

Florida's DOMESTIC VIOLENCE BENCHBOOK

September 2014



Office of the State Courts Administrator

This project was supported by Contract No. LN967 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women.

INTRODUCTION

Education enhances the knowledge and skills of the judiciary and therefore contributes to the administration of justice. The Office of the State Courts Administrator (OSCA), Office of Court Improvement (OCI), developed Florida's domestic violence benchbook to address the highly litigated legal issues in domestic violence cases. OSCA continues to update the benchbook periodically in order to assist both new and experienced judges. This benchbook is a compilation of promising and science-informed practices as well as a legal resource guide. It is a comprehensive tool for judges, providing information regarding legal and non-legal considerations in domestic violence cases.

The benchbook features -

- Domestic Violence, Repeat Violence, Sexual Violence and Dating Violence and Stalking Checklists
- Domestic Violence Colloquy
- Domestic Violence Legal Outline
- Best Practice Guidelines for determining child support
- Comparison of Chapter 741 and 39 Injunctions
- Domestic Violence Related Articles and Publications
- Elder Abuse Benchcard
- Mandatory Reporting of Abuse Checklist

Applicable federal law and critical case law are also included. The information contained in the benchbook focuses primarily on civil domestic violence proceedings; however, its Domestic Violence Legal Outline includes informative sections that address evidence and violence issues in criminal proceedings. Due to the length of the legal outline, a separate table of contents is included for that section.

Our office invites suggestions for future editions and ways this benchbook can be made more useful to judges hearing domestic violence cases. Please provide comments and suggestions to: Kathleen Tailer, Office of Court Improvement, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1900. You may also send comments and suggestions via email: tailerk@flcourts.org, or phone: 850/414.1507.

Upon request by a qualified individual with a disability, this document will be made available in alternate formats. To order this document in an alternate format, please contact the Office of Court Improvement, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1900. Phone: 850/414.1507.



DOMESTIC VIOLENCE BENCHBOOK

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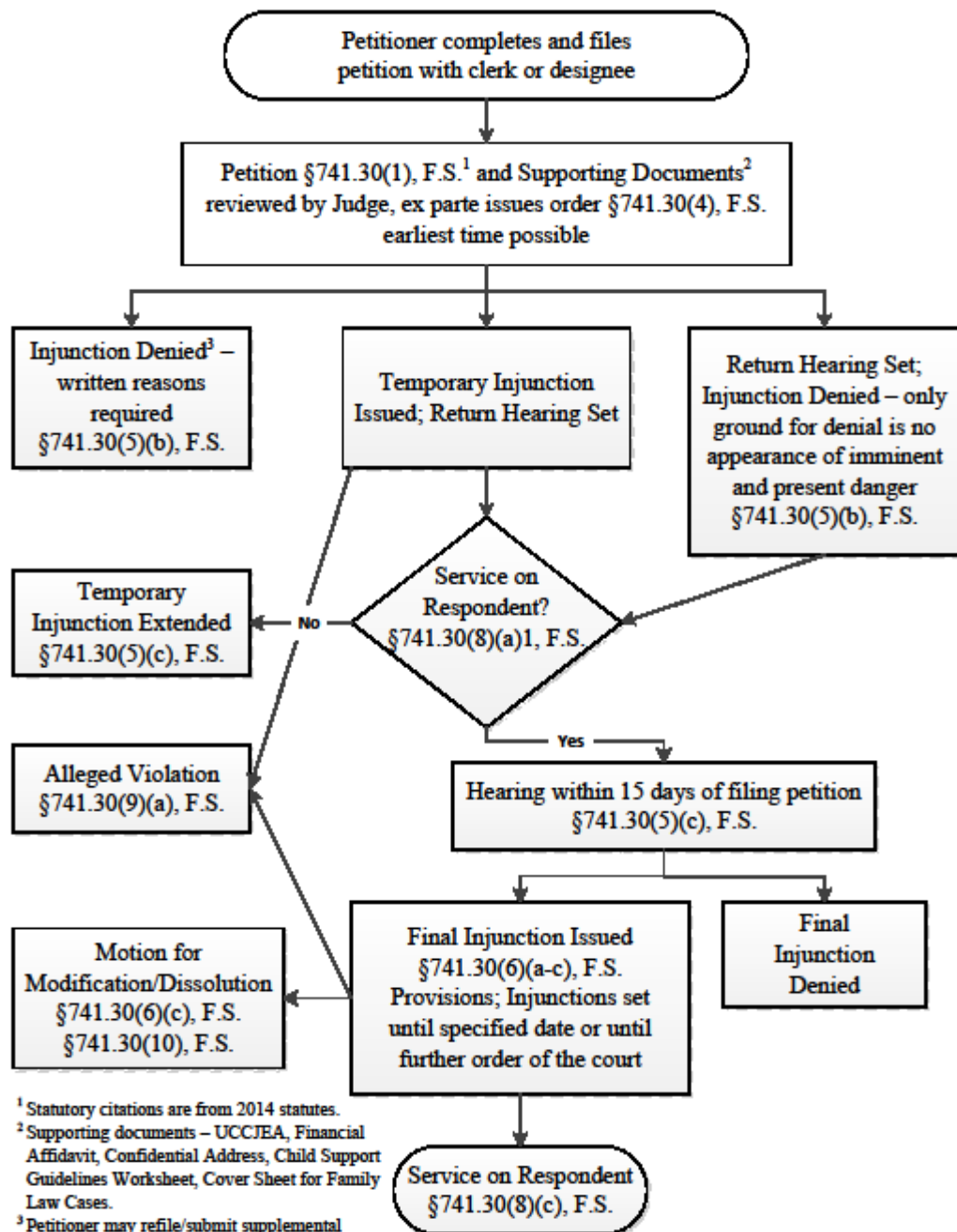
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CHAPTER 741 INJUNCTION FLOW CHART



¹ Statutory citations are from 2014 statutes.

² Supporting documents – UCCJEA, Financial Affidavit, Confidential Address, Child Support Guidelines Worksheet, Cover Sheet for Family Law Cases.

³ Petitioner may refile/submit supplemental affidavit.

IN ORDER TO FILE A PETITION FOR AN INJUNCTION, THE PETITIONER MUST BE A VICTIM OF DOMESTIC VIOLENCE OR BE IN IMMINENT DANGER OF BECOMING A VICTIM OF DOMESTIC VIOLENCE. §741.30(1)(a), Florida Statutes.

Domestic violence includes: any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, (including cyber-stalking) aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death of one family or household member by another family or household member. §741.28(2), Florida Statutes.

In determining whether Petitioner has “reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence,” the court must consider all relevant factors alleged in the petition for injunction for protection against domestic violence, including, but not limited to:

- The history between the petitioner and the respondent, including threats, harassment, stalking, and physical abuse.
- Whether the respondent has attempted to harm the petitioner or family members or individuals closely associated with the petitioner.
- Whether the respondent has threatened to conceal, kidnap, or harm the petitioner's child or children.
- Whether the respondent has intentionally injured or killed a family pet.
- Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.
- Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.
- Whether the respondent has a criminal history involving violence or the threat of violence.
- The existence of a verifiable order of protection issued previously or from another jurisdiction.
- Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communications equipment, clothing, or other items belonging to the petitioner.
- Whether the respondent engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence.

§741.30(6)(b), Florida Statutes.

DOMESTIC VIOLENCE INJUNCTION CASE PROCESS AND THE ISSUES ASSOCIATED WITH EACH STAGE

(Note: Stages refer to the court process; issues are items the judiciary should consider)

Stages	Issues
<p>First:</p> <p>A petition is filed for protection from domestic violence.</p>	<ul style="list-style-type: none"> • Access to court/courthouse • Employment, children, transportation, office hours • Completion of forms - usually pro se <ul style="list-style-type: none"> ○ Lengthy, confusing forms ○ Language/literacy ○ Denial/minimization of abuse as survival strategy ○ Emotional upset/agitation
<p>Second:</p> <p>The court issues an ex parte order granting or denying temporary injunction. If granted, a return hearing is set. In jurisdictions that permit, the petitioner may decline a return hearing in writing without the protection of an ex parte injunction.</p>	<ul style="list-style-type: none"> • Increased danger • Safety of persons and pets • If temporary injunction issued (or if judge wants more info), the respondent is served with injunction and notice of hearing and often has a very angry reaction • MOST DANGEROUS TIME FOR PETITIONERS/VICTIMS - separating or attempting to separate from partner • Especially dangerous if court has scheduled a hearing without issuing a temporary injunction

Third:

The court holds a return hearing to determine whether or not the final injunction will be granted.

- Access to court/courthouse
- Employment, children, transportation
- Safety of persons and pets
- Unknown cultural barriers
- Threats, violence to coerce petitioner to drop case, directly or through others
- Courthouse/courtroom safety issues
- Respondent's access to children through shared custody
- Unsupervised visitation
- Firearms issues
- Family support
- Custody and visitation provisions
- Child support/alimony
- Counseling, other services for victim and children (not part of injunction order)

Fourth:

Enforcement of compliance with terms of injunction.

- Safety
- No contact
- No violence
- Firearms surrender
- Treatment/family support
- BIP/other treatment for respondent
- Custody and visitation provisions
- Child support/alimony
- Fear - who is responsible for tracking and enforcing compliance? (Often, it turns out to be the petitioner)



FLORIDA’S INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE TABLE OF CONTENTS

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DOMESTIC VIOLENCE CHECKLIST

STANDING

- ☐ **Petitioner and respondent must be family or household members. §741.30(1)(e), Florida Statutes.**
 - “Family or household member” means spouses, former spouses, persons related by blood or marriage, persons who are presently living together as if a family or who have lived together in the past as if a family and persons who are parents of a child together regardless of whether or not they have been married or lived together. §741.28(3), Florida Statutes.
 - With the exception of persons who have a child in common, the family or household members must be currently residing together or have in the past resided together in the same single dwelling unit. §741.28(3), Florida Statutes.
A minor child can file by and through a parent as “next friend.” Parrish v. Price, 71 So.3d 132 (Fla. 2d DCA 2011).
- ☐ **There is no minimum residency or venue requirement.** A petition may be filed in the circuit where the petitioner currently or temporarily resides, where the respondent resides, or where the domestic violence occurred. §741.30(1)(j), Florida Statutes.
- ☐ **Petitioner must be a victim of domestic violence or in imminent danger of becoming a victim.** §741.30(1)(a), Florida Statutes.
 - Domestic violence includes: assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death to one family or household member by another family or household member. §741.28(2), Florida Statutes.
 - In determining whether petitioner has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence, the court must consider all relevant factors alleged in the petition for injunction for protection against domestic violence, including, but not limited to:
 - The history between the petitioner and the respondent, including threats, harassment, stalking, and physical abuse.
 - Whether the respondent has attempted to harm the petitioner or family members or individuals closely associated with the petitioner.
 - Whether the respondent has threatened to conceal, kidnap, or harm the petitioner’s child or children.

- Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.
- Whether the respondent has intentionally injured or killed a family pet.
- Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.
- Whether the respondent has a criminal history involving violence or the threat of violence.
- The existence of a verifiable order of protection issued previously or from another jurisdiction.
- Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communication equipment, clothing, or other items belonging to the petitioner.
- Whether the respondent engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence.

In making a determination as to whether the petitioner has reasonable cause, the court is not limited to the above factors. §741.30(6)(b), Florida Statutes.

- **No bond shall be required for entry of an injunction.** §741.30(2)(b), Florida Statutes.

EX PARTE (TEMPORARY) INJUNCTIONS

- **Determine whether it appears to the court that an immediate and present danger of domestic violence exists.** §741.30(5)(a), Florida Statutes.
 - The court can only consider the verified pleadings or affidavits unless respondent appears at the hearing or has received reasonable notice of the hearing. §741.30(5)(b), Florida Statutes.
 - EXCEPTION: The court may take judicial notice of prior court records when imminent danger has been alleged and it is impractical to give prior notice to the parties. §90.204(4), Florida Statutes.
- **If the ex parte (temporary) injunction is denied:**
 - If the court finds no basis for the issuance of an injunction, the petition may be denied without a return hearing; however, a denial of a petition for an ex parte (temporary) injunction shall be by written order noting the legal grounds for denial. §741.30(5)(b), Florida Statutes.
 - When the only ground for denial is no appearance of an immediate and present danger of domestic violence, the petition for ex parte (temporary) injunction may be denied but the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. §741.30(5)(b), Florida Statutes. Some circuits allow the petitioner

to request in writing that the court dismiss the case rather than set a hearing. This practice increases victim safety.

- ☐ **If the *ex parte* (temporary) injunction is granted:**
 - Any such temporary injunction shall be effective for a fixed period not to exceed 15 days. §741.30(5)(c), Florida Statutes.
 - A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §741.30(5)(c), Florida Statutes.
 - The court may grant a continuance of the hearing before or during a hearing for good cause shown by either party, which shall include a continuance to obtain service of process. §741.30(5)(c), Florida Statutes.
 - Any injunction shall be extended if necessary to remain in full force and effect during any period of continuance. §741.30(5)(c), Florida Statutes.

POSSIBLE RELIEF WITH EX PARTE (TEMPORARY) INJUNCTIONS

- ☐ Restrain respondent from committing any acts of domestic violence. §741.30(5)(a)(1), Florida Statutes.
- ☐ Restrain respondent from contact with petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
- ☐ Award petitioner temporary exclusive use and occupancy of the dwelling that the parties share or excluding the respondent from the residence of the petitioner. §741.30(5)(a)2, Florida Statutes. Section 741.2902(2)(a), Florida Statutes, specifically recognizes that the petitioner's safety may require such an award due to the "inherent danger in permitting the respondent partial or periodic access to the residence." NOTE: Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2) have a check off box to assist the petitioner or respondent in retrieving personal property from a dwelling.
- ☐ Specify distances the respondent must stay away from the petitioner; the dwelling; the place of employment or school; school the children attend; any place the petitioner frequently visits, such as a parent's home or child's daycare; and the auto of the petitioner. Florida Supreme Court Approved Family Law Forms 12.980 (c)(1) and (c)(2).
- ☐ Exclude respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
- ☐ Exclude respondent from places frequented regularly by petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

- ☐ Award a temporary parenting plan including a time-sharing schedule which may award the petitioner up to 100 percent of the time-sharing on the same basis as provided in §61.13. §741.30(5)(a)(3), Florida Statutes. A UCCJEA form must be filed by petitioner if seeking such relief. §741.30(3)(d), Florida Statutes. Paternity must be legally established for the court to award time-sharing to the father.
- ☐ Order respondent to surrender any firearms and ammunition in his or her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
- ☐ Order such additional relief as the court deems necessary to protect the petitioner from domestic violence. Florida Supreme Court Approved Family Law Form 12.980(c)(1) and (c)(2). *See also* §741.2902(2)(c), Florida Statutes.

FINAL INJUNCTIONS

- ☐ The court shall allow an advocate from a state attorney's office, an advocate from a law enforcement agency, or an advocate from a certified domestic violence center who is registered under §39.905, Florida Statutes, to be present with the petitioner or respondent during any court proceedings or hearings related to the injunction for protection, provided the petitioner or respondent has made such a request and the advocate is able to be present. §741.30(7), Florida Statutes.
- ☐ **All domestic violence proceedings shall be recorded. Recording may be by electronic means as provided by the Rules of Judicial Administration. §741.30(6)(h), Florida Statutes.**
- ☐ Upon proper notice, when it appears to the court that the petitioner is a victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim, the court may grant such relief as the court deems proper, regardless of whether the respondent appears in court or not. §741.30(6)(a), Florida Statutes.
- ☐ **The final judgment of injunction for protection against domestic violence may:**
 - be effective indefinitely; until modified or dissolved by the judge at either party's request, upon notice and hearing, §741.30(6)(c), Florida Statutes; or
 - expire on a date certain at the judge's discretion. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
- ☐ The final injunction order ***must*** provide that it is a violation of §790.233, Florida Statutes, and a first degree misdemeanor, for the respondent (unless respondent is a law enforcement officer defined in §943.10, Florida Statutes, holding an active certification) to have in his or her care, custody, possession or control any firearm or ammunition. §741.30(6)(g); §790.233(1), Florida Statutes; 18 U.S.C. §922(g)(9).

POSSIBLE RELIEF WITH FINAL INJUNCTIONS

- **In addition to the types of possible relief listed in the ex parte temporary injunction section, the court may also:**
 - Establish temporary support for a minor child or children. §741.30(6)(a)(4), Florida Statutes.
 - The temporary support and/or parenting plan provisions that are established in a temporary parenting plan in a permanent domestic violence injunction remain in effect until the order expires or a subsequent order is entered which affects the placement of, access to, parental time with, adoption of, or parental rights and responsibilities for the minor child. §741.30(6)(a)(3-4), Florida Statutes.
 - Refer the petitioner to a certified domestic violence center. The court must provide the petitioner with a list of certified domestic violence centers in the circuit. §741.30(6)(a)(6), Florida Statutes. However, the petitioner may not be ordered to attend counseling.
 - Order a substance abuse and/or mental health evaluation for the respondent and order the respondent to attend any treatment recommended by the evaluation(s). Florida Supreme Court Approved Family Law Form 12.980(d)(1) and (d)(2).
 - Order the respondent to enroll and complete a certified batterer intervention program. If the court orders the respondent to this type of program the court must provide the respondent with a list of batterer intervention programs. §741.30(6)(a)(5), Florida Statutes.
 - Unless the court makes written factual findings in its judgment or order which are based on substantial evidence, stating why batterer intervention programs would be inappropriate, the court **shall** order the respondent to attend a batterer intervention program if:
 1. It finds that the respondent willfully violated the ex parte injunction;
 2. The respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; or
 3. At any time in the past in this state or another state, an injunction has been entered against the respondent after a hearing with notice. §741.30(6)(e), Florida Statutes.
 - Establish a parenting plan with the minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(d)(1).
 - Establish temporary alimony. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (2).
 - Provide restitution to the petitioner. §741.31(6), Florida Statutes.

REQUIREMENTS FOR WRITTEN ORDERS—TEMPORARY AND FINAL

A judgment should indicate on its face that:

- The injunction is valid and enforceable in all counties in Florida. §741.30(6)(d)(1), Florida Statutes.
- Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of injunction. §741.30(6)(d)(2), Florida Statutes.
- The court had jurisdiction over the parties and matter.
- Reasonable notice and opportunity to be heard was given to respondent sufficient to protect that person's right to due process. §741.30(6)(d)(3), Florida Statutes.
- The date respondent was served with the temporary or final order, if obtainable. §741.30(6)(d)(4), Florida Statutes.
- If a final order of injunction is issued, the terms of the temporary injunction should be extended until the respondent is served. Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

☐ Special requirement for final injunctions:

- A final injunction must, on its face, indicate that it is a violation of §790.233, Florida Statutes, and a first degree misdemeanor, for respondent to have in his or her care, custody, possession, or control any firearm or ammunition. §741.30(6)(g), Florida Statutes.

ENFORCEMENT

- ☐ It is the intent of the Legislature that domestic violence be treated as a criminal act rather than a private matter. Consequently, criminal prosecution shall be the favored method of enforcing compliance with injunctions. §741.2901(2), Florida Statutes.
- ☐ The Florida Department of Law Enforcement maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic violence injunctions issued by the courts throughout the state. **The Department must have the respondent's name, race, sex, and date of birth.**
- ☐ The court may enforce a violation of an injunction for protection against domestic violence through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under §741.31, Florida Statutes. The court may enforce the respondent's compliance with the injunction through any appropriate civil and criminal remedies, including but not limited to, a monetary assessment or fine. §741.30(9)(a), Florida Statutes. At the time of service of the final judgment, the respondent should be served with an Order to Appear in 30 to 45 days for purposes of confirming compliance

with any court ordered obligations (such as BIP, MH, parenting, child support etc.) and to review on-going safety and time-sharing considerations. The petitioner should be given notice of the compliance hearing. Set follow-ups as needed.



DOMESTIC VIOLENCE COLLOQUY

Today we are holding final full evidentiary hearings on injunctions for domestic, repeat, and dating violence. Based on the evidence presented, I will determine whether any temporary injunctions should be extended, any final injunctions should be entered, or any cases should be dismissed. The person who filed the petition is called the petitioner. The person whom the petition was filed against is called the respondent. If a final injunction is issued, please read it carefully and become familiar with its terms, conditions, and duration.

If the petitioner does not appear for the scheduled hearing today, the case may be dismissed. If the respondent does not appear because the temporary injunction was not served, we will reset the hearing for a later date, and will extend the temporary injunction. If the respondent has been served and fails to appear, the court may go forward with the hearing. If the court finds a lawful basis, a final injunction and other relief including temporary spousal support, a parenting plan and child support may be ordered.

It is possible that some of the respondents have been arrested or charged with a crime arising out of the same incident(s) which is the basis for today's hearing. As required by law, this hearing is being recorded. If the respondent is facing criminal charges he/she has the right to remain silent because anything he/she says can be used against him/her in the criminal case.

This injunction hearing is a civil matter, separate from any criminal case, and regardless of whether or not the final injunction is issued or dismissed here today, **THE CONDITIONS OF RELEASE INCLUDING ANY STAY AWAY ORDERS IN YOUR CRIMINAL CASE ARE NOT CHANGED.**

Petitioners are reminded that he/she signed the petition under penalty of perjury, and, therefore, can be charged with a crime if he/she provided untruthful answers or allegations in the petition. All testimony taken today, including that of the respondent and witnesses, will also be under oath and subject to the same penalty.

When your case is called, please come forward to be sworn and seated. Do not bring the witnesses into the courtroom at this time. They will be sworn and asked to wait out of hearing of the court. I will first ask if the respondent agrees or disagrees with issuing the injunction. There are consequences of having an injunction issued against you and you should be fully aware of these before you agree. If the respondent agrees, we will then establish how long the injunction will be in place and other specific terms. I may hear from the petitioner and the respondent as to those. If the petition is contested, I will first determine whether the petitioner has anything to add to the allegations in the petition, and if the petitioner can establish their case. This is known as the burden of proof. If the petitioner cannot establish the case I will dismiss it without the need for further testimony.

If the case goes forward, the respondent will then be allowed the opportunity to fully respond to the testimony and evidence presented. Each party will be allowed to call any witnesses and present any evidence they may have.

The law allows either party to request, in writing, a modification or dismissal of the injunction at any time after it is issued.

If a final injunction is issued, respondents may be ordered to promptly enroll in and complete a batterer intervention program (BIP) which is 29 weeks from intake, obtain a mental health evaluation and treatment, obtain a substance abuse evaluation, attend a parenting class, or other programs. Failure to comply with the order may result in the respondent being held in contempt of court.

To ensure that the court orders are followed, a separate Order to Appear shall be issued at the end of the case. The respondent shall be required to appear on a specific date to show that all the evaluations and recommendations have been filed, and all other items the court ordered are being followed.

If a final injunction is entered against the respondent, federal and Florida law makes it unlawful for him/her to possess or purchase a firearm, including a rifle, pistol, revolver, or ammunition. If the respondent's job requires the use of a firearm, we will review that during the case.

If a final injunction is entered today, understand that the injunction is against the respondent, not the petitioner. Respondents please understand that the

petitioner cannot give the respondent permission to violate the injunction. Only a judge can change the terms of the injunction. Unless the respondent has in his/her hand a copy of an order dismissing the injunction which is signed by a judge, he/she is required to follow the injunction. If the respondent violate the terms of the injunction, he/she may be arrested and may be charged with a crime known as "Violation of an Injunction," which is a first degree misdemeanor punishable by up to one year in jail, and/or a \$1,000.00 fine, in addition to possible civil penalties. Also, if the respondent follows or harasses the petitioner, he/she may be arrested for aggravated stalking, a felony punishable by up to five years in prison.

At the conclusion of your hearing, I will go over with the petitioner and the respondent each part of the injunction so that each party fully understands what they can and can't do, and what they must do. Please do not leave the courtroom until my bailiff has had both parties sign for receipt of the orders entered in the case and copies of any necessary paperwork, and directs the parties to leave. The petitioners will leave ahead of the respondents. Both parties will be asked to sign the receipt with their current mailing address. If the petitioner has a confidential address, he/she must let my bailiff or the clerk know. All parties must update their mailing and physical address with the clerk immediately upon any change. If either party fails to do so, he/she may miss a notice of hearing and the opportunity to be heard.

If either the petitioner or the respondent has any questions, feel free to ask when the case is called, or, if either party needs help sooner, ask my bailiff. Please come forward when the parties' names are called. Thank you.

PROTOCOL FOR DOMESTIC VIOLENCE INJUNCTION HEARINGS

DO:

- ☒ Use a courtroom rather than chambers for domestic violence injunction hearings and do have law enforcement officers present. If in chambers, do not place parties in close proximity to avoid unseen kicking or intimidation through eye contact or gestures.
- ☒ Physically separate the petitioners and respondents in the waiting area and in the courtroom to ensure that there is no verbal or physical intimidation by the respondent. Ideally, they should be separated in designated areas.
- ☒ Have the petitioners leave the courtroom before the respondents in order to lessen the risk of post-hearing danger. Allow adequate time so the petitioner is not followed into and leaving the parking lot.
- ☒ Use the services of a victim advocate in the courtroom and waiting area.
- ☒ Timely grant temporary child support and award ancillary relief where it is appropriate.
- ☒ Carefully address time-sharing in a temporary parenting plan, keeping in mind the safety of the parties and the children.
- ☒ Use the services of any available supervised visitation center when safety concerns for the petitioner and/or children indicate that time-sharing or pick up and drop off must be supervised.
- ☒ At the time of service of the final judgment, serve the respondent with an Order to Appear in 30 to 45 days for purposes of confirming compliance with any court ordered obligations (such as BIP, SAP, MH, parenting, child support) and to review on-going safety and frequency of parenting considerations. The petitioner should be given notice of the compliance hearing. Set follow-ups as needed.

- ☒ Exercise your powers of civil contempt and indirect criminal contempt to enforce the domestic violence injunction.
- ☒ Have a protocol in place with the clerk and your office to handle any post judgment motions and contempt.
- ☒ Let parties know that child support and time-sharing found in the temporary parenting plan is temporary because it will terminate when the final injunction ends or when ordered in a related civil case. If they want request permanent child support and/or time-sharing in a parenting plan, they may file a different civil case/cause of action.

DO NOT:

- ☐ Issue mutual injunctions.
- ☐ Order the petitioner to attend a batterer intervention program or any other program other than parenting classes. You may refer the petitioner to other services, but do not order these.
- ☐ Substitute an anger management program for a statutorily required certified batterer intervention program. Anger control programs are for stranger violence and are completely different programs from BIP.
- ☐ Fail to order a respondent to complete a batterer intervention program merely because the respondent has a job which requires out-of-town work or long hours.
- ☐ Refer any case to mediation if there is a significant history of domestic violence between the parties which would compromise the mediation process.
- ☐ Award time-sharing, child support or establish a parenting plan to anyone who is not a legal parent, adoptive parent, or a guardian by court order of a minor child or children. Paternity must be legally established.

CONSEQUENCES FOR RESPONDENT ONCE A FINAL INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE IS ENTERED

- An injunction may require no contact, limited time-sharing with children, supervised time-sharing, the respondent to leave the residence, and/or pay support for minor children and/or petitioner.
- Under both state and federal law the respondent is prohibited from possessing firearms and ammunition.
- Law enforcement officers or anyone employed in a position that requires the use of weapons may be affected.
- Respondent's current employment status or employment applications may be affected.
- Professional licenses may be affected.
- Entry into the military may be affected.
- Admission to schools, colleges, and universities may be affected.
- Violation of a final injunction may affect a resident alien's application for citizenship, and may result in deportation if respondent is not a citizen.
- Final injunctions are enforceable in all fifty states and all U.S. territories under the Full Faith and Credit Clause.
- Violation of a final injunction may result in arrest and charge of a first degree misdemeanor for each violation with a maximum sentence of one year under Florida law.
- If the respondent stalks the petitioner who has an injunction against him/her, the respondent may be charged with aggravated stalking, a second degree felony.

DOMESTIC VIOLENCE ADVOCATES

Courts may benefit from the services of a court advocate from the local domestic violence program in a variety of ways. Advocates are non-attorneys whose job is to provide support and information to victims of domestic violence. Job descriptions may vary from program to program, which is why it is important to know about your local program and what it offers. Most court advocates focus on assisting victims in obtaining civil protective orders. Advocates are more likely to be able to be present in court when domestic violence cases are scheduled on the same day and time.

Examples of actions advocates can take:

- Meet with and provide counseling and support to a plaintiff or witness who is reluctant to cooperate with the judicial process, especially due to threats or retaliation.
- Accompany a person through the civil or criminal court process in order to provide information and support.
- Be available to the clerk's office or regularly present in the courthouse to provide information, support and accompaniment to court.
- Be present and available in court to meet with plaintiffs or witnesses who may need information about support services, including shelter or counseling.
- Meet with victims who seek to have the injunction vacated to determine if this is being requested due to threats or economic coercion.
- Refer the petitioner to available local services.

To locate the domestic violence agency that serves your area, go to:
<http://www.fcadv.org/centers/local-centers>

North Carolina Administrative Office of the Courts, *North Carolina Domestic Violence Best Practices Guide for District Court Judges*, Pages 36-37, July 2010.

SECURITY: A MODEL FAMILY COURT ESSENTIAL ELEMENT

By: Nathan Moon, Esquire, Office of Court Improvement

Family Court Security Resource Guide

The Florida Supreme Court has identified security as one of the twelve essential elements of a model family court and determined that it is incumbent upon Florida's courts to create a safe and secure atmosphere for the individuals who are entering family courts in ever growing numbers. An individual's experience and attitude about family court is likely to be shaped by the physical impressions and feelings he or she may have while in the courthouse. Further, it is extremely important that children are made to feel safe upon entering the courthouse, since this often sets the tone for the child's experience in the hearing room. The former Florida Supreme Court's Family Court Steering Committee on Families and Children in the Court (FCSC) defined security as:

The provision of adequate and sufficient security personnel and equipment to ensure that family courts are safe environments for judges, non-judicial staff, and the public.

Thus, proper provision of security measures is a critical component to ensure safe and effective operations of a family court.

SCOPE

Details regarding court security are, by necessity, a local matter. All circuits are not currently capable of securing the resources necessary to implement a uniform security model. Security measures will vary from circuit to circuit based on geographic and demographic characteristics, as well as financial resources. Chief judges, court administrators, and local law enforcement agencies are uniquely suited to make security decisions based on a wide variety of local conditions and considerations.

RECOMMENDATIONS

Staff from the Office of the State Courts Administrator (OSCA) researched other states' materials on courthouse security and developed the following recommendations, which were approved by the FCSC. The FCSC recommended that this security guide be used solely as an advisory resource. Although this security guide refers to family courts and family court staff, it is not intended to imply that other court divisions would not benefit from or require similar security measures.

I. Prepare a Written Security Plan - Security in family courts is essential; improving and maintaining security should be a key objective!

Written security plans and safety procedures appear to be an imperative for all courts, regardless of division or resources; however, written security plans and safety procedures that are specific to family courts also appear to be beneficial. Security plans specific to family courts can be a part of the overall court security plan or as a separate resource. This information should be produced as a safety manual that is provided to all family court judges and personnel, as well as be reviewed and revised on a continual basis, as revisions and updates are necessary in order to maintain consistency with potential changes in courthouse structure, or any other presenting circumstances.

Issues to be considered when developing a security plan are the degree of security necessary to ensure the effective operation of the family court; and the resources needed to establish and maintain adequate security.

During the development phase, it is critical that the family court foster a collaborative atmosphere to allow all key stakeholders in the family court process an opportunity to express safety concerns and issues. This can be accomplished through questionnaires, surveys, and staff meetings, all of which provide judges and front-line family court personnel opportunities to voice concerns regarding personal safety and courthouse security.

Security Issues Addressed in the Written Security Plan.

Strategies for Security Emergencies. The way in which each circuit handles security emergencies can vary, but it is extremely important that standard procedures be established for publication in the safety manual, and that family court staff, courthouse security personnel, and court administration be made aware of them.

At a minimum, a family court's security plan should advise family court personnel on how to handle 1) persons who exhibit violent behavior; 2) persons who may be under the influence of drugs and/or alcohol; 3) harassing, obscene, and threatening phone calls; and 4) bomb threats, all of which can occur during the daily operations of a family court.

Staff should also be instructed on how to recognize the need for additional back-up assistance from local law enforcement, and the specific procedures to follow in order to request such assistance. In addition to training staff to immediately deal with security emergencies, a protocol for incident reporting and debriefing should be established.

Documentation of security incidents is key to planning necessary safety measures.

Incident Reporting Protocol. An incident reporting protocol will inform line staff, supervisory staff, and court administration of high risk areas and potentially dangerous situations experienced by staff in the performance of assigned duties. It will also provide documentation for use by court administration and court security personnel in planning necessary safety measures.

Incident Reporting. Family court staff should be specifically instructed on how to report events that occur during the course of their official duties, which represent an actual threat to the safety of judges, court employees, and/or the public. In the event of a safety incident, whether threatened or actual, the appropriate persons as indicated in the security plan should be notified immediately. The employee should then report the incident on a designated form and submit it to his/her immediate supervisor within an appropriate time-frame, as determined by each circuit. The immediate supervisor would inform court administration and courthouse security of the event, and develop a plan with the involved staff to provide necessary security during subsequent contacts with the involved persons. A designated staff person should be responsible for maintaining a file of all incident reports submitted by family court employees.

Incident Debriefing. Supervisory staff should be instructed on how to respond to incidents that compromise, or potentially compromise, staff safety by ensuring that employee needs, both physical and emotional, are met after involvement in a safety related incident. Court administration should then take steps to minimize the recurrence of such incidents.

Immediately upon receiving a verbal report of a safety incident, the supervisor is responsible for determining the employee's physical and emotional state for possible referral for further assistance. The supervisor ensures through medical documentation that the employee has received necessary medical assistance. If necessary, the supervisor also ensures that a police report has been made of the incident, and that a copy of such is contained in the incident file.

Circuits are encouraged to meet quarterly to review any reports of threatening incidents and to refine security policies and procedures as needed.

Fear for personal safety in the courthouse can prevent domestic violence victims from seeking relief through the court system.

Proceedings Involving Domestic Violence. The plan should provide specialized instructions for issues that can present during proceedings involving parties with a history of domestic violence. Family court personnel are aware that individuals who enter family courts may be seeking protection from highly abusive and dangerous situations. It is extremely important that these individuals be able to seek relief without having to confront the person from whom they are seeking protection. Confrontations between the domestic violence victim and perpetrator can occur in

the parking lot of the courthouse, the hallways and stairways of the courthouse, as well as in the courtroom. During family proceedings where domestic violence is a factor, court security officers should always be present in the courtroom, and constantly monitoring the waiting areas, hallways and stairways. Security guards that provide perimeter security for the courthouse should also be alert for threatening incidents that could occur in the parking lot and surrounding grounds.

“ ...given limited resources, intelligence and forewarning are of immense value in security programs.”

Security Director, Massachusetts Trial Court

Family court staff should provide court officers with, at a minimum, a one day advanced notice of potentially violent individuals who are scheduled to appear before the court. This will allow the court officers to coordinate and organize the movements of petitioners and respondents to ensure that the domestic violence victim does not become subject to intimidation, threats or harm. For example, the security officer can provide for special seating arrangements in the courtroom, and/or escort the victim in and out of the courthouse.

In order to ensure a safe exit from the courthouse, the court should allow the victim of a domestic violence dispute to leave the courthouse fifteen minutes before the respondent, and direct the respondent to remain in the courtroom upon conclusion of the hearing. This will allow the victim to exit the building without fear of confronting the respondent.

Courthouse Security Diagram. The safety manual should contain a diagram that depicts where the courthouse security office and security stations are located throughout the building. It should also highlight the safest and most convenient evacuation routes should an emergency arise. Staff should also be provided with emergency contact numbers, and directed to place them near their telephones in a visible location.

Security Issues Outside of the Courthouse. In addition to the orders courts can enter to specifically provide for the protection of a family member or child, family courts frequently refer or order families and children to service providers within the community, i.e.: private mediators, custody evaluators, parenting course provides, and supervised visitation centers. While family courts cannot be responsible for providing security for programs not operated by the court, family court judges and staff should be aware of the security issues that may arise. One way that family courts can assist community providers in this area is to meet with them on a regular basis to how the court can assist with ensuring family safety. Some examples include:

- in a dissolution of marriage involving domestic violence, the court could order (and copy the provider) that the parents not attend the parenting class at the same time;
- develop a screening protocol to identify families with a history of domestic violence prior to referring them to mediation;
- in cases where there is a high level of hostility between the parties, courts could provide a room in the courthouse for private mediators to use; and
- in order to provide for the safety of the parents and children, supervised visitation program staff need specific information regarding the reason supervised visitation was ordered and what activities should not be permitted during the visit. Supervised visitation programs are often confronted with threats from irate program participants and there have been instances where children have been re-victimized due to the fact that the visitation supervisor was not aware of the specific allegations and in turn did not recognize certain behaviors as harmful. The Clearinghouse on Supervised Visitation, FSU School of Social Work, can provide specific information on the need for security precautions in supervised visitation settings and what courts can do to help. For more information, visit <http://familyvio.ssw.fsu.edu/>.

Once a circuit has developed a family court security plan and safety manual, it is imperative that court administration and the courthouse security office be willing to implement the necessary policies and procedures. Everyone plays a role in maintaining a safe and secure working environment; it is a team effort.

II. Provide For Family Court Security Personnel - The presence of uniformed officers is critical to ensuring the safety of family courts.

Every court proceeding has the potential to become violent. This is especially true for family court proceedings, due to the emotional nature of the issues being deliberated. The presence of an adequate number of trained uniformed court security personnel can act as a deterrent for violent outbursts in the courthouse, providing that they are equipped with monitoring and communication equipment, which allows for quick response to alarming incidents.

Family court staff should be encouraged to establish open communication with court security personnel. On days when litigants who have the potential to become violent or be under the influence of drugs or alcohol are scheduled to appear before the court, family court staff should feel comfortable in alerting security that these individuals may require extra security attention. Security personnel should also be made aware of all family court programs located in the courthouse, as well as any security issues that can arise during the programs' daily operations. Security personnel should be made aware of potentially dangerous situations, so that planning for necessary safety measures can be executed.

Court security personnel may include: security guards, who are primarily responsible for monitoring access into the courthouse, as well as its surrounding grounds; and court officers, or bailiffs, who have primary responsibility within the court, specifically, the courtroom and judges' chambers.

Family courts should be staffed with an adequate number of security officers to provide, at a minimum:

- a. one security officer stationed at the entrance of the family court, providing screening and monitoring services;
- b. one security officer to constantly monitor all waiting rooms, corridors, and stairways; and,
- c. one security officer to be present during all hearings conducted in the courtroom and judges' chambers.

III. Implement Model Family Court Design Specifications - Accessing justice begins with getting in and out of the courthouse safely.

Following are model safety design specifications that every family court should strive to implement and utilize in order to ensure the safety of the litigants it serves.

Security Screening Stations. Safety in family courts begins with being able to enter the building safely. This can be accomplished through having reliable, full-time security screening at the entrance to ensure that no weapons or other potentially dangerous paraphernalia are brought into the courthouse. Screening can be performed by using airport-style x-ray scanners and metal detectors, or by physical bag/briefcase searches.

Security Badges. Security badges should be mandatory for all family court staff. These badges with the employee's picture will allow the employee to gain access into the courthouse, as well as into the "staff only" area of the courthouse.

Panic Buttons and Alarms. Panic buttons, placed at the family court receptionist desk located at the entrance of the family court, in the judges' chambers, in all family court staff offices, and in all waiting areas and conference rooms can be very helpful. When activated, these panic buttons will sound an alarm to notify court officers to the need for assistance.

Separate and Secure Waiting Rooms. Separate and secure waiting rooms for petitioners and respondents will provide domestic violence victims with a sense of security by minimizing the frequency of contact with the other party. Waiting rooms should be located near a main security checkpoint of the family court where security

officers are stationed and readily available. Waiting rooms should also be equipped with panic buttons and remain locked when not in use.

Conference Rooms. Litigants may feel intimidated by having to speak with their attorneys or fill out forms in the presence of others. A conference room will provide private meeting space for litigants to consult with their attorneys and advocates, and to fill out forms. Conference rooms should also be located near a security checkpoint for close monitoring, as well as be equipped with panic buttons, and remain locked when not in use.

IV. Conduct Periodic Security Assessments - Detection of potential security problems is critical!

The regular assessment of your local security policies and procedures reduces the risk of security emergencies, as well as provides a yardstick by which their effectiveness can be measured.

Family court staff are strongly encouraged to request their courthouse security specialist to conduct periodic security assessments to identify areas of potential risk, and where security may be inadequate. Information obtained from an assessment is vital when there are:

- suspicions that explosives may be used against the courthouse
- concerns that weapons are being brought into the courthouse
- violent outbreaks in family courtrooms, halls, and waiting areas
- strangers loitering where they don't belong

V. Provide Security Training Opportunities - Training begins with getting people to think security.

Once a security plan has been developed, and safety procedures and policies are in place, it is important that family court personnel are provided training opportunities that will promote optimal personal safety. This will minimize the frequency of events that jeopardize staff and public safety.

For example, safety awareness seminars can often be coordinated through a circuit's local law enforcement agency. These seminars provide staff with the skills necessary to identify security problems before they occur, and what measures to take should they occur. Family courts may wish to consider providing self-defense training, which can also be coordinated through local law enforcement.



Domestic Violence Case Law Updates

Carty v. State, 79 So.3d 239 (Fla. 1st DCA 2012) **BATTERER'S INTERVENTION PROGRAM REMOVED FROM PROBATION** The appellant was convicted of resisting an officer without violence and sentenced to probation which included a special condition requiring him to complete a batterer's intervention program (BIP). The appellant claimed the BIP condition was invalid because it was not reasonably related to his rehabilitation. He was originally charged with battery, burglary of a conveyance with assault, and resisting an officer without violence. The jury acquitted him of the battery and burglary charges, but returned a guilty verdict on the resisting charge. However, the trial court still included the batterer's intervention program as a special condition of appellant's probation. Since the batterer's intervention program has no relationship to the appellant's conviction for resisting an officer without violence and there is nothing in the record to suggest that Appellant has a propensity towards domestic violence, the court reversed. February 17, 2012.

Achurra v. Achurra, 80 So.3d 1080 (Fla. 1st DCA 2012) **ENTRY OF DOMESTIC VIOLENCE INJUNCTION REVERSED** The wife filed a petition for an injunction for protection from domestic violence against her husband. The trial court issued an ex parte temporary injunction and scheduled an evidentiary hearing, and the husband filed a response denying the material allegations in the petition. During the hearing, the wife's counsel asked the court to take judicial notice of a previous dissolution of marriage proceeding to avoid presenting redundant testimony. The circuit judge stated that he had retained his notes of the dissolution proceeding and announced his intent to review the other file and to allow the transcript from the earlier proceeding to be filed in the injunction case. The respondent neither objected to the request to take judicial notice nor complained of a lack of prior notice. At the close of the domestic violence hearing, the court ordered that the temporary injunction would remain in effect until all pertinent investigations were concluded, but made no oral findings of fact to support his ruling. Subsequently, a different circuit judge issued a final judgment of injunction against domestic violence, and the husband appealed, claiming that the final judgment was not supported by competent substantial evidence.

The appellate court noted that the petitioner had the initial burden to prove entitlement to relief, and in this case, she presented no evidence at the petition hearing. The record also showed no proof that the trial court ever received and considered a copy of the transcript from the dissolution proceedings of which it agreed to take judicial notice. The court stated that "(j)ust as the petitioner has the right to allege and prove the grounds for injunctive protection at a full and fair evidentiary hearing, the respondent is entitled to a fair hearing and protection from the effects of a final judgment of injunction that lacks any evidentiary support."

Since the record was deficient of any proof to support the petitioner's allegations, the court reversed. February 17, 2012.

Sauriol v. Sauriol, 79 So.3d 204 (Fla. 2d DCA 2012) **CIVIL CONTEMPT OF COURT ORDER REVERSED** The respondent appealed an order holding him in contempt for sending an email to his wife in violation of a domestic violence injunction. The court reversed this order because it was not a proper order of civil contempt, but rather punished the respondent as a criminal contempt order would do. Civil contempt orders are used to coerce the respondent into compliance, or to compensate the petitioner. February 10, 2012.

D.M. and B.A., v. Department of Children and Families, 79 So.3d 136 (Fla. 3d DCA 2012) **TERMINATION OF PARENTAL RIGHTS AFFIRMED** The trial court terminated the parental rights of both parents and the parents appealed. The appellate court found that there was substantial competent evidence to support the order terminating the father's rights. The father denied his behavior was domestic violence and experts testified that the father had difficulty accepting his role in the children's abuse. Therefore, the court found that substantial harm to the children could occur if the father's rights were not terminated. Feb. 1, 2012.

In re G.S., 84 So.3d 1231 (Fla. 2d DCA 2012) **CASEPLAN ACCEPTANCE REVERSED** After a dependency adjudication, the mother objected to tasks outlined in her caseplan, including that she participate in domestic violence evaluation and counseling, because they did not address the reasons for removal. The child was adjudicated dependent after his mother was arrested for a custody violation and the child had no other place to go. The appellate court held that because the case plan tasks requiring the mother to participate in domestic violence counseling, prescription drug monitoring, and parenting classes were irrelevant to the issue that resulted in the dependency, these tasks violated §§39.6011 and 39.603, Florida Statutes, and were improperly included in the Department's case plan for the mother. The dependency adjudication was affirmed, however, the acceptance of the case plan was reversed and remanded so the Department could prepare an amended case plan that contained tasks for the mother that address the reasons for the dependency. April 11, 2012.

Ramirez v. Teutsch, 134 So.3d 995 (Fla. 1st DCA 2012) **MOTION TO DISSOLVE A DOMESTIC VIOLENCE INJUNCTION REMANDED** A respondent appealed an order denying his motion to dissolve a domestic violence injunction in favor of his former wife. In his motion, the respondent alleged that circumstances between the parties have changed since the injunction was entered. Specifically, he alleged that the parties have interacted without violence for several years, that he now lives 341 miles away from his former wife, and that the parties' only interaction relates to time-sharing exchanges of their child which were scheduled to end in January 2012. In light of these allegations, the trial court erred in summarily denying the motion to dissolve the injunction. The appellate court remanded the case for an evidentiary hearing. May 18, 2012.

Harden v. State of Florida, 87 So.3d 1243 (Fla. 4th DCA 2012) **PRIOR ACT OF DOMESTIC VIOLENCE INADMISSIBLE** Appellant appealed his convictions for sexual battery, false imprisonment, and domestic battery. He was accused of beating and raping his girlfriend following an argument. Before the trial, the prosecutor notified the trial court that he intended to ask the girlfriend about her relationship with the appellant, including a prior domestic violence incident that occurred six months before the rape, and the trial court found the evidence admissible. Because the trial court abused its discretion in admitting the evidence of a prior incident of domestic violence that served only to show propensity, the appellate court reversed the decision and remanded the case for a new trial. May 23, 2012.

In re Amendments to the Florida Supreme Court Approved Family Law Forms, 93 So.3d 194 (Fla. 2012) **FORM AMENDMENTS ISSUED** The Supreme Court amended 24 forms regarding domestic, repeat, dating, and sexual violence. The amendments do the following: (1) revise language in notices of hearing to comply with Florida Rule of Judicial Administration 2.540 (Requests for Accommodations by Persons with Disabilities); (2) remove unnecessary or unauthorized requests for personal information, such as place of marriage, and place of birth or gender of a minor; (3) add language to forms used in proceedings for temporary injunctions to expressly advise litigants that failure to appear at the final hearing may result in the issuance of a permanent injunction; (4) add language in the petition for temporary injunction forms making a specific prayer for entry of a temporary injunction; (5) update language relating to health and dental insurance, where applicable, to reflect current statutory requirements; and (6) revise the method of payment sections, where applicable, to add the central depository within each circuit as an entity able to accept court-ordered payments. June 7, 2012.

Holley v. State, 91 So.3d 216 (Fla. 4th DCA 2012) **JUDGE NOT REQUIRED TO DISQUALIFY HIMSELF** Although primarily a burglary case, the court noted in a footnote that the prosecution argued that the presiding trial judge should have disqualified himself from this case because of his previous membership in the Women in Distress Judicial and Legal Council, an organization dedicated to assisting victims of domestic violence. The court stated that the appellant's motion for disqualification did not allege that the judge had a personal bias against him, and the judge's prior membership in the Women in Distress organization was not, without more, a legally sufficient ground for disqualification. A trial judge's "alleged desire to solve the problem of domestic violence is not a legally sufficient basis for his disqualification." June 20, 2012.

Williams v. Williams, 89 So.3d 301 (Fla. 5th DCA 2012) **INJUNCTION REVERSED** The respondent appealed a final judgment of injunction for protection against domestic violence. The appellate court reversed and remanded the case for dismissal because the trial court never made a finding of domestic violence, and because according to the record, the petitioner did not present evidence that could support a finding that

she had been a victim of domestic violence or was in imminent danger of becoming a victim of domestic violence. June 8, 2012.

In re: Amendments to Florida Family Law Rules of Procedure, 95 So.3d 126 (Fla. 2012). **RULES AMENDED** In response to newly passed legislation, the court approved changes to the family law rules that amended references throughout the rules to injunctions for domestic, repeat, dating and sexual violence to include stalking. The amendments will take effect on October 1, 2012 at the same time that the cause of action for an injunction for protection against stalking becomes effective. July 12, 2012.

Lee v. Lee, 93 So.3d 516 (Fla. 2d DCA 2012) **EXTENSION FOR INJUNCTION REMANDED FOR HEARING** A petitioner filed a motion for an extension of an injunction for protection against domestic violence. An ex parte order was entered that extended the injunction and then a hearing was held on the motion. Despite the respondent's opposition to the motion, the trial court entered an order permanently extending the injunction without hearing any evidence and the respondent appealed. Section 741.30(1)(a), Florida Statutes (2010), states "[w]hen moving for an extension of a preexisting injunction, the petitioner must establish either that additional domestic violence has occurred or that, at the time the petition for extension is filed, he or she has a continuing reasonable fear of being in imminent danger of becoming the victim of domestic violence." Since the trial court failed to hear any evidence or make any findings that additional domestic violence had occurred or that the petitioner had a continuing reasonable fear of being in imminent danger, the appellate court held that the ex parte order temporarily extending the injunction for protection against domestic violence could not be permanently extended against the respondent, in absence of the required findings and in absence of opportunity for the respondent to be heard in opposition to the motion. July 27, 2012.

Young v. Young, 96 So.3d 478 (Fla. 1st DCA 2012) **DOMESTIC VIOLENCE INJUNCTION REVERSED** The respondent appealed the trial court's issuance of a domestic violence injunction against her. The petitioner claimed that the respondent committed cyberstalking when she used the petitioner's password to read his email and then changed the password so he couldn't access his account. The court found that although the evidence showed that she did engage in improper behavior, it did not constitute domestic violence since there was no malicious harassment that threatened imminent violence and therefore reversed. September 11, 2012.

Hall v. Ryan, 98 So.3d 1195 (Fla. 3d DCA 2012) **VIOLATION OF PROBATION UPHOLD** The defendant pled guilty to a charge of aggravated battery with a deadly weapon and two counts of child abuse and was sentenced to prison followed by 3 years of probation. The defendant's ex-wife was also granted a permanent injunction for domestic violence against him. During the defendant's probation period, the state filed a violation of probation affidavit alleging that the defendant had committed a new criminal violation when he contacted the petitioner's 16 year old daughter via a

Facebook “friend request.” Since this request went to the petitioner’s daughter who lived with the petitioner, the court found that there was probable cause to believe that the defendant violated his probation. The language of the permanent injunction stated: “Unless otherwise provided therein, Respondent shall have no contact with Petitioner. Respondent shall not directly or indirectly contact Petitioner in person, by mail, e-mail, fax, telephone, through another person, or in any other manner. Further, Respondent shall not contact or have any third party contact anyone connected with Petitioner’s employment or school to inquire about Petitioner or to send any messages to Petitioner.” September 5, 2012.

Morris v. Mascia, 97 So.3d 278 (Fla. 5th DCA 2012) **INJUNCTION REVERSED** The respondent appealed a permanent injunction for protection against domestic violence entered by the trial court against him and the appellate court reversed because the petitioner failed to prove the elements necessary for the entry of a domestic violence injunction. The petitioner filed the petition against the uncle of his wife. Since the petitioner and the uncle had never lived in the same dwelling unit as the respondent, the court held that the petitioner did not have standing to seek the injunction. September 7, 2012.

Johns v. Johns, 101 So.3d 377 (Fla. 1st DCA 2012) **INJUNCTION REVERSED DUE TO LACK OF DUE PROCESS** The trial court entered an injunction for protection against domestic violence in favor of a mother’s adult son and the mother appealed. Neither party was represented by counsel. Although the son was allowed to testify and present witnesses, the mother was only allowed a limited chance to present evidence, and did not get a chance to testify about the allegations in the petition. Because the trial court entered the injunction without first conducting a full evidentiary hearing, the mother was deprived of her fundamental constitutional right to procedural due process, and the appellate court reversed the decision. October 10, 2012.

Hernandez v. Silverman, 100 So.3d 272 (Fla. 4th DCA 2012) **DENIAL OF INJUNCTION WITHOUT HEARING REVERSED** Appellant filed a petition for an injunction against domestic violence against her ex-fiance, however, at the evidentiary hearing, the trial court determined that the allegations were insufficient and denied the petition without conducting a full evidentiary hearing. The appellate court reversed remanded the case for a full evidentiary hearing. The court also noted that the allegations were pled with sufficient specificity and, depending upon the evidence produced during the hearing, sufficient grounds could have existed to grant the injunction. November 14, 2012.

Reyes v. Reyes, 104 So.3d 1206 (Fla 5th DCA 2012) **DENIAL OF MOTION TO DISSOLVE AN INJUNCTION AFFIRMED** The father appealed the trial court’s order that denied his motion to modify or dissolve his domestic violence injunction. In 2004, the trial court entered an injunction in favor of the mother. The father’s motion to modify the injunction challenged the original injunction and made several other claims, but failed to allege any change in circumstances and the trial court denied the motion.

