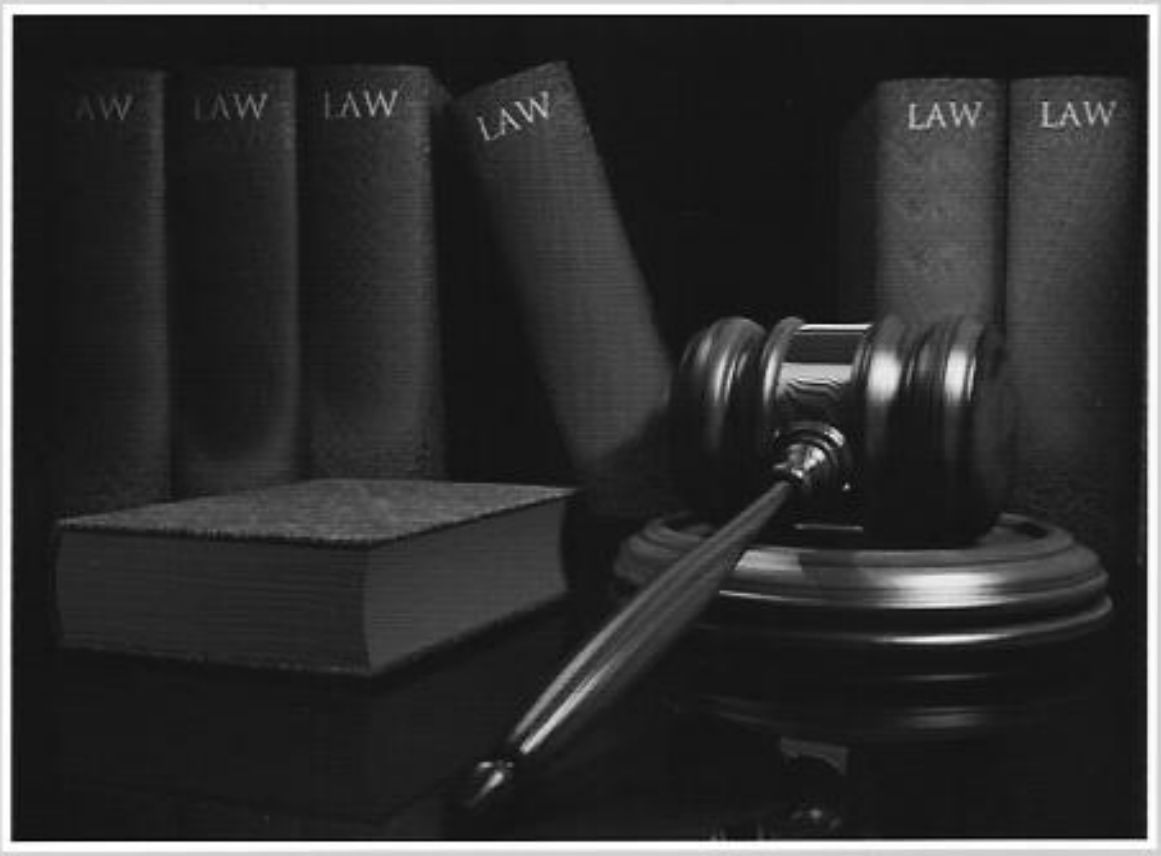
National Council of Juvenile and Family Court Judges

A Judicial Guide to Child Safety in Custody Cases



A Judicial Guide to Child Safety in Custody Cases

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

Introduction

Custody and visitation decisions are among the most difficult that judges make. Whether by statute, case law, or custom, all state and tribal courts employ some form of "the best interest of the child" standard in making these decisions. A child's physical, emotional, and psychological safety are always in his or her best interest. This tool is designed to maximize a child's safety as you determine issues of custody and visitation and can help you

- Assess whether a child or parent is at risk for physical, emotional, or mental abuse.
- Review the evidence so that the safety of the child is the primary factor in determining his or her best interest.
- Evaluate safety risks at various stages of a case, from initial filing through post-disposition.
- Make findings that explain and prioritize safety concerns.
- Draft custody and visitation orders that maximize family safety.

This tool will also assist you in conducting a thoughtful exploration of the child's safety risks when abusive behavior has been part of the family fabric. Sometimes, the parties may not articulate clearly either the abuse or the child's safety risks during litigation. Indicators may be present that require you to explore the possibility that one parent is putting the other parent or the child at risk of abuse. Because the abused parent might not directly raise issues of physical abuse or other forms of control, you will want to be aware of indicators of abusive behaviors that may alter the dynamics of the litigation process. This tool will explore the various behaviors that you might encounter, both from the controlling and abusive parent, and from the controlled and abused parent.

Organization of the Bench Tool

This supplemental guide and the attached bench cards follow your decision-making from the initial filing through drafting and enforcing the order. While much of the material is presented in procedural order,[1] there are also bench cards and chapters devoted to topics and issues that can arise throughout litigation.

The authors suggest that you first read the cards as an introduction to the topics addressed. This supplement, to which the cards are keyed, offers additional information and suggests further resources at the end of the guide, and in footnotes.

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1. The stages of litigation might be named differently in various state and tribal jurisdictions. The process of filing, hearing, and decision-making are familiar enough that the procedural references made in this volume are likely to be easily adapted to the actual practice in your court.

I. Children, Abuse, and Custody

Numerous studies document the negative effects on children who are exposed to the abuse of one parent by the other. The studies provide evidence of the problems associated with their psychological, emotional, and cognitive functions, and longer-term development.[2] Children who witness violence and coercive control by one parent toward the other experience at least the same level of serious effects as those who were direct targets of the abuse.[3] The research also shows that each child's experiences, perceptions, and responses are unique. Any intervention should be tailored to that child's particular risk set and situation.[4]

Studies also support that children are at greater risk of being abused when one parent is abused by the other parent.[5] Abuse of the children, or threatened abuse, is a powerful tool of control.[6]

Abuse directly perpetrated on the child happens frequently after parental separation when the abusive parent may no longer have ready access to the other parent. This means that children are at risk post-separation even if they were never directly abused by the abusive parent previously.[7] Sometimes, abuse of a child can lead to "reconciliation" if the abused parent believes that resuming the relationship is the only way to keep the child safe.[8]

A. [§1.1] Indications that Abuse Exists in a Child's Life

As with adults who have been subjected to physical abuse or other forms of coercive control, there is no one pattern of behavior that will be observed in children who have experienced abuse, whether they were abused themselves or whether they have lived in a family where one parent has abused the other. Given the range of psychological and physical injury to a child from an abusive parent and the many elements that contribute to or delay a child's recovery, assessing risk to the child from the abusive parent is a complex process.[9] Sometimes, child behaviors can be confusing or counterintuitive. Children who have experienced abuse might

- Be better behaved with either the at-risk or the abusive parent, or, on the contrary, act disrespectfully toward him or her.
- Identify with the parent who is perceived as more powerful.[10]

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2. For a review of these studies, see J. L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. Interpersonal Violence 839-870 (1999).
3. *See, e.g.*, UNICEF, Child Protection Section, Behind Closed Doors: The Impact Of Domestic Violence On Children (2006).
4. *See generally* J. L. Edleson, VAWnet, National Resource Center, Problems Associated With Children's Witnessing Of Domestic Violence (revised).
5. Studies show that if a mother is abused, her children are at a 30-60% greater risk of being abused. *See generally* A.E. Appel & G.W. Holden, *The Co-occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12-4 J. Fam. Psych. 578-599 (1998); S.M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents*, 20(7) Child Abuse & Neglect 589-598 (1966).
6. Please note that this tool addresses child safety in the context of private, civil legal custody cases involving abuse or coercive control by one parent over the other.
7. *See generally* L. Bancroft & G. Silverman, Assessing Risk To Children From Batterers (2002), http://www.lundybancroft.com/pages/articles_sub/JAFFE.htm.
8. *See generally* Future Interventions With Battered Women And Their Families (Jeffrey Edleson & Zvi Eisikovits, eds, Sage Publications 1996).
9. *Id.* at 5.
10. Some people may assume that a person who abuses an intimate partner would not abuse their children out of love for them. However, love is not a preventative and does not foreclose abuse. Likewise, the fact that children love an allegedly abusive parent is no indication that abuse did not occur. Children often bond with the abuser. This is sometimes referred to as "traumatic bonding." L. Bancroft & J. Silverman, The Batterer As Parent: Addressing The Impact Of Domestic Violence On Family Dynamics 39-40 (2002).

