

# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide



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This document was developed under grant number SJI-03-N-103 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position of the State Justice Institute.



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Special thanks to Martha Steketee, Senior Court Research Associate, National Center for State Courts, for her contributions to the evaluation of this project.



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While there are rules of evidence to direct judges in determining who qualifies as an expert, practical resources are lacking to help judges critically review the expert testimony of child custody evaluators, determine whether the evaluator's testing methods were accurate and reliable, or tease out the biases of individual clinicians, particularly when domestic violence is involved. This publication is designed to be a practical tool for judges on how to order, interpret, and act upon child custody evaluations and includes bench cards and supplementary materials.

### Acknowledgements

This project would not have been possible without the generous support of the State Justice Institute and its continuing leadership in seeking to improve the quality of justice in state courts and the outcomes for families in crisis. The Family Violence Department of the National Council of Juvenile and Family Court Judges (NCJFCJ) is indebted to all of the people who helped make this publication possible. Special thanks go to the authors, Clare Dalton, Leslie Drozd and Judge Francis Wong, for their dedication; to the Advisory Committee members for their guidance; to our consultants, Shelia Hankins and Judge William Jones, for their enthusiasm and expertise; to Larry Winkler for his graphic design; to the judges of the Child Victims Act Model Courts Project and other professionals for serving as reviewers of the document, and to the staff of the NCJFCJ Permanency Planning for Children Department for its contributions to this project.

The Family Violence Department would also like to thank the U.S. Department of Health and Human Services (HHS) for helping to support this important endeavor. Much of the groundwork for this tool was done through the Resource Center on Domestic Violence: Child Protection and Custody, a project of NCJFCJ and funded by HHS.



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# Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge’s Guide

## Introduction

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It is more likely than not, according to current research,<sup>1</sup> that judges presiding over contested custody cases will have to grapple with two related questions:

- whether the parents’ relationship has been physically violent or otherwise abusive, and, if so,
- how that violence or abuse should affect the court’s decisions about ongoing custody and visitation arrangements.

In at least some cases, you probably use formal custody evaluations to assist you in answering those two questions: to frame the issues, gather the relevant evidence, analyze and synthesize it, and offer it to you in a format that will facilitate your decision making. The primary function of this tool is to help you make more effective use of those custody evaluations—not just in cases in which there is a record of domestic violence, but also in cases in which domestic violence is alleged, or where the presence of other “red flags” raises a suspicion of domestic violence.

The quality of custody evaluations is of critical importance. Yet, not all the experts on whom courts rely have the training and experience needed to collect adequately and evaluate competently the evidence, or offer the recommendations, that will provide a solid basis for deciding one of these complex cases.<sup>2</sup>

This tool will help you:

- determine whether the case is one that requires an evaluation;
- determine what the content of the evaluation should be;
- select the right person to conduct the evaluation;
- tailor the evaluation to your needs; and
- know, at the end, whether or to what extent you can rely on the evaluator’s report.

By becoming a more demanding consumer, you will also assist the evaluators on whom you rely to increase their expertise in this difficult work.

If you find yourself in the not uncommon situation that neither the parties nor the court has the resources to pay for a thorough evaluation, or indeed for any evaluation, the tool may still be of assistance. This is a topic covered in the supplementary material to Card I.

## Organization

In the bench cards provided here, as well as in these supplementary materials, we guide you chronologically through the process, asking with you:

- I. Is this a case that would benefit from an evaluation that includes a domestic violence focus?

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1 See Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57 (2003).

2 For purposes of this Guide, “evaluation” refers only to the work product of those professionals qualified to evaluate the data and form an opinion about the parties in a contested custody case based upon their training and experience.

## Why a Tool with a Domestic Violence Focus?



*The hand symbol is used throughout this tool to bring readers’ attention to issue areas related to safety for victims of domestic violence and their children.*



- II. What should the scope of the evaluation be, and whom should I ask to conduct it?
- III. How should the final product itself be evaluated? How should I use it?

The cards and the supplemental text use an identical format, allowing you to refer easily from one to the other. The text expands upon the cards, where additional explanatory material is offered. At the end of these materials, you will also find a list of additional resources, many of them available on the NCJFCJ website, at [www.ncjfcj.org](http://www.ncjfcj.org).

The remainder of this introduction offers a context for the tool, by defining domestic violence and highlighting critical aspects of the legal and ethical framework governing any case in which domestic violence is known to be, or may be, an issue.

## How to Define Domestic Violence

Domestic violence is a complex and confusing phenomenon. For purposes of this tool, as will become clear, we are defining it as a dynamic between parents whereby one partner seeks to control the other through the use of abusive patterns of behavior that operate at a variety of levels—emotional, psychological, and physical. The presence of this abusive dynamic will always be relevant to the question of what custody or visitation arrangement will serve the best interests of any children shared by the adult parties.

In some cases, there will be a public record of violence or abuse (police reports; 911 calls; criminal, civil, or protective order litigation) and private records (from medical, mental health, substance abuse, shelter, and other service providers); in many others there will be explicit allegations, and often counter-allegations; in still others there will be indications of disturbance in the family that may or may not, upon further investigation, be related to violence or abuse. We have called these the “red flag” issues that should prompt further inquiry into the presence or absence of domestic violence.

The untrained eye and ear do not reliably detect the abusive dynamics in relationships where violence is hidden, or where most of the abuse is not physical in nature. Abusive partners can often appear charming, “in charge,” and sincere in their commitment to their families even when their behavior, if we knew it, would tell another story; partners who have suffered abuse can be unreliable witnesses, and appear unappealing, disorganized or emotionally unstable. The parties often hold radically different perceptions of their relationships and of one another; and abusers are often motivated to deny or minimize their abusive behavior. It is particularly important in these cases to test what the parties say against other available evidence.

## The Legal Context

In cases involving known or suspected domestic violence, as in all contested custody cases, the court’s fundamental task is to determine how each child has been affected by what has gone on inside the family, the quality of the child’s relationship with each parent, each parent’s capacity to meet the child’s needs, and how best to assure the child’s physical, psychological and emotional wellbeing going forward. The evaluator can offer critical assistance to the judge in gathering the information needed to answer these questions.

Even when they are not themselves physically or sexually abused, when there is violence at home, children are aware of it and affected by it, although parents would prefer to think, and may say, that they are not. 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>3</sup> even within the same home. We are using the term “exposure” to signal that children are affected not only when they are

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<sup>3</sup> PETER G. JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* 21 (2003). See also, Jeffrey L. Edleson, *Problems Associated with Children’s Witnessing of Domestic Violence* (April 1997, revised April 1999) at <http://vaw.umn.edu/documents/vawnet/witness/witness.pdf>.



present at the violent incident, but also when they hear it, or see the aftermath—a parent injured or in distress, furniture knocked over, things broken, blood on the wall. They are affected, too, when they are forced to live in an atmosphere of threat and fear created by violence. And they are affected, as the research is increasingly demonstrating, by a parent’s use of abusive behaviors that stop short of physical violence, whether those behaviors are directed primarily towards a partner, or characterize the abusive parent’s relationships with partner and children alike.

This is why judges are now almost universally under a statutory obligation to consider domestic violence as a factor when determining the best interests of children. It is why many judges are under a statutory obligation to presume that a perpetrator of domestic violence is not someone who should be given either joint or sole physical or legal custody of a child. The definitions of “domestic violence” underlying these specific statutory obligations may be narrower, and more focused on physical violence, than the broader definition we have proposed. But because domestic violence in the broader sense hurts children, it is incumbent on every judge in every custody or visitation decision based on the best interests of a child, regardless of particular statutory obligations, to have an accurate picture of any violence or abuse in the parents’ relationship, and to consider its implications for the child after the parents separate.