The appellate court held that “for a movant to be entitled to obtain relief on a motion to modify or dissolve a domestic violence injunction, the movant must prove a change in circumstances.” Because the father’s motion failed to allege any change in circumstances, the court affirmed the lower court’s decision. December 14, 2012.

Santiago v. Ryan, 109 So.3d 848 (Fla. 3d DCA 2013) [WRIT OF HABEAS CORPUS DENIED](#)

The defendant was arrested and charged with aggravated stalking of his ex-wife. While being processed, he was served with a temporary domestic violence injunction which prohibited him from contact with her. During the first appearance, the court entered a stay away order that also prohibited contact with his ex-wife. While incarcerated, the defendant made threatening phone calls to her. The next day, the defendant went to a first appearance for the new charges based upon the calls. He posted bond for both offenses, and was released. When he was arraigned for the first case, his bond was revoked because he had violated the conditions of his pretrial release by committing the new crimes, and the defendant filed a petition for a writ of habeas corpus. The court denied the writ and held that the statute governing revocation of pretrial release did apply to a defendant who committed new felonies from jail during the period between setting a bond for the prior offense and his release. March 11, 2013.

Bacchus v. Bacchus, 108 So.3d 712 (Fla. 5th DCA 2013) [TEMPORARY INJUNCTION REVERSED](#)

The husband appealed an order that extended a temporary injunction against domestic violence for one year. The court reversed and noted that the purpose of extending a temporary injunction is to preserve the status quo until a final evidentiary hearing can be held. In this case, the temporary injunction was extended in lieu of a full hearing on a permanent injunction, which is not authorized by the Florida Statutes. The court also noted that there was not enough evidence presented to support issuing a permanent injunction, however, since the wife was limited by the court in her ability to present evidence, the case was remanded for a full hearing. March 1, 2013.

Fernandez v. Wright, 111 So.3d 229(Fla. 2d DCA 2013) [AWARD OF ATTORNEY FEES REVERSED](#)

The mother filed a petition for modification of child support, and the father filed a motion requesting attorney fees, additional time sharing, and enforcement of the pervious court order. The mother had previously filed three petitions for an injunction for protection against domestic violence that were not a part of this family law case. The court ordered a modification to the parenting plan and awarded the father attorney fees for the family law case and the domestic violence cases, and the mother appealed. The appellate court held that the trial court abused its discretion in awarding attorney fees to the father for work related to the domestic violence petitions because the domestic violence statute does not allow an award of attorney fees in domestic violence cases. April 10, 2013.

Rudel v. Rudel, 111 So.3d 285 (Fla. 4th DCA 2013) [DISMISSAL OF INJUNCTION REVERSED](#)

The wife, a German citizen, petitioned for dissolution of marriage and for

an injunction for protection against domestic violence. The court granted the ex parte temporary injunction, but later dismissed the petition for injunction against domestic violence and the wife appealed. The court reversed the part regarding the injunction dismissal and noted that the wife gave uncontradicted testimony regarding acts of domestic violence and also provided corroborating witness testimony. Although the dissolution of marriage petition was correctly dismissed due to jurisdiction issues, the appellate court held that the wife did present sufficient evidence to support an injunction, and remanded the case for a new hearing because the husband did not have the opportunity to present evidence on the domestic violence issue since his challenge to jurisdiction was still outstanding. April 17, 2013.

Curtis v. Curtis, 113 So.3d 993 (Fla. 5th DCA 2013) **ORDER DENYING INJUNCTION REVERSED** The wife filed a petition for an injunction for protection against domestic violence against her husband. The petition contained a sworn statement about a violent incident and also contained a copy of the husband's arrest report. The court denied the petition without a hearing and handwrote on the order "the petitioner is protected by conditions of release" from the pending criminal action. The wife filed a motion for rehearing, but the trial court denied the motion and ruled that the petitioner cannot reasonably fear that she is in danger since the respondent currently has conditions of release more restrictive than what an injunction could provide, including electronic monitoring. The wife appealed and argued that the trial court erred by denying her petition without conducting a hearing, and the appellate court agreed and reversed. The appellate court noted that the trial court should have held a hearing, and also erred by deciding that the husband's bond conditions were sufficient to fully protect the wife. Criminal bond conditions are not the same as the conditions which can be imposed under the domestic violence injunction statute, and do not award the petitioner exclusive use of the parties' home, temporary support, or order the respondent to participate in treatment, intervention, counseling services, or a batterers' intervention program. The court also noted that since the wife is not a party to the criminal proceeding, she might not receive timely notice of any dismissal or changes in the husband's bond conditions. April 12, 2013.

Baker v. Baker, 112 So.3d 734 (Fla. 2d DCA 2013) **DENIAL OF MOTION TO DISSOLVE INJUNCTION REVERSED** The former husband filed a motion to dissolve an injunction for protection against domestic violence, and following a hearing, the trial court denied the motion. The appellate court noted that in order to dissolve the injunction, the former husband had to show a change in circumstances. Since the injunction was ordered, the former husband was incarcerated on a 30 year sentence, and the court held that the incarceration had substantially changed the situation and the injunction no longer served a valid purpose. Therefore, the injunction was dissolved. May 8, 2013.

Waybright v. Johnson-Smith, 115 So.3d 445 (Fla. 1st DCA 2013) **CUSTODY ORDER REVERSED** The father appealed a visitation order that resulted from a pro se hearing on child custody. During the hearing, the father offered police reports that detailed

acts of domestic violence, however, the trial court excluded the evidence. The appellate court reversed, stating that the trial court erred in categorically excluding the reports. The court also noted that domestic violence and other violent behavior are probative matters in a child custody case. June 24, 2013.

Disston v. Hanson, 116 So.3d 612 (Fla. 5th DCA 2013) **INJUNCTION AFFIRMED** The respondent appealed a domestic violence injunction against him in favor of his former live-in girlfriend. Because there was competent substantial evidence presented to support the injunction, the appellate court affirmed the lower court's decision. The appellate court also noted that even though the evidence was in sharp contrast, the credibility of the witnesses was within the trial court's exclusive purview and they could not reweigh the evidence. June 28, 2013.

Brilhart v. Brilhart ex rel. S.L.B., 116 So.3d 617 (Fla. 2d DCA 2013) **INJUNCTION FOR DOMESTIC VIOLENCE ORDER REVERSED** The mother appealed a final judgment of injunction for protection against domestic violence which was issued to prevent contact between her and her daughter. The parents had been divorced for several years and the injunction was brought by the child's father. The mother argued that there was not competent, substantial evidence to support the trial court's decision to issue the injunction.

The fourteen year old daughter sent a letter to her father saying that her mother was abusing her, and the father filed the petition for an injunction on the daughter's behalf. The child did not testify at the hearing, and the only evidence offered to support the petition was the father's vague testimony based upon the letter, and doctor's statements that based upon his meeting with the child, he had concerns for the child's safety. The court accepted the doctor's testimony even though the mother was never provided with an opportunity to properly explore the basis of the doctor's alleged expertise. The mother denied the abuse, and the letter was not admitted into evidence.

The court reversed the order for the injunction and stated that the father's testimony, which was based upon the father's hearsay and unsubstantiated fear and the doctor's testimony, did not amount to competent, substantial evidence supporting the issuance of the injunction. The court also noted that there was no evidence in the record that showed that the doctor was an expert in domestic violence. July 3, 2013.

Tobin v. Tobin, 117 So.3d 893 (Fla. 4th DCA 2013) **EVIDENTIARY HEARING REQUIRED IN DISSOLUTION CASE** A wife refused to make pretrial disclosures and attend a video deposition in a dissolution action due to her fear of domestic violence from her husband and disclosing her address and other information. She had obtained an injunction for protection against domestic violence. The trial court struck her pleadings as a sanction for the discovery violations, and the appellate court reversed. The appellate court ruled that an evidentiary hearing was necessary to give the wife an opportunity to show the extreme fear she cited as the reason for refusing comply with the discovery requests. The court also noted that striking a party's pleadings is

the severest of penalties and should only be exercised under “extreme circumstances.” July 24, 2013.

Touchet v. Jones, 135 So.3d 323 (Fla. 5th DCA 2013) **INJUNCTION REVERSED IN PART** A petitioner filed for an injunction against domestic violence against her partner in a same sex relationship alleging that the respondent had physically attacked her. The respondent also filed a reciprocal petition for protection against domestic violence against her partner, and the court heard the two petitions simultaneously. The trial court granted the initial petition and found that there was “an overwhelming amount of evidence in her favor.” The trial court then ordered the respondent to complete a certified batterers' intervention program and to undergo evaluations for both substance abuse and mental health, and also ordered the petitioner to obtain psychological evaluations for herself and her son to specifically address the issue of why the petitioner kept going back to the respondent. The petitioner filed a motion for stay pending appeal, and the trial court denied the motion. The trial court then issued an order of contempt threatening to incarcerate the petitioner if she did not comply with the order within thirty days.

The petitioner appealed the part of the order that required her to obtain the psychological evaluations and argued that the trial court erred by including this in the order. The appellate court agreed. Although s.741.30(6)(a), Florida Statutes, allows the court to order a respondent to participate and pay for treatment, intervention, or counseling services, there was no authority under the statute to order the petitioner to undergo an evaluation. The court also noted that the statute is designed to protect victims of domestic violence, and “requiring a victim of domestic violence to undergo a psychological evaluation would impose a substantial financial and emotional burden on the victim and would have a chilling effect on victims of domestic violence seeking the protection of the courts.” Therefore, the court reversed the portion of the order requiring the petitioner to get the evaluations. August 16, 2013.

Arnold v. Santana, 122 So.3d 512 (Fla. 1st DCA 2013) **INJUNCTION REVERSED** The court ordered an injunction for protection against domestic violence and claimed for a wife that claimed that her husband was harassing and stalking her. The appellate court held that the evidence presented did not support a finding that the wife’s fear of imminent violence was reasonable and reversed the lower court’s decision. October 7, 2013.

Weisberg v. Albert, 123 So.3d 663 (Fla 4th DCA 2013) **INJUNCTION REVERSED** A former son-in-law filed a petition for an injunction for protection against domestic violence without minor children against his former father-in-law. The Circuit Court granted the petition, but the appellate court reversed and held that there was insufficient evidence that the former son-in-law was in imminent danger of becoming a victim of domestic violence by virtue of a single altercation he had with his former father-in-law. October 16, 2013.

Barbieri v. Muller, 124 So.3d 320 (Fla. 5th DCA 2013) **ORDER DISSOLVING INJUNCTION REVERSED** The petitioner appealed the order dissolving her permanent injunction for domestic violence protection against her former boyfriend. The appellate court reversed because the petitioner correctly argued that the trial court abused its discretion in dissolving the injunction by reweighing the evidence supporting the initial injunction rather than finding a change in circumstances since the injunction was issued. October 4, 2013.

In re Standard Jury Instructions In Criminal Cases - Report No. 2012-05, 131 So.3d 755 (Fla. 2013) **NEW JURY INSTRUCTIONS** The Supreme Court proposed new standard criminal jury instructions and/or amended several existing standard criminal jury instructions for crimes including aggravated stalking, violation of a stalking injunction, aggravated assault on an elderly person, sexual battery of a victim less than 12 years of age and several others. The instructions are ready to be published and used. December 5, 2013.

Dietz v. Dietz, 127 So.3d 1279 (Fla. 1st DCA 2013) **INJUNCTION REVERSED** A temporary injunction against domestic violence was entered ex parte against the respondent and six days later, a full evidentiary hearing was held during which the court heard testimony from the respondent, his mother and his sister. The judge ordered the temporary injunction to continue for six months but stated that “the trial judge made no final determination as to the sufficiency of the evidence presented at the hearing.” The court further ordered the parties to return in six months for a status conference. The appellate court reversed the decision and noted that while the statute did allow the trial court to extend a temporary injunction for good cause, it does not allow for a series of temporary injunctions to be issued in lieu of a permanent injunction. Extending the temporary injunction is not permissible unless a continuance is authorized by the Florida Statutes. December 17, 2013.

Stone v. Stone, 128 So.3d 239 (Fla. 4th DCA 2013) **INJUNCTION VACATED** The former husband appealed an injunction for protection against domestic violence and argued that the court erred because the former wife failed to prove that she was in danger of impending violence, or that actual domestic violence occurred. The petition alleged that the former husband grabbed the former wife’s arms, forced her onto the bed, and made unwanted sexual advances. He stopped when he realized she was not interested. During the hearing, the former wife introduced photos of the bruises on her arms, but also admitted that she may have gotten the bruises from moving boxes. The former husband claimed that the bruises, if he was responsible, came from playing around near the pool and were not intentional. The appellate court held that the evidence did not show that the former husband acted with the purpose of causing harmful or offensive contact, or intended to touch her against her will. Likewise, the court found that the former husband’s texts and calls did not threaten violence or make the former wife believe she was in danger, and therefore, did not constitute domestic violence. The court ordered the lower court to vacate the injunction. December 11, 2013.

Garrett v. Pratt, 128 So.3d 928 (Fla. 5th DCA 2013) **CASE REMANDED FOR A NEW HEARING** An inmate in Florida's correctional system appealed the trial court's order denying his motion to modify or dissolve a domestic violence injunction. The inmate filed a motion to appear telephonically, and although the court didn't rule on this motion, the clerk's notice of hearing noted the inmate would appear telephonically. When the inmate failed to call in for the scheduled hearing, the trial court denied his motion. Although it didn't occur in this case, the Department of Corrections requires staff to place calls to the court when an inmate must participate in a hearing telephonically. Since the inmate was denied his chance to appear through no fault of his own, the appellate court reversed and remanded the case for further proceedings. December 20, 2013.

In re Amendments to Florida Rules of Judicial Admin., 132 So.3d 1114 (Fla. 2014) **RULES AMENDED** The Steering Committee on Families and Children in the Court proposed amendments to Florida Rule of Judicial Administration 2.545(d) which was approved by the Court. The Steering Committee also proposed five new rules of procedure for Florida's family courts which were also approved. The new rules require the courts to assign related family cases to a single judge unless it is deemed impractical, and also for coordination of related cases that are assigned to different judges. The Supreme Court also noted its support for the unified family court model. The amendments are effective April 1, 2014. January 16, 2014.

Hunter v. Booker, 133 So.3d 623 (Fla. 1st DCA 2014) **WRIT GRANTED FOR REMOVAL OF TIME SHARING PLAN** The petitioner filed a petition for protection against domestic violence and was granted a temporary injunction ex parte which gave her one hundred percent of the time sharing for her son. At the subsequent hearing, the court denied the injunction, but established a time sharing plan, even though the respondent did not request time sharing and there was no pending action to establish parental responsibility or visitation. The petitioner appealed and the appellate court held that the trial court lacked the statutory authority to establish a temporary parenting plan since the court dismissed the temporary injunction and denied the permanent injunction. The court noted that the Florida statutes only authorized the court to establish a temporary parenting plan when the court issued an injunction. The court also stated that the trial court's order violated the petitioner's right to due process and departed from the essential requirements of law because the mother's pleading had not presented the issue of shared custody and the father had not requested custody of the child. If it had been proper for the judge to order time sharing, the trial court also failed to consider the criteria set out in s. 61.13, Florida Statutes, for developing a time-sharing plan. March 07, 2014.

Jeffries v. Jeffries, 133 So.3d 1243 (Fla. 1st DCA 2014) **INJUNCTION AFFIRMED** This opinion replaces one issued on January 23, 2014. The trial court issued a petition against domestic violence and the respondent appealed, claiming that he was the victim rather than the aggressor in a domestic violence incident. The appellate court affirmed the trial court's decision because the record contained substantial evidence

to support the injunction, and noted that the appellate court does not re-weigh the evidence or the credibility of witnesses. March 24, 2014.

Sanchez v. Marin, 138 So.3d 1165 (Fla. 3d DCA 2014) **NEW HEARING REQUIRED** The appellate court vacated an order of protection from domestic violence and an order denying a motion for rehearing. The trial court originally entered the order for protection based upon some verbal threats and a fire that occurred. However, the original petition did not include the facts that formed the basis for the order, and the respondent's due process rights were violated when the court let the petitioner raise material allegations for the first time during the final hearing without allowing the respondent proper time to prepare. The case was remanded for a new final hearing. May 21, 2014.

Kunkel v. Stanford ex rel. C.S., 137 So.3d 608 (Fla. 4th DCA 2014) **INJUNCTION REVERSED** A grandfather appealed an injunction ordered against him that was brought on behalf of his granddaughter. While testimony supported that the relationship between the two was strained, there was no evidence or finding by the court that the granddaughter was a victim of domestic violence, or that she was in imminent danger of domestic violence. The appellate court reversed because the evidence was insufficient to support the injunction order. May 7, 2014.

Nettles v. Hoyos, 138 So.3d 593 (Fla 5th DCA 2014) **COURT CAN LIMIT DISCOVERY** A female police officer filed a petition for an injunction for protection against stalking against a male police officer. The respondent attempted to engage in discovery, but the petitioner filed a motion for a protective order and the court granted the motion and quashed the respondent's discovery requests. The respondent then filed a petition for writ of certiorari, which the appellate court granted and held that the trial court could not completely deny the respondent the opportunity to conduct discovery. The court also noted that the court must balance the need to expedite the hearing with the parties' right to due process, and is therefore given to discretion to limit the time frame and nature of discovery on a case by case basis. May 9, 2014.

Smith v. Manno, 138 So.3d 1143, (Fla. 5th DCA 2014) **BOND CONDITIONS OF NO CONTACT INSUFFICIENT TO DENY INJUNCTION** The mother appealed after she filed a petition for an injunction against domestic violence on behalf of herself and her minor daughter which the court dismissed. The court originally entered a temporary injunction against the respondent but dismissed the case during the return hearing upon noting that the respondent had a pending criminal case in which the conditions of his bond already prohibited contact with the petitioner. The appellate court reversed and remanded the case and noted that the petitioner was entitled to an evidentiary hearing, and that if the petitioner meets her burden of proof at the hearing, then she is entitled to an injunction. The existence of a pending criminal case with bond conditions that prohibit contact does not abolish her right to a domestic violence injunction and the protections it offers. May 16, 2014.

Baker v. Pucket, 139 So.3d 954 (Fla. 4th DCA 2014) **DENIAL OF MOTION TO VACATE INJUNCTION REVERSED** The court denied a respondent's motion to vacate an injunction against domestic violence without a hearing that was entered in 2011. The respondent alleged that she has not had any contact with the appellee, nor does she plan to, and that the injunction was preventing her from participating in a work release program while she was incarcerated. The appellate court held that the motion was legally sufficient and that the respondent was entitled to an evidentiary hearing to fulfill due process. June 04, 2014.

In re Standard Jury Instructions in Criminal Cases--Instruction 8.25, --- So.3d ----, 2014 WL 2882571 (Fla. 2014) **JURY INSTRUCTIONS AMENDED** The Supreme Court amended the standard jury instructions proposed by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases. The new instructions amend instruction 8.25 related to domestic violence charges to reflect that a person can violate a condition of pretrial release before being released from jail. June 26, 2014.

In re Amendments to Florida Supreme Court Approved Family Law Forms, --- So.3d ---, 2014 WL 3555973 (Fla. 2014) **FORMS AMENDED** The court amended Florida Supreme Court Approved Family Law Form 12.980(b)(1) to better explain the findings that the trial court should make when it denies an ex parte temporary injunction and sets a hearing on the petition for an injunction. The court also amended Form 12.980(u) by deleting the provision that required a respondent to participate in treatment, intervention or counseling services at the respondent's expense. July 03, 2014.

Pryor v. Pryor, --- So.3d ----, 2014 WL 3594209 (Fla. 1st DCA 2014) **ORDER VACATED** The respondent appealed an order that extended a temporary injunction for protection against domestic violence which, even as extended, had expired by the time of the court's review. The court vacated the original order and the temporary injunction and dismissed the appeal due to the collateral consequences that occur through the injunction process. The court noted that while the statute does allow the court to issue a continuance for good cause, the court may not issue a series of temporary injunctions in lieu of a permanent injunction. July 22, 2014.

Branson v. Rodriguez-Linares, --- So.3d ----, 2014 WL 3673881 (Fla. 2d DCA 2014) **INJUNCTION PROTECTING AGAINST CYBERSTALKING AFFIRMED** The respondent appealed a final judgment of injunction for protection against domestic violence that was issued to protect the petitioner from cyberstalking. Although the respondent did not verbally threaten the petitioner, the trial court found that he did stalk her with about 300 emails during a 1.5 month period. The respondent claimed that his actions did not constitute violence under the statute, however, the court found that "the statute plainly permits the entry of an injunction for a person who is the victim of "stalking." Thus, the court held that proof of recent stalking can be sufficient to establish the act of "violence" required for the issuance of a section 741.30(1)(a) domestic violence injunction." If such an act of violence is sufficiently established and if it is between "family or household member[s]" as defined in section 741.28(3),

the petitioner is not also required to demonstrate reasonable cause to believe that he or she is in imminent danger of becoming the victim of any future act of domestic violence. The court also noted that “some of the offenses described in the statute, such as assault, battery, kidnapping, false imprisonment, aggravated stalking, and stalking, do not need to result in physical injury or death to qualify as acts of domestic violence.” July 25, 2014.



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DOMESTIC VIOLENCE LEGAL OUTLINE

1. DOMESTIC VIOLENCE - BACKGROUND AND DEFINITIONS:

A. FEDERAL LAW:

1. **Violence Against Women Act, 42 U.S.C. §13981:** Under section 5 of the Fourteenth Amendment and section 8 of Article I of the Constitution, Congress enacted the Violence Against Women Act of 1994 (VAWA), a federal civil rights cause of action for victims of gender motivated violence. 42 U.S.C. §13981.
 - a. However, the Supreme Court held that Congress did not have the authority to enact the civil remedy provision of VAWA: See *United States v. Morrison*, 120 S.Ct. 1740 (2000). The Supreme Court held that the Commerce Clause did not provide Congress with authority to enact the civil remedy provision of VAWA (§13981). The provision was not a regulation of activity that substantially affected interstate commerce, gender-motivated crimes of violence were not economic activity, and the provision contained no jurisdictional element establishing that a federal cause of action was in pursuance of Congress' power to regulate interstate commerce. Although, state-sponsored gender discrimination could violate equal protection under certain circumstances, the Fourteenth Amendment did not prohibit or provide a shield against private conduct; it prohibits only state action, and is directed at conduct of a State or state actor. The conduct at issue in this case is that of a private individual.
 - b. The Court further rejected the argument that Congress may regulate noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce and stated that they "can think of no better example of police power which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 1754.
2. **Federal Definition of Domestic Violence:** A "misdemeanor crime of domestic violence" is defined as a misdemeanor under Federal or State Law that involves the use, attempted use, or threatened use of physical force against a person by

a current or former spouse, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, or by a person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides. 18 U.S.C. §921(a)(33)(A); 18 U.S.C.A. §2266(7)(B). “Physical force” as used in this statute has been clarified to include “offensive touching” as the phrase is used in common law; the “physical force” referred to in the statute can be either direct force or indirect force. U.S. v. Castleman, 134 S. Ct. 1405 (U.S. 2014).

3. Interstate Domestic Violence Statute, 18 U.S.C. §2261(a):

a. Offenses:

- (i) Crossing a State Line. -- Under this provision a person who travels across a state line or enters or leaves Indian Country with the intent to injure, harass, or intimidate that person’s spouse or immediate partner, and who, in the cause of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner shall be punished as provided in subsection (b).
- (ii) Causing the crossing of a state line. -- A person who causes a spouse or intimate partner to cross a state line or to enter or leave Indian Country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person’s spouse or intimate partner, shall be punished as provided in subsection (b).

b. Penalties: A person who violates this section or section 2261A shall be fined under this title and imprisoned:

- (i) For life or any term of years, if death of the victim results;
- (ii) For not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;
- (iii) For not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
- (iv) As provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
- (v) For not more than 5 years, in any other case, or both fined and imprisoned.
- (vi) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.

c. Enactment of 18 U.S.C. §2261(a) does not exceed Congress’ authority under the Commerce Clause. See U.S. v. Bailey, 112 F. 3d 758 (4th Cir. 1997).

The portion of the Violence Against Women Act that makes it a federal crime to cause bodily injury to one's spouse after crossing state lines with the intent to do so, 18 U.S.C. §2261(a)(2), does not exceed Congress' authority under the Commerce Clause. The court pointed out that §2261(a)(2) requires the crossing of a state line, and therefore placed the criminal activity squarely in interstate commerce.

4. Full Faith and Credit, 18 U.S.C. §2265:

The Violence against Women Act requires all states and Indian nations to give full faith and credit to restraining orders and orders of protection against domestic violence that meet the federal definition if the respondent was given notice and an opportunity to be heard. The mandatory injunction forms used in Florida were created in part to qualify under the federal statute, including the written finding that the petitioner is a victim of domestic violence and/or petitioner has reasonable cause to believe that she or he is in imminent danger of becoming a victim of domestic violence.

B. FLORIDA STATE LAW:

1. Application of Traditional Rule of Law of Injunctions to Domestic Violence Injunctions:

a. Domestic Violence Injunctions are NOT Controlled by Traditional Rule of Law of Injunctions:

Domestic violence injunctions are created by statute, chapter 741, Florida Statutes, and therefore do not appear to be controlled by the traditional rule of law of injunctions. The Florida Family Law Rule of Procedure 12.610(a), entitled "Injunctions for Domestic, Repeat, Dating, and Sexual Violence, And Stalking" specifically states that it applies to domestic, repeat, dating, and sexual violence, and stalking injunctions; all other injunctions are controlled by Florida Rule of Civil Procedure 1.610.

(i) No Requirement to First Exhaust other Remedies:

Further indications that the traditional requirements for requesting an injunction do not apply to domestic violence injunctions is that a petition for injunction does not require a showing that no other adequate remedy available at law exists. Because the basis for a domestic violence injunction can be the commission of an act of domestic violence, and these include assault, battery, etc., criminal prosecution for these offenses provides another remedy at law. Additionally, when an individual is charged with these offenses, the court must order that the defendant have no contact with the alleged victim as a condition of pre-trial release. §903.047(1)(b), Florida Statutes. Therefore, the pre-trial release conditions for these types of criminal offenses serve one of the injunctive purposes of a domestic violence injunction and provide another remedy at law.

(ii) No Requirement to Allege Irreparable Harm:

Also, although one way to obtain a domestic violence injunction is by showing an imminent threat of domestic violence, this is not required if a petition is filed based on the petitioner already being a victim of domestic violence. Therefore, alleging irreparable harm is not a requirement to seeking an injunction against domestic violence.

2. Florida Statutes Chapter 741

- a. Chapter 741, Florida Statutes, Exclusive Method to Obtain an Injunction.
The procedure outlined in chapter 741, Florida Statutes, is the *exclusive* method to obtain an injunction in Florida for protection against domestic violence. No other remedies, including an injunction under Florida Rule of Civil Procedure 1.610, may be utilized to obtain an injunction against domestic violence. Campbell v. Campbell, 584 So. 2d 125 (Fla. 4th DCA 1991); see Florida Family Law Rule of Procedure 12.610(a) and §61.052(6), Florida Statutes.
- b. See Shaw-Messer v. Messer, 755 So. 2d 776 (Fla. 5th DCA 2000). The Fifth District Court of Appeal held that the trial court erred in not conducting an evidentiary hearing on the issuance of an injunction for protection against domestic violence filed by the wife against the husband, and in entering a mutual injunction in the dissolution action, under chapter 61, Florida Statutes, without any testimony that the husband had committed any conduct deserving such action. In reversing the lower court's ruling and remanding the case for further action, the Fifth District Court of Appeal held that §741.30, Florida Statutes, not chapter 61 of the Florida Statutes, is the appropriate vehicle for a domestic violence injunction.
- c. In addition to §741.28, Florida Statutes, a number of Florida statutes address issues associated with domestic violence cases, including injunctions (§741.31), civil actions for damages (§768.35), confidentiality (§§39.908, 741.401, 741.465), evidentiary issues (§90.5036) and mediation (§44.102). These related sections will be discussed further in this outline.

3. Domestic Violence Definitions in Florida Statutes:

- a. **DOMESTIC VIOLENCE** means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death of one family or household member by another family or household member. §741.28(2), Florida Statutes.
- b. Assault defined:
An assault is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. §784.011(1), Florida Statutes.

- c. An assault is a misdemeanor of the second degree, punishable as provided in §§775.082 or 775.083, §784.011(2), Florida Statutes.
 - (i) Punishment for Assault under §775.082(4)(b), Florida Statutes: For a misdemeanor of the second degree, definite term of imprisonment not to exceed 60 days.
 - (ii) Punishment for Assault under §775.083(1)(e), Florida Statutes: A person who had been convicted of assault may be sentenced to pay a fine in addition to the punishment under §775.082 above or he or she may be sentenced to pay a fine not to exceed \$500.00 in lieu of the punishment described above.
- d. **Battery defined:**

A person commits a battery if he or she (1) actually and intentionally touches or strikes another person against the will of the other, OR (2) intentionally causes bodily harm to another person. §784.03, Florida Statutes.
- e. A battery is a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, Florida Statutes. §784.03(1)(b), Florida Statutes.
 - (i) Punishment for Battery under §775.082(4)(a): For a misdemeanor of the first degree, definite term of imprisonment not to exceed 1 year.
 - (ii) Punishment for Battery under §775.083(1)(d): A person who had been convicted of battery may be sentenced to pay a fine in addition to the punishment under §775.082 above or he or she may be sentenced to pay a fine not to exceed \$1,000 in lieu of the punishment described above.
- f. A person who has one or more prior convictions for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084. §784.03(2), Florida Statutes.
 - (i) Punishment for third degree felony under §775.082(3)(e), Florida Statutes: a term of imprisonment not to exceed 5 years.
 - (ii) Punishment for third degree felony under §775.083(1)(c), Florida Statutes: A person who had been convicted of a third degree felony may be sentenced to pay a fine in addition to the punishment under §775.082 above or he or she may be sentenced to pay a fine not to exceed \$5,000 in lieu of the punishment described above.
 - (iii) Punishment for a third degree felony under §775.084(4)(a)(3), Florida Statutes: If defendant is found to be a habitual felony offender: for a term of years not exceeding 10.
 - (iv) Punishment for a third degree felony under §775.084(4)(b)(3), Florida Statutes: If defendant is found to be a habitual violent felony offender: term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

- (v) Punishment for third degree felony under §775.084(4)(c)(1)(d), Florida Statutes: If defendant is found to be a three time violent criminal, the court must sentence the offender to a minimum mandatory sentence of: a term of imprisonment of 5 years.
- (vi) Punishment for third degree felony under §775.084(4)(d)(3), Florida Statutes: If defendant is found to be a violent career criminal: term of years not exceeding 15, with a mandatory minimum term of 10 years imprisonment.

g. Felony Battery defined:

A person commits felony battery if he or she (1) actually and intentionally touches or strikes another person against the will of the other; and (2) causes great bodily harm, permanent disability, or permanent disfigurement. §784.041(1), Florida Statutes.

A person commits domestic battery by strangulation if the person knowingly and intentionally, against the will of another, impedes the normal breathing or circulation of the blood of a family or household member or of a person with whom he or she is in a dating relationship, so as to create a risk of or cause great bodily harm by applying pressure on the throat or neck of the other person or by blocking the nose or mouth of the other person. This paragraph does not apply to any act of medical diagnosis, treatment, or prescription which is authorized under the laws of this state. §784.041(2)(a), Florida Statutes.

- h. Felony battery and domestic battery by strangulation are a third degree felony and punishable as set out above as provided in §§775.082, 775.083, or 775.084, Florida Statutes. *See also* section (f) above.

i. Aggravated Battery defined:

A person commits aggravated battery if he or she, while committing battery: (1) intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or (2) uses a deadly weapon. Furthermore, a person commits aggravated battery if victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant. §784.045, Florida Statutes.

- j. Aggravated battery is a second degree felony, punishable as provided in §§775.082, 775.083, and 775.084, Florida Statutes.

- (i) Punishment for second degree felony under §775.082(3)(d), Florida Statutes: a term of imprisonment not to exceed 15 years.

- (ii) Punishment for second degree felony under §775.083(1)(b), Florida Statutes: A person who had been convicted of aggravated battery may be sentenced to pay a fine in addition to the punishment under §775.082 above. The fine shall not exceed \$10,000.

- (iii) Punishment for a second degree felony under §775.084(4)(a)(2), Florida Statutes: If defendant is found to be a habitual felony offender: for a term of years not exceeding 30.
 - (iv) Punishment for second degree felony under §775.084(4)(b)(2), Florida Statutes: If defendant is found to be a habitual violent felony offender: term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
 - (v) Punishment for second degree felony under §775.084(4)(c)(1)(c), Florida Statutes: If defendant is found to be a three time violent criminal, the court must sentence the offender to a minimum mandatory sentence of a term of imprisonment of 15 years.
 - (vi) Punishment for second degree felony under §775.084(4)(d)(2), Florida Statutes: If defendant is found to be a violent career criminal: term of years not exceeding 40, with a mandatory minimum term of 30 years' imprisonment.
- k. The general view is that **consent is not a defense to battery**.
- (i) Lyons v. State, 437 So. 2d 711, 712 (Fla. 1st DCA 1983).
 - (ii) State v. Conley, 799 So. 2d 400 (Fla. 4th DCA 2001), "A view of the law that a victim of domestic violence can consent to the batteries and injuries perpetrated on him or her is incompatible with both the general law of battery and the specific legislative intent expressed in §741.2901(2)...."
 - (iii) See also State v. Conley, 799 So. 2d 400 (Fla. 4th DCA 2001). Judge Warner concurs in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery is a defense. Consent is only a defense in cases of sexual battery, not domestic violence.
- l. **Stalking defined:**
 Section 784.048(2), Florida Statutes, states: Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking. Stalking is a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, Florida Statutes. *See also* section (e) above.
- m. **Cyber-Stalking defined:**
 To engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose. §784.048(1)(d), Florida Statutes. *See Branson v. Rodriguez-Linares*, --- So.3d ----, 2014 WL 3673881 (Fla. 2d DCA 2014). Petitioner received approximately 300 emails in one and one-half months. The court held that stalking and cyberstalking can be sufficient to establish

the act of “violence” as required by the domestic violence statute, as long as the cyberstalking was directed at a family or household member.

n. Aggravated stalking defined:

- (i) Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084, Florida Statutes. §784.048(3), Florida Statutes.
- (ii) Any person who, after an injunction for protection against repeat violence, sexual violence, or dating violence, pursuant to §784.046, Florida Statutes, or an injunction for protection against domestic violence pursuant to §741.30, Florida Statutes, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084, Florida Statutes. §784.048(4), Florida Statutes.
- (iii) Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a minor under 16 years of age commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084. §784.048(5), Florida Statutes. *See also* section (f) above.

4. Applicable Rules of Procedure:

- a. The Florida Family Law Rules of Procedure apply to domestic, repeat, dating, and sexual violence, and stalking proceedings. Florida Family Law Rule of Procedure 12.010(a)(1).
- b. Pre-trial discovery:
Pre-trial discovery is available in injunction cases including: depositions (rule 12.290), interrogatories (rule 12.340), production of documents (rule 12.350), examination of persons (rule 12.360), and requests for admission (rule 12.370). However, the mandatory disclosure required under Florida Family Law Rule of Procedure 12.285 for most family law cases is not available in domestic, repeat, dating, and sexual violence, or stalking injunction proceedings.
- c. Procedures for temporary and final injunctions for protection against domestic violence are governed by Florida Family Law Rule of Procedure 12.610. In conjunction with this rule, the Florida Supreme Court has approved a series of standardized domestic violence forms, which include petitions for various types of injunctions and mandatory injunction forms. Judges are required to use the injunction forms when making

determinations in domestic violence cases. Modifications of the mandatory injunction forms themselves must be approved by the Supreme Court of Florida.

5. Clerk Shall Provide Assistance to Petitioners:

The clerk of the court shall provide forms and assist petitioners in seeking both injunctions for protection against domestic violence and enforcement for a violation of an injunction. §741.30(2)(c)(1), Florida Statutes. Florida Family Law Rule of Procedure 12.610(b)(4)(A) broadens this obligation to require that the clerk of court also provide forms and assistance to petitioners seeking injunctions for protection against repeat, dating, and sexual violence, and stalking.

6. No Filing Fee:

The clerk of court cannot assess a filing fee for petitions for injunction against domestic violence. §741.30(2)(a), Florida Statutes.

7. Other types of Injunctions available in Florida:

- a. Dating Violence Injunction. §784.046, Florida Statutes.
- b. Sexual Violence Injunction. §784.046, Florida Statutes.
- c. Repeat Violence Injunction. §784.046, Florida Statutes.
- d. Stalking Injunction. §784.0485, Florida Statutes.

For more information on the Dating Violence, Sexual Violence, Repeat Violence, and Stalking Injunctions, please see TAB 8.





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1. DOMESTIC VIOLENCE COURT - CIVIL PROCEEDINGS:

A. VALID ESTABLISHMENT OF DOMESTIC VIOLENCE COURTS:

1. Case Law Validating Establishment of Domestic Violence Courts:

- a. Holsman v. Cohen, 667 So. 2d 769 (Fla. 1996). It is appropriate for circuits to establish domestic violence courts to enable family law judges to address all issues involving domestic violence in an expeditious, efficient, and deliberate manner.
- b. Rivkind v. Garcia, 650 So. 2d 38 (Fla. 1995).
- c. In re: Report of Comm'n on Family Courts III, 646 So. 2d 178 (Fla. 1994).

2. Local Rules and Administrative Orders Regarding the Implementation of Family Court Divisions are Both Valid.

- a. Holsman v. Cohen, 667 So. 2d 769 (Fla. 1996).
 - (i) District courts lack authority to review administrative orders.
 - (ii) District courts' obligations do not include the approval of routine matters generally included in administrative orders such as the assignment of judges to divisions.
- b. In re: Report of Comm'n on Family Courts III, 646 So. 2d 178 (Fla. 1994).
- c. Rivkind v. Patterson, 672 So. 2d 819 (Fla. 1996).

3. Judicial Assignments in Domestic Violence Court:

- a. Rivkind v. Patterson, 672 So. 2d 819 (Fla. 1996) ("that judicial assignments at issue constitute a logical and lawful means to ensure the expeditious and efficient resolution of domestic violence issues...").
- b. Holsman v. Cohen, 667 So. 2d 769 (Fla. 1996). County court judges may be assigned to hear circuit court work on a temporary or regular basis, provided that the assignment is directed to a specified or limited class of cases. Likewise, this applies equally to the assignment of circuit judges to handle county court matters.

B. JURISDICTION OF DOMESTIC VIOLENCE COURTS:

- 1. The Court Must Have Jurisdiction before Entering a Final Judgment of Injunction for Protection against Violence and Ancillary Relief.**

- a. Velez v. Selmar, 781 So. 2d 1197 (Fla. 3d DCA 2001). The trial court, which lacked jurisdiction, incorrectly entered an injunction against repeat violence and supplemental order for a final injunction.
 - b. *See also* Rinas v. Rinas, 847 So. 2d 555 (Fla. 5th DCA 2003). Trial court did not have jurisdiction to award custody, child support and alimony, in a domestic violence action, absent dissolution of marriage proceeding; §741.30, Florida Statutes, does not authorize such awards, under provisions of chapter 61, Florida Statutes, *when petitioner in a domestic violence action is a minor child filing by and through her mother as “next best friend.”* Unique to this case, was that the petitioner’s mother was filing on her minor child’s behalf, and in such cases ancillary relief may be limited. *See Domestic Violence Legal Outline* II. C. 4. c.
2. **Florida’s Courts Lack Authority to Issue Protective Injunctions Granting Custody of Children who are Subjects of Foreign Custody Order.**
Baumgartner v. Baumgartner, 691 So. 2d 488 (Fla. 2d DCA 1997).
- a. Florida courts likewise lack authority to prohibit children, who are subjects of foreign custody orders, from leaving Florida.
 - b. Florida courts do have authority to issue protective orders to those persons within the state.
 - c. **Foreign Orders Which Prohibit Removal of Child from Other Countries:** *See* Abuchaibe v. Abuchaibe, 751 So. 2d 1257 (Fla. 3d DCA 2000). The Third District Court of Appeal held that the courts in Florida had no jurisdiction over a child for the purpose of making a custody determination under §61.1308(1)(b), Florida Statutes, where the child did not have any significant connection with the state of Florida. The child was born in Florida, and later moved to Colombia. He had lived about half of his thirty-three months in Florida, and about half in Colombia. The father was a dual citizen of the U.S. and Colombia, where he resided. The mother was a Colombian citizen and had resided in the U.S. while attempting to qualify for residency. The child was present in Florida visiting his mother for six days prior to the mother filing an injunction for protection against domestic violence. The Florida court entered a domestic violence injunction, asserted jurisdiction over the child, awarded her temporary custody, and ordered the child returned from Colombia by the father, who had sent him back to Colombia the day after the mother filed for the injunction. The father commenced formal proceedings in Colombia to determine custody of the child some time after the final order of the Florida court in November 1998, which awarded custody to the mother. Service of process on the mother for the Colombia proceedings was attempted, though unsuccessfully, through the Colombian Consulate in Miami. In December 1998, the mother filed for dissolution of marriage, seeking permanent custody of the child. The mother subsequently dismissed her dissolution petition while the issue of jurisdiction was being considered by the Family Court. The domestic violence trial court later held the father in contempt for his failure to return the child to the mother, despite the father’s

argument that Colombian law prevented him from removing the child from the country while custody proceedings were pending. The Third District Court of Appeal reversed the trial court's custody order, finding that the court erred in asserting jurisdiction. Further, the Third District Court of Appeal reversed the contempt order, since the father was barred from removing the child from Colombia by Colombian law.

3. Court's Authority in Consolidated Action Subsequent to Dismissal of Domestic Violence Injunction:

Court cannot enter no contact directives in related and consolidated paternity actions, subsequent to the court dismissing the temporary injunction. See Taylor v. Taylor, 831 So. 2d 240 (Fla. 2d DCA 2002). The trial court's sua sponte consolidation of the Mother's petition for an injunction with the Mother's subsequently filed paternity action did not confer authority on the court to enter no contact directives against the Father, where the court dismissed the temporary domestic violence injunction.

See also Hunter v. Booker, 133 So. 3d 623 (Fla. 1st DCA 2014).

C. PARTIES/STANDING/RESIDENCY:

1. Petitioner Does Not Have to Vacate Residence:

A person's right to file a petition for injunction against domestic violence is not affected by whether that person has left the parties' residence or household. §741.30(1)(d), Florida Statutes. Likewise, a litigant may still be awarded exclusive use and possession of the parties' home, even if the litigant has left the home. Amendments to the Florida Supreme Court Approved Family Law Forms -- Domestic Violence Forms, 830 So. 2d 72 (Fla. 2002); Florida Supreme Court Approved Family Law Form 12.980(a).

2. Petition can be filed Pro Se:

A pro se litigant can file a petition for protection against domestic violence. §741.30(1)(f), Florida Statutes.

3. Standing:

Section 741.30(1)(a), Florida Statutes: "Any person described in paragraph (e), who is either the victim of domestic violence as defined in §741.28 or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence, has standing in the circuit court to file a sworn petition for an injunction for protection against domestic violence."

a. There is apparently no statutory distinction between the standing to file a petition, conferred above by being a victim of domestic violence or having a reasonable belief of being in imminent danger of becoming a victim, and prevailing on the merits. Section 741.30(6)(a), Florida Statutes, permits the court to enter the injunction upon making either of the findings in §741.30(1)(a), Florida Statutes. This interpretation of standing is also

supported by case law. Cleary v. Cleary, 711 So. 2d 1302 (Fla. 2d DCA 1998); Gustafson v. Mauck, 743 So. 2d 614 (Fla. 1st DCA 1999).

- b. However, other cases discuss standing in the context of the relationship required to exist between parties before an individual can petition for a domestic violence injunction. A petitioner lacks standing to file a petition for injunction if he or she does not meet the “residing together” requirement for seeking a domestic violence injunction. Partlowe v. Gomez, 801 So. 2d 968 (Fla. 2d DCA 2001). Therefore, there are two aspects to the standing requirement in domestic violence injunction cases; the provisions under (a) above and (b) the “Family or Household Members” requirement below.

4. Parties Must Be “Family or Household Members” to Request an Injunction for the Protection against Domestic Violence: An injunction for protection

against domestic violence requires that the domestic violence or threat of domestic violence occur between “one family or household member” and “another family or household member” but the petitioner is not required to be the spouse of the respondent. §§741.28(2) & 741.30(1)(e), Florida Statutes. Any “family or household member” as defined under §741.30(1)(e), Florida Statutes, below, can file a petition for protection against domestic violence.

- a. Pursuant to §741.28(3), Florida Statutes, “FAMILY OR HOUSEHOLD MEMBER” means:
 - (i) They are family or household members - spouses, ex-spouses, relatives by blood or marriage, anyone who lives or has lived together in the same dwelling as a family unit AND
 - (ii) They currently reside or have in the past resided together in the same dwelling as a family unit, OR
 - (iii) They have a child in common, regardless of whether they have been married and regardless of whether they currently reside or have in the past resided together in the same dwelling. (If the parties are relatives and no longer reside together or did not reside together in the past they may want to file for an injunction under §784.046, Florida Statutes.)
- b. Unless the parties have a child in common, the parties must have lived in the same single dwelling with the person against whom the injunction is sought. (Therefore, a child who has never lived with his biological parent could not seek a domestic violence injunction against the parent.)
- c. Definition of “family or household member” under Florida law is broader than under federal statutes: Florida includes blood relatives and in-laws but federal law, 18 U.S.C. §921(a)(33)(A), does not. Furthermore, a minor child can file by and through a parent as “next best Friend.” However in such case ancillary relief may be limited.
 - (i) See Rinas v. Rinas, 847 So. 2d 555 (Fla. 5th DCA 2003). Improper for trial court to award custody, child support, and alimony for petitioner’s mother and sister in a domestic violence action where petitioner was a minor child filing by and through her mother as “next best friend.”

- (ii) *See also* *infra* D.1. Venue or Residency Requirement, there is no minimum residency requirement to petition for protection against domestic violence in Florida. §741.30(1)(j), Florida Statutes.

5. Lack of Standing Must be Raised Initially:

Andrews v. Byrd, 700 So. 2d 1250 (Fla. 1st DCA 1997). Respondent must raise lack of qualification to meet definition of “family or household member” before the final injunction is entered. The court affirmed the entry of a domestic violence injunction under chapter 741, Florida Statutes, despite the claim that the respondent did not qualify as a “family or household member,” where the issue was not raised until after the injunction was entered.

6. Standing Requirement Met:

- a. Section 741.30, Florida Statutes, was intended to protect intimate (including same sex) partners and was not intended to exclude those who seek protection from someone of the same sex. Peterman v. Meeker, 855 So. 2d 690 (Fla. 2d DCA 2003).
- b. Petitioner and respondent who are brother and sister have not lived together for 40 years. They still qualify for domestic violence relief. Rosenthal v. Roth, 816 So. 2d 667 (Fla. 3d DCA 2002). The statutes defining “domestic violence” and “family household member” were amended after this case in 2002.
- c. Temporary stay, of one week, with Aunt satisfied statutory requirement that the parties were residing in the “same dwelling.” Kokoris v. Zipnick, 738 So. 2d 369 (Fla. 4th DCA 1999).
- d. Parrish v. Price, 71 So. 3d 132 (Fla. 2d DCA 2011). The appellate court held that the petitioner was authorized to petition for the injunctions on behalf of the children. Section 741.30, Florida Statutes, clearly contemplates that children are among those who may invoke the statute's protection from domestic violence, and Florida Rule of Civil Procedure 1.210(b), applicable to all civil cases, provides that a minor cannot sue on his or her own behalf. Rather, suit must be instituted by an appointed representative or a “next friend,” such as a parent. Thus, a child's only vehicle for seeking protection under the domestic violence statute is through a petition filed by a next friend or representative.

7. Standing Requirement NOT Met:

- a. Petitioner lacked standing to file a domestic violence action because, although the parties’ relationship was romantic in nature with overnight visits, both parties lived in separate residences. Slovenski v. Wright, 849 So. 2d 349 (Fla. 2d DCA 2003).
- b. Petitioner who is maternal grandfather and who had custody of the grandchild requested domestic violence injunction against child’s father. The Court found that, pursuant to §741.28, Florida Statutes, the grandfather and father did not share child in common and dismissed the petition. Partlowe v. Gomez, 801 So. 2d 968 (Fla. 2d DCA 2001).

- c. In the case of a father and his adult son who never met until the son was an adult, and who never lived in the same single dwelling unit, statutory DV cannot occur between them. Fleshman v. Fleshman, 50 So. 3d 797 (Fla. 2d DCA 2011).

8. Alternative Procedure: If the petitioner does not have standing to file a petition for an injunction against domestic violence, an injunction against repeat violence may be applicable. §784.046, Florida Statutes.

D. PROCEDURAL REQUIREMENTS FOR CLAIMS:

1. Florida Family Law Rule of Procedure 12.610 Contains Additional Procedural Sections that are Titled Requirements for Use of Petitions, Consideration of Petitions by the Court, Forms, Orders of Injunction, Issuing of Injunction, Service of Injunctions, Final Injunctions, Duration, Enforcement, and Motion to Modify or Vacate Injunction.

2. Venue or Residency Requirement:

- a. Section 741.30(1)(j), Florida Statutes, states, “Notwithstanding any provisions of chapter 47 [Venue], a petition for an injunction for protection against domestic violence may be filed in the circuit where the petitioner currently resides, where the respondent resides, or where the domestic violence occurred. There is no minimum requirement of residency to petition for an injunction for protection.”
- b. Location of the Alleged Act of Domestic Violence:
 - (i) Whether an injunction can be issued when the act of domestic violence or the alleged victim’s basis for fearing he or she will become a victim of domestic violence occurs outside the State of Florida is a question that has not been answered by case law. However, a petition for a domestic violence injunction is a private cause of action, equivalent to a civil action, Tobkin v. State, 777 So. 2d 1160, 1164 (Fla. 4th DCA 2001), and §48.193(1)(b), Florida Statutes, states that a person submits to the jurisdiction of this state by “committing a tortious act within this state.” This indicates that the acts forming the basis for a domestic violence injunction must be committed in Florida.
 - (ii) However, when contemplating the issue discussed above, the court must recognize that the statutes do specifically state that Legislature’s intent is to protect the victim. Therefore, when determining whether to issue an injunction the court must focus on the safety of the victim, the victim’s children, and any other person who may be in danger, whether or not the alleged act occurred at home or just across the state line.
 - (iii) Venue Provision for §784.046, Florida Statutes (2011), injunctions.
 - 1. Weimorts v. Shockley, 47 So. 3d 386 (Fla. 1st DCA 2010). Because §784.046, Florida Statutes, provides for a protective injunction against dating violence but does not contain a special venue provision, the trial court was required to apply the general venue

provision in §47.011, Florida Statutes, which states "[a]ctions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located." The court also noted that the legislature amended §741.30, Florida Statutes, to add a special venue provision, §741.30(1)(j), which allows a petition to be filed in the circuit where the petitioner resides, however, there is no indication by the legislature that this special venue provision applies outside of chapter 741. The court also recognized that under the instructions to family law form 12.980(n) appended to the Florida Family Law Rules of Procedure, a petitioner filing a petition for prohibition against dating violence is instructed to file the petition in the circuit where she lives. However, these instructions cannot contradict §47.011, Florida Statutes.

3. Service Requirements of Pleadings and Other Documents:

Florida Family Law Rule of Procedure 12.610(b)(2)(A) requires petitions for protection against domestic violence, other required documents, and the temporary injunction (if one has been entered) to be served by a law enforcement agency and requires the clerk to furnish a copy of the petition and applicable forms to law enforcement for service.

a. Temporary and Final Injunctions Must be Served:

See Florida Family Law Rules of Procedure 12.610(b)(2)(A) and 12.610(c)(3)(A-B).

b. Service Requirements for Subsequent Pleadings and Orders:

"All orders issued, changed, continued, extended, or vacated subsequent to the original service of documents enumerated under subparagraph (1), shall be certified by the clerk of the court and delivered to the parties at the time of the entry of the order. The parties may acknowledge receipt of such order in writing on the face of the original order. In the event a party failed or refuses to acknowledge the receipt of a certified copy of an order, the clerk shall note on the original order that service was affected. If delivery at the hearing is not possible, the clerk shall mail certified copies of the order to the parties at the last known address of each party. Service by mail is complete upon mailing." §741.30(8)(a)(3), Florida Statutes. See also Florida Family Law Rule of Procedure 12.080. The procedure for service of pleadings other than the petition, supplemental petitions and orders is governed by rule 12.080, except that service of a motion to modify or vacate an injunction should be by notice that is reasonably calculated to apprise the nonmoving party of the pendency of the proceedings. Florida Family Law Rule of Procedure 12.610(b)(2)(C).

