's development and can impede the protective parent's ability to parent in ways that support his or her child's healthy development. When abusers who exhibit coercive and controlling behavior are given legal custody, these harmful dynamics are allowed to continue to the detriment of children and victims. This is because the authority that legal custody provides can be a powerful mechanism for

---

<sup>91</sup> Wis. Stat. § 767.41(2)(d)2.

the abuser to use to control the other parent and the child.

Often, abusive parents with sole or joint decision-making power think first about how they can use this power to continue the pattern of control over the non-abusive parent. The child's needs are an afterthought, if they are considered at all. By the very nature of being subjected to joint decision-making authority, the non-abusive parent's power to act in the child's interest is compromised. Therefore, in cases of domestic abuse that meet the threshold of serious incident or pattern of abuse, request that the court make a finding of domestic abuse under Wis. Stat. § 767.41(2)(d)1. and proceed with the custody and placement analysis with a presumption that legal custody awarded to the abuser is not appropriate.

There are two critical aspects of Wis. Stat. § 767.41(2)(d)1. that directly correspond to the discussion about coercive control contained in section B.

First, in some cases, the statute directs the court to apply the presumption against sole or joint legal custody against the party who has used a "pattern of coercive and abusive behavior."<sup>92</sup> When the court finds that both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse, the guardian ad litem may be required to consider who is the primary physical aggressor in order to determine how the presumption against joint and sole custody should be applied. [See section I.A.1.d., "Primary Physical Aggressor, as Defined in the Family Law Code" for more information.] The factors that must be considered in determining who is the primary physical aggressor directly correspond to the dynamics of coercive control. A common thread that links the enumerated factors - history of prior acts, the relative severity of injury, likelihood of future injury, and self-defense<sup>93</sup> - is whether one party is likely to be in fear of the other. As discussed in STEP TWO, fear is a hallmark of coercive control. Even more explicitly, Wis. Stat. § 767.41(2)(d)2.e. requires that the court consider "[w]hether there is or has been a pattern of coercive and abusive behavior" when determining the primary physical aggressor. Therefore, investigation of coercive and controlling abuse can be essential to determining if and how the presumption against sole or joint legal custody in Wis. Stat. § 767.41(2)(d)1. should be applied.

---

<sup>92</sup> Wis. Stat. § 767.41(2)(d)2.e.

<sup>93</sup> Wis. Stat. § 767.41(2)(d)2.a.-d.

Second, because the definition of domestic abuse includes stalking, many cases of coercive and controlling abuse will meet the definition of domestic abuse, regardless of the level of physical abuse. Thus, these cases are eligible for the application of the presumption against joint custody. Recall from section I.A.1.a. that stalking, as defined in Wis. Stat. § 940.32, is incorporated in the definition of domestic abuse as that term is used in Wis. Stat. § 767.41(2)(d)1. Therefore, when one party has stalked another party, the presumption against sole or joint legal custody is applied against the perpetrating party.

The elements of stalking strongly correspond to coercive controlling behavior. Generally, stalking occurs when the stalker engages in a course of conduct that causes the victim to reasonably experience serious emotional distress or to fear bodily injury or death and when the stalker knew or should have known that at least one of the stalking acts would cause the victim to experience this distress or fear. [See Wis. Stat. § 940.32 for the precise definition.] Therefore, the core of the definition of stalking consists of a course of conduct (i.e., a pattern of behavior) that produces a sense of fear or distress.

These essential elements are the same as the core elements of coercive control. Abusers who engage in coercive and controlling behavior use a series of tactics to induce fear or psychological distress to limit the freedom of their victims. Simply put, abusers who engaged in coercive control of their victims have likely engaged in stalking and the presumption against sole or joint legal custody should be applied against that party on that basis.<sup>94</sup> Understanding that stalking can occur without physical violence is of critical importance to a guardian ad litem.

#### **b. Paramount Concern: Safety and Well-Being of the Child and Victim**

Under Wis. Stat. § 767.41(5)(bm), once a court has found that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, “the safety and well-being of the child and the safety of the parent who was the victim ... shall be the paramount concerns in determining legal custody

---

<sup>94</sup> There is a common misconception that victims are usually stalked by strangers. Guardians ad litem should understand this is not true and that a stalking perpetrator is most often known to the victim. According to the Bureau of Justice Statistics, the majority of stalking victims are stalked by someone they know. More specifically, 61% of female victims and 44% of male victims of stalking are stalked by a current or former intimate partner.

and periods of physical placement.” This provision recognizes that domestic abuse often has significant and potentially long-lasting impacts on the psychological health and physical safety of children and victims and reflects the commonsense principle that mitigating the risk of future abuse is more important than the other considerations that generally factor into custody and placement decisions when abuse is not a concern. Simply put, when domestic abuse has occurred, the statute makes the guardian ad litem’s first responsibility in making custody and placement recommendations to protect the well-being and safety of both the child and the protective parent. All other objectives are secondary.

“ Under Wis. Stat. § 767.41(5)(bm), once a court has found that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, “the safety and well-being of the child and the safety of the parent who was the victim ... shall be the paramount concerns in determining legal custody and periods of physical placement.”

## Practice Point

### Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors

Over the last several years, researchers and practitioners have focused their attention on indicators of high lethality in domestic abuse cases. Identification of specific risk factors has grown out of a body of research that has been primarily led by Jacquelyn Campbell at Johns Hopkins University.<sup>95</sup> Screening for these risk factors can help you attend to the safety of domestic abuse victims and their children, as required under Wis. Stat. § 767.41(5)(bm).

Understanding the factors that tend to increase the risk of deadly violence can also provide a lens through which to determine whether a single incident of domestic abuse is “serious” under Wis. Stat. § 767.41(2)(d)1.

The Lethality Assessment, based on Campbell’s research, considers a victim at high risk to be killed if any of the following statements are true:<sup>96</sup>

- Has he/she threatened to kill you or your children?
- Has he/she used a weapon against you or threatened you with a weapon?
- Do you think he/she might try to kill you?

In addition, affirmative responses to three or more of the following questions also mark the case as presenting a high risk of lethality:

- Does he/she have a gun or can he/she easily get one?
- Has he/she ever tried to strangle you?
- Is he/she violently or constantly jealous or does he/ she control most of your daily activities?

<sup>95</sup> Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C. R., Campbell, D. W., Curry, M. A., ... & Ulrich, Y. (2003). Assessing Risk Factors for Intimate Partner Homicide. *National Institute of Justice Journal*, (250), 14-19.

<sup>96</sup> Maryland Network Against Domestic Violence. (2005). Lethality Assessment Program Maryland Model For First ... Retrieved April 25, 2016, from [http://mnadv.org/\\_mnadvWeb/wp-content/uploads/2011/10/LAP\\_Info\\_Packet--as\\_of\\_12-8-10.pdf](http://mnadv.org/_mnadvWeb/wp-content/uploads/2011/10/LAP_Info_Packet--as_of_12-8-10.pdf)



## Practice Point (cont.)

- Have you left him/her or separated after living together or being married?
- Has he/she ever tried to kill himself/herself?
- Does he/she spy on you or leave you threatening messages?
- Is he/she unemployed?
- Do you have a child that he/she knows is not his/hers?

Other factors that research confirms are markers of higher risk for lethality include the following:<sup>97</sup>

- Abuser has forced sex on the victim
- Abuser has successfully avoided arrest for domestic abuse
- Abuser uses illegal drugs
- Abuser is an alcoholic or problem drinker
- Abuser beat the victim while the victim was pregnant
- Victim has threatened or attempted suicide
- Abuser has threatened to harm the children
- Abuser follows, spies on, or leaves threatening messages for the victim

With a number of these indicators, the degree to which the risk of homicide multiples is stark.<sup>98</sup> Campbell found that women who were threatened or assaulted with a gun were 20 times more likely than other women to be murdered. Women whose partners threatened them with murder were 15 times more likely than other women to be killed. Attempted strangulation presents a ten-fold increased risk of murder. Male abusers who are violently and constantly jealous are nine times more likely to kill their female partners, and male abusers who force their victims in to sexual activity are over seven times more likely to commit homicide.

<sup>97</sup> Campbell, J. C., Webster, D. W., & Glass, N. (2009). The Danger Assessment Validation of A Lethality Risk Assessment Instrument for Intimate Partner Femicide. *Journal of Interpersonal Violence*, 24(4), 653-674. Also see: <http://www.dangerassessment.org>

<sup>98</sup> Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C. R., Campbell, D., Curry, M. A., . . . Wilt, S. A. (2008). Assessing Risk Factors for Intimate Partner Homicide. *National Institute Journal*, (250), 14-19.

**c. Sole Custody When Parties Will Not Be Able to Cooperate**

Wis. Stat. § 767.41(2) gives courts latitude to avoid joint custody arrangements even when there has not been a finding that one party has engaged in a pattern or serious incident of interspousal battery or domestic abuse. Guardians ad litem should consider making a recommendation under this statute when they have identified coercive and controlling behavior but there is not enough evidence of domestic abuse to support a finding of a pattern or serious incident.

A parent who engages in coercive control against the other parent is generally not a person who is willing or able to engage in future decision making, as demonstrated by that parent's inability and unwillingness to allow the protective parent control over his or her life. Coercive and controlling abuse is incompatible with the type of cooperation required with joint legal custody as contemplated in Wis. Stat. § 767.41 (2).

<p><b>Successful co-parenting requires:</b></p> <ul style="list-style-type: none"><li>• Safe parental involvement</li><li>• Secure parent-child relationships</li><li>• Low parental conflict</li><li>• Effective parental communication</li><li>• Clear boundaries between partners and parental roles</li></ul>	<p><b>Coercive and controlling behaviors that interfere with co-parenting:</b></p> <ul style="list-style-type: none"><li>• The other parent's access to resources</li><li>• Freedom to manage daily affairs</li><li>• Economic decision making, ability to meet one's daily needs</li><li>• Control over the other's parenting and/or ability to parent</li><li>• Social and cultural connectedness</li><li>• Freedom from unwanted intrusion</li></ul>
---	---

**i. Presumption of Uncooperative Parties When There is Domestic Abuse**

Wis. Stat. § 767.41(2)(d)1. creates a presumption that the parties will not be able to cooperate when a parent has been a victim of domestic abuse. This statute has a lower threshold than Wis. Stat. § 767.41(2)(d)1 (which is discussed in section a.) and applies when there is evidence of interspousal battery or domestic abuse. When evidence exists and when one party requests sole legal custody, the court may grant sole custody to a party.

Again, this provision can be invoked by a guardian ad litem who has concerns

about ongoing coercive and controlling behavior, such as psychological abuse and manipulation, but who may also have concerns as to whether there is enough evidence to support a finding of a pattern or serious incident of domestic abuse. Using this provision may be the best way to advance the best interests of the child because the child deserves the benefit of parental decisions that are free of coercive and controlling tactics.

## ii. Presumption Against Joint Custody When There is Evidence of Child Abuse

The same presumption discussed above also applies in cases that include evidence that a party engaged in child abuse.<sup>99</sup> As discussed in section II.B.5., “Children’s Experience of Abuse,” there is a substantial overlap between an abuser’s use of abuse or violence against a parent and direct abuse to the child. Children of domestic abusers are at risk of being victims of physical or sexual abuse by domestic abusers.<sup>100</sup> Given the range of physical and psychological danger to children that exists when domestic abuse is present, assessing the risk of danger to children is complex.<sup>101</sup> Studies show that the higher the severity or frequency of a domestic abuser’s level of violence, the greater the risk of child abuse. Therefore, if guardians ad litem have identified concerns related to domestic abuse, they should consider whether sole custody under Wis. Stat. § 767.41(2)(b)2. is appropriate.

## 2. Best Interest of the Child Factors

Once the correct statutory framework for custody and placement decision making has been identified, consider all facts relevant to the best interest of the child.<sup>102</sup> The statute lists numerous factors that are to be considered. However, remember that the paramount concern in cases involving domestic abuse is the safety and well-being of the child and victim parent.<sup>103</sup> The other considerations and values that are embedded in the best interest of the child factors are secondary.

---

<sup>99</sup> Wis. Stat. § 767.41(2)(b)2.c.

<sup>100</sup> Jaffe, P. G., Crooks, C. V., & Poisson, S. E. (2003). Common Misconceptions in Addressing Domestic Violence In Child Custody Disputes. *Juvenile and Family Court Journal*, 54, 57.

<sup>101</sup> Bancroft, L., & Silverman, J. G. (2004). Assessing Abusers’ Risks to Children. *Protecting Children from Domestic Violence: Strategies for Community Intervention*, 101-119.

<sup>102</sup> Wis. Stat. § 767.41(5)

<sup>103</sup> Wis. Stat. § 767.41(5)(bm)

The statute lists the following factors as being in the best interests of the child:

1. The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan, or any legal custody or physical placement proposal submitted to the court at trial.
2. The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
3. The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
4. The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles, and any reasonable lifestyle changes that a parent proposes to make to be able to spend time with the child in the future.
5. The child's adjustment to the home, school, religion, and community.
6. The age of the child and the child's developmental and educational needs at different ages.
7. Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.
8. The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
9. The availability of public or private child care services.
10. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.
11. Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
12. Whether there is evidence that a party engaged in abuse of the child
13. Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse of the child or

any other child or neglected the child or any other child:

- a. A person with whom a parent of the child has a dating relationship, as defined in Wis. Stat. § 813.12(1)(ag).
  - b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.
14. Whether there is evidence of interspousal battery or domestic abuse.
  15. Whether either party has or had a significant problem with alcohol or drug abuse.
  16. The reports of appropriate professionals if admitted into evidence.
  17. Such other factors as the court may in each individual case determine to be relevant.

Several of these factors are likely to be particularly salient in cases involving domestic abuse. For that reason, they are discussed individually.

- a. **Past Parenting:** The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.<sup>104</sup>

This factor calls on the guardian ad litem to consider parenting patterns established prior to the separation and what changes to those patterns are being considered. As discussed in section II.B.6., "Parenting in the Context of Domestic Abuse," abusers' parenting styles and level of involvement often reflect the abusive tendencies that are directed at the non-abusive parent. When domestic abuse is present, analyze how the abusers' need to control the non-abusive parent has influenced past parenting in order to anticipate what parenting issues can be expected post-judgment. After the case is concluded, the child will be one of the few, and likely one of the strongest, connections the abusive parent has to the victim. Therefore, it is less likely that the abusive parent will be able to make changes in his or her child's interest. The abuser's actions with respect to the child are more likely to be influenced by the abusive dynamics, and, because the child will likely be one of the few remaining

---

<sup>104</sup> Wis. Stat. § 767.41(5)(am)4.

conduits to attempt to carry on the abuse, the abuser's unhealthy parenting tendencies may amplify post-judgment.

- b. **Child Development:** The age of the child and the child's developmental and educational needs at different ages.<sup>105</sup>

Section II.B.5.c., "Effects of Domestic Abuse on Children According to their Age and Developmental Stage," provides an explanation of the developmentally specific implications of domestic abuse on children. These implications should be analyzed in relation to the guardian ad litem's consideration of the child's age and development.

- c. **Health and Well-Being:** Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.<sup>106</sup>

Again, section II.B.5., "Children's Experience of Abuse," discusses the many ways that living with an abusive parent can negatively affect the child's intellectual, physical, or emotional well-being. Consider this information and the implications it may have on the best interests of the child.

- d. **Predictable and Meaningful Placement:** The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.<sup>107</sup>

This factor is often used to argue that placement arrangements should give both parties substantial amounts of placement time. This argument is not cogent when domestic abuse is present. Sections II.B.5., "Children's Experience of Abuse," and II.B.6., "Children's Experience of Abuse," detail the ways in which being parented by an abuser can traumatize and destabilize children. In particular, children who are raised by abusers are susceptible to neglectful and inconsistent parenting, and are at risk for physical and emotional abuse. Therefore, significant and unsupervised placement with the abuser will likely not be "meaningful" in the sense provisioned in the statute and will likely not meet the child's need for "predictability and stability."