## The Ethical Context: Safety First<sup>4</sup>

When you make a determination or approve a parental agreement about custody and visitation, you are trying to create a climate in which children can flourish, physically and emotionally. The safety of the parties and their children is a paramount consideration. Children do not flourish if they are not, or do not perceive themselves to be safe, or if they perceive their parents to be at risk. Parents who are fearful for their own safety may have a difficult time providing safety, security, and effective parenting for their children.

Cases involving domestic violence can create acute risks, for children and for parents; and we cannot determine with any certainty, especially at the outset, exactly which cases, or which circumstances, contain or create those risks. Contrary to earlier thinking, in many cases separation increases, rather than reduces, the risks of harm to a vulnerable parent or to children. Lethal violence between partners occurs more often during and after separation than when the couple is still together, and children are often caught up in that post-separation violence.<sup>5</sup>

It may be helpful to think about three contexts in which concerns about safety can be addressed:

- At the outset of the case, if an existing record of violence prompts immediate concern about the safety of one or both of the parties or their children. This is addressed on Card I.
- During the litigation and evaluation process, which can (a) create its own risks, and (b) uncover information that triggers immediate concern about the safety of the parties or their children. This is addressed on Cards II and IIA.
- In framing final custody and visitation orders, which must ensure the ongoing safety of the parties and their children. This is addressed on Card III.

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<sup>4</sup> When we speak of safety, we are including both physical and emotional safety.

<sup>5</sup> JAFFE ET AL., *supra* note 3, at 8. See also Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 AM. J. PUB. HEALTH 1089-97 (2003), and Walter S. DeKeseredy et al., *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAV. 675 (2004), available at <http://www.ncdsv.org/images/Separationdivorcesexualassault.pdf>.



# Ordering an Evaluation: When Is Domestic Violence Experience Necessary?

## What If There Are No Resources for an Evaluation?

As Card I suggests, this tool offers you a checklist of information that will be important to your decision making in any case in which domestic violence is known, alleged, or suspected. If neither the parties nor the court has the resources for an evaluation, it will still be possible for you to request that information from the parties' attorneys, from the parties themselves if they are unrepresented, and sometimes directly from the source. Child abuse/CPS reports, criminal records, and records of court activity may all fall into the latter category.

The tool may also help you determine which avenues of inquiry are the most crucial, and how to maximize the productivity of an inquiry, so that if you have resources for a limited evaluation, you can allocate those resources effectively. If, for example, the case involves young children, you might decide to ask a mental health professional with expertise in child development and domestic violence to observe the children with each parent and alone, and evaluate the children's functioning and their relationships with each parent. This limited evaluation would add significantly to the information the parents provide.

If you order a limited inquiry, it will be important to ensure that the evaluator's conclusions or recommendations do not presume more knowledge than the limited inquiry has in fact produced. It is critical in such cases for you to frame the inquiry carefully, and to use the court's authority to make relevant collateral resources available to the evaluator. This may be especially crucial in cases where the parties are unrepresented, and have a limited capacity to address effectively any negative conclusions drawn by the evaluator. Exercising critical judgment in your reading of an evaluator's report is a topic addressed extensively on Card III.

## If Resources Are Available, Should I Order an Evaluation?

### The Clearest Cases

In the most egregious cases, it may not even be necessary to order an evaluation in order to decide that a child's best interests would not be served by allowing contact with a violent and abusive parent. However, even a parent who is not an appropriate candidate for custody may desire visitation; and a careful evaluation may indeed be necessary to determine (a) the motivation for that request, (b) what impact ongoing contact will have on the children, and (c) whether and how visitation can be structured to assure the safety of the vulnerable parent and the children.

There will be other cases involving a limited record of domestic violence in which one of the parties will contest the legitimacy of that record, or its relevance to custody and visitation determinations. And there will be cases involving allegations, and perhaps counter-allegations, of domestic violence in which there are no public records to serve as substantiation. These cases will always benefit from careful investigation and evaluation.

### When Victims Have a History of Physical Violence

A history of physical violence in the parents' relationship—and especially a history of police or criminal justice system involvement—almost always warrants an evaluation, if resources are available. In such cases, it is crucial that the history be subject to careful review and to supplementation, as appropriate. In particular, concerns are frequently raised that neither the standards governing the issuance of civil restraining/protection orders, nor the standards used by prosecutors in criminal domestic

assault cases, sufficiently distinguish between the primary perpetrator of violence in an abusive relationship, and a partner who may be using violence defensively.

In the civil restraining/protection order and criminal contexts, the focus is on specific acts of violence. The family court system has both the luxury and the obligation to look more broadly at the dynamics within the family, and to ask whether one partner is abusing the other as a means of power and control and what the implications of that abuse are for each member of the family. A careful examination may reveal that although *both* parents have a record of violence, only one of the parents poses any ongoing risk to the children or the other parent, or that the parent with a record of violence is actually the victimized partner within an abusive relationship, rather than the abuser.

### The Red Flag Cases

Perhaps the most difficult and important category is the “red flag” case. This is the case in which no record or allegation of domestic violence surfaces when the parties first come to court, and yet the children may have been exposed to domestic violence, and may be at risk in the future unless you order an evaluation to explore that history and factor your findings into your best-interests analysis.

- Substance abuse, while it does not cause or excuse domestic violence, often co-occurs with it, and can certainly precipitate particular incidents. Substance abuse on the part of an abused partner can be a form of self-medication.
- Mental illness can produce violence, but it can also be the product of exposure to violence or abuse.
- Current research suggests that between 30 and 60 percent of households (depending on the study) in which there is child abuse are also households in which one partner is abusing the other.<sup>6</sup>
- Children are affected by parental conflict and separation, as well as by the kinds of disruption in their lives those actions engender. However, when children are exhibiting symptoms consistent with post traumatic stress disorder (which include those listed on Card I: sleep disturbances, bedwetting, excessive separation anxiety, hyperactivity, aggression or other behavioral problems, depression or anxiety, or regressive behaviors), it is important to test whether those symptoms are the consequence of abuse or exposure to parental violence.
- Children who appear “alienated” from a parent may have legitimate and substantial reasons for being angry, distrustful, or fearful.<sup>7</sup> That possibility should be explored, before one parent is blamed for inducing that alienation. How to understand issues of estrangement, protection, and alienation in cases involving domestic violence is treated more fully in the supplementary materials to Card III. The frequency with which a perpetrator of domestic violence accuses his or her partner of alienating the children from him or her is an indicator of the importance of testing for domestic violence in any case in which that allegation is made.
- If parents are entangled in an abusive relationship, they may both be inattentive to the children’s needs. The perpetrator of abuse may be focused on his or her own needs, rather than the needs of others in the family. The parent vulnerable to abuse may be focused on meeting the perpetrator’s demands in order to contain the violence, or may be too physically or emotionally depleted to meet the children’s needs appropriately.
- The lop-sided agreement in an uncontested case, particularly when both parties, or the party who seems to be giving most away, are unrepresented, raises the concern that the “losing” party is incapable of protecting his or her own interests, which may be because of patterns of violent or coercive controlling behavior in the relationship.

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<sup>6</sup> See, e.g., National Clearinghouse on Child Abuse & Neglect Information, *In Harm’s Way: Domestic Violence and Child Maltreatment 1* (1999).