- Act lovingly toward or comfortable with an abusive parent.
- Assume the role of parent.
- Be anxious when away from the abused parent.

Those children may also

- Suffer from depression or other mental health problems.
- Self medicate with drugs or alcohol (adult victims often do the same).

B. [§1.2] The Best Interest of the Child Standard

Generally speaking, it is considered detrimental to a child and not in his or her best interest to be placed in sole custody, joint legal custody, or joint physical custody with the abusive parent.[11] The most important protective resource to enable a child to cope with exposure to abuse is a strong relationship with a competent, nurturing, positive adult—most often, that adult will be the non-abusing parent.[12] Providing for the physical, mental, and emotional safety of the child will include providing safe visitation by the abusive parent, if truly safe visitation can be arranged. You should award visitation to an abusive parent only if you find that adequate provisions for the child's and the abused parent's safety can be made, assuming that contact with the abusive parent is advised at all.[13]

At-risk parents may advocate for limited or supervised contact between the abusive parent and the child; their reasons may not be clearly or easily articulated. Any allegations of abuse, whether made by the at-risk parent or the child, should be taken seriously. Often when viewed through the lens of abuse and coercive control, though, the case comes into focus. It is important that abusive parents' access to their children occur only in safe environments or when safety of both the child and the at-risk parent can be ensured. Even if you find that the behaviors of a parent do not seem to meet the definition of "abuse" as defined in this tool, the best interest of the child standard demands that the child be placed in the custody of the more appropriate, and safer, parent.

II. Abusive Behavior and Evidence of Risk

A. [§2.1] How This Tool Defines "Abusive Behavior"

It is important to remember that abusive behavior, often described as domestic violence, is not limited to physical violence against a parent. Physical violence is generally one of

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11. National Council Of Juvenile And Family Court Judges (hereinafter NCJFCJ), Family Violence: A Model State Code (hereinafter Model Code) §401 and its commentary (1994).
12. J. D. Osofsky, *The Impact of Violence on Children*, 9 Domestic Violence And Children 38 (1999).
13. NCJFCJ, Model Code §405(1) (1999).

several tactics used to maintain control over another person. For purposes of this tool, we are defining abusive behavior as "a pattern of assaultive and coercive behaviors that operate at a variety of levels – physical, psychological, emotional, financial or sexual – that one parent uses against the other parent.[14] The pattern of behaviors is neither impulsive nor 'out of control,' but is purposeful and instrumental in order to gain compliance or control."[15]

Although the definition refers to a pattern of behavior, you may consider one incident of physical violence to be abusive behavior and therefore sufficient to put a child at risk.[16] This tool may use either the term "abusive behavior" or the term "coercive or controlling behavior" to refer to similar types of behavior patterns. Abusive or coercive behavior directed at an intimate partner, no matter how defined, can create serious safety risks for children.[17]

In recent years, a growing body of social science research has addressed the wide range of violent and abusive behavior in families, documenting its severity, frequency, and injurious outcomes, and arguing about who perpetrates it and for what apparent purpose.[18] Determining the level of risk for both parent and child is a crucial first step in making custody and visitation decisions. If you have any lingering safety concerns, put protections in place that address the source of the concerns prior to ruling on custody and visitation.

B. [§2.2] How Abusive Behaviors Might Manifest Themselves in Court

Often, the abusive parent will seek to control the at-risk parent through a mixture of criticism, verbal abuse, economic control, and isolation. The abusive parent may employ an array of other tactics, many of which may be more difficult to quantify for evidentiary purposes than physical or sexual assault.[19] Abusive behaviors within a parenting relationship are complex and often go unrecognized or unidentified in legal proceedings.[20] These behaviors, too, might not be readily or easily connected to any definition of abuse during the course of custody litigation.[21] The reactions of the at-risk parent to the abuse will be unique to the individual and the circumstances. Similarly, each child will experience domestic violence in unique ways depending on a variety of factors that include direct

14. This definition is derived from NCJFCJ Clare Dalton et al., Navigating Custody And Visitation Evaluations In Cases With Domestic Violence: A Judge's Guide 8 (hereinafter Navigating Guide) (2004, revised 2006), citing Anne L. Ganley, *Understanding Domestic Violence: Preparatory Reading for Trainers* in Anne L. Ganley & Susan Schechter, Domestic Violence: A National Curriculum For Child Protective Services 1-32.
15. *Id.*
16. This statement presumes the incident of physical violence by the abusive parent, and not an incident of resistive violence by the at-risk parent.
17. *See* §1.1 for a discussion of the impact of abusive behavior on children, whether or not the children were the intended targets of the controlling and violent behavior.
18. Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 Fam.Ct. Rev. 500 (2008).
19. Bancroft & Silverman, *supra* note 7 (citing J. Herman, Trauma And Recovery: The Aftermath Of Violence (Basic Books, New York 1992).
20. *See* L. Frederick & J. Tilley, Battered Women's Just. Project, Effective Interventions In Domestic Violence Cases: Context Is Everything (2001) at http://www.bwjp.org/documents/contextisteverything.htm.
21. Even the attorney representing the abused parent might not recognize domestic violence, especially where there has been little or no physical abuse.

physical abuse of the child, his or her gender and age, the time since exposure to violence, and his or her relationship with adults in the home. Some children may show no apparent negative developmental problems despite witnessing repeated violence.[22]

You may observe behavior in court that may not be readily identifiable as evidence of risk. Abusive parents and at-risk parents may behave in unpredictable ways depending on the circumstances of each case.[23] Some at-risk parents as a survival technique will minimize or deny that they have been abused, even when evidence of abuse is overwhelming. Both parents might minimize or deny the impact of the violence on the child. Or, the at-risk parent may express fear that the abusive parent will hurt the children, even if there is no evidence of prior child abuse.

C. [§2.3] Courtroom Demeanor of the Abusive Parent

As described elsewhere, there is no one pattern of behavior that you will observe in either the abusive parent or the at-risk parent. There are some behaviors, however, that indicate disrespect toward the other parent. These behaviors should raise red flags for you to determine whether they result from a pattern of control.

Often abusive parents present well, as they are skilled at maintaining control. An abusive parent might

- Believe or claim that the other parent is stupid, unsophisticated, or inflexible.
- Anger easily.
- Behave in an arrogant or superior manner.
- Attempt to present as the true victim in the relationship.
- Appear vulnerable or otherwise engender empathy with the court or with third parties.
- Be unwilling to understand another's perspective.
- Expect the child to meet the parent's needs.
- Advocate or adhere to strict gender roles.
- Patronize the other party, counsel, and even the court.
- Attempt to create an alliance with you.
- Minimize, deny, blame others for, or excuse inappropriate behavior.

This controlled courtroom presence of the abusive parent may contrast with the at-risk parent's behavior.

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22. Edleson, *supra* note 4, at 7.
23. Frederick & Tilley, *supra* note 20.

D. [§2.4] Courtroom Demeanor of the At-Risk Parent

The at-risk parent may not present as well and might

- Have difficulty presenting evidence for any number of reasons: cognitive impairments resulting from abuse, fear, or a conviction that she[24] will not be believed.
- Demonstrate inappropriate affect resulting from fear, depression, post-traumatic stress disorder, or other response to abuse.
- Be extremely anxious and unfocused in the presence of the abusive parent.
- Be aggressive or angry when testifying.
- Show signs of distress when listening to the other parent's testimony.
- Appear numb, unaffected, or disinterested.

E. [§2.5] Distinguishing the "High-Conflict" Case

Both legal and mental health professionals acknowledge the relevance of parent-to-parent abuse and coercive control in determining the best interest of the child.[25] Family law cases involving evidence of abuse may be (and in fact, often are mistakenly) labeled "high-conflict." Abuse cases may have high-conflict characteristics, but they require a different set of considerations in order to promote safety for the at-risk parent and child.

High-conflict cases are those intense and protracted disputes that require considerable court and community resources during litigation and possibly after.[26] They are distinguished by mutual mistrust of each partner, poor impulse control, and cycles of reaction and counter-reaction which further erode the possibility of trust.[27] In cases with abuse, on the other hand, one parent exhibits attitudes and behaviors designed to exert inappropriate control over the other parent.[28] To add to the confusion, there may be responsive violence or protective behaviors by the victim parent, which may make the case appear to be high-conflict on the surface.