---

<sup>105</sup> Wis. Stat. § 767.41(5)(am)6.

<sup>106</sup> Wis. Stat. § 767.41(5)(am)7.

<sup>107</sup> Wis. Stat. § 767.41(5)(am)8.

Additionally, Wis. Stat. § 767.41(5)(bm) requires that any priority for significant amounts of placement that is implied by this factor must yield to supporting the safety and well-being of the child and victim.

- e. **Cooperation, Communication, and Supporting the Other Party's Relationship with the Child:** The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party, and whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.<sup>108</sup>

As discussed in section II.B.6., "Parenting in the Context of Domestic Abuse," and in section II.C.1.a., "Presumption Against Joint and Sole Custody to the Abuser," coercive and controlling behavior is incompatible with supporting a healthy relationship between the non-abusive parent and the child. Frequently, abusers who use coercive and controlling behavior will claim, in the context of a child custody and placement dispute, that the protective parent is not amenable to a strong relationship between the abusive parent and the child and that the protective parent is unreasonably interfering with the child's continuing relationship with the abuser. Thus, the guardian ad litem may focus on the best interest factors that relate to cooperation and communication between the parties and support for the other party's relationship with the child.

A guardian ad litem who has identified domestic abuse and considered the nature and context of the abuse is able to accurately counter the claims of the abuser and put these factors into the correct legal and factual context. The guardian ad litem can describe to the court the implications of the coercive and controlling abuse: that the abusive parent's behavior makes the mutually respectful and cooperative parenting impossible. The protective parent's desire for safety is not only reasonable in the context of the abuser's conduct, but also justified by Wis. Stat. § 767.41(5)(bm), which makes safety and well-being the paramount objective of custody and placement decisions.

---

<sup>108</sup> Wis. Stat. § 767.41(5)(am)10. and 11.

Therefore, these factors should not be used as a basis to argue that the victim should cooperate with the abuser or that the goal of the custody and placement arrangement should be to force this type of cooperation. The abuser is ultimately responsible for the inability of the parents to cooperate, communicate, and have a mutually supporting relationship. In addition, Wis. Stat. § 767.41(5)(bm) holds that concern for cooperative and mutual support between the parties cannot override the need to protect the safety and well-being of the child and victim.

- f. **Child Abuse:** Whether there is evidence that a party engaged in abuse, as defined in Wis. Stat. § 813.122(1)(a), of the child, as defined in Wis. Stat. § 813.122(1)(b).<sup>109</sup>

In addition to being a basis for sole custody, child abuse is a separate factor for determining the best interest of the child. [See section II.C.1.c.2., “Presumption Against Joint Custody When There is Evidence of Child Abuse.”] As discussed earlier, child abuse and domestic abuse tend to co-occur, which is another reason why it is so important to conduct a thorough investigation and analysis into any allegations of abuse and apply this factor.

- g. **Domestic Abuse:** Whether there is evidence of interspousal battery, as described under Wis. Stat. § 940.19 or 940.20(1m), or domestic abuse, as defined in Wis. Stat. § 813.12(1)(am).<sup>110</sup>

Like child abuse, evidence of domestic abuse is a separate factor for determining the best interest of the child, in addition to being a basis for presumptions related to legal custody. This factor provides a guardian ad litem who has learned about domestic abuse and who has investigated the nature and context of that abuse another opportunity to remind the court of the implications of abuse. Bear in mind that the safety and well-being of the child and victim are the paramount concerns in determining legal custody and placement.<sup>111</sup> What this means in practice is that the guardian ad litem’s understanding of the physical and psychological abuse should guide decision making about both legal custody and physical placement. In that respect, domestic abuse is not merely one of many of the best interest factors to be considered. The implications of abuse override other considerations.

---

<sup>109</sup> Wis. Stat. § 767.41(5)(am)12.

<sup>110</sup> Wis. Stat. § 767.41(5)(am)13.

<sup>111</sup> Wis. Stat. § 767.41(5)(bm)



- h. **Alcohol and Drugs:** Whether either party has or had a significant problem with alcohol or drug abuse.<sup>112</sup>

Consult section I.C.2., “Not About Anger, or Caused by Stress, Alcohol, or Drugs,” for information that may be relevant to the implications of drug and alcohol use in domestic abuse cases. Also note that a male abuser’s heavy consumption of alcohol and use of illegal drugs is associated with a higher risk of murder of abused women. [See “*Practice Point - Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors*” for more information about lethality factors.]<sup>113</sup>

- i. **Reports:** The reports of appropriate professionals if admitted into evidence.<sup>114</sup>

Psychological reports are often misinterpreted and misapplied in domestic abuse cases in ways that tend to harm victims and children. [See “*Practice Point - Using the Results of Psychological Testing*” for important information.]

- j. **Other:** Such other factors as the court may in each individual case determine to be relevant.<sup>115</sup>

Wisconsin Stat. Wis. Stat. § 767.41(5)(am)16. allows the court to consider any factors in an individual case it determines to be relevant when deciding custody and placement issues. Guardians ad litem should consider using this as an opportunity to highlight to the court any of the lethality factors discussed in “*Practice Point - Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors.*” In domestic abuse cases, where the safety of the child and victim is the paramount concern, the presence of one or more lethality factors is acutely relevant.

---

<sup>112</sup> Wis. Stat. § 767.41(5)(am)14.

<sup>113</sup> Campbell, J. C., Webster, D. W., & Glass, N. (2009). The Danger Assessment Validation of A Lethality Risk Assessment Instrument for Intimate Partner Femicide. *Journal of Interpersonal Violence*, 24(4), 653-674. Also see: <http://www.dangerassessment.org>

<sup>114</sup> Wis. Stat. § 767.41(5)(am)15.

<sup>115</sup> Wis. Stat. § 767.41(5)(am)16.

## Practice Point

### Using the Results of Psychological Testing

Psychological testing is widely used in custody determinations. Guardians ad litem may be asked to account for the results of this kind of testing in their recommendations. However, there is little evidence validating the ability of any psychological test to contribute to a better custody recommendation.<sup>116</sup> Even though there is no reliably established association between traditional psychological testing and parenting styles or competencies, a large proportion of custody evaluators refer to the results of these tests as indicative of parenting ability.

The use of psychological tests becomes more of a concern when a history of domestic abuse is present. There is often an absence of serious psychopathology in most domestic abusers. The post-traumatic effects of domestic abuse on victims lead them to have higher rates of symptoms associated with a large range of mental health problems than non-abused women. This can lead to incorrect diagnosis by evaluators not familiar with domestic abuse trauma in ways that benefit abusers and harm victims and children.

One of the commonly used psychological tests, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), has a documented tendency to produce distorted results for abused women. The MMPI-2 will tend to produce elevated scores if a female test subject believes someone is following her, has trouble sleeping, has frequent worry, or believes another person is responsible for most of her troubles.<sup>117</sup> Therefore, if an abused woman answers the MMPI-2 questions correctly based on her experiences of abuse, the MMPI-2 may cast her as mentally unwell or socially maladjusted.

<sup>116</sup> Emery, R. E., Otto, R. K., & O'Donohue, W. T. (2005). A Critical Assessment of Child Custody Evaluations Limited Science and a Flawed System. *Psychological Science in the Public Interest*, 6(1), 1-29.

<sup>117</sup> Pope, K. S., Butcher, J. N., & Seelen, J. (2006). *The MMPI, MMPI-2, & MMPI-A In Court: A Practical Guide for Expert Witnesses and Attorneys* (3rd.) American Psychological Association.

## Practice Point (cont.)

Research has confirmed the skewed effect that victimization has on MMPI-2 and similar test results. Abused women's MMPI-2 scores are similar to those who are seen as maladjusted, guarded, alienated, and emotionally upset.<sup>118</sup> Abused women are more likely to score low on ego strength and high on desire to escape personal responsibility for their own lives. Additionally, they tend to have elevated scores for anger, confusion, paranoia, and fearfulness.<sup>119</sup> Normative test results for abused women are sometimes used as evidence that she is not credible and that the domestic abuse allegations are likely to be false. A number of additional problems exist with psychological tests (MMPI-2 & MCMI); they are not normed for custody litigants, who typically have several elevated scales including hysteria, paranoia, psychopathic deviance, self-favorability, and over-controlled hostility.<sup>120</sup>

In layman's terms, MMPI-2 results for abused women that indicate the conditions listed above are likely to be detecting the effects of being victimized and not an underlying pathology. Therefore, these types of results are actually consistent with victimization, rather than a reason to discredit the test subject.

### Misuse of MMPI-2 Leads to Severe Violence: A Case Example

A Wisconsin domestic violence abuse victim and her ex-husband were involved in a contested child custody case. The court ordered psychological evaluations of the parties as recommended by the guardian ad litem. The psychologist who evaluated the victim administered the MMPI-2. The victim's test results showed elevated scores for paranoia, which is not uncommon for victims of severe abuse. However, the psychologist administering the test did not properly put these results in the context of the victimization and instead used the results, in part, to conclude that the victim was fabricating or exaggerating the abuse claims. The psychologist further used this conclusion as a reason to recommend that the victim be denied joint legal custody and primary placement. The guardian ad litem agreed with this recommendation. The ex-husband used the evaluation to bolster his claim that the victim was "crazy" and "psycho" to family, friends, and community members. Over the course of the next year, the ex-husband's abusive behavior and stalking escalated. Among other things, he broke into the victim's apartment, strangled her, and assaulted her. He was eventually criminally convicted of several felonies and sentenced to a long prison term. In this case, the misuse of the MMPI-2 contributed to enabling the batterer to continue his behavior and severely increased the victim's vulnerability.

<sup>118</sup> Khan, F. I., Welch, T. L., & Zillmer, E. A. (1993). MMPI-2 Profiles of Battered Women in Transition. *Journal of Personality Assessment*, 60(1), 100-111.

<sup>119</sup> Rosewater, L. B. (1987). A Critical Analysis of the Proposed Self-Defeating Personality Disorder. *Journal of Personality Disorders*, 1(2), 190-195.

<sup>120</sup> Bathurst, K., Gottfried, A. W., & Gottfried, A. E. (1997). Normative Data for the MMPI-2 In Child Custody Litigation. *Psychological Assessment*, 9(3), 205.

## Practice Point (cont.)

To make matters worse, there are no psychological tests for determining whether an individual is a domestic abuser. Nevertheless, even though psychological tests are poor predictors of parenting capacity, they are commonly given inappropriate weight by custody evaluators.

Tests that more appropriately evaluate post-traumatic conditions or the likelihood for repeated or lethal violence by an abuser are seldom used. Examples of such tests and inventories include:

- Danger Assessment, 2001 [See *Practice Point - Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors.*]<sup>121</sup>
- *Ontario Domestic Assault Risk Assessment (ODARA)*<sup>122</sup>
- Post-traumatic Stress Diagnostic Scale (PSD)<sup>123</sup>
- Brief Symptom Inventory (BSI)<sup>124</sup>
- Spousal Assault Risk Assessment (SARA)<sup>125</sup>
- Domestic Violence Screening Instrument -Revised (DVSI-R)<sup>126</sup>
- Conflict Tactics Scale<sup>127</sup>

It is critical to use evaluators who know how to screen for domestic abuse, know about post-separation violence, and have experience using domestic abuse specific questionnaires, instruments, and tests.

<sup>121</sup> Campbell, J. C., Webster, D. W., & Glass, N. (2009). The Danger Assessment Validation of A Lethality Risk Assessment Instrument for Intimate Partner Femicide. *Journal of Interpersonal Violence, 24*(4), 653-674. Also see: <http://www.dangerassessment.org>

<sup>122</sup> Hilton, N.Z., Harris, G.T., Rice, M.E., Lang, C., Cormier, C.A., & Lines, K.J. (2004). A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment. *Psychological Assessment, 16*, 267-275

<sup>123</sup> Foa, E. (1996). *Posttraumatic Diagnostic Scale Manual*. Minneapolis, MN: National Computer Systems.

<sup>124</sup> Derogatis, L.R. (1993). *BSI Brief Symptom Inventory: Administration, Scoring, and Procedure Manual* (4th ed.). Minneapolis, MN: National Computer Systems.

<sup>125</sup> Kropp, P.R., Hart, S.D., Webster, C.D., & Eaves, D. (1999). *Manual for the Spousal Assault Risk Assessment Guide* (3rd ed.). Toronto, Canada: Multi-Health Systems.

<sup>126</sup> Williams, K. R. (2012). Family Violence Risk Assessment: A Predictive Cross-Validation Study of the Domestic Violence Screening Instrument-Revised. *Law and Human Behavior, 36*, 120-129.

<sup>127</sup> Straus, M. A. (1979). Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales. *Journal of Marriage and the Family, 75*-88.

## D. STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR THE DOMESTIC ABUSE

Once all of the information about domestic abuse has been collected and analyzed, the final step for guardians ad litem is to make informed recommendations to the court. These recommendations should account for the nature, context, and implications of the abuse. Making informed recommendations that account for the abuse will better guarantee that the best interest of the child is met and that the long-term safety of the child and non-abusive parent are appropriately prioritized.

### 1. Statutory Requirement to Investigate Domestic Abuse

Under Wisconsin statute, guardians ad litem must screen for domestic abuse in all cases. Wisconsin Statute § 767.407(4) requires guardians ad litem to investigate whether there is evidence that either parent has engaged in interspousal battery or domestic abuse and to report the results of the investigation to the court. As discussed in section I.A., a thorough investigation requires the guardian ad litem to take a number of steps, including interviewing the parties as well as reviewing all relevant records. Evaluations that are based solely on interviewing and observing the parties and their children are significantly less reliable.

“ Wisconsin Statute § 767.407(4) requires guardians ad litem to investigate whether there is evidence that either parent has engaged in interspousal battery or domestic abuse and to report the results of the investigation to the court.

### 2. Statutory Requirement to Report Investigative Findings to the Court

Once a guardian ad litem has investigated whether there is evidence that either parent has engaged in interspousal battery or domestic abuse, Wis. Stat. § 767.407(4) requires the guardian ad litem to report the results of the investigation to the court. This reporting is significant for three reasons.

First, Wis. Stat. § 767.41(5)(bm) directs that if the court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incidence of

interspousal battery or domestic abuse, “the safety and well-being of the child and the safety of the parent who was the victim of the battery shall be the paramount concerns in determining legal custody and periods of physical placement.” Second, Wis. Stat. § 767.41(2)(d)1. directs that if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. Third, the existence of evidence of domestic abuse is, in and of itself, a basis for awarding sole legal custody.

### **3. Request the Court to Make a Finding of Domestic Abuse**

After conducting an investigation, if the guardian ad litem determines that domestic abuse exists, request that the court make a finding of domestic abuse under Wis. Stat. § 767.41(2)(d)1. and (5)(bm). This finding better allows the court to consider domestic abuse in determining the best interest of the child in custody and placement decisions. It also makes it more likely that the court will make orders that account for the safety of the child and non-abusive parent. [See Appendix: Step Three - A Judicial Guide to Domestic Abuse Issues titled “Family Law: Legal Custody and Physical Placement Orders When Domestic Abuse is Alleged,” for more information on this topic.]

### **4. Making Recommendations for Custody and Placement**

Through the course of the investigation, if a guardian ad litem discovers that the family is experiencing domestic abuse, the guardian ad litem must consider, within the parameters of the provisions discussed in section II.C.1., “Statutory Presumptions and Paramount Considerations,” how the custody and placement recommendations will be tailored to protect the safety of the child and victim and reflect the best interest of the child.