<sup>7</sup> See Leslie M. Drozd & Nancy W. Olesen, *It is Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1 J. CHILD CUSTODY (Nov. 2004).



## Other Cases

One party may be requesting permission to relocate with the children, and the other may be resisting that relocation, for a number of reasons, more or less persuasive. In at least some cases, the desire to move is prompted by a party's desire to protect him- or herself, and the children, from ongoing abuse or harassment. If there is any hint that the case may involve domestic violence, or the case is one in which a clear motivation for the relocation appears to be missing, an evaluator asked to address the relocation issue would be remiss if he or she did not explore the possibility of domestic violence as an underlying reason for the request.

## Is There an Additional Need for an Emergency/ Interim Evaluation?

If a case seems dangerous from the outset, and IF the situation has not already been stabilized, you may need to take immediate action.

In framing temporary orders, you may want to draw on an interim safety assessment performed by a qualified expert—in other words, an interim evaluation with a limited and specific focus on safety. The expert asked to conduct this type of evaluation must be someone with specific expertise and experience in domestic violence and risk assessment.

Research into domestic violence homicides underscores the fact that our ability to measure risk is still quite imperfect. This in itself suggests that caution is advisable. However, the research does provide some valuable guidance, and suggests the following areas of inquiry as most important for an emergency evaluation:

- the abusive partner's employment status (unemployment is the most significant socio-demographic risk factor);
- whether the abusive partner has access to a gun, has made previous threats with a weapon, or has previously threatened to kill;
- whether the abusive partner uses drugs (drug use, but not alcohol use, appears to increase the risk);
- the level of control exercised by the abusive partner: the more controlling a partner has been in the relationship, the greater the risk created by a separation;
- whether there is a child in the home who is not the abusive partner's biological child;
- whether the abused partner has a new relationship; and/or
- whether there have been incidents of violence or threatening behavior since the separation.<sup>8</sup>





## What Do I Need to Know, from Whom, and How Do I Ask?

When you order a custody evaluation, everyone affected by that order—the parties to the case, their children, the expert who is to conduct the inquiry, and you as the ultimate recipient of the expert’s report—is best served when you articulate clearly what you need to know, when there is a match between the scope of the inquiry and the qualifications of the person assigned to conduct it, and when the process to be followed is well defined and managed.

### Frame the Inquiry

#### Investigation, Evaluation, Recommendation

We sweep under the general rubric of “custody evaluation” many very different kinds of information gathering. We ask evaluators to process the information they collect, interpret it and draw conclusions from it, without always stopping to consider whether the particular assessment requires specialized expertise. And we often ask evaluators for recommendations, while appreciating that making custody and visitation determinations is a judicial function, and not one that can be delegated. The guidelines on the cards accompanying these materials offer assistance in negotiating this treacherous terrain.

All custody evaluators investigate. Their core function is to gather information and report that information to the judge. However, different skill sets will be useful in different investigatory contexts. A lawyer’s familiarity with the legal process may ease his or her access to police, court or child abuse/CPS records, and the task of compiling and reporting on the information contained in them. Both lawyers and mental health professionals are likely to be competent in interviewing adults and older children, and synthesizing and reporting what is said. Obtaining information from younger children, and understanding the limits of its reliability, is a task which a mental health clinician with expertise in child development will be better qualified to perform than someone without that expertise—even though the task is investigatory, it requires specialized skills.

The line between “investigation” and “evaluation” (in its technical sense) is clearest when the evaluative task requires specific mental health expertise. Suppose a child, or a parent talking about a child, reports that the child is suffering from nightmares, has had trouble concentrating on school work (reflected in poor grades), complains of frequent stomach pain, and has been in trouble for aggressive behavior in the playground. Any competent investigator could collect and report that information, but only a mental health professional would be qualified to conclude from that information that the child is, or might be, suffering from post-traumatic stress disorder. Any diagnosis of a party’s or a child’s mental health status, in other words, is an evaluation requiring particular expertise.

By the same token, it would not be inappropriate for either an investigator or an evaluator to report that a party seemed listless, or hostile, in the course of an interview, or that a child was “restless.” Those are “lay” opinions within the competence of any responsible professional. It would, however, be inappropriate for someone without mental health expertise to say that a party appeared clinically depressed, or to be suffering from borderline personality disorder. Those opinions are conclusions that must be reserved for experts.

What “lay” and “technical” opinions have in common, however, is that they should both be fully supported in the evaluator’s report by an account of the facts on which that opinion was based. The facts provide you, as the judge, with a basis to review such opinion, to determine whether the facts support it, and to confirm that the evaluator had the necessary expertise to make it.

## Recommendations to the Court

Many judges and courts feel that even asking an evaluator to offer recommendations at the conclusion of his or her report is an inappropriate delegation of judicial authority. Others fear that it will encourage too heavy a reliance on the evaluator, and discourage judges from their own careful assessment of how the best interests of the child can be served. Still others require evaluators to offer recommendations, and feel that a report's utility is significantly reduced if it does not include them. Given the sharp division of opinion on this issue, we offer suggestions for how a judge can review and work with an evaluator's recommendations, without inappropriately ceding decision-making authority.

## Choose the Expert

Family courts use a wide variety of mechanisms to identify the pool of experts available for appointment as custody evaluators and select an evaluator in each case. Your practice will therefore be dependent on the mechanisms available to you; you will have more or less flexibility depending on how those mechanisms are structured. Within those constraints, as well as the constraints imposed by limited resources, your goal will be to find a person who has the qualifications best suited to the particular inquiry. In some cases, that expertise might lie in an area relevant to cultural context or a specialty such as substance abuse.

### First and Foremost, Training and Experience in Domestic Violence

Domestic violence is its own specialty. Qualification as an expert in the mental health field does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are now requiring custody evaluators to take a minimum amount of training in domestic violence, that "basic training" by itself is unlikely to qualify an evaluator as an expert, or even necessarily competent, in such cases.

Ideally, your jurisdiction will already have a way of designating evaluators who have particular competence in domestic violence. Where that is not the case, you might test the evaluator's level of experience and expertise, despite the difficulties inherent in any such inquiry, by asking:

- whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization;
- what courses or training (over what period of time) the evaluator has taken focused on domestic violence;
- the number of cases involving domestic violence in which the evaluator has been appointed; and
- the number of cases in which the evaluator has been qualified as an expert in domestic violence.

## Be Specific about the Information You Need

- **The exposure of children:** As explained in the introductory materials, exposure includes more than directly witnessing violence, because children are affected by what they hear as well as by what they see, by the aftermath of violence, and by the atmosphere of fear and threat that characterizes an abusive household.



### Short- and long-term safety concerns for children and/or parents:

The evaluator can glean this information from what has happened in the past, and by talking with the parties and, as appropriate, the children about explicit threats that have been made and threatening behaviors. It is also important to know what the

parties and children fear, both because they may be in the best position to predict what will happen, and because even if their fears are exaggerated, their states of mind are relevant to the inquiry.

- **Impact of abusive behaviors on each parent, each child, and each parent/child relationship:** A list of common symptoms of trauma in children is identified in the introduction to these materials. See page 5, Red Flag Cases. What has not yet been said is that these symptoms can interfere with cognitive and emotional development in children, affect their relationships with adults and peers, impact their school performance, and negatively affect their physical health. The impact of abuse on children's relationships with their abusive and their vulnerable parent is explored further below in the context of the discussion of parental alienation. The most crucial point here is that reports based solely on interviewing and/or observing the parties and their children will almost never produce an adequate evaluation in a case known or suspected to involve domestic violence.