4. Due Process Problems:

a. Notice Problems:

- (i) Trial court's decision to permit psychologist's testimony, which was based on a child custody psychological report, during a hearing on a temporary domestic violence injunction issued against the father,

- deprived the mother of procedural due process. The report, which recommended that the children be removed from the mother's custody due to severe alienation of the children from their father, was 35 pages single-spaced and was not received by the mother until the day before the hearing. Schmitz v. Schmitz, 890 So. 2d 1248 (Fla. 4th DCA 2005).
- (ii) Lab report, which was sent directly to the judge, was an ex parte communication, and the court must provide a copy to each party and allow each side to be heard before suspending visitation base upon report. Pierce v. Tello, 868 So. 2d 1253 (Fla. 4th DCA 2004).
 - (iii) Former Wife's due process rights were violated when trial court on its on its own motion modified the "no contact" provision of the contempt order, and domestic violence injunction, when husband did not request a modification and agreed at that hearing that the only issues to be decided was the amount of child support. Swanson v. Swanson, 888 So. 2d 117 (Fla. 4th DCA 2004). *See also* White v. Cannon, 778 So. 2d 467 (Fla. 3d DCA 2001).
 - (iv) Trial court erred in dismissing an injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered, thus failing to provide due process on the issue. Parties must have notice that dismissal will be considered. Farr v. Farr, 840 So. 2d 1166 (Fla. 2d DCA 2003).
 - (v) Court erred in hearing respondent's motion to modify temporary injunction concerning child custody at the same time as the final hearing. Petitioner claimed no notice and asked for continuance which was denied. Cervieri v. Cervieri, 814 So. 2d 528 (Fla. 4th DCA 2002).
 - (vi) Conversion of ex parte hearing on Motion to Quash Injunction into full evidentiary hearing infringed upon due process and therefore the injunction was vacated and the case remanded for a full hearing. Melton v. Melton, 811 So. 2d 862 (Fla. 5th DCA 2002).
 - (vii) Respondent's right to due process violated where custody and visitation were terminated without a petition requesting such relief. Ryan v. Ryan, 784 So. 2d 1215 (Fla. 2d DCA 2001).
 - (viii) By dismissing injunction without motion, notice or hearing, the court erred. Chanfrau v. Fernandez, 782 So. 2d 521 (Fla. 2d DCA 2001).
 - (ix) Judge cannot sua sponte modify injunction where no motion seeking modification was filed. Mayotte v. Mayotte, 753 So. 2d 609 (Fla. 5th DCA 2000).
 - (x) The trial court amended a domestic violence injunction and granted the paternal grandmother temporary custody of the child without motion, notice, or hearing afforded to the parties. The custody order was reversed and the court stated that the fact that the wife had obtained a hearing on a motion to dissolve the child custody order was not sufficient to satisfy due process requirements. Snyder v. Snyder, 685 So. 2d 1320 (Fla. 2d DCA 1996).
- b. Opportunity to be Heard:

- (i) It was error to deny respondent the opportunity to present evidence. Oravec v. Sharp, 743 So. 2d 1174 (Fla. 1st DCA 1999); Madan v. Madan, 729 So. 2d 416 (Fla. 3d DCA 1999).
- (ii) Full evidentiary hearing required. Cisneros v. Cisneros, 782 So. 2d 547 (Fla. 3d DCA 2001); Chanfrau v. Fernandez, 782 So. 2d 521 (Fla. 2d DCA 2001).
- (iii) Must allow evidence to be presented. Wooten v. Jackson, 812 So. 2d 609 (Fla. 1st DCA 2002); Shaw-Messer v. Messer, 755 So. 2d 776 (Fla. 5th DCA 2000); Cuiksa v. Cuiksa, 777 So. 2d 419 (Fla. 1st DCA 2000).
- (iv) It was error for the court to “cut hearing short” due to number of cases to be heard that day. Semple v. Semple, 763 So. 2d 484 (Fla. 4th DCA 2000).
- (v) Petitioner requested emergency writ of certiorari for review of two separate orders which denied her ex parte motion for a domestic violence injunction. The first petition was denied without a hearing. The second petition denied relief, holding that the first order issued by a different judge was controlling. The writ was granted and the judge issuing the first order admitted error because the petitioner’s allegations were sufficient. The Fifth District Court of Appeal quashed both orders and remanded the case to the first judge with instructions to issue the temporary injunction. Gonzales v. Clark, 799 So. 2d 451 (Fla. 5th DCA 2001).
- c. Court Forced Defendant to Proceed to Hearing without Representation: Defendant, against whom injunction for protection was sought, was denied due process when trial court granted her twenty days to obtain representation and at the same time required her to proceed pro se at a hearing in which all of the issues that required the assistance of an attorney were to be decided. Sheinheit v. Cuenca, 840 So. 2d 1122 (Fla. 3d DCA 2003).

5. Injunction Must be Issued as a Separate Order under Chapter 741:

- a. An injunction for protection against domestic violence must be issued as a separate order under chapter 741, Florida Statutes, including service of process, proper pleadings, and sufficient evidence to support an injunction or waiver. Guida v. Guida, 870 So. 2d 222 (Fla. 2d DCA 2004).
- b. Section 61.052(6), Florida Statutes, mandates that an injunction must be a separate order from the final judgment of dissolution of marriage. *See also* Campbell v. Campbell, 584 So. 2d 125 (Fla. 4th DCA 1991).
- c. Practical Reasons for this Mandate: It facilitates protection by Police. The Florida Supreme Court Approved Family Law Form final judgments, which pertain to domestic violence, are recognized due to their uniformity by law enforcement personnel, whereas individually created final judgments may not be registered or easily recognized. The form injunctions are registered in a statewide registry and may be verified by law enforcement personnel. A similar order under chapter 61, Florida Statutes, would not be registered.

6. Entering and Interpreting Multiple or Inconsistent Orders:

Provisions regarding support, custody, and exclusive use and possession of the home in Chapter 61 orders take precedence over inconsistent determinations in domestic violence injunctions, where a chapter 61 case was filed and determined subsequent to the chapter 741, Florida Statutes, action. §741.30(1)(c), Florida Statutes.

7. Domestic Violence Hearings Must be Recorded:

- a. All proceedings must be recorded. Recording may be by electronic means as provided by the Rules of Judicial Administration. §741.30(6)(h), Florida Statutes.
- b. Schmidt v. Hunter, 788 So. 2d 322 (Fla. 2d DCA 2001). Initial hearing must be recorded for contempt to be adjudicated; otherwise, facially sufficient claim of error cannot be refuted by the record.

8. Mediation in Domestic Violence Cases:

- a. A court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process. §44.102(2)(c), Florida Statutes.
- b. Florida Family Law Rule of Procedure 12.610 prohibits mediation in domestic violence injunction cases until after all the issues involved in granting a final injunction have been resolved except for the issues listed in the rule under 12.610(c)(1)(C). “The court, with consent of the parties, may refer the parties to mediation by a certified mediator to attempt to resolve the details as to [issues listed in the rule 12.610(c)(1)(C).] This mediation shall be the only alternative dispute resolution process offered by the court. Any agreement reached by the parties through mediation shall be reviewed by the court and, if approved, incorporated into the final judgment. If no agreement is reached the matters referred shall be returned to the court for appropriate rulings. Regardless of whether all issues are resolved in mediation, an injunction for protection against domestic violence shall be entered or extended the same day as the hearing on the petition commences.” Florida Family Law Rule of Procedure 12.610(c)(1)(C).

9. Bond is Not Required for Civil Domestic Violence Injunction:

No bond is required for issuance of a civil injunction for protection against domestic violence. §741.30(2)(b), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).

10. Error for Trial Court to Enter Final Injunction When no Petition was Filed:

Orth v. Orndorff, 835 So. 2d 1283 (Fla. 2d DCA 2003). Trial court’s sua sponte entry of a final injunction where there was no petition before it was in “direct contravention of §741.30(1)(l), (4), and (6)(a), which requires the filing of a petition and a hearing on such prior to the issuance of an injunction.”

11. Petition Requirements: The petition must be sworn, §741.30(3)(b), Florida Statutes, and the petitioner must initial a statement in the petition acknowledging that he/she understands that the statements made in the petition are subject to the penalty perjury. §741.30(3)(c), Florida Statutes. *See also* §741.30(1)(b), Florida Statutes (An injunction for protection against domestic violence may be sought regardless of whether any other actions are pending between the parties. However, the pendency of any other action must be alleged in the petition for protection against domestic violence).

12. Required Forms for Filing:

Depending on the request of the petitioner, the following additional Florida Supreme Court Approved Family Law Forms must be filed in addition to the petition:

a. If temporary child support is requested:

- (i) Notice of Social Security Number, Florida Supreme Court Approved Family Law Form 12.902(j),
- (ii) Family Law Financial Affidavit, Florida Family Law Rules of Procedure Form 12.902(b) or (c), and
- (iii) Child Support Guidelines Worksheet, Florida Family Law Rules of Procedure Form 12.902(e).

b. If temporary custody of a minor child is requested:

Uniform Child Custody Jurisdiction and Enforcement Affidavit, Florida Supreme Court Approved Family Law Form 12.902(d).

c. If temporary alimony is requested:

Family Law Financial Affidavit, Florida Family Law Rules of Procedure Form 12.902(b) or (c).

13. Perjury:

- a. If a petitioner makes false statements in a petition for an injunction against domestic violence, the petitioner is subject to perjury prosecution pursuant to the elements of §837.02, Florida Statutes. Adams v. State, 727 So. 2d 983 (Fla. 5th DCA 1999). The petitioner is made aware of this potential sanction when the petitioner signs the petition and takes the oath required under §741.30(3)(c), Florida Statutes. In Adams, the wife was convicted of perjury by contradictory statement after filing a false affidavit in a domestic violence action against her husband. On appeal she contended that the trial court erred in not granting her motion for judgment of acquittal because 1) the evidence established that she did not sign the affidavit under oath, and 2) her defense of recantation was established as a matter of law. The Fifth District Court of Appeal Court of Appeals affirmed the trial court finding that neither argument possessed merit and emphasized the criminal consequences attach to the false swearing of complaints, even where the affiant might have been motivated by the desire to benefit the person against whom the complaint was sworn.
- b. Additionally, in a dissolution action, the court can consider false allegations made by a party in an injunction proceeding under §741.30, Florida

Statutes, when determining parental responsibility and physical residence of the parties' children. §61.13(3)(n), Florida Statutes.

14. Frivolous Allegations:

- a. Chapter 741, Florida Statutes, does not provide a sanction when a party to an injunction proceeding makes frivolous allegations. However, one possible sanction could be the award of attorney's fees under §57.105, Florida Statutes.
- b. Although no cases were located authorizing attorney's fees in such a case, §57.105, Florida Statutes, permits an award of attorney's fees in a civil action if the court finds that "the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts." *But see Cisneros v. Cisneros*, 831 So. 2d 257 (Fla. 3d DCA 2002) (stating request for appellate attorney's fees under §57.105 in domestic violence injunction case should be made by timely motion before appellate court); *but see Lewis v. Lewis*, 689 So. 2d 1271 (Fla. 1st DCA 1997) (stating attorney's fees may not be awarded in a domestic violence injunction case under §61.16 (dissolution of marriage) where it did not involve enforcement or facilitation of an action under chapter 61).
- c. *See also* section II.P.(1), Attorney's Fees in Domestic Violence Proceedings.

15. Failure to Appear:

No specific sanctions are provided under chapter 741, Florida Statutes, when a petitioner or respondent fails to appear at a hearing on an injunction petition. The court generally dismisses the petition if the petitioner fails to appear. Filing fees can no longer be assessed for a domestic violence injunction.

E. SUBSTANTIVE REQUIREMENTS FOR CLAIMS:

1. Legal Grounds Required to Enter an Ex parte Temporary Injunction:

The court is required to find that an immediate danger exists prior to issuing a temporary injunction. Section 741.30(5)(a), Florida Statutes, states that when a petitioner files a petition for injunction and "it appears to the court that an immediate and present danger of domestic violence exists" the court may grant a temporary injunction, ex parte. *See also* infra section 2(b).

2. Legal Grounds Required to Enter a Final Injunction:

- a. There are two bases for obtaining a final injunction for protection against domestic violence. A petitioner must either show:
 - (i) The petitioner is a victim of domestic violence, as defined under §741.28, Florida Statutes, OR
 - (ii) The petitioner has reasonable cause to believe that he or she is in imminent danger of becoming the victim for a court to issue an ex parte

temporary injunction and/or a final injunction for protection against domestic violence. §741.30(1)(a),(6)(a), Florida Statutes; *See also Farrell v. Marquez*, 747 So. 2d 413 (Fla. 5th DCA 1999).

- (iii) Physical Injury or Death Not a Pre-Requisite to Grant an Injunction: Definition does not require that the physical injury or death occur in connection with the offense. *R.H. v. State*, 709 So. 2d 129 (Fla. 4th DCA 1998). *See also Rey v. Perez-Gurri*, 662 So. 2d 1328 (Fla. 3d DCA 1995). Chapter 741, Florida Statutes, does not require a petitioner to demonstrate that he or she has already been a victim of domestic violence. The petitioner's evidence that her former husband recently threatened her was sufficient to establish "reasonable cause to believe that she was about to become a victim of domestic violence" in light of her former husband's prior violent threatening behavior.
- (iv) The second basis for petitioning for an injunction requires the petitioner to show that he or she is in "imminent danger" of domestic violence. *Taylor v. Taylor*, 831 So. 2d 240 (Fla. 2d DCA 2002) (stating court failed to find that either of the two statutory bases for issuing a domestic violence injunction existed).
- (v) Section 741.30(6)(b), Florida Statutes, sets forth specific factors the court should consider when determining whether there is imminent danger of domestic violence. *See infra* section (b).
- b. Court Must Consider; §741.30(6)(b), Florida Statutes:
In determining whether the petitioner has reasonable cause to believe he or she is in imminent danger of becoming a victim, the court must consider all relevant factors alleged in the petition for injunction, including but not limited to:
 - (i) The history between the petitioner and respondent, including threats harassment, stalking, and physical abuse.
 - (ii) Whether the respondent has attempted to harm the petitioner or family members or individuals closely associated with the petitioner.
 - (iii) Whether the respondent has threatened to conceal, kidnap, or harm the petitioner's child or children.
 - (iv) Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.
 - (v) Whether the respondent has intentionally injured or killed a family pet.
 - (vi) Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.
 - (vii) Whether the respondent has a criminal history involving violence or the threat of violence.
 - (viii) The existence of a verifiable order of protection issued previously or from another jurisdiction.
 - (ix) Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communications equipment, clothing, or other items belonging to the petitioner.

- (x) Whether the respondent engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that she or he is in imminent danger of becoming a victim of domestic violence.
- c. Remoteness of Incident(s) Forming Basis For Petition:
There is no requirement that the incidents alleged to support the issuance of an injunction for protection against domestic violence occur within a certain time frame relative to filing of the petition. Section 741.30(6)(b), Florida Statutes, sets forth the factors the court should consider regarding whether a threat of domestic violence is imminent. Some factors indirectly address the proximity of the alleged acts to the filing of the petition: 1) the history of the parties; and 2) the prior criminal record of violence of the respondent.

3. Fear of Imminent Danger Established:

- a. Moore v. Hall, 786 So. 2d 1264 (Fla. 2d DCA 2001). The trial court erred in finding that the verbal statement from the respondent saying, “I should have killed her,” made to a process server (shortly before the petition for protection against domestic violence was filed), provided the petitioner with an objectively reasonable fear of imminent domestic violence. A pushing incident that occurred twelve years ago, along with a gift sent to the petitioner from the respondent containing a knife in the back of the statuette, may have given the petitioner a reasonable fear of imminent domestic violence sufficient to support the issuance of an injunction at that time. However, at the time of the injunction hearing twelve years had passed without further violence or threats (with the exception of the statement above) despite continued litigation between the parties. The decision of the trial court was reversed.
- b. Abravaya v. Gonzalez, 734 So. 2d 577 (Fla. 3d DCA 1999). The Third District Court of Appeal held that the testimony of a former girlfriend alleging that her former boyfriend threatened her well-being by driving his truck on the expressway in an erratic and threatening manner, intentionally preventing her from exiting the highway at her desired exit, and rear-ending her vehicle, was internally consistent and sufficient to support the entry of a final injunction for protection against domestic violence. The Third District Court of Appeal held that the testimony of the girlfriend alone was sufficient and the court expressly recognized the general “cycle of violence.”

4. Fear of Imminent Danger NOT Established:

- a. Kopelovich v. Kopelovich, 793 So. 2d 31 (Fla. 2d DCA 2001). *Respondent threatened to harm dog and petitioner in court by destroying her financially, brainwashing her and embarrassing her in front of her friends.* The Second District Court of Appeal held that it was error for the trial court to grant initial ex parte injunction and amended temporary injunction against respondent where petitioner failed to establish “immediate or present danger” or threat of or actual “domestic violence,” in accordance

- with §741.30(5), Florida Statutes (1999), and Florida Family Law Rule of Procedure 12.610. In order to balance respondent's due process rights against harm sought to be protected, *evidence supporting an ex parte injunction should be "strong and clear."* Additionally, it was error to enter a final injunction where petitioner amended her petition to include allegations sufficient to satisfy the statutory requirements, but where *petitioner's testimony at hearing still failed to satisfy the requirement* that she had "a reasonable cause to believe she was in imminent danger of domestic violence." Note: This case was decided before injuring or killing a family pet was added to the statute as a relevant factor.
- b. McMath v. Biernacki, 776 So. 2d 1039 (Fla. 1st DCA 2001). *Receipt of letter and later flowers* does not create "well-founded fear that violence is imminent."
 - c. Giallanza v. Giallanza, 787 So. 2d 162 (Fla. 2d DCA 2001). *General harassment* of petitioner and/or her children insufficient.
 - d. Cuiksa v. Cuiksa, 777 So. 2d 419 (Fla. 1st DCA 2000). The First District Court of Appeal held that the trial court did not abuse its discretion in denying the entry of a temporary injunction for protection against domestic violence where the *allegations in the petition did not demonstrate the existence of an "immediate and present danger of domestic violence"* as required by §741.30(5)(a), Florida Statutes. Although the appellate court did not rule on the issue of whether the trial court erroneously dismissed the petition without a hearing, due to the fact that such an order was not provided as part of the case on appeal, the opinion noted that in accordance with §741.30(5)(b), Florida Statutes, a hearing on the allegations of the petition would clearly be required before the case could be dismissed.
 - e. Gustafson v. Mauck, 743 So. 2d 614 (Fla. 1st DCA 1999). The First District Court of Appeal held that the trial court erred in granting a final injunction for protection against domestic violence on the basis of *repeated telephone calls made to petitioner, where the calls did not give the petitioner objectively reasonable grounds to fear* that she was in imminent danger of violence from the respondent, and there was *no evidence of previous physical violence, although a final injunction had been previously entered which expired two years prior*. The parties had not lived together for five years and the calls subsided once the step-father asked the respondent to stop calling. The court reviewed the 1997 amendment to §741.30(1)(a), Florida Statutes, which changed the standard for issuance of an injunction to require reasonable fear of *imminent danger*, as opposed to reasonable fear of violence at some indeterminate time in the future.
 - f. Farrell v. Marguez, 747 So. 2d 413 (Fla. 5th DCA 1999). Petitioner and respondent are both students at the University. He parked his car in a school lot near her, greeted her, offered her a birthday card and was seen on campus several times. No reasonable cause to believe the petitioner was about to become a victim of domestic violence. *See infra* (5)(c) for further facts of this case.

- g. Oettmeier v. Oettmeier, 960 So. 2d 902 (Fla. 2nd DCA 2007). Competent, substantial evidence did not support finding that wife had an objectively reasonable fear of imminent domestic violence at the hands of husband, as required for issuance of injunction for protection against domestic violence. The danger feared must be imminent and the rationale for the fear must also be objectively reasonable. In this case, the husband (1) moved out of the home taking most of his personal belongings except a loaded gun in the closet, which she concluded was a threat; (2) left angry messages on her cell phone and notes at the home; (3) "broke into" the home with the aid of a locksmith after having moved out; (4) spit on her face and pushed her away when she tried to kiss him approximately nine months earlier; (5) is a very heavy drinker who becomes depressed and angry when he drinks; (6) beat on the door and walls of the home and on one occasion smashed a trash can in the kitchen; (7) threatened to make her life miserable if she did not offer to buy him out; and (8) has a mental health problem but does not take his medication. The wife did not allege that the husband ever physically harmed her or that he verbally threatened to physically harm her.
- h. Alderman v. Thomas, --- So.3d ----, 2014 WL 2783463 (Fla. 2d DCA 2014). The petitioner appealed a final judgment of injunction for protection against dating violence. Although she presented evidence that dating violence had occurred in the past, she did not prove that she believed she was in imminent danger of becoming the victim of another act of dating violence. Therefore, the court reversed the final judgment of injunction. [NOTE: the standard for a dating violence injunction requires that the petitioner is a victim of dating violence and is in imminent danger of further violence.

5. Sufficiency of Allegations and Evidence:

- a. Whether the conduct meets the statutory requirement is a question of fact for the trier of fact. Biggs v. Elliot, 707 So. 2d 1202 (Fla. 4th DCA 1998).
- b. Sufficient Evidence to Grant an Injunction:
 - (i) Gonzales v. Clark, 799 So. 2d 451 (Fla. 5th DCA 2001).
Petitioner requested an emergency writ of certiorari for review of two separate orders which denied her ex parte petition for a domestic violence injunction. The first petition was denied without a hearing. A different judge denied the second petition, holding that the first order was controlling. The writ was granted and the judge issuing the first order candidly admitted, by filing a response with the district court, error because the petitioner's allegations were sufficient to issue the injunction. The Fifth District Court of Appeal quashed both orders and remanded the case to the first judge with instructions to issue the temporary injunction.
 - (ii) See *supra* section E.(4)(d), Cuiksa v. Cuiksa, 777 So. 2d 419 (Fla. 1st DCA 2000).

- (iii) *See supra* section E.(3)(b), Abravaya v. Gonzalez, 734 So. 2d 577 (Fla. 3d DCA 1999).
- (iv) Biggs v. Elliot, 707 So. 2d 1202 (Fla. 4th DCA 1998). Following the petitioner, repeatedly telephoning her, and stalking her constitutes grounds for a final injunction.
- (v) Rey v. Perez-Gurri, 662 So. 2d 1328 (Fla. 3d DCA 1995). Chapter 741, Florida Statutes, does not require a petitioner to demonstrate that he or she has already been a victim of domestic violence. The petitioner's evidence that her former husband recently threatened her was sufficient to establish "reasonable cause to believe that she was about to become a victim of domestic violence" in light of her former husband's prior violent threatening behavior. Note: The 1997 statutory change requires that petitioner must either be a "victim of domestic violence or have reasonable cause to believe he or she is in imminent danger of becoming a victim..." Notwithstanding such change, the reasoning of this case should apply, provided the imminent standard is met.
- (vi) Parrish v. Price, 71 So. 3d 132 (Fla. 2d DCA 2011). The appellate court held that the allegations were sufficient to support the temporary injunctions; however, the court offered no opinion on whether permanent injunctions were warranted. The petitions were based almost entirely on hearsay statements the children supposedly made to the petitioner. At the renewed hearing on the permanent injunctions, the appellate court suggested that the trial court might consider taking testimony from one or both of the children in order to assess the accuracy of the allegations and to determine whether the respondent engaged in violence against his children.
- c. *See also* in this outline, IV. Domestic Violence - Criminal Proceedings, section F. Parental Discipline/Battery on a Child.

6. Insufficient Evidence to Grant Injunction:

- a. Hursh v. Asner, 890 So. 2d 494 (Fla. 5th DCA 2004). No error in denying petition for domestic violence when petitioner's ultimate burden of proof is not met.
- b. Mossbrooks v. Advincula, 748 So. 2d 382 (Fla. 3d DCA 2000). The Third District Court of Appeal reversed the entry of an injunction for protection against domestic violence because the evidence presented to the trial court of the alleged prior acts of violence was *insufficient as a matter of law*.
- c. Farrell v. Marquez, 747 So. 2d 413 (Fla. 5th DCA 1999). The Fifth District Court of Appeal held that it was error for the trial court to enter a final injunction for protection against domestic violence where no *evidence was presented that the former husband had physically harmed or threatened the former wife*, and the facts alleged and proved did not support the conclusion that the former wife had reasonable cause to believe that she was in imminent danger of becoming a victim of domestic violence. The testimony revealed four encounters which did not involve any physical harm

or threat of harm. During the first such encounter, the former wife discovered the former husband's parked car next to hers in the school parking lot; however, there was no evidence the former husband was present at the time. Second, the former wife saw the former husband three times at a school building where they both take classes. On one occasion he greeted her in passing. On another occasion, he offered her a birthday card, and she continued to exit the building. On the third occasion, following the conclusion of a lecture they had both attended, when she attempted to cut through the crowd to leave and the former husband did not move out of her way, she reacted by pushing him out of the way with her book bag. The testimony revealed, however, that it was impossible for him to move due to the fact that there were people on both sides of him.

7. Aggravated Stalking:

- a. Continued Incidents Constitute Aggravated Stalking:
Jordan v. State, 802 So. 2d 1180 (Fla. 3d DCA 2001). Defendant appealed convictions for aggravated stalking and trespass after violating a domestic violence injunction on the grounds that the evidence was not sufficient to sustain the charges. The court held that the defendant's conduct in visiting the victim's home after the issuance of the injunction and multiple phone calls from jail subsequent to his arrest constituted aggravated stalking under §741.30, Florida Statutes.
- b. Single Incident Not Enough:
Stone v. State, 798 So. 2d 861 (Fla. 4th DCA 2001). Defendant appealed a conviction for aggravated stalking after a no contest plea. The only evidence supporting the charge was the probable cause affidavit detailing the events of the night in question. The Fourth District Court of Appeal held that there was not a sufficient factual basis for a nolo contendere plea on a charge pursuant to §784.048(3), Florida Statutes. The affidavit alleged a single incident on one occasion. There was no other evidence presented that the defendant had contact with the victim at any other juncture; therefore, a charge of aggravated stalking was inappropriate because there was only a single act.
- c. Disjointed and Discrete Incidents Not Enough:
Butler v. State, 715 So. 2d 339 (Fla. 4th DCA 1998). Disjointed and discrete incidents, interspersed with one of more reconciliations between the defendant and the victim, who were in an "on and off" again marital relationship, were not instances of repeated harassing conduct constituting aggravated stalking.

F. EX PARTE TEMPORARY INJUNCTIONS:

1. Required Forms/Information:

If the petition for injunction requests that the court address issues of temporary child custody or visitation of the parties minor child or children, the required allegations under §61.522, Florida Statutes, shall be incorporated into

the petition for protection against domestic violence or a separate Uniform Child Custody Jurisdiction and Enforcement Act Affidavit Form (UCCJEA), which sets out the required information, shall accompany it. Section 741.30(3)(d), Florida Statutes.

See also in this outline, sections II.D.(12),(13) for further explanation of the petition requirements and additional forms required for filing when petitioner requests temporary child or spousal support.

2. Amended Petition:

The petitioner retains the right to promptly amend any petition, or otherwise be heard in person on any petition in accordance with Florida Rules of Civil Procedure. §741.30(5)(b), Florida Statutes. Once amended, the court must consider the amended petition as if it was originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).

3. Making the Judicial Determination of Whether to Enter a Domestic Violence Injunction:

In actual practice, the court reviews the petition and pleadings ex parte, the same day it is filed, to determine if an ex parte temporary injunction should be issued. To accomplish this, a judge must be available in each circuit 24 hours a day, seven days a week, to hear petitions for injunctions for protection against domestic violence. §26.20, Florida Statutes. *See also supra* section E. Substantive Requirements for Claims.

4. The Court Must Use Florida Supreme Court Approved Family Law Forms Applicable to Domestic Violence. Florida Family Law Rule of Procedure 12.610(c)(2)(A).

5. Period of Effectiveness:

An ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days AND a full hearing on a final injunction shall be set for a date no later than the date the temporary injunction ceases to be effective.

§741.30(5)(c), Florida Statutes, Florida Family Law Rule of Procedure 12.610(c)(4)(A).

Bacchus v. Bacchus, ___ So.3d ___, 2013 WL 756350 (Fla. 5th DCA 2013). The husband appealed an order that extended a temporary injunction against domestic violence for one year. The court reversed and noted that *the purpose of extending a temporary injunction is to preserve the status quo until a final evidentiary hearing can be held*. In this case, the temporary injunction was extended in lieu of a full hearing on a permanent injunction, which is not authorized by the Florida Statutes.

6. Notice of Full Hearing:

Once a petition for an injunction is filed, a hearing on the petition must be held at the earliest possible time. §741.30(4), Florida Statutes. The respondent should receive notice of the hearing when the petition, temporary

injunction or order denying the petition, and other pleadings are served. §741.30(4), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2).

7. Required Verified Pleadings:

The court can only consider the verified pleadings/affidavits in an ex parte hearing, unless the respondent appears at the hearing or has received reasonable notice of the hearing. §741.30(5)(b), Florida Statutes.

a. If the respondent appears at the temporary injunction hearing or has had reasonable notice of it, a full evidentiary hearing may be held. Florida Family Law Rule of Procedure 12.610(c)(1)(A).

b. **Court Can Not Consider Ex parte Motion unless it is Verified:**

Vargas v. Vargas, 816 So. 2d 238 (Fla. 2d DCA 2002). Appellant appeals from a non-final order issued without notice that temporarily enjoined her and her husband, appellee, from removing their children from the jurisdiction of the circuit court and required her to relinquish the children's passports to her attorney or to her husband. The Second District Court of Appeal reversed the decision from the trial court because the trial court failed to conform to the requirements of Florida Rule of Civil Procedure 1.610. The Second District Court of Appeal said that *the party seeking a temporary injunction without notice must file a verified pleading or affidavit that alleges specific facts showing immediate and irreparable harm and must detail any efforts made to give notice and the reasons why notice should not be required*. Florida Rule of Civil Procedure 1.610(a). Appellant's motion was not verified because he did not file an affidavit, and he did not detail any efforts made to give notice or state why notice should not be required. Note that this does not preclude a party from reapplying for injunctive relief in accordance with the requirements of rule 1.610.

8. Denial of Petition for Temporary Injunction, Mandatory Requirements of Judiciary when Petition for Temporary Injunction is Denied:

a. If the court finds no basis for the issuance of an injunction the petition may be denied without a return hearing. A denial shall be by written order noting the legal grounds for denial. §741.30(5)(b), Florida Statutes. See also Florida Supreme Court Approved Family Law Form 12.980(b)(2).

b. When the only ground for denial is no appearance of an immediate and present danger of domestic violence, the petition for an ex parte temporary injunction may be denied but the court shall set a full hearing on the petition with notice at the earliest possible time. §741.30(5)(b), Florida Statutes, Florida Supreme Court Approved Family Law Form 12.980(b)(1).

(i) See also Cuiksa v. Cuiksa, 777 So. 2d 419 (Fla. 1st DCA 2000). The trial court did not abuse its discretion in denying the entry of a temporary injunction for protection against domestic violence where the allegations in the petition did not demonstrate the existence of an "immediate and present danger of domestic violence" as required by §741.30(5)(a), Florida Statutes. Furthermore, although the appellate

court, in *Cuiksa*, did not rule on the issue of whether the trial court erroneously dismissed the petition without a hearing, due to the fact that such an order was not provided as part of the case on appeal, the opinion noted that in accordance with §741.30(5)(b), Florida Statutes, a hearing on the allegations of the petition would clearly be required before the case could be dismissed.

(ii) *Segui v. Nester*, 745 So. 2d 591 (Fla. 5th DCA 1999).

- c. Likewise, Florida Family Law Rule of Procedure 12.610(b)(3) requires the denial of a petition to be by written order noting the legal grounds for denial and when the only ground for denial is no appearance of immediate and present danger of domestic violence the court must set a full hearing on the petition, with notice, at the earliest possible time.

(i) Mandatory requirements if petition is denied -

- (a) order must be in writing and noting the legal grounds for denial. OR
- (b) if the petition is dismissed because there is no appearance of an immediate and present danger of domestic violence, a full hearing must be scheduled at the earliest possible time.

(ii) *Sanchez & Smith v. State*, 785 So. 2d 672 (Fla. 4th DCA 2001). The Fourth District Court of Appeal held in these consolidated opinions that it was error for the trial court to summarily deny a facially sufficient petition for ex parte injunction against domestic violence without a hearing and without explanation for the reason for summarily denying the petition. The trial court provided as its sole reason for denying the petition, only that petitioner “failed to allege facts sufficient to support the entry of an injunction against domestic violence or repeat violence,” but did not specify how the allegations were insufficient. Additionally, the denial of petitioner’s facially sufficient petition without a hearing was a departure from the essential requirements of the law. The Fourth District Court of Appeal also held that it was error for the trial judge to summarily dismiss an ex parte injunction for protection against domestic violence issued by a duty judge the previous day and to cancel the hearing which had been set by the duty judge. Before the denial of a petition and prior to dismissal of an injunction, where the trial court’s action is based on a finding of insufficient allegations, the trial court must have a specific basis for that finding.

(iii) *See also Kniph v. Kniph*, 777 So. 2d 437 (Fla. 1st DCA 2001). Dismissal of a request for an injunction against domestic violence solely on the basis that there was a pending divorce action between the parties is contrary to §741.30(1)(b), Florida Statutes (1999), and constitutes error.

- d. **Please note:** some jurisdictions have begun using a waiver form, **Petitioner’s Waiver or Non-Waiver on Return Hearing**. This form allows petitioners the opportunity to waive the right to an injunction hearing if the judge determines that the only ground for denial is no appearance of an immediate and present danger of domestic violence. In such an instance, the respondent is not served with any paperwork related to the denied petition for protection. The petitioner’s waiver does not affect the right to

amend the denied petition. **This form is not a Florida Supreme Court Approved Family Law Form.**

e. Continuation of the Hearing/ Extension of Temporary Injunction:

- (i) The court may grant a continuance of the hearing and an extension of the temporary injunction when “good cause” is shown by any party, or on the court’s own motion for “good cause,” including failure to obtain service of process. Florida Family Law Rule of Procedure 12.610(c)(4)(A); §741.30(5)(c), Florida Statutes. Therefore, the court can sua sponte extend a temporary injunction when it has “good cause” or when it finds it “necessary” due to the fact the hearing is being continued. There does not appear to be a time limit to an extension of a temporary injunction when it is made according to the above procedures. However, due process concerns would still apply. See Kopelovich v. Kopelovich, 793 So. 2d 31 (Fla. 2d DCA 2001).
- (ii) See also Miller v. Miller, 691 So. 2d 528 (Fla. 4th DCA 1997). The court may not extend a temporary injunction without good cause.
- (iii) Section 741.30(5)(c), Florida Statutes, states that a request for an extension of a hearing on a petition must be made before or during the hearing on the petition for injunction. When a hearing on a petition is continued, the court can extend the temporary injunction if necessary during any period of continuance. §741.30(5)(c), Florida Statutes.
- (iv) Motions regarding the extension of a temporary injunction may be served by certified mail. Florida Family Law Rule of Procedure 12.610(c)(3)(A).

9. Service of Temporary Injunction and Notice of Hearing on Final Injunction:

The respondent shall be personally served, by a law enforcement officer, with a copy of the petition, temporary injunction or order denying the petition, notice of hearing and the following additional forms, a financial affidavit and UCCJEA, if applicable; unless the respondent was present at the ex parte hearing or had reasonable notice. §741.30(4), Florida Statutes, Florida Family Law Rule of Procedure 12.610(c)(3)(A). Service should be made as soon as possible and may be obtained any day of the week, at any time. §741.30(8)(a)(1), Florida Statutes.

G. RELIEF GRANTED IN TEMPORARY DOMESTIC VIOLENCE INJUNCTIONS:

1. Judgment of Ex Parte Temporary Injunction

If the court determines that there is an immediate and present danger of domestic violence, the court may grant a temporary injunction ex parte, and may grant such relief as the court deems proper, including an injunction:

- a. Restraining the respondent from committing any acts of domestic violence.
- b. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.

- c. Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in chapter 61. §741.30(5)(a)(1)-(3), Florida Statutes.
- d. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
- e. Restrain respondent from contact with petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
- f. Exclude respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
- g. Exclude respondent from knowingly coming within 100 feet of Petitioner's automobile at any time. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
- h. Exclude respondent from places frequented regularly by petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and 12.980(c)(2).
- i. Order respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and 12.980(c)(2).

2. See Also *Infra* Section II.J. Factors the Court Must Consider When Entering an Injunction.

H. FINAL INJUNCTIONS:

1. A "full evidentiary hearing" is required before a final injunction can be entered. Florida Family Law Rule of Procedure 12.610(c)(1)(B).
 - a. Lewis v. Lewis, 689 So. 2d 1271 (Fla. 1st DCA 1997). It was error to enter a final injunction and award the wife temporary custody of the children without providing an adequate hearing as required by the domestic violence statute and Florida Family Law Rules of Procedure. The law requires custody to be addressed at the final injunction hearing on the same basis as provided in chapter 61. The domestic violence statute requires a full evidentiary hearing prior to issuing a final injunction. The trial court erred in not allowing any testimony from witnesses who were present or cross-examination of the parties. See also Miller v. Miller, 691 So. 2d 528 (Fla. 4th DCA 1997).
 - b. Ohrn v. Wright, 963 So. 2d 298 (Fla. 5th DCA 2007). In a hearing for a final domestic violence injunction, the trial court violated the petitioner's due process rights when it did not swear either witness and did not permit the appellant to call a witness who could have offered testimony to support her version of the incidents that had occurred between the parties.
 - c. Smith v. Smith, 964 So. 2d 217 (Fla. 2nd DCA 2007). The husband's right to due process was violated when the trial court did not permit him to call his witnesses or to testify himself prior to the court entering a final injunction.

- d. Furry v. Rickles, 68 So. 3d 389 (Fla. 1st DCA 2011). In a hearing for a final domestic violence injunction, the trial court began the hearing by informing the parties that they had a limited amount of time to present their cases. The court then conducted all questioning of the parties and virtually all questioning of the other witnesses that testified. The court was aware the attorneys might wish to conduct direct/cross examination as it made two comments dismissing any request based on time constraints. The court also dismissed Appellant's request for a "quick hearing"; denied his request to present the relevant noncumulative testimony of a pertinent witness; and did not allow him to "object to," or cross-examine, the opposing party's expert witness. Because the trial court entered the injunction without conducting a full evidentiary hearing pursuant to §741.30(5), Florida Statutes (2010), its actions constituted a due process violation. The appellate court therefore reversed and remanded the case.
- e. *See also supra* section E., Substantive Requirements for Claims.

2. Court Must Ensure that the Parties Understand the Terms:

The court must "ensure that the parties understand the terms of the injunction, the penalties for failure to comply, and that the parties cannot amend the injunction verbally, in writing, or by invitation to the residence." §741.2902(2)(b), Florida Statutes.

3. Recording:

All proceedings shall be recorded which may be by electronic means as provided by the Rules of Judicial Administration. §741.30(6)(h), Florida Statutes.

4. Defenses

G.C. v. R.S., 71 So. 3d 164 (Fla. 1st DCA 2011). The petition for injunction was filed by his former wife on behalf of their minor child after the father administered a single spank on the child's buttocks in response to the child's disrespectful and defiant behavior. The appellate court noted that the common law recognized a parent's right to discipline his or her child in a reasonable manner, and that in both civil and criminal child abuse proceedings, a parent's right to administer reasonable and non-excessive corporal punishment to discipline their children is legislatively recognized. The court held that under established Florida law this single spank constituted reasonable and non-excessive parental corporal discipline and, as a matter of law, was not domestic violence. The court also stated that reasonable parental discipline is available as a defense against a petition for an injunction against domestic violence.

5. Grounds for Relief:

When it appears to the court that the petitioner is a victim of domestic violence or has reasonable cause to believe he or she will become a victim, the court may grant such relief as the court deems proper. §741.30(6)(a), Florida

Statutes. *See also* section II.J. Factors the Court Must Consider when Entering an Injunction.

6. It is Error to Grant Relief Not Requested, Unless it Falls within the Statutory Language Regarding Domestic Violence:

- a. Ryan v. Ryan, 784 So. 2d 1215 (Fla. 2d DCA 2001).
- b. Don't give exclusive use of marital home if not requested. Montemarano v. Montemarano, 792 So. 2d 573 (Fla. 4th DCA 2001).

7. An injunction for protection against domestic violence should not be used as a substitute for an order regarding issues which should be addressed in dissolution of marriage or paternity proceeding.

See O'Neill v. Stone, 721 So. 2d 393 (Fla. 2d DCA 1998). Although custody matters may be decided in domestic violence proceeding, "better practice in such case would be for trial court to enter temporary order, such as order adopting general master's report, and direct parties to litigate their subsequent custody and visitation disputes in proper paternity proceeding where orders entered would remain in effect beyond temporary lifespan of most injunctions."

8. The Court Must Use the Florida Supreme Court Approved Forms that Apply to Domestic Violence. Florida Family Law Rule of Procedure 12.610(c)(2)(A).

9. Period of Effectiveness:

- a. Section 741.30, Florida Statutes, has also been revised to provide that the terms of an injunction are to "remain in effect until modified or dissolved." *See* §741.30(6)(c), Florida Statutes.
- b. Florida Family Law Rule of Procedure 12.610(c)(4)(B) states that a final injunction must be issued for a fixed period or until further order of the court. *See also Miguez v. Miguez*, 824 So. 2d 258 (Fla. 3d DCA 2002).
- c. A final judgment of injunction for protection against domestic violence may be effective indefinitely, until modified or dissolve by the judge at either party's request, upon notice and hearing, or expire on a date certain at the judge's discretion. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2). The court has discretion to determine the length of time for which the injunction will remain in effect. *See Amendments to the Florida Family Law Rules*, 713 So. 2d 1 (Fla. 1998). Therefore, the duration of the injunction is not subject to any time limits by statute. *Id.*; Patterson v. Simonik, 709 So. 2d 189 (Fla. 3d DCA 1998).
- d. *See also Cox v. Deacon*, 82 So. 3d 827 (Fla. 4th DCA 2011). The appellate court held that an injunction with a period of effectiveness longer than one year was proper. Although at one time there was a statutory provision that limited permanent injunctions to a period of one year, that provision was removed by the legislature in 1997. The court noted that the current statute as amended provides for an injunction to "remain in effect until modified or dissolved."

- e. See also Goodell v. Goodell, 421 So. 2d. 736 (Fla. 4th DCA 1982). The appellate court affirmed the trial court's finding of contempt against the wife for violation of the injunction contained in the final judgment of dissolution of marriage against her claim that the injunction was void because it was perpetual. The court held that the injunction was properly entered, valid and enforceable and not overbroad despite the absence of a time limit. The Fourth District Court of Appeal held that an injunction can be entered as long as the court feels the protection is necessary or until a modification is needed.

10. Judicial Error Entering and Vacating Final Injunction:

- a. Oravec v. Sharp, 743 So. 2d 1174 (Fla. 1st DCA 1999). The First District Court of Appeal held that the trial court erred in entering a final injunction for protection against domestic violence where the entry of the order was inconsistent with the judge's statement that he intended only to extend the temporary injunction for 90 days, and the court denied the respondent an opportunity to present evidence in opposition to the entry of the injunction.
- b. Lee v. Delia, 827 So. 2d 368 (Fla. 2d DCA 2002). The trial court erred in denying the respondent's post judgment motions to vacate the final injunction where a stipulation was entered into to enter the final injunction and the final injunction is inconsistent with the terms of the stipulation. The denial of the post judgment motion to vacate is reversed and the case remanded to the trial court to hold a hearing on the merits of the motion.
- c. G.C. v. R.S. and K.C., 71 So. 3d 164 (Fla. 1st DCA 2011). The trial court erred in entering the final injunction for protection against domestic violence where the petition for injunction was filed after the father administered a single spank on the child's buttocks in response to the child's disrespectful and defiant behavior. The appellate court also noted that the common law recognized a parent's right to discipline his or her child in a reasonable manner, and that in both civil and criminal child abuse proceedings, a parent's right to administer reasonable and non-excessive corporal punishment to discipline their children is legislatively recognized. The court held that under established Florida law this single spank constituted reasonable and non-excessive parental corporal discipline and, as a matter of law, was not domestic violence. The court also stated that reasonable parental discipline is available as a defense against a petition for an injunction against domestic violence and reversed the final judgment.
- d. Coe v. Coe, 39 So. 3d 542 (Fla. 2d DCA 2010). The petitioner appealed a final judgment of injunction for protection against domestic violence entered in favor of his former wife. The parties were also involved in a divorce and custody dispute being heard by the same judge. The appellate court reversed the order granting the petition because it was entered based on evidence from the custody hearing that was not a part of the injunction hearing record. In essence, the court's decision was based on impermissible extrajudicial knowledge. This case demonstrated that trial judges assigned to dissolution proceedings who also handle interrelated petitions for

domestic violence must exercise care in ensuring that their rulings are supported by an adequate record.

I. RELIEF GRANTED IN FINAL DOMESTIC VIOLENCE INJUNCTIONS:

1. Final Judgment of Injunction for Protection Against Domestic Violence:

After notice and hearing, if the court determines that the petition is either a victim of domestic violence, as defined by §741.28, Florida Statutes, or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence, the court may grant such relief as the court deems proper, including an injunction:

- a. Restraining the respondent from committing any acts of domestic violence against petitioner.
- b. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.
- c. Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in chapter 61, Florida Statutes.
- d. Establishing temporary support for the petitioner (temporary alimony) and/or minor child or children (temporary child support), on the same basis as provided in chapter 61, Florida Statutes.
- e. Ordering the respondent to participate in a treatment, intervention, or counseling services to be paid for by the respondent. *See infra*, Batterer Intervention Programs.
- f. Referring a petition to a certified domestic violence center.
- g. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies. §741.30(6)(a)(1)-(7), Florida Statutes.
- h. Restraining respondent from contact with petitioner. Florida Supreme Court Approved Forms 12.980(d)(1) and (d)(2).
- i. Ordering provisions relating to minor children. Florida Supreme Court Approved Family Law Form 12.980(d)(1).
- j. Excluding respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
- k. Excluding respondent from places frequented regularly by petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Forms 12.980(d)(1) and (d)(2).
- l. Ordering respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
- m. Ordering a substance abuse and/or mental health evaluation for the respondent and order the respondent to attend any treatment recommended by the evaluation(s). §741.30(6)(a)(5), Florida Statutes.

- n. Specifying the type of contact/visitation the noncustodial parent may have with the minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(d)(1).
- 2. **See Also *Infra* section II.J., Factors the Court Must Consider When Entering an Injunction.**
- 3. **Participation in a Parenting Class May Be Court Ordered:**
A parenting class can be required as a condition of a domestic violence injunction. Roman v. Lopez, 811 So. 2d 840 (Fla. 3d DCA 2002).
- 4. **Court Must Provide List of Domestic Violence Centers, If Applicable:** If the court refers the petitioner to a domestic center, the court must provide the petitioner with a list of domestic violence centers in the circuit, which the petitioner may contact. §741.30(6)(a)(6), Florida Statutes.
- 5. **Batterers' Intervention Programs: Under Certain Circumstances Respondents must be Court Ordered to Attend Batterers' Intervention Programs (BIPs),** §741.30(6)(e), Florida Statutes:
 - a. The court **MAY** order the respondent to attend a batterers' intervention program as a condition of the injunction; however,
 - b. The court **SHALL** order the respondent to attend a batterers' intervention program if the any of the following circumstances exist:
 - (i) The court finds that the respondent willfully violated the ex parte injunction;
 - (ii) The respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; OR
 - (iii) At any time in the past in this state or another state, an injunction has been entered against the respondent after a hearing with notice, **UNLESS** the court makes written factual findings in its judgment or order which are based on substantial evidence, stating why batterers' intervention programs would be inappropriate.
- 6. **A List of BIPs Must Be Provided to the Respondent if Participation is Court Ordered:** When the court orders the respondent to participate in a BIP, the court, or any entity designated by the court, must provide the respondent with a list of all BIPs, from which the respondent must choose a program in which to participate. §741.30(6)(a)(5), Florida Statutes.
- 7. **The Court May Not Order Petitioner to Undergo Psychological Evaluations.** Touchet v. Jones, 135 So.3d323, (Fla. 5th DCA 2013). Although §741.30(6)(a), Florida Statutes, allows the court to order a respondent to participate and pay for treatment, intervention, or counseling services, there was no authority under the statute to order the petitioner to undergo an evaluation. The court also noted that the statute is designed to protect victims of domestic violence,

and “requiring a victim of domestic violence to undergo a psychological evaluation would impose a substantial financial and emotional burden on the victim and would have a chilling effect on victims of domestic violence seeking the protection of the courts.”

J. FACTORS THE COURT MUST CONSIDER WHEN ENTERING AN INJUNCTION:

1. Custody:

- a. The court must consider evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to §741.30, Florida Statutes, and evidence of domestic violence or child abuse when making a temporary determination in a domestic violence proceeding regarding parental responsibility and designating the primary residential parent. §61.13(3)(m) & (n), Florida Statutes.
- b. Custody Must be Properly Pled in Domestic Violence Petition:
 - (i) Ryan v. Ryan, 784 So. 2d 1215 (Fla. 2d DCA 2001).
The Second District Court of Appeal held that it was error for the trial court to grant an injunction for protection against domestic violence in favor of petitioner where the injunction also awarded temporary custody of the parties’ minor children to former husband and denied former wife any contact with children for one year. Former wife’s rights of due process were violated when her rights of custody and visitation were terminated based upon pleadings that did not request such relief and did not provide notice that the court could take such action. The former husband did not mark appropriate boxes on the face of the petition to indicate he was seeking temporary exclusive custody or to determine visitation rights, nor did the former husband in the narrative portion of the petition seek temporary exclusive custody of the children or exclusion of visitation by the former wife. Additionally, the husband did not file a Uniform Child Custody Jurisdiction Act Affidavit (UCCJA), despite the petition form clearly stating UCCJA was required if petitioner was requesting the court to determine issues of temporary custody. §741.30(3)(d), Florida Statutes. Finally, the best interests of the children were not addressed at the hearing for the injunction.
 - (ii) Blackwood v. Anderson, 664 So. 2d 37 (Fla. 5th DCA 1995). The petitioner filed for a domestic violence injunction against the respondent but failed to appear at the final hearing. The court granted the respondent (the father) custody of the children and reset the case for final hearing. The order awarding custody to the father was quashed because the father did not properly plead for custody and the mother was not sufficiently notified of the custody issue. Note: See Judge Antoon’s concurring opinion for an interesting discussion on jurisdiction and the frustration trial judges can experience in dealing with domestic violence injunction cases.

2. Relocation of a Child:

- a. O'Neill v. Stone, 721 So. 2d 393 (Fla. 2d DCA 1998). A relocation issue arose in the domestic violence proceeding involving unmarried parents, where no paternity or judgment had been obtained. The parties appeared before a general master, who issued a report recommending that custody, visitation and support be awarded as part of the domestic violence injunction. Prior to the trial court entering an order adopting the report, the petitioner left the state with the minor child of the parties, who were unmarried. At a hearing where the petitioner was present, the trial court granted a motion filed by the respondent to transfer custody to him and ordered law enforcement to pick up the minor child. The petitioner then filed a motion to set aside this order. The appellate court held that the trial court abused its discretion by ordering the petitioner to return to Florida with the child, when it failed to conduct a full hearing and take testimony to consider the statutory factors regarding relocation. Note: The dicta in this opinion contains strong language to the effect that it is *contrary to the intent of the legislature for domestic violence injunction proceedings to be the primary forum for custody, visitation, and child support issues to be addressed*.
- b. Young v. Young, 698 So. 2d 314 (Fla. 3d DCA 1997). The restriction prohibiting either party from removing the children from the county without prior court order or written agreement of the parties is premature, where neither party sought to relocate and the court made no findings to support such a residential restriction.

3. Court Must Consider the Existence of Any Domestic Violence (Child or Spouse Abuse) as Evidence of Detriment to the Child.

- a. Under §61.13(2)(c)(2), Florida Statutes, due to the detriment of the child, the court may base an award of sole parental responsibility on evidence of child or spouse abuse.
 - (i) See Ford v. Ford, 700 So. 2d 191 (Fla. 4th DCA 1997).

The trial court abused its discretion in awarding custody to the husband where it made no determination regarding the credibility of either party, failed to apply §61.13, Florida Statutes, and where the final judgment was devoid of all but the most “minimal mention” of the husband’s established pattern of domestic violence. The court noted that the record from the six-day trial was replete with testimony regarding domestic violence, which was the “central focus” of the case. The final judgment stated, “The court has considered everything that each side has accused the other side of as well as all the good things that each side has presented about themselves.” The appellate court found that failure to give the domestic violence evidence the proper consideration and weight mandated a reversal of the custody award to the father and restoration of custody to the mother. Note: The 1997 amendment to §61.13(2)(b)(2), Florida Statutes, mandates the court’s

consideration of the existence of any child abuse or spousal abuse as evidence of detriment to the child.

- b. Felony conviction of domestic violence is not an absolute bar to being a primary residential parent.
- c. A misdemeanor conviction of the first degree or higher involving domestic violence creates a presumption of detriment to the child, which can be rebutted by the abuser to persuade the court that shared parental responsibility should be ordered. §61.13(2)(c)(2), Florida Statutes.
 - (i) See Doyle v. Owens, 881 So. 2d 717 (Fla. 1st DCA 2004). Father failed to rebut the statutory presumption against unsupervised visitation.
 - (ii) Monacelli v. Gonzalez, 883 So. 2d 361 (Fla. 4th DCA 2004). Although §61.13(2)(c)(2), Florida Statutes, provides that a felony conviction is a rebuttable presumption of detriment to a child, the court held that the evidence supported the award of primary residential custody of four minor children to ex-husband; although there was a history of domestic violence towards ex-wife, emotional ties were significantly greater towards ex-husband, he had greater capacity and disposition to provide children with necessities, they would maintain a stable environment in the home of their paternal grandmother, the children preferred to be with their father, ex-wife suffered from bipolar disorder, and ex-wife refused to accept treatment or medication for her illness.
- d. Visitation between Inmate and Minor Child: Singletary v. Bullard, 701 So. 2d 590 (Fla. 5th DCA 1997). The trial court exceeded its authority by entering a post-conviction order requiring the Department of Corrections to allow visitation between the inmate and minor child during the inmate's incarceration. The statutory provision permitting the trial court to grant permission for special visitation where visiting was restricted by court order did not apply in the case where the trial court was not eliminating the restriction it had earlier imposed.

4. Visitation:

- a. Although shared parental responsibility is the statutory preference under §61.13(2)(c), Florida Statutes, this determination can set up a dangerous situation for abuse victims and their children. Consequently, when making a visitation determination, the court must be cognizant of the situation and prevent giving the perpetrator access to the home for visitation with the children. See Burke v. Watterson, 713 So. 2d 1094 (Fla. 1st DCA 1998); Fullerton v. Fullerton, 709 So. 2d 162 (Fla. 5th DCA 1998); M. Sharon Maxwell and Karen Oehme, *Referrals to Supervised Visitation Programs, A Manual for Florida's Judges* (2004).
- b. *But see* Andrade v. Dantas, 776 So. 2d 1080 (Fla. 3d DCA 2001). The court erred in granting a temporary order denying the father the right to overnight visitation with his twenty-two month old child. There is nothing about overnight visitation which permits its treatment as an exception to the doctrine that both parents of children of any age must be treated

equally. In the instant case, there was a lack of substantial competent evidence that would prevent more extensive visitation between the father and minor child. Thus, there was no basis to deny it.