#### **a. Categories to Account for Domestic Abuse**

To maximize safety for the non-abusive parent and the child, guardians ad litem must consider how his or her recommendations account for the domestic abuse in each of

these categories:

- Custody
- Placement
- Supervised or monitored placement
- Transfer of placement
- Communication between the parents
  - » Communication via online resources
  - » Communication via the child
  - » Communication about the other parent
  - » Communication regarding the child's annual calendar
- Child's welfare
  - » Provisions to promote the child's welfare
  - » Discipline of the child
- Home environment
- Internet / social media / other technology
- Parental provisions
  - » Child support
  - » Education and treatment
  - » Weapons restrictions
- Other conditions for the safety and well-being of the child and non-abusive parent

---

**For a full list of specific recommendations that can be drafted under each section, see Appendix: Step Four - Potential Recommendations for Custody and Placement in Family Cases that Involve Domestic Abuse**

---

**b. Consider What Conditions the Court Can Order Under Wisconsin Law**

Wisconsin Stat. § 767.41(6)(g)1.-8. specifically directs courts to impose one or more conditions in its custody and placement order to ensure the parent and child's safety.<sup>128</sup> Consider the ability of the court to impose the following safety measures when drafting recommendations:

---

<sup>128</sup> Wis. Stat. § 767.41(6)(g)1.-8.

- Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate third party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility
- Requiring the child's periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate third party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility
- Requiring the party who committed the battery or abuse to pay the costs of supervised physical placement
- Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as a condition of exercising his or her periods of physical placement
- If the party who committed the battery or abuse has a significant problem with alcohol or drug abuse, prohibiting that party from being under the influence of alcohol or any controlled substance when the parties exchange the child for periods of physical placement and from possessing or consuming alcohol or any controlled substance during his or her periods of physical placement
- Prohibiting the party who committed the battery or abuse from having overnight physical placement with the child
- Requiring the party who committed the battery or abuse to post a bond for the return and safety of the child



- Imposing any condition not specified above that the court determines is necessary for the safety and well-being of the child or the safety of the party who was the victim of the battery or abuse

## Practice Point

### Anger Management vs. Certified Batterer Treatment

When giving an account of an episode of domestic abuse, many abusers (and victims alike) identify an escalation of conflict and anger that ultimately ends in some type of physical, sexual, and psychological violence. However, anger management interventions are not appropriate for attempting to help an abuser end violence. Moreover, to meet legal requirements, perpetrators must complete a certified batterers intervention program (BIP).<sup>129</sup>

In general, it is true that many men who batter have been found to have problems with anger.<sup>130</sup> Thus, it may seem intuitive and appealing to think of domestic abuse as anger driven, and that anger management treatments would be an appropriate intervention to end domestic abuse. However, the role of anger in domestic abuse is not clearly known at this time. For example, while research does show that perpetrators exhibit a range of anger-related problems, this finding is not universal. Hastings and Hamberger (1988) found that nonviolent men did not differ from alcoholic batterers and actually showed higher anger proneness than nonalcoholic batterers.<sup>131</sup> Further, Hamberger, Lohr, Bonge, and Tolin (1996) reported that abusive men who showed signs of depressive and anti-social personality disorder showed high levels of anger proneness, but batterers with no psychopathology (which is the largest

<sup>129</sup> See Wis. Stat. § 767.41(2)(d)1.a.

<sup>130</sup> Birkley, E.L. & Eckhardt, C.I. (2015). Anger, Hostility, Internalizing Negative Emotions, and Intimate Partner Violence Perpetration: A Meta-Analytic Review. *Clinical Psychology Review*, 37, 40-56.

<sup>131</sup> Hastings, J.E., & Hamberger, L.K. (1988). Personality Characteristics of Spouse Abusers: a Controlled Comparison. *Violence and Victims*, 3, 31-48.

## Practice Point (cont.)

subgroup of male batterers) showed low levels of anger proneness.<sup>132</sup> Thus, there is no empirical basis for focusing on anger issues as the primary treatment to end domestic abuse. And, in fact, given that the largest subgroup of male batterers do not show evidence of an anger problem, targeting anger for treatment with such a treatment population would simply be inappropriate.

As noted above, many abusive men report the experience of anger and other strong negative feelings as part of the escalation process. Therefore, attention to strong negative feelings and a negative or aversive arousal is an important component of batterer intervention programming. As such, many BIPs include anger and more general arousal management skills training as elements of a comprehensive intervention to end domestic abuse.<sup>133</sup> Most anger management approaches are skills-training based and place responsibility for change and for managing the anger on the client. However, anger management approaches fall short of an appropriate intervention for domestic abuse for several reasons. The first reason, noted earlier, is that large numbers of abusive men report no clinical problem with anger and anger proneness. Second, also noted, is that while many abusive men do show evidence of anger problems, the role of anger in domestic abuse is not fully known and is not the same for all abusive men. Clinical experience suggests some abusive men may actually experience a build-up of tension and anger that becomes sufficiently aversive that they explode with abusive behavior. For such men, skills training to manage arousal and escalation might be appropriate to include as part of an overall treatment to end domestic abuse. However, other men use anger as a tool of abuse, coercion, and control. That is, they use angry outbursts to intimidate their victim and enforce coercion and control. Anger management techniques would not be effective in such cases because the anger is used instrumentally to accomplish the objective of coercion and control. A third reason anger management intervention is not appropriate for BIP programming is that it focuses only on the client's anger to the exclusion of the key dynamics of domestic abuse - coercion and control, victimization and trauma, shame, and negative emotions, including hurt, anxiety, insecurity, and so on. As emphasized

<sup>132</sup> Hamberger, L.K., Lohr, J.M., Bonge, D., & Tolin, D.F. (1996). A Large Sample Empirical Typology of Male Spouse Abusers and its Relationship to Dimensions of Abuse. *Violence and Victims, 11*, 277-292.

<sup>133</sup> Price, B., & Rosenbaum, A. (2009). Batterer Intervention Programs: A Report from the Field. *Violence and Victims, 29*, 757-770.

## Practice Point (cont.)

throughout this guidebook, domestic abuse is a complex, multi-faceted problem. Intervention must also be multi-faceted. A narrow focus on anger is inadequate and is to be discouraged. For this reason, certified batterers treatment programming is recommended.

Programmatically, according to Gondolf and Russell (1986), anger management is less threatening to the community and easier to accept than changing established sexist social conditions that give rise to domestic abuse.<sup>134</sup> Further, anger management does not address the economic, social, political injustices, and patriarchal structure that perpetuates domestic abuse and violence toward women. While these factors have not been empirically connected to improved treatment outcome, most BIP's typically focus aspects of their treatment on these areas as targets for moral development and attitude change related to masculinity and relationship equality. Finally, in contrast to anger management treatment, many BIP's are beginning to require victim contacts. These contacts are designed to provide the victim with referrals, safety planning, and information to help. Conversely, anger management approaches focus on the individual client and do not consider broader community level dynamics or victim safety as necessary intervention components.

Organizationally, BIP's are typically connected to a larger effort to eliminate domestic abuse through organizations called Coordinated Community Responses (CCR's). Citizens receive the message that abusive behavior is against the law, regardless of the relationship between the assailant and the victim. CCR's coordinate victim advocacy services, law enforcement, criminal justice system, and abuser treatment. The goal of such coordination is to shift responsibility for imposing legal sanctions from the victim to the community while holding the abuser accountable for his or her violence. BIPs are an essential component in this larger community effort. No such systematic or organized coordination is typically utilized by anger management treatment.

<sup>134</sup> Gondolf, E. & Russell, D. (1986). The Case against Anger Control Treatment for Batterers. *Response* 9(2), 2-5.

## Practice Point (cont.)

In Wisconsin, Certified Batterer Treatment refers to certification through the Wisconsin Batterer Treatment Provider Association (WBTPA), which is a project of End Domestic Abuse Wisconsin (formerly the Wisconsin Coalition Against Domestic Violence). This certification was developed as a mechanism for administering and monitoring compliance to the Wisconsin Male Batterer Treatment Standards, developed by a subcommittee of the Governor's Council on Domestic Violence, which emphasize safety for victims (including both partners and children), standardized treatment program content, and trained practitioners. To be certified to conduct batterers treatment programming requires both a minimum number of hours of training in the dynamics of domestic abuse, supervised experience in treating abusive men, active collaboration with the broader community of domestic abuse interventions (e.g., local advocacy program, local coordinated community response to domestic abuse), and ongoing, continuing education on domestic abuse dynamics, the latest evidence-based treatments and interventions for domestic abuse, and so on. The WBTPA is the only statewide organization that provides this certification.

Thus, certification through the WBTPA in BIP work provides confidence that treatment program personnel and the intervention program itself have been reviewed by a committee of peers and has been deemed to possess the necessary components and training background to adequately address the complexities of domestic abuse as exhibited by domestic abuse perpetrators.

### c. All Recommendations Must Be Specific

In drafting custody and placement recommendations, especially in cases where domestic abuse is present, it is important to be as specific as possible. Recommendations should provide for structure, limits, and predictability. Recommendations should provide specific times and processes in each category (e.g., how long, how often,

**“ In drafting custody and placement recommendations, especially in cases where domestic abuse is present, it is important to be as specific as possible. Recommendations should provide for structure, limits, and predictability.**

timelines for responses, consequences for failure to comply such as calling law enforcement or asking the court to schedule an emergency hearing, etc.). Making the recommendations specific and clear can help reduce the degree of coercive control the abuser can exercise over the victim once the family case is over.

**d. Presenting the Recommendations to the Court**

Guardians ad litem must be prepared to present to the court information, testimony, and evidence to promote and support their beliefs as to what is in the best interests of the child. However, despite the requirement that the guardian ad litem communicate the child's best interests and wishes to the court (unless the child otherwise requests), the statute does not indicate the procedure for doing so.<sup>135</sup> Possible options for presenting this information include the following:

- Through the testimony of the family court counselor or other witnesses
- Submitting information by written report
- Bringing the child to the judge's chambers

**e. Drafting Custody and Placement Recommendations**

The categories below represent four common domestic abuse scenarios. These scenarios contain a list of suggested recommendations based on the degree of domestic abuse in the relationship.

---

**For a full list of specific recommendations that can be drafted under each section, see Appendix: Step Four - Potential Recommendations for Custody and Placement in Family Cases that Involve Domestic Abuse**

---

In the context of family cases involving domestic abuse, the recommendation is not

---

<sup>135</sup> Wis. Stat. § 767.41(5)(am)2

a process to provide the abuser equal and unrestrained residential time with the children. The guardian ad litem's recommendations must consider the following issues to account for the safety and well-being of the child:

- Abuse of the victim, including interference with the victim's access to resources, decision-making authority, and freedom from unwanted intrusion
- The child's experience of the violence, including direct harm from the abuse, direct observation of the abuse, attempts at intervening into the abuse, and the effects of witnessing or experiencing the abuse
- The ability of the abusive parent to appropriately parent, including the ability to provide emotional support to the child, protect the child from emotional or physical harm, respond to the child's needs, and support the child's relationship with and support the parental authority of the non-abusive parent

**Scenario 1: Recommendations when GAL asks the court to make a finding of domestic abuse and the court does so. (See Wis. Stat. s 767.41(2)(d)1.)**

**For a fact pattern of Scenario 1, see Appendix Step 4: Long Scenarios, Scenario 1**

**I. Custody**

- a. Sole custody to the non-abusive parent.
- b. If not sole custody to the non-abusive parent, the abusive parent is allowed to consult on decision making for select issues. The non-abusive parent has the final say (impasse authority).

**II. Placement**

Primary placement to the non-abusive parent.

**III. Supervised / Monitored Placement**

Supervised visitation or monitored visitation.

**IV. Transfer of Placement**

- a. Placement transfers need to occur in a safe, public place, preferably with a camera.
- b. During the transfer, parents are to be instructed as to physical proximity to each other and precisely how the child is to be transferred (e.g., child is brought to the door; dropped off at the curb; handed off to third party; etc.).
- c. Specify when the receiving parent may contact law enforcement for assistance with the order (e.g., 15 minutes after being late without notice).
- d. Consider whether the transfers need to be recorded.

**V. Communication Between the Parents**

- a. *Communication via Online Resources:* Specify which online communication resource and features will be used by the parents. Specify that no other form of communication is allowed except for an emergency. All emergencies shall be noted in the online communication tool.

- b. *Communication via the Child:* Parents may not use the child to deliver verbal or written communication to the other parent. Parents will receive communication about the child via a notebook carried in the child's backpack.
- c. *Communication About the Other Parent:* Parents shall refrain from having arguments in the child's presence. Neither party shall discuss court issues. Neither party may derogate nor allow a third party to derogate the other parent.
- d. *Communication Regarding the Child's Annual Calendar:* The order must include specific arrangements for events such as vacations, holidays, family events, and child care when school is not in session.

**VI. Child's Welfare**

- a. *Provisions to Promote Child's Welfare:* Consider recommending that the abusive parent post bond to ensure the child's safe return. Order shall be specific as to how the abusive parent communicates with the child and what additional resources, such as therapy, may be needed.
- b. *Discipline of Child:* Specify methods for discipline and timeouts. Neither parent shall spank or hit the child.

**VII. Home Environment**

- a. Specify issues related to meal time, bed time, and sleeping arrangements, and prohibit parent or child from viewing pornography.
- b. Specify when the non-abusive parent is allowed contact with the child during placement time with the other parent.
- c. Specify whether the abusive parent is allowed overnight placement and which (if any) third parties may be present.

**VIII. Internet / Social Media / Other Technology**

- a. Specify how parents will monitor and/or restrict the use of Internet and electronic communication devices.

**IX. Parental Provisions**

- a. *Child Support:* Parents shall communicate via the assigned online communication tool if they make a request to change child support. Parents shall be informed that child support is established by court



guidelines and not by either parent.

- b. *Education and Treatment*: Specify if any treatment is required for either parent such as batterer's treatment, parenting classes, trauma-informed classes, and substance abuse and other AODA evaluation and treatment.
- c. *Weapons Restrictions*: Specify if there are existing state or federal firearms or weapons restrictions or whether such restrictions are warranted.

X. **Other Conditions**

- a. Impose any additional condition not specified above that the court determines is necessary for the safety and well-being of the child or the non-abusive parent.

**Scenario 2: Recommendations when the court makes a finding of domestic abuse and the abusive parent rebuts the domestic abuse presumption (See Wis. Stat. § 767.41(2)(d)1.a. and b.)**

**For a fact pattern of Scenario 2, see Appendix Step 4: Long Scenarios, Scenario 2**

**Note:** In this scenario, the guardian ad litem should consider whether the abusive parent has adequately met the requirements to rebut the presumption against sole or joint custody to the abuser. Even if the abusive parent meets the requirements, the guardian ad litem may wish to argue that parties cannot engage in future decision making under Wis. Stat. § 767.41(2)(b)2.b. or c. If the latter standard does not apply, move on to making the following recommendations:

**I. Custody**

- a. Joint custody.
- b. Specific decisions made only by the non-abusive parent.

**II. Placement**

Primary placement to the non-abusive parent.

**III. Supervised / Monitored Placement**

- a. Supervised visitation or monitored visitation.
- b. Graduated safety provisions dependent on risk factors.

**IV. Transfer of Placement**

- a. Placement transfers need to occur in a safe, public place, preferably with a camera.
- b. During the transfer, parents are to be instructed as to physical proximity to each other and precisely how the child is to be transferred (e.g., child is brought to the door; dropped off at the curb; handed off to third party; etc.).
- c. Specify when the receiving parent may contact law enforcement for assistance with the order (e.g., 15 minutes after being late without notice).
- d. Consider whether the transfers need to be recorded.