## Articulate Expected Sources of Information

Since abusive partners routinely deny and minimize their use of violence and other controlling behaviors, even to themselves, they may present as sincere and caring partners and parents. Their expressed concerns about the parenting capacity of their abused partners may be consistent with a longstanding habit of relentless criticism.<sup>9</sup> Alternatively, the vulnerable partner may indeed present as a less than competent parent, but his or her deficiencies may be because of the emotional and physical toll the abuse has taken, and may to that extent be temporary in nature.<sup>10</sup> Children may, in self-protection, have identified with their abusive parent rather than the parent who appears unable to offer protection, and express their anger at being unprotected in the form of rejection or blame.<sup>11</sup>

In this confusing environment, an evaluation that reaches conclusions based on the "he said/she said" of conflicting accounts without recourse to other corroborating sources must be regarded as inherently unreliable.

Helpful collateral sources may include:

- other family members, friends, neighbors, or community members 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;
- professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy or counselors;
- professionals (including shelter advocates, child welfare workers, or attorneys) who have become involved with the family because of reported incidents of, or concerns about, domestic violence or the safety or well-being of the children involved.

Pertinent records may include:

- police reports;
- child abuse/child protection reports;
- court files in the present case and any relevant prior civil or criminal cases involving either party;
- medical, mental health, and dental records; and
- school records.

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<sup>9</sup> See LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002).

<sup>10</sup> See Cris M. Sullivan et al., *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women Are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51-71 (2000).

<sup>11</sup> Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11, 20 (2003).

In all cases, the relevant questions are:

- whether there have been incidents of physical violence or other forms of abuse in a parental relationship,
- what impact that violence or abuse has had on the parties and their parenting, and
- what impact that violence or abuse has had on the children.

The important questions raised by requests for parties to provide the evaluator with access to privileged information is dealt with below, in the context of the obligations of the parties. Here we discuss two controversial issues: the value of psychological testing for custody and visitation determinations, and allegations of parental alienation.

### The Role of Psychological Testing

On occasion, you may determine, or the expert may decide, that psychological testing would provide a helpful supplement to the information obtained through interviews and examination of the written record. This is an area to approach with caution.<sup>12</sup>

The relevant questions to ask are the following:

- What is the test being used to measure?
- How is the test relevant to issues of custody and visitation?
- Is the test valid for the purposes for which it is being used?
- Is the test recognized and accepted by experts in the field?
- What are the qualifications necessary to use the instrument?
- Does the expert have those qualifications?

In determining the relevance and reliability of psychological testing, consider the following:

- The more tailored tests, developed in the past decade to address the questions most relevant in the custody context, such as the Bricklin Perceptual Scales (BPS), Perception of Relationships Test (PORT), Ackerman-Schoendorf Scales for Parent Evaluation of Custody Test (ASPECT) and Parent Awareness Skills Survey (PASS) tests, have not been evaluated with enough rigor to establish their validity or reliability. These tests do not provide answers. At best, they raise hypotheses in the mind of the evaluator to be validated or invalidated in subsequent explorations.
- The standard psychological tests measuring personality, psychopathology, intelligence or achievement, including the Minnesota Multiphasic Personality Inventory (MMPI-2), Millon Clinical Multiaxial Inventory (MCMI-III), Personality Assessment Inventory (PAI), Rorschach Inkblot Test, Children's Apperception Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence Scale (WAIS-III), and Wide Range Achievement Test (WRAT-3), do not directly address the psycho-legal issues relevant to most child custody cases—issues about parents' relationships with children, or parents' child-rearing attitudes and capacities. In a particular case, a standard test may offer information that is related to parent-child interactions, parent functioning or child functioning; but that information should be included in the evaluation *only if* the examiner makes clear the connection between the test results and the issue that is legally relevant in the custody context, and *only if* the test results are backed up by and integrated with other data about real-life behavior.
- Some of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology. While there may be cases in which trauma induced by abuse has a negative impact on parenting in the short term, it is critically important not to attach a damaging label prematurely to a parent whose functioning may improve dramatically once she or he is safe, and the acute stress has been alleviated and the trauma treated.

- Specific tests to assess for trauma [Trauma Symptom Inventory (TSI), Draw-a-Person Test (DAP) and others] may be helpful in determining treatment goals and facilitating the healing process of the victim parent and children, but they are not appropriate to determine whether traumatic incident(s) occurred.
- No single psychological test can determine whether or not a person has been an abuser or abused. There is no single profile of a victim or a perpetrator of abuse.

### Parental Alienation and the *Daubert* Standard: on Syndromes and Behaviors

In *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court ruled that even expert testimony based in the “soft sciences” must meet the standard set in the *Daubert*<sup>13</sup> case. *Daubert*, in which the Court re-examined the standard it had earlier articulated in the *Frye*<sup>14</sup> case, requires application of a multi-factor test, including peer review, publication, testability, rate of error, and general acceptance.

Richard Gardner’s theory positing the existence of “parental alienation syndrome” or “PAS” has been discredited by the scientific community.<sup>15</sup> Testimony that a party to a custody case suffers from the syndrome should therefore be ruled inadmissible both under the standard established in *Daubert* and the stricter *Frye* standard.

Children in contested custody cases may indeed express fear of, concern about, distaste for, or anger with one parent. And those feelings may sometimes have been fostered or encouraged by alienating behaviors on the part of the other parent. On the other hand, there are a variety of competing explanations that need to be explored—including the very real possibility that the children are responding to concerns based in their own experience with the parent from whom they feel estranged.

Cases known or suspected to involve domestic violence pose particular challenges, because:

- abusive parents commonly blame their partners for turning their children against them, and rarely take responsibility for the impact of their own behavior on the children;<sup>16</sup>
- it is often legitimate for the partner of an abusive parent to try to protect the children from exposure to abuse, or to try to secure his or her own safety from the abusive partner by limiting that partner’s contact with the children. It may be hard to distinguish between appropriately protective behavior and behavior which is well-intentioned but excessive and ultimately counter-productive;<sup>17</sup>
- the undermining strategies employed by abusive partners commonly include invalidating their partners’ parental authority and sabotaging their relationships with the children;<sup>18</sup> and
- children in an abusive household may feel safer identifying and allying with the abusive partner than with the one who suffers abuse.<sup>19</sup>

Custody evaluators should be advised to listen carefully to children’s concerns about each of their parents, and follow up with a careful investigation as to whether those concerns are grounded in fact, what role each parent has played in shaping the children’s perceptions of the other parent, and each parent’s apparent motivation. This careful fact-based inquiry, unlike applying the PAS label, will yield admissible and more accurate and valuable testimony.

13 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

14 *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

15 According to the American Psychological Association, “... there are no data to support the phenomenon called parental alienation syndrome ...” AM. PSYCHOL. ASSOC., *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY* at 40 (1996).

16 See BANCROFT & SILVERMAN, *supra* note 9, at 29-53.

17 See Drozd & Olesen, *supra* note 7.

18 See BANCROFT & SILVERMAN, *supra* note 9, at 57-64.

19 See Dalton et al., *supra* note 11.



## Communicate Expectations about Information-Gathering Procedures

Caution: In cases where violence is not an issue, an evaluator may, for convenience or because it will yield useful information:

- conduct a joint interview with the parties;
- ask to observe children interacting with both parents together;
- create situations where one parent “overlaps” the other, such as meeting in a waiting room for a scheduled interview, or bringing children to or collecting them from an appointment;
- create situations where parents are required to coordinate with one another to make children available to the evaluator; and
- share information obtained from one party, or from children, with the other party—in situations where the source of the information is easy to identify—in order to seek corroboration or refutation.