5. Support:

- a. Support should be paid by an income deduction order and through the State Disbursement Unit or court depository in order to eliminate control issues and to avoid further contact between the victim and the abuser. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) & (d)(2).
- b. Payments for the victim's future medical expenses may be included in the support order. This requirement can remain effective subsequent to remarriage by the victim. See Garces v. Garces, 704 So. 2d 1106 (Fla. 3d DCA 1998).
- c. Where a conviction of domestic violence results in incarceration, said incarceration is not a valid reason to deny setting an amount of support attributable to convicted party based on imputed income.
 - (i) See McCall v. Martin, 34 So. 3d 121 (Fla. 4th DCA 2010). The appellate court noted that a child's best interest is not served by refusing to set an initial amount of support based on imputed income for a parent about to be imprisoned. The court held that income should have been imputed to the father so that the arrearages can accumulate until he is able to earn an income. When release occurs, the court should establish a payment plan to reduce arrearages according to his earning ability and set a payment plan.

6. Alimony:

- a. An individual who petitions for an injunction against domestic violence can request temporary support as a term of the injunction. §741.30(6)(a)(4), Florida Statutes. The same standard for awarding alimony in a family law case under chapter 61, Florida Statutes, must be applied in determining whether to award temporary support in an injunction case. *Id.*
- b. Section 61.071, Florida Statutes, permits the court to award a "reasonable sum" of alimony when a temporary request for support is made. Section 61.08(2), Florida Statutes, sets forth the factors for the court to consider when making an alimony award in a dissolution proceeding. Both permanent and rehabilitative alimony can be awarded under this section. Rehabilitative alimony, including bridge-the-gap alimony, is temporary in nature, and therefore could likely be awarded as a term of a domestic violence injunction.
- c. Rehabilitative Alimony: Rehabilitative alimony requires the court to make specific findings including: whether the petitioner has a specific rehabilitation plan, the costs of rehabilitation, the stated purpose of the rehabilitation, and the duration of the award. Collinsworth v. Collinsworth, 624 So. 2d 287 (Fla. 1st DCA 1993). This type of support is awarded to enable a spouse to become self-supporting. Shea v. Shea, 572 So. 2d 558 (Fla. 1st DCA 1990).

- d. Bridge-the-gap Alimony: Whereas rehabilitative alimony is to help a spouse become self-supporting, bridge-the-gap alimony is to ease the transition from married to single life. Murray v. Murray, 374 So. 2d 622 (Fla. 4th DCA 1979) (stating bridge-the-gap alimony may be appropriate for a period of six months to transition the wife from a high standard of living during the marriage to a modest standard of living); Shea, *supra* at 559 (stating even though spouse is employed or employable, bridge-the-gap alimony can be ordered). Bridge-the-gap alimony is “to assist a spouse with any legitimate, identifiable, short-term need . . . when the other spouse has the ability to pay the award.” Borchard v. Borchard, 730 So. 2d 748 (Fla. 2d DCA 1999). Therefore, in injunction cases, bridge-the-gap alimony could be awarded to a petitioner to make the transition from married to single life.

7. Marital Home and Marital Property:

- a. Damages to Marital Property: When distributing marital assets, reimbursements should be figured in for damaged property, such as broken window, doors, furniture, etc. §741.31(6), Florida Statutes; *See also Hill v. Hill*, 415 So. 2d 20 (Fla. 1982), which discusses requiring abusive spouses to pay for medical expenses.
- b. Petitioner must request exclusive use and possession of home. Montemarano v. Montemarano, 792 So. 2d 573 (Fla. 4th DCA 2001). Without background, the court held that in domestic violence cases, where the petitioner did not seek exclusive use and possession of the marital home, it is an error to include in that order a requirement that the respondent vacate the premises. Due process requires that a party have proper notice of hearing, and the opportunity to be heard before such an order is entered requiring the party to vacate the marital home.

K. ADDITIONAL PROVISIONS WHICH MUST BE INCLUDED IN BOTH TEMPORARY AND FINAL INJUNCTIONS:

A temporary or final injunction should indicate on its face the following:

1. The injunction is valid and enforceable in all counties in Florida.
2. Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
3. The court had jurisdiction over the parties and matter.
4. Reasonable notice and opportunity to be heard was given to respondent sufficient to protect that person’s rights to due process.
5. The date the respondent was served with the temporary or final order, if obtainable. §741.30(6)(d)(4), Florida Statutes.

- 6. Firearms Violation:** It is a violation of §790.233, Florida Statutes, and a first degree misdemeanor for respondent to have in his or her care, custody, possession or control any firearm or ammunition. §741.30(6)(g), Florida Statutes.
- a. Florida's Firearm Prohibition:
- (i) Section 741.31(4)(b)(1), Florida Statutes. Possession of a firearm or ammunition is prohibited when a person is subject to a final injunction against committing acts of domestic violence.
 - (ii) Therefore, according to §741.31(4)(b)(1), Florida Statutes, possession of a firearm or ammunition is prohibited when a person is subject to a final injunction against committing acts of domestic violence. It is a first degree misdemeanor to violate the firearms provision of an injunction and punishable as provided in §775.083, Florida Statutes. However, this provision is consistent with federal law and therefore the active law enforcement exception applies in Florida. This provision does not apply to active law enforcement officers who possess firearms and ammunition for use in performance of their job, unless the law enforcement agency finds that possession of firearms should be denied. §741.31(b)(2), Florida Statutes.
 - (iii) State's Evidence in Criminal Contempt Proceedings for Proof of Firearm Violation Must Rebut Reasonable Hypothesis of Innocence: Fay v. State, 753 So. 2d 682 (Fla. 4th DCA 2000). The Fourth District Court of Appeal held that it was error for the trial court to deny a motion for judgment of acquittal where the defendant was charged with indirect criminal contempt for possession of a firearm in violation of an injunction for protection against domestic violence, and the evidence that the defendant possessed a firearm prior to the issuance of the injunction, coupled with circumstantial evidence relating to current possession of the firearm, was insufficient to rebut a reasonable hypothesis of innocence.
 - (iv) FDLE form requiring gun purchasers to disclose prior conviction for domestic violence is unconstitutional.
 - (a) State v. Watso, 788 So. 2d 1026 (Fla. 2d DCA 2001).
 - (b) Randall v. State, 805 So. 2d 917 (Fla. 2d DCA 2001).
- b. Federal Firearm Prohibition:
- (i) 18 U.S.C. §922(g)(8):
 - (a) Prohibits any person, under a final domestic violence injunction, from possessing a firearm.
 - (b) Penalty: Up to ten years incarceration.
 - (ii) U.S. v. Emerson, No 99-10331 (5th Cir. 2001). Statute is not unconstitutional on its face under Second Amendment.
 - (iii) 18 U.S.C. §922(g)(9).
 - (a) Prohibits any person convicted of domestic violence from possessing a firearm.
 - (b) Penalty: up to ten years incarceration.

- (iv) A trial court has no power to authorize a respondent to possess firearms in violation of federal law. Weissenburger v. Iowa Dist. Court for Warren County, 740 N.W. 2d 431 (Iowa 2007).

L. SERVICE OF FINAL INJUNCTIONS:

Proper Procedure to Effectuate Service is Set Out in §741.30(8)(a)(3), Florida Statutes, and Florida Family Law Rule of Procedure 12.610(c)(3)(B)(i).

1. Obtaining Personal Service at the Hearing:

To effectuate service, a certified copy of the injunction must be provided to the parties at the full hearing. The party must acknowledge receipt of the injunction in writing on the original order. If the respondent will not acknowledge receipt, the clerk should make note on the original order that service was made. If the parties are present but they are not provided with copies at the hearing, the clerk will make service by certified mail. Service by mail is complete upon mailing. The clerk must certify in writing how service was made for the court file. §741.30(8)(a)(3), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(3)(B)(i).

2. Service Subsequent to Hearing:

“Within 24 hours after the court issues, continues, modifies, or vacates an injunction for protection against domestic violence the clerk must forward a copy of the injunction for service to the sheriff with jurisdiction over the residence of the petitioner for service. §741.30(8)(c)(1), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(3)(B)(ii). However, §741.30(8)(a)(3), Florida Statutes, allows for service to be effectuated by mail.

M. ADDITIONAL REMEDIES:

1. Mutual Orders of Protection are Prohibited:

Section 741.30(1)(i), Florida Statutes, prohibits the court from issuing mutual orders of protection. Likewise, mutual restraining orders or similar restrictive provisions based on domestic violence should not be incorporated into orders which address issues under chapter 61, Florida Statutes. §61.052(6), Florida Statutes. However, the court is not precluded from issuing separate injunctions for protection for each party where each party has complied with the provisions of §741.30, Florida Statutes.

- a. DeMaio v. Starr, 791 So. 2d 1116 (Fla. 4th DCA 2000). The trial court erred in entering a mutual restraining order without proper pleading by petitioner or testimony, and over respondent’s objection. *See also* Martin v. Hickey, 733 So. 2d 600 (Fla. 3d DCA 1999) (Trial court erred in entering a domestic violence injunction on behalf of the appellee after the appellant had obtained an injunction against him, amounting in effect to mutual restraining orders, as the injunction was not independently supported by the pertinent evidentiary requirements of §741.30(1)(i), Florida Statutes (1997); Hixson v. Hixson, 698 So. 2d 639 (Fla. 4th DCA 1997)).

- b. *But see Brooks v. Barrett*, 694 So. 2d 38 (Fla. 1st DCA 1997). In a contempt proceeding, it was error to sua sponte amend a previously entered mutual injunction against domestic violence by either the husband or wife, on the ground that the mutual injunction was prohibited by statute, and to enter in its place an injunction against domestic violence as to the husband only, without notice or hearing. The court of appeal reversed the amended injunction against husband and remanded the case for further proceedings to address the initial mutual injunction which was prohibited by statute.

2. Confidentiality of Information:

- a. Address Confidentiality can be Requested:
 - (i) Petitioner can request that his or her address be kept confidential and omitted from the Petition for Protection Against Domestic Violence and other required forms by filing Florida Supreme Court Approved Family Law Form 12.980(h). Florida Family Law Rule of Procedure 12.610(b)(4)(B); §741.30(6)(a)(7), Florida Statutes.
 - (ii) The ultimate determination of a need for address confidentiality must be made by the court as provided in Florida Rule of Judicial Administration 2.420. Florida Family Law Rule of Procedure 12.610(b)(4)(B).
- b. Address Confidentiality Program: In accordance with §741.408, Florida Statutes, the Attorney General shall designate state and local agencies and nonprofit agencies that provide counseling and shelter services to victims of domestic violence to assist persons applying to be program participants in the Address Confidentiality Program.
 - (i) The addresses, corresponding telephone numbers, and social security numbers of program participants in the Address Confidentiality Program of Victims of Domestic Violence held by Office of the Attorney General are exempt from §119.07(1), Florida Statutes. §741.465, Florida Statutes.
 - (ii) Legislative Intent and Program for Victims of Domestic Violence: §§741.401 - 741.409, Florida Statutes, enable state and local agencies to respond to requests for public records without disclosing the location of a victim of domestic violence.
- c. Practical note: The confidentiality provisions of chapter 741, Florida Statutes, are not distinctly cross referenced to other statutes that cover related areas of a Unified Family Court. The clear intent and language used to create the confidentiality program indicates that information made confidential under its provisions must remain confidential regardless of the context in which the information is kept. If this was not true, then a respondent to a domestic violence injunction could simply initiate an additional court matter as a means to discover the whereabouts of the petitioner.
Likewise, any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of the crime of sexual

- battery as defined in chapter 794, Florida Statutes, is exempt from public record disclosure. §119.071(2)(h)1.b Florida Statutes.
- d. Victim and Domestic Violence Center Information Exempt from Public Record: Information received by department or Domestic Violence Center about clients and location of domestic violence centers and facilities is exempt from the public records provisions of §119.07(1), Florida Statutes, and unable to be disclosed without the written consent of the client. §39.908, Florida Statutes.

N. SUBSEQUENT ACTIONS:

1. Modification of Injunctions:

- a. Either party may file a motion to modify an injunction. §741.30(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6).
- b. Motion for modifications must be filed and a hearing held with opposing party properly notified.
- (i) Mayotte v. Mayotte, 753 So. 2d 609 (Fla. 5th DCA 2000).
The Fifth District Court of Appeal held that it was error for the trial court to modify a final injunction for protection against domestic violence without the filing of a motion for modification, without a hearing, and without notice to the opposing party.
- (ii) Betterman v. Kukelhan, 977 So. 2d 702 (Fla. 4th DCA 2008). A former boyfriend made a motion to vacate an injunction against domestic violence pursuant to §741.30(6)(c), Florida Statutes. The court issued an order denying the motion without a hearing. The appellate court reversed and held that the trial court erred in denying the motion without giving the boyfriend a hearing and an opportunity to be heard. The summary denial of a motion to vacate without a hearing violates due process requirements.
- (iii) But see Ribel v. Ribel, 766 So. 2d 1185 (Fla. 4th DCA 2000). Extensions of temporary injunctions may be done ex parte.
- c. Evidence of a change in circumstances since the time the injunction was entered must be provided. Simonik v. Patterson, 752 So. 2d 692 (Fla. 3d DCA 2000). The Third District Court of Appeal held that it was not error for the trial court, after conducting a hearing, to deny respondent's motion to modify an injunction for protection against repeat violence to allow him to possess firearms, in the absence of evidence that circumstances had changed since the injunction was entered. Alkhoury v. Alkhoury, 54 So. 3d 641 (Fla. 1st DCA 2011). The appellate court reversed, and noted that although §741.30(10), Florida Statutes, provides that either party may move for modification or dissolution of a domestic violence injunction at any time, the statute does not directly speak to the burden of proof upon the movant. However, as a general rule, permanent injunctions, which remain indefinitely in effect, may be modified by a court of competent jurisdiction "whenever changed circumstances make it equitable to do so...." The requirement to show changed circumstances applies equally to modification

or dissolution of a protective injunction. Also, a party seeking an extension of a domestic violence injunction must present evidence from which a trial court can determine that a continuing fear exists and that such fear is reasonable, based on all the circumstances.

- d. Courts have broad discretion regarding injunction modifications. Reed v. Giles, 974 So. 2d 624 (Fla. 4th DCA 2008). Appellant sought review of a trial court order denying her motion to dissolve a final injunction against domestic violence. Since courts have broad discretion regarding injunctions, appellant could not prevail without demonstrating that there was an abuse of discretion.
- e. Service of an Order Modifying an Injunction:
 - (i) *See supra* section D(3)(b).
 - (ii) *See also* Florida Family Law Rule of Procedure 12.610(c)(3)(B)(i).
Service of an order modifying an injunction must be made in the same manner as an injunction.

2. Extension of Final Injunctions:

- a. To extend an injunction, no new violence is necessary but a continuing fear that is reasonable based on the circumstances must exist.
 - (i) Sheehan v. Sheehan, 853 So. 2d 523 (Fla. 5th DCA 2003).
Although §741.30(6)(c), Florida Statutes, does not specifically require any allegation of a new act of violence, the moving party must prove to the trial court that a continuing fear exists and that such fear is reasonable based on the circumstances.
 - (ii) *See also* Giallanza v. Giallanza, 787 So. 2d 162 (Fla. 2d DCA 2001). The trial court erred in extending the injunction against domestic violence against the respondent because the petitioner has not established sufficient facts. The statutory definition of domestic violence requires some showing of violence or a threat of violence. General harassment does not constitute domestic violence under the statute. Here, the petitioner never alleged any further actual violence or threats of violence, nor showed any fear of domestic violence. Rather, the allegations reflected that she was upset by the respondent's dealings with their children and that she believed that he was using the children to harass her.
 - (iii) *See also infra* Spiegel v. Haas.
- b. Court may consider the circumstances leading to the imposition of the original injunction, as well as subsequent events.
 - (i) Patterson v. Simonik, 709 So. 2d 189 (Fla. 3d DCA 1998).
 - (ii) In determining whether to extend a final injunction the court may consider the circumstances leading to the imposition of the original injunction, as well as subsequent events which may cause the petitioner to have continuing reasonable fear that violence is likely to reoccur in the future.
- c. Florida Statutes permit an extension hearing to be set ex parte. Ribel v. Ribel, 766 So. 2d 1185 (Fla. 4th DCA 2000). The trial court did not err in

- extending the temporary injunction for two weeks and rescheduling the hearing by entering an order without a motion or notice of hearing, based solely on the ex parte communication of the wife's attorney with the judge's office. The Florida Statute permits an extension hearing to be set ex parte. The petitioner did not demonstrate how an order resetting the noticed hearing on a petition for temporary injunction for protection would present the possibility of any harm, let alone irreparable harm.
- d. Court's Discretion to Extend a Final Injunction: Miguez v. Miguez, 824 So. 2d 258 (Fla. 3d DCA 2002). The appellate court affirmed the trial court's decision granting petitioner a second domestic violence injunction five days before the expiration of petitioner's one year previous injunction. The Third District Court of Appeal held that the seven year duration of the second injunction was not defective and could only be challenged as an abuse of discretion. See Goodell v. Goodell, 421 So. 2d 736 (Fla. 4th DCA 1982). As there was no record of the proceeding to determine if there had been an abuse of discretion, the court affirmed the trial court's decision.

3. Dissolving Injunctions:

- a. Either party may move to dissolve the injunction at any time. §741.30(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6).
- (i) See also York v. McCarron, 842 So. 2d 281 (Fla. 1st DCA 2003). The First District Court of Appeal reversed the trial court's decision denying appellant's motion to dissolve the final injunction against repeat violence as either party may motion at any time to modify or dissolve an injunction, as provided for in §784.046(7)(c), Florida Statutes. The court held that the trial court erred in not allowing the presentation of evidence "regarding the initial procurement of the injunction at a hearing."
- (ii) Madan v. Madan, 729 So. 2d 416 (Fla. 3d DCA 1999). The Third District Court of Appeal reversed the lower court's denial of the husband's motion to dissolve the final injunction, holding that a trial judge must allow a respondent to present evidence of false allegations by the petitioner at the initial injunction hearing. Pursuant to §741.30(6)(b), Florida Statutes (now §741.30(6)(c)), either party may move at any time to dissolve an injunction. In this case, the appellate court interpreted this statute to permit what would appear to amount to a de novo rehearing *at any time*, to reopen the case with proof of falsehoods in the petitioner's "initial procurement of the injunction."
- b. Service of the motion to dissolve must be made on the other party to provide notice and an opportunity to be heard. Florida Family Law Rule of Procedure 12.610(b)(2)(C). Chanfrau v. Fernandez, 782 So. 2d 521 (Fla. 2d DCA 2001). The Second District Court of Appeal held that it was error to dismiss final injunction against domestic violence where there was no motion, notice or evidentiary hearing. "By dismissing the injunction without motion, notice, or evidentiary hearing, the court failed to accord appellant

- due process in this matter.” Snyder v. Snyder, 685 So. 2d 1320 (Fla. 2d DCA 1996).
- c. Required change of circumstance applies to dissolution of a domestic violence injunction. See Alkhoury v. Alkhoury, 54 So. 3d 641 (Fla. 1st DCA 2011).
 - d. Court’s Authority Subsequent to Dismissal: Incorrect to Order Compliance with Counseling Subsequent to Dismissal of Petition or Domestic Violence Injunction. Tobkin v. State, 777 So. 2d 1160 (Fla. 4th DCA 2001).

O. CROSSOVER CASES/RELATED CASES:

- 1. Chapter 39 Orders Pertaining to Custody, Visitation, Etc. Take Precedence Over Similar Orders in Other Civil Cases. A Court of Competent Jurisdiction In Any Other Civil Action May Modify Such an Order If The Dependency Court Has Terminated Jurisdiction. §39.013(4), Florida Statutes.**
- 2. Final Orders and Evidence From a Dependency Case are Admissible In a Subsequent Civil Case that Deals with Custody and Visitation Issues. §39.0132(6)(d-e), Florida Statutes.**
- 3. The Provisions of Injunctions Dealing with Custody, Visitation, and Child Support Remain In Effect Until the Order Expires or an Order on Those Matters Is Entered In a Subsequent Civil Case. §741.30(6)(a)(3-4), Florida Statutes.**
 - a. An injunction should not be used as a substitute order for issues which should be addressed in dissolution of marriage or paternity proceedings. See O’Neill v. Stone, 721 So. 2d 393 (Fla. 2d DCA 1998). Although custody matters may be decided in a domestic violence proceeding, “better practice in such case would be for trial court to enter temporary order, such as order adopting general master’s report, and direct parties to litigate their subsequent custody and visitation disputes in proper paternity proceeding where orders entered would remain in effect beyond temporary lifespan of most injunctions.”
 - b. Types of Crossover Cases: Issues in Dissolution of Marriage/Domestic Violence Crossover Cases:
 - (i) Domestic Violence Injunctions in Dissolution Cases:
In a dissolution action under chapter 61, Florida Statutes, injunctions for protection against domestic violence must be issued under §741.30, Florida Statutes. An injunction under §741.30 is the exclusive remedy at law for a domestic violence injunction.
 - (a) Shaw-Messer v. Messer, 755 So. 2d 776 (Fla. 5th DCA 2000). The Fifth District Court of Appeal held that the trial court erred in not conducting an evidentiary hearing on the issuance of an injunction for protection against domestic violence filed by the wife against the husband, and in entering a mutual injunction in the dissolution action, under chapter 61, Florida Statutes, without any testimony

that the husband had committed any conduct deserving such action. In reversing the lower court's ruling and remanding the case for further action, the Fifth District Court of Appeal clearly maintained that §741.30, Florida Statutes, was the appropriate vehicle for a domestic violence injunction, as opposed to Chapter 61 proceedings.

(b) Campbell v. Campbell, 584 So. 2d 125 (Fla. 4th DCA 1991).

Injunctions against domestic violence may not be issued as part of a final judgment of dissolution; they must be made in a separate order. *See also* §61.052(6), Florida Statutes.

(c) However, there does not appear to be any prohibition against issuing an injunction under Florida Rule of Civil Procedure 1.610 in a dissolution action if threatened behavior would not qualify for an injunction under §741.30, Florida Statutes. Therefore, it would seem a "no contact" order could be issued in a dissolution action if it was not based on circumstances supporting an injunction against violence.

(ii) Domestic Violence and Dissolution Case with a Foreign Order in a Pending Action:

Abuchaibe v. Abuchaibe, 751 So. 2d 1257 (Fla. 3d DCA 2000). Husband could not be held in contempt of order awarding temporary child custody to wife where husband was precluded from removing his son from foreign country by foreign administrative and judicial orders until his custody claim filed there was resolved.

(iii) Trial Court must Make Findings Regarding Domestic Violence or Child abuse in Dissolution Action when Ruling on the Issue of Primary Residential Custody:

Collins v. Collins, 873 So. 2d 1261 (Fla. 1st DCA 2004). In making a ruling on the issue of primary residential custody in the divorce action, the trial court was required to make a finding regarding alleged domestic violence or child abuse by husband; evidence indicated that alleged domestic abuse appeared to be serious incident involving wife making distraught 911 call to local police, and appellate review could not be meaningfully conducted without trial court explicitly addressing allegation.

(iv) Ancillary Relief is Limited when Child Files Domestic Violence Petition by and through her Mother:

Rinas v. Rinas, 847 So. 2d 555 (Fla. 5th DCA 2003). The Fifth District Court of Appeal found it improper for trial court to award custody, child support and alimony for petitioner's mother and sister in a domestic violence action where petitioner was a minor child filing by and through her mother as "next best friend." Mother was only a party to the case as representative of the child, and the statute did not authorize awards of custody, child support, or alimony in the absence of an action for dissolution of marriage. Consequently, the Fifth District Court of Appeal held that the trial court did not have jurisdiction to award custody, child

support and alimony absent dissolution of marriage proceeding as §741.30, Florida Statutes (1997), does not authorize such awards.

- (v) Trial Court Can not Dismiss Domestic Violence Injunction in Dissolution where Parties did not Move to Vacate and were not Notified the Matter would be Considered:
Farr v. Farr, 840 So. 2d 1166 (Fla. 2d DCA 2003). Trial court erred in dismissing an injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered, thus failing to provide due process on the issue. Additionally, the court struck the trial court's order setting a motion for a rehearing as the court had lost jurisdiction on the matter when the wife filed an appeal.
- (vi) Trial Court Can Dismiss Temporary Injunction at a Related Hearing but the Requirements of Due Process must be Observed:
White v. Cannon, 778 So. 2d 467 (Fla. 3d DCA 2001). The trial court erred in dismissing a temporary injunction for protection against domestic violence at a hearing on husband's emergency motion for visitation by claiming that whether or not a restraining order should or should not be granted must be determined by the court in the parties' dissolution of marriage. The matter may be handled by one circuit judge, §741.30, Florida Statutes, however the requirements of due process must be observed.
- (vii) Pending Dissolution Action does not Prevent Court from Issuing Domestic Violence Injunction (DVI):
Knipf v. Knipf, 777 So. 2d 437 (Fla. 1st DCA 2001). Dismissal of a request for an injunction against domestic violence solely on the basis that there was a pending divorce action between the parties is contrary to §741.30(1)(b), Florida Statutes (1999), and constitutes error.
- (viii) Trial judges assigned to dissolution proceedings who also handle interrelated petitions for domestic violence must exercise care in ensuring that their rulings are supported by an adequate record.
Coe v. Coe, 39 So. 3d 542 (Fla. 2d DCA 2010). The petitioner appealed a final judgment of injunction for protection against domestic violence entered in favor of his former wife. The parties were also involved in a divorce and custody dispute being heard by the same judge. The appellate court reversed the order granting the petition because it was entered based on evidence from the custody hearing that was not a part of the injunction hearing record. In essence, the court's decision was based on impermissible extrajudicial knowledge.
- (ix) Judge Hearing Dissolution Erred in Requiring Husband to Pay Attorney's Fees in a Separately Filed DVI Case:
Belmont v. Belmont, 761 So. 2d 406 (Fla. 2d DCA 2000). The Second District Court of Appeal held that the trial court hearing the dissolution case erred in requiring the husband to pay attorney's fees incurred by the wife in a separately filed domestic violence injunction case. *See also*

in this outline, section II., P.(1), Attorney's Fees in Domestic Violence Proceedings.

- (x) Provisions in Chapter 61 Orders Trump Conflicting Temporary Provisions Set out in Chapter 741, Florida Statutes, DVI Orders:
Cleary v. Cleary, 711 So. 2d 1302 (Fla. 2d DCA 1998). When parties are involved in both an injunction and a dissolution case, matters governed by chapter 61 are controlled by the judge hearing the dissolution case, without regard to whether the family court action was filed before or after the injunction case.
- c. Issues in Dependency/ Domestic Violence Crossover Cases: Opinion from New York's Highest Court: A charge of child neglect may be made only where there is a link or causal connection between the mother's alleged actions or inactions and proven harm to the child. Nicholson v. Scopetta, 3 N.Y. 3d 357, (N.Y. 2004). In Nicholson, the court specifically ruled that it violates the U.S. Constitution to remove children from battered mothers solely or primarily on the grounds that there is domestic violence in the home, to charge those battered mothers with child neglect, and to mark cases against them as "indicated" at the State Central Register of Child Abuse and Maltreatment.
- d. Florida Case Law:
 - (i) Sufficient Evidence to Adjudicate Child As Dependent:
 - (a) D.R. v. Department of Children and Families, 898 So. 2d 254 (Fla. 3d DCA 2005). The Third District Court of Appeal upheld the trial court's adjudication of the child as dependent as to the mother based on finding that domestic violence in the house adversely affected the child even though there was insufficient evidence to conclude the child witnessed the physical altercations between both parents.
 - (b) T.R. v. Dept. of Children and Families, 864 So. 2d 1278 (Fla. 5th DCA 2004). The Fifth District Court of Appeal affirmed the trial court's ruling that evidence supported adjudication of father's two children as dependents based upon the children being aware of an act of domestic violence. The children had been aroused from sleep by the screams of their father and his girlfriend who was yelling for the father to keep the knife away from her and the baby.
 - (c) W.V. v. Department of Children and Families, 840 So. 2d 430 (Fla. 5th DCA 2003). Competent substantial evidence supported conclusion that there was a pattern of domestic violence in presence of child, warranting finding of abuse.
 - (d) D.W.G. v. Department of Children and Families, 833 So. 2d 238 (Fla. 4th DCA 2002). Dependency adjudication affirmed based on a holding that it is not necessary for a child to witness violence in order to be harmed by it as children may be affected and aware that the violence is occurring without actually having to see it occur. This rule of law is to be considered in determining whether visitation or custody is appropriate where domestic violence is committed against a parent.

- (e) E.G. v. Department of Children and Families, 830 So. 2d 212 (Fla. 5th DCA 2002). Dependency case in which the court affirmed the adjudication of dependency, but remanded for entry of written findings consistent with the trial court's oral announcement. The Fifth District Court of Appeal provided specifically, "[t]he children's health was in danger of being significantly impaired by the acts of domestic violence that took place in the children's presence and by the mother's refusal to end her troubled relationship with the paramour."
 - (f) D.D. v. Department of Children and Families, 773 So. 2d 615 (Fla. 5th DCA 2000). Father (appellant) appealed trial court order finding his five-year-old child dependent. The court found that evidence that the child witnessed father's abuse of the mother, together with evidence indicating that parents would more likely than not resume their relationship in the future and resume the cycle of domestic violence in the presence of the child, established prospective neglect sufficient to support finding of dependency, even in absence of medical or other expert testimony. Pursuant to §39.01(46), Florida Statutes, (now §39.01(45)) defining neglect, the court can make a finding that the child is neglected and adjudicated a dependent when the state has presented sufficient evidence that the child is living in an environment which causes mental, physical, or emotional impairment. It continued by finding that it is not necessary for finding of dependency that the court make finding that there is no reasonable prospect that parents can improve their behavior. The appellate court affirmed the decision.
- e. Florida Case Law: Insufficient Evidence to Adjudicate Child As Dependent:
- (i) B.C. v. Department of Children and Families, 846 So. 2d 1273 (Fla. 4th DCA 2003). Dependency adjudicated based on domestic violence between father and former wife, and father's alleged substance abuse was not supported by competent substantial evidence. The two instances of domestic violence in the presence of the child more than a year and a half prior to the dependency petition were too remote in time to support dependency adjudication.
 - (ii) J.B.P.F. v. Department of Children and Families, 837 So. 2d 1108 (Fla. 4th DCA 2003). Error to adjudicate child dependent based on finding that she was at substantial risk of imminent abuse and neglect where that finding was based upon a single instance of abuse inflicted on a sibling, and evidence failed to establish a nexus between the abuse of the sibling and a risk of prospective abuse to the child.
 - (iii) E.B. v. Department of Children and Families, 834 So. 2d 415 (Fla. 2d DCA 2003). Evidence insufficient to support finding that child suffered from abuse as a result of domestic violence between mother and her boyfriend where there was no evidence that the child was present at the time of the act of domestic violence.

- (iv) C.W. v. Department of Children and Families, 10 So. 3d 136 (Fla. 1st DCA 2009). Dependency adjudication reversed where no findings were made that the three-month-old child was aware of the incident or was physically or mentally harmed. “Instead, the trial court found that, because a child may be harmed by witnessing violence, this child was actually harmed. Significantly, the record contains no evidence that the child comprehended the incident, sustained any physical or mental injury, or was cognizant in any way of the parents’ poor behavior toward one another.”
- f. Dismissal of Injunctions in Crossover Cases:
 - (i) Sumner v. Sumner, 862 So. 2d 93 (Fla. 2d DCA 2003). Appellate court decided, inter alia, that the trial court committed reversible error by entering an order dismissing the wife’s petition for a final injunction for protection against domestic violence at the end of its hearing on the petition for dissolution of marriage. Due process required that a hearing for the issuance of the final injunction occur; the court erred when it dismissed the petition based solely upon its observations at the final hearing of the dissolution of marriage.
 - (a) See also White v. Cannon, 778 So. 2d 467 (Fla. 3d DCA 2001). Trial court erred in dismissing a temporary injunction against domestic violence in the final judgment dissolving the parties’ marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered, thus failing to provide due process on the issue.
 - (b) Parties must have notice that dismissal will be considered. Farr v. Farr, 840 So. 2d 1166 (Fla. 2d DCA 2003).
 - (ii) Tobkin v. State, 777 So. 2d 1160 (Fla. 4th DCA 2001). Petitioner’s voluntary dismissal of an action for injunction for protection against domestic violence and an action for dissolution of marriage divested the trial judge of authority to continue with further proceedings on the wife’s attorney’s motion to withdraw, the husband’s motion to disqualify the wife’s counsel, and enforcement of the previously ordered requirement of counseling and attendance at the spouse batterers’ program. No final injunction requiring counseling or attendance at the Glass House was ever entered. A voluntary dismissal does not divest the court of jurisdiction to conclude ancillary matters involved in the case such as outstanding and unresolved motions for attorney’s fees and costs, and similar issues. The decision of the trial court was reversed.

4. International Implications of Domestic Violence.

- a. Lozano v. Alvarez, 134 U.S. 1224(2014). When one parent abducts a child and flees to another country, the other parent may petition for the return of the child pursuant to the Hague Convention. If the petition is filed within one year of the child’s removal, the court shall generally order the return of the child. If the petition is filed after one year, the court shall order the

child's return unless the child has settled in his/her environment. The 1-year period in Article 12 of the Hague Convention is not subject to equitable tolling.

P. HOUSING - FEDERAL HOUSING PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING:

- 1. The Violence Against Women Act of 2013** (Pub.L. 109-162; 119 Stat. 2960) protects tenants and family members of tenants who are victims of domestic violence, dating violence, or stalking from being evicted or terminated from housing assistance based on such acts of violence against them. These provisions apply to public housing and Section 8 programs. VAWA became effective on January 5, 2006.
- 2. Who is Covered:** The protections cover victims of domestic violence, dating violence, and stalking who are tenants in the federal Public Housing and Section 8 voucher and project-based programs. The protections also cover members of the victim's immediate family. "Immediate family member" includes: any person living with the victim and related to him or her by blood or marriage; or the victim's spouse, parent, brother, sister, child, or any person to whom the victim stands in loco parentis. 42 U.S.C. §1437d(u)(3)(D)(2006); 42 U.S.C. §1437f(f)(11) (2006).
- 3. Key Provisions:**
 - a. Provides that an individual's status as a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of admission or denial of housing assistance. 42 U.S.C. §1437d(c)(3) (2006); 42 U.S.C. §1437f(c)(9)(A) (2006); 42 U.S.C. §1437f(d)(1)(A) (2006); 42 U.S.C. §1437f(o)(B) (2006).
 - b. Establishes an exception to the federal "one-strike" criminal activity eviction rule for tenants who are victims. Provides that an incident of actual or threatened domestic violence, dating violence, or stalking does not qualify as a "serious or repeated violation of the lease" or "good cause for terminating the assistance, tenancy, or occupancy rights of the victim." 42 U.S.C. §1437d(l)(5) (2006); 42 U.S.C. §1437f(c)(9)(B) (2006); 42 U.S.C. §1437f(d)(1)(B) (2006); 42 U.S.C. §1437f(o)(7)(C) (2006); 42 U.S.C. §1437f(o)(20)(A) (2006).
 - c. Provides that criminal activity directly relating to domestic violence, dating violence, or stalking does not constitute grounds for termination of a tenancy. 42 U.S.C. §1437d(l)(6) (2006); 42 U.S.C. §1437f(c)(9)(C) (2006); 42 U.S.C. §1437f(d)(1)(C) (2006); 42 U.S.C. §1437f(o)(7)(D) (2006); 42 U.S.C. §1437f(o)(20)(B) (2006).
 - d. Provides that a Public Housing Authority (PHA) or Section 8 landlord may bifurcate a lease in order to evict, remove, or terminate the assistance of the offender while allowing the victim, who is a tenant or lawful occupant, to

- remain. 42 U.S.C. §1437d(l)(6)(B) (2006); 42 U.S.C. §§ 1437f(o)(7)(D)(ii) (2006); 42 U.S.C. §§1437f(c)(9)(C)(ii) and (d)(1)(B)(iii)(II) (2006).
- e. States that PHAs and Section 8 landlords have the authority to honor civil protection orders and other court orders from domestic violence and family court judges that address rights of access to or control of the property. 42 U.S.C. §1437d(l)(6)(C) (2006); 42 U.S.C. §§1437f(o)(7)(D)(iii) and (o)(20)(D)(ii) (2006); 42 U.S.C. §§ 1437f(c)(9)(C)(iii) and (d)(1)(B)(iii)(III) (2006).
 - f. Allows the PHA or Section 8 landlord to evict a victim if the PHA or Section 8 landlord demonstrates an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant's tenancy is not terminated. 42 U.S.C. § 1437d(l)(6)(E) (2006); 42 U.S.C. §§1437f(o)(7)(D)(v) and (o)(20)(D)(iv) (2006); 42 U.S.C. §§1437f(c)(9)(C)(v) and (d)(1)(B)(iii)(V) (2006).
 - g. Allows but does not require a PHA or Section 8 landlord to request documentation that the individual or family members have been a victim of domestic violence, dating violence, or stalking. A victim may satisfy a PHA's or Section 8 landlord's request for documentation by producing a federal, state, tribal, territorial, or local police or court record that documents the incident or incidents of violence. Alternatively, a victim may provide a statement in which "an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional, from whom the victim has sought assistance in addressing domestic violence, dating violence, or stalking, or the effects of the abuse" attests under penalty of perjury that the professional believes that "the incident or incidents in question are bona fide incidents of abuse." The victim also must sign or attest to the documentation. In addition, the documentation must name the offender. Finally, the statute also allows PHAs and Section 8 landlords to request documentation through a certification form approved by HUD. 42 U.S.C. §§1437d (u)(1)(A) and (C) (2006); 42 U.S.C. §§1437f(ee)(1)(A) and (C) (2006).
 - h. After a PHA or Section 8 landlord has requested the documentation in writing, an individual has 14 business days to respond to the request. If an individual does not provide the documentation within 14 business days, the PHA or landlord may bring eviction proceedings against the tenant. However, the PHA or Section 8 landlord also may extend this timeframe at its discretion. 42 U.S.C. §§1437d(u)(1)(A) and (B) (2006); 42 U.S.C. §§1437f(ee)(1)(A) and (B) (2006).

Q. ANCILLARY MATTERS:

1. Attorney's Fees in Domestic Violence Proceedings:

- a. Neither Appellate Rule 9.400 nor Chapter 741, Florida Statutes, Provides Authority to Grant Attorney's Fees:
 - (i) Lewis v. Lewis, 689 So. 2d 1271 (Fla. 1st DCA 1997).

Wife's request for appellate attorney's fees was denied. Neither the domestic violence statute nor Florida Rule of Appellate Procedure 9.400 provides authority for granting attorney's fees in domestic violence proceedings. Section 61.16(1), Florida Statutes, providing for attorney's fees for maintaining or defending proceedings under chapter 61, Florida Statutes, does not apply to chapter 741, Florida Statutes, proceedings, as domestic violence proceedings are independent of dissolution of marriage proceedings. Note: The court stated, "we are not unaware that the public policy reasons for granting attorney's fees in a chapter 61 proceeding exist in a domestic violence proceeding. This is a matter, however, that should be dealt with by the Legislature rather than the courts."

- (ii) Attorney's fees cannot be awarded in a domestic violence injunction case. Dudley v. Schmidt, 963 So. 2d 297 (Fla. 5th DCA 2007).
- (iii) But see Harrison v. Francisco, 884 So. 2d 239 (Fla. 2d DCA 2004). Husband was entitled to a hearing on his motion for costs, after wife voluntarily dismissed her domestic violence injunction. "Although an award of costs is a matter largely left to the discretion of the trial court," the holding in Coastal Petroleum requires "the trial court, in an appropriate hearing, after argument and presentation of appropriate evidence by both sides to determine exactly which expenses would have been reasonably necessary for an actual trial." Quoting, Coastal Petroleum Co. v. Mobil Oil Corp., 583 So. 2d 1022, 1025 (Fla. 1991).
- b. Attorney's fees under §57.105, Florida Statutes, could not be awarded in the absence of a timely motion for such fees in a domestic violence case: Cisneros v. Cisneros, 831 So. 2d 257 (Fla. 3d DCA 2002). Regardless of the fact that respondent's injunction was reversed by the Third District Court of Appeal on respondent's appeal, no attorney's fees could be awarded based on §57.105, Florida Statutes, (frivolous-bad faith lawsuit), for either the trial level or the appellate level proceedings, in the absence of a timely motion for such fees.
- c. **Compensatory and Punitive Damages:** A victim of domestic violence who has suffered repeated physical or psychological injuries over an extended period of time, as a result of continuing domestic violence, has a cause of action for compensatory and punitive damages against the perpetrator responsible for the violence. §768.35, Florida Statutes.

2. Disqualification and Recusal of Judge:

- a. Tindle v. Tindle, 761 So. 2d 424 (Fla. 5th DCA 2000). The Fifth District Court of Appeal held that the trial court erred in not granting the husband's motion for recusal where the trial judge showed strong disapproval of calling the children as witnesses of domestic violence occurring in their presence for purposes of determining custody issues.
- b. Wehbe v. Uejbe, 744 So. 2d 572 (Fla. 3d DCA 1999), concurring opinion. Where appellant and appellee were half brothers who each filed for an injunction for protection against domestic violence against one another, the

- Third District Court of Appeal held that the issue of whether the trial court should not have taken judicial notice of testimony presented in appellee's case without making such testimony a part of the record was not preserved for appellate review based on the fact that the issue was never raised as an objection before the trial court. There was also no abuse of discretion by the trial court in denying an oral motion for disqualification and request for new trial where it was *raised at the conclusion of the hearing*. The Third District Court of Appeal noted that a motion for disqualification is not properly used to express disagreement with the trial court's rulings.
- c. Yates v. State, 704 So. 2d 1159 (Fla. 5th DCA 1998), concurring opinion. Motion to disqualify judge based on judge's membership on domestic violence task force was legally insufficient.

R. APPELLATE REVIEW:

1. Appellate Record:

- a. Trial Court Must Make Findings for the Record Regarding Alleged Domestic Violence:
Collins v. Collins, 873 So. 2d 1261 (Fla. 1st DCA 2004).
In making a ruling on the issue of primary residential custody in divorce action, trial court was required to make a finding regarding alleged domestic violence or child abuse by husband; evidence indicated that alleged domestic abuse appeared to be a serious incident involving wife making distraught 911 call to local police, and appellate review could not be meaningfully conducted without trial court explicitly addressing the allegation.
- b. Issue Must be Raised by Objection for the Record:
Wehbe v. Uejbe, 744 So. 2d 572 (Fla. 3d DCA 1999), concurring opinion.
Where appellant and appellee were half brothers who each filed for an injunction for protection against domestic violence against one another, the Third District Court of Appeal held that the issue of whether the trial court should not have taken judicial notice of testimony presented in appellee's case without making such testimony a part of the record was not preserved for appellate review based on the fact that the issue was never raised as an objection before the trial court.

2. Standard of Review:

- a. S.E.R. v. J.R., 803 So. 2d 861 (Fla. 4th DCA 2002).
The petitioners requested review of the circuit court's order denying their motion to dismiss a domestic violence injunction. The petitioners based their motion on the grounds that there was a pending dependency action in Palm Beach, in which a custody award was granted that was contrary to the custody award given during the domestic violence injunction hearing. The Fourth District Court of Appeal found that no certiorari review is necessary where a party has failed to show that a denial of a motion to dismiss a domestic violence injunction caused irreparable harm. The Fourth District

Court of Appeal found that the petitioner's argument claiming that the Palm Beach award had precedence over the domestic award was not sufficient harm to mandate certiorari review. (*The test for irreparable harm is set forth in Bared & Co., Inc. v. McGuire, 670 So 2d. 153 (Fla. 4th DCA 1996).*)

3. Transcripts:

- a. Squires v. Darling, 834 So. 2d 278 (Fla. 5th DCA 2002).
Appellate court affirmed the entry of injunction as moving party failed to provide the court with a transcript of the proceedings and failed to provide the court a record of the proceedings pursuant to Florida Rule of Appellate Procedure 9.200(b)(4). Respondent's failure to provide either a transcript or record preserved the presumption of correctness attached to the final judgment. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979).
- b. Stevens v. Bryan, 805 So. 2d 881 (Fla. 2d DCA 2001).
Respondent appeals a repeat violence injunction, as next best friend of her son. Because no record or transcript was provided, the Second District Court of Appeal cannot find error in the trial court's decision, as evidence had to be provided to the lower court for the injunction to be issued. The case was remanded only to correct scrivener's errors regarding the correct parties, and to remedy an error on the pre-printed form.
- c. Ricketts v. Ricketts, 790 So. 2d 1265 (Fla. 5th DCA 2001).
No transcripts were made available to determine whether or not error was committed, therefore injunction preventing appellant from contacting ex-husband is affirmed.
- d. Lawrence v. Walker, 751 So. 2d 68 (Fla. 4th DCA 1999).
The Fourth District Court of Appeal affirmed the trial court's issuance of an injunction for protection against domestic violence where the contentions raised by the appellant could not be evaluated due to the fact that no transcript was ever made of the hearing in which the evidence was presented. In a special concurrence, the court observed that an injunction action is a civil proceeding, and there is no requirement as yet that such proceedings be transcribed at public expense, making it necessary for the party to arrange in advance for reporting and transcription. It was noted that with so much litigation being conducted pro se, the parties should be alerted in the notice for final hearing on the injunction that if they want the hearing reported, it is up to them to create a record by arranging for the services of a court reporter to transcribe the proceedings.
- e. Pollock v. Couffer, 750 So. 2d 659 (Fla. 5th DCA 1999).
The Fifth District Court of Appeal affirmed the ruling of the trial court where the appellant/respondent contended that the evidence of record did not support the trial court's entry of a final injunction for protection against repeat violence, but failed to provide the appellate court with either a transcript of trial court proceedings or stipulated statement of

facts. Accordingly, the appellate court was prevented from reviewing the validity of the claim and held that no error of law was apparent.

S. ENFORCEMENT:

1. Enforcement of Injunctions in Florida:

a. Florida Injunctions:

Injunctions for protection against domestic violence entered by the judiciary of Florida are valid and enforceable in all counties of the state. §741.30(6)(d)(1), Florida Statutes.

b. Foreign Protection Orders:

Protection orders entered by state courts other than Florida, which are issued in accordance with the Violence Against Women Act (VAWA) are enforceable by Florida's local law enforcement authorities as if they were entered by the judiciary of Florida. Record and registration of the order in Florida is not a prerequisite for enforcement. However, entry of the initial foreign protection order must be legally valid - the issuing court must have had jurisdiction over the parties and subject matter and the respondent must have been provided reasonable notice and opportunity to be heard, as defined by the law of foreign court. 18 U.S.C. §2265.

(i) Violation of Foreign Protection Order is a First Degree Misdemeanor.

§741.31(4)(a), Florida Statutes.

(ii) Police have Warrantless Arrest Powers for Violations of Foreign Orders of Protection. §901.15(6), Florida Statutes.

(iii) "Court of a Foreign State" is defined in §741.315(1), Florida Statutes as follows:

(a) Court of competent jurisdiction of a state of the United States, other than Florida;

(b) The District of Columbia;

(c) An Indian tribe; or

(d) A commonwealth, territory, or possession of the United States.

(iv) Residency and Registration of Foreign Protection Orders is Addressed in §741.315(3)(a), Florida Statutes:

(a) Foreign protection orders need not be registered in the protected person's county of residence to be valid.

(b) Venue is proper throughout the state.

(c) Residence in Florida is not required for enforcement of an injunction for protection against domestic violence.

(v) Registration of a Foreign Order:

(a) To register a foreign order the petitioner must present a certified copy to any sheriff in Florida and request that it be entered into the system.

(b) "The protected person must swear by affidavit, that to the best of the person's knowledge and belief, the attached certified copy of the foreign order . . . is currently in effect as written and has not been superseded by any other and that the respondent has been given a copy of it." §741.315(3)(a), Florida Statutes.

- (c) “If not apparent from the face of the certified copy of the foreign order, the sheriff shall use best efforts to ascertain whether the order was served on the respondent” [and] “shall assign a case number and give the protected person a receipt showing registration of the foreign order in this state.” §741.315(3)(b), Florida Statutes.
- (d) FDLE “shall develop a special notation for foreign orders of protection.” §741.315(3)(b), Florida Statutes.
- (e) It is a first degree misdemeanor to intentionally provide police with a false or invalid foreign protection order. §741.315(5), Florida Statutes.

2. Courts’ Power to Enforce through Civil or Criminal Contempt Proceedings:

- a. The court may enforce a violation of an injunction for protection against domestic violence through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under §741.31, Florida Statutes. The court may enforce the respondent’s compliance with the injunction through any appropriate civil and criminal remedies, including but not limited to, a monetary assessment or fine. §741.30(9)(a), Florida Statutes.
- b. Violations of provisions such as child support or visitation may be enforced through civil contempt sanctions, since the purpose of a civil contempt proceeding is to mandate compliance with the injunction, not to impose punishment. §741.30(9)(a), Florida Statutes.
- c. Legislative Intent: According to §741.2901(2), Florida Statutes, it is the intent of the legislature that domestic violence be treated as a crime; and for that reason, “criminal prosecution shall be the favored method of enforcing compliance with injunctions for protection against domestic violence.” However, that provision does not preclude the court from using indirect contempt to enforce the order. But if the violation is punishable by criminal contempt and incarceration, the court must comply with the provisions of Florida Rule of Criminal Procedure 3.840. *See also Lapushinsky v. Campbell*, 738 So. 2d 514 (Fla. 1st DCA 1999).

3. Inherent Power of Contempt: The Legislature has no authority under doctrine of separation of powers to limit the circuit court in exercise of its constitutionally inherent powers of contempt.

- a. Steiner v. Bentley, 679 So. 2d 770 (Fla. 1996). The statutory directive that domestic violence injunctions “shall” be enforced by civil contempt is directory rather than mandatory. The legislature cannot eliminate the court’s inherent indirect criminal contempt power. The portion of the statute expressing legislative intent that indirect criminal contempt may not be used to enforce compliance with injunctions for protection against domestic violence is unconstitutional.
- b. Ramirez v. Bentley, 678 So. 2d 335 (Fla. 1996). The statutory directive that domestic violence injunctions “shall” be enforced by civil contempt is permissive rather than mandatory.
- c. *See also Walker v. Bentley*, 660 So. 2d 313 (Fla. 2d DCA 1995). To the extent that statute would limit the circuit court’s jurisdiction to use civil contempt to

enforce compliance with a domestic violence injunction, it is unconstitutional as violative of the doctrine of separation of powers. The court's power to enforce an injunction through a civil contempt proceeding is discretionary rather than mandatory, and thus does not prohibit use of indirect criminal contempt by the circuit court.

- d. Lopez v. Bentley, 660 So. 2d 1138 (Fla. 2d DCA 1995). Trial court has inherent power to enforce an injunction for protection against "domestic/repeat violence" through indirect criminal contempt proceedings.

4. Contempt = Willful Violation of an Injunction for Protection Against Domestic Violence:

- a. It is a first degree misdemeanor to willfully violate an injunction for protection against domestic violence or a foreign protection order that is given full faith and credit pursuant to §741.315, Florida Statutes. Violation of the injunctions above is punishable as provided in §775.082 or §775.083, Florida Statutes. §741.31(4)(a), Florida Statutes.
- b. The essential inquiry in a contempt proceeding is whether the defendant intentionally failed to comply with the subpoena or other court order.
 - (i) Robinson v. State, 840 So. 2d 1138 (Fla. 1st DCA 2003). Error to deny motion for judgment of acquittal on charge of violation of domestic violence injunction where the state failed to establish that the defendant knew a final injunction had been entered against him, either through proof that the defendant had been served with the injunction or proof that defendant had some other notice.
 - (ii) Hunter v. State, 855 So. 2d 677 (Fla. 2d DCA 2003). Respondent was ordered to successfully complete a batterer intervention program as part of an injunction. Respondent enrolled and attended eight classes before being terminated by the program for failure to pay the provider fee or provide proof of community service hours. Respondent was sentenced to ninety days in jail for indirect criminal contempt for violating the injunction. Respondent testified that because he was sentenced to prison on an unrelated offense, he did not have any income and wanted to complete the community service but could not because of his asthma. Furthermore, the batterers' program issued a trespass warning against him because he had failed to pay the provider fees. The Second District Court of Appeal held that the respondent demonstrated a willingness to attend the class but, because of his indigency and disability status, he could not. Furthermore, the state failed to prove an intentional violation of the injunction.
 - (iii) Villate v. State, 663 So. 2d 672 (Fla. 4th DCA 1995).
 - (a) Fear of retaliation is not a valid defense for failing to comply with a lawful order to appear at a court proceeding.
 - (b) "While we sympathize with Villate's plight, the courts simply cannot conduct orderly business where individual witnesses take it upon themselves to decide when, and if, they should respond to a court order."

- (iv) Scimshaw v. State, 592 So. 2d 753 (Fla. 3d DCA 1992). Where a law enforcement officer reasonably believed that he had been excused from the subpoena by an assistant state attorney, there was no intent to disobey the order.
- (v) *See also* Gaspard v. State, 848 So. 2d 1161 (Fla. 1st DCA 2003). Trial court fundamentally erred in failing to instruct the jury that defendant's knowledge that the injunction is in effect at the time of the alleged violation is an essential element of the offense of violation.
- c. Actions which Constitute a Willful Violation: A person is guilty of a first degree misdemeanor who intentionally violates an injunction for protection against domestic violence by (§741.31(4)(a), Florida Statutes):
 - (i) Refusing to vacate the dwelling that the parties share;
 - (ii) Going to, or being with 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
 - (iii) Committing an act of domestic violence against the petitioner;
 - (iv) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;
 - (v) Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;
 - (vi) Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;
 - (vii) Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or
 - (viii) Refusing to surrender firearms or ammunition if ordered to do so by the court.
- d. Respondent may be charged with burglary or trespassing for entering the residential property in violation of an injunction:
 - (i) State v. Surez-Mesa, 662 So. 2d 735 (Fla. 2d DCA 1995), *review denied*, 669 So. 2d 252 (Fla. 1996). Husband who shared a house with wife, but was restrained by an injunction from entering the property, was charged with burglary for entering the premises with the intent to commit a crime.
 - (ii) Jordan v. State, 802 So. 2d 1180 (Fla. 3d DCA 2001). The domestic violence injunction had the effect of giving notice to defendant against entering the victim's property.
- e. Violation of Injunction by Indirect Contact Includes:
 - (i) Mailing letters to victim; circuit court could revoke probation based upon defendant's indirect contact with victim through a third party, as order of probation mandated that defendant was to have no association in any way with victim. Arias v. State, 751 So. 2d 184 (Fla. 3d DCA 2000).
 - (ii) *But see* Seitz v. State, 867 So. 2d 421 (Fla. 3d DCA 2004). Even though defendant's actions did not involve direct or indirect contact with the victim, he still could be convicted of stalking. (Defendant disseminated pharmaceutical records of the victim to various persons in the county. The

state alleged that this action served no legitimate purpose and that it caused the victim to suffer emotional distress.)