[§2.6] Remember: Abusive behaviors occur in all economic levels. Low-income at-risk parents may not have access to the resources they need in order to safely leave an abusive situation with their children. Parents who experience abuse in middle- and upper-class households may have different hurdles to overcome. They may be discredited by the abusive parent who may have special status in the business or local community. In addition, wealth and education can be confused with the ability to leave an abusive situation. The reality is that control is maintained by creating fear and is not related to

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24. Although the majority of victims of abuse and coercive control are women, this tool and the accompanying cards would apply equally where the at-risk parent is male. *See* Bureau Just. Stat., U.S. Dep't Just., Intimate Partner Violence, 1993-2001 1 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf (finding that about 85% of victimizations by intimate partners in 2001 were against women).
25. Peter G. Jaffe, Claire V. Crooks & Hon. Frances Q.F. Wong, *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. Ctr Families, Child. & Cts. 81, 83 (2005), *citing* Janet R. Johnston, *High-Conflict Divorce*, 4 Future of Child. 165 (1994).
26. *Id.*
27. *Id.* at 84.
28. *Id.*

wealth, although many at-risk parents may not have independent access to resources within the family while in the abusive situation, even in wealthy families.

III. Analyzing the Evidence

Of course, one of a judge's primary functions is to consider the evidence, determine its credibility, and find facts based upon his or her assessment of that evidence. Often in family law matters, the temptation is to view competing or opposing evidence of abuse as "he said/she said." This perspective can result in ruling against the parent who has the burden of proof on the theory that without additional testimony to tip the scales, the court lacks sufficient evidence to rule otherwise.

The abusive parent benefits from that perspective. Often that parent has invested effort in convincing the at-risk parent that she will not be believed if she discloses the abusive behavior. The coercive parent's attempts to influence you in order to discount the other parent's testimony about the abuse is a method of manipulation aimed at you, as well as the other parent.

As a judicial officer, familiarity with the dynamics of abusive behavior and coercive control will enable you to assess the testimony and other evidence, and create a plan that is in the best interest of the children.[29]

A. [§3.1] Cross-Allegations

Cross-allegations of abuse are not uncommon.[30] Sometimes, it is the abusive parent who raises issues of abuse in an effort to discredit the at-risk parent. To sort through this type of testimony,

- Determine whether any alleged physical act was part of a pattern of emotional, physical, financial, or sexual abuse.
- Determine whether any alleged physical acts were done in response or in reaction to other forms of abuse and control, including financial control, isolation, physical violence, sexual abuse, or humiliation.[31]

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29. For an excellent outline of abusive behaviors, *see* NCJFCJ, National Judicial Institute On Domestic Violence (hereinafter NJIDV), Understanding the Victim.

30. It is important to distinguish between levels of harm as well as to determine which parent engaged in a pattern of controlling behavior. Statistically, the mother is at far greater risk of being abused by the child's father than he is by her. *See* Bureau Just. Stat., U.S. Dep't Just., Family Violence Statistics: Including Statistics On Strangers And Acquaintances 1 (2006), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf (finding that females were 84 percent of spouse abuse victims, 86 percent of victims of abuse by a boyfriend or girlfriend, and 58 percent of family murder victims). *See also* Patricia Tjaden & Nancy Thoennes, Full Report Of The Prevalence, Incidence, And Consequences Of Violence Against Women iii-61, iv (2000) (finding that women (64 percent) were significantly more likely than men (16.2 percent) to report being raped, physically assaulted, and/or stalked by a current or former intimate partner and that women who were raped or physically assaulted by a current or former intimate partner were significantly more likely to sustain injuries than men who were raped or physically assaulted by a current or former intimate partner) as cited in NCJFCJ, Clare Dalton Et Al., Navigating Guide 7-9 (2004), revised 2006).

31. For an excellent discussion on the importance of differentiating types of violence in custody cases, see Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 Fam. Ct. Rev. 500 (2008).

- Consider whether one parent inflicted more harm.
- Consider the impact of the alleged abusive behavior on the other parent or the child.
- Consider a parent or child's fear of the other parent.

The more familiar you become with the dynamics of coercive control, the easier it will become to analyze the evidence in order to determine whether a pattern of abusive behavior is present.

B. [§3.2] Using Third-Party Information for Decision-Making

In the contested case, there may be sources of information that you will consider admitting into evidence, such as the reports of custody evaluators or expert witnesses. Determining whether to admit the reports or testimony into evidence and the extent to which you rely on them must be carefully considered, especially in cases where the safety of a child or a parent is at issue.[32] A good test of the source's expertise is whether any recommendations take into account the need to protect the physical and emotional safety of the child and the at-risk parent, and whether the recommendations offered make full use of the range of available alternatives.[33] While you may have one or more expert recommendations regarding the child's best interest, the ultimate responsibility for decision-making on issues of custody and visitation of course lies with you.

C. [§3.3] A Word of Caution about Parental Alienation[34]

Under relevant evidentiary standards, the court should not accept testimony regarding parental alienation syndrome, or "PAS." The theory positing the existence of PAS has been discredited by the scientific community.[35] 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* case.[36] *Daubert*, in which the court re-examined the standard it had earlier articulated in the *Frye*[37] case, requires application of a multi-factor test, including peer review, publication, testability, rate of error, and general acceptance. PAS does not pass this test. Any testimony that a party to a custody case suffers from the syndrome or "parental alienation" should therefore be ruled inadmissible and stricken from the evaluation report under both the standard established in *Daubert* and the earlier *Frye* standard.[38]

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32. For an excellent discussion on admitting the reports of custody evaluators and expert testimony, *see generally* NCJFCJ Claire Dalton et al., Navigating Guide.
33. *Id.*
34. This section, including the footnoted material was excerpted from Navigating Guide at 24-25.
35. According to the American Psychological Association, "... there are no data to support the phenomenon called parental alienation syndrome ..." Am. Psychol. Ass'n, Violence And The Family: Report Of The American Psychological Association Presidential Task Force On Violence And The Family 40, 100 (1994) (stating that custody and visitation disputes appear to occur more often in cases in which there is a history of domestic violence).
36. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
37. *Frye V. U.S.*, 293 F. 1013 (D.C. Cir. 1923).
38. These are federal standards, but many states adhere to them at least generally and should still exclude any proffered evidence of PAS.

The discredited "diagnosis" of PAS (or an allegation of "parental alienation"), quite apart from its scientific invalidity, inappropriately asks the court to assume that the child's behaviors and attitudes toward the parent who claims to be "alienated" have no grounding in reality. It also diverts attention away from the behaviors of the abusive parent, who may have directly influenced the child's responses by acting in violent, disrespectful, intimidating, humiliating, or discrediting ways toward the child or the other parent. The task for the court is to distinguish between situations in which the child is critical of one parent because they have been inappropriately manipulated by the other (taking care not to rely solely on subtle indications), and situations in which the child has his or her own legitimate grounds for criticism or fear of a parent, which will likely be the case when that parent has perpetrated domestic violence. Those grounds do not become less legitimate because the abused parent shares them, and seeks to advocate for the child by voicing his or her concerns.

IV. Respectful Interaction and Safety in Custody Cases with Child Safety Issues

A. [§4.1] Respectful and Safe Interaction

To encourage **respectful interaction** during the course of litigation, you may wish to

- Insist that the attorneys treat all parties with respect. If the abusive parent's attorney is allowed to be disrespectful toward the opposing counsel, the opposing party, or any witnesses, that behavior serves to empower the abusive parent and can thereby increase the safety threat to the at-risk parent.
- Because the at-risk parent may need additional time to answer questions, insist that the attorneys give each party adequate time to respond.
- Insist that counsel maintain a respectful distance from the witness.
- Warn the parties and counsel against the use of sarcastic or other disrespectful remarks or tone.
- Impose sanctions for the continued use of disrespectful tone, remarks, or tactics.
- Watch out for and intervene to stop any controlling non-verbal behavior by one parent toward the other.
- If one or both parents are *pro se*, require all questions and answers in court to be funneled through you.

To ensure **safety** during the course of litigation when you suspect that one parent has been controlled by the other parent, you may wish to

- Inform security that the suspected abusive parent must be kept a safe distance from the

at-risk parent. This may include escorting the at-risk parent into and out of the court house.

- If the parties are *pro se*, require a bailiff or other person to be placed between them when they stand before the bench.
- Order the controlling parent to remain in the courtroom for 15 minutes following a hearing so that the other party has an opportunity to leave safely.
- Design the terms of your order with an eye toward requiring the parties to have as little contact with each other as possible.
- Order professionally supervised visitation[39] or no visitation if safe visitation cannot be arranged.