V. **Communication Between the Parents**

- a. *Communication via Online Resources:* Specify which online communication resource and features will be used by the parents. Specify that no other form of communication is allowed except for an emergency. All emergencies shall be noted in the online communication tool.
- b. *Communication via the Child:* Parents may not use the child to deliver verbal or written communication to the other parent. Parents will receive communication about the child via a notebook carried in the child's backpack.
- c. *Communication About the Other Parent:* Parents shall refrain from having arguments in the child's presence. Neither party shall discuss court issues. Neither party may derogate nor allow a third party to derogate the other parent.
- d. *Communication Regarding the Child's Annual Calendar:* The order must include specific arrangements for events such as vacations, holidays, family events, and child care when school is not in session.

VI. **Child's Welfare**

- a. *Provisions to Promote Child's Welfare:* Consider recommending that the abusive parent post bond to ensure the child's safe return. Order shall be specific as to how the abusive parent communicates with the child and what additional resources, such as therapy, may be needed.
- b. *Discipline of Child:* Specify methods for discipline and timeouts. Neither parent shall spank or hit the child.

VII. **Home Environment**

- a. Specify issues related to meal time, bed time, and sleeping arrangements, and prohibit parent or child from viewing pornography.
- b. Specify when the non-abusive parent is allowed contact with the child during placement time with the other parent.
- c. Specify whether the abusive parent is allowed overnight placement and which (if any) third parties may be present.

**VIII. Internet / Social Media / Other Technology**

Specify how parents will monitor and/or restrict the use of Internet and electronic communication devices.

**IX. Parental Provisions**

- a. *Child Support*: Parents shall communicate via the assigned online communication tool if they make a request to change child support. Parents shall be informed that child support is established by court guidelines and not by either parent.
- b. *Education and Treatment*: Specify if any treatment is required for either parent such as batterer's treatment, parenting classes, trauma-informed classes, and substance abuse and other AODA evaluation and treatment.
- c. *Weapons Restrictions*: Specify if there are existing state or federal firearms or weapons restrictions or whether such restrictions are warranted.

**X. Other Conditions**

- a. Impose any additional condition not specified above that the court determines is necessary for the safety and well-being of the child or the non-abusive parent.

## Scenario 3: Recommendations when there is no finding of domestic abuse, but there is evidence of coercive control.

For a fact pattern of Scenario 3, see Appendix Step 4: Long Scenarios, Scenario 3

**Note:** In this scenario, the court has not made a finding that a party engaged in a pattern or serious incidence of interspousal battery or domestic abuse. However, based on evidence of domestic abuse or child abuse, the guardian ad litem may wish to argue that parties cannot engage in future decision making under Wis. Stat. § 767.41(2)(b)2.b. or c.

### I. Custody

- a. If the parent cannot engage in future decision making under Wis. Stat. § 767.41(2)(b)2.b. or c., recommend sole custody to the non-abusive parent or joint custody with specified decisions made only by the non-abusive parent.
- b. Joint custody with specific decisions made by non-abusive parent.

### II. Placement

Primary placement to the non-abusive parent.

### III. Supervised / Monitored Placement

- a. Supervised visitation or monitored visitation.
- b. Graduated safety provisions dependent on risk factors.

### IV. Transfer of Placement

- a. Placement transfers need to occur in a safe, public place, preferably with a camera.
- b. During the transfer, parents are to be instructed as to physical proximity to each other and precisely how the child is to be transferred (e.g., child is brought to the door; dropped off at the curb; handed off to third party; etc.).
- c. Specify when the receiving parent may contact law enforcement for assistance with the order (e.g., 15 minutes after being late without notice).
- d. Consider whether the transfers need to be recorded.

**V. Communication Between the Parents**

- a. *Communication via Online Resources:* Specify which online communication resource and features will be used by the parents. Specify that no other form of communication is allowed except for an emergency. All emergencies shall be noted in the online communication tool.
- b. *Communication via the Child:* Parents may not use the child to deliver verbal or written communication to the other parent. Parents will receive communication about the child via a notebook carried in the child's backpack.
- c. *Communication About the Other Parent:* Parents shall refrain from having arguments in the child's presence. Neither party shall discuss court issues. Neither party may derogate nor allow a third party to derogate the other parent.
- d. *Communication Regarding the Child's Annual Calendar:* The order must include specific arrangements for events such as vacations, holidays, family events, and child care when school is not in session.

**VI. Child's Welfare**

- a. *Provisions to Promote Child's Welfare:* Consider recommending that the abusive parent post bond to ensure the child's safe return. Order shall be specific as to how the abusive parent communicates with the child and what additional resources, such as therapy, may be needed.
- b. *Discipline of Child:* Specify methods for discipline and timeouts. Neither parent shall spank or hit the child.

**VII. Home Environment**

- a. Specify issues related to meal time, bed time, and sleeping arrangements, and prohibit parent or child from viewing pornography.
- b. Specify when the non-abusive parent is allowed contact with the child during placement time with the other parent.
- c. Specify whether the abusive parent is allowed overnight placement and which (if any) third parties may be present.

**VIII. Internet / Social Media / Other Technology**

Specify how parents will monitor and/or restrict the use of Internet and electronic communication devices.

**IX. Parental Provisions**

- a. *Child Support*: Parents shall communicate via the assigned online communication tool if they make a request to change child support. Parents shall be informed that child support is established by court guidelines and not by either parent.
- b. *Education and Treatment*: Specify if any treatment is required for either parent such as batterer's treatment, parenting classes, trauma-informed classes, and substance abuse and other AODA evaluation and treatment.
- c. *Weapons Restrictions*: Specify if there are existing state or federal firearms or weapons restrictions or whether such restrictions are warranted.

**X. Other Conditions**

- a. Impose any additional condition not specified above that the court determines is necessary for the safety and well-being of the child or the non-abusive parent.

**Scenario 4: Recommendations when there is evidence of a high likelihood of lethality. [See *Practice Point - Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors.*]**

For a fact pattern of Scenario 4, see Appendix Step 4: Long Scenarios, Scenario 4

**Note:** In this scenario, the guardian ad litem should advocate the court to make a finding of domestic abuse under Wis. Stats. § 767.41(5)(bm) and 767.41(2)(d)1. If the court makes the finding, the guardian ad litem should recommend the following in terms of custody, placement, and supervised/monitored placement. Even if the court doesn't make the finding, the guardian ad litem should still make these same recommendations and enter evidence of the lethality into the record.

- I. **Custody**  
Sole custody.
- II. **Placement**  
Primary placement to the non-abusive parent.
- III. **Supervised / Monitored Placement**  
No visitation or highly monitored visitation.
- IV. **Transfer of Placement**
  - a. Placement transfers need to occur in a safe, public place, preferably with a camera.
  - b. During the transfer, parents are to be instructed as to physical proximity to each other and precisely how the child is to be transferred (e.g., child is brought to the door; dropped off at the curb; handed off to third party; etc.).
  - c. Specify when the receiving parent may contact law enforcement for assistance with the order (e.g., 15 minutes after being late).
  - d. Consider whether the transfers need to be recorded.
- V. **Communication Between the Parents**
  - a. *Communication via Online Resources:* Specify which online communication resource and features will be used by the parents.



Specify that no other form of communication is allowed except for an emergency. All emergencies shall be noted in the online communication tool.

- b. *Communication via the Child:* Parents may not use the child to deliver verbal or written communication to the other parent. Parents will receive communication about the child via a notebook carried in the child's backpack.
- c. *Communication About the Other Parent:* Parents shall refrain from having arguments in the child's presence. Neither party shall discuss court issues. Neither party may derogate nor allow a third party to derogate the other parent.
- d. *Communication Regarding the Child's Annual Calendar:* The order must include specific arrangements for events such as vacations, holidays, family events, and child care when school is not in session.

#### VI. Child's Welfare

- a. *Provisions to Promote Child's Welfare:* Consider recommending that the abusive parent post bond to ensure the child's safe return. Order shall be specific as to how the abusive parent communicates with the child and what additional resources, such as therapy, may be needed.
- b. *Discipline of Child:* Specify methods for discipline and timeouts. Neither parent shall spank or hit the child.

#### VII. Home Environment

- a. Specify issues related to meal time, bed time, and sleeping arrangements, and prohibit parent or child from viewing pornography.
- b. Specify when the non-abusive parent is allowed contact with the child during placement time with the other parent.
- c. Specify whether the abusive parent is allowed overnight placement and which (if any) third parties may be present.

#### VIII. Internet / Social Media / Other Technology

Specify how parents will monitor and/or restrict the use of Internet and electronic communication devices.

#### IX. Parental Provisions

- a. ***Child Support:*** Parents shall communicate via the assigned online communication tool if they make a request to change child support. Parents shall be informed that child support is established by court guidelines and not by either parent.
- b. ***Education and Treatment:*** Specify if any treatment is required for either parent such as batterer's treatment, parenting classes, trauma-informed classes, and substance abuse and other AODA evaluation and treatment.
- c. ***Weapons Restrictions:*** Specify if there are existing state or federal firearms or weapons restrictions or whether such restrictions are warranted.

**X. Other Conditions**

- a. Impose any additional condition not specified above that the court determines is necessary for the safety and well-being of the child or the non-abusive parent.

#### f. Making Culturally Competent Recommendations

Guardians ad litem interact with families from diverse ethnic and cultural backgrounds. It is important to not let preconceived notions or stereotypes dictate the investigation and recommendations made to the court. Every guardian ad litem owes it to the child, whose best interest they represent, to adequately educate themselves about the child's unique circumstances and lifestyle. While this may result in the guardian ad litem having to conduct more interviews and a longer investigation, it is necessary to properly determine what is in the best interests of the child.

In making a custody and placement recommendation that fulfills the best interests of the child, make sure to consider the child's need to develop and maintain a positive self-image and cultural heritage, and take into account the child's need to positively identify and interact with others from his or her cultural background. Further, while some cultural practices may seem to some to be marks of bad or indifferent parenting, the guardian ad litem must consider whether they are simply a different method of raising a child than the practices to which the guardian ad litem is accustomed. For example, at first glance it may seem like a parent who regularly leaves his or her child in the care of other relatives isn't interested in spending time with the child; however, a thorough investigation may reveal that it is important in that parent's culture that children form deep, meaningful relationships with other family members and that the parent's notion of immediate family differs from the traditional American notion of a nuclear family. A hastily done investigation which relies on stereotypes or misconceptions will produce recommendations that are not in the child's best interest. Guardians ad litem must familiarize themselves with the child's unique set of circumstances and culture in order to accurately determine what is in the child's best interest.

Cultural background is also critical to understanding the experiences of domestic abuse victims. This article describes population-specific approaches to working with domestic abuse survivors:

<http://vawnet.org/domestic-violence/population.php>.

## CONCLUSION: THANK YOU FROM A DOMESTIC ABUSE SURVIVOR

The job of a guardian ad litem can be as challenging as it is critical for the safety and well-being of children and abuse victims. At times, you may encounter pressures that make it harder to implement the practices discussed in this guidebook. You may feel that going the extra mile is a thankless task. For anyone who has worked on difficult issues in an imperfect system, these feelings are understandable. Despite the potential obstacles, following the guidebook will make a positive and immeasurable difference in the lives of children and victims.

In some cases, you might not hear a thank you or you will not know about the pain, abuse, heartache, and even deaths that you will have prevented by taking domestic abuse seriously. But, you do deserve thanks. What follows is a thank you from a Wisconsin domestic abuse survivor.

*Thank you for using this guidebook and working to appropriately identify and respond to domestic abuse as a guardian ad litem. About ten years ago, I was nearly killed by my ex-husband. He abducted me and left me for dead, bound me and trapped me in a storage locker, freezing for over 24 hours. The abduction occurred during a custody exchange between me and my ex-husband because we shared custody and placement of our two young daughters. As I was locked in the storage locker, I could hear the voices of my daughters outside with their father. I struggled to survive so that I would be there for them. I knew that they needed me. Thankfully, I was rescued, and my daughters are now healthy and happy.*

*When I went through my divorce, I tried to get the guardian ad litem and judge to understand my ex-husband's controlling and jealous behavior, his history of violence, and the continuing harm he was causing my family. I remember the guardian ad litem only interviewing my ex-husband once and the guardian ad litem coming*

*away from that meeting convinced the man who would later try to kill me was a great person and deserved more time with his children. There was plenty of information available that would have allowed the guardian ad litem to identify the seriousness of the domestic abuse that was committed against me. There were many warning signs that could have been used to predict what could happen to me and my children. But, that information was not investigated and taken seriously. As a result, my ex-husband was given the opportunity to continue the abuse and ultimately attempt to kill me. If I hadn't been ordered to have ongoing contact with him during exchange of our kids, I could have stayed away.*

*The work that you are doing as a guardian ad litem can help ensure that other victims of domestic abuse and their children are not put in the same position as my family. When you gather complete information, when you recognize controlling behavior and risks of lethality, when you make custody and placement recommendations that prioritize the safety of children and victims, you will be preventing continued abuse, and you will be giving children the best chance to be resilient and move past the abuse they experienced in their families. Thank you for taking on this life-changing and potentially life-saving work. Know that you can make all the difference for the children and families you encounter as a guardian ad litem.*

## ADDITIONAL RESOURCES

The following is a list of resources that guardians ad litem may find useful as they work with cases involving domestic abuse.

### **Battered Women’s Justice Project: Four Part Framework entitled “Practice Guides for Family Court Decision-Making in Domestic Abuse Related Child Custody Matters”**

This document provides guidance on how to identify, understand, and account for the nature, context, and implications of domestic abuse at every stage of the family court proceeding.

<http://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf>

### **Wisconsin State Bar GAL Handbook**

The Handbook provides guidance on the basics of being a guardian ad litem, as well as detailed help with complex issues.

<http://www.wisbar.org/>

### **End Domestic Abuse Wisconsin (WI Domestic Abuse Programs)**

End Domestic Abuse Wisconsin is the statewide membership organization representing domestic abuse victim service providers and survivors.

<http://www.wcadv.org/gethelp>

### **National Domestic Violence Hotline:**

1-800-799-SAFE (7233)

The National Domestic Violence Hotline is a 24-hour, national, toll-free telephone hotline that provides information and assistance to adult and youth victims of domestic and dating violence.

<http://www.ndvh.org/>

**The Power and Control Wheel:**

The Power and Control Wheel is a helpful tool in understanding the overall pattern of abusive and violent behaviors that are used by a batterer to establish and maintain control over a partner.

<http://www.theduluthmodel.org/training/wheels.html>

**Dangers of Presumptive Joint Physical Custody**

This article details the problems that arise for victims of domestic violence and their children from legal presumptions for joint physical custody, and strongly advocates against such legal presumptions.

[http://www.bwjp.org/files/bwjp/articles/Dangers of Presumptive Joint Physical Custody.pdf](http://www.bwjp.org/files/bwjp/articles/Dangers_of_Presumptive_Joint_Physical_Custody.pdf)

**A Judicial Guide to Child Safety in Custody Cases**

The Judicial Guide contains 14 bench cards that provide an easy-to-use checklist system for judges at critical decision-making points throughout the case, as well as a supplemental guide that provides additional information about in- and out-of-court behaviors, best interest of the child, and order issuance and enforcement.

<http://www.ncjfcj.org/resource-library/publications/judicial-guide-child-safety-custody-cases>

**Specialized Family Violence Information Packets from National Council on Juvenile and Family Court Judges (NCJFCJ)**

The NCJFCJ has developed five specialized family violence information packets on child protection and child custody issues in the context of domestic and family violence.