5. Contempt Remedies:

Civil Contempt:

- a. Civil contempt is a remedy of a court “to coerce obedience to its orders which direct a civil litigant to do or abstain from doing an act or acts” Dowis v. State, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).
- b. A civil contempt adjudication is intended to operate in prospective manner to coerce, rather than to punish.
 - (i) Shillitani v. U.S., 384 U.S. 364 (1966).
 - (ii) Featherstone v. Montana, 684 So. 2d 233 (Fla. 3d DCA 1996).
- c. The preponderance of the evidence burden of proof applies to civil contempt proceedings. Kramer v. State, 800 So. 2d 319, 320 (Fla. 2d DCA 2001).
- d. A court order must be obeyed until vacated or reversed.
 - (i) Defendant cannot defend contempt by claiming that the order violated was wrong. McQueen v. State, 531 So. 2d 1030 (Fla. 1st DCA 1988).
 - (ii) *Also:* A defendant cannot complain, after revocation of probation, of the illegality of a sentence placing him on probation, because he accepted the benefits.
 - (a) Brown v. State, 659 So. 2d 1260 (Fla. 4th DCA 1995).
 - (b) Bashlor v. State, 586 So. 2d 488, 489 (Fla. 1st DCA 1991). “[S]entences imposed in violation of statutory requirements, which are to the benefit of the defendant and to which he agreed, may not be challenged after the defendant has accepted the benefits flowing from the plea, but has failed to carry out the condition imposed on him.”

6. Civil Contempt Orders Must Contain a Purge Provision.

- a. Jones v. Ryan, 967 So. 2d 342 (Fla. 3d DCA 2007). In these consolidated cases, two men sought habeas corpus relief based upon their confinement as a result of being found in civil contempt of court for failure to comply with the trial court’s order in final judgments for injunctions in domestic violence cases. The 3d District Court of Appeal noted that the last orders issued by the trial court found each respondent to be in civil contempt of court and sentenced each to incarceration without containing a purge provision. Without this provision, the contempt orders were criminal rather than civil, and required that the contemnors be afforded the same constitutional due process protections afforded criminal defendants.
- b. Sando v. State, 972 So. 2d 271 (Fla. 4th DCA 2008). A petition for habeas corpus was granted when Ms. Sando was sentenced for civil contempt after violating a domestic violence injunction. The trial court ordered Ms. Sando jailed for six months with a purge that stated she would be released upon completion of a 60-day domestic violence class which was unavailable where she was incarcerated. The appellate court found that the sentence represented a criminal contempt sanction, not a civil contempt sanction, and

that Ms. Sando was not properly noticed or provided with the due process requirements necessary in criminal contempt proceedings.

- c. Indirect Criminal Contempt: Florida Rule of Criminal Procedure 3.840:
 - (i) Indirect criminal contempt concerns conduct that has occurred outside the presence of the judge. Gidden v. State, 613 So. 2d 457 (Fla. 1993).
 - (ii) Indirect criminal contempt is a criminal matter with the object of punishment. Featherstone v. Montana, 684 So. 2d 233 (Fla. 3d DCA 1996).
 - (iii) Rule of Criminal Procedure 3.840:
 - (a) The prosecutorial procedure for indirect criminal contempt is governed by Florida's Rule of Criminal Procedure 3.840.
 - (1) Hagan v. State, 853 So. 2d 595 (Fla. 5th DCA 2003). The Fifth District Court of Appeal reversed the defendant's conviction for indirect criminal contempt for violating an injunction against repeat violence. The court held, inter alia, that: (1) the affidavit of violation was insufficient as it was not based on personal knowledge, and (2) the trial court committed reversible error by not having the proceeding transcribed, preventing the appellate court from reviewing the defendant's additional due process claims. The District Court of Appeal reversed without prejudice to new proceedings being initiated in conformity with Florida Rule of Criminal Procedure 3.840.
 - (2) Lapushinsky v. Campbell, 738 So. 2d 514 (Fla. 1st DCA 1999). The First District Court of Appeal granted a writ of *habeas corpus* where the trial judge hearing the petition for final injunction learned of a violation of the temporary injunction and, in addition to entering the final injunction, held the respondent in indirect criminal contempt and sentenced him to thirty days in the county jail. The First District Court of Appeal held that the trial court failed to comply with the procedural safeguards set forth in Florida Rule of Criminal Procedure 3.840 when instituting the contempt action.
 - (b) Indirect criminal contempt begins with the judge issuing an order to show cause. Tschapek v. Frailing, 699 So. 2d 851 (Fla. 4th DCA 1997).
 - (c) Motion for order to show cause on which contempt order is based must be sworn or supported by affidavit.
 - (1) Judkins v. Ross, 658 So. 2d 658 (Fla. 1st DCA 1995).
 - (2) Lindman v. Ellis, 658 So. 2d 632 (Fla. 2d DCA 1995).
 - (3) B.L.J. v. State, 678 So. 2d 530 (Fla. 1st DCA 1996).
 - (iv) All the procedural aspects of the criminal justice process must be accorded to a defendant in an indirect criminal contempt proceeding.
 - (a) Appropriate charging document;
 - (b) An answer;
 - (c) An order of arrest;
 - (d) The right to bail;
 - (e) An arraignment;
 - (f) A hearing;
 - (g) Representation by counsel;
 - (h) Process to compel the attendance of witnesses; and

- (i) Right to testify in his own defense.
 - (1) Gidden v. State, 613 So. 2d 457 (Fla. 1993).
 - (2) Tschapek v. Frailing, 699 So. 2d 851 (Fla. 4th DCA 1997).
- (v) State must Produce Non-Hearsay Testimony:
 In order to justify a holding that defendant violated an injunction for protection, the state must produce non-hearsay testimony. Torres v. State, 870 So. 2d 149 (Fla. 2d DCA 2004).
- (vi) Featherstone v. Montana, 684 So. 2d 233 (Fla. 3d DCA 1996). The fact that the husband had previously been found in civil contempt and incarcerated for noncompliance with court orders does not bar indirect criminal contempt proceedings based on the same noncompliance.
- (vii) Subject to Speedy Trial:
 - (a) Washington v. Burk, 704 So. 2d 540 (Fla. 5th DCA 1997). Indirect criminal contempt is subject to the speedy trial rule, whether the proceeding is initiated by arrest or service of an order to show cause. Where the defendant had been arrested for violation of an injunction, the state filed a nolle prosequere in county court after the defendant filed a motion for discharge, and the state subsequently filed a motion for an order to show cause in circuit court, the speedy trial period for the circuit court action commenced with the defendant's initial arrest rather than with service of the show cause order.
 - (b) *But see* Burk v. Washington, 713 So. 2d 988 (Fla. 1998). Indirect criminal contempt initiated by the court is not subject to the speedy trial rule.
- (viii) Right to jury trial:
 A defendant charged with indirect criminal contempt for violation of injunction was not entitled to a jury trial; denial of jury trial merely limited the maximum term of jail to six months. Wells v. State, 654 So. 2d 146 (Fla. 3d DCA 1995).
- (ix) Standard to support conviction for criminal contempt is beyond a reasonable doubt:
 - (a) Lindman v. Ellis, 658 So. 2d 632 (Fla. 2d DCA 1995).
 - (b) Tide v. State, 804 So. 2d 412 (Fla. 4th DCA 2001).
 - (1) In criminal contempt proceeding, the court must require proof of defendant's guilt beyond a reasonable doubt before shifting the burden to defendant to go forward.
 - (2) "Thus, to prove indirect criminal contempt, 'there must be proof beyond a reasonable doubt that the individual intended to disobey the court.'"
 - (c) Hoffman v. State, 842 So. 2d 895 (Fla. 2d DCA 2003). The trial court erred in finding that the defendant had violated the 500-foot provision of the injunction as the state failed to prove the exact distance the defendant was from petitioner. The court held that the state's burden of proof in an indirect criminal contempt case is to prove every element beyond a reasonable doubt.
- (x) Notice of Prohibited Conduct Must Be Provided in an Injunction:

- (a) Hoffman v. State, 842 So. 2d 895 (Fla. 2d DCA 2003). Defendant, a respondent in a civil case, was convicted of violation of the injunction for sending cards to the petitioner's residence and for allegedly violating the 500-foot provision of the injunction. The trial court erred in finding that the defendant had violated the injunction as the cards were addressed to other residents of the petitioner's household and as the injunction did not specifically prohibit this.
- (b) Zelman v. State, 666 So. 2d 188 (Fla. 2d DCA 1995). The order holding the husband in indirect criminal contempt for violating a temporary restraining order against harassing the wife by failing to pay her health insurance premiums in a timely fashion was reversed. Neither the final judgment of dissolution nor the temporary restraining order adequately apprised the husband of conduct that was prohibited in regard to the timeliness of payments of the wife's health insurance premiums. The husband's payment of premiums after the due date had passed, but within the grace period, did not constitute indirect criminal contempt.
- d. Direct Criminal Contempt, Florida Rule of Criminal Procedure 3.830:
 - (i) Criminal contempt proceedings are subject to Florida's Rules of Criminal Procedure 3.830 and 3.840 and to the "constitutional limitations applicable to criminal cases including due process requirement of a burden of proof 'beyond a reasonable doubt.'" Dowis v. State, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).
 - (a) Defendant must be allowed to show cause why he should not be found guilty.
 - (1) Rule 3.830, Florida's Rules of Criminal Procedure.
 - (2) Tchapek v. Frailing, 699 So. 2d 851 (Fla. 4th DCA 1997).
 - (ii) Direct criminal contempt occurs when the court sees or hears the conduct, which constitutes the contempt.
 - (a) Tchapek v. Frailing, 699 So. 2d 851 (Fla. 4th DCA 1997).
 - (b) Jackson v. State, 779 So. 2d 379 (Fla. 2d DCA 2000). Defendant's "contemptuous behavior occurred in the presence of the trial court, frustrated an ongoing proceeding, and is apparent on the face of the record."
 - (iii) The burden of proof to support conviction for criminal contempt is beyond a reasonable doubt:
 - (a) Kramer v. State, 800 So. 2d 319, 320 (Fla. 2d DCA 2001).
 - (b) Dowis v. State, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).
 - (c) Lindman v. Ellis, 658 So. 2d 632, 634 (Fla. 2d DCA 1995).
 - (d) Tide v. State, 804 So. 2d 412, 413 (Fla. 4th DCA 2001).
 - (1) In criminal contempt proceeding, the court must require proof of defendant's guilt beyond a reasonable doubt before shifting the burden to defendant to go forward.
 - (iv) Purpose of criminal contempt is to punish.
 - (a) Tchapek v. Frailing, 699 So. 2d 851 (Fla. 4th DCA 1997).
 - (1) Kress v. State, 790 So. 2d 1207 (Fla. 2d DCA 2001). Judge cannot hold a person in direct criminal contempt of court for a profanity-

- laced tirade that takes place away from the courtroom and has nothing to do with the judge's official duties.
- (v) Woods v. State, 600 So. 2d 27, 29 (Fla. 4th DCA 1992). Failure to appear is direct contemptuous behavior.

7. FDLE Statewide Verification System:

The Florida Department of Law Enforcement has established and maintains a Domestic and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic violence injunctions issued by the courts throughout the state. Such information must include, but is not limited to, information as to the existence and status of any injunction for verification purposes. §741.30(8)(b), Florida Statutes. Note: Mutual restraining orders, if granted as part of a chapter 61, Florida Statutes, dissolution of marriage action, are not included in this registry.

8. Law Enforcement's Role in Domestic Violence Proceedings:

- a. Law enforcement officers must assist the victim of domestic violence to obtain medical attention and advise the victim that there is a domestic violence center from which the victim may receive services. Additionally, law enforcement must immediately notify the victim of his or her legal rights by providing the victim with the Legal Rights and Remedies Notice, which is developed by the Department of Children and Families and shall include the statutory language in §741.29(1)(a-b), Florida Statutes.
- b. Law enforcement officers are required to prepare reports of each act of alleged domestic violence and give the report to the officer's supervisor and file it with the law enforcement agency "in a manner that will permit data on domestic violence cases to be compiled." §741.29(2), Florida Statutes.
- c. The court may order a law enforcement officer "to accompany the petitioner and assist in placing the petitioner in possession of the dwelling or residence, or otherwise assist in the execution or service of the injunction." §741.30(8)(a)(2), Florida Statutes.
- d. Law enforcement officers may arrest the alleged abuser regardless of the consent of the alleged victim. §741.29(3), Florida Statutes.
- e. Law enforcement officers may not be held liable in a civil action because of arrests, enforcement, or service of process under chapter 741, Florida Statutes. §741.29(5), Florida Statutes.
- f. Law Enforcement Must have Defendant Sign Notice to Appear (NTA) for the Court to have Jurisdiction over the Defendant:
 - (i) Mallard v. State, 699 So. 2d 797, 798 (Fla. 4th DCA 1997).
Conviction reversed on jurisdictional grounds where the defendant was issued a NTA and was booked into the county jail. The court held that where a defendant is booked into jail, the defendant does not sign the NTA and the officer does not fill in the court information, the NTA was no longer a NTA, thus there was no charging document before the court. The court therefore lacked any jurisdiction over the defendant. Jurisdiction can

never be waived; an information must be filed whenever someone is actually booked into jail.

- (ii) However, see Florida Rule of Criminal Procedure 3.170(a): “If the sworn complaint charges the commission of a misdemeanor, the defendant may plead guilty to the charges at first appearance . . . and the judge may thereupon enter judgment and sentence without the necessity of any formal charges being filed.”

9. Procedures Subsequent to a Violation of the Injunction:

a. Three Ways Enforcement of a Violation Can Be Initiated:

- (i) Victim may contact local law enforcement.
- (ii) If the court has knowledge on its own that the petitioner, the petitioner’s children, or another person is in immediate danger if the court fails to act before the decision of the state attorney to prosecute, the court may take one of two actions:
 - (a) Court may issue an order of appointment of the state attorney to file a motion for an order to show cause why the respondent should not be held in contempt, OR
 - (b) If the court does not issue an order of appointment of the state attorney, it shall immediately notify the state attorney that the court is proceeding to enforce the violation through criminal contempt. §741.31(3), Florida Statutes.
- (iii) Victim may contact the clerk of the court’s office and receive assistance from the clerk’s office in filing an “affidavit in support of the violation.” §§741.31(1) & 741.30(2)(c), Florida Statutes.
 - (a) Once an Affidavit in Support of the Violation is Completed: The affidavit must be immediately forwarded to the state attorney’s office, the designated judge, and, if the affidavit contains allegations that a crime has been committed, it shall be forwarded to the appropriate law enforcement agency to complete an investigation within 20 days and forward an investigative report to the state attorney.
 - (b) The state attorney must determine within 30 working days whether it will file criminal charges or prepare a motion for an order to show cause why the respondent should not be held in criminal contempt, or both, or file notice that the case is under investigation or still pending. §741.31(2), Florida Statutes.

10. Obligations of the State Attorney in Prosecuting Domestic Violence Cases:

- a. Each state attorney shall develop special units or assign prosecutors, who are trained in domestic violence, to specialize in the prosecution of domestic violence cases. §741.2901(1), Florida Statutes.
- b. State attorneys are required to adopt a “pro-prosecution policy” for acts of domestic violence. The consent of the victim is not required to prosecute; the state attorney possesses prosecutorial discretion. §741.2901(2), Florida Statutes. A respondent can be prosecuted for specific acts such as assault, battery, or stalking which constituted violation of the injunction. See State v.

Suarez-Mesa, 662 So. 2d 735 (Fla. 2d DCA 1995); Jordan v. State, 802 So. 2d 1180 (Fla. 3d DCA 2001).

c. *See also infra* section IV.G., Domestic Violence - Charging and Prosecuting.

11. Preparation for First Appearance Subsequent to Arrest for Violation of an Injunction:

- a. If the respondent is arrested by law enforcement for violation of an injunction under chapter 741, Florida Statutes, law enforcement must hold the respondent in custody until first appearance when court will decide bail in accordance with chapter 903. §741.30(9)(b), Florida Statutes.
See Simpson v. City of Miami, 700 So. 2d 87 (Fla. 3d DCA 1997). Sovereign immunity did not bar wrongful death action against city arising from death of woman killed by violator of domestic violence injunction after he was released from police cruiser; if officer's action of securing violator in cruiser, after having responded to call about injunction violation, constituted "arrest" of violator, then statute left officer no discretion under sovereign immunity principles to release violator, but required him to take violator before judge.
- b. Prior to first appearance the State Attorney's Office shall perform a thorough background investigation on the respondent and present the information to the judge at first appearance, so he/she will have all pertinent information when determining bail. §741.2901(3), Florida Statutes.

12. Damages, Costs, and Attorneys' Fees for Enforcement of Injunction:

- a. Economic Damages:
The court may award economic damages to any person who suffers an injury and/or loss due to a violation of an injunction for protection against domestic violence. §741.31(6), Florida Statutes.
- b. Compensatory and Punitive Damages:
A victim of domestic violence who has suffered repeated physical or psychological injuries over an extended period of time as a result of continuing domestic violence has a cause of action for compensatory and punitive damages against the perpetrator responsible for the violence. §768.35, Florida Statutes.
- c. Attorneys' Fees: *See supra* section II.P.





DOMESTIC VIOLENCE LEGAL OUTLINE - CRIMINAL PROCEEDINGS

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I. DOMESTIC VIOLENCE - CRIMINAL PROCEEDINGS:

A. BURGLARY:

1. State v. Byars, 804 So. 2d 336 (Fla. 4th DCA 2001). The defendant was charged with first degree murder and armed burglary of an occupied structure with assault and battery. The defendant had an injunction against him, preventing him from entering the structure where the victim was killed. The defendant successfully moved that the second count of armed burglary be dismissed based on Miller v. State, 733 So. 2d 955 (Fla. 1998), in which the court held that a complete defense to burglary is established when the defendant can prove that the premises were open to the public. *The state challenged the dismissal because of the domestic violence injunction, which encompassed the victim's workplace.* The Fourth District Court of Appeal ruled that the intent of Miller must be upheld because of the statutory wording of §810.02(1), Florida Statutes. Because the defendant entered into a store which was open to the public, a charge of burglary cannot stand. The court suggested the legislature consider this issue at the next session. *Affirmed by State v. Byars*, 823 So. 2d 740 (Fla. 2002).
2. *But see* State v. Suarez-Mesa, 662 So. 2d 735 (Fla. 2d DCA 1995). The husband, who had shared the house with his wife but was restrained by court order (an injunction) from entering the property, was subject to a burglary charge when he entered the premises with the intent to commit a crime. *Distinguished by Whetstone v. State*, 778 So. 2d 338 (Fla. 1st DCA 2000).

B. JURY INSTRUCTIONS AND JURORS:

1. Tindle v. State, 832 So. 2d 966 (Fla. 5th DCA 2002). Reversible error for trial court to deny defendant's motion to dismiss the amended information, and fundamental error to instruct jury in a way permitting the jury to find that one alleged victim was threatened while the other had a well-founded fear that

violence was imminent as the crime of aggravated assault requires that the victim must both have been threatened and have a well-founded fear that the violence is imminent.

2. **Rodriguez v. State, 816 So. 2d 805 (Fla. 3d DCA 2002).** Appellant Carlos Rodriguez appealed his conviction by the circuit court for felony battery in a domestic violence case following a jury trial challenging that the trial court erred in denying his challenge for cause to a potential juror. It was found that during voir dire, the trial court did not allow defendant Rodriguez to strike a potential juror who had revealed that she had been exposed to domestic violence in her past. The Third District Court of Appeal held that a juror is not impartial when one side must overcome a set opinion in order to prevail. If a prospective juror's statements raise reasonable doubts as to that juror's ability to make an impartial verdict, the juror should be excused. Note that when it is not completely clear whether or not the juror should be dismissed, then those cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality. This error made by the trial court was irreversible and as a result the conviction was reversed and remanded.
3. **Henry v. State, 756 So. 2d 170 (Fla. 4th DCA 2000).** The Fourth District Court of Appeal held that where the defendant was convicted for violating an injunction for protection against domestic violence, a new trial was required based on the fact that the trial court erroneously failed to excuse a juror for cause. The juror, who in his capacity as a paramedic and firefighter regularly worked with the police department and had responded to a number of domestic violence cases, gave answers which demonstrated reasonable doubt as to his ability to lay aside a bias in favor of law enforcement.

C. WARRANTLESS ARREST POWERS:

1. **Arrest Powers under §901.15, Florida Statutes: a Law Enforcement Officer May Arrest a Person Without a Warrant When:**
 - a. §901.15(6), Florida Statutes - There is probable cause to believe that the person has committed a criminal act according to . . . §741.31 or §784.047, Florida Statutes, which violates an injunction for protection entered pursuant to §741.31 or §784.046, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes, over the objection of the petitioner, if necessary.
 - b. §901.15(7), Florida Statutes - There is probable cause to believe that the person has committed an act of domestic violence as defined in §741.28, Florida Statutes, or dating violence as provided in §784.046, Florida Statutes. The decision to arrest shall not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to strongly discourage arrest and charges of both parties for

domestic violence on each other and to encourage training of law enforcement and prosecutors in this area.

- c. §901.15(8), Florida Statutes - There is probable cause to believe that the person has committed child abuse, as defined in §827.03, or has violated §787.025, relating to luring or enticing a child for unlawful purposes. The decision to arrest shall not require consent of the victim or consideration of the relationship of the parties. It is public policy of this state to protect abused children by strongly encouraging the arrest and prosecution of persons who commit child abuse. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection is immune from civil liability that otherwise might result by reason of his or her action.
 - d. §901.15(13), Florida Statutes, was created giving police warrantless arrest powers where there is probable cause to believe that a person has violated a condition of pretrial release when the original arrest was for an act of domestic violence.
 - e. *But see Espiet v. State*, 797 So. 2d 598 (Fla. 5th DCA 2001). The courts generally agree that a law enforcement officer may not make a warrantless entry into a person's home to arrest the person for a misdemeanor offense. The provisions of §901.15(7), Florida Statutes, which allow a law enforcement officer to arrest a person for an act of domestic violence without a warrant, do not permit the forcible entry into the person's home to effectuate the arrest based on a misdemeanor offense. The decision of the trial court is reversed and remanded. *See also infra* section (3).
 - f. *Also see Davis v. State*, 834 So. 2d 322 (Fla. 5th DCA 2003). The court held that warrantless entry is premised on the notion that law enforcement may enter and investigate an emergency, without the accompanying intent to seize or arrest. "The sine qua non of the exigent circumstance exception is 'a compelling need for official action and no time to secure a warrant.'" (*citing Michigan v. Tyler*, 98 S.Ct. 1942 (1978).) While there is no list of exigencies that are appropriate for warrantless entry, precedent suggests that emergencies relating to the safety of persons or property may support a warrantless entry into the home.
 - g. *See also Seibert v. State*, 923 So. 2d 460 (Fla. 2006), which affirmed the exigent circumstances exception as a basis for a warrantless entry.
2. **Arrest Powers Under §741.29(3), Florida Statutes:** Whenever a law enforcement officer determines upon probable cause that an act of domestic violence has been committed within the jurisdiction the officer may arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime. The decision to arrest and charge shall not require consent of the victim or consideration of the relationship of the parties.
3. **Warrantless Misdemeanor Arrest in Private Residence:**
- a. Invalid:

- (i) State v. Eastman, 553 So. 2d 349 (Fla. 4th DCA 1989). Arrest held invalid where trooper chased defendant three miles with lights flashing and siren on, followed defendant into his home and arrested him for fleeing. Subsequent DUI arrest based upon facts obtained after entering home also invalid.
- (ii) Drumm v. State, 530 So. 2d 394 (Fla. 4th DCA 1988).
- (iii) Welsh v. Wisconsin, 466 U.S. 740 (1984).
- (iv) Guerrie v. State, 691 So. 2d 1132 (Fla. 4th DCA 1997). LEO may not enter a private residence to effect a warrantless misdemeanor arrest even when the crime was committed in the LEO's presence.
- (v) Espiet v. State, 797 So. 2d 598 (Fla. 5th DCA 2001), *supra* (Domestic violence).
- (vi) M.J.R. v. State, 715 So. 2d 1103 (Fla. 5th DCA 1998).
- (vii) Conner v. State, 641 So. 2d 143 (Fla. 4th DCA), rev. denied. 649 So. 2d 234 (Fla. 1994).
- (viii) Johnson v. State, 395 So. 2d 594 (Fla. 2d DCA 1981).
- b. Valid: Gasset v. State, 490 So. 2d 97 (Fla. 3d DCA), rev. denied, 500 So. 2d 544 (Fla. 1986).

Dual Arrest Policy -§741.29(4)(b), Florida Statutes, created a dual arrest policy for police. If a law enforcement officer has probable cause to believe that two or more persons have committed a misdemeanor or felony, or if two or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response only with respect to the primary aggressor and not the preferred response to a person who acts in a reasonable manner to protect or defend oneself or another family or household member from domestic violence.

D. IMMUNITY OF LAW ENFORCEMENT UNDER FLORIDA STATUTES:

1. **§901.15(7), Florida Statutes** - A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection, under §741.31(4) or §784.047, or pursuant to a foreign order of protection accorded full faith and credit pursuant to §741.315, is immune from civil liability that otherwise might result by reason of his or her actions.
2. **§741.29(5), Florida Statutes** - No law enforcement officer shall be held liable, in any civil action, for an arrest based on probable cause, enforcement in good faith of a court order, or service of process in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.
3. **§741.315(4)(f), Florida Statutes** - A law enforcement officer acting in good faith under this section and the officer's employing agency shall be immune from all liability, civil, or criminal, that might otherwise be incurred or

imposed by reason of the officer's or agency's actions in carrying out the visions of this section.

4. *But see* **Brown v. Woodham**, 840 So. 2d 1105 (Fla. 1st DCA 2003). The court concluded that the sheriff had a special duty of care as it was reasonably foreseeable that individual, who was visiting defendant's wife at the time of the murder, would be in danger if the defendant was released from custody without sufficient warning.

E. VICTIM'S RIGHTS:

1. **Article I, Section 16(b), Florida Constitution.** "Victims of crime or their legal representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."
2. ***See Generally*, §960.001, Florida Statutes.**
3. **Victim's Right to be Present in Court During Trial:**
 - a. Here, the trial court heard argument of counsel before deciding whether the sequestration rule would be applied to the victim's next of kin. Key to the decision was the fact that the witnesses' testimony had been memorialized in prior depositions. Under these circumstances, the trial court did not err in denying defense counsel's request to apply the rule of sequestration to the victim's next of kin. **Beasley v. State**, 774 So. 2d 649 (Fla. 2000).
 - b. Mother of child victim had a statutory and constitutional right to remain in the courtroom in the penalty phase of a capital murder prosecution in the absence of a showing of prejudice. **Rose v. State**, 787 So. 2d 786 (Fla. 2001).
 - c. Excluding a murder victim's great-niece from the courtroom during the defendant's case before she testified as a defense witness violated her constitutional right to be present as the next of kin of a homicide victim; since the constitutional right to be present did not conflict with the right to a fair trial, the constitutional right prevailed over the rule of sequestration in the penalty phase of a capital murder prosecution. **Booker v. State**, 773 So. 2d 1079 (Fla. 2000).
 - d. Where victim's right to be present at defendant's trial might conflict with defendant's right to received fair trial, doubts should be resolved in favor of defendant receiving a fair trial. **Martinez v. State**, 664 So. 2d 1034 (Fla. 4th DCA 1995), **Cain v. State**, 758 So. 2d 1257 (Fla. 4th DCA 2000).
 - e. The victim is entitled to be present at all proceedings, including the trial, as long as it does not prejudice the defendant. **Gore v. State**, 599 So. 2d 978 (Fla. 1992). *See also* **Beasley v. State**, 774 So. 2d 649 (Fla. 2000).

4. **Victim's Right to be Properly Notified of Court Hearing Defendant's Pleas:** Ford v. State, 829 So. 2d 946 (Fla. 4th DCA 2002). Pleas quashed after constitutional rights of victim violated because victim received insufficient notice of hearing in which court accepted guilty pleas of defendants.
5. **Prosecutor Disciplinary Action for Violating Victim's Rights:**
 - a. In re: Disciplinary proceedings Against Lindberg, 494 N.W.2d 421 (Wis. 1993). Failure by prosecutor to contact victim in timely manner reference preliminary proceeding was grounds for disciplinary action.
 - b. The Florida Bar v. Buckle, 771 So. 2d 1131 (Fla. 2000). Lawyer misconduct: "An attorney was publicly reprimanded for sending a letter to the alleged victim of a battery that insinuated that the attorney would take her away from her job and her children and expose her to ridicule, contempt and hatred." The letter was sent after the attorney had spoken with the alleged victim by phone and told not to contact her. The Supreme Court of Florida found that the letter was a clear attempt to have the alleged victim drop the charges against the attorney's client and the contents of the letter violated Rule of Professional Conduct 4-4.4 and 4-8.4(d).
6. **Withholding Victim's Address and Current Place of Employment from Defendant Was Within the Trial Court's Discretion.** Deluge v. State, 710 So. 2d 83 (Fla. 5th DCA 1998).
7. **Court Does Not Error By Imposing Sentence Greater Than That Recommended By the Victim.** Pandolph v. State, 710 So. 2d 577 (Fla. 4th DCA 1998).
8. Yesnes v. State, 440 So. 2d 628 (Fla. 1st DCA 1983) (concurring opinion). "We should be grateful that this great country of ours has perfected the greatest justice system known to mankind. We should continually strive to better it. But, while doing this, should we ignore the rights of the lawful, should we ignore the rights of victims, should we ignore the rights of taxpayers? No! Should we consider only the rights of criminals who have shown no respect for their victims, for the law of the land, for the constitution of our country and state? No."

F. PARENTAL DISCIPLINE/BATTERY ON A CHILD:

1. **Child Abuse Defined §827.03, Florida Statutes** - the intentional infliction of physical or mental injury upon a child; an intentional act that could reasonably be expected to result in physical or mental injury to a child; or active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child. A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a

felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084, Florida Statutes.

2. **Over a century ago the Florida Supreme Court Reaffirmed the Right of a Parent to Moderately Chastise or Correct a Child under Their Authority.** Marshall v. Reams, 32 Fla. 499, 14 So. 95 (1893). However, that power is not absolute.
 - a. Raford v. State, 828 So. 2d 1012, (Fla. 2002). The court held that a parent or one standing in loco parentis has no absolute immunity and may be convicted of the lesser offense of felony child abuse under §827.03(1), Florida Statutes.
 - b. Brown v. State, 802 So. 2d 434 (Fla. 4th DCA 2001). “Even if the evidence in the present case had established a ‘typical spanking’, the parental privilege to administer corporal punishment is an affirmative defense which is waived if not asserted.”
 - c. Nixon v. State, 773 So. 2d 1213 (Fla. 1st DCA 2000). The defendant waived his right to assert privilege for battery on child by a parent by requesting instruction on lesser-included offense of simple child abuse.
 - d. State v. McDonald, 785 So. 2d 640 (Fla. 2d DCA 2001). “[A] father’s ‘privilege’ to reasonably discipline a child does not bar prosecution for simple child abuse when the beating results in bruising severe enough to require the child’s treatment at a hospital.” Common law recognizes a parent’s right to discipline a child, “in a reasonable manner”, and prevents prosecution for simple battery; however, no such privilege exists as to the separate statutory crime of child abuse.” “Our current child abuse statutes attempt to define the boundary between permissible parental discipline and prohibited child abuse.”
 - e. G.C. v. R.S., 71 So.3d 164 (Fla. 1st DCA 2011). The father appealed a final judgment of injunction for protection against domestic violence. The petition for injunction was filed by his former wife on behalf of their minor child after the father administered a single spank on the child’s buttocks in response to the child’s disrespectful and defiant behavior. The appellate court confirmed that a spouse has standing to seek an injunction against domestic violence against a former spouse on behalf of the parties’ children. However, the court also noted that the common law recognized a parent’s right to discipline his or her child in a reasonable manner, and that in both civil and criminal child abuse proceedings, a parent’s right to administer reasonable and non-excessive corporal punishment to discipline their children is legislatively recognized. The court held that under established Florida law this single spank constituted reasonable and non-excessive parental corporal discipline and, as a matter of law, was not domestic violence. The court also stated that reasonable parental discipline is available as a defense against a petition for an injunction against domestic violence.

G. CHARGING AND PROSECUTING:

1. Obligations of the Attorney:

- a. Each state attorney shall develop special units or assign prosecutors, who are trained in domestic violence, to specialize in the prosecution of domestic violence cases. §741.2901(1), Florida Statutes.
- b. State attorneys are required to adopt a “pro-prosecution policy” for acts of domestic violence. The consent of the victim is not required to prosecute; the state attorney possesses prosecutorial discretion. §741.2901(2), Florida Statutes. A respondent can be prosecuted for specific acts such as assault, battery, or stalking which constituted violation of the injunction. See State v. Suarez-Mesa, 662 So. 2d 735 (Fla. 2d DCA 1995); Jordan v. State, 802 So. 2d 1180 (Fla. 3d DCA 2002).
- c. See also *supra* section II.R.(9), Obligations of the Attorney in Prosecuting Domestic Violence Cases.

2. Discretionary Executive Function:

- a. The state attorney has complete discretion in the decision whether to charge and prosecute.
 - (i) Valdes v. State, 728 So. 2d 736 (Fla. 1999).
 - (ii) Cleveland v. State, 417 So. 2d 653, 654 (Fla. 1982).
- b. The decision to prosecute does not lie with the victim of a crime.
 - (i) State v. Wheeler, 745 So. 2d 1094 (Fla. 4th DCA 1999).
 - (ii) McArthur v. State, 597 So. 2d 406 (Fla. 1st DCA 1992). “The thrust of appellant’s argument is that he should not have been charged in a domestic dispute where the victim advised the state attorney’s office that she did not wish to prosecute. Since the decision to charge was the prerogative of the prosecutor, the argument is unavailing.
 - (iii) State v. Brown, 416 So. 2d 1258 (Fla. 4th DCA 1982).
- c. The judiciary cannot interfere with this discretionary executive function.
 - (i) Valdes v. State, *supra*.
 - (ii) State v. Bloom, 497 So. 2d 2, 3 (Fla. 1986).
- d. State, not trial court, makes decisions whether to prosecute.
 - (i) State v. Bryant, 549 So. 2d 1155 (Fla. 3d DCA 1989).
 - (ii) State v. Jogan, 388 So. 2d 322 (Fla. 3d DCA 1980). State Attorney has sole discretion to either prosecute or nolle prosequere a defendant.
 - (iii) In the Interest of S.R.P., 397 So. 2d 1052 (Fla. 4th DCA 1981). Decision to file nolle prosequere vested solely in discretion of State.
 - (iv) Cleveland v. State, 417 So. 2d 653, 654 (Fla. 1982). “State attorney has complete discretion in making the decision to charge and prosecute.”
 - (v) State v. Wheeler, 745 So. 2d 1094 (Fla. 4th DCA 1999). “Notwithstanding the court’s belief that the best interest of the public and the parties would be served by dismissal, it is the state attorney who ‘who make the final determination as to whether prosecution will continue.’”
- e. Court Improperly Dismissed Information Where State Attorney Determined to Prosecute:
 - (i) State v. Greaux, 977 So. 2d 614 (Fla. 4th DCA 2008). A victim in a criminal domestic violence case stated that she wanted to drop the

charges against the defendant, and the court dismissed the case sua sponte. The appellate court held that only the prosecutor has the authority to decide whether or not to go forward with the prosecution and that the trial court erred in dismissing the case.

- (ii) State v. Rubel, 647 So. 2d 995 (Fla. 2d DCA 1994). The State shall make the final determination as to whether the prosecution shall continue.
- (iii) State v. Conley, 799 So. 2d 400 (Fla. 4th DCA 2001). The State appealed an order dismissing a felony battery. An adversarial hearing occurred but the state had neglected to subpoena the witnesses to the events. The victim was present and claimed that she instigated the argument and the injuries she sustained were a result of her own actions, directly contradicting the eyewitness account. The victim claimed she never wanted charges brought against the defendant. The judge dismissed the charges despite the state's objection. In relying on both Florida Rule of Criminal Procedure 3.133(b), and on State v. Hollie, 736 So. 2d 96 (Fla. 4th DCA 1999), the Fourth District Court of Appeal held that because the hearing was an adversarial hearing, where the defendant never motioned the court for a dismissal, and because probable cause was clearly established, a dismissal was clearly in error. Judge Warner concurs in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery is a defense. Consent is only a defense in cases of sexual battery, NOT domestic violence. Judge Warner continues by noting that consent as a defense to domestic violence is in complete contravention to §741.2901(2), Florida Statutes, in that the intent behind creating the statute is to make domestic violence a criminal act, as opposed to a "private matter."

f. Severance/Joiner of Offenses:

- (i) Joiner of Offenses: Florida Rule of Criminal Procedure 3.150(a) -- Two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both are based on the same act or transaction or on two or more connected acts or transactions.
- (ii) Trying defendant for both battery LEO and DUI together was not error when battery charge occurred while defendant was in-route to breath-testing facility. Hamilton v. State, 458 So. 2d 863 (Fla. 4th DCA 1984).

g. Prosecution and Conviction of Stalking:

- (i) State v. Gagne, 680 So. 2d 1041 (Fla. 4th DCA 1996). Double jeopardy does not bar a subsequent prosecution for aggravated stalking where the defendant had previously been convicted for violating an injunction based on the same conduct.
- (ii) State v. Johnson, 676 So. 2d 408 (Fla. 1996).
- (iii) The defendant was properly convicted of aggravated stalking where he had previously been convicted of contempt for violating an injunction

based on the same conduct. Each of the offenses contained an element not contained in the other offense.

(iv) *See also infra* section H. Double Jeopardy.

- h. *See also supra* section II.R.(8), Preparation for First Appearance Subsequent to Arrest for Violation of an Injunction.

- 3. **The Victim's Lack of Consent to a Battery Can Be Proven With Circumstantial Evidence.** State v. Clyatt, 976 So. 2d 1182 (Fla. 5th DCA 2008). The defendant was charged with felony battery pursuant to §784.03(2), Florida Statutes (2007), for repeatedly striking the victim. The victim refused to testify, but the state attorney's office pursued the case. To prove the case pursuant to §784.03 (1)(a)(1), Florida Statutes, the State was required to prove that the defendant touched or struck the victim against her will. Because the State could not produce a Florida case stating that a purported battery victim's lack of consent could be proved circumstantially without the victim's testimony, the trial court did not allow the State's witnesses to testify regarding their observations. Although no Florida court has directly held that lack of consent can be established by circumstantial evidence in a simple battery case, Florida courts have recognized circumstantial evidence as sufficient to support a lack of consent finding in other types of criminal prosecutions. Additionally, Florida courts have routinely found circumstantial evidence sufficient to prove a victim's or defendant's state of mind on issues other than consent. Generally, the test for admissibility of evidence is its relevance. Because the State's evidence was clearly relevant to the issue of the victim's lack of consent, and because there is no rule of law barring the State from using circumstantial evidence to prove lack of consent, the appellate court held that the trial court should have allowed the witnesses to testify.

H. DOUBLE JEOPARDY:

- 1. **Double Jeopardy Clause Applies to All "Crimes":**
 - a. Ex Parte Lange, 85 U.S. 163 (1873). "(N)o man shall be twice punished by judicial judgments for the same offence." This applies to both criminal and civil cases.
 - b. Criminal contempt is a crime in every fundamental respect.
 - (i) Codispoti v. Pennsylvania, 418 U.S. 506 (1974).
 - (ii) Attwood v. State, 687 So. 2d 271 (Fla. 4th DCA 1997).
 - (iii) Civil and criminal sentences served distinct purposes, one coercive, the other punitive and deterrent; the fact that the same act may give rise to both of these distinct sanctions presents no double jeopardy problem. Yates v. U.S., 355 U.S. 66 (1957), Featherstone v. Montana, 684 So. 2d 233 (Fla. 3d DCA 1996).
 - c. It may be generally said that the Double Jeopardy Clause has no application in non-criminal cases.

- (i) An award of punitive damages in a civil lawsuit does not bar subsequent criminal prosecution for the offense. Smith v. Bagwell, 19 Fla. 117 (1882).
- (ii) Helvering v. Mitchell, 303 U.S. 391 (1938). “[C]ongress may impose both a criminal and civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.”
- (iii) Defendant may be convicted of indirect criminal contempt even though there has previously been a civil contempt adjudication based on the same noncompliance with court orders.
- (iv) A prior arbitration award under a collective bargaining agreement where a postal employee was suspended for thirty (30) days did not bar a subsequent prosecution for misappropriating postal funds involving the same conduct. U.S. v. Reed, 937 F.2d 575 (11th Cir. 1991).

2. The Guarantee Against Double Jeopardy Consists of Three Protections:

Lippman v. State, 633 So. 2d 1061 (Fla. 1994).

- a. Against a second prosecution for the same offense after acquittal,
- b. Against a second prosecution for same offense after conviction, and
- c. Against multiple punishments for the same offense.

3. Defendant May Properly Be Convicted of Aggravated Stalking Where He Had Previously Been Convicted of Contempt for Violating an Injunction Based on the Same Conduct:

- a. State v. Johnson, 676 So. 2d 408 (Fla. 1996). The defendant was properly convicted of aggravated stalking where he had previously been convicted of contempt for violating an injunction based on the same conduct. Each of the offenses contained an element not contained in the other. *See also Williams v. State*, 673 So. 2d 486 (Fla. 1996).
- b. State v. Gagne, 680 So. 2d 1041 (Fla. 4th DCA 1996). Double jeopardy does not bar a subsequent prosecution for aggravated stalking where the defendant had previously been convicted for violating an injunction based on the same conduct. *See also State v. Miranda*, 644 So. 2d 342 (Fla. 2d DCA 1994). *Approved*; State v. Johnson, 676 So. 2d 408 (Fla. 1996). Holding that the rule against double jeopardy did not bar a prosecution for aggravated stalking even though defendant had previously been convicted of criminal contempt for violating an injunction based on the same conduct because each offense contained at least one element that the other did not.
- c. Richardson v. Lewis, 639 So. 2d 1098 (Fla. 2d DCA 1994). Defendant may properly be charged with indirect criminal contempt for violating an injunction prohibiting defendant from committing battery on or entering residence of his former girl friend although he had previously been convicted of armed trespass aggravated battery arising out of the same incident.

4. Where Defendant Pointed a Gun at the Victim and Stabbed the Victim After the Gun Had Been Taken Away, Both Acts Occurring in Uninterrupted Sequence are Properly Viewed as Being but a Single Act; Thus Attempted Second Degree Murder By the Gun and Aggravated Battery By the Knife are Barred By Double Jeopardy. Gresham V. State, 725 So. 2d 419 (Fla. 4th DCA 1999).
5. Sentencing of Defendant on Both Battery and Violation of Domestic Violence Injunction Counts Violated Double Jeopardy Clause. Doty v. State, 884 So. 2d 547 (Fla. 4th DCA 2004).
See also Young v. State, 827 So. 2d 1075 (Fla. 5th DCA 2002). Double Jeopardy bars conviction for both battery AND violation of injunction (here, for repeat violence) where the violation consists of the battery itself: “Young was convicted of violating the injunction by committing a battery. Because of the crime of battery did not contain any elements distinct from the elements of a violation of §784.047 [prohibiting willfully violating an injunction for protection against repeat violence], the crimes are not separate under the Blockburger test.”
6. Multiple Charging:
 - a. Double jeopardy prohibits multiple homicide convictions for a single death. Barnes v. State, 528 So. 2d 69 (Fla. 4th DCA 1988).
 - b. HOWEVER: Although a defendant cannot be convicted of multiple homicide offenses based on a single death, he can be charged with multiple crimes.
 - (i) State v. Lewek, 656 So. 2d 268 (Fla. 4th DCA 1995).
 - (ii) *See also* State v. Miller, 700 So. 2d 1253 (Fla. 1st DCA 1997).
Double jeopardy principles did not preclude multiple charges, even though charges arose from single DUI violation.
 - (iii) THUS: State can charge defendant with domestic battery and violation of injunction in the same information regardless of double jeopardy considerations, although double jeopardy bars conviction for both.

I. PREPARATION FOR FIRST APPEARANCE SUBSEQUENT TO ARREST FOR VIOLATION OF AN INJUNCTION:

1. If the respondent is arrested by law enforcement for violation of an injunction under chapter 741, Florida Statutes, law enforcement must hold the respondent in custody until first appearance when court will decide bail in accordance with chapter 903. §§ 741.30(9)(b) & 741.2901(3), Florida Statutes. Murder was committed by a person who was the subject of a domestic violence injunction, who was placed in a police cruiser by a law enforcement officer dispatched to the victim’s home after the victim called the police department, and who was subsequently released after he promised the officer he would leave the victim alone. It was error to dismiss the complaint with prejudice. On remand, the plaintiff was given leave to amend

her complaint to allege an arrest since the officer had no discretion under sovereign immunity principles to release a violator who had been arrested. Simpson v. City of Miami, 700 So. 2d 87 (Fla. 3d DCA 1997).

2. Prior to first appearance the State Attorney's Office shall perform a thorough background investigation on the respondent and present the information to the judge at first appearance, so he/she will have all pertinent information when determining bail. §741.2901(3), Florida Statutes.
3. See also II. Domestic Violence - Civil Proceedings, section R.(6) and (7), for information about Indirect and Direct Criminal Contempt.

J. DOMESTIC VIOLENCE PRETRIAL RELEASE/DETENTION:

1. Pretrial release:

- a. No bond until First Appearance. §741.2901(3), Florida Statutes.
- b. §741.29(6), Florida Statutes: A person who willfully violates a condition of pretrial release when the original arrest was for an act of domestic violence commits a first degree misdemeanor and shall be held in custody until his or her first appearance.
- c. Judicial Obligation: The court shall consider the safety of the victim, the victim's children, and any other person who may be in danger if the defendant is released, and exercise caution in releasing defendants. §741.2902(1), Florida Statutes.
- d. There is probable cause to believe that the person has committed an act that violates a condition of pretrial release provided in §903.047 when the original arrest was for an act of domestic violence as defined in §741.28, Florida Statutes, or when the original arrest was for an act of dating violence as defined in §784.046. §901.15(13), Florida Statutes.
- e. State Attorney Offices should have victim advocate contact the victim before the first appearance hearing.
 - (i) Counties should have the availability for victims to obtain an injunction for protection at the first appearance hearing.
 - (ii) Section 741.30(6)(a)(5), Florida Statutes, authorizes courts issuing an injunction to order the respondent to participate in treatment, intervention, or counseling services.
- f. Judicial Discretion Regarding Arrest Warrant Issued by Another Judge: First appearance judge has the authority and duty to consider the appropriate conditions of release for a defendant arrested on a warrant issued by another judge. State v. Norris, 768 So. 2d 1070 (Fla. 2000).

2. Pretrial Detention:

- a. Section 907.041(4)(a)(18), Florida Statutes, classifies domestic violence as a "dangerous crime."

- b. Section 907.041(4)(b), Florida Statutes: “No person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing; however the court shall retain the discretion to release an accused on electronic monitoring or on recognizance bond if the findings on the record and circumstances warrant such release.”
- c. Section 907.041(4)(c)(1-2,6), Florida Statutes, authorizes a court to order pretrial detention if it finds a substantial probability, based on a defendant’s past and present patterns of behavior, the criteria in §903.046, Florida Statutes, and any other relevant facts, that any of the following circumstances exist:
 - (i) The defendant has previously violated conditions of release and that no further conditions of release are reasonably likely to assure his appearance at subsequent proceedings;
 - (ii) The defendant, with the intent to obstruct the judicial process, has threatened, intimidated, or injured any victim, potential witness, . . . or has attempted or conspired to do so, and that no further conditions of release are reasonably likely to assure his appearance at subsequent proceedings;
 - (iii) The defendant is on probation, parole, or other release pending completion of sentence or on pretrial release for a *dangerous crime* at the time of the current arrest.
- d. Where defendant is held without bond on an offense which is not designated a “dangerous crime” the State must prove that there are no reasonable conditions of release that would secure the defendant’s appearance at trial.
 - (i) Martinez v. State, 715 So. 2d 1024 (Fla. 4th DCA 1998).
 - (ii) Dupree v. Cochran, 698 So. 2d 945 (Fla. 4th DCA 1997)
- e. Arguments for Detention or High Bond -
 - (i) Prior criminal record:
 - (a) NCIC/FCIC
 - (b) Local records check
 - (c) Input from victim or police.
 - (ii) Ties to the jurisdiction:
 - (a) Family
 - (b) Property
 - (c) Employment
 - (d) Passport
 - (e) Pilot license
 - (iii) Victim safety:
 - (a) Statements by the defendant, reference future harm to the victim or witnesses.
 - (b) Seriousness of the instant offense.
 - (c) Prior violence offenses or harm to the victim.
- f. Recommended conditions for pretrial release:
 - (i) No contact (or violent contact) with the victim;
 - (a) Consider having victim obtain caller ID and call block,

- (b) Have the victim consider changing the phone number to unlisted and change the locks on the house,
- (c) Issue and explain safety plan to the victim,
- (d) Consider initiating a program to issue a 911 cellular phone to the victim.

Example Program Overview: A cooperative venture between local criminal justice agencies and the local cellular telephones may be available at no cost to victims. Specified victims are provided cellular telephones which have been pre-programmed for 911 access only, which victims can have with them at all times, but especially when they are most vulnerable. The cellular telephone provides a tool for security in that 911 assistance is just a phone call away.

- (ii) No possession of dangerous weapons;
- (iii) No possession or consumption of alcohol;
- (iv) Random alcohol/drug testing;
- (v) Geographical restrictions;
- (vi) Counseling - violence and/or substance abuse;
- (vii) Electronic monitoring.
 - (a) Home detention (house arrest)
 - (b) Receiver alarm at victim's house
 - (1) When perpetrator is close, the victim's receiver emits an alarm.
 - (2) Victim's receiver automatically calls monitoring center.
 - (3) Police are notified immediately.
 - (4) Communicator inside receiver turns on.
 - (5) Monitoring center begins to record audio.
 - (6) Electronic record demonstrates violation of court order.
- (viii) Note: These same pretrial conditions would be valid special conditions of probation.

K. BAIL:

1. Purpose of Bail:

- a. Ensure that appearance of the criminal defendant at subsequent proceedings; and, to protect the community against unreasonable danger from the criminal defendant. §903.046(1), Florida Statutes.
- b. To assure the integrity of the judicial process. §907.041(3)(a), Florida Statutes.

2. Initial Determination and Bail Modification:

- a. The court shall consider the following when determining bail:
 - (i) The safety of the victim,
 - (ii) The victim's children, and
 - (iii) Any other person who may be in danger if the defendant is released. §741.2902(1), Florida Statutes.

- b. Once bail is set, the State may move to modify it “by showing good cause,” with notice to the defendant.
 - (i) Florida Rule of Criminal Procedure 3.131(d)(2).
 - (ii) Keane v. Cochran, 614 So. 2d 1186 (Fla. 4th DCA 1993).
 - (iii) However: In contrast there is no requirement of showing good cause when a defendant moves to reduce bond.
 - (a) Florida Rule of Criminal Procedure 3.131(d)(2).
 - (b) Keane v. Cockran, 614 So. 2d 1186 (Fla. 4th DCA 1993). “This suggests that the state has a greater burden to carry to increase a bond than a defendant had to reduce it.”
 - (c) Defendant has the burden of proof when seeking a bail reduction to adduce evidence sufficient to overcome the presumption of correctness of the trial court’s order. Mesidor v. Neumann, 721 So. 2d 810 (Fla. 4th DCA 1999).
- c. In order to have good cause to modify a bond, the State must present evidence of a change in circumstances or information not made known to the first appearance judge.
 - (i) Keane v. Cochran, 614 So. 2d 1186 (Fla. 4th DCA 1993).
 - (ii) Kelsey v. McMillan, 560 So. 2d 1343 (Fla. 1st DCA 1990).
 - (iii) Sikes v. McMillan, 564 So. 2d 1206 (Fla. 1st DCA 1990).
Where there was conflicting evidence as to whether the first appearance judge had the same information as the trial judge who increased a bond, and the conflict was not resolved, the State failed to carry its burden of demonstrating adequate grounds to increase bail.
- d. Bond can be denied or revoked to assure the integrity of the judicial process.
 - (i) §903.0471, Florida Statutes.
 - (ii) Ex Parte McDaniel, 86 Fla. 145, 97 So. 317, 318 (Fla. 1923).
 - (iii) Witness tampering would violate the conditions of pretrial release and disrupt the integrity of the court. Arcia v. Manning, 680 So. 2d 1146 (Fla. 3d DCA 1996).
 - (iv) §903.0471, Florida Statutes, violations of conditions of pretrial release.
 - (a) Notwithstanding §907.041, a court may, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that the defendant committed a new crime while on pretrial release. Parker v. State, 780 So. 2d 210 (Fla. 4th DCA 2001).
 - (1) Statute is constitutional. State v. Paul, 783 So. 2d 1042 (Fla. 2001).
 - (2) Trial court properly revoked pretrial release and placed defendant in pretrial detention upon finding probable cause that defendant committed new crime while on pretrial release.
 - (b) Williams v. Spears, 814 So. 2d 1167 (Fla. 3d DCA 2002).
 - (1) Statute authorizing courts to revoke pretrial release where there is probable cause to believe a defendant has committed a new crime while free on bail is constitutional.