B. [§4.2] Assigning Accountability

As a judge, you may take steps that require a parent to act or to refrain from action. One of the most important steps you can take when you recognize abuse is to remind yourself that the abusive parent must be held accountable for the abusive behaviors. Remember that the source of the family's problems is not immaturity or poor communication, but rather that one parent and the child are very much at risk of being abused by the other parent. If you can make the at-risk parent and child safe, their lives and behaviors will improve. Assigning accountability to the controlling parent and not permitting it to be shifted to the at-risk parent is the best and safest approach you can take.[40]

V. Establishing Jurisdiction

In cases involving family violence, parents may relocate to perpetrate or escape abuse, often taking children across state lines. This may create confusion about which state should make or modify custody decisions. To help courts decide these jurisdictional issues, all states and the District of Columbia adopted the Uniform Child Custody Jurisdiction Act (UCCJA). Most states have replaced the UCCJA with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[41] The UCCJA and UCCJEA set standards for determining when a state can appropriately exercise jurisdiction in cases involving custody and visitation decisions. The acts also require states, except in limited circumstances, to enforce custody judgments issued in other states.

The federal Parental Kidnapping Prevention Act[42] (PKPA) and the full faith and credit provisions of the Violence Against Women Act[43] (VAWA) also may apply in child custody proceedings.

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39. See § 12.3 for information regarding supervised visitation for cases involving domestic violence.
40. It may be that all members of the family could benefit from separate therapeutic support and batterer's treatment for the abusive parent. The primary focus must be the safety of the child.
41. While most states have adopted the UCCJEA, a minority still follow the UCCJA.
42. 28 U.S.C. § 1738A.
43. 18 U.S.C. §§ 2265-66.

Other federal or international laws and treaties also may come into play.[44] It is important to familiarize yourself with these laws, particularly when dealing with *pro se* litigants in family violence cases.[45]

A. [§5.1] Initial Custody Determinations

A state court may exercise jurisdiction to make an initial custody decision if it has one of the following (in order of priority):

Home state jurisdiction. Home state refers to the state in which a child has lived for at least six consecutive months immediately prior to commencement of the current case. If home state jurisdiction in your state is relied on as the basis for an initial custody decision, your state will have continuing jurisdiction to make future custody determinations for that child so long as at least one parent continues to live in your state.

Significant connection jurisdiction. To have significant connection jurisdiction, the court must find that the child and at least one parent or person acting as parent have a significant connection with your state and substantial evidence is available in your state concerning the child's care, protection, training, and personal relationships. A state may exercise significant connection jurisdiction if no other state has home state jurisdiction or if the child's home state has declined to exercise jurisdiction.

Last resort jurisdiction. This applies if no other state has home state or significant connection jurisdiction, or all other states having jurisdiction have declined to exercise jurisdiction.

B. [§5.2] Temporary Emergency Jurisdiction

A state may exercise temporary emergency jurisdiction if the child has been abandoned in the state, or it is necessary to protect the child because the child, child's sibling, or parent is subjected to or threatened with mistreatment or abuse. A court may exercise temporary emergency jurisdiction even if it is not the child's home state and the child does not have a significant connection with the state. Abuse of a parent is significant to a child's welfare and is often a reason for a court to exercise temporary emergency jurisdiction.

If a court exercises temporary emergency jurisdiction to protect a child from harm, no other court has issued a custody decision, and a custody proceeding has not been commenced in

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44. Indian Child Welfare Act (25 U.S.C. § 1901 (2005) applies to certain child custody actions where the child is Indian. The Act does not apply to custody actions between parents. The Hague Convention may apply to cases where parents seek refuge in a different country. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement And Co-Operation In Respect Of Parental Responsibility And Measures For The Protection Of Children, opened for signature Oct. 19, 1996, 35 I.L.M. 1391 (entered into force 1 January 2002) (hereinafter "Hague Convention").
45. While both the UCCJA § 8 and UCCJEA § 208 require courts to decline jurisdiction if a parent has wrongfully taken a child from another state, courts are encouraged to make findings of fact as to whether a parent is relocating to perpetuate or escape abuse prior to declining jurisdiction.

a state with jurisdiction, the child custody determination will remain in effect until an order is obtained from a state having home state, significant connection, or last resort jurisdiction. If no other state exercises jurisdiction, the orders made pursuant to temporary emergency jurisdiction may become final orders. If a custody proceeding has been commenced or a custody decision has been made in another state, your temporary emergency order is truly temporary. It should remain in effect long enough to allow the petitioner to seek an order from the original court. When two states are involved, you must communicate with the court in the other state to resolve the emergency and protect the parent and child.

C. [§5.3] Custody Modifications

A court in one state may not modify another state's custody judgment or decree unless the new state has acquired home state or significant connection jurisdiction **and** the court of the initial state

- determines that it no longer has exclusive continuing jurisdiction, or
- determines that the new state is a more convenient forum; **or** a court of either state determines that the child and child's parent or a person acting as a child's parent no longer reside in the initial state.

It is important to communicate with other courts in these circumstances, using the express procedures of the judicial communication statutes enacted in your state. You should discuss whether the other court still has jurisdiction, which court is the most convenient forum, and which court can provide the best protection for the at-risk parent and child.

If you issued an initial custody decision and the parent and child move to another state, you may be contacted by a judge in the new state about jurisdictional issues. This is a good time to review your case file to determine if it contains indicia of coercive control or other abusive behaviors. Sometimes in hindsight, certain behaviors or strategies will indicate abuse that initially went unnoticed.

[§5.4] Remember: Under the Violence Against Women Act, custody orders entered as part of civil protection orders must be given full faith and credit if the orders were issued after notice and an opportunity to be heard in the issuing state. Consider checking your local statutes to see how your jurisdiction handles jurisdictional issues.

D. [§5.5] Absent an Emergency

Parents relocate for reasons other than to escape or perpetrate violence. For example, a parent who has been abused may move closer to supportive family members or for

financial reasons. The same jurisdictional laws apply to these moves except that temporary emergency jurisdiction may not be available.[46]

E. [§5.6] Tribal Jurisdiction

Tribal courts vary in their responses to custody issues and family violence. As sovereign nations, tribes have their own laws addressing civil protection orders, custody and visitation, and parent-child relationships. If you have a case involving Indian children or jurisdictional issues with a tribe, you should communicate with the tribal court.

VI. Temporary and Emergency Orders

Often, one of the parties requests that the court enter an interim order of custody or visitation at the outset of a case. In cases where the pleadings or affidavits in support of such a request contain allegations that raise safety concerns, or you have such concerns for some other reason, you should consider scheduling a hearing, even if your jurisdiction allows temporary or emergency custody and visitation rulings without a hearing. The hearing can provide you with an opportunity to gather important information and conduct a safety assessment.

Some examples of concerning allegations are:

- A child is unsafe with one parent.
- A child has been subjected to adult behavior that is inappropriate for a child to witness.
- One of the parents has been physically abusive to the child, the other parent, or a new or former partner.
- One parent is a sex offender or has a new partner who is a sex offender.
- Child or adult protective services has been involved with this family or individual family members.
- A parent or other caregiver has a substance abuse problem.
- A child engages in sexualized behavior.
- One parent has committed an act of psychological or emotional abuse.
- One parent controls the financial resources.
- The parent alleged to be abusive has a history of being abused either as a child or as an adult.
- The parent alleged to be abusive has a history of witnessing abuse as a child.

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46. For further discussion, *see* Deborah Goelman & Darren Mitchell, *Interstate Custody Cases*, *in* ABA, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE (2004) at 257; Billie Lee Dunford-Jackson, *The Uniform Child Custody Jurisdiction and Enforcement Act: Affording Enhanced Protection for Victims of Domestic Violence and their Children*, 50 JUV. & FAM. CT. J. 55 (1999).

- One parent is not contributing substantially to the support of the child.
- One parent does not permit the child to bring toys or clothing to the other parent's house.
- A parent's immigration or disability status makes that parent unsuited to be the child's primary custodian.[47]

As with the initial filing, you may not have substantial evidence before you at this stage; nevertheless, you may observe statements or behaviors that trigger your concern for a child's physical, emotional, or mental health with one or the other of the parents. Though coercive control can be subtle and the things that concern you are only nuances, they should not be disregarded. They serve to keep you alert for other indicia as the case progresses.