These practices, which can be useful, routine and harmless in many cases, are *highly problematic, and potentially dangerous or traumatic*, in cases of known or suspected domestic violence. They also seriously undermine the integrity of the information obtained, because adults or children who have experienced or been exposed to violence are unlikely to talk openly about it if they are fearful that the perpetrator will have opportunities for retaliation.

With care, the evaluator will be able to shield the parties from any contact or unsafe communication with one another during the evaluation process. In many cases, the evaluator will also be able to seek corroboration of negative information disclosed by one party about the other without disclosing the source of that information.

Alternative available corroboration strategies include:

- seeking corroboration from third party sources, where available; and
- inviting the other party to give an open-ended account of a particular incident and asking follow up questions, without revealing details shared by the first party.



If it becomes clear that information must be disclosed that may put one of the parties at risk, that party should be alerted to the disclosure in advance, so that he or she may take whatever safety precautions are warranted and available.

Special considerations apply to interviews of children and the use of information obtained from children. First, interview strategies should be non-suggestive and appropriate to the age and developmental stage of the child. Second, the evaluator must build into his or her report the understanding 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. From a safety perspective, it is also critical that the evaluator not attribute direct quotes to children to reduce the risk that a parent will use the children’s words against them or against the other parent.

An evaluator who does not respect the safety-driven procedures listed on the card accompanying these materials is not qualified to conduct an evaluation in a domestic violence case. An evaluation that has been conducted without following those procedures will not yield reliable information or recommendations.

## Frame the Process

In the sample order referenced in these materials, we propose the specific inclusion of:

- the timeline you expect the evaluator and the parties or their attorneys to comply with; and
- the obligations of the parties, their attorneys, and the evaluator with respect to the completion of the evaluation.

## Define the Obligations of the Participants

### The Obligations of the Parties

By stressing the need for the parties to assist the evaluator in accessing relevant information, we do not mean to discount the sensitivity of the decision whether or not to waive a privilege attaching to information that might be obtained from a collateral source, or might be gleaned from a written record. It is the responsibility of the parties' attorneys, if they are represented, and of the evaluator, particularly if they are not represented, to ensure that the parties fully understand the implications of both choosing and declining to waive a privilege and make an informed decision. It may also be useful to issue the reminder that a parent may not waive the privilege attaching to a child's relationship with a therapist; only the child's own representative can take that step.

### The Obligations of the Evaluator

The question of when, if ever, it would be appropriate for a mental health professional to enter a therapeutic, counseling, or other professional relationship with a party or a child, subsequent to providing a custody evaluation in a case involving those individuals, is a vexed one. Because no custody case is truly "closed," at least until the children reach the age of majority, and because the evaluator may be asked to return to court to assist in subsequent proceedings, the safest course of action is for the evaluator to avoid any subsequent professional contact, along with the conflict of interest it inevitably creates. If, in a small community, that guideline is too restrictive, then it may be appropriate to adopt a less restrictive but clear "waiting period" to discourage the creation of conflict at least during the period during which relitigation is most likely.

### Court Initiative

We also recommend that the court take the initiative in ordering, at the time of appointment of the evaluator, any records available to the court, such as criminal records, court activity records and child abuse/CPS records. All these steps will facilitate the evaluation process, and prevent the delays that follow when the evaluator and/or the parties are forced to return to court to clarify the terms of the appointment.







# Reading the Report

## Safety First

Consistent with the emphasis on safety throughout these materials, we suggest that the judge, on receipt of the evaluator's report, make an immediate determination whether the report identifies risks that should be promptly addressed, or whether disclosure of the report to the parties may create risks that should be promptly guarded against. The responses suggested on Card III are meant to be illustrative only; there may be additional steps available to you depending on the rules governing your court.

## Once Admitted, How Do I Make More Effective Use of the Report?

The checklist provided on Card III offers a recap of much of the material included on Cards I and II, offering you a final opportunity to assess how well the evaluation has been performed, and the extent to which you can feel comfortable relying on its conclusions and recommendations.


One common flaw in reports prepared by custody evaluators that deserves special mention is “confirmatory bias.” It appears when the evaluator develops a hypothesis—forms an opinion about some issue in the case—early in his or her process, finds data to support it, confirms the hypothesis, and then stops testing it against new or different data that might undermine the hypothesis or effect a change of mind.

As the judge, you can test for the presence of this “confirmatory bias” by:

- looking at the extent to which the evaluator has made use of collateral sources and available documentation to corroborate important findings of fact on which his or her conclusions and recommendations are based;
- looking at whether the evaluator has made available to you all the relevant data gleaned in the course of the inquiry: both the data that supports the evaluator's conclusions and recommendations, and the data that might have led to competing conclusions or recommendations. If the report seems suspiciously one-sided, you might conclude that the evaluator has left out data that did not support his or her conclusions and recommendations; and
- looking at whether the evaluator has identified areas where he or she has been unable to obtain information or to reconcile or choose between competing accounts.

## How Do I Assess the Recommendations?

A final test of the evaluator's expertise is whether his or her recommendations take into account the need to protect the physical and emotional safety of a vulnerable parent and children involved in the case, and whether the recommendations make full use of the range of alternatives available in such cases by:

-  postponing visitation until the vulnerable parent and the children have had an opportunity to establish their safety and heal from any trauma associated with violence or abuse;
- postponing visitation until the violent or abusive parent has successfully completed appropriate treatment (which should always include treatment specifically targeting domestic violence, rather than more generic and often inappropriate and inadequate treatment for anger management, as well as treatment for substance abuse and mental health issues where those have been identified);

- allowing relocation to a confidential address (or, if that has already occurred, making sure that the address is kept confidential from the violent or abusive parent);
- restraining the violent or abusive parent’s communication with or proximity to the other parent;
- restraining the violent or abusive parent’s communication with or proximity to children, except in the context of authorized visitation;
- structuring visitation with appropriate levels of restriction as seems appropriate:
  - ♦ visits in a formally structured supervised setting;
  - ♦ visits informally supervised by appropriate family members, provided the court establishes conditions to be followed during visitation;
  - ♦ denial of overnight visits;
  - ♦ visits limited to a specific location or locations;
  - ♦ restrictions on the presence of specific persons other than the parent while the parent is with the children;
  - ♦ prohibition on the violent or abusive parent using alcohol or drugs during or within a specified time period prior to a visit;
- easing those restrictions over time if the violent or abusive parent has remained in compliance with the conditions and it appears to be in the interests of the children to allow less restrictive visitation;
- exchanging children through an intermediary, or in a protected setting; and/or
- requiring a violent or abusive parent to post a bond to secure the return of children after a visit, or to secure any other performance on which visitation is conditioned.<sup>20</sup>

It goes without saying that since the best interests of the children must always be the judge’s highest priority, there will be occasional cases where the only way to express that priority will be to deny the violent or abusive parent any future contact with his or her children, where it seems that less restrictive alternatives will not secure the safety of the children and/or the other parent.

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<sup>20</sup> This list draws heavily on the list of “appropriate measures” contained in § 2.11(2) of the AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTIONS: ANALYSIS AND RECOMMENDATIONS (2002) and § 405 from NCJFCJ’S MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994).



# Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide

## Suggested Resources

### Reading Material

AMERICAN PSYCHOLOGICAL ASSOCIATION, *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY* (1966).

Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluations* at [http://www.afccnet.org/pdfs/Child\\_Model\\_Standards.pdf](http://www.afccnet.org/pdfs/Child_Model_Standards.pdf).

LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* (2002).

Carol S. Bruch, *Parental Alienation Syndrome and Alienated Children—getting it wrong in child custody cases*, 14 *CHILD & FAM. L.Q.* 381-400 (2002).

Jacquelyn C. Campbell, *Danger Assessment* (2003) at <http://www.son.jhmi.edu/research/CNR/Homicide/Danger03.pdf>.

Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 *AM. J. PUB. HEALTH* 1089-97 (2003).

Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 *JUV. & FAM. CT. J.* 11 (2003).

DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTIONS, AND SOCIAL POLICY (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001).

Leslie M. Drozd & Nancy W. Olesen, *Is it Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1 *J. CHILD CUSTODY* 65 (Nov. 2004).

Jeffrey L. Edleson et al., *Parenting in the Context of Domestic Violence* (March 2003) at <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications>.

Jeffrey L. Edleson, *Problems Associated with Children's Witnessing of Domestic Violence* (April 1997, revised April 1999) at <http://www.vaw.umn.edu/documents/vawnet/witness/witness.pdf>.

Andrea C. Farney & Roberta L. Valente, *Creating Justice through Balance: Integrating Domestic Violence Law into Family Court Practice*, 54 *JUV. & FAM. CT. J.* 11 (2003).

Loretta Frederick, *Effective Intervention in Domestic Violence Cases: Context Is Everything* (2001), at <http://www.bwjp.org/documents/context%20is%20everything.htm>

PETER G. JAFFE ET AL., *CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* (2003).



Peter G. Jaffe et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 4 (2003).

NCJFCJ, Sample Order Appointing Custody Evaluator at <http://www.ncjfcj.org/dept/fvd>.

PROTECTING CHILDREN FROM DOMESTIC VIOLENCE—STRATEGIES FOR COMMUNITY INTERVENTION (Peter G. Jaffe et al. eds., 2004).

JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* (1999).

MARIA D. RAMOS & MICHAEL W. RUNNER, *CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDGES BENCH BOOK* (1999).

Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with “Outside Neutrals”*, 42 JUDGES’ J. 10 (Winter 2003).

Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgement*, 36 FAM. L.Q. 135 (2002).

## Links to Organizations

**American Bar Association (ABA)**, <http://www.abanet.org>, seeks to provide attorneys and judges with the knowledge and tools needed to assist them in their legal profession. The ABA has several programs targeted to specialized areas of interest, which are highlighted below.

**Center on Children and the Law**, <http://www.abanet.org/child/home2.html>, provides technical assistance, training, and research that “[address] a broad spectrum of law and court-related topics affecting children. These topics include child abuse and neglect, custody and support, guardianship, and children’s exposure to domestic violence.”

**Commission on Domestic Violence**, <http://www.abanet.org/domviol/home.html>, works “to mobilize the legal profession to provide access to justice and safety for victims of domestic violence.” The Commission produces publications that assist professionals in the field, including the newest edition of *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK*, 2ND ED. (2004).

**Family Law Section**, <http://www.abanet.org/family/home.html>, has a mission “to Serve as the National Leader in the Field of Marital and Family Law.” Among its stated goals is to improve the public and professional understanding about marital and family law issues and practitioners.

**American Judges Association (AJA)**, <http://aja.ncsc.dni.us/domviol/page1.html>, seeks to improve “the effective and impartial administration of justice, to enhance the independence and status of the judiciary, to provide for continuing education of its members, and to promote the interchange of ideas of a judicial nature among judges, court organizations and the public.” The AJA offers publications to address domestic violence issues, including a *Special Issue on Domestic Violence*, 39 CT. REV. 4-51 (Fall 2002) and *Domestic Violence & The Courtroom: Understanding The Problem—Knowing The Victim*, both of which can be downloaded from its website.



**Association of Family and Conciliation Courts (AFCC),**

<http://www.afccnet.org/index.html>, is “an international and interdisciplinary association of family, court, and community professionals dedicated to constructive resolution of family disputes.” Among its stated purposes, the AFCC seeks to provide an interdisciplinary forum for the exchange of ideas and the development of procedures to assist families in conflict and to develop and improve parent education, mediation, custody evaluation, and other processes to aid families in resolving their disputes.

**Battered Women’s Justice Project, Civil Office,** <http://bwjp.org>, works to enhance “justice for battered women and their children in the civil legal arena by improving battered women’s access to civil justice options and quality legal representation in civil court processes.” BWJP works with professionals on issues such as divorce and support, child custody, separation violence, mediation, and protection orders.

**Family Violence Prevention Fund (FVPF),** <http://www.endabuse.org/programs/justice>, “works to prevent violence within the home, and in the community, to help those whose lives are devastated by violence because everyone has the right to live free of violence.” FVPF’s Judicial Education Project, in partnership with the National Council of Juvenile and Family Court Judges, conducts education seminars for judges across the country in order to enhance their skills in handling criminal and civil domestic violence cases.

**Minnesota Center Against Violence and Abuse,** <http://www.mincava.umn.edu>, operates an electronic clearinghouse that provides research, education, and access to more than 3,000 violence-related resources on such issues as child abuse, domestic violence, dating violence, stalking, sexual violence, and elder abuse.

**National Association of Counsel for Children’s (NACC),** <http://naccchildlaw.org>, mission is “to improve the lives of children and families through legal advocacy. The NACC provides training and technical assistance to attorneys and other professionals, serves as a public information and professional referral center, and engages in public policy and legislative advocacy.”

**National Center for State Courts (NCSC),** <http://www.ncsconline.org>, provides “up-to-date information and hands-on assistance that helps [court leaders] better serve the public. NCSC offers solutions that enhance court operations with the latest technology; collects and interprets the latest data on court operations nationwide; and provides information on proven ‘best practices’ for improving court operations in many areas, such as civil case management.”

**National Council of Juvenile and Family Court Judges (NCJFCJ),** <http://www.ncjfcj.org>, is “dedicated to serving the nation’s children and families by improving the courts of juvenile and family jurisdictions.” NCJFCJ has dedicated programs addressing family violence, child abuse and neglect, victims of juvenile offenders, alcohol and drug abuse, termination of parental rights, child support enforcement, adoption and foster care, and juvenile delinquency.

**Office on Violence Against Women,** <http://www.ojp.usdoj.gov/vawo>, provides on-line resources with “up-to-date information on interventions to stop violence against women for criminal justice practitioners, advocates, and social service professionals with the latest in research and domestic violence, stalking, batterer intervention programs, child custody [and] protection, sexual assault, and welfare reform.”



## I

## The Fundamental Question:

## What If There Are No Resources for an Evaluation?

## If Resources Are Available, Should I Order an Evaluation?

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card I Side 1

## Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

Is this a case where I need assistance in determining:

- the presence and extent of physical violence or other abusive behaviors in the parental relationship;
- its impact on the children;
- its effect on the parenting of each party; and
- its implications for decisions about how to structure custody and visitation?

Many litigants are unable to afford evaluations, and many courts have limited evaluation resources. If resource constraints preclude an evaluation in a particular case, this tool may still assist you to:

- identify categories of evidence that the parties' attorneys should be required to produce;
- outline for *pro se* litigants the information they need to provide to assist your decision making;
- allocate limited evaluation resources to maximum effect; and
- make safe and responsible decisions even in situations where you lack complete information—there is value in knowing what you do not know.