- (2) “The reason for revoking the defendant’s pretrial release in this case - and refusing to further release - is because the defendant committed a new crime while on pretrial release. No showing that the defendant poses a risk of physical harm is required.”
- (3) “The integrity of the judicial process is undercut if the courts do not have effective tools to use where a defendant free on bail commits a further crime.”
- e. Trial court may not increase bond on its own motion.
 - (i) Flemming v. Cochran, 694 So. 2d 131 (Fla. 4th DCA 1997).
 - (ii) Bowers v. Jenne, 710 So. 2d 681 (Fla. 4th DCA 1998).
 - (iii) Cousino v. Jenne, 717 So. 2d 599 (Fla. 4th DCA 1998).
 - (iv) Mongomery v. Jenne, 744 So. 2d 1148 (Fla. 4th DCA 1999).
 - (v) Welch v. Jenne, 770 So. 2d 731 (Fla. 4th DCA 2000).

3. Denial of Bail:

- a. To deny an accused the right to bail in a capital case under our constitution, the State must present proof that guilt is evident or the presumption of guilt is great.
 - (i) State ex rel. Van Eeghen v. Williams, 87 So. 2d 45 (Fla. 1956).
Specifically, the court held that the state is actually held to an even greater degree of proof than that required to establish guilt beyond a reasonable doubt.
 - (ii) Russell v. State, 71 Fla. 236, 71 So. 27 (Fla. 1916).
 - (iii) State v. Arthur, 390 So. 2d 717 (Fla. 1980).
 - (iv) Mininni v. Gillum, 477 So. 2d 1013 (Fla. 2d DCA 1985).
- b. Proof Required:
 - (i) The State must rely on something more than the Indictment and the probable cause affidavit to have bailed denied.
 - (a) State v. Arthur, 390 So. 2d 717 (Fla. 1980).
 - (b) Young v. Neumann, 770 So. 2d 205 (Fla. 4th DCA 2000).
 - (ii) Admissible Hearsay:
 - (a) State v. Arthur, 390 So. 2d 717 (Fla. 1980).
 - (1) “The state can probably carry this burden by presenting the evidence relied upon by the grant jury or the state attorney in charging the crime.”
 - (2) “This evidence may be presented in the form of transcripts or affidavits.”
 - (01) Mininni v. Gillum, 477 So. 2d 1013 (Fla. 2d DCA 1985).
 - (02) Kinson v. Carson, 409 So. 2d 1212 (Fla. 1st DCA 1982).
 - (iii) Proof Beyond a Reasonable Doubt:
Burden of proof on State even when defense moves for bail. Gomez v. McCampbell, 701 So. 2d 412 (Fla. 4th DCA 1997).
- c. Circumstances valid for denial of bail:
 - (i) Martin v. State, 700 So. 2d 809 (Fla. 4th DCA 1997).
 - (a) Lack of ties to the community;
 - (b) Lack of regard for the orders of the courts;

- (c) Expressed intent of leaving jurisdiction.
- d. Appellate remedy:
 - (i) Through writ of mandamus.
 - (a) Martin v. Circuit Court of the Fifteenth Judicial Circuit, 690 So. 2d 674 (Fla. 4th DCA 1997). Mandamus will lie to compel the timely performance of a purely ministerial duty, such as entering a ruling on a bond motion.
 - (b) Kramp v. Fagan, 568 So. 2d 479 (Fla. 1st DCA 1990).
 - (c) Review of an order relating to post-trial release shall be by the court on motion. Florida Rule of Appellate Procedure 9.140(h)(4).
 - (ii) Writ of Habeas Corpus.
 - (a) Flemming v. Cochran, 694 So. 2d 131 (Fla. 4th DCA 1997).

L. PRETRIAL INTERVENTION:

1. **Batter Intervention Programs:** If a person is found guilty of, has had adjudication withheld on, or has pled nolo contendere to a crime of domestic violence, as defined in §741.28, Florida Statutes, the COURT MUST ORDER -
 - a. a minimum term of 1 year's probation, and
 - b. attendance at a batterer intervention program as a condition of probation; UNLESS the court determines not to impose attendance and states on the record why a batterer intervention program might be inappropriate. §741.281, Florida Statutes.
2. **Plea and Pass Diversion Program:** The following are guidelines for a State Attorney "plea & pass" program:
 - a. "Plea & pass" is a form of diversion to be utilized for cases where the State is unable to proceed with the prosecution. (Alternatively, in cases where there is a cooperating victim or the case is otherwise provable, probation with counseling or incarceration will be the standard disposition.)
 - b. "Plea & pass" should be considered in the following type cases:
 - (i) Where the victim will not cooperate and the case cannot otherwise be proven. (Proceed with caution.)
 - (ii) For first offenders, where victim agrees and is concerned with the effect of a criminal record on the family.
 - (iii) For mutual combatants where the primary aggressor cannot be determined.
 - c. The victim must be in agreement with a "plea & pass" disposition.
 - d. A standardized office "Plea & Pass" form may be utilized.
 - e. All defendants will be required to participate in and complete a Batterer Intervention Program (BIP) as a standard condition; otherwise, there will be a written explanation by the court.
 - f. An administrative order should set out program specifics. For example, when a status check should be scheduled (45 days after the plea and 90 days after the plea).

3. **It is an Error to Dismiss Case after Defendant Successfully Completed Pretrial Intervention (PTI) Program Where State Objected to the Original Placement of The Defendant In PTI.** State v. Turner, 636 So. 2d 815 (Fla. 3d DCA 1994). Section 948.08(2), Florida Statutes, specifically requires consent of State to placement in PTI program.
4. **PTI Diversion Decision of State Attorney is Prosecutorial in Nature and Thus Not Subject to Judicial Review.**
 - a. Cleveland v. State, 417 So. 2d 653 (Fla. 1982).
 - b. State v. Turner, 636 So. 2d 815 (Fla. 3d DCA 1994).
 - c. Virgo v. State, 675 So. 2d 994 (Fla. 3d DCA 1996).
 - d. State v. Winton, 522 So. 2d 463 (Fla. 3d DCA 1988). Trial court cannot second-guess State's decision to withhold consent to defendant's entry into PTI program.
5. **State, Not Trial Court, Makes Decision Whether to Prosecute.**
 - a. State v. Bryant, 549 So. 2d 1155 (Fla. 3d DCA 1989).
 - b. State v. Jogan, 388 So. 2d 322 (Fla. 3d DCA 1980). State attorney has sole discretion to either prosecute or nolle prosequere a defendant.
 - c. In the interest of S.R.P., 397 So. 2d 1052 (Fla. 4th DCA 1981). Decision to file nolle prosequere vested solely in discretion of State.
 - d. Court improperly dismissed information where State attorney determined to prosecute.
 - (i) State v. Brown, 416 So. 2d 1258 (Fla. 4th DCA 1982).
 - (ii) State v. Rubel, 647 So. 2d 995 (Fla. 2d DCA 1994). The state attorney shall make the final determination as to whether the prosecution shall continue.
 - (iii) Section 948.08(5), Florida Statutes.
 - e. **HOWEVER:** Trial court has discretion to dismiss charges against substance abuse-impaired offender, over objection by the State, where the offender has successfully completed a court referred drug treatment program.
 - (i) State v. Dugan, 685 So. 2d 1210 (Fla. 1996).
 - (a) A trial court is empowered "to dismiss the charges against a substance-abuse impaired offender who successfully completes a drug treatment program when the offender is referred to the program by the court."
 - (b) A trial court is authorized to close a case by dismissing the charges against the offender once the offender successfully completes the drug treatment program.
 - (c) *See also* State v. Upshaw, 648 So. 2d 851 (Fla. 3d DCA 1995). Court properly dismissed case over State's objection where defendant successfully completed PTI type program offered with the consent of the State under the theory of specific performance of a settlement agreement.
 - (ii) *See also supra* section IV.G. Charging and Prosecuting.

M. PROBATION:

1. Batterer Intervention Shall be Ordered in Conjunction with Probation: “If a person is found guilty of, has had adjudication withheld on, or has pled nolo contendere to a crime of domestic violence, as defined in §741.28, Florida Statutes, that person shall be ordered by the court to a minimum term of 1 year’s probation and the court shall order that the defendant attend a batterer intervention program as a condition of probation. The court must impose the condition of the batterer intervention program for a defendant under this section, but the court, in its discretion, may determine not to impose the condition if it states on the record why a batterer intervention program might be inappropriate. The court must impose the condition of the batterer intervention program for a defendant placed on probation unless the court determines that the person does not qualify for the batterer intervention program pursuant to §741.325, Florida Statutes.” §741.281, Florida Statutes.

2. Jurisdiction to Revoke Probation:

- a. Young v. State, 739 So. 2d 1179 (Fla. 4th DCA 1999). The Fourth District Court of Appeal held that the trial court was without jurisdiction to revoke probation where the warrant charging the defendant with probation violation was delivered to the sheriff’s office after expiration of the probationary period. It was error to find that the defendant had absconded from supervision by failing to file monthly reports with her probation officer where the defendant was not hiding, nor had departed the jurisdiction of the state, and that the probationary period was thereby tolled.
- b. Paulk v. State, 733 So. 2d 1096 (Fla. 3d DCA 1999). The Third District Court of Appeal held that in order to invoke jurisdiction of the court, not only must a timely affidavit of violation of probation be filed (within the period of probation), but the judge must sign and issue an arrest warrant and that warrant must be delivered to the proper officer for execution within that same time period. The Third District Court of Appeal rejected the trial court’s conclusion that a probationer absconds by failing to sign-up for intake, and by the fact that the defendant failed to appear at a duly noticed hearing.
[Note: See also Tatum v. State, 736 So. 2d 1214 (Fla. 1st DCA 1999), where it was determined that the probation revocation process was not timely commenced when the arrest warrant was not delivered to the sheriff until the probationary term had expired.]

3. General Conditions of Probation:

- a. General Conditions are Contained within the Statutes and may be Imposed in Written Order without Oral Pronouncement:
 - (i) State v. Hart, 668 So. 2d 589 (Fla. 1996).
 - (ii) Fernandez v. State, 677 So. 2d 332 (Fla. 4th DCA 1996).

- b. A condition of probation which is statutorily authorized or mandated may be imposed and included in a written order of probation even if not orally pronounced at sentencing.
 - (i) State v. Hart, *supra*.
 - (ii) Nank v. State, 646 So. 2d 762, 763 (Fla. 2d DCA 1994), *cited by State v. Hart*, *supra*.
- c. “The legal underpinning of this rational is that the statute provides ‘constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process.’” Quoting Tillman v. State, 592 So. 2d 767 (Fla. 2d DCA 1992). General conditions set forth in statute need not be orally pronounced.
- d. “All persons are presumed to know the contents of criminal statutes and the penalties provided within them.” State v. Ginn, 660 So. 2d 1118 (Fla. 4th DCA 1995), *review denied*, 669 So. 2d 251 (Fla. 1996).
- e. Defendant’s have notice of all probation conditions contained in the statutes.
 - (i) Tillman v. State, *supra*.
 - (ii) State v. Green, 667 So. 2d 959 (Fla. 2d DCA 1996). All persons have constructive notice of Florida’s criminal statutes.
 - (iii) State v. Beasley, 580 So. 2d 139 (Fla. 1991).
- f. Random testing is a General Condition of Probation:
 - (i) Urinalysis, Breathalyzer, and blood testing are statutorily authorized as “random testing.” Fernandez v. State, 677 So. 2d 332 (Fla. 4th DCA 1996).
 - (ii) Section 948.03(1)(l), authorizes the imposition of this condition.
- g. Conditions contained in the approved Probation Order under Rule of Criminal Procedure 3.986 are general conditions, which do not require oral pronouncement. State v. Hall, 668 So. 2d 600 (Fla. 1996).
- h. A Defendant may object to imposition of statutory conditions on ground of relevancy. Fernandez v. State, 677 So. 2d 332 (Fla. 4th DCA 1996).

4. Special Conditions of Probation:

- a. Special Conditions must be related to the offense or rehabilitation of the defendant.
 - (i) Brewer v. State, 531 So. 2d 393 (Fla. 2d DCA 1988).
 - (ii) Grubbs v. State, 373 So. 2d 905 (Fla. 1979).
 - (iii) Hussey v. State, 504 So. 2d 796 (Fla. 2d DCA 1987), *review denied*, 518 So. 2d 1275 (Fla. 1987).
 - (iv) Goldschmitt v. State, 490 So. 2d 123 (Fla. 2d DCA 1986). DUI bumper sticker valid special condition.
 - (v) Pratt v. State, 516 So. 2d 328 (Fla. 2d DCA 1987).
 - (vi) A court may impose a condition of probation that is reasonably related to the offense or future criminality.
 - (a) Biller v. State, 618 So. 2d 734 (Fla. 1993).

- (1) Condition of probation in CCF that defendant not use alcohol was improper as there was nothing connecting any use of alcohol with the offense and nothing in the record to suggest that the defendant had a propensity toward alcohol abuse.
- (2) Condition of probation is invalid if it:
 - i. has no relationship to the crime of which the offender was convicted;
 - ii. relates to conduct which is not itself criminal; and
 - iii. requires or forbids conduct which is not reasonably related to future criminality.
- (b) See also Rogriquez v. State, 378 So. 2d 7 (Fla. 2d DCA 1979); Grate v. State, 623 So. 2d 591 (Fla. 5th DCA 1993).
- b. Special Condition of Probation Must be Ordered by the Court and Orally Pronounced:
 - (i) Carson v. State, 531 So. 2d 1069 (Fla. 4th DCA 1988).
 - (ii) Requirement that defendant pay for urinalysis, breathalyzer or blood test, a condition not mentioned at sentencing, to be deleted.
 - (a) Catholic v. State, 632 So. 2d 272 (Fla. 4th DCA 1994).
 - (b) Cumbe v. State, 597 So. 2d 946 (Fla. 1st DCA 1992).
 - (c) Nank v. State, 646 So. 2d 762 (Fla. 2d DCA 1994).
 - (d) Luby v. State, 648 So. 2d 308 (Fla. 2d DCA 1995).
 - HOWEVER:
 - (1) Requirement to submit to random testing is not a special condition.
 - (2) Section 948.03(1)(k), Florida Statutes, authorizes the imposition of this condition, thus it need not be orally announced.
 - (3) Condition that probationer pay for this testing is a special condition which must be orally announced.
 - (e) Bartley v. State, 675 So. 2d 246 (Fla. 4th DCA 1996).
 - (iii) Special condition must be orally pronounced at sentencing before it can be included in the written probation order.
 - (a) State v. Williams, 712 So. 2d 762 (Fla. 1998).
The requirement that the defendant pay for drug testing is a special condition of probation which the trial court must pronounce orally at sentencing.
 - (b) Nank v. State, *supra*.
 - (c) Cumbe v. State, 597 So. 2d 946 (Fla. 1st DCA 1992).
 - (d) Shacraha v. State, 635 So. 2d 1051 (Fla. 4th DCA 1994).
 - (iv) Because a defendant must make a contemporaneous objection to the probation conditions at the time of sentencing, the defendant must be informed of the conditions being imposed.
 - (a) State v. Hart, 668 So. 2d 589 (Fla. 1996).
 - (b) Olvey v. State, 609 So. 2d 640 (Fla. 2d DCA 1992) (*en banc*).
 - (v) Special condition of probation prohibiting use of intoxicants stricken because it was not orally pronounced.

- (a) Hann v. State, 653 So. 2d 404 (Fla. 2d DCA 1995). Random alcohol testing is special condition which should have been orally pronounced.
 - (b) Nank v. State, 646 So. 2d 762 (Fla. 2d DCA1994).
 - (c) Friend v. State, 666 So. 2d 599 (Fla. 4th DCA 1995).
 - (d) Fitts v. State, 649 So. 2d 300 (Fla. 2d DCA 1995).
 - (vi) Where sentence is reversed because trial court failed to orally pronounce special conditions of probation which later appeared in the written sentence, trial court may not reimpose the conditions at re-sentencing.
 - (a) Justice v. State, 674 So. 2d 123 (Fla. 1996).
 - (b) Burdo v. State, 682 So. 2d 557 (Fla. 1996).
 - (c) Young v. State, 699 So. 2d 624 (Fla. 1997).
5. **Probation Order Must Specify the Period Within Which the Probationer Must Complete Special Conditions.** Young v. State, 566 So. 2d 69 (Fla. 2d DCA 1990).
6. **Illegal Conditions of Probation: Condition which are too vague to advise the probationer of the limits of his restrictions and could be easily violated unintentionally, are illegal.**
- a. Hughes v. State, 667 So. 2d 910 (Fla. 4th DCA 1996). Condition prohibiting probationer from coming within 250 miles of the victim was too vague and thus illegal.
 - b. Huff v. State, 554 So. 2d 616 (Fla. 2d DCA 1989). Condition prohibiting probationer from being within three blocks of a high drug area was stricken as being illegal.
 - c. Almond v. State, 350 So. 2d 810 (Fla. 4th DCA 1977). Condition that probationer reside elsewhere other than Central Florida was illegal.
 - d. **HOWEVER:** Condition prohibiting probationer from traveling to Tallahassee, Florida was not illegal. Larson v. State, 572 So. 2d 1368 (Fla. 1991).
7. **No Contemporaneous Objection Required to Contest an Illegal Condition of Probation:**
- a. Hughes v. State, *supra*.
 - b. Larson v. State, *supra*.
8. **Problems with Representation: Uncounseled Plea and Inadequate Waiver of Right to Counsel:**
- a. Tur v. State, 797 So. 2d 4 (Fla. 3d DCA 2001). The defendant in this case was sentenced to a term of probation after an uncounseled plea pursuant to Florida Rule of Criminal Procedure 3.111(b)(1). Defendant later violated his probation for driving under the influence of alcohol. The Third District Court of Appeal looked at whether or not a defendant, sentenced to a term of probation pursuant to Florida Rules of Criminal Procedure, may be sentenced to incarceration after violating that probation. The Third District

Court of Appeal held that as the trial court could not impose a jail sentence on this defendant for his uncounseled plea to the charges, it cannot later impose a jail term for a violation of the terms of probation. The case was reversed and remanded for resentencing without incarceration.

- b. Harris v. State, 773 So. 2d 627 (Fla. 4th DCA 2000). The defendant was charged with a crime allowing imprisonment for up to one year. The state represented that they would not seek jail time. Knowing this, the defendant was tried without a jury and without counsel, but never formally waived those rights on the record. The defendant subsequently violated the probation and was sentenced to 60 days in jail. The defendant appealed, alleging that there was a denial of his right to a jury trial and appointed counsel at the original sentencing. In its appellate capacity, the circuit court found that because jail time was a possibility at sentencing, jail time for a violation was permissible. On appeal, the Fourth District Court of Appeal found that the defendant was entitled to a jury trial, as well as counsel. The court also held that the trial court could not impose jail time for either the original charge or the probation violation. Reversed and remanded with instructions that the defendant is to be resentenced without any jail time.

N. JAIL:

1. Consecutive Sentences - (Stacking multiple misdemeanors):

- a. Valid for misdemeanors:
 - (i) Armstrong v. State, 656 So. 2d 455 (Fla. 1995).
 - (ii) State v. Troutman, 685 So. 2d 1290 (Fla. 1996). Consecutive county jail sentences exceeding one year for defendant convicted of two or more misdemeanors are valid, unless defendant is also convicted of a felony along with the misdemeanors.
- b. Thus: domestic battery + stalking + trespass after warning + violation of injunction = four (4) years county jail.
- c. Section 741.281, Florida Statutes - "The imposition of probation under this section shall not preclude the court from imposing any sentence of imprisonment authorized by §775.082." (§775.082 - Penalties; applicable of sentencing structures; mandatory minimum sentences for certain re-offenders previously from prison.)
- d. Jail credit: Court cannot give jail credit for house arrest. McCarthy v. State, 689 So. 2d 1095 (Fla. 5th DCA 1997). "There is simply no statutory authority for 'crediting' such time."

O. SENTENCING:

- 1. **Minimum Term of Imprisonment for Domestic Violence:** If a person is adjudicated guilty of a crime of domestic violence and the person has intentionally caused bodily harm to another person, the court SHALL order the person to service a minimum of 5 days in the county jail as part of the

sentence imposed, unless the court sentences the person to serve a non-suspended period of time in a state correctional facility. The court may also sentence the person to probation, community control, or additional period of incarceration. §741.283, Florida Statutes.

2. Upon revocation of probation, the court shall adjudicate the probationer.

- a. Section 948.06(2)(b), Florida Statutes. “If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.”
- b. State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1998).
 - (i) A judge may withhold adjudication of guilt only if the defendant is placed on probation.
 - (a) Florida Rule of Criminal Procedure, 3.670.
 - (b) Section 948.01(2), Florida Statutes.
 - (ii) Amendment to Fla.R.Crim.P 3.704(d)(23), 763 So. 2d 997 (Fla. 1999). Sentencing guideline scoresheet (Rule 3.704(d)(23)) amended to reflect that use of sentencing multiplier for crime involving domestic violence in the presence of a child is no longer in the trial court’s discretion.

3. Lawful Suspended Sentences:

- a. Ex parte Williams, 26 Fla. 310, 8 So. 425 (1890). “That sentence may be suspended on conviction of an offender, because of mitigating circumstances, or the pendency of another indictment, or other sufficient cause, is not denied, and in practice is frequently done in this state, and in other states is held to be permissible.”
- b. Statutory Authority:
 - (i) Sections 948.01(3), Florida Statutes.
 - (ii) McGuirk v. State, 382 So. 2d 1235 (Fla. 2d DCA 1980). Court may suspend some or a defendant’s entire sentence in order to place him on probation.
 - (iii) Section 958.06, Florida Statutes. The court upon motion of the defendant, or upon its own motion, may within 60 days after imposition of sentence suspend the further execution of the sentence and place the defendant on probation in a community control program upon such terms as the court may require.
- c. Split Sentences:
 - (i) A trial court may impose a true split sentence in which the period of community control and probation is shorter than the suspended portion of incarceration.
 - (ii) Suspending sentence and placing defendant on probation constitutes a split sentence. Lawton v. State, 711 So. 2d 142 (Fla. 2d DCA 1998).
- d. Hearings on Revocation of Suspension of Sentences are Informal:

- (i) Hearings on the question of revocation of suspension of sentence for violating the conditions of suspension are informal and do not take the course of a regular trial.
 - (a) Brill v. State, 159 Fla. 682, 32 So. 2d 607 (1947).
 - (1) evidence adduced at such hearings does not have the same objective as that taken at a criminal trial;
 - (2) that its first purpose is to satisfy the conscience of the court as to whether the conditions of suspension have been violated;
 - (3) second purpose is to give the accused an opportunity to explain away the accusation as to violation of the conditions of suspension.
 - (b) State ex rel. Ard v. Shelby, 97 So. 2d 631 (Fla. 1st DCA 1957). The latitude of inquiry is such that even though evidence upon which the revocation is based would be inadmissible upon trial of the accused for a crime, it is competent for the trial court to consider it on the issue of compliance with the conditions under which suspension of the sentence was granted.
 - (c) Caston v. State, 58 So. 2d 694 (Fla. 1952).

4. Unlawful Suspended Sentences:

- a. Order suspending sentence from day to day and term to term, is illegal.
 - (i) Coleman v. State, 205 So. 2d 5 (Fla. 3d DCA 1967).
 - (ii) State v. Bateh, 110 So. 2d 7 (Fla. 1959).
 - (iii) Drayton v. State, 177 So. 2d 250 (Fla. 3d DCA 1965).
 - (iv) Hunter v. State, 200 So. 2d 577 (Fla. 3d DCA 1967).
 - (v) Helton v. State, 106 So. 2d 79 (Fla. 1958).
 - (vi) *But see* Miller v. Aderhold, 288 U.S. 206 (1933). “Such an order is a mere nullity without force or effect, as though no order at all had been made; and the case necessarily remains pending until lawfully disposed of by sentence.”
- b. Mandatory Sentencing Statutes:
 - (i) Court cannot withhold adjudication or suspend sentence in use of a firearm conviction. §775.087(2)(b), Florida Statutes.
 - (ii) State v. Gibson, 353 So. 2d 670 (Fla. 2d DCA 1978).

5. Sentencing Multiplier for Domestic Violence Cases:

- a. Florida Rule of Criminal Procedure 3.704(d)(23) provides for a domestic violence multiplier of one-and-a-half times when a domestic battery is committed in the presence of a child under the age of 16.
- b. Lane v. State, 973 So. 2d 654 (Fla. 1st DCA 2008). The trial court imposed a domestic violence multiplier of one-and-a-half times on appellant’s sentence for aggravated battery, based upon the state’s argument that the child of the appellant and the victim resided in the home. The appellate court reversed because Florida Rule of Criminal Procedure 3.704(d)(23) requires that the domestic battery be committed in the presence of a child under the age of 16, however, no evidence was presented by the state on

this issue or on the issue of whether the child was present during the domestic violence. In fact, the victim's affidavit, which was accepted into evidence without objection, stated that the child was not in the home at the time of the battery.

P. VIOLATION OF PROBATION OR INJUNCTION:

1. **Gaspard v. State, 845 So. 2d 986 (Fla. 1st DCA 2003).** When a conviction for aggravated stalking has been reversed, any sentence imposed after revocation of probation based solely on the conviction must also be vacated. This, however, does not preclude the state from seeking revocation of probation on other grounds.
2. **Hoffman v. State, 842 So. 2d 895 (Fla. 2d DCA 2003).** Defendant, a respondent in a civil case was convicted of violation of the injunction for sending cards to the petitioner's residence and for allegedly violating the 500 foot provision of the injunction. The trial court erred in finding that the defendant had violated the injunction as the cards were addressed to other residents of the petitioner's household and as the injunction did not specifically prohibit this. Additionally, the trial court erred in finding that the defendant had violated the 500 foot provision of the injunction as the state failed to prove the exact distance the defendant was from petitioner. The court held that the state's burden of proof in an indirect criminal contempt case is to prove every element beyond a reasonable doubt.
3. **Robinson v. State, 840 So. 2d 1138 (Fla. 1st DCA 2003).** The court reversed the trial court's conviction for violation of a domestic violence injunction for failing to grant appellant's motion for judgment of acquittal. The court held that the State failed to establish that the appellant knew the final injunction had been entered against him. Appellant's conviction for aggravated battery was upheld, however.
4. **Dunkin v. State, 780 So. 2d 223 (Fla. 2d DCA 2001).** Defendant was placed on probation for a period of three years, and ordered to complete an outpatient sex offenders' treatment program until he was officially discharged by the program administrator. Probation officer violated the defendant, finding that he was absent from the sex offenders program without permission by missing three separate meetings without notification to the therapist as to why he missed the sessions. The defendant contended that the missed appointments were due to illness. The terms of his probation did not specify that the defendant successfully complete the program on the first try, just that the program be completed within the three years of probation. The circuit court revoked the defendant's probation, but the Second District reversed and remanded on the grounds that the defendant's termination from the sex offenders program was insufficient to establish a "willful and substantial" violation of probation, and did not therefore warrant a revocation.

5. **Murtha v. State**, 777 So. 2d 1067 (Fla. 3d DCA 2001). The court held that the trial court abused its discretion when it found that the defendant had violated the terms of and revoked probation for failing to pay restitution and perform community service hours. The court reversed the probation revocation on the grounds that the original order never specified a schedule for this sentence to be completed by, and there was still sufficient time in the probationary period for the terms to be completed. The court also held that a violation can't be deemed willful where a defendant, as this one, was incarcerated on unrelated charges for the first three months of the probationary period.
6. **Suggs v. State**, 795 So. 2d 1028 (Fla. 2d DCA 2001). Defendant appeals a denial of her motion to dismiss an aggravated stalking charge. The court reversed, and remanded on the grounds that a defendant cannot be charged with a violation of a final injunction unless the defendant was served with the injunction. In this case, there was no service on the defendant; therefore the court found that she cannot be charged with a violation.
7. **Brown v. State**, 776 So. 2d 329 (Fla. 5th DCA 2001). The defendant failed to complete an intake interview with the probation officer, as court ordered, and was asked to call back and provide the information requested by the officer. The defendant failed to do so, and the court held that the defendant's failure to complete intake procedure was a substantial enough violation to justify the revocation of the probation.
8. **Meadows v. State**, 747 So. 2d 1043 (Fla. 4th DCA 2000). Where the state agreed at the beginning of a probation violation hearing not to proceed on a count alleging aggravated battery and domestic violence, but did proceed on a second count alleging accessing 911 for a non-emergency purpose, the case was reversed and remanded by the Fourth District Court of Appeal. Because the revocation of probation was based upon two violations, it was not apparent whether the trial court would have revoked the defendant's.
9. **Young v. State**, 739 So. 2d 1179 (Fla. 4th DCA 1999). The Fourth District Court of Appeal held that the trial court was without jurisdiction to revoke probation where the warrant charging the defendant with probation violation was delivered to the sheriff's office after expiration of the probationary period. It was error to find that the defendant had absconded from supervision by failing to file monthly reports with her probation officer where the defendant was not hiding, nor had departed the jurisdiction of the state, and that the probationary period was thereby tolled.
10. **Mitchell v. State**, 717 So. 2d 609 (Fla. 4th DCA 1998). The claim that the trial court erred in finding the defendant in violation of probation because the order of probation did not specify the time frame for completion of a domestic batterer intervention program was not preserved for appellate review. The

appellate court found that there was no merit to the claim due to the fact that the time period for completion of the program was implicit in other dictates imposed by the court order and supported the trial court's revocation of probation.

11. **Rawlins v. State**, 711 So. 2d 137 (Fla. 5th DCA 1998). Two unexcused absences from a substance abuse treatment program amounts to a material probation violation. The probation officer lacked the authority to substitute a program different from that ordered by the court.
12. **Appearance via satellite at probation revocation hearing of otherwise unavailable victim is not a denial of the Sixth Amendment's Confrontation Clause.**
13. **Lima v. State**, 732 So. 2d 1173 (Fla. 3d DCA 1999). The Third District Court of Appeal held that in a probation revocation hearing for the commission of a domestic violence-related battery, it is not a denial of the Sixth Amendment's Confrontation Clause to present the victim's testimony via satellite transmission, so long as there is a showing that the victim "was unable to attend." This holding will also apply to the trial itself, as opposed to a probation violation hearing.

Q. EXPUNCTION OF CRIMINAL HISTORY IN DOMESTIC VIOLENCE CASES:

Domestic violence cases are statutorily ineligible for expunction under §943.0585(2), Florida Statutes. **Williams v. State**, 879 So. 2d 77 (Fla. 3d DCA 2004). Defendant, who was convicted of battery and false imprisonment with charging instrument stamped "domestic violence," was not eligible for expunction of criminal history records; expunction statute did not permit the expunction of criminal offenses involving domestic violence.

R. PROSECUTOR'S RESPONSIBILITY DEALING WITH A THREAT OF PERJURY OR CONTEMPT:

1. **Prosecutor must be cautious when attempting to get reluctant witnesses to testify (e.g., by threatening perjury of false affidavit).**
 - a. **Lee v. State**, 324 So. 2d 694 (Fla. 1st DCA 1976). *See also* **Davis v. State**, 334 So. 2d 823 (Fla. 1st DCA 1976).
 - b. Merely advising witness of what consequences would be if she failed to testify or if she failed to tell the truth is appropriate.
 - (i) **Coleman v. State**, 491 So. 2d 1206 (Fla. 1st DCA 1986).
 - c. Prosecution correctly informed victim that if she attempted to change testimony or affidavit statements in order to achieve her desire to have the battery charges against her husband dropped she would be held in contempt for perjury. **Coleman v. State**, 491 So. 2d 1206 (Fla. 1st DCA 1986).

- (i) An admonition to a witness to “tell the truth,” if such admonition does not suggest to the witness exactly what testimony to give, is appropriate, and will not be cause for discipline.
 - (ii) The Coleman court upheld this action distinguishing both: Lee and Davis supra.
- d. Prosecutor may be disciplined by The Florida Bar for telling a witness not to speak with defense counsel at all unless the prosecutor was present.
- e. Appellate Review Due to Prosecutorial Error: “Prosecution error alone does not warrant automatic reversal of conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless.” State v. Murray, 443 So. 2d 955, 956 (Fla. 1984). “The correct standard of appellate review is whether the error committed was so prejudicial as to vitiate the entire trial.”
- f. Conclusive Summary:
 - (i) Prosecutor suggesting which version of testimony = misconduct, and Misconduct = discipline action
 - (ii) However, misconduct is not equal to per se reversal.



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I. EVIDENCE:

A. PRIVILEGES APPLICABLE TO DOMESTIC VIOLENCE:

1. Domestic Violence Advocate-Victim Privileges; §90.5036, Florida Statutes.

- a. Section 90.5036(1)(d), Florida Statutes - A communication between a domestic violence advocate and a victim is “confidential” if it is related to the incident of domestic violence for which the victim is seeking assistance and if it is not intended to be disclosed to third persons other than:
 - (i) Those persons present to further the interest of the victim in the consultation, assessment, or interview.
 - (ii) Those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted.
- b. Section 90.5036(2), Florida Statutes - A victim has a privilege to refuse to disclose and to prevent any other person from disclosing, a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim.

2. Attorney-Client Privilege; §90.502, Florida Statutes.

Attorney-client privilege is relatively limited in scope, and thus does not require exclusion of evidence voluntarily submitted by an attorney in violation of that privilege. State v. Sandini, 395 So. 2d 1178 (Fla. 4th DCA 1981).

3. Spouse Privilege; §90.504, Florida Statutes.

- a. No privilege “prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other’s apprehension. It is only the spouse’s testimony in the courtroom that is prohibited” Trammel v. U.S., 445 U.S. 40 (1980); State v. Grady, 811 So. 2d 829 (Fla. 2d DCA 2002).
- b. Statements of spouse that would be privileged at trial can be used to establish cause to obtain a search warrant or to investigate a suspect based on those statements. State v. Grady, 811 So. 2d 829 (Fla. 2d DCA 2002).
- c. Husband-wife evidentiary privilege does not apply to criminal acts by one spouse.
 - (i) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing,

communications which were intended to be made in confidence between the spouses while they were husband and wife.

- (ii) Section 90.504(3)(b), Florida Statutes. There is no privilege in a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse or the person or property of a child of either.
- (iii) Valentine v. State, 688 So. 2d 313 (Fla. 1996).

B. ALLOCATION OF DECISION MAKING/FINDER OF FACT:

Question of Fact for the Trier:

1. **Emotional Distress:** D.L.D., Jr. v. State, 815 So. 2d 746 (Fla. 5th DCA 2002). The court looked to the 1st District Court of Appeal in McMath v. Biernacki, 776 So. 2d 1039 (Fla. 1st DCA 2001), agreeing with the First DCA's finding that in deciding whether an incident or series of incidents creates substantial emotional distress that distress should be judged on an objective, not subjective, standard and even if a subjective standard is used, a person does not need to be reduced to "tears or hysteria in order to be considered substantially emotionally distressed."
2. **Stalking:** Biggs v. Elliot, 707 So. 2d 1202 (Fla. 4th DCA 1998). The court's finding that whether following and repeatedly telephoning the victim fell within the statutory definition of stalking under the domestic violence statute so as to permit the issuance of an injunction was a question of fact for the trier of fact and was not clearly erroneous. The stalking statute (§784.048, Florida Statutes) was found not to be unconstitutionally vague or overbroad.

C. CONFIDENTIAL RECORDS:

1. A Petitioner's Place of Residence May Be Kept Confidential for Safety Reasons. §741.30(6)(a)(7), Florida Statutes. *See also* Family Law Form 12.980(h), Request for Confidential Filing of Address, and §119.071(2)(j)1, Florida Statutes.
2. *See Also* in this outline section II.,M.(2), Confidentiality of Information.

D. JUDICIAL NOTICE:

1. **Improper for Court to Take Judicial Notice of Service which is an Essential Element that the State is Required to Prove.**
 - a. Cordova v. State, 675 So. 2d 632 (Fla. 3d DCA 1996).
 - (i) Notice of injunction is an essential element of charge of violating its provisions.
 - (ii) Return of service, while hearsay, was admissible in evidence under public records exception.

- (iii) Trial court may not take judicial notice of fact that defendant was served with an injunction.
 - (a) Fact that the defendant was served is not generally known within territorial jurisdiction of the court.
 - (b) And it was not type of fact that was not subject to dispute because it was capable of being determined by a source whose accuracy could not be questioned.
 - (iv) However: Trial court may allow State to use “permissive inference” to establish that the defendant was served with an injunction.
 - (a) Permissive inference allows, but does not require, the trier of fact to infer elemental fact upon proof of a basic fact and places no burden on the defendant.
 - (b) Such inference passes the rational connection test, as fact of service more likely than not flowed from the return of service.
- b. Hernandez v. State, 713 So. 2d 1120 (Fla. 3d DCA 1998). The District Court of Appeal held that the defendant was entitled to judgment of acquittal on charge of violating a domestic violence injunction, as the trial court could not properly take judicial notice of an essential element that the State was required but failed to prove for conviction.
- 2. **Court Records** - The Court Can Take Judicial Notice of a Record from any Florida or U.S. Court when imminent danger to persons or property has been alleged and it is impractical to give prior notice to the parties of the intent to take judicial notice. An opportunity to present evidence relevant to the propriety of taking judicial notice may be deferred until after judicial action has been taken. If judicial notice is taken, the court shall file a notice in the pending case of the matters judicially noticed within 2 business days. §90.204(4), Florida Statutes.

E. BATTERED SPOUSE SYNDROME (BSS) or (BWS):

- 1. **Admissible Against Batterers to Bolster Credibility of Victim:**
 - a. Commonwealth v. Goetzendanner, 679 N.E. 2d 240 (1997). “Where relevant, evidence of BWS may be admitted through a qualified expert to enlighten jurors about behavioral or emotional characteristics common to most victims of battering and to show that an individual or victim witness has exhibited similar characteristics.”
 - b. State v. Griffin, 564 N.W.2d 370 (Iowa 1997).
 - (i) Iowa Supreme Court allowed the use of expert testimony on BWS with respect to the victim’s recantation.
 - (ii) Expert did not offer opinion on the specific victim’s credibility, but instead testified concerning the medical and psychological syndrome present in battered woman generally.
 - c. People v. Morgan, 58 Cal.App.4th 1210 (Cal. Ct. App.1997). BWS is admissible to bolster the credibility of a victim who recants her story.
 - d. Gonzalez-Valdes v. State, 834 So. 2d 933 (Fla. 3d DCA 2003). Defendant was convicted in a jury trial in the circuit court, Miami-Dade County, of

second-degree murder of her live-in boyfriend. Defendant appealed. On motion for rehearing, the District Court of Appeal held that the testimony of victim's ex-wife, that victim never abused her in 29 years of marriage, was relevant to battered woman's syndrome defense.

2. BSS is Admissible as a Defense by Those Suffering from the Condition:

- a. State v. Hickson, 630 So. 2d 172 (Fla. 1993).
- b. *But see* Trice v. State, 719 So. 2d 17 (Fla. 2d DCA 1998). No error in prohibiting BSS relating to the victim where the expert could not testify that the victim was suffering from such at the time of the homicide.

F. STATEMENTS BY WITNESSES: FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(B)(1)(B):

1. State Must Disclose Prior Statements of Prosecution Witness.

- a. Roman v. State, 528 So. 2d 1169 (Fla. 1988). State's failure to disclose exculpatory statements made by witness who testified to the contrary at trial was reversible error.
- b. Holmes v. State, 642 So. 2d 1387 (Fla. 2d DCA 1994).

2. State Must Disclose Defense Witness Statements. Sun v. State, 627 So. 2d 1330 (Fla. 4th DCA 1993).

3. The Reference to "Statements" Is Limited to Written Statements or Contemporaneously Oral Statements. Watson v. State, 651 So. 2d 1159 (Fla. 1994). Expert's oral statement was not discoverable, however, the State must disclose a witness's oral statement if that statement materially alters a prior written or recorded statement previously provided to the defendant. State v. Evans, 770 So. 2d 1174 (Fla. 2000).

4. State Is Not Charged with Knowledge Of Defendant's Statement To State Witness.

- a. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995). "We agree with the trial court that none of the rules of criminal procedure relating to discovery require the State to disclose information which is not within the State's actual or constructive possession."
- b. *Limited by implication: McCray v. State, 640 So. 2d 1215 (Fla. 5th DCA 1994).* Where there was no evidence on the record that the State did not have knowledge before trial of a witness's information, and where the State did not notify the defense of the witness's information before trial, the court is required to hold a Richardson hearing to determine whether the State had actual or constructive knowledge of the information before trial and failed to inform the defense, thus triggering a reversal. (Referring to Richardson v. State, 246 So.2d 771 (Fla. 1971).

5. **Prosecutor's Trial Preparation Notes, Work Product, Not Subject to Disclosure:** Where the prosecutor's trial preparation notes did not reflect verbatim statements of any witness interviewed, had not been adopted or approved by the person to whom they were attributed, and included interpretation of remarks made by witnesses, they were not subject to disclosure. Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994).

G. STATEMENTS BY VICTIMS:

1. Reluctant v. Recanting Victim:

- a. **Fairness of Opposing Party and Counsel:** A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act. Rule 4-3.4, Florida Rules of Professional Conduct.
- b. State v. Conley, 799 So. 2d 400 (Fla. 4th DCA 2001). The state appealed an order dismissing a felony battery. An adversarial hearing occurred but the state had neglected to subpoena the witnesses to the events. The victim was present and claimed that she instigated the argument and the injuries she sustained were a result of her own actions, directly contradicting the eyewitness account. The victim claimed she never wanted charges brought against the defendant. The judge dismissed the charges despite the state's objection. In relying on both Florida Rule of Criminal Procedure 3.133(b), and on State v. Hollie, 736 So. 2d 96 (Fla. 4th DCA 1999), the Fourth District Court of Appeal held that because the hearing was an adversarial hearing, where the defendant never motioned the court for a dismissal, and because probable cause was clearly established, a dismissal was clearly in error. Judge Warner concurs in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery is a defense. Consent is only a defense in cases of sexual battery, NOT domestic violence.

2. **Cross Examination of Victim; Fundamental Right:** Zuchel v. State, 824 So. 2d 1044 (Fla. 4th DCA 2002). Defendant, charged with aggravated stalking and violation of the restraining order, filed a writ of prohibition after the trial court denied his motion for disqualification. The Fourth District Court of Appeal granted defendant's request and remanded the case back to the trial court for assignment of a new judge. The appellate court held that the trial court's denial of the basic fundamental right of cross examination of the victim would give a "reasonably prudent person a well-founded fear of judicial bias." The Fourth District Court of Appeal noted the fact that the state was allowed to use the victim's testimony in its opposition to the motion to reduce bond.

H. HEARSAY:

1. **Definition:** A statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. §90.801(1)(c), Florida Statutes.
2. **Conviction May Stand Solely on Hearsay:**
 - a. “We decline to enunciate a blanket rule that no conviction can stand based solely on hearsay.” Anderson v. State, 655 So. 2d 1118 (Fla.1995).
3. **When the Declarant Testifies During the Hearing and Is Subject to Cross-Examination the Confrontation Clause is Satisfied.**
 - a. U.S. v. Owens, 484 U.S. 554 (1988).
 - b. U.S. v. Spotted War Bonnett, 933 F.2d 1471 (8th Cir.1991), *cert. denied*, 112 S.Ct. 1187 (1992).
4. **Satisfaction of the confrontation clause where the declarant does not testify. See also infra section I.**
 - a. If a hearsay statement is admissible under any of the hearsay exceptions included in the Evidence Code, with the exception of §90.803(23) (hearsay exception; statement of child victim), admission of the statement will not infringe upon the defendant’s confrontation rights. Ehrhardt, 1 Fla. Prac., Evidence §802.2 (2014 ed.).
 - (i) Where witness is unavailable to testify at subsequent hearing, prior testimony is admissible, despite confrontation clause, if opponent can show that testimony was given under circumstances that indicate its content is probably true. State v. Kleinfeld, 587 So. 2d 592 (Fla. 4th DCA 1991).
 - b. *But see* Mathieu v. State, 552 So. 2d 1157 (Fla. 3d DCA 1989). Defendant’s right to confrontation was violated when there was testimony from which an inescapable inference was drawn that two eye-witnesses who did not testify had identified the defendant as the person who committed the robbery.
 - c. *See also* Crawford v. Washington, 124 S.Ct. 1354 (2004), which, regarding “testimonial” hearsay, overruled the Roberts decision, which held that reliability could be inferred if the hearsay statement falls within a firmly-rooted exception or if there are particular guarantees of trustworthiness. Ohio v. Roberts, 448 U.S. 56 (1980).
 - (i) Note: The Crawford opinion applies to “testimonial” hearsay and Roberts analysis applies to “non-testimonial.”
 - (ii) In Crawford, the U.S. Supreme Court held that when hearsay statements of an unavailable witness are “testimonial” in nature, the 6th amendment requires that the accused be afforded a prior opportunity to cross-examine the witness. Crawford v. Washington, 124 S.Ct. 1354 (2004). However, the Supreme Court did not set out a definition of “testimonial.” *Id.*

I. HEARSAY EXCEPTIONS: §90.803, FLORIDA STATUTES:

Availability of Declarant Immaterial: The provision of §90.802, Florida Statutes, (hearsay rule) to the contrary notwithstanding, the following are admissible as evidence, even though the declarant is unavailable as a witness:

1. **Spontaneous Statement** - §90.803(1), Florida Statutes. A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

The spontaneity of the statement negates the likelihood of conscious misrepresentation by the declarant and provides the necessary circumstantial guarantee of trustworthiness to justify the introduction of the evidence.

Ehrhardt, 1 Fla. Prac., Evidence § 803.1 (2014 Ed.).

- a. White v. Illinois, 502 U.S. 346 (1992).
- b. Fratcher v. State, 621 So. 2d 525 (Fla. 4th DCA 1993). Defendant's companions' statement to store manager should not have been admitted under spontaneous statement exception to hearsay rule.
- c. McDonald v. State, 578 So. 2d 371 (Fla. 1st DCA 1991), *review denied*, 587 So. 2d 1328 (Fla. 1991). Victim's statement to friend immediately after sexual battery incident was admissible.
 - (i) Sunn v. Colonial Penn Ins. Co., 556 So. 2d 1156 (Fla. 3d DCA 1990). Testimony inadmissible where record did not reflect that statements were spontaneous and made without engaging in reflective thought.
 - (ii) Cadavid v. State, 416 So. 2d 1156 (Fla. 3d DCA 1982). "There was no error in permitting the investigating police officer to testify as to victim's spontaneous statements at the time of the incident."
 - (iii) The spontaneity is lacking if more than a "slight lapse of time" has occurred between the event and the statement.
 - (iv) State v. Jano, 524 So. 2d 660 (Fla. 1988). Spontaneous statement by two-and-one-half year old to baby sitter that child's father had sexually molested her was no showing that statement was made contemporaneously with the alleged act by the father.
 - (v) Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988). Testimony by police officer concerning victim's version of aggravated assault, when the statement was made after the victim drove home and called the police, was not admissible.
 - (vi) U.S. v. Cruz, 765 F.2d 1020 (11th Cir. 1985). Undercover agent's statement as to whom agent identified as source of cocaine was not admissible under present sense impression exception to hearsay rule.

2. **Excited Utterance** - §90.803(2), Florida Statutes. A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

- a. Excited utterance is an exception to the hearsay rule.
 - (i) Viglione v. State, 861 So. 2d 511 (Fla. 5th DCA 2003). Victim of a kidnapping had called witnesses while the offense was taking place.

These were considered excited utterances, and the people who were called were allowed to testify about the content of the conversations.

- (ii) J.L.W. v. State, 642 So. 2d 1198 (Fla. 2d DCA 1994).
- (iii) Power v. State, 605 So. 2d 856 (Fla. 1992), *cert. denied*, 507 U.S. 1037 (1993).

- (iv) Stoll v. State, 762 So. 2d 870 (Fla. 2000). The Supreme Court rejected the state's argument that statements of the victim to a witness were admissible under the excited utterance exception to the hearsay rule where the proper predicate was not established by the state and where such a finding was not made by the trial court. An alternative argument that the witness's testimony was admissible under the state-of-mind exception to the hearsay rule was rejected because the victim's state of mind was not found to be relevant to any issue in the case. The Supreme Court also held it was error to admit the victim's handwritten statement of a prior domestic violence case from the court record.

b. Elements:

- (i) There must be an event startling enough to cause nervous excitement;
- (ii) The statement must have been made before there was time to contrive or misrepresent; and
- (iii) The statement must have been made while the person is under the stress of excitement cause by the event.
 - (a) State v. Jano, 524 So. 2d 660 (Fla. 1988).
 - (b) Rogers v. State, 660 So. 2d 237 (Fla. 1995).
 - (c) Henyard v. State, 689 So. 2d 239 (Fla. 1997).

c. Time:

- (i) State v. Jano, 524 So. 2d 660 (Fla. 1988).
 - (a) "Some out-of-court statements may be admitted as excited utterances even though they were not made contemporaneously or immediately after the event."
 - (b) "The length of time between the event and the statement is pertinent in considering whether the statement may be admitted as an excited utterance."
 - (c) "It would be an exceptional case in which a statement made more than several hours after the event could qualify as an excited utterance because it would be unlikely that the declarant would still be under the stress of excitement caused by the event."
- (ii) The lapse of time between the startling event and the statement is relevant but not dispositive. Henyard v. State, 689 So. 2d 239 (Fla. 1997). ". . . the immediacy of the statement is not a statutory requirement."
- (iii) There is no bright-line rule of hours or minutes to determine whether the time interval between the event and the statement is long enough to permit reflective thought.
 - (a) Werley v. State, 814 So. 2d 1159 (Fla. 1st DCA 2002).
 - (b) Rogers v. State, 660 So. 2d 237, 240 (Fla. 1995). The fact that reflective thought may be possible does not automatically exclude a

statement from being classified as an excited utterance. If the evidence establishes a lack of reflective thought, the predicate is satisfied.

- (iv) “As long as the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements of §90.803(2).” *Ehrhardt, 1 Fla. Prac., Evidence §803.2* (2014 Ed.). Cited by:
 - (a) *State v. Jano, supra*.
 - (b) *Edwards v. State*, 763 So. 2d 549 (Fla. 3d DCA 2000). No error in admission, as excited utterance, statement made by bystander at accident scene that she had been at party with defendant, that defendant was drunk, and that defendant had been told not to drive.
- d. Excited utterance does not violate the confrontation clause.
 - (i) *J.L.W. v. State*, 642 So. 2d 1198 (Fla. 2d DCA 1994).
 - (ii) *White v. Illinois*, 502 U.S. 346 (1992).
- e. 9-1-1 Recordings:
 - (i) Generally, 9-1-1 tapes are admissible as excited utterance or spontaneous statement exceptions to the hearsay rule.
 - (a) *State v. Frazier*, 753 So. 2d 644 (Fla. 5th DCA 2000).
 - (b) *Werley v. State*, 814 So. 2d 1159 (Fla. 1st DCA 2002). The First District Court of Appeal affirmed trial court’s conviction of aggravated battery with a deadly weapon and held that the trial court did not abuse its discretion in admitting 911 tapes regardless of the fact that the victim did not call the police until an hour after the alleged battery occurred as she was shaken and visibly frightened when the police arrived.
 - (c) *Coley v. State*, 816 So. 2d 817 (Fla. 2d DCA 2002) Jamie Coley appealed from his judgment and sentence for aggravated battery, arguing that the trial court erred in failing to redact portions of a 911 tape admitted into evidence, which referred to a nonexistent restraining order. The State argued that even if the reference to the restraining order should have been redacted from the tape, its admission into evidence was harmless. The test for harmless error requires the state to prove that there is no reasonable possibility that the error complained of contributed to the verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). Here the State did not meet its burden and as a result the court reversed and remanded the judgment.
 - (d) *Sliney v. State*, 699 So. 2d 662 (Fla. 1997). Prosecutor allowed to read transcript of 911 call to the jury.
 - (e) *Davis v. State*, 698 So. 2d 1182 (Fla. 1997).
 - (f) *Allison v. State*, 661 So. 2d 889 (Fla. 2d DCA 1995). 911 audio recording of victim’s ten-year-old son’s telephone call was admissible under excited utterance exception to hearsay rule. (*reversed on other grounds*), *affirmed* by Sliney, *supra*.

- (g) Ware v. State, 596 So. 2d 1200 (Fla. 3d DCA 1992), *approved*, Davis v. State, 698 So. 2d 1182 (Fla. 1997), *affirmed* by Sliney, *supra*.
- (h) *See also* Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986), *approved*, Davis v. State, *supra*.
- (i) Quinn v. State, 692 So. 2d 988 (Fla. 5th DCA 1997).
- (j) Evans v. State, 854 A.2d 1158 (Del.Supr. 2004); Williamson v. State, 707 A.2d 350 (Del.Supr. 1998) Defendant's argument that the statements could not be admitted as evidence identifying the defendant as the killer was rejected by the court.
- (ii) **However:** The fact that a call is placed on a 911 line does not, standing alone, qualify it for admission, as a hearsay exception, under §90.803, Florida Statutes.
 - (a) Quinn v. State, *supra*.
Tape of 911 call from anonymous caller was not admissible.
 - (b) Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995). 911 call not admissible absent firsthand knowledge of the events described under present sense impression or excited utterance exceptions.
 - (c) People v. Adkinson, 215 A.D.2d 673 (N.Y. 2d Dept. 1995). Transcript of a 911 call was not admissible as present sense exception because caller was not an eyewitness. Affirmed as modified by, People v. Vasquez, 670 N.E. 2d. 1328 (N.Y. 1996).
 - (d) Franzen v. State, 746 So. 2d 473 (Fla. 2d DCA 1998). The concurring opinion pointed out that 911 tapes do not come in under business records exception.
- f. **Call to Third Party:**
 - (i) Viglione v. State, 861 So. 2d 511 (Fla. 5th DCA 2003).
The court recognized the rule that a victim's telephone "calls for help" to third parties made while the victim was being held against his will and threatened during a kidnapping incident are admissible under the same excited utterance or spontaneous statement exception to the hearsay rule that would permit the admission of a victim's 911 calls.
 - (ii) J.L.W. v. State, *supra*. Officer's testimony that victim stated "the guys in the car pointed a gun at me" was admissible.
 - (iii) Wilcox v. State, 770 So. 2d 733 (Fla. 4th DCA 2000). Testimony that the victim yelled to her daughter to "call the police because Ernest picked up a knife[,] " was admissible as an excited utterance.
- g. **Excited utterance on their own are sufficient to deny a Judgment of Acquittal (JOA) motion and send case to the jury.**
 - (i) Williams v. State, 714 So. 2d 462 (Fla. 3d DCA 1998).
 - (a) Trial testimony which conflicts with excited utterance goes to the weight of the testimony; jury has the choice of which statement to believe.
 - (b) These excited utterances were, on their own, sufficient to deny the defendant's motion's for JOA and to send the case to the jury.
 - (c) Rivera v. State, 718 So. 2d 856 (Fla. 4th DCA 1998).
 - (d) Lopez v. State, 716 So. 2d 301 (Fla. 3d DCA 1998).