A. [§6.1] Why Financial Control is Relevant to Early Decisions

Financial control is frequently part of coercive behavior and can be sufficient in itself to maintain control over the entire family. Controlling finances can also be a method of limiting the other parent's ability to parent effectively. For example, abusive parents might want to pay family expenses directly, rather than make support payments to the other parent. More typically, financial control appears as part of a complex of controlling behaviors.[48]

B. [§6.2] Moving toward Certainty

At this stage, you may feel that you do not have sufficient information to make a decision on custody and visitation based upon the pleadings or other evidence presented. As long as you have unresolved safety concerns, you should refrain from any decision. Steps you can take to move toward the certainty you need include

- Ordering the parties to provide essential information.
- Appointing a third party trained and experienced in safety and abuse issues to make a factual investigation regarding claims made by the parents or to otherwise secure information that you need.
- Giving the parents clear deadlines to provide specified information or otherwise comply with an order.
- Directing court personnel to assist *pro se* clients locate needed information.

Whenever you have concerns regarding the safety of a child or a parent, you should consider protective measures such as professionally supervised visitation or limited access

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47. G. Pendleton, *Ensuring Fairness to Noncitizens Survivors of Domestic Violence*, 54 JUV. & FAM. CT. J. 69, 72 (2003).
48. *See generally* NCJFCJ, NJIDV, PERPETRATOR'S ABUSIVE TACTICS.

by the abusive parent if there are no formal supervised visitation centers in your community. You could order enrollment and strict attendance in a certified treatment program for the abusive parent.[49] While compliance with a treatment program order does not ensure that an abusive parent has changed the concerning behavior, non-compliance can be a clear indicator that a parent does not respect boundaries. Not respecting rules and boundaries (including the terms of your orders) is often characteristic of individuals who engage in tactics of coercive control.

VII. Initial Filing

It is troublesome to consider that the individuals who appear before you may be causing harm to their children, whether they are doing so directly or indirectly. The earlier in a case that you recognize signs of coercive and controlling behaviors, the earlier you can take steps to create safety for the child and the at-risk parent. Often, you may be able to recognize signs of abuse at the very beginning of a case, long before an evidentiary hearing is calendared.

A. [§7.1] Review the Pleadings and Case History

It is important to review thoroughly the content of the pleadings as well as the litigants' court history very early on. Even though most judges feel the pressure of a busy docket and know that the claims pled and remedies requested may change during the course of the litigation, taking time to consider carefully the information that initial filings contain is a good use of resources. In fact, spending time considering what is – and what is not – contained in the pleadings may save substantial time as the litigation proceeds. The earlier you become aware that safety may be a consideration in the case, the earlier you can issue appropriate orders.

For example, was cruelty or abuse alleged in the pleadings? Allegations of abuse must be taken seriously as a warning sign that household members could be unsafe. Of course, the parties will have to provide evidence to the court to support any claim of abuse; yet, the fact that one party has made the allegations should alert you to be mindful of safety issues. At this stage of the litigation, you simply want to be aware of the fact that abuse has been raised and that further exploration on your part is required.

B. [§7.2] Review the Family's History

You might consider obtaining a history of prior court proceedings by the parties. Information contained in civil protection orders, prior family court pleadings, and criminal

49. Under many state statutes, judges have discretion to order a variety of remedies that promote the safety and well-being of the child, including attendance in and successful completion of an intervention program for batterers. *See, e.g.*, 10 MASS. GEN. LAWS ch. 209 § 38 (2007), ARIZ. REV. STAT. § 25-403.03 (2006). *See also* NCJFCJ, MODEL CODE § 406 2(c) (1994).

records might indicate that the family is high-risk and that the children might not be safe. Even though it is far too soon for findings in the case, it is important at this stage to be alert to the fact that safety is a likely factor.

C. [§7.3] A Word of Caution about the Absence of Allegations

The absence of allegations of abuse or the absence of requests for sole custody does not mean that safety risks are not present. For any number of reasons, victims of abuse may fail to disclose the abuse in their initial pleadings; among them, a fear of increasing the level of dangerousness,[50] embarrassment or shame, or advice from an attorney that asserting such claims may be detrimental to their case or delay resolution. Continuing to be sensitive to safety risks as the case proceeds will help you make appropriate safety assessments.

D. [§7.4] A Word of Caution about Requests for Sole Custody

Requests to exclude one parent substantially from any form of shared parenting may be made for one of two reasons: the abusive parent might be attempting to control the litigation and the at-risk parent by requesting sole physical custody or sole decision-making authority regarding the child;[51] or, if abuse has occurred, the abused parent may be making the request as a safety strategy for both the abused parent and the child. In essence, either parent's request for sole custody may be a warning that family members have experienced abuse. Because there may be safety concerns underlying the request for sole custody, explore the reasons behind the request prior to making any determination about custody or visitation.

[§7.5] Remember: Performing a sufficient initial safety assessment is critical to good decision-making. Paying attention to potential safety issues at the outset of the case reduces the risk of harm to abused family members and helps ensure that the court proceeds in a positive direction. Early assessment and intervention also result in a savings of time for the court later. Additional hearings in order to put safety measures in place at a later time, when access issues break down, are potentially avoided. Careful scrutiny through a safety lens early on can help ensure that the best interest of the child is met.

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50. Jaffe et al., *supra* note 25, at 82.
51. Your jurisdiction might use different nomenclature. Physical custody, primary residential parent, sole physical or legal custody might be used to describe when one parent has primary custody or makes the final decisions regarding a child. Visitation might be called parenting time or custodial time. For the purposes of this guide, we use the terms physical custody, visitation, and decision-making authority.

VIII. The Pretrial Process

A. [§8.1] The Discovery Process

A number of strategies are available to control the discovery process and enhance safety:

- Enforce no-contact orders so that the parties are not both present at depositions.
- Permit counsel to interrupt a deposition to consult with a client by telephone outside the presence of the other parent.
- Use remote video or other technology for deposition testimony, with the abusive parent being out of sight and earshot of the at-risk parent.
- Order the attorney requesting discovery to submit a safety plan[52] to the court for your approval.

B. [§8.2] Appointment of Third Parties

When you determine that a situation requires a third-party professional and the safety of the child or a parent is at issue, it is critical that you appoint professionals who are qualified. It is essential that **any**[53] professional brought into such a case, in whatever capacity, has extensive training in the dynamics of abuse and coercive control. As stated earlier, this pattern of behaviors is complex. Abuse and the responses to it are sometimes counterintuitive, susceptible to misinterpretation, and can lead to serious harm to the parent who is the target of abuse and to any child exposed to it.

C. [§8.3] The Pretrial Conference

Many jurisdictions require a pretrial conference to narrow the trial issues and settle those issues on which the parties agree. Your jurisdiction might require the parents to meet to discuss settlement prior to appearing at the pretrial conference. In cases where a protection order is in effect, you might amend the meeting requirement so that only the attorneys meet, if both parents are represented. To require the parties to come face-to-face where a protection order specifically prohibits such an event sends mixed messages to the parents, sets up a potential power imbalance between them, and can increase the level of harm to the at-risk parent.

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52. *See e.g.*, Jill Davies, VAWnet Applied Research Forum, Safety Planning (1997), available at http://new.vawnet.org/Assoc_Files_VAWnet/DaviesSafetyPlanning.pdf.
53. Professionals may include guardians *ad litem*, custody evaluators, parenting coordinators, mental health professionals, or unpaid volunteers such as court appointed special advocates (CASAs).

D. [§8.4] Drafting the Pretrial Order

Whenever you draft a pretrial order, be as clear and specific as possible. In cases where coercive control does exist, the abusive parent will likely use every contact with the other parent as an opportunity to continue the abuse. Therefore, the less room for contact or for differing about the meaning of a term of your order, the greater the safety. In some cases, where risk is high, you may need to provide for no contact between the parties or between the abusive parent and child, at least at this stage of the proceedings.

[§8.5] Suggestions: In appropriate cases, consider an award of substantial attorneys fees at the outset of the case. This corrective action is important where, for example, the abusive parent controls access to the financial information or controls the purse strings, so the at-risk parent lacks the means to finance necessary discovery.

E. [§8.6] Litigation Abuse during the Pretrial[54] Process

A parent who uses tactics of coercive control may find litigation to be an effective means of controlling the other parent.[55] Contact with the at-risk parent is critical to effectuating control strategies, and family court processes allow many opportunities for contact. Often court proceedings are the only contact available if the two parents are living separate and apart, with a protection order in place.

When both parents are *pro se*, court processes permit them direct access both in and out of court. When the abusive parent has legal representation, frequent court hearings reinforce the imbalance of power for unrepresented, at-risk parents and run up legal costs for at-risk parents who have retained counsel. For the at-risk parent, multiple pretrial appearances tend to maximize emotional trauma and increase the risk of losing employment by requiring time away from work.