<http://www.ncjfcj.org/resource-library/publications/specialized-family-violence-information-packets>

# APPENDIX TABLE OF CONTENTS

<b>I.</b>	<b>Guardian ad Litem Responsibilities and the Four Part Framework .....</b>	<b>AP.2</b>
a.	Wisconsin Guardian ad Litem Statutory Responsibilities in Family Law Cases .....	AP.2
b.	Overview of the Four Part Framework .....	AP.3
<b>II.</b>	<b>Step One: Identify Domestic Abuse.....</b>	<b>AP.4</b>
a.	Guardian Ad Litem Screening Questions for Domestic Abuse .....	AP.4
b.	Guardian Ad Litem Interview Questions - Adult Parties .....	AP.6
c.	Guardian Ad Litem Interview Questions - Child Parties .....	AP.11
d.	Domestic Abuse Checklist .....	AP.14
<b>III.</b>	<b>Step Two: Define the Nature and Context of the Abuse..</b>	<b>AP.15</b>
a.	Parenting in the Context of Domestic Abuse .....	AP.15
<b>IV.</b>	<b>Step Three: Evaluate the Implications of Abuse.....</b>	<b>AP.16</b>
a.	A Judicial Guide to Domestic Abuse Issues - Family Law: Legal Custody and Physical Placement When Domestic Abuse is Alleged .....	AP.16
b.	Mandatory Deviations for the Joint Legal Custody Presumption when there is a Finding of Interposal Battery or Domestic Abuse .....	AP.19
c.	Permissive Deviations from the Joint Legal Custody Presumption when it is in the Child's Best Interests .....	AP.21
<b>V.</b>	<b>Step Four: Make Informed Recommendations that Account for Domestic Abuse.....</b>	<b>AP.24</b>
a.	Potential Recommendations for Custody and Placement in Family Cases that Involve Domestic Abuse .....	AP.24
b.	Domestic Abuse Scenarios .....	AP.36
i.	Scenario 1: GAL asks the court to make a finding of domestic abuse and the court does so .....	AP.36
ii.	Scenario 2: GAL asks the court makes a finding of domestic abuse and the abusive parent rebuts the domestic abuse presumption ....	AP.38
iii.	Scenario 3: No finding of domestic abuse, but evidence of coercive control .....	AP.40
iv.	Scenario 4: Evidence of a high likelihood of lethality .....	AP.43



# GUARDIAN AD LITEM RESPONSIBILITIES AND THE FOUR PART FRAMEWORK

---

## Wisconsin Guardian ad Litem Statutory Responsibilities in Family Law Cases

---

Wis. Stat. § 767.407(4) outlines the responsibilities of a guardian ad litem in actions affecting the family. It states that a guardian ad litem shall:

- Be an advocate for the best interests of a minor child
- Function independently, in the same manner as an attorney for a party to the action
- Consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child
- Consider the custody and placement factors under Wis. Stat. § 767.41(5)(am)
- Consider custody studies under Wis. Stat. § 767.405(14)
- Investigate whether there is evidence that either parent has engaged in interspousal battery or domestic abuse
- Report to the court on the results of the investigation
- Review and comment to the court on any mediation agreement and stipulation made under Wis. Stat. § 767.405(12)
- Review and comment to the court on any parenting plan filed under Wis. Stat. § 767.41(1m)
- Communicate to the court the wishes of the child as to the child's legal custody or placement unless the child requests otherwise

# GUARDIAN AD LITEM RESPONSIBILITIES AND THE FOUR PART FRAMEWORK

## Overview of the Four Part Framework

### Step 1: Identify Domestic Abuse

Ask: Is abuse an issue in this case?



### Step 2: Define the Nature and Context of Abuse

Ask: What is actually going on here?



### Step 3: Evaluate the Implications of Abuse

Ask: What does it mean?



### Step 4: Make Informed Recommendations that Account for Domestic Abuse

Ask: What can be done about it?

# STEP ONE: IDENTIFY DOMESTIC ABUSE

## GUARDIAN AD LITEM SCREENING QUESTIONS FOR DOMESTIC ABUSE INITIAL DOMESTIC ABUSE SCREENING GUIDE<sup>136</sup>

### Basic Screening Questions:

### What to Listen For:

How comfortable are you interacting with \_\_\_\_\_ now?

- Do you have any concerns, fears or anxieties that I should be aware of?
- What worries you most?

#### Personal Interactions

Comfortable	←→	Uncomfortable
Safe/Secure	←→	Fearful/Anxious
Self-Ruled	←→	Controlled
Connected	←→	Isolated
Respected	←→	Disparaged
Self-Reliant	←→	Dependent
Supported	←→	Undermined

When you look back over time, how were practical, everyday decisions made in your relationship?

- How did you arrive at that arrangement?
- Are you comfortable with that?
- What happened when disagreements arose?

#### Everyday Decision-Making (food, shelter, finances, children)

Equal	←→	Dominating
Cooperative	←→	Coercive
Responsible	←→	Irresponsible
Fair	←→	Manipulative

Is there anything that gets in your way of doing the things you want or need to do in your daily life, like:

- Managing your daily affairs
- Meeting your basic needs
- Meeting the basic needs of the children
- Fulfilling your everyday responsibilities
- Making your own decisions
- Interacting with other people

#### Control of Everyday Life

Self-Directed	←→	Controlled
---------------	----	------------

Has there ever been any physical violence between you and \_\_\_\_\_? If so, can you tell me about that?

Very rare	←→	Every day
Very minor	←→	Very severe
No harm	←→	Severe injury

#### Physical Violence

Have you ever felt so ashamed, humiliated, embarrassed or fearful by something you or \_\_\_\_\_ said or did to the other that you didn't want anyone else to know about it? If so, can you tell me about what that was like for you (without revealing specifics)?

Safe/Secure	←→	Fearful/Anxious
Self-Respect	←→	Humiliation
Autonomous	←→	Controlled

#### Emotional Well-being

Have you or \_\_\_\_\_ ever forced the other to do sexual things the other didn't want to do or insisted on having sex when the other didn't want to? If so, can you tell me about that?

Voluntary	←→	Forced
Respectful	←→	Degrading

#### Sexual Autonomy

<sup>136</sup> Practice Guide for Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters, Battered Women's Justice Project (<http://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf>)

## STEP ONE: IDENTIFY DOMESTIC ABUSE

Have you or \_\_\_\_\_ ever been concerned that the other was going to physically or psychologically harm the other, the children, or pets? If so, please explain.

Fear of Physical or Psychological Harm  
(self, children, pets, others)

Not fearful ←————→ Very fearful

How are parenting time arrangements currently being worked out?

- How did you arrive at that arrangement?
- Are you comfortable with that?
- Any concerns about children or fears for their safety?

Parental Decision-Making

Equal ←————→ Dominating

Cooperative ←————→ Coercive

Responsible ←————→ Irresponsible

Child-Focus ←————→ Self-Focus

Fair ←————→ Manipulative

## STEP ONE: IDENTIFY DOMESTIC ABUSE

### Guardian Ad Litem Interview Questions - Adult Parties

**Physical and Sexual Abuse Questions:** *Ask questions that contain action verbs.*

- How do you and your spouse/partner communicate when upset? What happens when you or your spouse/partner disagree and your spouse/partner wants to get his/her way?
- Have you ever been hurt or injured in an argument?
- Has your spouse/partner ever used physical force against you?
- Did your spouse/partner ever say or do things that made you fearful for your safety or the safety of your child?
- If so, what was said or what did your spouse/partner do?
- Did your spouse/partner ever force or coerce you to engage in sexual activities that made you feel uncomfortable?
- Did your spouse/partner ever cause you physical pain against your will? If so, what caused this pain?

If the party begins to reveal that some type of physical or sexual abuse occurred, ask questions about specific types of abuse. Many people do not identify the following actions as abusive and will not reveal they occurred unless directly asked.

**Specific Physical and Sexual Abuse Questions:**

- Has your spouse/partner ever hit, slapped, punched, or struck you or some part of your body?
- Did your spouse/partner ever pin you against the wall or some other object?
- Does your spouse/partner ever shove or push you into objects, onto the floor or another surface, or down steps?
- Has your spouse/partner ever thrown objects at or toward you?
- Does your spouse/partner spit, bite, or use excessive force when interacting with your body?

## STEP ONE: IDENTIFY DOMESTIC ABUSE

### Economic Abuse Questions:

Economic abuse alone *may* indicate domestic abuse. In addition, *if* the guardian ad litem determines there are also other tactics, the guardian ad litem can conclude that there is domestic abuse in the relationship.

- Who controls the finances in your family?
- Do you share a checking and/or savings account?
- Do you each have equal access to the account(s)? Do you each make decisions about how to spend the assets in the account(s)?
- Who set up this financial arrangement? Have you ever tried or requested to change this arrangement? If so, what happened? If not, why not?
- What do you think would happen if you proposed a change in the financial arrangements?
- Does your spouse/partner prevent you from getting or keeping a job?
- Does your spouse/partner allot how much money you can have or spend?

### Social Isolation Questions:

- Who do you spend time with and how often? Does your spouse/partner support your efforts to have a social life and time away, or limit your time with friends and family?
- Does your spouse/partner control what you do, who you see, or who you talk to?
- Does your spouse/partner control or monitor your phone calls, emails, or communication with others?
- Does your spouse/partner display jealousy such that you limit your activities or interactions with others?
- Does your spouse/partner ever lock you into or out of the home, or prevent you from going to a place of recreation, workplace, or any other place?
- Does your spouse/partner prevent you from having a driver's license or using a vehicle?
- Who decides where you live? Has your spouse/partner ever moved you away from family and friends?

## STEP ONE: IDENTIFY DOMESTIC ABUSE

### Privilege Questions:

- Who makes household and social decisions and why?
- Are there written or unwritten rules created by the other spouse/partner that you must follow around the home and elsewhere?
- What are those rules and what would happen if you attempt to change them?
- Does your spouse/partner act as if he or she has the right to make all the big decisions? If so, what will happen if you try to make a big family decision?
- Does your spouse/partner define which of you takes care of what chores or needs in your household?

### Intimidation Questions:

- Have you ever felt threatened or intimidated by your spouse/partner?
- Does your spouse/partner ever threaten to destroy or has the spouse/partner ever destroyed your possessions or property? If so, when and why?
- Does your spouse/partner ever harm a family pet or animal?
- Does your spouse/partner ever force you to watch or actively or inactively participate in harm to your pets or other animals?
- Does your spouse/partner engage in any behavior that causes you to feel on edge, frightened, or concerned about your safety? If so, when does this happen?
- Did your spouse/partner ever use or threaten to use a weapon or an object to intimidate, threaten, or harm you?
- Does your spouse ever engage in cruel or harmful punishment against you or your child?
- Does your spouse/partner engage in looks, actions, or gestures that threaten or intimidate you?

### Coercion and Threat Questions:

- Does your spouse/partner ever threaten to take the children if you ever leave him or her?
- Has your spouse/partner ever told you that if you seek a divorce, he/she will gain full custody of the children?
- Has your spouse/partner ever told you or implied that you will pay a price if you do not follow his/her rules?

## STEP ONE: IDENTIFY DOMESTIC ABUSE

- Has your spouse/partner ever threatened or attempted to commit suicide?
- Does your spouse/partner threaten you or force you to not call for help or tell others when you are afraid of his/her behavior?

### Minimize, Deny Blame Questions:

- If you and your spouse/partner fight, does your spouse/partner minimize or deny his/her role in that conflict?
- If you and your spouse/partner fight, does your spouse/partner blame you for the conflict?
- If something goes wrong in the family or household, does your spouse/partner blame you for what happened?
- Is your spouse/partner likely to blame you or someone in the household when bad things happen?
- Does your spouse/partner ever engage in behavior that you find demeaning or controlling but he or she says is done “in fun”?
- If your spouse/partner engages in behavior that you find harmful or hurtful to you or your child, does he or she make light of it and/or not take it seriously when you express concern about that behavior?

### Using the Children Questions:

- Does your spouse/partner ever undermine your interactions with your child? If so, how?
- Does your spouse/partner ever undermine or override your efforts to discipline or set boundaries with your child?
- Does your spouse/partner belittle, demean or make fun of you in the presence of your child?
- Does your spouse/partner ask your child to report to him/her about your actions or activities?
- Does your spouse/partner force the children to watch as he/she harms or hurts you?
- Does your spouse/partner force you to watch as he/she harms or hurts your child?
- Does your spouse/partner discipline or react to your child in a manner that frightens or concerns you?



## STEP ONE: IDENTIFY DOMESTIC ABUSE

- Have your children ever been hurt or injured as a result of your spouse/partner's behavior?
- Are the children afraid of your spouse/partner?

### Emotional Abuse Questions:

- Does your spouse/partner repeatedly undercut or hurt your self-esteem?
- Does your spouse/partner engage in name calling or other put downs?
- Does your spouse/partner make you feel badly about yourself, your thoughts, and /or your behavior?
- Does your spouse/partner ever make you feel crazy or play mind games with or against you?
- Does your spouse/partner ever humiliate you in private or public?
- Does your spouse/partner make you feel guilty if you do not engage in the behavior he or she expects of you?

In all cases, the guardian ad litem must ask about specific types of abuse that might increase a likelihood of lethality. [See "*Practice Point - Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors*" for more information.]

- Did your spouse/partner ever use or threaten to use a firearm or other weapon to intimidate, threaten, or harm you?
- Has your spouse/partner ever placed his or her hands around your neck or mouth, causing you to have difficulty breathing?
- Did your spouse/partner ever strangle, choke, or smother you with an object or with his/her hands?
- As a result of any strangulation or smothering behavior by your spouse/partner, did you ever experience momentary or more prolonged loss of consciousness?
- Is your spouse constantly and violently jealous?
- Does your spouse/partner ever follow, track, or monitor your actions and activities? How and why?
- Does your spouse/partner force you to engage in sexual activities against your will?
- Has your spouse/partner ever threatened to kill you or your children?
- Do you think your spouse/partner is capable of killing you or your children?

# STEP ONE: IDENTIFY DOMESTIC ABUSE

## Guardian Ad Litem Interview Questions - Child Parties

### Parental Dynamics Questions:

- Tell me about what happens when mom and dad fight.
- Is the fighting with words or bodies?
- Does anybody get hurt?
- What does dad/mom do when he/she gets mad? How do you know when mom/dad is mad?
- How do you feel when the parent is mad?
- Are you ever afraid when your parents get mad? Why? What happens or can happen?
- I hear the police were at your house. Can you tell me what happened?
- Do you ever hear one of your parents say mean or negative things about the other parent? What does he/she say? How does that make you feel? Does that parent ever ask you to say those same things to the other parent? What would happen if you did?
- Have you ever heard one parent tell another that they might take you away and the other parent would not see you again? When did that happen? How did it make you feel?

### Child and Parent Dynamics Questions:

- How do your parents discipline you or punish you if you have done something wrong?
- Do you think they are fair with their method of discipline or punishment? Why/why not?
- Which of your parents is the disciplinarian - enforces the rules around the house?
- Do you know what the rules are around the house?
- Do those rules ever change suddenly? Why?
- What happens if you do not follow the house rules?
- Do your parents ever make you do things that make you feel really uncomfortable?
- Do your parents allow you to have privacy (e.g., your own room or time to yourself)?

## STEP ONE: IDENTIFY DOMESTIC ABUSE

- Does either of your parents ever ask you to keep secrets? If so, how does that make you feel? How do you manage to keep it a secret?
- Does either of your parents ask you to disobey or disregard what the other parent asked you to do or what the other parent told you that you are responsible to do?
- Have you ever argued or gotten angry with your parents? What happens if you do?
- Let's say you were mad at your mother and yelled at her. What would your father do or say to you?
- Let's say you were mad at your father and yelled at him. What would your mother do or say to you?
- Do you ever feel torn (conflicted) about which parent to be angry or upset with if there is a fight in your home? Why? How do you decide who you are angry with?
- Have either of your parents ever told you that they love you better than the other parent does?
- Have either of your parents asked you or encouraged you to fight against the other parent? When? What happened if you did that?
- Does either of your parents ask you to relay messages to the other parent? If so, how does that make you feel?
- When do you think your parents act like grown-ups (adults)?
- When do you think your parents do not act like grown-ups (adults)?
- Does either of your parents ask you to be the parent or grown-up sometimes? How?
- Do you like it best when just one of your parents is home? Which one? Why?
- Are both of your parents home a lot or is one gone a lot?
- Are you ever afraid to tell your parents something? Why? What could happen?
- Do your parents ever ask you to spy on the other parents or report what that parent does?
- Who can you talk to if you are afraid or want someone to comfort you?