The answer is *YES* when:

- the facts trigger a statutory obligation to obtain an evaluation;
- there is a documented history of physical violence in the parents' relationship;\* and/or
- there are allegations that a party has harmed or threatened to harm him- or herself or the other party, or otherwise abused the other party.

The answer is *also YES* when:

- The case has, as yet, no proven or alleged violence, but has other evidence or other allegations that raise "**RED FLAGS**" because of their common co-occurrence with domestic violence.

### **RED FLAGS** include:

- a documented history or allegations of mental illness, substance abuse, or child abuse by either party;
- indications that the children are exhibiting symptoms consistent with, although not necessarily the result of, abuse or exposure to parental violence, such as sleep disturbances, bedwetting, age-inappropriate separation anxiety, hyperactivity, aggression or other behavioral problems, depression, or anxiety; \*
- the presence of one or more prior court orders restricting a parent's access to any of his or her children, in this or another relationship;
- a history of court or social services involvement with the family;
- allegations of alienating behavior by a parent; and
- indications that one or both parents are inattentive to the children's needs.

[See also **FACTORS** Side 2, and **INFORMATION**, Card II, Side 2.]



## If Resources Are Available, Should I Order an Evaluation? (cont.)

## Is There an Additional Need for an Emergency/ Interim Evaluation?

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card I Side 2

And the answer may also be *YES* when:

- one or both parties have already retained one or more experts;
- one or both parties, or the children's lawyer or guardian *ad litem*, has requested an evaluation that raises concerns about domestic violence or may raise "red flags" warranting an investigation of domestic violence;
- a party seeking custody is also making a contested request to relocate, particularly if the move will take him or her to another jurisdiction; \* and/or
- a stipulated or mediated agreement heavily favors one party, raising concerns of intimidation or coercion, especially if one or both of the parties are unrepresented.

**NO**, if a restraining/protection order is in place, the party against whom it was issued is in compliance, and the situation is stable.

**YES**, if an existing restraining/protection order has been violated, or if there is no restraining/protection order in place, you have reason to be concerned about the safety of one or both of the parties and/or their children, and temporary orders are needed to stabilize the situation pending a final resolution of the contested issues.

**FACTORS** that might prompt an interim evaluation include:

- credible allegations of child abuse;
- one or more convictions of domestic violence-related or other violent offenses;
- a record of one or more 911 calls;
- possession of, access to, or threats to use firearms;
- evidence of stalking;
- evidence of harm or threats of harm to self, partner, or children;
- evidence of suicide threats;
- evidence of threats of abduction of children;
- a documented history of drug or alcohol abuse;
- a prior record of restraining/protection orders; and/or
- evidence of violations of prior or existing restraining/protection orders.

**An interim evaluation should:**

- be limited to an assessment of what measures are needed to minimize the risks to all concerned pending the resolution of the contested issues in the case;
- be conducted by an evaluator with experience in domestic violence and risk assessment; and
- consider, at a minimum, the advisability of the following alternatives:
  - ◆ suspending all contact between the parent whose behavior raises concerns and his or her partner and children until an interim hearing can be conducted, or pending a final resolution of the case;
  - ◆ providing for appropriately supervised visits; and
  - ◆ structuring the exchange of children in a safe setting without contact between the parents.





## Framing the Order: What Do I Need to Know, from Whom, and How Do I Ask?

**REMEMBER:** Even if you are not ordering an evaluation, you can use this tool to guide you in requiring the production of evidence by attorneys, providing *pro se* litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

### Safety First



### Frame the Inquiry

Your highest priority in framing your order, and the evaluator’s highest priority in conducting the inquiry, is to make sure that:

- no one is endangered by how the information is collected or shared; and
- safety concerns that emerge in the course of the inquiry are promptly addressed.

### Investigation, Evaluation, Recommendation\*

You need information to guide your own application of the relevant legal principles and rules. Your choice of expert to provide you with the information will be influenced by the type of information you need.

#### • Investigation:

You need an investigation when the questions are purely or primarily factual.

For example:

- ◆ “What has happened in this family?”
- ◆ “What do the relevant records show?”
- ◆ “Does the child express concerns about visiting with his mother or father?”

#### • Evaluation:

You need a mental health professional’s evaluation to answer these questions:

- ◆ “What is the quality of a relationship?”
- ◆ “What are the personality, characteristics, functioning, or symptoms of a party or child?”
- ◆ “What is the psychological impact of parental behavior on a child?”

#### • Recommendations to the Court:

*Court practice is sharply divided on the question of asking evaluators to make recommendations. However, opinion is unanimous that the judge, not the evaluator, must make the ultimate best-interests determination.* If you or your court permits or requires evaluators to make recommendations, be sure that you can still make your own independent assessment. Make sure you understand:

- ◆ the factual basis for the recommendation;
- ◆ how the recommendation was derived from the facts (what theory and methodology link the facts to the recommendation); and
- ◆ the level of support for the theory and methodology in the relevant professional community.

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

## Choose the Expert

## Be Specific about the Information You Need

*\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*

It is important to choose an evaluator who has training and experience in:<sup>\*</sup>

- ◆ the dynamics of abusive relationships, including the dangers associated with separation;
- ◆ the links between partner abuse and child abuse;
- ◆ the impact of exposure to domestic violence on children; and
- ◆ the impact of abuse on parenting.

You will also need to match the evaluator's training and skills to the particular inquiry:

- ◆ A case with extensive documentation may require the investigatory skills of an attorney.
- ◆ Obtaining sensitive information from relatively young children may require a mental health clinician with a background in child development and child psychology.
- ◆ A diagnosis or evaluation will require mental health expertise.
- ◆ Inquiries regarding a particular cultural competence, or specialized expertise in another area, such as substance abuse, will require someone with that competence or expertise.

Although the particular areas of inquiry may differ from case to case, areas that are usually important in a case in which domestic violence has or may have occurred, and that you will want to direct the expert to inquire into, include the following:

- the record of any criminal or civil legal proceeding or police involvement;
- any facts that would trigger a statutory presumption or specific statutory obligations;
- any specific cultural context that is relevant to the inquiry;
- incidents of physical violence, sexual abuse, threats, stalking, or intimidation;
- the exposure of children to any incidents of physical violence, sexual abuse, threats, stalking, or intimidation;<sup>\*</sup>
- behaviors designed to make a parent fearful for the children's safety or fearful that the children will be abducted;
- short- and long-term safety concerns raised by the behavior of a parent;<sup>\*</sup>
- patterns of coercive or controlling behavior, including emotionally abusive behavior; inappropriately limiting access to finances, education, or employment; and isolation from friends or family;
- behaviors that appear designed to, or likely to, undermine a parent's relationships with the children or capacity to parent effectively;
- the impact of all these behaviors on each parent, each child, and the relationship between each parent and each child;<sup>\*</sup>
- the current situation and needs of each child;
- each parent's ability to meet each child's need; and
- the nature of the communication between the parents.

[See also the **RED FLAGS** and **FACTORS** listed on Card I.]