Pretrial restrictions on custody and visitation are an especially powerful trigger for abusive behavior. Very often, abusive parents make multiple appearances seeking to undo orders that they perceive to be unfavorable to them, even in the absence of any change in circumstance between hearings. In addition, abusive parents may make multiple requests for continuance or otherwise seek to postpone final judgment. A final judgment will provide one less means of access to the at-risk parent and possibly to the child.

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54. Litigation abuse is not limited to the pretrial process and can occur at any point in the case, whether pre- or post-trial.
55. Legal process tactics of control can be present whether or not a party is represented by counsel.

Technique of Abuse	What You Can Do
Excessive filings or court appearances	• Order the parent bringing excessive motions to pay the attorneys fees and costs of the other parent • Order the parent who files frivolous motions to reimburse lost wages and other expenses of the other parent • Excuse the at-risk parent from appearing at hearings or permit the at-risk parent to appear by telephone • Order that no court appearances may be scheduled without your prior approval
Excessive requests for discovery	• Prohibit any discovery or court appearances that directly involve the children, like depositions • Ensure that the at-risk parent has adequate resources to comply with appropriate discovery • Control the discovery process by requiring that the abusive parent show the relevancy of requested deposition testimony and other potentially harassing discovery • Ensure that the abusive parent has no physical access to the at-risk parent during the discovery process • Ensure that the at-risk family members are adequately protected during the pretrial process (*e.g.*, private security, to be paid for by the controlling party, or orders that the abusive parent not be present during depositions)
Filing motions to change unfavorable orders	• Keep in place any orders you have made that enhance the safety of the at-risk parent or child • Require compliance with your orders unless there has been a significant change in circumstances • Prohibit contact between the parents, including during visitation exchanges • Keep all protections in place, including no contact with the child, if that term was part of your original order, absent strong evidence of change and compliance
Multiple requests for continuance	• Deny requests for excessive or unnecessary delay

Technique of Abuse	What You Can Do
Abuse of the *ex parte* process	• Determine whether the at-risk parent is available for the hearing and whether adequate notice was given • Determine whether a true emergency exists • Use collateral information to assist you in making a decision; for example, determine whether any protection orders have been entered against either parent • In post-divorce proceedings, attempt to determine whether the claims asserted in the *ex parte* motion were raised in prior litigation • Consider the length of time since any prior custody litigation • Consider whether prior allegations of abuse have been raised in prior court proceedings or with children's protective services

IX. Mediation and Other Forms of Negotiation

Most jurisdictions, including tribal courts, favor resolution of disputes without the need for litigation. Many family law courts automatically refer a dispute regarding children to some form of mediation. Mediation may even be mandatory in your court for all child custody matters.

To be successful, mediation requires an equal balance of power across the table. Situations that involve coercion, whether physical violence has occurred, are generally not suited for mediation. Although there are circumstances under which mediation can be configured to maximize safety, it is best avoided in cases where coercion and safety are factors for either a parent or a child.[56] This is so even if no civil protection order has been entered in the case.

A. [§9.1] Reasons Why Mediation Might be Inappropriate

Mediation assumes that if communication skills can be improved, the parties will be able to work together.[57] However, abuse is not a communication problem. Indeed, any communication between the parties may increase the safety risks for the at-risk parent by providing opportunities for control by the abusive parent.

56. NCJFCJ, Model Code § 408(A) and § 408(B) (1994).
57. Michael Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHSJDR 321, 330 (2007), citing Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: Responding To Conflict Through Empowerment And Recognition (1994).

- When mediation is suggested by the court, the at-risk parent may view the suggestion as an order.
- The at-risk parent may be placed at heightened risk if that parent at any time determines that the process is not acceptable and needs to be terminated. Terminating the mediation against the abusive parent's wishes may endanger not only the at-risk parent, but the mediator as well.
- The at-risk parent may agree to terms out of intimidation, coercion, or fear, creating an unworkable agreement.
- The mediator or the individual determining whether the case is appropriate for mediation may not appreciate the dynamics of a controlling situation. Identifying domestic violence is complex and counterintuitive, and requires extensive education and experience.

In many cases involving coercion and abuse, mediated agreements do not save the court's time or the parties' money down the road. If one party controlled the terms of an agreement, then litigation is likely to ensue in the future. A party who felt in control of the mediation is likely to advocate for ongoing mediation should problems arise in the future, perpetuating that party's position of power.

B. [§9.2] What You Can Do

As one of the gatekeepers to the process, you can order other options when mediation is inappropriate for a given case. Most mediation statutes and orders contain an "opt-out" provision where safety issues are of concern.[58] If your mediation statute, standing order, or policy recommends but does not mandate mediation, consider not requiring the parents to mediate their child custody and visitation issues. Since mediation is often ordered at the beginning of a case, it is important that you take the time to review pleadings and conduct an inquiry before ordering any contact between the parties. Where the parties are represented by counsel, you can ask the attorneys whether the case is appropriate for mediation, although not all attorneys are sensitive to the risks of mediation in abuse cases. An at-risk parent might opt for mediation if that parent is assured that the process can be made safe. Remember that *pro forma* orders of mediation, without any inquiry into the appropriateness of the order, can increase safety risks as well as create more work for the court in the future when mediated agreements break down.[59]

C. [§9.3] If You Decide to Order Mediation

If your decision is to order mediation, you can improve its safety by

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58. In July, 2000 the American Bar Association adopted a policy encouraging courts to have a mediation opt-out provision for domestic violence cases. ("Resolved that the American Bar Association recommends that court-mandated mediation include an opt-out prerogative in any action in which one party has perpetrated domestic violence upon the other party.").
59. Violence Against Women Vol. III 9-51 (J. Zorza ed., 2006).

- Appointing only mediators who are well-trained in coercive control and the potential safety risks of mediation.
- Physically separating the parties within the same building. Remote access to the at-risk parent (such as videoconferencing) or separately scheduled mediation sessions may create settings where both parents feel empowered to speak.
- Telling the parents that failure to reach a mediated agreement will not affect your decision after a hearing on the merits.
- Implementing a policy in your court that mediators not report back to the court what happened during mediation, unless the mediator believes there are safety risks of which the court must be aware.

D. [§9.4] Collaborative Law

While collaborative law has been a useful tool for settlement of many family cases, it is generally inappropriate for cases involving coercive control. The process requires frequent in-person meetings between clients and counsel. If the matter does not resolve, the parties must hire separate counsel to litigate, making the process appropriate primarily for parties with means. The negotiation sessions provide opportunities for exercise of ongoing control by the coercive parent. The presence of counsel does not diminish the frequency or impact of the coercive behavior. Like mediation, the process can incorporate safety measures, such as the use of videoconferencing and representation by counsel who are well-trained in the dynamics of coercion and violence. The expense, the lack of understanding of some family law lawyers in the dynamics of domestic violence, and the ongoing contact between the controlling and the target parent make this process inappropriate in domestic violence cases.

E. [§9.5] Cooperative Law

In cooperative law, the same lawyers who negotiate on behalf of the clients are permitted to litigate the case if negotiations fail. This process may be even more dangerous to the at-risk parent because negotiations carry the awareness that litigation will follow if the at-risk parent does not cooperate. The process could easily be used by the coercive parent to gain informally information that may be used against the at-risk parent during litigation. The at-risk parent is often best protected through the parallel process of formal discovery and negotiations through counsel.

[§9.6] Remember: An abusive parent might favor mediation or other forms of alternative dispute resolution. The abuser knows that contact with the at-risk parent is an effective means of continuing coercion. Often, an at-risk parent will agree to mediation or other processes believing that the mediator will somehow be able to correct the power imbalance during the process. An at-risk parent who agrees to mediation or other alternative forms of dispute resolution must be made aware of the attendant risks. It may be that the burden of explaining these risks and incorporating safety precautions falls to you.

X. Settlements and the Uncontested Case

Ideally, all parents would be able to resolve their child custody and visitation disputes in a manner that provides for safe and healthy relationships among all concerned. It may seem that adults would prefer to make for themselves such crucial decisions as the custody and visitation arrangements. We reason, therefore, that a settled case is better than a tried one. Such assumptions rarely hold true where one parent has subjected the other to coercive control. As indicated earlier, where there is an imbalance of power, the more powerful parent will often prevail in negotiations. The parent who feels threatened or coerced into settling the custody matter is unlikely to admit so in court, especially in the presence of the abusive parent. Any inquiry into the voluntariness of an agreement's execution where coercive control exists is inherently unreliable, even though it may be required in your jurisdiction. Your obligation to review the agreement for appropriateness does not end because the case is uncontested or has settled. As a judge, you are in a unique position to determine whether the plan is appropriate for the parents and is in the best interest of the child, given their particular circumstances.