### Daily Routine Questions:

- Which of your parents helps you with your daily routine: who takes you to school or makes sure you get to school? Who looks at your notes from the

## STEP ONE: IDENTIFY DOMESTIC ABUSE

teacher or your school information? Who takes you to the doctor's office? Who do you call if you have a problem or get sick at school? Do your parents know the names of your teachers? Do they know the names of your friends?

- Who do you talk to if you have a problem or need help?
- Do you have a set bedtime and set bedtime routine? What is it and who helps you?
- How do you wake up in the morning? Do your parents help you get up and off to school?
- Do your parents ask you about your daily activities, your homework and your friends?
- Do your parents encourage you to have friends and outside of home interests or extracurricular activities?
- Do both of your parents make you stick to your routine?
- Who cooks the meals? Who buys the groceries? Does that parent ask what you like to eat?
- What happens if you do not like certain food at a meal? If you decide not to eat it, what will your parents do? Are you afraid to tell them if you do not like certain food?
- Are you in school or community activities? Why or why not? Who takes you to those events? Who attends those events when they are open to the public?
- Do you ever have trouble concentrating at school because of something that happens at home? Do you talk to anyone about that? Why or why not? What would happen if you did?

### Safety At Home Questions:

- Do you ever want to stay at home because of what happens at home? Or get away from home because of what happens at home?
- Do you ever feel unsafe in your home? When? What happens if you tell your parents?

# STEP ONE: IDENTIFY DOMESTIC ABUSE

## Domestic Abuse Checklist<sup>137</sup>

Physical/Sexual Abuse	Emotional Abuse	Control of Daily Life	Economic Abuse
<input type="checkbox"/> Hold, pin, restrain	<input type="checkbox"/> Insult you/put you down	<input type="checkbox"/> Follow or stalk you	<input type="checkbox"/> Deny money
<input type="checkbox"/> Kneel on or sit upon	<input type="checkbox"/> Ridicule you in public	<input type="checkbox"/> Often check up on	<input type="checkbox"/> Refuse to pay bills
<input type="checkbox"/> Tie up, bind, gag	<input type="checkbox"/> Purposely humiliate you	<input type="checkbox"/> Examine mail/email	<input type="checkbox"/> Empty bank
<input type="checkbox"/> Push, shove, shake	<input type="checkbox"/> Play mind games	<input type="checkbox"/> Check phone calls	<input type="checkbox"/> Hide assets
<input type="checkbox"/> Grab			
<input type="checkbox"/> Scratch, pull hair,	<input type="checkbox"/> Intimidate you	<input type="checkbox"/> Hack into email	<input type="checkbox"/> Destroy your credit
<input type="checkbox"/> Shave	<input type="checkbox"/> Yell or scream at you	<input type="checkbox"/> Grill you	<input type="checkbox"/> Deny credit access
<input type="checkbox"/> Twist arm	<input type="checkbox"/> Act aggressively to you	<input type="checkbox"/> Time activities	<input type="checkbox"/> Run up debt
	<input type="checkbox"/> Get jealous/possessive	<input type="checkbox"/> Use others as spies	<input type="checkbox"/> Forge papers
<input type="checkbox"/> Bite	<input type="checkbox"/> Accuse you of infidelity	<input type="checkbox"/> Invade privacy	<input type="checkbox"/> Refuse to pass title
<input type="checkbox"/> Spit on		<input type="checkbox"/> Misuse social media	
<input type="checkbox"/> Urinate upon	<input type="checkbox"/> Interfere with:	<input type="checkbox"/> Physically restrain	<input type="checkbox"/> Destroy property
	<input type="checkbox"/> work/school life	<input type="checkbox"/> Forbid you to leave	<input type="checkbox"/> Steal your property
<input type="checkbox"/> Slap	<input type="checkbox"/> social life	<input type="checkbox"/> Punish you for disobeying	<input type="checkbox"/> Sell your property
<input type="checkbox"/> Hit or punch	<input type="checkbox"/> sleep		<input type="checkbox"/> Shut off utilities
<input type="checkbox"/> Kick or stomp	<input type="checkbox"/> healthcare/medication	<input type="checkbox"/> Arrive unannounced	<input type="checkbox"/> Fail to pay insurance
<input type="checkbox"/> Strike or throw object	<input type="checkbox"/> Threaten to:	<input type="checkbox"/> Make unwanted contact	<input type="checkbox"/> Cancel insurance
	<input type="checkbox"/> kill you or the children	<input type="checkbox"/> Leave things to scare you	<input type="checkbox"/> Cancel credit cards
<input type="checkbox"/> Choke or strangle	<input type="checkbox"/> kill him/herself		<input type="checkbox"/> Refuse to work
<input type="checkbox"/> Burn	<input type="checkbox"/> harm you or the children	<input type="checkbox"/> Make you do things you don't want to do	<input type="checkbox"/> Refuse to let you work
<input type="checkbox"/> Poke, stab, cut	<input type="checkbox"/> harm person you care for		<input type="checkbox"/> Try to get you fired
	<input type="checkbox"/> harm or kill pets		
<input type="checkbox"/> Withhold food	<input type="checkbox"/> Destroy things you care for		<input type="checkbox"/> Hide bills
<input type="checkbox"/> Withhold medicine	<input type="checkbox"/> Threaten you w/ weapon		<input type="checkbox"/> Hide financial info.
<input type="checkbox"/> Disable medical equip.	<input type="checkbox"/> Put your life in danger		
	<input type="checkbox"/> Disable your car		<input type="checkbox"/> Constantly return to court
<input type="checkbox"/> Forced sex	<input type="checkbox"/> Drive recklessly to scare you		

<sup>137</sup> Practice Guide for Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters, Battered Women's Justice Project (<http://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf>)

## STEP TWO: DEFINE THE NATURE AND CONTEXT OF THE ABUSE

### Parenting in the Context of Domestic Abuse

An important element in completing Step Two, defining the nature and context of abuse, is analyzing the dynamics of parenting in the context of domestic abuse. To aid in conducting this analysis, please review pages 23-36 of the Battered Women's Justice Project's "Practice Guides for Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters" (<http://bit.ly/FourStep>). There, guardians ad litem will find several charts meant to assess the parenting capacities of abusers and the abusive parent's effects on the child and the non-abusive parent.

## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

### A JUDICIAL GUIDE TO DOMESTIC ABUSE ISSUES –

#### FAMILY LAW: LEGAL CUSTODY AND PHYSICAL PLACEMENT ORDERS WHEN DOMESTIC ABUSE IS ALLEGED

**Findings of Fact which trigger Domestic Abuse Provisions Under § 767.41(5)(bm); See also § 767.41(2)(d)2.**

- Court finds, by preponderance of the evidence, one party has engaged in a pattern or serious incident of interspousal battery or domestic abuse such as:
  - Intentional infliction of physical pain, physical injury or illness
  - Causing bodily harm with intent to harm while subject to a restraining order
  - Intentional impairment of physical condition
  - 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> degree sexual assault per § 940.225
  - Intentional damage to property of the individual
  - Threat to engage in any of the above
- OR court finds, by preponderance of the evidence, both parties have engaged in a pattern or serious incident of the above AND one of them was the primary physical aggressor. Consider the following to determine primary aggressor:
  - Prior acts of domestic abuse between the parties
  - Relative severity of the injuries
  - Likelihood of future injury to either party from domestic abuse
  - Whether either party acted in self-defense
  - Whether there has been a pattern of coercive and abusive behavior
  - Any other factor that is relevant
- If only one of the parties has been convicted of a crime of domestic abuse against the other party, the court shall find the convicted party was the primary physical aggressor. § 767.41(2)(d)3

**Upon making a Finding of Fact that one party engaged in domestic abuse or one was the primary aggressor, presumption of joint legal custody does NOT apply, and the safety and well-being of the child and the safety of the parent who was the victim of abuse shall be the paramount concern in determining physical placement. Specifically, the following apply:**

#### **Presumption Against Joint or Sole Legal Custody to the Abuser**

- The safety and well-being of the child and the safety of the parent who was victim of abuse shall be the paramount concern in determining legal custody. § 767.41(5)(bm)
- It is generally detrimental to the child and contrary to the best interest of the child to award joint or sole custody to the abuser. § 767.41(2)(d)

## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

The presumption against joint or sole legal custody to the abuser may only be overcome if the abuser shows ALL of the following: See § 767.41(2)(d)1.

- Abuser has successfully completed treatment provided through a certified treatment program or by a certified treatment provider; Providers can be located at <http://www.wcadv.org/ourwork/wbtpa>
- Abuser is not abusing alcohol or any other drug; and
- It is in the best interest of the child for the abuser to be awarded joint or sole legal custody after consideration of the factors under § 767.41(5)(am)
- When determining legal custody, the safety of the child and victim are still paramount. See § 767.41(2)(d) and (5)(bm)

### Final Order

- Any final order granting joint or sole legal custody to the abuser in cases in which domestic abuse is found must state in writing whether the presumption against awarding joint or sole legal custody to that party is rebutted and, if so, what evidence rebutted the presumption and why it is in the best interest of the child. § 767.41 (6)(f)

### Paramount Concerns for Physical Placement

- The safety and well-being of the child and safety of the parent who was victim of abuse shall be the paramount concern in determining periods of physical placement. § 767.41(5)(bm)
- IF the court awards periods of physical placement to the abuser, court shall provide for safety and well-being of the child and victim-parent by imposing one or more of the following:
  - Requiring supervised exchange of the child
  - Requiring supervised visits
  - Requiring the abuser to pay the costs of supervision
  - Requiring the abuser to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of placement
  - Prohibiting the party from being under the influence of alcohol or controlled substances
  - Prohibiting overnight placement with the abuser
  - Requiring the abuser to post a bond to ensure the child's return or safety
  - Any other condition the court determines is necessary



## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

### Role of the Guardian Ad Litem in Cases Alleging Domestic Abuse

- The GAL must investigate whether either party has engaged in interspousal domestic abuse and report to the court on the results of the investigation.  
§ 767.407(4)

### Parental Alienation Syndrome (PAS) in cases alleging domestic abuse or sexual assault

- PAS is frequently alleged in cases in which an abusive and non-abusive parent separate. Upon separation, the child reveals to the non-abusive parent physical or sexual abuse by the abusive parent. The non-abusive parent is accused of PAS because the allegations of abuse come forward during the pendency of the case.
- PAS in this context refers to the theory that allegations of domestic abuse or sexual assault are false, are designed to gain a custody advantage, and have resulted in the child being wrongly alienated.
- Be watchful as to the motivation in cases alleging PAS or other alienation: is the parent attempting to alienate the child or protect the child from further abuse? Learn whether abuse occurred in the family.
- PAS has been discredited by the psychiatric profession, and has been routinely deemed by courts and mental health professionals as inadmissible in the courtroom in this context. See, e.g., *State v. Fortin*, 706 N.Y.S.2d 611, 614 (N.Y. Co. Ct. 2000) (finding that PAS has not been generally accepted by the professional community and, therefore, lacks the foundation for its admission at trial); *People v. Loomis*, 658 N.Y.S.2d 787, 789 (N.Y. Co. Ct. 1997) (specifically rejecting PAS evidence in criminal cases).
- See Joan S. Meier. (January 2009) **Parental Alienation Syndrome and Parental Alienation: Research Reviews**. Available online at [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_PAS.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_PAS.pdf)

*Upon making a finding that one party engaged in domestic abuse, presumption of joint custody does NOT apply. Rather, the safety and well-being of the child and the safety of the parent who was the victim of abuse shall be the paramount concern in determining legal custody and physical placement. It is generally detrimental to the child and contrary to the best interest of the child to award joint or sole custody to the abuser.*

## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

### Mandatory Deviations for the Joint Legal Custody Presumption when there is a Finding of Interspousal Battery or Domestic Abuse

If ...	And ...	Then
<p>The court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am)</p>	<p>That party does not show by a preponderance of evidence of all of the following:</p> <p>a. The party who committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug.</p> <p>b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under s.767.41 (5) (am).</p>	<p>It is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.</p>
	<p>That party does show by a preponderance of evidence of all of the following:</p> <p>a. The party who committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug.</p> <p>b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under s.767.41 (5) (am).</p>	<p>Refer to the joint legal custody presumption for further analysis under s. 767.41 (2).</p>

## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

If ...	And ...	Then
<p>The court finds by a preponderance of the evidence that both parties have engaged in a pattern or serious incident of interspousal battery, described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am)</p>	<p>One, but not both, of the parties has been convicted of a crime that was an act of domestic abuse, as defined in s. 813.12 (1) (am), with respect to the other party, the court shall find the party who was convicted of the crime to be the primary physical aggressor</p>	<p>There is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to the primary physical aggressor. This presumption may only be rebutted under the conditions in s. 767.41(2)(d).</p>
	<p>One party is determined to be the primary physical aggressor, based on consideration of:</p> <ul style="list-style-type: none"> <li>a. Prior acts of domestic violence (DV) between the parties.</li> <li>b. The relative severity of the injuries, if any, inflicted upon a party by the other party in any of the prior acts of DV.</li> <li>c. The likelihood of future injury to either of the parties resulting from acts of DV.</li> <li>d. Whether either of the parties acted in self-defense in any of the prior acts of DV.</li> <li>e. If there is or has been a pattern of coercive and abusive behavior between the parties.</li> <li>f. Any other relevant factor.</li> </ul>	<p>There is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to the primary physical aggressor. This presumption may only be rebutted under the conditions in s. 767.41(2)(d)</p>
	<p>Neither party is determined to be the primary physical aggressor, based on consideration of:</p> <ul style="list-style-type: none"> <li>a. Prior acts of domestic violence (DV) between the parties.</li> <li>b. The relative severity of the injuries, if any, inflicted upon a party by the other party in any of the prior acts of DV.</li> <li>c. The likelihood of future injury to either of the parties resulting from acts of DV.</li> <li>d. Whether either of the parties acted in self-defense in any of the prior acts of DV.</li> <li>e. If there is or has been a pattern of coercive and abusive behavior between the parties.</li> <li>f. Any other relevant factor.</li> </ul>	<p>Refer to the joint legal custody presumption for further analysis under s. 767.41 (2).</p>

## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

### Permissive Deviations from the Joint Legal Custody Presumption when it is in the Child's Best Interests

If . . .	And . . .	Then
The court finds that granting sole legal custody to a party is in the child's best interest based on a considerations of the factors under s. 767.41(5)(am), subject to s. 767.41(5)(bm)	Both parties agree to sole legal custody with the same party	The court may grant sole legal custody.
	The parties do not agree, but at least one party has requested sole legal custody and the court finds <b>the other party is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising a child</b>	The court may grant sole legal custody.
	The parties do not agree, but one at least one party has requested sole legal custody and the court finds <b>one or more conditions exist at that time that would substantially interfere with the exercise of joint legal custody</b>	The court may grant sole legal custody.
	The parties do not agree, but one at least one party has requested sole legal custody and the court finds <b>the parties will not be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence that either party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 813.122 (1) (b), or evidence of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required</b>	The court may grant sole legal custody.

## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

Even when the court orders joint legal custody, the court may give one party sole power to make specified decisions, while both parties retain equal rights and responsibilities for other decisions. (See Wis. Stat. § 767.41(6)(b).) This is commonly referred to as impasse decision-making authority.