- (e) Willis v. State, 727 So. 2d 952 (Fla. 4th DCA 1998). Applies to violation of probation hearings.
 - (ii) *But see* R.T.L. v. State, 764 So. 2d 871 (Fla. 4th DCA 2000). Error to deny JOA where only evidence of intent was prior inconsistent statement from victim.
 - (a) Note: This holding is no new revelation. The case law has always held that prior inconsistent statements cannot be used as substantive evidence. However, an excited utterance is not a prior inconsistent statement; it is an exception to hearsay and can supply the basis for a conviction. Controlling precedent has held that excited utterances on their own are sufficient to deny JOA motion and send cases to the jury.
 - h. Other Case Law Regarding Excited Utterance:
 - (i) Garcia v. State, 492 So. 2d 360 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986). Statement made to police by wounded victim admissible because, “her response was spontaneous, sprang from the stress, pain and excitement of the shootings and robberies, and was not the result of any premeditated design.”
 - (ii) Power v. State, 605 So. 2d 856 (Fla. 1992). Bystander’s hearsay statement to officer, which described assailant, was admissible because bystander flagged down officer and appeared visibly shaken.
 - (iii) Henyard v. State, 689 So. 2d 239 (Fla. 1997).
 - (iv) Rodriguez v. State, 696 So. 2d 533 (Fla. 3d DCA 1997). The fact that the declarant also testifies does not affect the admissibility of the excited utterance. Evidence that victim identified defendant to an investigating officer, which was properly admitted as an excited utterance, was sufficient to support a conviction.
 - (v) Willis v. State, 727 So. 2d 952 (Fla. 4th DCA 1998). Although evidence was conflicting, trial court was in best position to weight the credibility of the witnesses.
 - (vi) Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). Being stabbed and beaten was a sufficiently startling event.
 - (vii) Pedrosa v. State, 781 So. 2d 470 (Fla. 3d DCA 2001). Statement made to police while victim was still bleeding and in a distressed state.
 - i. Practical Points When Dealing with Excited Utterances:
 - (i) Establish the victim’s emotional condition and demeanor at the time of the statement.
 - (ii) Establish whether the statement was made pursuant to detailed questioning (reflective thought), the product of a general “what happened question” or was it spontaneous.
3. **Medical Statement** - §90.803(4), Florida Statutes. Statements made for the purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or

sensations, or the inception or general character of the cause or external source thereof, insofar, as reasonably pertinent to diagnosis or treatment.

a. White v. Illinois, 502 U.S. 346 (1992).

b. State v. Ochoa, 576 So. 2d 854 (Fla. 3d DCA 1991).

c. Elements:

(i) The statements were made for the purpose of diagnosis or treatment; and,

(ii) The individual making the statements knew the statements were being made for medical purposes.

(a) Lazarowicz v. State, 561 So. 2d 392 (Fla. 3d DCA 1990).

(b) Reyes v. State, 580 So. 2d 309 (Fla. 3d DCA 1991). Victim's statements to physician may be admitted "only, if, and to the extent that it was knowingly made for the purpose of and was pertinent to diagnosis or treatment." *See also* State v. Frazier, 753 So. 2d 644 (Fla. 5th DCA 2000).

d. Statements which are Not Necessary for Medical Diagnosis are Inadmissible:

(i) Conley v. State, 620 So. 2d 180 (Fla. 1993). In prosecution for armed burglary and sexual battery with a deadly weapon, doctor could testify that victim stated that she was orally, vaginally, and anally penetrated because it was reasonably pertinent to the diagnosis or treatment of the victim's wounds. However, the "assault at gunpoint" portion of the statement was inadmissible because it was not reasonably pertinent to medical diagnosis or treatment.

(ii) Begley v. State, 483 So. 2d 70 (Fla. 4th DCA 1986). Statements about victim's medical state provided by sexual abuse counselor were unsupported by any showing purpose for medical diagnosis and therefore inadmissible hearsay.

(iii) Allison v. State, 661 So. 2d 889 (Fla. 2d DCA 1995).

(a) Where the record does not show that the statement was elicited for the purpose of treatment as opposed to investigation, the statement is not within the medical diagnosis exception.

(b) Where a four year old witnessed her father kill her mother, the child's statement to a psychologist, who was treating her for Post-Traumatic Stress (PTS), describing the killing is not admissible under the medical diagnosis exception.

(iv) Randolph v. State, 624 So. 2d 328 (Fla. 1st DCA 1993). In sexual battery prosecution, error to admit doctor's testimony concerning statements made by the victim which related the "details of the crime", particularly those relating to a shotgun because the statements were not "reasonably pertinent to medical diagnosis or treatment."

(v) Bradley v. State, 546 So. 2d 445 (Fla. 1st DCA 1989). Hearsay exception for statements made for purposes of medical diagnosis does not permit the admission of victim's statement to doctor that she was raped when she went to the doctor to determine if she was pregnant, not for treatment of injuries from the assault.

e. Statement Regarding Circumstances which Caused Injury May be Admissible:

- (i) Pridgeon v. State, 809 So. 2d 102 (Fla. 1st DCA 2002).
- (ii) Allison v. State, 661 So. 2d 889 (Fla. 2d DCA 1995).
Statements describing the cause or inception of an illness are admissible, but statements of fault are not.
- (iii) Brown v. State, 611 So. 2d 540 (Fla. 3d DCA 1992). Testimony of doctor who conducted rape treatment examination that the victim stated that she was beaten with a show was admissible because the “information was pertinent to the treatment of her wounds.”
- (iv) State v. Ochoa, 576 So. 2d 854 (Fla. 3d DCA 1991). Victim’s statement to physician that “they had been touched in the genitalia by an adult male and had experienced some pain when that happened” was admissible.
- (v) *See also* Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988).
- f. Statement Need Not be Made to Medical Doctor:
 - (i) Begley v. State, *supra*.
 - (ii) Otis Elevator Co. v. Youngerman, 636 So. 2d 166 (Fla. 4th DCA 1994).
Plaintiff’s statement to emergency room nurse that she fainted or passed out and fell was admissible under exception to hearsay for statements made for medical treatment or diagnosis.
- g. Identity of Perpetrator Not Pertinent to Diagnosis and Therefore Seldom Admissible: The details of a violent crime may be reasonably pertinent to diagnosis or treatment, but the identity of the perpetrator would seldom, if ever, be admissible as not being pertinent to either diagnosis or treatment.
 - (i) State v. Jones, 625 So. 2d 821 (Fla. 1993). Statements made to child protection team doctor by victims of child sexual abuse identifying their abuser are not admissible.
 - (ii) Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988).
 - (a) In murder prosecution, statement to doctor that he was shot was admissible because it was reasonably pertinent to the diagnosis or treatment of his wounds.
 - (b) But the statement that black people had tried to steal his medallion was not admissible, because it was a statement of fact “not reasonably pertinent in the medical treatment.”
 - (iii) State v. Frazier, 753 So. 2d 644 (Fla. 5th DCA 2000). The Fifth District Court of Appeal upheld the ruling of the trial court where the victim’s statements to her treating physician identifying the defendant as her assailant were not given for purposes of medical diagnosis or treatment, and were therefore inadmissible and not excepted from the hearsay rule. The Fifth District Court of Appeal held however those statements on the 911 tape identifying the defendant as her assailant may be admissible if the trial court determines on remand that the statements are hearsay, but qualify as excited utterances. The statements on the 911 tape may be excluded as hearsay if the trial court determines that the statements are not excited utterances or admissible on some other

grounds. The Fifth District Court of Appeal also held that statements on the 911 tape were also not inadmissible as violative of the defendant's right to confrontation, as such hearsay evidence is firmly rooted in the common law and its reliability can be inferred.

(iv) Lages v. State, 640 So. 2d 151 (Fla. 2d DCA 1994).

- (a) Statements by a child abuse victim describing the cause of an injury are admissible if reasonably pertinent to the diagnosis.
- (b) A description about how the victim was assaulted is admissible.
- (c) Identity of the defendant by the doctor as related by the victim was error.

4. Former Testimony - §90.803(22) - Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to §90.402 or §90.403, Florida Statutes.

- a. State v. Mosley, 760 So. 2d 1129 (Fla. 5th DCA 2000). Defendant's testimony in first trial was admissible on retrial under former testimony hearsay exception, where defendant was only surviving eyewitness of homicide, defendant voluntarily took the stand in his own defense at trial, and testimony would not be cumulative, would not mislead the jury, and would not confuse the issues.
- b. But see Price v. City of Boynton Beach, 847 So. 2d 1051 (Fla. 4th DCA 2003). Psychiatrist's deposition testimony that defendant had made threats, talked about guns, and was a danger was not admissible in hearing on city's motion for temporary injunction for protection against defendant under former testimony exception to rule against admission of hearsay, where deposition was not taken in case, but in defendant's workers' compensation case involving different issues; rule required that the party against whom the testimony was offered had the opportunity and motive to cross-examine the witness in the prior proceeding.
- c. See also Friedman v. Friedman, 764 So. 2d 754 (Fla. 2d DCA 2000).
 - (i) Court held that the admissibility of a discovery deposition of a nonparty witness as substantive evidence continues to be governed by rule 1.330(a)(3), Florida Rule of Civil Procedure.
 - (ii) "An attorney taking a discovery deposition does not approach the examination of a witness with the same motive as one taking a deposition for the same purpose of presenting testimony at trial."
- d. Former Testimony Statute, as Applied in Criminal Cases is Unconstitutional.
 - (i) Abreu v. State, 804 So. 2d 442 (Fla. 4th DCA 2001). "It is, therefore, clear that live testimony may not be constitutionally supplanted with former testimony in criminal cases absent a showing of unavailability."

- (ii) In re: Amendments to the Florida Evidence Code, 782 So. 2d 339 (Fla. 2000). The court specifically declined to adopt and approve an amendment made by the legislature, which would allow the admission of former testimony when the defendant is available as a witness.
- (iii) Brown v. State, 721 So. 2d 814 (Fla. 4th DCA 1998). Although the court did not address the former testimony statute, it held that it was error to admit the pretrial deposition of the victim as evidence in place of live testimony where the defendant was not personally present when the deposition was taken.

5. Statement of Child Victim, §90.803(23)(a), Florida Statutes. - “Unless the method or circumstances under which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against the child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act . . . in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible into evidence in any civil or criminal proceeding if:”

- a. The court conducts a separate hearing, outside of the jury, and determines that the circumstances of the statement provide adequate safeguards of reliability, AND
 - b. the child either testifies; OR is unavailable as a witness and other corroborative evidence regarding the abuse or offense exists.
- §90.803(23)(a)1-2, Florida Statutes.

6. Statement of an Elderly Person or a Disabled Adult §90.803(24), Florida Statutes. - “Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

- a. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; AND
- b. The elderly person or disabled adult either: testifies or is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly

person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to §90.804(1), Florida Statutes.

7. **Statements of Family History and Relationships are Admissible as an Exception to the Hearsay Rule.** Brown v. State, 473 So. 2d 1260 (Fla. 1985). *See also Cruz v. State*, 557 So. 2d 668 (Fla. 5th DCA 1990).
 - a. Providing the identity of the victim is a material element of the proof at trial.
 - b. The identity of the victim could not be established through “inadmissible hearsay”.
 - c. Cruz does not identify what is inadmissible hearsay.
8. **Statements Admissible as Substantive Evidence are Exceptions to Hearsay:**
 - a. Exceptions to hearsay are substantive evidence. J.L.W. v. State, 642 So. 2d 1198 (Fla. 2d DCA 1994). Officer’s testimony that victim stated “the guys in the car pointed a gun at me” was admissible as substantive evidence.
 - b. Impeachment testimony cannot be used as substantive evidence.
 - (i) Izquierdo v. State, 890 So. 2d 1263 (Fla. 5th DCA 2005). Allowing deputy, on direct examination by prosecutor, to read specific question from the Domestic Violence Threat Level Assessment checklist and the victim’s affirmative answers in order to impeach victim’s testimony at hearing, was permissible to show victim’s motivation to testify untruthfully about her husband’s crime and was not an abuse of the court’s discretion.
 - (ii) Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986).
 - (iii) Kingery v. State, 523 So. 2d 1199, 1204 (Fla. 1st DCA 1988), *affirmed by: State v. Smith*, 573 So. 2d 306 (Fla. 1990).
 - (iv) Santiago v. State, 652 So. 2d 485 (Fla. 5th DCA 1995). Victim’s recanted original statement could be used as impeachment but not as substantive evidence.
 - c. In a criminal prosecution, a prior inconsistent statement standing alone is insufficient as a matter of law to prove guilt beyond a reasonable doubt.
 - (i) State v. Green, 667 So. 2d 756 (Fla. 1995). Criminal depositions pursuant to Florida’s Rule of Criminal Procedure 3.220 are inadmissible as substantive evidence.
 - (ii) State v. Moore, 485 So. 2d 1279 (Fla. 1986).
 - (iii) Joyce v. State, 664 So. 2d 45 (Fla. 3d DCA 1995).
 - d. **HOWEVER:** Prior inconsistent statement introduced pursuant to §90.801(2)(a), Florida Statutes, is admissible as substantive evidence.
 - (i) Moore v. State, 452 So. 2d 559 (Fla. 1984). “Under §90.801(2)(a), Florida Statutes (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a grand jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact.”

- (ii) State v. Green, 667 So. 2d 756 (Fla. 1995). Depositions to perpetuate testimony taken pursuant to Florida Rule of Criminal Procedure 3.190(j) are admissible as substantive evidence.
- (iii) §90.801(2), Florida Statutes. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.
(Note: Depositions referred to are those taken pursuant to Rule 3.190(j). Green, *supra*.)
- e. Discovery depositions may not be used as substantive evidence in a criminal trial.
 - (i) State v. Green, 667 So. 2d 756 (Fla. 1995).
 - (ii) State v. James, 402 So. 2d 1169, 1171 (Fla. 1981).

J. NON-HEARSAY (EXCLUDED FROM DEFINITION OF HEARSAY):

1. §90.801(2), Florida Statutes - A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:
 - a. Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at trial, hearing or other proceeding or in a deposition;
 - b. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; OR
 - c. One of identification of a person made after perceiving the person.
2. **Statements of Identification: Non-hearsay:**
 - a. Statements of identification made by a witness made after the witness has perceived the individual, which identify an individual before a trial, are excluded from the definition of hearsay.
 - (i) Ehrhardt, 1 Fla. Prac., Evidence § 801.9 (2014 ed.).
 - (ii) State v. Freber, 366 So. 2d 426 (Fla. 1978).
 - (a) "An identification made shortly after the crime is inherently more reliable than a later identification in court."
 - (b) "The fact that the witness could identify the respondent when the incident was still fresh in her mind is of obvious probative value."
 - b. Statements of identification May be Admissible as Substantive Evidence:
 - (i) State v. Freber, 366 So. 2d 426 (Fla. 1978). "Testimony of prior extrajudicial identification is admissible as substantive evidence of identity if identifying witness testifies to fact that prior identification was made."
 - (ii) *But see* Rockerman v. State, 773 So. 2d 602 (Fla. 1st DCA 2000). Affirmative defense cannot rest on evidence of prior inconsistent identifying statement adduced for impeachment purposes only.

- c. Failure of the witness to repeat the identification in court does not affect the admissibility of evidence of the prior identification:
 - (i) Brown v. State, 413 So. 2d 414 (Fla. 5th DCA 1982). Evidence of prior identification admissible even though witness denied making the prior identification and testified at trial that defendant did not commit the crime.
 - (ii) A prior identification is also admissible as a prior inconsistent statement to impeach the victim's recantation of the identification at trial.
 - (a) U.S. v. Jarrad, 754 F.2d 1451 (9th Cir. 1985), *cert. denied*, 474 U.S. 830 (1985). Where witness identified defendant in photo-spread after the crime was committed and at trial denied making the identification, an FBI agent could testify at trial that witness had made the pretrial identification.
 - (b) Eans v. State, 366 So. 2d 540 (Fla. 3d DCA 1979).
- d. Must be a Statement of Identification to be Admissible: Robbery victim's description of suspect to police was not statement of identification, and thus police officer's testimony as to victim's description was not admissible under statute providing that statement of identification of person after perceiving him is non-hearsay when declarant testifies and is subject to cross examination. Puryear v. State, 810 So. 2d 901 (Fla. 2002).
- e. Witness Must Testify for Identifying Statement to be Admissible: Individual who made out-of-court identifying statement must testify during trial for statement to be admissible.
 - (i) Valley v. State, 860 So. 2d 464 (Fla. 4th DCA 2003).
 - (ii) Hayes v. State, 581 So. 2d 121 (Fla. 1991), *cert. denied*, 502 U.S. 972 (1991).
 - (iii) Hall v. State, 622 So. 2d 1132 (Fla. 2d DCA 1993).
 - (iv) D'Agostino v. State, 582 So. 2d 153 (Fla. 4th DCA 1991).
 - (v) Postell v. State, 398 So. 2d 851 (Fla. 3d DCA 1981), *review denied*, 411 So. 2d 384 (Fla. 1981).
 - (vi) Graham v. State, 479 So. 2d 824 (Fla. 2d DCA 1985).
- f. The statement of identification need not be made to a police officer; it may be made to a family member or other non-law enforcement person. See Henry v. State, 383 So. 2d 320 (Fla. 5th DCA 1980). Testimony of father who was present when his daughter identified the victim at a chance encounter.

3. Caller-ID Readout: Non-hearsay.

- a. Bowe v. State, 785 So. 2d 531 (Fla. 4th DCA 2001).
 - (i) "The caller ID display and the pager readouts are not statements generated by a person, so they are not hearsay within the meaning of subsection 90.801(1)(c)."
 - (ii) "Only statements made by persons fall within the definition of hearsay."
- b. *But see* Schmidt v. Hunter, 788 So. 2d 322 (Fla. 2d DCA 2001) (Polygraph results incorrectly admitted.).

4. Statements of Defendant: Non-hearsay:

- a. Police questioning of the defendant at a domestic violence crime scene does not normally require the reading of *Miranda* warnings in that the questioning does not involve custodial interrogations.
 - (i) Morris v. State, 557 So. 2d 27 (Fla. 1990). *Miranda* warnings are not required of defendant questioned in defendant's home.
 - (ii) Melero v. State, 306 So. 2d 603 (Fla. 3d DCA 1975). Admission to killing wife to the police in response to what happened type question at the crime scene found not to violate *Miranda*.
 - (iii) U.S. v. Axsom, 289 F.3d 496 (8th Cir. 2002). Where defendant was not "in custody" during an interview in his home, based on the presence of mitigating factors and absence of aggravating factors, *Miranda* warnings were not required, and granting of motion to suppress inculpatory statements made by appellant is reversed.
- b. False statements of the defendant are admissible in State's case-in-chief as substantive evidence to prove guilt.
 - (i) Simpson v. State, 562 So. 2d 742 (Fla. 1st DCA 1990). Jury instruction as to this issue should not be given.
 - (ii) Brown v. State, 391 So. 2d 729 (Fla. 3d DCA 1980). Used as both impeachment and substantive evidence to prove guilt.
 - (iii) Mackiewicz v. State, 114 So. 2d 684 (Fla. 1959). False exculpatory statements admissible as consciousness of guilt evidence.

5. Admissions: Non-hearsay:

- a. Statements which are made against a party and are his own statements are admissions and therefore an exception to the prohibition against hearsay. §90.803(18)(a), Florida Statutes.
- b. *Ehrhardt, 1 Fla. Prac., Evidence* § 803.18(a), (2014 ed.).
- c. The statement need not be against the interest of the party-opponent either at the time the statement was made or at the time it is offered.
- d. Husband-wife evidentiary privilege does not apply to criminal acts by one spouse on the other.
- e. Searcy v. Simmons, 299 F.3d 1220 (10th Cir. August 19, 2002). A corrections department's Sexual Abuse Treatment Program (SATP) does not violate an inmate's Fifth Amendment right against self-incrimination, and the SATP's admission of responsibility requirement does not violate the right to free exercise of religion.

6. Impeachment Testimony: §90.608(1), Florida Statutes, Allows a Party to Impeach His Own Witness.

- a. Limitations:
 - (i) Party (State) cannot call a witness solely to impeach. London v. State, 541 So. 2d 119 (Fla. 4th DCA 1989).
 - (ii) Impeachment testimony cannot be used as substantive evidence.
 - (iii) State v. Smith, 573 So. 2d 306 (Fla. 1990).
 - (a) Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986).

- (b) Kingery v. State, 523 So. 2d 1199, 1204 (Fla. 1st DCA 1988), *affirmed* by: State v. Smith, 573 So. 2d 306 (Fla. 1990).
 - (c) Santiago v. State, 652 So. 2d 485 (Fla. 5th DCA 1995). Victim's recanted original statement could be used as impeachment but not as substantive evidence.
 - (iv) Joyce v. State, 664 So. 2d 45 (Fla. 3d DCA 1995).
- b. The impeaching party must be prepared to prove up the disputed evidence prior to asking the question. This concept is based on the idea that for the party to ask the question in good faith he must be prepared to prove up the answer.
 - (i) Marrero v. State, 478 So. 2d 1155 (Fla. 3d DCA 1985).
 - (ii) Tobey v. State, 486 So. 2d 54 (Fla. 2d DCA 1986), *review denied*, 494 So. 2d 1153 (Fla. 1986).
 - (iii) Criticized by: *Ehrhardt*, 1 Fla. Prac., Evidence § 608.4 (2014 Edition).
 - (a) "The logical result of the restrictive decisions is to limit any cross-examination regarding credibility to situations in which counsel has a witness-room full of witnesses prepared to give backup testimony. Such an approach would unduly inhibit impeachment by imposing overwhelming burdens, delays, and expenses on showing good faith."
 - (b) *See also Greenfield v. State*, 336 So. 2d 1205 (Fla. 4th DCA 1976). Requiring counsel to demonstrate to the court by a "professional statement to the court" or through other evidence that counsel's belief is well-founded.
- c. There is no requirement that a prior inconsistent statement be reduced to writing in order to be used for impeachment.
 - (i) Kimble v. State, 537 So. 2d 1094 (Fla. 2d DCA 1989).
 - (ii) Williams v. State, 472 So. 2d 1350 (Fla. 2d DCA 1985). "The prior inconsistent statement may be oral and unsworn and may be drawn out on cross-examination of the witness himself and, if on cross-examination the witness denies, or fails to remember making such a statement, the fact that the statement was made may be proven by another witness."
- d. The court did not err in granting State's motion in limine excluding evidence that defendant had filed two petitions for domestic violence injunctions against the victim after the criminal incident. Nelson v. State, 704 So. 2d 752 (Fla. 5th DCA 1998).
- e. Simmons v. State, 790 So. 2d 1177 (Fla. 3d DCA 2001). By testifying that he had never been violent with the victim or anyone else, defendant opened the door to admission of impeachment evidence that defendant had engaged in acts of domestic violence against another girlfriend.
- f. Butler v. State, 842 So. 817 (Fla. 2003). Defendant alleged, inter alia, that the trial court erred by allowing the state to elicit testimony regarding alleged prior acts of violence committed by defendant. The court held that the trial court did not err in allowing the cross examination of defense witnesses on other crimes evidence as "the evidence was admissible to explain and modify direct testimony, was relevant and probative, and its probative value was not outweighed by the prejudicial effect."

- g. Mills v. State, 816 So. 2d 170 (Fla. 3d DCA 2002). Respondent appealed from a judgment of conviction for aggravated battery. The Third District Court of Appeal affirmed the lower court's decision concluding that the domestic violence final injunction and the arrest warrant issued, based upon alleged violations of the injunction, were admissible under §90.402, Florida Statutes, and not Williams' rule of evidence. The court held that evidence of uncharged crimes, which are inseparable from the crime charged, is not Williams' rule of evidence and is admissible if it is a relevant and inseparable part of the act, which is in issue. "It is necessary to admit the evidence to adequately describe the deed." Coolen v. State, 696 So. 2d 738, 742-43 (Fla. 1997), (quoting Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994)).
 - h. Werley v. State, 814 So. 2d 1159 (Fla. 1st DCA 2002). The First District Court of Appeal affirmed trial court's conviction of aggravated battery with a deadly weapon and held evidence of prior convictions was admissible pursuant to §90.806(1), Florida Statutes, for the purpose of impeaching statements (made by defendant) but offered by wife but through her testimony and the court found that the statement made by the wife was "exculpatory hearsay" offered for the truth of the matter.
- 7. Statements from Radio dispatch: Non-hearsay:**
- a. Police may testify that they arrived on the scene because of a statement made to them. Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989)(*en banc*), *affirmed in: Conley v. State*, 620 So. 2d 180 (Fla. 1993).
 - b. **HOWEVER:** The contents of the statement are inadmissible especially where they are accusatory.
 - (i) The inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information only to establish the logical sequence of events outweighs the probative value of such evidence.
 - (a) Conley v. State, 620 So. 2d 180 (Fla. 1993). Police dispatch is hearsay.
 - (b) State v. Baird, 572 So. 2d 904 (Fla. 1990).
 - (c) Harris v. State, *supra*, expressly receding from: Freemen v. State, 494 So. 2d 270 (Fla. 4th DCA 1986).

K. EXCULPATORY EVIDENCE (BRADY VIOLATION):

- 1. The State Cannot Suppress Material Evidence.**
 - a. Brady v. Maryland, 373 U.S. 83, 87 (1963). "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment" *See also White v. State*, 664 So. 2d 242 (Fla. 1995).
 - b. **Material Evidence Means:** "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A

‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”

(i) U.S. v. Bagley, 473 U.S. 667, 682 (1995).

(ii) White v. State, *supra*.

(iii) Kyles v. Whitley 514 U.S. 419 (1995).

- c. In order to establish a Brady violation, the defendant must prove that the State possessed evidence favorable to the defense, that the defendant did not have the evidence, nor could have obtained it through the exercise of reasonable diligence, that the State suppressed the evidence, and that a reasonable probability exists that had the evidence been disclosed, the outcome would have been different. Cherry v. State, 659 So. 2d 1069 (Fla. 1995), Hegwood v. State, 575 So. 2d 170,172 (Fla. 1991). *See also* Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (Here, the defendant failed to establish such a violation where the State made its entire file available to the defense).
- d. TEST: The test “is whether there is a reasonable probability that ‘had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990), quoting, U.S. v. Bagley, 473 U.S. 667, 682 (1985); Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

2. Searches: Exigent Circumstances which Could Justify Entry of Home:

- a. People v. Greene, 289 Ill.App.3d 796, 682 N.E. 2d 354 (Ill. App.2d Dist. 1997). Officer’s belief that a potential emergency was justified and their entry onto the defendant’s porch was proper after 911 hang-up call.
- b. State v. Gilbert, 942 P.2d 660 (Kan. Ct.App. 1997). Where victim, who had visible signs of injury, answered the door upset and crying and told police that suspect was not there, police were justified in making a warrantless entry of home for the safety of the victim.
- c. US v. Holloway, 290 F.3d 1331 (11th Cir. May 10, 2002). Law enforcement officials may conduct a limited, warrant less search of a private residence in response to an emergency situation reported by an anonymous 911 caller, where exigent circumstances (particularly danger to human life) demand an immediate response; any evidence in plain view is properly seized.
- d. *But see* Espiet v. State, 797 So. 2d 598 (Fla. 5th DCA 2001). The courts generally agree that a law enforcement officer may not make a warrantless entry into a person’s home to arrest the person for a misdemeanor offense. The provisions of §901.15(7), Florida Statutes, which allow a law enforcement officer to arrest a person for an act of domestic violence without a warrant, do not permit the forcible entry into the person’s home to effectuate the arrest based on a misdemeanor offense. The decision of the trial court is reversed and remanded.

3. Photographs:

- a. To be admissible, photographs must be a fair and accurate depiction of that which it purports to be:

- (i) Pierce v. State, 718 So. 2d 806 (Fla. 4th DCA 1997). Computer generated animation.
 - (ii) Paramore v. State, 229 So. 2d 855 (Fla. 1969), *vacated as to sentence only*, 408 U.S. 935 (1972); Bryant v. State, 810 So. 2d 532 (Fla. 1st DCA 2002). Videotape admission.
 - (iii) Grant v. State, 171 So. 2d 361 (Fla. 1965), *cert. denied*, 384 U.S. 1014 (1966). Motion picture.
- b. Two methods of authenticating photographic evidence: Dolan v. State, 743 So. 2d 544 (Fla. 4th DCA 1999)(computer enhanced process).
 - (i) First, the “pictorial testimony” method requires the testimony of a witness to establish that, based upon personal knowledge; the photographs fairly and accurately reflect the event or scene.
 - (ii) Second, the “silent witness” method provides that the evidence may be admitted upon proof of the reliability of the process which produced the tape or photo.
- c. The trial court’s admission of autopsy photographs was held to be in the sound discretion of the trial judge in all of the following cases:
 - (i) Gudinas v. State, 693 So. 2d 953 (Fla. 1997).
 - (ii) Olivera v. State, 719 So. 2d 341 (Fla. 3d DCA 1998).
 - (iii) Maret v. State, 605 So. 2d 949 (Fla. 3d DCA 1992). The fact that photographs were taken at medical examiner’s office rather than at the scene of the crime did not affect their admissibility.
 - (iv) Russell v. State, 454 So. 2d 778 (Fla. 4th DCA 1984), photograph of post evisceration view of empty chest cavity.
 - (v) Mordenti v. State, 630 So. 2d 1080 (Fla. 1994). Morgue photographs admissible even though manner of death was not in dispute; however, repetitious photographs should be excluded.
- d. The following cases held that photographs which corroborated testimony were properly admitted.
 - (i) Jackson v. State, 545 So. 2d 260 (Fla. 1989). Photographs of victim’s charred remains.
 - (ii) Russell v. State, *supra*.
 - (iii) Brumbley v. State, 453 So. 2d 381 (Fla. 1984). Color photographs of homicide victim’s skeletal remains.
 - (iv) Stratight v. State, 397 So. 2d 903, 906 (Fla. 1984).
 - (v) Edwards v. State, 414 So. 3d 1174 (Fla. 5th DCA 1982). Entry and exit gunshot wounds.
 - (vi) Carvajal v. State, 470 So. 2d 73 (Fla. 3d DCA 1985). Color photograph of deceased victim’s face in early state of decomposition.
 - (vii) Zamora v. State, 361 So. 2d 776 (Fla. 3d DCA 1978). Notwithstanding defendant’s offer to stipulate to murder, position of body, etc., photographs were relevant in that they corroborated testimony of certain witnesses.
- e. Photographs which assisted the medical examiner in explaining wounds found on murder victim are admissible.

- f. Pressley v. State, 261 So. 2d 522 (Fla. 3d DCA 1972). Held that the trial court did not err in admitting 12" x 15" black-and-white glossy photographs of murder victim lying dead on the floor of the murder scene, taken within one hour of the commission of the crime, though bloodstain appeared, where the photograph accurately portrayed the setting and served to illustrate or explain the testimony of the witnesses.
- g. The test for admissibility of photographs is relevancy rather than necessity. (The fact that other witnesses can or will testify to that which is depicted in the various photographs does not make those photographs inadmissible.)
 - (i) Pope v. State, 679 So. 2d 710, 713 (Fla. 1996).
 - (ii) King v. State, 623 So. 2d 486 (Fla. 1993).
 - (iii) Nixon v. State, 572 So. 2d 1336 (Fla. 1990).
 - (a) Rejecting the defense's argument that since the cause and nature of death had been clearly established there was no circumstances which necessitated the introduction of the seven photographs of the victim's charred remains.
 - (b) *Affirmed* on this point in Jones v. State, 648 So. 2d 669, 679 (Fla. 1994).
 - (c) Photographs, although "extremely gruesome", were not "so shocking in nature" as to outweigh their relevancy. Pope v. State, *supra*; Gudinas v. State, 693 So. 2d 953, 963 (Fla. 1997). Six slides of victim's body in the alley, two slides which showed the stick protruding from the victim's vagina and several slides of the body in the morgue were relevant.
 - (iv) Gore v. State, 475 So. 2d 1205, 1208 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986).
 - (v) Straight v. State, 397 So. 2d 903, 906 (Fla. 1981).
 - (vi) Waggoner v. State, 800 So. 2d 684 (Fla. 5th DCA 2001).
 - (vii) Bush v. State, 461 So. 2d 936, 941 (Fla. 1984). Reaffirming its position that gruesome and inflammatory photographs are admissible if relevant to any issues required to be proven in a case, and relevancy is to be determine in the normal manner without regard to any special characterization of the proffered evidence.
 - (viii) State v. Wright, 265 So. 2d 361, 362 (Fla. 1972).
- h. Admission of photographs appears to be reversible error only when the photographs have little or no relevance or the photographs are so shocking in nature as to outweigh their relevance.
 - (i) Ruiz v. State, 743 So. 2d 1 (Fla. 1999). Admission during penalty phase of murder trial of 2' x 3' blowup showing in detail the bloody and disfigured head and upper torso of the victim was reversible error.
 - (ii) Czuback v. State, 570 So. 2d 925 (Fla. 1990). Photographs of victim's body, which had been ravaged by dogs and was in a severely decomposed condition, should not have been admitted.
 - (iii) Rosa v. State, 412 So. 2d 891 (Fla. 3d DCA 1982). Admission of photograph of the victim's blood-splattered body, which depicted the results of emergency procedures performed after the stabbing was error.

- (iv) Polygraph exam results were incorrectly admitted at contempt hearing for violation of domestic violence injunction. Schmidt v. Hunter, 788 So. 2d 322 (Fla. 2d DCA 2001).
- (a) Evidence of respondent's character and previous criminal convictions was admitted,
- (b) respondent's arrest for violating an earlier injunction not involving petitioner, and
- (c) a letter that respondent wrote to an old girlfriend apologizing for an incident that lead to charges being filed.

L. WILLIAMS RULE/SIMILAR FACT EVIDENCE:

1. **Prior Bad Acts, Wrongs, or Crimes Committed by the Accused are Admissible Into Evidence if They are Relevant to Prove Some Material Fact In Issue.**
 - a. See Williams v. State, 110 So. 2d 654 (Fla. 1959).
 - b. §90.404(2), Florida Statutes.
 - c. To Prove Lack of Consent: Boroughs v. State, 684 So. 2d 274 (Fla. 5th DCA 1996). Testimony concerning the abusive nature of the defendant's relationship with the victim, including the defendant's prior "bad acts," was relevant to prove the sexual battery victim's lack of consent and to explain why the victim did not immediately contact the police.
 - d. To Prove Premeditation/Motive:
 - (i) Goldstein v. State, 447 So. 2d 903 (Fla. 4th DCA 1984).
 - (a) Evidence was that defendant threatened ex-wife (victim) on a prior occasion.
 - (b) "[W]e hold that the prior act of aggressive conduct and the accompanying verbal statements were admissible because they were relevant to the issue of intent which is an essential element of premeditated murder."
 - (ii) Hyer v. State, 462 So. 2d 488 (Fla. 2d DCA 1984).
 - (a) "Defendant also argues that the trial court erred in allowing the admission of testimony establishing that defendant's wife prior to the shooting had obtained an order restraining defendant from bothering, threatening or harming her."
 - (b) "Before any testimony was given regarding the restraining order, the wife testified without objection concerning an occasion when her husband hit her."
 - (c) "The evidence was relevant to the issue of premeditation. One of defendant's defenses at trial was lack of premeditation."
 - (d) *See also*:
 - (1) King v. State, 436 So. 2d 50 (Fla. 1983). Evidence that defendant severely beat victim twenty-three days before killing her was relevant to premeditation.
 - (2) Wooten v. State, 398 So. 2d 963 (Fla. 1st DCA 1981). Evidence that defendant previously beat or physically mistreated one-year-

old murder victim or victim's two-year-old sister was properly admissible.

- (iii) Burgal v. State, 740 So. 2d 82 (Fla. 3d DCA 1999). Although no facts were given, the court held that evidence of prior incidents of domestic violence by defendant against victim were properly admitted to prove motive, intent and premeditation, in an attempted first degree murder/armed burglary trial.
- (iv) *But see* Robertson v. State, 829 So. 2d 901 (Fla. 2002). Landmark collateral crimes domestic violence case; reversible error "as a matter of law" to allow as Williams rule evidence "a prior threat six years earlier against a different victim and involving a different weapon" to prove absence of mistake or accident. The Supreme Court noted it was "unable to find...any cases in Florida where a prior threat against a different victim was admitted under the Williams rule to prove the absence of mistake or accident of the present offense." The court did cite with apparent approval cases allowing "prior crimes against the same victim as the charged offense."
- e. To prove motive, intent and the absence of mistake: Testimony regarding prior incident was admissible. The defendant appealed his conviction and sentence for second-degree murder with a deadly weapon. He argued that the trial court erred in admitting witness testimony regarding a collateral, uncharged crime because during the trial, the victim's best friend testified about a possible domestic violence incident that had occurred between the victim and the defendant. The trial judge had given the jury specific directions on how to interpret the evidence based upon Williams v. State, 110 So. 2d 654 (Fla. 1959), and the appellate court found that the trial court did not abuse its discretion and that the testimony of prior incidents was admissible to prove motive, intent and the absence of mistake or accident based upon §90.404(2)(a), Florida Statutes. The court affirmed the conviction and sentence. Aguiluz v. State, 43 So. 3d 800 (Fla. 3d DCA 2010).
- f. Prior Bad Acts Admitted Once Defense "Opened the Door": Fiddemon v. State, 858 So. 2d 1100 (Fla. 4th DCA 2003). The Fourth District Court of Appeal reversed the trial court's judgment convicting the defendant of the second-degree murder of his girlfriend. Prior to the trial, the court granted the defendant's motion in limine to preclude evidence regarding defendant's prior assault on his girlfriend. At trial, the court allowed the State to introduce evidence of the assault on the theory that the defense had "opened the door" by presenting evidence of a 10-year-old domestic violence incident involving the girlfriend's former husband. The District Court of Appeal reversed and held that in order for prior bad acts to be admitted under the "opening the door" argument, the defense must first present misleading testimony or a factual assertion which the State would have a right to correct. (Note: The court did go on to discuss in a footnote that evidence of prior violence or assaults may be relevant to establish motive, intent.)

- g. Proper and Improper use of Prior Bad Acts in Trial for Resisting Arrest:
 - (i) Burgos v. State, 865 So. 2d 622 (Fla. 3d DCA 2004). While responding to a domestic violence call, defendant struggled with the officers as they intended to arrest him. The domestic battery charge was not filed. During his trial for resisting arrest with violence, the officers testified in detail about the domestic violence offense. This was error, and defendant was entitled to a new trial.
 - (ii) Logan v. State, 705 So. 2d 140 (Fla. 3d DCA 1998). Proper to enter injunction for protection against domestic violence into evidence on resisting with violence charge where defendant/respondent battered law enforcement officer when trying to serve injunction.
- 2. **Pre-requisites to Introduce Similar Fact Evidence:** There must be sufficient similarity between the crime charged and the evidence introduced. The evidence introduced must be relevant to a fact in issue; and the evidence must not be relevant solely to prove bad character. Crowell v. State, 528 So. 2d 535 (Fla. 5th DCA 1988).
- 3. **Evidence is Inadmissible if Solely Relevant to Prove Bad Character or Propensity to Commit the Crime.**
 - a. Peek v. State, 488 So. 2d 52 (Fla. 1986).
 - b. Coler v. State, 418 So. 2d 238 (Fla. 1982).
 - c. Florida v. State, 522 So. 2d 1039 (Fla. 4th DCA 1988).
 - d. Paquette v. State, 528 So. 2d 995 (Fla. 5th DCA 1988). Improper to admit prior bad act evidence where purpose is to show that because of propensities, defendant very likely did the acts for which he is charged.
 - e. Jackson v. State, 522 So. 2d 802 (Fla. 1988).
 - f. LaMarr v. Lang, 796 So. 2d 1208 (Fla. 5th DCA 2001). The Fifth District Court of Appeal reversed a lower court's decision to enter a final injunction for repeat violence against the respondent on the grounds that the court erred in admitting certain evidence regarding the respondent's character and previous criminal convictions. At the original hearing, the court allowed the petitioner's attorney to "1) show that LaMarr had been arrested for violating an earlier injunction not involving Lang; 2) introduce a letter that LaMarr wrote to an old girlfriend apologizing for an incident that apparently lead to charges being filed against him; 3) question LaMarr regarding prior injunctions filed against him by other people." The Fifth District Court of Appeal held that this was improper for the lower court to admit this evidence pursuant to the Williams rule regarding collateral evidence. Relying on Pastor v. State, 792 So. 2d 627 (Fla. 4th DCA 2001), the court comments that collateral crimes evidence is not admissible when its relevance goes only to prove a respondent's propensity.
 - g. *See also* Rodriguez v. State, 842 So. 2d 1053 (Fla. 3d DCA 2003). Trial court improperly permitted victim's testimony regarding a restraining order she obtained subsequent to an argument she and the defendant had which resulted in defendant's charge of aggravated assault with a deadly weapon against the victim. The Third District Court of Appeal held that the

testimony should not have been admitted as it bolstered the victim's credibility.

4. Collateral Crime Evidence: Evidence of a Collateral Crime May be Admitted to Establish the Context Out of Which the Criminal Conduct Arose:

- a. Jackson v. State, 522 So. 2d 802 (Fla. 1988).
- b. Smith v. State, 365 So. 2d 704 (Fla. 1978).
- c. The collateral offenses must not only be strikingly similar, but they must also share some unique characteristics or combination of characteristics which sets them apart from other offenses. See Crowell v. State, 528 So. 2d 535 (Fla. 5th DCA 1988).
- d. The evidence must be relevant to a material fact in issue. See Crowell v. State, *supra*.
- e. Reverse Williams Rule: When the State seeks to introduce Williams rule evidence, the defendant should have the same right to question the alleged collateral victim about the circumstances surrounding the collateral crime as he would have in questioning the alleged victim in a crime for which he stands accused. Gutierrez v. State, 705 So. 2d 660 (Fla. 2d DCA 1998).

5. Inseparable Crime Evidence:

- a. Inseparable crime evidence or inextricably intertwined evidence is admissible because it is relevant and necessary to adequately describe the events leading up to the crime and/or the entire context out of which the criminal conduct arose or occurred.
 - (i) Smith v. State, 365 So. 2d 704, 707 (Fla. 1978).
 - (ii) Hall v. State, 403 So. 2d 1321 (Fla. 1981).
 - (iii) Osborne v. State, 743 So. 2d 602 (Fla. 4th DCA 1999).
 - (iv) State v. Cohens, 701 So. 2d 362, 364 (Fla. 2d DCA 1997).
 - (v) Austin v. State, 500 So. 2d 262 (Fla. 1st DCA 1986).
- b. Evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is admissible under §90.402, Florida Statutes, because "it is relevant and inseparable part of the act which is in issue."
 - (i) Osborne v. State, 743 So. 2d 602 (Fla. 4th DCA 1999).
 - (ii) Coolen v. State, 696 So. 2d 738 (Fla. 1997).
 - (iii) It is inseparable crime evidence that explains or throws light upon the crime being prosecuted.
Tumulty v. State, 489 So. 2d 150 (Fla. 4th DCA 1986).
 - (a) "Under this view, inseparable crime evidence is admissible under §90.402 because it is relevant rather than being admitted under 90.402(2)(a)."
 - (b) Affirmed in: Padilla v. State, 618 So. 2d 165 (Fla. 1993).
 - (iv) There is no need to comply with the ten (10) day notice provision.
Tumulty v. State, 489 So. 2d 150 (Fla. 4th DCA 1986).





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Supreme Court of Florida

No. SC12-2007

**IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUDICIAL
ADMINISTRATION.**

No. SC12-2030

**IN RE: AMENDMENTS TO THE FLORIDA FAMILY LAW RULES OF
PROCEDURE.**

[January 16, 2014]

PER CURIAM.

We have for consideration two separate petitions to amend the Florida Rules of Court, filed by the Florida Supreme Court's Steering Committee on Families and Children in the Court (Steering Committee).¹ In the first petition, case number SC12-2007, the Steering Committee proposes amendments to Florida Rule of Judicial Administration 2.545(d) (Case Management; Related Cases). In the

1. We have jurisdiction. See art. V, § 2(a), Fla. Const.

second petition, case number SC12-2030, the Steering Committee proposes five new Florida Family Law Rules of Procedure. The Steering Committee's proposals in these petitions advance the important goal of effectively implementing the unified family court model to ensure that all parties, attorneys, and judges in a family case receive proper notice of other related family cases. These proposals also outline new procedures for assigning related family cases to a single judge unless impractical and for coordinating related family cases assigned to different judges.

In adopting the Steering Committee's proposals, we continue to express our strong support for the general guiding principles and characteristics of the model family court espoused in In re Report of the Commission on Family Courts (Family Courts I), 588 So. 2d 586 (Fla. 1991); In re Report of the Commission on Family Courts (Family Courts II), 633 So. 2d 14 (Fla. 1994); In re Report of the Commission on Family Courts (Family Courts III), 646 So. 2d 178 (Fla. 1994); and In re Report of the Family Court Steering Committee (Family Courts IV), 794 So. 2d 518 (Fla. 2001). As we stated when the Court unanimously endorsed the recommendations of the Steering Committee in Family Courts IV:

Having reviewed the Committee's recommendations, we strongly endorse the guiding principles and characteristics of the model family court developed therein and we reaffirm our commitment to the principles we espoused in In re Report of Commission on Family Courts, 588 So. 2d 586, 587 (Fla. 1991) (Family Courts I) and Family Courts II. In so doing, our goal

continues to be the creation of “a fully integrated, comprehensive approach to handling all cases involving children and families,” Family Courts II, 633 So. 2d at 17, while at the same time resolving family disputes in a fair, timely, efficient, and cost-effective manner. We also stress the importance of embracing methods of resolving disputes that do not cause additional emotional harm to the children and families who are required to interact with the judicial system.

794 So. 2d at 519-20. With the Steering Committee’s assistance, the amendments adopted by the Court here address remaining impediments to the effective implementation of the unified family court model and further this Court’s goal of ensuring that cases involving families and children are managed in an efficient manner that serves the best interests of the parties.

BACKGROUND

The Steering Committee’s petitions represent years of work to implement the unified family court model and to overcome impediments to its operation. Beginning in 1994, this Court established the Steering Committee to support and assist the Court in developing and fully implementing the family court concept in Florida, and we directed the Steering Committee to, among other things, develop recommendations on the characteristics of a model family court, including organization, policy, procedures, staffing, resources, and linkages to the community to assist children and families involved in litigation. See Family Courts II, 633 So. 2d at 18-19. The Court considered the Steering Committee’s recommendations in Family Courts IV.

As is relevant here, the Steering Committee recommended that the Court adopt a rule of judicial administration to require judges assigned to different cases involving the same family to confer, as well as to coordinate pending litigation to maximize judicial efforts, prevent inconsistent court orders, and avoid multiple court appearances by the parties on the same issues. Family Courts IV, 794 So. 2d at 526. Because the Steering Committee did not submit a specific rule proposal, the Court referred the matter back to the Steering Committee to develop appropriate standards. Id. As the Court stated at that time:

Coordination of cases is critical. Indeed, in 1991, the Commission on Family Courts noted that there is “no justification to have situations such as have been presented to the commission which indicate that families were required to appear before one judge in a dissolution proceeding that included determination of custody of the children and at the same time to have a hearing before another judge concerning the juvenile dependency of one of the children including the determination of the custody of that child.” Family Courts I, 588 So. 2d at 588.

Because a specific rule has not been submitted, we refer this important matter back to the Family Court Steering Committee for the development of appropriate standards to be followed when there are multiple court appearances in different cases by the parties on the same issue. Some specific aspects the Committee should consider are whether there should be notice to the parties when cross-over cases are identified before consolidation or coordination occurs and whether the confidentiality requirements in chapter 39 (regarding dependency cases) will restrict the ability of the court to coordinate these cases.

Of course, if all cases involving the same family are identified and assigned to a single judge, many of these problems of coordination and confidentiality will be eliminated. As the Committee’s commentary observes:

Automatic transfer avoids any complaint about ex parte communication between the judges. See Chaddick

v. Monopoli, 714 So. 2d 1007 (Fla. 1998) (judges must allow parties to be present during conference on interstate jurisdiction). It also avoids any dispute over the chief judges' authority to resolve these issues. Because of the broad jurisdiction of our circuit courts, which includes jurisdiction over all of the types of cases listed above, coordination of cases, and more particularly assignment to one circuit court judge, can be accomplished—provided that the technology and necessary staff is in place to identify the related cases.

Id. (emphasis added).

Consistent with our direction in Family Courts IV, the Steering Committee developed standards to handle related family cases, and in 2005 the Court adopted amendments to Florida Rule of Judicial Administration 2.085 (Time Standards for Trial and Appellate Courts), creating a new subdivision (d) (Related Cases). This new subdivision set forth a procedure for the petitioner in a family case to file a Notice of Related Cases if such cases are known or reasonably ascertainable. See In re Amends. to Fla. Rules of Jud. Admin. (Two-Year Cycle), 915 So. 2d 157, 160 (Fla. 2005). Rule 2.085 was later renamed and renumbered as Florida Rule of Judicial Administration 2.545 (Case Management). See In re Amends. to Fla. Rules of Jud. Admin.—Reorganization of the Rules, 939 So. 2d 966, 967 (Fla. 2006).

When the Steering Committee was reauthorized for a subsequent two-year term in 2006, the Committee was charged with, among other requests, examining existing court rules that impact the implementation of the unified family court

model. The Steering Committee was also asked to develop and recommend additional rules, suggest the repeal of rules, and propose amendments to existing rules as may be needed to enhance the implementation of the unified family court model. See In re Steering Comm. on Families & Children in the Court, Fla. Admin. Order No. AOSC06-30 (August 30, 2006).

Ultimately, in its 2006-2008 End of Term Report, the Steering Committee identified nine impediments to the successful implementation of the unified family court model. As is relevant here, Impediment 3 pertained to Rule of Judicial Administration 2.545(d) and the Notice of Related Cases. The Steering Committee recommended in Impediment 3 that “in order to develop the most effective and efficient notice rule, the broader operational issues involved in handling related cases should first be further studied.” Fla. Supreme Court’s Steering Comm. on Families & Children in the Court, Report of the 2006-2008 Families & Children in the Court Steering Comm., at 52 (2008).

Over the next two years, the Steering Committee was charged with prioritizing, studying, and recommending resolutions to the nine impediments it had identified, including Impediment 3. See In re Steering Comm. on Families & Children in the Court, Fla. Admin. Order No. AOSC08-97 (Dec. 22, 2008). In 2010, the Committee was specifically directed to:

Examine rule 2.545(d), Florida Rules of Judicial Administration, which requires the petitioner in a family case to file with the court a

notice of related cases, and propose amendments that ensure all of the necessary parties and attorneys receive proper notification and that also prevent problems with regard to notice, case coordination, scope of representation, and efficiency that were identified during the 2006-2008 term of the Steering Committee (Impediment 3).

See In re Steering Comm. on Families & Children in the Court, Fla. Admin. Order No. AOSC10-50 (Sept. 10, 2010). In June 2012, the Steering Committee submitted its 2010-2012 End of Term Report. Regarding its charge to examine and recommend resolutions to Impediment 3, the report indicated that the Steering Committee would file two petitions, one proposing amendments to the Florida Family Law Rules of Procedure and one seeking to amend the Florida Rules of Judicial Administration.

In September 2012, the Steering Committee filed the petitions currently before the Court. As noted, in case number SC12-2007, the Steering Committee proposes amendments to Florida Rule of Judicial Administration 2.545(d) (Case Management; Related Cases). In case number SC12-2030, the Steering Committee proposes five new Florida Family Law Rules of Procedure: 12.003 (Coordination of Related Family Cases and Hearings); 12.004 (Judicial Access and Review of Related Family Files); 12.006 (Filing Copies of Orders in Related Family Cases); 12.007 (Access and Review of Related Family Files by Parties); and 12.271 (Confidentiality of Related Family Hearings).

The Court published both sets of proposals in The Florida Bar News for comment. No comments were filed in case number SC12-2007. The Court received two comments in case number SC12-2030, one from the Family Law Rules and Forms Committee of the Family Law Section of The Florida Bar (the Family Law Section), and one from the Family Law Rules Committee. The Steering Committee filed a response to the comments, with a revised proposal to amend Rule of Judicial Administration 2.545(d), as well as revisions to its proposed new Family Law Rules of Procedure. Because the comments and response in case number SC12-2030 impacted the Steering Committee's petition to amend Rule of Judicial Administration 2.545(d) in case number SC12-2007, we consolidated the cases and held oral argument.

We note that there were no comments filed in opposition to the concepts embodied in the petitions, which aim to ensure that the goals of the unified family court are not impeded by existing procedural rules. The recommended revisions and alternate proposals submitted by the Family Law Section and the Family Law Rules Committee simply suggested alternate ways to accomplish the same goals.

The Family Law Rules Committee favored placement of the proposed new Family Law rules within the Rules of Judicial Administration and also proposed a more formal conference procedure, modeled after the procedures followed when judges from different states confer under the Uniform Child Custody Jurisdiction

and Enforcement Act (UCCJEA), so that the parties are ensured that they can meaningfully participate when judges are conferring with each other. The Chair of the Family Law Rules Committee also reported concerns in ensuring that conflicting orders are not entered when different judges are handling different aspects of cases involving the same family. Preventing conflicting orders is one of the critical goals of the unified family court, and circuits where this problem still occurs should re-examine their existing practices.