A. [§10.1] Equal Time is Not Always the Same as Best Interest

In non-abusive relationships, parents often work out child-centered arrangements for custody and visitation. Parents in non-abusive relationships frequently work out plans that provide each parent with substantial, but not necessarily equal, time with the child. Child-centered parents often recognize that for a variety of reasons, the child will thrive by spending more time at the residence of one or the other of them; and that those time allocations are likely to change in the future to accommodate the child's developmental needs. Parents in non-abusive relationships must work through the difficult adjustments that come with separation but ultimately focus on the best interest and the particular needs of their child.

B. [§10.2] What You Can Do

Your review of agreements that provide for equal physical time with the child should include the following considerations:

- Historically, in the child's life (pre-separation), which parent has provided the child with significant nurturing?
- Historically, which parent has been primarily responsible for the child's day-to-day needs?
- Does equal time mean equal responsibility for meeting the child's routine needs?
- Who will be primarily responsible for the child during time spent with each parent? Will it be the parent, a relative, or a friend?
- Do the parents have equal parenting skills in terms of making the child feel safe, respected, and supported?

- Are the parents equally respectful of the child's age-appropriate needs as well as any special needs that the child might have?
- Have there been any allegations of abuse by either parent toward the other parent, a child, or another person?
- If the agreement calls for the child to split physical time in two different houses, is it in the child's best interest to be without one home base?
- Does the arrangement eliminate or substantially reduce a prior child support order?

These questions are not exhaustive. There may be additional considerations as you review each case and each agreement. You may want to consider the same questions when drafting your decisions and orders.

Often parents have a difficult time distinguishing between their needs and those of the child. You may be the only one who is reviewing the agreement from the child's perspective.

C. [§10.3] Equal Decision-Making Authority May Not Be in the Child's Best Interest

Some jurisdictions presume by statute that parents shall have equal decision-making authority on issues involving the child. Most presumptions, appropriately so, include exceptions for cases where there is a history of abuse.

Joint decision-making arrangements put the parents in the position of having to communicate frequently and directly with each other. This contact allows the pattern of abuse and control to continue, and perhaps even encourages it to escalate, since the abusive parent now has a court order that supports contact and forces decision-making with the at-risk parent. Likewise, "joint decisions" in these situations are often no more than the coercive parent dictating what will happen. Joint decision-making arrangements may present children with the opportunity to learn that abusive behavior is an effective and appropriate tool of control, which is not in their best interest.

Your review of agreements that call for joint decision-making should include the following considerations:

- Have there been allegations of coercive behavior?
- Is there a history of unequal power or strict gender roles in the family? (A history of unequal power, whether financial or otherwise, should be of concern to the court, particularly when there are strict gender roles and a history of coercive behavior in the family.)
- Is there a history of non-payment or under-payment of child support? (Non-payment

or under-payment of child support often is a form of coercive and abusive behavior.)
- Historically, once a decision is made, is the same parent who made the decision responsible for its implementation? (Frequently, once the decision is made, the at-risk parent is left with the responsibility of implementing the decision or dealing with its consequences.)

D. [§10.4] Agreements as to Sole Custody

Agreements giving sole physical custody or sole decision-making authority to one parent likewise should attract the court's heightened attention. You will need to review the history of both the case and the family. Sole custody and sole decision-making authority may well be an appropriate solution in a case where a parent or child has experienced abuse, but can be harmful or dangerous if allocated to the abusing parent. When you are presented with agreements that allocate custody and decision-making exclusively to one parent, you should inquire:

- What is the history of abuse in this case and with the parents generally?
- Has child or adult protective services ever been involved with the family?
- Is the custodial arrangement a change from what has happened historically in terms of parenting?
- Will the child be living with the more nurturing parent?
- Will the child be living with his or her siblings?
- Will the child be living with a parent who has abused either the other parent, other adults, or children?

No single answer determines whether you should approve the agreement. You will need to consider all of the circumstances of the particular case and may at times reach unexpected results. For example, where an at-risk parent agrees to a change in custody of a child, it may be that the at-risk parent is attempting to minimize the extent of the abuse in order to secure some level of future safety and security.[60] Likewise, an at-risk parent could agree to one child residing with the abusive parent in order to secure the safety of the other children.

E. [§10.5] Particular Concerns for the Uncontested Case

It can be tempting to allow requested relief when the other parent does not appear in court. However, a party's non-appearance does not relieve you of your obligation to review the requests in light of the best interest of the child. This is particularly so when the relief requested changes an existing order of custody or visitation.

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60. Donna Hitchens & Patricia Van Horn, *The Court's Role in Supporting and Protecting Children Exposed to Domestic Violence*, 6 J. Ctr. For Families, Child. & Cts. 31, 40 (2005).

The inquiries suggested above for sole custody requests are appropriate in the uncontested case as well. In addition, where a party fails to appear and you have concerns that the non-appearing party may be an at-risk parent, you might

- Inquire as to whether actual service was made.
- Inquire as to whether the absent parent made any response during any part of the litigation.
- If a response was made to either the court or the other parent, ask to review any written response or have the other parent or counsel state on the record the substance of the communication with the non-appearing parent.
- Determine whether the non-appearing parent has funds for counsel, particularly if there is income disparity.
- Continue the hearing for the appearance of the other parent.

F. [§10.6] A Final Word about Settlements and Uncontested Cases

There is no evidence that mediated or settled agreements in cases involving abuse are better for the parties or the court. When a party signs an agreement out of fear, that case is likely to return to the court repeatedly. Often, the agreement breaks down because the at-risk parent recognizes that the agreement, when implemented, either is not in the child's best interest or is unsafe.

Alternatively, it is not unusual for an abusive parent to bring the case back on the court's docket whenever the other parent questions decisions, or makes decisions, no matter how trivial, without consultation.

Whenever you have concerns about an agreement or uncontested matter, consider asking the parents why the intended arrangement is in the best interest of the child. You may find that an at-risk parent answers your questions from a conviction that the agreement is not, in fact, in the child's best interest. In the final analysis, if you have misgivings about whether the terms of an agreement are best for the child, you are not bound to accept the agreement.

XI. Findings of Fact and Conclusions of Law

For several reasons, both parents will benefit from clear, precise orders complete with detailed findings of fact and conclusions of law. Findings provide clarity to the parents. Conclusions explain to counsel and the parents the legal underpinnings of your decision. Making your reasoning clear from the beginning of the case through final judgment offers the best assurance that the relief you have shaped actually will occur. Well-crafted findings and conclusions will not only support you in the event of an appeal, they could prevent an appeal.

A. [§11.1] Be Clear about the Behaviors

You can enhance safety by making clear to the abusive parent what past abusive behavior you find inappropriate and that such behavior must be modified before you will consider any change in your order. The at-risk parent will feel supported in requests for safety considerations and will be on notice about what behavior changes you require of the other party. Future judicial officers will benefit from the guidance that findings of fact and conclusions of law will give them, should they preside over related contempt or modification proceedings.

Making findings of fact about past behavior may also be necessary to support or rebut certain statutory presumptions regarding the best interest of the child. Some of the statutory presumptions that might require findings of fact and conclusions of law are

- Presumption of shared physical custody.
- Presumption of shared decision-making authority.
- Presumption of equal access to information regarding the child.
- Presumption against custody or visitation to a perpetrator of domestic violence.

B. [§11.2] Wrap-Around Findings and Conclusions

Your findings will be best understood if they are comprehensive. The best findings might encompass

- The history of the parents' relationship.
- Evidence of abuse, whether it be parent's testimony, medical records, or other documentary evidence.
- The history of childcare.
- The history of the child's financial support.
- The child's educational and health history.
- The parents' respective legal positions.
- What strategies the at-risk parent has engaged in for the parent's safety and that of the child.
- The testimony of third-party witnesses that support your findings.
- Which testimony or witnesses you find credible.
- The history of the child's behavior with each parent.
- The child's exposure to risky behavior with one or both parents.
- The child's response to witnessing or experiencing abuse directly.
- The child's relationship with siblings.
- The parents' disciplinary methods.
- The child's relationship with third parties who nurture the child and provide a safe haven for the child.

C. [§11.3] Tying Findings and Conclusions into the Child's Best Interest

Always connect your findings and conclusions to the safety and best interest of the child. When findings wrap around the child, positioning each finding to support the child's best interest, they are difficult to dispute. You will want to make reference to the testimony and other evidence that supports each finding. The same method is helpful in drafting conclusions of law. When you draft conclusions that support every detail of your judgment, you will know that you are on solid ground for enforcement and appeal.