Card II Side 2

Continued on Card **IIA**

# IIA

## Articulate Expected Sources of Information

## Communicate Expectations about Any Information- Gathering Procedures

## Frame the Process

*\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*

Card IIA Side 1

Evaluations that are based solely on interviewing and/or observing the parties and their children are significantly less reliable. You will want to ensure that evaluators supplement basic information with:

- interviews with relevant collaterals;
- a thorough review of all pertinent written records, assuming they are non-privileged or that any privilege attaching to them has been properly waived;\* and
- sometimes psychological testing, although this, as explained in the supplementary materials, should be approached with caution.\*

[See also Card III, How Do I Make More Effective Use Of The Report?]

Evaluators must make the information-gathering process safe for all concerned to avoid putting the parties or their children at risk, or compromising the reliability of the information obtained.

Evaluators should:

- make initial contact with each party separately;
- reflect the safety needs of each family member in any guidelines for further contacts with both the adult parties and the children;
- respect the terms of existing restraining orders;
- help *pro se* litigants understand the evaluation process and the risks of disclosing information that may be shared with the other party;
- whenever possible, avoid identifying one party as the source of negative information about the other; \*
- warn the party at risk about any disclosure of information in advance, if it ever becomes essential to share the information with one party that may put the other at risk; \*
- never attribute direct quotes to children; and
- use specialized techniques and understanding to obtain and interpret information from children.

### The Calendar

It will expedite the process if you order specific deadlines for:

- the evaluator's acceptance or rejection of the appointment;
- the evaluator's initial contacts with the parties or their representatives;
- receipt by the evaluator of necessary signed consents or waivers;
- receipt of relevant documents by the evaluator;
- initial interviews with each party;
- submission of the final report; and
- the next court hearing.

### Facilitate the Inquiry

Be proactive in ordering the production of any records available to the courts but not directly available to the parties or their attorneys, including:

- child abuse/child protective services reports; and
- criminal or court activity records.

## Define the Obligations of the Participants

To facilitate the evaluation and increase the utility of the final product, articulate clearly the obligations of the parties, their attorneys, and the evaluator:

**A. The parties shall:\***

- provide information as requested and appropriate;
- sign requested consents or waivers, after full consideration of the implications and advisability of waiving any privilege involved;
- make themselves available to the evaluator;
- provide access to their children; and
- make timely payments if responsible for so doing.

**B. The attorneys shall:**

- assist their clients in fulfilling their responsibilities; and
- provide information and documentary material to the evaluator in an organized and timely fashion.

**C. The evaluator shall:\***

- 👤 make the safety of the parties and their children a priority at every stage of the process;
- accept the appointment only if qualified;
- accept the appointment only if unaffected by any conflict of interest;
- commit not to enter into any conflicting professional relationship with anyone involved in the case after accepting the appointment;
- conduct the inquiry giving equal weight to the claims and concerns of each party;
- conduct the inquiry in a timely fashion, according to the schedule provided by the order; and
- with the permission of the court, draw on any necessary specialized resources.

**\*** Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.



## Safety First



## Should I Admit the Report into Evidence?

## Once Admitted, How Do I Make More Effective Use of the Report?

*\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.*

Card III Side 1

# Reading the Report

- Does the content of the report in and of itself raise immediate concerns about the existing safety of the parties or their children?
- Does the fact that each party will be given access to the report raise new safety concerns that should be addressed before the report is shared?

Apart from the task of framing final orders, immediate safety concerns may require you to:

- schedule a hearing and propose a protective order, or make a referral for safety planning or other needed services; or
- based on your state's reporting laws, involve child protective services if you conclude from the report that a child is also at risk.

It is important to recognize that custody evaluation reports are a form of evidence, either written or oral, that requires an admissibility determination. Check your state's rules of evidence counterparts. See also the Federal Rules of Evidence (FRE): FRE 401 and 402 (relevance), FRE 403 (probative value), and FRE 702 (experts).

In determining the relevance of the report, you will want to know if the evaluator:

- responded to each area of inquiry detailed in your appointment order;
- provided you with sufficient information to make a determination on the operative legal principles present in the case;
- reported each known instance where a child has directly witnessed, been exposed to, or been affected by, incidents of domestic violence perpetrated by one party against the other;
- explained the context of the evaluation—i.e., at what point in the couple's separation process the evaluation took place and the possible impact of that timing on the findings and recommendations; and
- properly reflected the limited scope of the task assigned in cases where the evaluator has been asked to investigate rather than evaluate.

In determining the report's credibility, does the report contain sufficient information for you to:

- rule on potential evidentiary concerns raised by the report?
  - ◆ Was the information obtained directly from individuals interviewed, documents examined, or observations made by the evaluator? Is the source of each piece of information identified?
  - ◆ Is any information vulnerable to challenge because it was obtained "second-hand"? If so, is that indicated in the report?
  - ◆ Is the information in the report relevant to the legal issues raised by the case?
- assess the thoroughness of the factual investigation?
  - ◆ Have relevant collateral sources been interviewed?
  - ◆ Have relevant written records been reviewed?
  - ◆ Have important facts been corroborated?
- assess the accuracy of information from the parties and their children?
  - ◆ Have the safety needs of each member of the family been recognized?
  - ◆ Has the evaluator avoided creating opportunities for intimidation or coercion?

## Once Admitted, How Do I Make More Effective Use of the Report? (cont.)

## How Do I Assess the Recommendations?

\* Asterisks denote points at which it may be particularly helpful to refer to the accompanying supplementary materials.

Card III Side 2

- determine whether the factual investigation has been even-handed?
  - ◆ Can you determine if fair consideration was given to the claims and concerns of each of the parties?
  - ◆ Does the report assess the strengths and deficiencies or vulnerabilities of each parent and each parent/child relationship?
  - ◆ Does the report consider the particular cultural context of the parties' parenting and the relationship between the parties and their children?
  - ◆ Has the evaluator explored all possible interpretations of the information?
- identify what information was not available, and why—allowing you to determine the extent to which the missing information limits the value of the report's conclusions or recommendations?
- determine, in cases where the evaluator has conducted an investigation and analyzed, interpreted, or drawn conclusions from the data:
  - ◆ that the evaluator has fully reported the underlying data, with the source identified and relevant documents or records attached?
  - ◆ that the evaluator has clearly distinguished between the facts and the analysis, interpretation, or conclusions he or she is deriving from them?
  - ◆ that the underlying data support the analyses, interpretations, or conclusions from which they are drawn?
- determine, in cases where an evaluator employs specialized mental health expertise:
  - ◆ that the evaluator has the appropriate training, qualifications, and experience to employ any specialized data-gathering procedures used?
  - ◆ that any psychological tests administered offer relevant information and that the evaluator satisfactorily explained their relevance?
  - ◆ that the tests employed have received appropriate professional endorsement for use in this context?
  - ◆ that the evaluator has the requisite mental health expertise to analyze, interpret and draw conclusions from the available data?[See also, Card IIA, Articulate Expected Sources of Information]

If domestic violence is identified as an issue in the parties' relationship, you will need to determine whether:\*

- 👉 the evaluator demonstrated an understanding of the ongoing safety risks;
- the recommendations provide the security needed to allow healing from any existing trauma associated with abuse or exposure to abuse;
- the evaluator considered the full range of protective options, including:
  - ◆ supporting relocation of the vulnerable party and the children to a secure location;
  - ◆ otherwise shielding the vulnerable party from contact with or direct communication from the abusive party;
  - ◆ total or partial, permanent or provisional restrictions on contact between the abusive party and the children;
  - ◆ formal or informal supervision of visitation, or of transfer/exchange; and
- 👉 conditioning visitation rights on compliance with safety-related conditions; and
- any of the evaluator's recommendations provide unnecessary opportunities for ongoing harassment or coercion.