When considering whether deviation from the joint legal custody presumption is proper, always consider Wis. Stat. § 767.41(2)(c), which states “... the court may not give sole legal custody to a parent who refuses to cooperate with the other parent if the court finds that the refusal to cooperate is unreasonable.”

**Four Key Legal Custody and Physical Placement Provisions** are triggered by a finding by a preponderance of the evidence that one party has engaged in a pattern or serious incident of interspousal battery, as described under Wis. Stats. § 940.19 or 940.20(1m), or domestic abuse, as defined in Wis. Stat. § 813.12(1)(am). They are as follows:

**Wis. Stat. § 767.41(2)(d)**, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.

**Wis. Stat. § 767.41(5)(bm)**, the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement.

**Wis. Stat. § 767.41(6)(f)**, the court shall state in writing whether the presumption against awarding joint or sole legal custody to that party is rebutted and, if so, what evidence rebutted the presumption, and why its findings relating to legal custody and physical placement are in the best interest of the child.

**Wis. Stat. § 767.41(6)(g)**, if the court awards periods of physical placement to both parties, in order to provide for the safety and well-being of the child and for the safety of the party who was the victim of the battery or abuse, the court, giving consideration to the availability of services or programs and to the ability of the party who committed the battery or abuse to pay for those services or programs, shall impose one or more of the following, as appropriate:

## STEP THREE: EVALUATE THE IMPLICATIONS OF ABUSE

1. Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.
2. Requiring the child's periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.
3. Requiring the party who committed the battery or abuse to pay the costs of supervised physical placement.
4. Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as a condition of exercising his or her periods of physical placement.
5. If the party who committed the battery or abuse has a significant problem with alcohol or drug abuse, prohibiting that party from being under the influence of alcohol or any controlled substance when the parties exchange the child for periods of physical placement and from possessing or consuming alcohol or any controlled substance during his or her periods of physical placement.
6. Prohibiting the party who committed the battery or abuse from having overnight physical placement with the child.
7. Requiring the party who committed the battery or abuse to post a bond for the return and safety of the child.
8. Imposing any condition not specified in subds. 1. to 7. that the court determines is necessary for the safety and well-being of the child or the safety of the party who was the victim of the battery or abuse.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

### Potential Recommendations for Custody and Placement in Family Cases that Involve Domestic Abuse

These recommendations are compiled from suggestions submitted by Wisconsin guardians ad litem, domestic abuse advocates, victims, and members of the Governor's Council on Domestic Abuse Legislative, Policy and Systems Collaboration Committee Guardian ad Litem Workgroup, which created this guidebook.

In drafting custody and placement recommendations, *especially in cases where domestic abuse is present*, it is important to be as specific as possible. Recommendations should provide for structure, limits, and predictability. Recommendations should provide specific times and processes in each category (e.g., how long, how often, timelines for responses, consequences for failure to comply, such as calling law enforcement or asking the court to schedule an emergency hearing, etc.). Making the recommendations specific and clear can help reduce the degree of coercive control the abuser can exercise over the victim once the family case is over.

#### I. Custody Recommendations

- A. Sole custody
- B. Shared custody
- C. Impasse authority

#### II. Placement Recommendations

- A. Primary placement
- B. Shared placement
- C. Supervised / Monitored Placement (see more detail below)
- D. Require the abuser to post bond. If a placement schedule becomes less restrictive over time, there must be change in the abuser. Change can be assessed by looking at a number of factors:
  - i. Has the abuser made full disclosure of the history of physical and psychological abuse?

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

- ii. Has the abuser recognized that abusive behavior is unacceptable?
  - iii. Has the abuser recognized that abusive behavior is a choice?
  - iv. Does the abuser show empathy for the effects of his or her actions on his or her former partner and children?
  - v. Can the abuser identify what the pattern of coercive/controlling behavior and entitlement has been?
  - vi. Has the abuser replaced abuse with respectful behaviors and attitudes?
  - vii. Has the abuser been willing to make amends in a meaningful way?
  - viii. Does the abuser accept the consequences of his/her actions?
- E. If one parent has spent little or no time with the child, a plan must be developed to allow that parent to establish a relationship with that child. The plan may include reunification therapy, Skype, or monitored Internet conversations, and/or short supervised visits.

### III. Supervised / Monitored Placement Recommendations

- A. Guardians ad litem may need to recommend supervised visitation on a temporary or ongoing basis.
- B. All placement by the petitioner/respondent shall be supervised/monitored. Placement shall occur at \_\_\_\_\_ during the hours of \_\_\_\_\_ on the following days: \_\_\_\_\_.
- C. All placement with the abusive parent shall be supervised/monitored. The placement shall be supervised/monitored by \_\_\_\_\_ [insert name]. This person shall supervise/monitor all exchanges.
- D. If a family member or friend provides third party supervision, that person is to receive a copy of the court order so they know the terms of the supervision.
- E. The following third parties, \_\_\_\_\_ [insert names] may access and appear at visits without notice.
- F. Where possible, recommend a supervised exchange/visitation center with professionals who have training and a history of working in domestic abuse situations.



## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

- G. When appropriate, recommend any costs of supervision be paid by the abusive parent.
- H. Prior to allowing unsupervised placement time, the court must be satisfied that the abusive parent successfully completed a certified batterer's treatment program (not anger management), pursuant to Wis. Stat. 767.41(6)(g)4.

### IV. Transfer of Placement Recommendations

- A. All transfer orders must be detailed and specific.
- B. If possible, placement transfers should take place in sight of a camera and in a public place (e.g., police station, library, school, daycare, McDonald's, gas station).
- C. Placement transfer shall take place at \_\_\_\_\_. If transfer site is closed, transfers shall occur at \_\_\_\_\_.
- D. By a designated time [insert day of week and time], parties should communicate via the approved online resource any concerns or needs of the child.
- E. Parties are to be prompt at exchange times and, unless there is an emergency, the party picking up the child shall not be more than 15 minutes late.
- F. If a party does not arrive to pick up the child within 15 minutes, the party with the child may leave the exchange site; if the tardiness is not due to an emergency, the tardy parent will forfeit that placement time. If a party cannot make a scheduled transfer at the assigned time, s/he should notify the other parent by text or telephone.
- G. If the parent delivering the child is more than 30 minutes late with no notification, the party picking up the child shall contact law enforcement. The court order shall specify that law enforcement is to check on the child's welfare.
- H. During the transfer, \_\_\_\_\_  
[detail what exchange should look like (e.g., neither party shall leave the car except to remove the child from any restraints or to assist the child with removing an item from the car; the party dropping off the

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

child shall ensure that the child has the necessary items for the next placement; the transfers shall be curbside in the front of the other parent's home; the party receiving the child shall remain inside the door of the home in plain view and not approach the vehicle; etc.)).

- I. During exchanges, neither party shall discuss issues in the presence of the child unless it relates to the child's immediate well-being or immediate schedule. If there are issues between the parties that need to be discussed, the parents are required to use whatever online method of communication that has been approved.
- J. All exchanges shall be recorded.
- K. The non-abusive parent may record the exchange.

### V. Communication Between the Parents Recommendations

#### A. Communication via Online Resources

- i. Guardians ad litem should recommend that the majority of communication between parties occur online so direct communication may be minimized and monitored. Some examples of online communication resources include:
  - 1. Our Family Wizard ([www.OurFamilyWizard.com](http://www.OurFamilyWizard.com))
  - 2. 2Houses.com
  - 3. Google or Apple Calendars
  - 4. TalkingParents.com
  - 5. UpToParents.org
  - 6. Parent Connection
  - 7. Private third party (Parent Connection; Web Cam)
- ii. The parties shall communicate regarding their children via \_\_\_\_\_ [insert online communication resource]. The parties must enroll in the program within one week of the final judgment of divorce. Parties must enroll for at least a one-year subscription. Once enrolled, parties shall conduct all communication regarding shared parenting matters using the website's features.
- iii. Parties must renew the annual subscription unless there is a court

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

- order or signed and filed stipulation.
- iv. The following recommendations are specific to Our Family Wizard. (Guardians ad litem should make the equivalent recommendations for other online tools.)
    1. The parties shall use the *Messaging* feature only when information cannot be conveyed in the *Calendar*, *Expense*, and *Info Bank* features.
    2. The parties shall use the *Expense* features of the website to record and formalize all potentially-reimbursable expenses. An electronic file of the receipt for payment must be attached to each request or record. If a parent is not capable of posting a photograph or scan of a hard copy receipt, he or she shall mail a hard copy of the document by regular first class mail on the day following the electronic announcement in the *Expense* section. Each parent shall preserve the original of any scanned or photographed document that is posted.
    3. The parties shall only communicate by telephone or text messaging regarding matters of an emergency or urgent nature regarding the child that must be acted upon in less than 48 hours. In the case of such an emergency, the subject and general content of any such communication shall be memorialized by a journal entry in the *Calendar* feature.
  - v. If the court has ordered therapy for the child, the court should order the counselor have access to online communications.
  - vi. Parents' entries shall be viewable via \_\_\_\_\_ [insert feature that is equivalent to a "professional account" for the online tool], which is accessible to the guardian ad litem and \_\_\_\_\_ [insert name of counselors and other professionals].

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

### B. Communication via the Child

- i. The parties shall maintain a notebook, which shall travel in the child's backpack. The notebook should include the child's school schedule, extracurricular activity schedules, and any notes from a school or teacher.
- ii. Communication in the notebook should only be used to convey school-related information or information that cannot be conveyed via the online tool. The communication in the notebook should be respectful and can be used as an exhibit at later hearings. Neither party should advise the child of writings by the other parent.
- iii. Neither party shall use the child to deliver verbal or written communications to the other parent.

### C. Communication About the Other Parent

- i. Parents shall refrain from having arguments in the child's presence due to the detrimental impact of this behavior.
- ii. Neither party should discuss court issues regarding the parties with the child except the placement schedule, and only if there is an immediate change that cannot be communicated via the online communication tool.
- iii. Both parents should be supportive of the other parent and may not derogate the other party in front of the child.
- iv. Both parties should ensure that other persons in the presence of their child (e.g., third parties) do not derogate the other parent.
- v. If the child is/are consistently refusing to communicate/visit with one of the parents, note the refusal using the online communication tool. If the refusal continues, the court order shall require the child meet with \_\_\_\_\_ [insert therapist name] and the therapist shall provide recommendations to address the child's behavior.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

- D. Communication Regarding the Child's Annual Calendar (e.g., holidays, vacation, and school and family events)
- i. A court order should never allow for “reasonable notice” to modify a provision of the court order.
  - ii. One parent has preference every other year to make the first vacation request(s). Each party shall have two nonconsecutive weeks of vacation with the minor child in the summer. The vacation request shall be made online at least \_\_\_\_ months prior to the vacation. If the parent receiving the request rejects the request, he/she shall state the reasons via the online tool and submit a counter proposal. If the parties cannot agree on a vacation, the objecting party shall motion the court for a hearing.
  - iii. One parent has preference every other year to make the first request for \_\_\_\_\_ [insert any holiday or family events, birthdays, Mother's Day, Father's Day, etc.].
  - iv. Both parties shall provide information regarding where the child are going for vacation, with whom the child will have contact, and contact information for each day of the trip. The parties will cooperate and share a passport, if necessary.
  - v. The parties shall communicate twice per year (August and December) to review the upcoming school semester calendar and ensure child care coverage for days off of school. Unless otherwise ordered by the court, the parents are equally responsible for ensuring coverage of child care for days the child is not in school.

### VI. Child's Welfare

#### A. Provisions to Promote the Child's Welfare

- i. Recommendations should account for trauma the child has experienced.
- ii. Recommendations should allow for continued access to community resources and school/community activities as age appropriate.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

- iii. In appropriate cases, recommend that the abusive parent post bond to ensure the child's safe return.
- iv. The abusive parent may only communicate with the child through cards and letters sent to the child addressed to the other parent. The non-abusive parent may read the contents before sharing with the child and must do so within 24 hours of receipt. If the contents are inappropriate, the non-abusive parent may withhold the letter/card from the child and report the contents via the online tool.
- v. The child must participate in therapy. [Insert treatment provider.] The therapist must receive copies of the guardian ad litem recommendations, copies of any police reports involving the family, and release of information to speak to the guardian ad litem. The child shall continue with this treatment provider until therapeutically recommended otherwise. Both parents are required to follow the treatment recommendations. If the therapist cannot continue, the treatment provider must name a new therapist.
- vi. In situations where there is coercive control, but joint custody and placement is ordered, appoint a co-parent coordinator to make day-to-day decisions. The co-parent coordinator has the authority to order one parent solely responsible for fees in the event that the parent unreasonably uses the parent coordinator or forces the other parent to use the parent coordinator.

### B. Discipline of the Child

- i. Neither parent shall spank or hit the child.
- ii. Timeouts may not include physical restraints, unless allowed by court order, and shall be no longer than \_\_\_\_ minutes.
- iii. The court shall order parents to agree on certain discipline methods including \_\_\_\_\_ [insert methods].

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

### VII. Home Environment

- A. Each parent will provide consistency in mealtimes and bedtimes for the child.
- B. Parents shall provide mealtimes at these approximate times \_\_\_\_\_ [insert breakfast, lunch, and dinner times] during the school year.
- C. If parents wish to change these times when school is not in session, they must communicate via the approved online tool.
- D. Parents are to begin the bedtime routine at approximately \_\_\_\_\_ [insert time] and have the child in bed by approximately \_\_\_\_\_ [insert time].
- E. The child shall not share a room with a person of the opposite sex if the child are under the age of \_\_\_\_\_.
- F. Each party shall have a separate bed and dresser for each child.
- G. Neither parent shall view pornography, nor have pornography located in a place accessible by the child while he/she has placement with the child. If this provision is violated, the parent shall lose placement until an emergency temporary hearing is held in family court to determine appropriate placement.
- H. Neither parent shall allow the child to view pornography. If a parent discovers the child has/have pornography, the parent shall communicate that via the online communication tool and remove the pornography from the child.
- I. \_\_\_\_\_ [insert name of parent] shall not use alcohol or non-prescription drugs during any placement period.
- J. Contact, including telephone and electronic, with the non-abusive parent shall be allowed during placement time with the other parent. Contact shall occur at \_\_\_\_\_ [specify times].
- K. When an abusive parent is allowed physical placement and overnights, the following third parties may be present: \_\_\_\_\_ [insert names]. In addition, the following third parties are prohibited from being present during placement times: \_\_\_\_\_ [insert names].

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

### VIII. Internet / Social Media / Other Technology

- A. Both parties shall assure that any Internet usage by the child is age appropriate.
- B. Both parties shall maintain \_\_\_\_\_ [insert the name of Internet accountability software, such as CovenantEyes] on their home computers which allows the parent to monitor/restrict the child's Internet usage.
- C. Parents shall not allow children under the ages of \_\_\_\_\_ to use computers outside of the home without constant supervision to monitor/restrict the websites the children view.
- D. Cell phones, iPads, iPods, and other electronic communication devices shall be turned off at \_\_\_\_\_ [insert time].
- E. Cell phones, iPads, iPods, and other electronic communication devices shall be turned into the parent at \_\_\_\_\_ [insert time] and shall be returned to the child at \_\_\_\_\_ [insert time].