In matters where abuse is an issue, extensive findings of fact and conclusions of law can assist the parties to understand the factual and legal basis for your decision. When you take the time to write extensive findings of fact and conclusions of law, the parties are more likely to see that you considered their evidence and positions. When litigants believe that they received a fair hearing, they are more likely to comply with the order, even if the result was not what they hoped.

You may initially be concerned that extensive findings might provide a party with grounds to appeal. In abuse cases, the more carefully you set out the parties' history, the pattern of abuse, the resulting family dynamics, and the best interest of the child, the more likely an appellate court will understand the factual and legal underpinnings for your decision. Should the matter be appealed, you will have an extensive basis for your decision, which will enhance its chances of being affirmed.

All in all, there is no downside to careful drafting of findings and conclusions.

XII. Drafting the Order

It can be beneficial in every case to state, with specificity, the custody arrangement and any schedule for visitation. In cases that involve coercive control, such a schedule is imperative, and the more detailed, the better. The family will be safer and be less likely to return to court if the order or judgment anticipates and speaks to as many situations as possible. Attention to detail can reduce or eliminate the need for contact between the parties.

A. [§12.1] Recommended Inquiries

Information you should request of the parties before the close of the hearing:

- Is there a protection order in place that impacts the available options for visitation and exchange?
- If visitation is to be ordered, how do the parties prefer to exchange the child and is this preference a safe option?

- Is there another person each would suggest to deliver and pick up the child if it is unsafe for one parent to do so?
- What specifics do they recommend to ensure safety at drop-off and pick-up?
- If visitation needs to be supervised, and no professional supervised visitation center exists in the community, is there a safe non-relative who could supervise the visitation?
- What vacation and holiday schedule do they propose?
- What weekly visitation do they propose?
- Is each parent comfortable with the other taking the child out-of-state or out of the country?
- What restrictions, if any, would they put on travel?
- What do they anticipate to be the most difficult issues for the child regarding any change in the current custodial or visitation arrangement?
- What terms would they like to see in an order to help the child transition safely and comfortably into a different custody and visitation arrangement?

B. [§12.2] Considerations Prior to Issuing the Order

If you determine that the case involves a parent with a history of violent or coercive behavior, then you will want to consider

- Ordering professionally supervised visitation between the child and the abusive parent.
- If professional supervision is not available, determining whether the child is at risk if there is visitation.
- If you determine that a non-relative can provide safe supervision, setting out the parameters for how visitation is to be conducted and what behaviors justify the supervisor terminating the visit.
- Ordering the parent whose behavior requires the supervision to pay the supervisor or the costs of visitation exchange.
- Ordering a thoroughly detailed visitation schedule.
- Designing an order that eliminates any contact between the parties.
- Designating another person to communicate emergency messages when visitation cannot occur.
- Setting out rules for the communicator so that he or she knows not to communicate any messages beyond a verified emergency involving the child or the need to cancel a scheduled visitation.
- Informing parties that, should the parent fail to appear for visitation within a set number of minutes of the appointed time (20-30 minutes), the visitation is cancelled and will not be made up.
- Setting out a mechanism to enable the parties to reschedule visitations cancelled on account of an emergency (such as death of a family member, or serious illness of a child or parent).

- Setting a date in three or four months to review compliance and any difficulties that the child might be experiencing.[61]
- If possible, designing a plan that will work without the use of a parent coordinator. If you must appoint a coordinator, make sure that it is someone who is well-trained and experienced in the dynamics of abuse and how those dynamics play out in family law cases. Assign costs of the coordinator to the party whose behavior necessitated the appointment.

C. [§12.3] Safer Options for Visitation and Exchange

Supervised visitation or exchange is preferred where you have found that one incident of abuse or a pattern of abuse was present in the family.[62] Supervised visitation or exchange is also preferred where a parent has abused third parties, including former intimate partners or other children. Many supervised visitation centers have the training and experience to provide services specifically for domestic violence cases. If you do not have a supervised visitation center in your area, local advocates or domestic violence law enforcement might help you develop some creative solutions. Rarely will family members be appropriate supervisors.

Asking staff or counsel to contact supervised visitation centers to obtain copies of their hours of operation and their visitation rules and regulations will give you helpful ideas for drafting an order that sets out the guidelines of supervision. In some situations, it simply will be too unsafe for either the child or one of the parents for you to order visitation. You will want to make sure that you set out your findings carefully to support any termination, suspension, or restrictions on visitation.

The best interest of the child demands that the safest and healthiest environment possible be created for the child's development. Your orders can accomplish not only safe visitation and custody, but provide maximum nurturing for the child.

XIII. Enforcing the Order

Accountability and consequences for the abusive parent can be effective tools for stopping the abusive behavior and improving the safety of the other family members. Enforcement proceedings afford valuable opportunities to control abusive behavior and shift the balance of power away from the abuser.

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61. Regularly scheduled review hearings should take place only if being required to attend them does not place the at-risk parent at further physical, emotional, or financial harm.
62. *See generally* Jaffe et al., *supra* note 25, at 89.

A. [§13.1] Non-Compliance as Controlling Behavior

Abusive parents generally have carefully manufactured a situation that facilitates and, in their minds, justifies their behavior. When the justice system fails to hold abusive parents accountable, especially when their behavior has been revealed to the court, it reinforces their belief that there are no real consequences for their actions. Because the abusive parent now sees the court as a collusive partner, he or she may have no reason to think that the court will hold him or her accountable to obey any of its orders. This result puts both the child and the at-risk parent in an extremely dangerous position.[63]

B. [§13.2] What You Can Do

- Do not let the first violation of the order go by without consequences.
- Require that the abusive parent prove any defenses to the contempt or other action with independent evidence.
- Order the abusive parent to pay all court expenses pertaining to the violation, including the attorneys fees and lost wages of the at-risk parent.
- Even if not required to do so in your jurisdiction, make findings in your order that will be helpful to you and the parties should additional contempt actions follow.
- Set a review date to ensure compliance and address any safety concerns.[64]
- Have the abusive parent wait in the courthouse for 15 minutes so that the other parent may leave safely. Have a bailiff or security guard escort the at-risk parent out of the building.

C. [§13.3] When the Abusive Parent Files for Contempt

There will be times when the at-risk parent violates an order. As with decision-making at other critical points in the case, context is everything. In order to intervene effectively, it is important to understand the effect that coercive control has had on the at-risk parent and the context within which any violation of your order occurred.[65] For example, an at-risk parent may violate an order to protect the child's physical or emotional safety, particularly if the child was abused during a visit. Equally important is that you evaluate any new allegations of abuse to avoid placing the at-risk parent in the no-win position of choosing between non-compliance and failing to take action to halt further abuse.

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63. Barbara J. Hart, *Rule Making and Enforcement, the Violent and Controlling Tactics of Men Who Batter, and Rule Compliance and Resistance, The Response of Battered Women*, in I Am Not Your Victim: Anatomy Of Domestic Violence 258, 262 (Beth Sipe & Evelyn Hall eds., 1996).
64. Regularly scheduled review hearings should only take place if the at-risk parent will not be placed at further physical, emotional, or financial harm if required to attend. Consider reviews where the at-risk parent may report to the court without appearing.
65. Frederick & Tilley, *supra* note 20, at 1.

D. [§13.4] What You Can Do

- Understand the connection between prior abuse and the perceived threat of abuse that triggered the violation of your order.
- Consider making findings that explain the facts behind the contempt, as well as the basis for your order.
- Draft an order that addresses any lingering safety concerns.
- Schedule a review date so that you can monitor compliance.

If a parent files for contempt for what appear to be trivial infractions, that parent may be using the legal process as a tool to continue the coercive control. To enhance party safety, protect the at-risk parent from financial obligations resulting from the other parent's behavior, and prevent the use of your court as a tool for coercion. Also, inquire into facts behind any alleged contempt with both parties, and the intent of the complainant, where possible. While the answers may not alleviate any contempt finding, it may prompt you to consider revising a prior order.

Conclusion

While child custody and visitation issues can be difficult ones, there are strategies that can guide you in making appropriate and effective decisions. Familiarity with the dynamics of abuse will clarify and simplify custody and visitation cases where domestic violence, sexual assault, dating violence, or stalking may be an issue. Being familiar with the dynamics of abuse and the tactics of coercive control, through observation of the family and review of the supporting literature, can assist you in making appropriate child-centered orders that maximize safety.