### IX. Parental Provisions

- A. Child Support
  - i. Parents shall communicate via the online tool if they have requested or been ordered to make a change in child support.
  - ii. Parents shall be informed that child support is established via court guidelines and the county child support office. Parents are to cooperate with that office.
- B. Education and Treatment
  - i. The parent(s) shall attend comprehensive parenting classes.
  - ii. Both parents shall attend individual counseling and sign releases so the therapists can communicate with each other. The therapy goal is to help the parents focus on the best interest of the child and establish routines, behavior plans, and schedules that support the needs of the child and foster healthy/appropriate communication.
  - iii. If applicable, both parents' therapists shall have access to speak



## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

- to the child's therapist or other relevant professionals, and vice versa.
- iv. Trauma-informed classes shall be ordered for either parent who has committed or is alleged to have committed child abuse.
  - v. The abusive parent shall attend Batterer's Treatment, which is *not* anger management.
  - vi. The abusive parent shall obtain substance abuse and other AODA evaluation and treatment.
  - vii. If a request is made for mental health records by either parent, the court must review the necessity of the request. If the court orders the records released, the judge shall review the records in camera to determine if any portion of the records should not be disclosed to the other party.
- C. Weapons Restrictions
- i. If a restraining order is in place, check to see if the respondent is required to surrender firearms. If so, recommend that the surrender be included in the family court order.
  - ii. If an abuser has ever used or threatened to use a gun or other weapon against the victim, the chances that the victim will be killed increase over 20 times.<sup>138</sup> The presence of a firearm alone increases an abused woman's risk of being killed by a factor of five.<sup>139</sup>
  - iii. When placement with an abuser is being contemplated, strongly consider recommending that the surrender or removal of firearms or other dangerous weapons be a precondition of placement with the abuser. Guardians ad litem should privately discuss the

<sup>138</sup> Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C. R., Campbell, D., Curry, M. A., & Wilt, S. A. (1985). A team of researchers studied the Danger Assessment and found that despite certain limitations, the tool can with some reliability identify women who may be at risk of being killed by an intimate partner. *Intimate Partner Violence*, 1993.

<sup>139</sup> Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C., Campbell, D., Curry, M. A., & Laughon, K. (2003). Risk factors for femicide in abusive relationships: Results from a multisite case control study. *American journal of public health*, 93(7), 1089-1097.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

possibility of recommending this condition with the victim. The victim will often be able to offer insight on whether the removal of guns will increase safety.

- iv. An abusive parent must be told that the non-abusive parent is not responsible for the recommendation of firearm surrender.

### X. Other Conditions

- A. Impose any additional condition not specified above that the court determines is necessary for the safety and well-being of the child or the non-abusive parent.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

### Long Scenarios

**Scenario 1: Recommendations when GAL asks the court to make a finding of domestic abuse and the court does so. (See Wis. Stat. § 767.41(2)(d)1.)**

#### FACT PATTERN

Pedro and Destiny have been married for 15 years. They have three children, Amara (12), Michael (10), and Mateo (6). Seven months ago, the police responded to their home because Michael dialed 911 after witnessing Pedro hit Destiny. After taking statements from Pedro, Destiny, and all three children, the police arrested Pedro. Destiny had to go to the hospital to get treatment for the injuries caused during the incident. Destiny signed the 72-hour no contact provision when Pedro was arrested. Before that no contact order expired, she filed a petition for a domestic abuse temporary restraining order (TRO), which the court granted. After a hearing, in which Pedro did not testify, she was granted a 4-year Injunction.

Pedro was charged criminally with one count of felony battery and one count of misdemeanor disorderly conduct. As a condition of his criminal bail, he was to have no contact with Destiny. As the case proceeds through the criminal justice system, Pedro is charged with a misdemeanor disorderly conduct and given deferred prosecution.

Destiny files for divorce. At the temporary divorce hearing, Destiny's attorney requests that a guardian ad litem be appointed.

The guardian ad litem conducts interviews with Pedro, Destiny, and the children. Through these interviews, the guardian ad litem learns that Pedro moved Destiny away from her family and friends and that she was never allowed to have her name

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

on any of their bank accounts. Pedro has physically abused her on an ongoing basis. However, other than the one incident, there is no other documentation of abuse because of Pedro's promises and Destiny's belief that he would change.

After interviewing the children, the guardian ad litem learns that the children have witnessed ongoing physical abuse by Pedro. On most occasions, the children hid in their bedrooms and tried to block the noise by turning on music. In the most recent incident, Amara pleaded with her father to stop harming her mother. The youngest child, Mateo, did not want to talk about anything that happened in the home and showed signs of trauma. Additionally, the children also report that their father is a lot of fun and takes them to many events. He is an active parent, but does not engage in activities he defines as "women's work," such as cleaning, laundry, or cooking.

### GUARDIAN AD LITEM'S CONCLUSION

Based on the guardian ad litem's investigation and analysis, the GAL determines that domestic abuse occurred in this case and determines that it is appropriate to ask the court to make a finding of domestic abuse under Wis. Stat. § 767.41(2)(d)1. and (5) (bm).

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

Scenario 2: Recommendations when the court makes a finding of domestic abuse and the abusive parent rebuts the domestic abuse presumption (See Wis. Stat. § 767.41(2)(d)1.a. and b.)

### FACT PATTERN

Pedro and Destiny have been married for 15 years. They have three children, Amara (12), Michael (10), and Mateo (6). Seven months ago, the police responded to their home because Michael dialed 911 after witnessing Pedro hit Destiny. After taking statements from Pedro, Destiny, and all three children, the police arrested Pedro. Destiny had to go to the hospital to get treatment for the injuries caused during the incident. Destiny signed the 72-hour no contact provision when Pedro was arrested. Before that no contact order expired, she filed a petition for a domestic abuse temporary restraining order (TRO), which the court granted. After a hearing, in which Pedro did not testify, she was granted a 4-year Injunction.

Pedro was charged criminally with one count of felony battery and one count of misdemeanor disorderly conduct. As a condition of his criminal bail, he was to have no contact with Destiny. As the case proceeds through the criminal justice system, Pedro is charged with a misdemeanor disorderly conduct and given deferred prosecution.

Destiny files for divorce. At the temporary divorce hearing, Destiny's attorney requests that a guardian ad litem be appointed.

The guardian ad litem conducts interviews with Pedro, Destiny, and the children. Through these interviews, the guardian ad litem learns that Pedro moved Destiny away from her family and friends and that she was never allowed to have her name on any of their bank accounts. Pedro has physically abused her on an ongoing basis. However, other than the one incident, there is no other documentation of abuse because of Pedro's promises and Destiny's belief that he would change.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

After interviewing the children, the guardian ad litem learns that the children have witnessed ongoing physical abuse by Pedro. On most occasions, the children hid in their bedrooms and tried to block the noise by turning on music. In the most recent incident, Amara pleaded with her father to stop harming her mother. The youngest child, Mateo, did not want to talk about anything that happened in the home and showed signs of trauma. Additionally, the children also report that their father is a lot of fun and takes them to many events. He is an active parent, but does not engage in activities he defines as “women’s work,” such as cleaning, laundry, or cooking.

### GUARDIAN AD LITEM’S CONCLUSION

Based on the guardian ad litem’s investigation and analysis, the GAL determines that domestic abuse occurred in this case and determines that it is appropriate to ask the court to make a finding of domestic abuse under Wis. Stat. § 767.41(2)(d)1. and (5) (bm). However, Pedro successfully completes a certified batterers treatment program and the court finds it is in the best interest of the children for Pedro to be awarded joint custody under Wis. Stat. § 767.41(2)(d)1.a. and b.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

Scenario 3: Recommendations when there is no finding of domestic abuse, but there is evidence of coercive control.

### FACT PATTERN

Rachel and Mark have been married for 15 years. They have two children together, Jacob (11) and Maryann (8). Rachel has been feeling unhappy in her relationship with Mark, but is not sure why. She began to do individual therapy to work out her feelings. Through therapy, she discovered that Mark was excessively controlling. Her therapist was helping her “find herself” once again. When the family was invited for dinner by a couple who had been their friends for many years, Rachel put on a brown dress (her favorite color) and red lipstick. When they were about to leave, Mark told her that she needed to change her dress because brown made her look like a “fat cow.” Mark also told Rachel that she needed to clean up her lipstick because he was not going to be seen with a woman who looked like a “whore.” When Rachel refused to change her clothes or wipe her face clean, Mark sat down and said he was not going anywhere. Rachel took the children to their friends’ house for dinner. After returning from dinner that night, Rachel made the decision to separate and divorce from Mark.

At the temporary order hearing, the parties had a dispute regarding the custody and physical placement of the children. Rachel requested sole custody and primary placement based on the fact that Mark was controlling and would never agree on any custodial decisions. After hearing evidence from both parties (unrepresented), the court granted the parties joint custody on a temporary basis and ordered the parties from making any changes to the children’s school or main doctor. Rachel requested the children begin therapy and Mark objected. Rachel was successful in obtaining primary placement because Mark did not object at first, and only objected once he learned he would have to pay child support. The court held open the issue of therapy and ordered a family court study and the appointment of a GAL. You were appointed to represent the children’s best interest.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

The guardian ad litem conducts interviews with Mark, Rachel, and the kids and finds out the following information from each party.

Mark: Mark acts surprised about the divorce. He feels that he and Rachel have the perfect relationship. He acknowledges that, even though both of them work outside the home the same hours, Rachel is primarily responsible for taking care of the children, cleaning the house, and doing the laundry and cooking. He is responsible for managing the household finances, and all the bank accounts are in his name. At the time of the temporary order hearing, the court commissioner ordered him to give Rachel one half of the parties' savings. Mark contested that ruling from the court because he believes Rachel is a spendthrift who doesn't know how to handle money. At the court hearing, Mark also contested paying child support, stating that he couldn't get by if he had to pay Rachel support and that he preferred to buy the children the things they needed. The court entered a child support order, and Mark says he wants primary placement so that Rachel will have to pay him child support.

Rachel: Rachel reports that the relationship with Mark has been a struggle for a while. While in therapy, she learned that Mark has been controlling her for years. She recounts the story of the dinner. She tells you that Mark would never allow her to wear certain colors, wear makeup, or get her hair or nails done. Even though she works at an office and has to wear business attire, Mark would only give her \$500 per year to purchase clothes, shoes, and accessories for herself. Mark insisted on going to the store with her whenever she purchased clothing to make sure that she did not buy anything he did not like or exceed her budget. Mark also did all the Christmas shopping for the children to make sure they did not get gifts that were too expensive. After he began to control the finances, Rachel did not have any money to buy Mark Christmas gifts. He told Rachel that he would not buy her anything for Christmas because she never got him anything, clarifying it was her fault that she didn't get gifts. He did the same for other special holidays like birthdays, Valentine's Day, and Mother's Day.

Rachel also reports that the only social life they had was visiting friends who were couples. All of them were his high school and college friends and their wives. Mark



## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

alienated Rachel from all of her friends and would not agree to go visit them under any circumstance. They spent most holidays with Mark's family, even though Rachel's family lived closer.

Once Rachel feels more comfortable with the guardian ad litem, she reports that Mark is "mean" to her. He constantly calls her stupid and fat. She is never allowed to wear brown and he prefers her to wear black. She also has to wear very conservative clothing and can not wear makeup. When they have sexual relations, he tells her that she has to have sex with him because no other man would ever want a fat whore like her. Mark has said that Rachel is too stupid to have a better job and that's why he has to provide for the entire family. She didn't know how much he earned until the temporary order hearing and was surprised when she learned he makes less money than her.

Jacob: The oldest child seems pretty well-adjusted. However, during the course of the interview, he refers to his mother as "stupid" and "fat" several times during the conversation. When the guardian ad litem asks why he uses these terms for his mom, he replies, "That's what my dad calls her." When asked what he got for Christmas last year, he says, "My mom didn't make enough money for me to get a Christmas gift."

Maryann: Maryann is unwilling to discuss her parents' relationship, but does say she wants to stay with mom and not spend time with her dad.

### GUARDIAN AD LITEM'S CONCLUSION

Based on the guardian ad litem's investigation and analysis, the guardian ad litem concludes that domestic abuse occurred in this case because Rachel is subject to continuous controlling behavior. The guardian ad litem will ask the court to make a finding of domestic abuse under Wis. Stat. § 767.41(2)(d)1. and (5)(bm). If the court does not make that finding, then the guardian ad litem will argue that the parents are unable to cooperate in future decision making under Wis. Stat. § 767.41(2)(b)2.c. due to Mark's extremely controlling behavior.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

Scenario 4: Recommendations when there is evidence of a high likelihood of lethality. [See Practice Point - Identifying Serious and High-Risk Domestic Abuse: Lethality Risk Factors.]

### FACT PATTERN

John and Angela have been married for 15 years. They have two children, Rosie (14) and Thomas (13). Ten months ago, the police responded to their home because Thomas dialed 911 after seeing John strangling Angela. After taking statements from John, Angela, and the children, the police arrested John. Angela went to the hospital to get treatment for the injuries caused during the incident. Angela signed the 72-hour no contact provision when John was arrested. Before that no contact order expired, she filed a petition for a temporary restraining order, and the judge granted a 4-year injunction.

During the investigation into the crime, it came to light that John had not only strangled Angela, but also had bashed her head against the wall with so much force that he had put her head through the drywall in their living room. John was charged criminally with one count of felony battery, one count of felony strangulation/suffocation, and one count of misdemeanor disorderly conduct. As a condition of his criminal bail, he was to have no contact with Angela or the two children.

Three weeks after John was charged, he had a few drinks while at the bar with one of his friends. He became angry and told his friend he was going to “scare” Angela. Against his friend’s advice, John drove over to the house and rang the doorbell. Angela saw him from the bedroom window and immediately called the police. When Angela did not answer the door, John began to pound on it, yelling insults at Angela and telling her that he would kill her before he’d let her have the children. The police arrived, and he was arrested and charged with felony bail jumping and misdemeanor disorderly conduct.

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

After that incident, Angela filed for divorce. During the temporary order hearing, a guardian ad litem was appointed.

The guardian ad litem conducts interviews with John, Angela, and the kids and learns the following information from each party.

John: John is cooperative and friendly during the interviews, but downplays his actions. When asked about the events leading to the two criminal cases, John explains that he was stressed and, during the first incident, Angela was nagging him about the kids and his drinking. John insists that he is a good husband, father, and provider for his family and that they should be more grateful for everything he does for them.

Angela: Angela reports that John has been physically and emotionally abusive for years. It started when she was pregnant with their first child. He insisted that they move across the country for his job, away from her family and friends. He had always been a little “on the jealous side,” but when she got pregnant, he became very physically abusive. On two occasions, when he was really upset and threatening, he told her to not forget that he could get a gun from his friend at any time.

After having her first child, John didn’t allow her to work outside of the home, saying that it was her job to take care of him and the kids. About a year ago, Angela became involved in an organization through her kids’ school that had weekly meetings. Even though he “let” her go, John still constantly questioned whether she was actually going to the school and accused her of lying and cheating on him. On several occasions, she caught him following her to and from the school in his car.

After a couple interviews, Angela also confides that John has frequently forced her to have sexual relations when she didn’t want to. If she resisted, he would become very angry and forceful, reminding her that “it’s her duty” and that “he can have her anytime he wants.”

Rosie and Thomas: Both children report that their dad can be nice and fun at times,

## STEP FOUR: MAKE INFORMED RECOMMENDATIONS THAT ACCOUNT FOR DOMESTIC ABUSE

but say they are very afraid of him when he drinks or gets angry. Rosie admits that she has seen her dad hit and beat up her mom several times. Thomas reports that there have been two times when he's tried to intervene when John was abusing their mom by jumping on John's back. John threw him off each time and demanded Thomas go to his room. During the strangulation incident, Rosie said that she pleaded with her father to stop hurting their mom and feared that their mom was dead because her body went limp during the strangulation.

Both children also reported that the night John came pounding on the door and threatened to kill them all, they were crying because they believed they would all die. They also believed the police could not help them because even after calling them the last time, John still appears at their door with threats of harm.

### GUARDIAN AD LITEM'S CONCLUSION

Based on the guardian ad litem's investigation and analysis, the guardian ad litem concludes not only that there is domestic violence, but that there are extreme lethal risk factors in this case, including stalking, strangulation, and forced sex. The guardian ad litem asks the court to make a finding of domestic abuse under Wis. Stat. § 767.41(2)(d)1. and (5)(bm).