As for the Family Law Section, the Section not only favored the adoption of procedural rules that would remove impediments to the effective implementation of the unified family court model, but also suggested that all cases involving the same family should be assigned to one judge. As stated during oral argument, the “Section absolutely embraces the concept of family court, the one family/one judge model.”

We are pleased to receive this unanimous endorsement of the Court’s adoption of the principles underlying the unified family court in Florida, which represents a critical commitment to ensuring that the court system manages its cases in a manner that will best resolve the issues facing families and children who come before the courts. As one member of the Steering Committee sagely stated, “families do not think of their problems in terms of divisions of the court.” For a family who has to appear before different judges at different times for related

issues, this type of fragmented approach does not best serve the interests of the family or the children.

With these considerations in mind, and with deference to the expertise of the Steering Committee, we have determined to adopt the Steering Committee's proposals with some modifications, as addressed below.

AMENDMENTS

Rule of Judicial Administration 2.545 (Case Management)

Initially, subdivision (d)(1) of Florida Rule of Judicial Administration 2.545 is amended to clarify that the term "family case" is defined in the rule (in subdivision (d)(2)), and to add a cross-reference to the relevant Family Law Form, Form 12.900(h) (Notice of Related Cases). Additionally, subdivision (d)(2) of rule 2.545 is amended to add a "stalking" injunction to the definition of a family case.

The crux of the changes is contained in subdivision (d)(4) of rule 2.545. As amended, the rule provides that the Notice of Related Cases shall be filed in each open and pending related case, and served on all parties in each of the related cases and as may be directed by the chief judge. This change is consistent with the Steering Committee's charge—to ensure that all of the necessary parties, attorneys, and judges involved in a family case receive proper notification of related family cases. Language is also added in subdivision (d)(4) of rule 2.545, allowing parties to file joint Notices of Related Cases; clarifying that a Notice of Related Cases

filed pursuant to the rule is not an appearance; providing that if any related case is confidential and exempt from public access by law, then a Notice of Confidential Information Within Court Filing must accompany the notice, pursuant to Florida Rule of Judicial Administration 2.420; and directing parties to file supplemental Notices of Related Cases as such cases become known or reasonably ascertainable.

We also delete existing subdivision (d)(7), because the language in this provision is now included in subdivision (d)(4) of rule 2.545.

Florida Family Law Rules of Procedure

As noted, the Steering Committee's proposal in case number SC12-2030 included five new Family Law Rules of Procedure. Both the Family Law Section and the Family Law Rules Committee provided comments on the proposed new rules. While the comments of both the Family Law Section and the Family Law Rules Committee contained several suggestions to amend or revise the Steering Committee's proposals, there was no opposition to the unified family court model.

One of the comments from the Family Law Rules Committee suggested that the substance of the Steering Committee's proposals would be better placed in Rule of Judicial Administration 2.545. While the Court considered the Family Law Rules Committee's suggestion, ultimately we defer to the Steering Committee and have adopted its proposals with some minor modifications. We address each of the new rules in turn.

The first new Florida Family Law Rule of Procedure we adopt is rule 12.003 (Coordination of Related Family Cases and Hearings). Subdivision (a) (Assignment to One Judge) of this important new rule provides that all related family cases must be handled before one judge unless impractical. This rule is consistent with the Court's 2001 opinion in Family Courts IV, which encourages this practice.

The Family Law Section and the Family Law Rules Committee both raised concerns that the language "unless impractical" is vague and may be subject to different interpretations in different courts. The Family Law Section favored a mandatory requirement to have related family cases heard before a single judge, except in narrowly defined categories such as when the cases are in different circuits. The Family Law Section was especially concerned that the "unless impractical" language "will allow for a lot of arguments that were not the intent of the rule."

The Steering Committee agrees that one judge should be the model, but recognizes the need for flexibility. We defer to the views of the Steering Committee, whose members are uniformly committed to the one judge/one family model, that there must be some flexibility to manage related family cases under limited circumstances. If the Steering Committee, in monitoring the actual practices, discerns that the "unless impractical" language is being used when there

is no valid reason for one judge not to handle all related family cases, then the Court will consider a revised proposal in the future.

We fully agree with the Family Law Section that having one judge handle all related family cases is the goal and should be the model for the circuits to follow. Through effective case management, this goal should be realized in the overwhelming majority of cases. To the extent that one judge is not handling all related family cases, we urge each circuit to examine its practices to determine why this is currently occurring.

In tandem with the subdivision regarding the one judge/one family model, new rule 12.003 also codifies the procedures to be followed if it is “impractical” for one judge to handle all related family cases. Subdivision (a)(2) of rule 12.003 provides that the judges assigned to hear each related family case or cases may confer with each other for the purposes of case management and coordination. This is another important rule that will ensure that case management and coordination are conducted in a more formal manner between the judges.

We have, however, revised the Steering Committee’s proposal to incorporate language proposed by the Family Law Rules Committee, allowing the court or the party who filed the Notice of Related Cases to coordinate a case management conference to: (1) consolidate as many issues as is practical to be heard by one judge; (2) coordinate the progress of remaining issues in order to facilitate the

resolution of pending actions and avoid inconsistent rulings; (3) determine the attendance and participation of minor children in the proceedings; and (4) determine the access of the parties to court records if a related case is confidential pursuant to Rule of Judicial Administration 2.420.

Together with the other new provisions for a more uniform way of handling related cases, new rule 12.003, subdivision (b) (Joint Hearings or Trials), allows the court to order joint hearings or trials of any issues in related family cases. If any such joint or coordinated hearings are ordered, the moving party, the court, or any other party ordered by the court shall provide notice to all parties and to all attorneys of record in each related case.

The second new Family Law Rule of Procedure we adopt addresses judicial access and review of related family case files. Because one of the impediments to a successful unified family court has been the question of accessing related files, new Family Law Rule of Procedure 12.004 (Judicial Access and Review of Related Family Files), subdivision (a) (In General), authorizes a judge hearing a family case to access and review the files of any related case, whether pending or closed. Authorized court staff is also permitted to access and review related family case files. The Steering Committee indicates that this rule will complement a judge's ability to coordinate related family cases.

Additionally, subdivision (b) of rule 12.004 (Family Case Defined) defines a related family case as another pending or closed family case, as that term is defined in Rule of Judicial Administration 2.545(d); subdivision (c) of rule 12.004 (Nondisclosure of Confidential Information) precludes judges or authorized court personnel from disclosing confidential information and documents in related family case files except in accordance with applicable state and federal confidentiality laws; and subdivision (d) of rule 12.004 (Notice by Court Staff) provides that authorized court staff may advise the court of related legal proceedings, the legal issues involved, and administrative information about such cases.

The third new Family Law Rule of Procedure we adopt codifies procedures already existing but not uniform. New rule 12.006 (Filing Copies of Orders in Related Family Cases) provides that the court may file copies of court orders in related family cases involving the same parties. This rule will help to ensure that the files in each of the related family cases contain copies of relevant and appropriate orders, which will reduce the possibility that judges will enter conflicting orders in the related cases.

The fourth new rule addresses another identified impediment to the effective implementation of the unified family court model, which is the fact that records might be confidential in one family case but not in a related family case. Although

many judges have adopted procedures to handle these issues, the Steering Committee determined that it would be preferable to codify the procedures in a rule. New Family Law Rule of Procedure 12.007 (Access and Review of Related Family Files by Parties) therefore addresses confidential files in related family cases.

We have revised the Steering Committee's proposal in subdivision (a) of rule 12.007 (In General) to provide that access to confidential files in related cases shall not be granted except as authorized by Florida Rule of Judicial Administration 2.420. We have also revised subdivision (b) of rule 12.007 (Confidentiality of Address) to clarify that, when a petitioner for a domestic violence injunction requests that his or her address be kept confidential, this information is exempt from the public records provisions of section 119.07(1), Florida Statutes, and article I, section 24(a), of the Florida Constitution, and is a confidential court record pursuant to Rule of Judicial Administration 2.420(d). Subdivision (c) of rule 12.007 (Disclosure Prohibited) provides that disclosure by parties of confidential information and documents in related family case files is prohibited, except in accordance with state and federal confidentiality statutes.

Finally, new Family Law Rule of Procedure 12.271 (Confidentiality of Related Family Hearings) pertains to confidentiality of joint or coordinated hearings in related family cases. Subdivision (a) of rule 12.271 (Confidentiality of

Coordinated or Joint Hearings) requires that, when related family cases are coordinated or joint hearings ordered, the hearings or proceedings involving more than one related family case are subject to the applicable state and federal confidentiality statutes pertaining to each case as if it were heard separately. Additionally, subdivision (b) of rule 12.271 (No Waiver) provides that the confidentiality of a case or issue is not waived by coordination or joint hearings.

CONCLUSION

We thank the Steering Committee for its continued diligent work in developing and improving the unified family court model. Through the proposed rule amendments, the Steering Committee has assisted the Court in furthering its ultimate goal to create a fully integrated, comprehensive approach to handling all cases involving families and children. We also wish to thank the Family Law Section and the Family Law Rules Committee for their support of the unified family court model and for helpful input and suggestions regarding the proposed rule amendments.

Accordingly, we amend the Florida Rules of Judicial Administration and the Florida Family Law Rules of Procedure as set forth in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall become effective on April 1, 2014.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA,
and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE
EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceedings – Florida Rules of Judicial Administration and Florida
Family Law Rules of Procedure

Nikki Ann Clark, Vice-Chair, Steering Committee on Families and Children in the
Court, Tallahassee, Florida

for Petitioner

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Florida; and Reuben A. Doupe of Klaus Doupe, Naples, Florida,

Responding with comments

APPENDIX

FLORIDA RULES OF JUDICIAL ADMINISTRATION

RULE 2.545 CASE MANAGEMENT

(a) – (c) No Change

(d) Related Cases.

(1) The petitioner in a family case as defined in this rule shall file with the court a notice of related cases in conformity with family law form 12.900(h), if related cases are known or reasonably ascertainable. A case is related when:

(A) it involves any of the same parties, children, or issues and it is pending at the time the party files a family case; or

(B) it affects the court's jurisdiction to proceed; or

(C) an order in the related case may conflict with an order on the same issues in the new case; or

(D) an order in the new case may conflict with an order in the earlier litigation.

(2) "Family cases" include dissolution of marriage, annulment, support unconnected with dissolution of marriage, paternity, child support, UIFSA, custodial care of and access to children, proceedings for temporary or concurrent custody of minor children by extended family, adoption, name change, declaratory judgment actions related to premarital, marital, or postmarital agreements, civil domestic, repeat violence, dating violence, stalking, and sexual violence injunctions, juvenile dependency, termination of parental rights, juvenile delinquency, emancipation of a minor, CINS/FINS, truancy, and modification and enforcement of orders entered in these cases.

(3) [No Change]

(4) The notice of related cases shall be filed with the initial pleading by the filing attorney or self-represented petitioner. The notice shall be

filed in each of the related cases that are currently open and pending with the court and served on all other parties in each of the related cases, and as may be directed by the chief judge or designee. Parties may file joint notices. A notice of related cases filed pursuant to this rule is not an appearance. If any related case is confidential and exempt from public access by law, then a Notice of Confidential Information Within Court Filing as required by Florida Rule of Judicial Administration 2.420 shall accompany the notice. Parties shall file supplemental notices as related cases become known or reasonably ascertainable.

(5) – (6) [No Change]

~~(7) — The notice of related cases shall be served on all parties in the related cases, the presiding judges, and the chief judge or family law administrative judge.~~

(e) [No Change]

Committee Notes

[No Change]

FLORIDA FAMILY LAW RULES OF PROCEDURE

RULE 12.003 COORDINATION OF RELATED FAMILY CASES AND HEARINGS

(a) Assignment to One Judge.

(1) All related family cases must be handled before one judge unless impractical.

(2) If it is impractical for one judge to handle all related family cases, the judges assigned to hear the related cases involving the same family and/or children may confer for the purpose of case management and coordination of the cases. Notice and communication shall comply with Canon 3.B.(7) of the Code of Judicial Conduct. The party who filed the notice of related cases or the court may coordinate a case management conference under rule 12.200 between

the parties and the judges hearing the related cases. In addition to the issues that may be considered, the court shall:

(A) consolidate as many issues as is practical to be heard by one judge;

(B) coordinate the progress of the remaining issues to facilitate the resolution of the pending actions and to avoid inconsistent rulings;

(C) determine the attendance or participation of any minor child in the proceedings if the related cases include a juvenile action; and

(D) determine the access of the parties to court records if a related case is confidential pursuant to Florida Rule of Judicial Administration 2.420.

(b) Joint Hearings or Trials.

(1) The court may order joint hearings or trials of any issues in related family cases.

(2) For joint or coordinated hearings, notice to all parties and to all attorneys of record in each related case shall be provided by the court, the moving party, or other party as ordered by the court, regardless of whether or not the party providing notice is a party in every case number that will be called for hearing.

RULE 12.004 JUDICIAL ACCESS AND REVIEW OF RELATED FAMILY FILES

(a) In General. A judge hearing a family case may access and review the files of any related case either pending or closed, to aid in carrying out his or her adjudicative responsibilities. Authorized court staff and personnel may also access and review the file of any related case.

(b) Family Case Defined. For purposes of this rule, a related family case is another pending or closed case separate from the pending case, as defined in Rule of Judicial Administration 2.545(d).

(c) Nondisclosure of Confidential Information. Judges or authorized court personnel shall not disclose confidential information and documents contained in related case files except in accordance with applicable state and federal confidentiality laws.

(d) Notice by Court Staff. Authorized court staff may advise the court about the existence of related legal proceedings, the legal issues involved, and administrative information about such cases.

RULE 12.006 FILING COPIES OF ORDERS IN RELATED FAMILY CASES

The court may file copies of court orders in related family cases involving the same parties. All relevant case numbers should be placed on the order and a separate copy placed in each related case file.

RULE 12.007 ACCESS AND REVIEW OF RELATED FAMILY FILES BY PARTIES

(a) In General. Access to confidential files in related cases shall not be granted except as authorized by Florida Rule of Judicial Administration 2.420.

(b) Confidentiality of Address. When a petitioner for domestic violence injunction requests that his or her address be kept confidential pursuant to section 741.30, Florida Statutes, this information is exempt from the public records provisions of section 119.07(1), Florida Statutes and article I, section 24(a), Florida Constitution, and is a confidential court record under Rule of Judicial Administration 2.420(d). Persons with authorized access to confidential information shall develop methods to ensure that the address remains confidential as provided by law.

(c) Disclosure Prohibited. Disclosure by parties of confidential information and documents contained in court files for related family cases, except in accordance with applicable state and federal confidentiality statutes, is prohibited.

**RULE 12.271 CONFIDENTIALITY OF RELATED FAMILY
HEARINGS**

(a) Confidentiality of Coordinated or Joint Hearings. When related family cases are coordinated or joint hearings ordered, any hearings or proceedings involving more than one related family case are subject to the applicable state and federal confidentiality statutes pertaining to each case as if heard separately.

(b) No Waiver. The confidentiality of a case or issue is not waived by coordination or a joint hearing.

CIVIL DOMESTIC VIOLENCE/UNIFIED FAMILY COURT (UFC) BENCH OUTLINE:

- I. Be aware of all related cases involving the same family.
- II. Domestic violence injunctions must be issued separately but be aware of related pending cases in order to avoid entering orders that are inconsistent or conflict and the legal precedent of conflicting orders.
- III. Be mindful of the petitioner's request to keep her or his home address confidential and take steps to ensure safe keeping of confidential information in all related cases.
- IV. Determine if the petitioner has standing.
- V. Make sure the petition includes allegations which meet the definition of domestic violence.
- VI. Apply the appropriate burden of proof.
- VII. Issue the ex parte order the same day the petition is filed.
- VIII. Grant relief in the temporary injunction as listed under §741.30(5)(a), Florida Statutes. If a temporary injunction has already been entered or denied, skip to number XII below.
- IX. Should you deny an injunction, it shall be by written order noting the legal grounds for denial. If you find no basis for the issuance of an injunction, you may deny the petition without a return hearing; however, if the only legal ground for denial is no appearance of an immediate and present danger of domestic violence, you may deny the petition, but you must set a full hearing on the petition with notice at the earliest possible time. (§741.30(5)(b), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3)A; and Florida Supreme Court Approved Family Law Forms 12.980(b)(1) and (2)).
- X. Consider and follow the actions recommended by the Domestic Violence Subcommittee of the FCC and the Domestic Violence Strategic Planning Workgroup for entering orders and conducting hearings in civil domestic violence proceedings.
- XI. Grant relief in a final injunction as listed under §741.30(6)(a), Florida Statutes.
- XII. Complete all the relevant sections of the Final Judgment Injunction for Protection Against Domestic Violence and sign the order at the conclusion of the hearing.
- XIII. Consider referring the parties to mediation, but only with the consent of the parties, and only in an attempt to resolve matters of use of the residence, temporary time-sharing, and temporary spousal and child support. Do not refer the parties to mediation if a degree of past violence, potential for future lethality, or other factors that would compromise the mediation exist.

- XIV. Provide the petitioner and respondent with copies of the order immediately upon the conclusion of the hearing, or the sheriff's office for service on absent respondents, as required by Rule 12.610.
- XV. Provide litigants with a list of batterers' intervention programs, and information about other programs in which you order them to participate.
- XVI. Ensure that appropriate protocols are established to monitor and enforce compliance.
- XVII. Injunctions are meant to be permanent unless otherwise requested by the petitioner. See §741.30(6)(c), Florida Statutes. No new violence is required to extend a final injunction, although in the absence of new acts of violence, the petitioner must present evidence that a continuing fear of violence exists and that such fear is reasonable based on the circumstances.

CIVIL DOMESTIC VIOLENCE/UNIFIED FAMILY COURT (UFC) BENCH GUIDE

Civil domestic violence proceedings are one of the many types of family law proceedings that are encompassed in the Florida Supreme Court's Unified Family Court comprehensive approach to handling all cases involving the same children and family.¹ The coordination of multiple cases involving a single family is an essential element of Unified Family Court. It effectively eliminates duplicate hearings, decreases the potential for conflicting orders, creates opportunity for alternative dispute resolution, provides prompt linkages to services, and promotes more informed judicial decision making. Judicial decisions in domestic violence proceedings may affect or conflict with orders entered in related cases involving the same family. Judges need to know the possible impact of a domestic violence injunction on related cases. The following checklist is designed to help judges coordinate domestic violence cases with related cases and illustrates circumstances when civil domestic violence proceedings and other related cases impact one another.

I. Be aware of all related cases involving the same family.

It is important to be mindful of both pending and closed cases that may contain judgments and orders, which impact pending cases. The court must be aware of and consider any orders or judgments that affect jurisdiction, establish a precedence of orders, or contain potentially inconsistent rulings. *See also* Florida's Family Court Tool Kit: Volume II, pg. 12.

When dealing with related cases, the best way to ensure consistency among orders is to assign all of a family's related cases to one judge. This makes the judge aware of the family's interconnected cases and puts the judge in the best position possible to effectively coordinate proceedings and to create consistent and meaningful orders. *See also* Florida's Family Court Tool Kit: Volume II, pg. 13.

II. Domestic violence orders must be issued separately; however, be aware of related pending cases in order to avoid entering orders that are inconsistent or conflict and the legal precedence of conflicting orders. (See section "Crossover/Related Cases" in the Domestic Violence Legal Outline on page 47 of this benchbook for applicable case law).

To prevent the entry of inconsistent orders, except as provided in chapter 39, Florida Statutes, the court must enter chapter 741, Florida Statutes, civil domestic violence orders separately. The court should not include domestic

¹ For materials about Unified Family Court see the section titled "Other Related UFC Publications" in this benchbook.

violence injunctions within orders or final judgments in dissolution of marriage, separate maintenance, child support or paternity cases.

Furthermore, judges must be aware of orders entered in related cases and the precedence of the orders to mitigate the impact of inconsistent provisions. §39.013, Florida Statutes, provides that orders entered pursuant to chapter 39 which affect the placement of, access to, parental time with, adoption of, or parental rights and responsibilities of a minor child, take precedence over other orders entered in civil cases. Additionally, §741.30(1)(c), Florida Statutes, mandates that the provisions of injunctions dealing with time-sharing, and child support remain in effect until the order expires or an order on those matters is entered in a subsequent civil case.

The examples below occur daily in courtrooms across Florida and further illustrate the importance of judicial education regarding related cases and the precedence of orders. In each of the following circumstances domestic violence allegations may arise, separate domestic violence injunctions must be ordered, and multiple orders may impact one another.

A. Domestic Violence Allegations during Dissolution of Marriage:

Sometimes an injunction for protection will arise during a pending dissolution of marriage case. Judges should be aware that §61.052(6), Florida Statutes, requires that “[a]ny injunction for protection against domestic violence arising out of the dissolution of marriage shall be issued as a separate order in compliance with chapter 741, Florida Statutes, and shall not be included in the judgment of dissolution of marriage.” The separate injunction for protection against domestic violence is filed in national and state crime information systems so it is readily available to other courts and to law enforcement. No other type of order is filed under this system, so do not grant a restraining order in dissolution of marriage actions. Law enforcement will not be aware of the provisions and therefore will not be able to properly protect litigants.

Furthermore, even if both parties consent, the court is prohibited from entering mutual injunctions unless both parties have filed petitions. §741.30(1)(i), Florida Statutes. *See also Hixson v. Hixson*, 698 So. 2d 639 (Fla. 4th DCA 1997)(reversing “mutual order of protection” where only one party had filed a petition for a domestic violence injunction).

B. Domestic Violence Injunction Entered Prior to Dissolution of Marriage:

Inconsistent orders can arise when a party to a dissolution of marriage has been issued an injunction for protection against domestic violence. The typical scenario is that of a petitioner with an injunction for protection that prohibits all contact between the parties who then gets a subsequent order in the dissolution case that allows for contact to exchange children for time-sharing. According to §741.30(1)(c), Florida Statutes, orders entered

in a subsequent action filed under chapter 61, Florida Statutes, take precedence over any inconsistent provisions of an injunction that address matters more appropriately governed by chapter 61 of the Florida Statutes.

Therefore, when hearing chapter 61 actions, the court needs to be aware of the domestic violence issues between the parties to make decisions regarding parenting issues and to tailor safe and effective means for exchanging children for time-sharing. If contact for time-sharing purposes is allowed in a chapter 61 proceeding, the court may need to enter an amended injunction for protection that clarifies or modifies the contact the parties may have pursuant to the injunction for protection.

A paternity or dissolution of marriage action is the more appropriate forum in which to address a permanent child support obligation and parenting plan. Although §741.30(6)(a), Florida Statutes, and Florida Family Law Rule of Procedure 12.610(c)(1)C provide for establishing a temporary parenting plan and child support for any minor child or children connected with domestic violence proceedings, the domestic violence forum is not designed for establishing a parenting plan and support obligations because time-sharing and support determinations in domestic violence cases end on the termination date of the injunction. The primary focus of domestic violence injunction proceedings is prohibiting and preventing violence between the parties.

C. Modifying Bond Conditions to make Consistent with Provisions in Domestic Violence Injunctions:

A judge may modify bond conditions in a criminal case to make them consistent with the contact provisions of a domestic violence injunction. While the orders should be consistent in each case, the bond conditions should be in a separate order to maintain the integrity of the criminal proceeding and to provide effective notice of the conditions to law enforcement.

III. Be mindful of the petitioner's request to keep her or his home address confidential and take steps to ensure safe keeping of confidential information in all related cases. (See Florida Family Law Rule of Procedure 12.610(b)(4)(B), and §§741.30(3)(b)(a)) and 741.465, Florida Statutes.) For further discussion on the topic of addressing confidentiality in general, read the section titled "Address Confidentiality" in the Domestic Violence Legal Outline that is included in this benchbook and Florida's Family Law Tool Kit: Volume II, pg.17.

- A. Once the petitioner requests that her or his address be kept confidential, it shall remain confidential in the pending proceeding and in related case files. This will take some diligence on the part of the petitioner in alerting

the court and clerk of the confidential address and not disclosing the address on his or her own in other court documents.

- B. Court personnel should work with the clerk of court staff and the sheriff's office to develop a method to ensure that the address is truly confidential.

IV. Determine if the petitioner has standing.

The Petitioner and Respondent are family or household members - spouses, ex-spouses, relatives by blood or marriage, anyone who lives or has lived together in the same dwelling as a family unit AND

- A. They currently reside or have in the past resided together in the same dwelling as a family unit, OR
- B. They have a child in common, regardless of whether they have been married and regardless of whether they currently reside or have in the past resided together in the same dwelling.
- C. If the parties are relatives and no longer reside together or did not reside together in the past, they may want to file for an injunction under §784.046, Florida Statutes.
- D. There is no minimum residency requirement, §741.30(1)(j), Florida Statutes. Therefore a petition can be filed in the circuit where the petitioner currently or temporarily resides, where the respondent resides, or where the domestic violence occurred.

V. Make sure the petition includes allegations which meet the definition of domestic violence.

An assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death must have occurred and the appropriate burden of proof, which is set out below, must be met.

VI. Apply the appropriate burden of proof.

The burden of proof varies slightly depending on the type of domestic violence action that is pending. For example:

- A. Ex parte Temporary Domestic Violence Injunctions :
 - 1. A temporary injunction may be granted when it appears to the court that an "immediate and present danger of domestic violence exists," §741.30(5)(a), Florida Statutes.
 - 2. The rule requires the same finding by the court, "an immediate and present danger of domestic. . . ." Florida Family Law Rule of Procedure, 12.610(c)(1)(A).
 - 3. The evidence must be "strong and clear" to balance the harm sought to be prevented against the respondent's right to notice and a hearing. Kopelovich v. Kopelovich, 793 So.2d 31, 33 (Fla. 2d DCA 2001).

B. Final Domestic Violence Injunctions:

1. The court may grant relief, including an injunction, when “it appears to the court” that petitioner is “either the victim of domestic violence . . . or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence.” §741.30(6)(a), Florida Statutes.

C. Violation of Domestic Violence Injunction:

1. The burden of proof in a hearing involving a violation of an injunction is beyond a reasonable doubt. Hunter v. State, 855 So. 2d 677, 678 (Fla. 2d DCA 2003).
2. In a case based entirely on circumstantial evidence, the state has the burden of presenting evidence from which the court can exclude every reasonable hypothesis except that of guilt. Fay v. State, 753 So. 2d 682, 683 (Fla. 4th DCA 2000).
3. Willful violation of an injunction may be prosecuted criminally as a first degree misdemeanor pursuant to §741.31(4)(a), Florida Statutes.
4. “Because criminal contempt is ‘a crime in the ordinary sense,’ a contemnor must be afforded the same constitutional due process protections afforded to criminal defendants.” Id. (quoting Feltner v. Columbia Pictures Television, Inc., 789 So. 2d 453, 455 (Fla. 4th DCA 2001))(citation omitted). Therefore, the person seeking the order of contempt has the initial burden of going forward at the contempt hearing.

D. Civil Contempt:

1. No civil contempt may be imposed without notice to the alleged contemnor and without providing the alleged contemnor an opportunity to be heard. Family Law Rule of Procedure 12.615(b).
2. The preponderance of the evidence burden of proof applies to civil contempt proceedings. Kramer v. State, 800 So. 2d 319, 320 (Fla. 2d DCA 2001).
3. Civil contempt is a remedy of a court “to coerce obedience to its orders which direct a civil litigant to do or abstain from doing an act or acts” Dowis v. State, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).
4. The defaulting party has the burden to come forward with evidence to dispel the presumption that he had the ability to pay and has willfully disobeyed the court order. Bowen v. Bowen, 471 So. 2d 1274, 1280 (Fla. 1985).

E. Criminal Contempt:

1. The burden of proof in a criminal contempt proceeding is beyond a reasonable doubt. Kramer v. State, 800 So. 2d 319, 320 (Fla. 2d DCA 2001).

2. Criminal contempt proceedings are subject to Florida Rules of Criminal Procedure 3.830 and 3.840 and to the “constitutional limitations applicable to criminal cases including due process requirement of a burden of proof ‘beyond a reasonable doubt.’” Dowis v. State, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).
 3. The person accused of the violation does not have the burden of going forward at the outset of the hearing to show why he or she should not be held in contempt. Tide v. State, 804 So. 2d 412, 413 (Fla. 4th DCA 2001).
- VII. Issue the ex parte order the same day the petition is filed.**
Initial orders should be issued the same day that the petition is filed. Unless extended, they remain in effect for a period of fifteen days. The timeliness of the court’s actions in domestic violence cases is critical due to the potential danger to petitioners and their children. Violence will likely escalate in frequency and severity when a victim attempts to separate from the abuser especially after the respondent receives notice that the victim has filed a petition seeking protection against domestic violence.
- VIII. Grant relief for the temporary injunction as listed under §741.30(5)(a), Florida Statutes. If a temporary injunction has already been entered or denied, skip to Roman numeral XII.**
- A. Restraining the respondent from committing any acts of domestic violence. §741.30(5)(a)(1), Florida Statutes.
 - B. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner. §741.30(5)(a)(2), Florida Statutes.
 - C. Granting the petitioner of a minor child or children 100% of the temporary time-sharing on the same basis as provided in Florida chapter 61. §741.30(5)(a)(3), Florida Statutes.
 - D. Paternity may be established by: a separate paternity action filed in family court; a hospital affidavit executed by both parents pursuant to §§382.013 or 382.016, Florida Statutes; by affidavit or stipulation of paternity executed by both parents and filed with the clerk of the court; in a worker’s compensation or similar hearing that determines the dependent(s) of an injured worker; in an adjudicatory hearing in a probate case (addressing inheritance); or in a dependency proceeding under chapter 39, Florida Statutes.
 - E. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies. Florida Supreme Court Approved Family Law Forms 12.980 (c)(1) and (c)(2).
 - F. Restraining respondent from contact with petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

- G. Excluding respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
 - H. Excluding respondent from places regularly frequented by petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
 - I. Ordering respondent to surrender any firearms and ammunition in his or her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).
 - J. **NOTE: Extending temporary injunctions should not be a substitute for issuing a final order. See Sanchez v. Alviar, 906 So. 2d 1263 (Fla. 4th DCA 2005), which states that the statute does not contemplate relief beyond an ex parte temporary injunction without a full evidentiary hearing, Bacchus v. Bacchus, 108 So. 3d 71 (Fla. 5th DCA 2013), which states that an extension of a temporary injunction cannot be used in lieu of a full hearing, and Dietz v. Dietz, 127 So.3d 1279 (Fla. 1st DCA 2013), which states that a series of temporary injunctions cannot be used in lieu of a permanent injunction.**
- IX. Should you deny an injunction, it shall be by written order noting the legal grounds for denial. If you find no basis for the issuance of an injunction, you may deny the petition without a return hearing; however, if the only legal ground for denial is no appearance of an immediate and present danger of domestic violence, you may deny the petition but you must set a full hearing on the petition with notice at the earliest possible time. See §741.30(5)(b), Florida Statutes and Florida Supreme Court Approved Family Law Forms 12.980(b)(1) and (2).
- X. Consider and follow the actions recommended by the 2004 Domestic Violence Subcommittee of the Steering Committee on Families and Children in the Court (FCC) and the 2008 Domestic Violence Strategic Planning Workgroup for entering orders and conducting hearings in civil domestic violence proceedings.
- Below, excerpted from the 2004 Domestic Violence Court Action Plan and the 2008 Domestic Violence Strategic Planning Workgroup, are recommendations to consider when entering domestic violence orders and conducting hearings.²
- A. General Items for Judicial Consideration When Entering Orders:
- 1. Judges should recognize domestic violence injunction proceedings as emergency matters and review petitions for injunction immediately so that petitioners are not required to remain at or make multiple trips to the point of intake to obtain a temporary injunction.

² A copy of the 2004 Domestic Violence Court Action Plan can be obtained from the Office of Court Improvement in the Office of the State Courts Administrator, Tallahassee, Florida. The 2008 Domestic Violence Strategic Planning Workgroup's Final Report can also be obtained from the same location.

2. Courts should handle injunction cases in a timely manner by scheduling all original return hearings within the 15-day statutory time limit. If the respondent is not served on the first attempt, courts should consider whether extending the temporary injunction for longer than an additional 15 days would facilitate service on the respondent. Courts should schedule motion hearings on an expedited basis.
3. The court should be discouraged from issuing an order that sets a hearing without providing any ex parte relief.
4. Address temporary child support, if it is requested by petitioner. See *infra* Best Practices Model on Child Support in Domestic Violence Cases.
5. The court must allow witnesses during the final injunction hearing. Smith v. Smith, 964 So. 2d 217, 219 (Fla. 2d DCA 2007); Tejeda-Soto v. Raimondi, 968 So. 2d 635, 637 (Fla. 2d DCA 2007); Ohrn v. Wright, 963 So. 2d 298 (Fla. 5th DCA 2007).
6. The court should issue final orders instead of extending temporary injunctions. Extensions put the burden on the petitioner to repeatedly request them, create a burden for the clerks and law enforcement to input the information in the FCIC, and increase the court's workload. The purpose of extending a temporary injunction is to preserve the status quo until a final evidentiary hearing can be held; an extension cannot be used in lieu of a full hearing. Bacchus v. Bacchus, 108 So.3d 71 (Fla. 5th DCA 2013), nor does the statute allow for a series of temporary injunctions to be issued in lieu of a permanent one. Dietz v. Dietz, 127 So.3d 1279, (Fla. 1st DCA 2013).
7. After a final hearing has occurred, injunctions are meant to be effective, unless otherwise requested by the petitioner, until modified or dissolved. §741.30(6)(c), Florida Statutes. Florida Family Law Rule of Procedure 12.610(c)(4)(B) also states, "Any relief granted by an injunction for protection against domestic, repeat, dating, or sexual violence, or stalking shall be granted for a fixed period or until further order of court. Such relief may be granted in addition to other civil and criminal remedies. Upon petition of the victim, the court may extend the injunction for successive periods or until further order of court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required."
8. No new violence is required to extend a final injunction; however, in the absence of new acts of violence, the petitioner must present evidence that a continuing fear of violence exists and that such fear is reasonable based on the circumstances. Spiegel v. Haas, 697 So. 2d 222 (Fla. 3d DCA 1997); Giallanza v. Giallanza, 787 So. 2d 162 (Fla. 2d DCA 2001).
9. If a respondent fails to appear at an order to show cause hearing after being properly noticed, the court should issue a civil contempt/arrest warrant for failure to appear.
10. Respondents should fill out a mailing certification form in court which includes primary and secondary addresses.

11. Courts should refer petitioners to community support services and counseling if necessary. The plain language of §741.30, Florida Statutes, does not authorize a trial court to order a petitioner for an injunction for protection against domestic violence to attend a batterers' intervention program. Chacoa v. Mahon, 970 So. 2d 909 (Fla. 1st DCA 2007).
12. The court should make the safety of the parties and the children a primary factor in determining time-sharing arrangements and parenting plans.
13. If the judge deems unsupervised time-sharing appropriate, the judge should consider requiring that time-sharing be exercised at a location physically separate from the residence of the parent having the majority of time-sharing or that the transfer of the children between the parents be accomplished using a third party intermediary in a protected setting.
14. Courts should be discouraged from using family and friends to supervise time-sharing in domestic violence cases if supervised time-sharing is necessary.
15. Judges and court personnel should monitor and periodically review compliance with supervised time-sharing.
16. Judges and court personnel should proactively monitor compliance with court ordered counseling, including Batterers' Intervention Programs, and other provisions.
17. Courts should take into consideration disabilities of parties and of children when structuring orders.
18. Judges should ensure that provisions within an injunction do not conflict with each other or with any other court orders regarding this family.
19. Judges should phrase all injunction orders in terms that litigants and law enforcement officers can understand.
20. Courts should not enter an injunction upon the respondent's consent unless, after a hearing, the court finds that the petitioner is a victim of domestic violence or is in imminent danger of becoming a victim of domestic violence and that the respondent has been fully advised of the ramifications of his or her decision, the possible consequences of a violation, and that he or she will be subject to the terms of the injunction.
21. Imminent danger may include:
 - a. Whether or not the history between the petitioner and the respondent, includes threats, harassment, stalking, and physical abuse.
 - b. Whether, the respondent has attempted to harm the petitioner, family members or individuals closely associated with the petitioner.
 - c. Whether the respondent has threatened to conceal, kidnap, or harm the petitioner's child or children.
 - d. Whether the respondent has intentionally injured or killed a family pet.

- e. Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.
- f. Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.
- g. Whether the respondent has a criminal history involving violence or the threat of violence.
- h. Whether or not the existence of a verifiable order of protection issued previously or from another jurisdiction.
- i. Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communications equipment, clothing, or other items belonging to the petitioner.
- j. Whether the respondent had engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence. §741.30(6)(b)(1-10), Florida Statutes.
- k. The court is not limited to these factors.

B. Treatment Provisions: Courts should order treatment provisions for respondents whenever appropriate and enforce compliance with such orders.

- 1. Courts should order respondents to successfully complete a batterers' intervention program (BIP) if, after a hearing, the court determines that such a program is statutorily mandated or otherwise appropriate. Pursuant to §741.30(6)(e), Florida Statutes, the court shall order the respondent to attend a batterers' intervention program if:
 - a. It finds that the respondent willfully violated the ex parte injunction;
 - b. The respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; or
 - c. The respondent, in this state or any other state, has had at any time a prior injunction for protection entered against the respondent after a hearing with notice.
- 2. Judges may order BIP classes in other situations as appropriate.
- 3. A petitioner cannot be ordered to attend BIP classes. Chacoa v. Mahon, 970 So. 2d 909 (Fla. 1st DCA 2007).
- 4. A petitioner cannot be ordered to undergo a psychological evaluation. The domestic violence statute is designed to protect victims of domestic violence; requiring a victim to undergo such evaluation would have a chilling effect on a victim seeking protection from the court in addition to the imposition of a financial and emotion burden on them. Touchet v. Jones, 135 So.3d 323 (Fla. 5th DCA 2013).
- 5. Courts should ensure respondents are ordered to attend only those BIPs that comply with the minimum state standards for those programs.
- 6. Courts should order respondents for assessment and treatment for substance abuse and mental health issues when appropriate.

7. Courts should establish protocols to monitor compliance with and enforce injunction provisions regarding alcohol, substance abuse, and mental health treatment as well as respondent's enrollment in and completion of any batterers' intervention program, and should utilize contempt and show cause proceedings as appropriate.
 8. Do not order couples to attend counseling for their relationship or for the children; it can set up a dangerous situation.
 9. Judges may also consider ordering respondent to a BIP if the violence has been physical or if it happened more than once.
- C. Firearms Provisions: The court should pay particular attention to the statutory requirements regarding possession of firearms and ammunition in cases where final injunctions are issued.
1. Judges should require respondents in injunction cases to surrender firearms and ammunition in their possession in accordance with state and federal 18 U.S.C. §922(g); §741.31(4)(b), Florida Statutes. Judges should fully inform the respondents about the legal prohibitions against gun ownership.
 2. Injunction orders should contain instructions regarding surrender of firearms and ammunition, including the requirement that the respondent produce a receipt documenting the sale or surrender of the firearms and ammunition within a specified time-frame and direct law enforcement officers to execute the firearms surrender provision upon service of the order on the respondent.
 3. Circuits should track and enforce compliance with firearms surrender.
 4. **A trial court has no power to authorize a respondent to possess firearms in violation of federal law.** Weissenburger v. Iowa Dist. Court for Warren County, 740 N.W.2d 431, 435 (Iowa, 2007).
 5. The Brady Handgun Control Act, Pub. L. No. 103-159; 107 Stat. 1536 (1993), requires federally licensed firearm dealers to run a background check on any prospective buyer. The Act also created the National Instant Criminal Background Check System (NICS), which allows the FBI and state law enforcement agencies to check the available records in the National Crime Information Center, Interstate Identification Index and the NICS database itself to determine if prospective gun buyers are authorized to own weapons. §§741.31(4)(b)(1) and 790.233, Florida Statutes, prohibit a person from possessing a firearm or ammunition when they are subject to a final injunction for committing acts of domestic violence. The Brady Handgun Control Act gives gun dealers the ability to conduct background checks to verify that the purchaser is eligible to own a weapon pursuant to Florida and federal law.
- D. Judicial Consideration When Conducting Final Hearings:
1. Judges should afford both parties the opportunity for a full, fair, and impartial hearing on all matters to be decided in injunction cases. This includes hearing witnesses. Tejeda-Soto v. Raimondi, 968 So. 2d 635

(Fla. 2d DCA 2007). To comply with due process requirements at an injunction hearing, the parties must have an opportunity to prove or disprove the allegations made in the complaint. Ohrn v. Wright, 963 So. 2d 298 (Fla. 5th DCA 2007). The trial court violated the petitioner's due process rights when it did not swear either witness and did not permit the appellant to call a witness who could have offered testimony to support her version of the incidents that had occurred between the parties. Ohrn v. Wright, 963 So.2d 298 (Fla.5th DCA 2007). The husband's right to due process was violated when the trial court did not permit him to call his witnesses or to testify himself prior to the court entering a final injunction. Smith v. Smith, 964 So.2d 217 (Fla. 2d DCA 2007). An inmate who filed a motion to appear telephonically and was denied a chance to appear through no fault of his own deserved a chance to appear. Garrett v Pratt, 128 So.3d 928, (Fla. 5th DCA 2013).

2. Courts may only establish a temporary parenting plan when issuing an injunction. A trial courts lacks the statutory authority to establish a temporary parenting plan if it has dismissed a temporary injunction and denied a permanent injunction. In Hunter v. Booker, 133 So.3d 623 (Fla. 1st DCA 2014).
3. An advocate from a state attorney's office, law enforcement agency, or certified domestic violence center should be allowed to be present with the petitioner at the podium during any court proceedings or hearings related to an injunction for protection, provided that the petitioner has made such a request and the advocate is able to be present.
4. Courts should ensure the accurate recording of domestic violence hearings. §741.30(6)(h).
5. Courts should not dismiss injunction cases at the petitioner's request without first conducting a hearing at which the court determines whether the petitioner initiated the request freely and voluntarily, is aware of community resources, and understands the availability and process for filing a case in the future.
6. Mediation is not an appropriate mechanism for determining whether criminal charges should be filed or whether an injunction for protection should be issued.
7. Upon a motion or request by a party, the court shall not refer a case to mediation where it finds that there is a history of domestic violence that would compromise the mediation process. §44.102(2)(c), Florida Statutes. The parties cannot stipulate to mediation.
8. Before the parties leave the final hearing, the court should explain its decision, the terms of the injunction, the possible consequences of violations, and how to proceed if the injunction is violated. For safety reasons, the petitioner should leave the courtroom first, and the respondent should not be allowed to leave until 15 minutes after the petitioner has left. See *Infra* Security: A Model Family Court Essential Element, which addresses additional safety considerations.

9. Judges should advise the litigants of the full faith and credit provisions of the injunction which make the terms and conditions enforceable nationally.
10. Judges should emphasize to the parties that decisions regarding the terms of an injunction are that of the court and not the petitioner's.

XI. Grant relief in a final injunction as listed under §741.30(6)(a), Florida Statutes:

- A. Restraining the respondent from committing any acts of domestic violence against petitioner;
- B. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner;
- C. Granting the petitioner 100% of the time-sharing in a temporary parenting plan on the same basis as provided in chapter 61, Florida Statutes;
- D. Establishing temporary support for the petitioner (temporary alimony) or minor child or children (temporary child support), on the same basis as provided in chapter 61, Florida Statutes. (*See Infra Best Practices Model on Child Support in Domestic Violence Cases*). Paternity may be established by: a separate paternity action filed in family court; a hospital affidavit executed by both parents pursuant to §§382.013 or 382.016, Florida Statutes; by affidavit or stipulation of paternity executed by both parents and filed with the clerk of the court; in a worker's compensation or similar hearing that determines the dependent(s) of an injured worker; in an adjudicatory hearing in a probate case (addressing inheritance); or in a dependency proceeding under chapter 39, Florida Statutes;
- E. Ordering the respondent to participate in a treatment, intervention, or counseling services to be paid for by the respondent. *See infra* batterers' intervention programs.
- F. Referring a petitioner to a domestic violence center.
- G. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies.
- H. Restraining respondent from contact with petitioner. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
- I. Ordering counseling for any minor children and order any other provisions relating to minor children. Florida Supreme Court Approved Family Law Form 12.980(d)(1). (*Promising practice suggestion - this is not required.*);
- J. Excluding respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (2);
- K. Excluding respondent from places regularly frequented by petitioner and/or any named family or household member of petitioner. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2);
- L. Ordering respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the

court; Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2);

- M. Ordering a substance abuse and/or mental health evaluation for the respondent and order the respondent to attend any treatment recommended by the evaluation(s). §741.30(6)(a)(5), Florida Statutes;
- N. Awarding the petitioner 100% of the time-sharing in a temporary parenting plan that remains in effect until the order expires or an order is entered in a subsequent civil case. §741.30(6)(a)3, Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(d)(1).

XII. For a final injunction, verbally explain the “no contact” terms in the injunction (unless the court has addressed it in its colloquy), complete all the relevant sections of the order and sign the order at the conclusion of the hearing.

Once the court has ruled on the petition, all relevant sections of the order should be completed, and the order should be signed at the conclusion of the hearing. The final injunction shall remain effective indefinitely; until modified or dissolved by the judge at either party’s request, upon notice and hearing; or until the date set out on the final judgment as determined by the judge.

Note: Even if both parties consent, the court is prohibited from entering mutual injunctions. The court may issue separate injunction orders where each party has filed a petition and met the statutory requirements for an injunction. §741.30(1)(i), Florida Statutes. *See also Hixson v. Hixson*, 698 So. 2d 639 (Fla. 4th DCA 1997).

XIII. Consider referring the parties to mediation, but only with the consent of the parties, and only in an attempt to resolve matters of use of the residence, temporary custody and visitation, and temporary spousal and child support. Do not refer the parties to mediation if a degree of past violence, potential for future lethality, or other factors that would compromise the mediation exist.

A. Mediation in Domestic Violence Cases:

Florida Family Law Rules of Procedure, Rule 12.610 provides that mediation offered or ordered by the court in domestic violence injunction cases is to be performed as follows:

1. The court conducts a hearing and makes a finding of whether domestic violence occurred or imminent danger exists. If the court determines that an injunction will be issued, the court shall also rule on such matters as contact between the parties, use of the residence, petitioner’s temporary time-sharing, whether respondent will have temporary time-sharing and whether it will be supervised, temporary spousal and child support. Rule 12.610(c)(1)(C), Florida Family Law Rules of Procedure.
2. With the consent of the parties, the court may refer the parties to mediation by a certified family mediator to attempt to resolve the

details as to the use of the residence, temporary custody and visitation, and temporary spousal and child support. **This mediation shall be the only alternative dispute resolution process offered by the court.** Rule 12.610(c)(1)(C), Florida Family Law Rules of Procedure.

3. Any agreement reached by the parties through mediation shall be reviewed by the court and, if approved, incorporated into the final judgment. If no agreement is reached, the matters referred shall be returned to the court for appropriate rulings. Rule 12.610(c)(1)(C), Florida Family Law Rules of Procedure.
4. According to the commentary to Rule 12.610, Florida Family Law Rules of Procedure, the court should *not* refer the case to mediation if there exists (1) a degree of past violence, (2) a potential for future lethality, or (3) other factors that would compromise the mediation.

XIV. Provide the petitioner and respondent with copies of the order immediately upon the conclusion of the hearing, or the sheriff's office for service on absent respondents, as required by Rule 12.610.

- A. Consider having parties sign, in court, an acknowledgement of receipt of the final judgment.
- B. Consider issuing, simultaneously with the final judgment, an order to appear which requires that the respondent either:
 1. File proof of compliance with the court order (for example, firearms surrender, batterers intervention program, substance abuse, counseling, child support); or
 2. Appear and show cause why he or she should not be held in contempt for non-compliance.

XV. Provide litigants with a list of batterers' intervention programs, and information about any other programs in which the court orders them to participate. http://www.myflorida.com/cf_web/

XVI. Ensure that appropriate protocols are established to monitor and enforce compliance.

XVII. Injunctions are meant to be permanent unless otherwise requested by the petitioner. See §741.30(6)(c), Florida Statutes. No new violence is required to extend a final injunction, although in the absence of new acts of violence, the petitioner must present evidence that a continuing fear of violence exists and that such fear is reasonable based on the circumstances. While courts are in agreement that no new violence is required to extend a final injunction, courts have held that, in the absence of such, in order to obtain an extension of a domestic violence injunction, the moving party must present evidence from which a trial court can determine that a continuing fear exists and that such fear is reasonable, based on all the circumstances. Sheehan v. Sheehan, 853 So. 2d 523 (Fla. 5th DCA 2003) at 525 (citing to Giallanza v. Giallanza, 787 So.2d 162 (Fla. 2d DCA 2001)).



RELATED UNIFIED FAMILY COURT PUBLICATIONS

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General Family Court Issues

- 2007 Compendium of Family Court Practices
- 2006 Compendium of Family Court Practices
- A Model Family Court for Florida
- Florida's Family Court Toolkit: Vol. 1
- Florida's Family Court Toolkit: Vol. 2
- Report of the 2008-2010 Family Court Steering Committee
- Report of the 2006-2008 Family Court Steering Committee

Domestic Violence

- 2008 Domestic Violence Strategic Plan
- 2008 Statewide Domestic Violence Referral Guide
- Civil Injunction for Protection Brochure for Petitioners
- Civil Injunction for Protection Brochure for Respondents
- DV Civil Injunction Survey Report
- DV Resources for Court Staff
- 2011 Case Management Guidelines
- Best Practices Model on Child Support in DV cases
- Dating Violence Checklist
- Domestic Violence Checklist
- Repeat Violence Checklist
- Sexual Violence Checklist
- Stalking Checklist
- Domestic Violence Benchbook

Dependency

- Model for Child Support in Dependency Cases
- A Parent's Guide to Juvenile Dependency Court
- A Caregiver's Guide to Dependency Court
- What's Happening in Dependency Court—An Activity Book for Children
- Hearing your Voice: A Dependency Guide for Youth
- My Future Depends on It! A Guide to Dependency Court for Teens
- 2013 Dependency Benchbook

Juvenile Delinquency

- “What’s Going to Happen to Me [in Delinquency Court]?”
- Family Guide to Delinquency Court
- 2010 Delinquency Benchbook

Drug Court

- Florida’s Adult Drug Court Tool Kit (April 2007)
- Treatment-Based Drug Courts: A Guide
- Transforming Florida’s Mental Health System
- Psychotropic Medications Judicial Reference Guide
- Critical Performance Indicators and Data Elements for Adult Drug Courts in Florida
- Post-Adjudicatory Drug Court Expansion Program Fact Sheet (January 2014)
- Report on Florida’s Drug Courts (July 2004)

PROMISING PRACTICES FOR DETERMINING CHILD SUPPORT IN DOMESTIC VIOLENCE CASES

Introduction

As petitioners seek safety for themselves and their children, financial needs are also a concern. At the same time, petitioners sometimes fear that seeking temporary child support will alert the respondent to their address, require physical contact during courtroom proceedings, revive efforts for visitation or child custody, or anger the respondent further. Therefore, while petitioners are aware that child support will help with the care of their children, they are also wary that it may compromise their safety.

This best practices model serves as suggested guidelines for how child support should be handled in domestic violence cases. Its purpose is to provide guidance on issues related to temporary child support in domestic violence injunction proceedings so petitioners may pursue child support safely and knowledgeably.

The Intake Process

Make sure the petitioner understands all parts of the Petition for Injunction for Protection Against Domestic Violence. In particular, make sure that the petitioner is aware that he or she may seek temporary child support from the respondent if the respondent is the legal parent, adoptive parent, or guardian by court order of a minor child or children. See §§741.30(6)(a)(4), 61.13(1)(a), 39.402(11)(a), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(a), section VI, paragraph 3.

1. Find out whether paternity has ever been established and if the petitioner is already receiving child support in another case. Also ask whether the mother was legally married to a man who is not the other party in the current case when the child(ren) was conceived or born. If paternity has never been established, inform the petitioner that initiating a paternity case is one way to have child support established on a permanent basis.
2. If the petitioner fears disclosing his or her address in Section I of the Petition for Injunction for Protection against Domestic Violence, make sure that the petitioner is aware that he or she can keep this information confidential. If desired, have the petitioner write “confidential” in the spaces provided in Section I, number 1 and then have the petitioner complete and file the Florida Supreme Court Approved Form 12.980(h), Request for Confidential Filing of Address.
3. If the petitioner wishes to seek child support, make sure that Section VI is filled out completely and accurately. In addition, make sure that the petitioner also completes:
 - a) Family Law Financial Affidavit, Florida Family Law Rules of Procedure Form 12.902(b) or (c);

- b) Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) Affidavit, Florida Supreme Court Approved Family Law Form 12.902(d);
 - c) Child Support Guidelines Worksheet, Florida Family Law Rules of Procedure Form 12.902(e);
 - d) Notice of Social Security Number, Florida Supreme Court Approved Family Law Form 12.902(j); and
 - e) Notice of Related Cases, Florida Family Law Rules of Procedure Form 12.900(h), if applicable.
4. In addition to the required forms, it will be helpful for the establishment of temporary child support if the petitioner lists such information as the respondent's place of employment along with the address, phone number, fax number, rate of pay, pay stub information, a W-2 form, or a recent tax return. If the petitioner does not know this information but can obtain it and bring it to the hearing, advise him or her to do so.
 5. Prior to the return hearing, make sure to check for related cases to see if child support has already been established.

In Court

1. If the petitioner requests temporary child support in the petition, the judge must address it in the domestic violence hearing pursuant to §741.2902(2)(d), Florida Statutes, regardless of whether other paternity, divorce, or related cases are pending. It is the best practice for the presiding judge to consider and order temporary child support at the injunction hearing to alleviate the need for the petitioner to return to court, prevent additional contacts between the petitioner and the respondent, and to ensure that temporary child support is ordered and hopefully received by the petitioner as soon as possible. Victims of domestic violence are often in need of child support immediately as they may lose their regular means of support when they file a petition for an injunction. Other family court cases may take months to resolve and in the meantime the children of victims of domestic violence still need to be supported. Lastly, an order for temporary child support becomes ineffective upon the entry of an order pertaining to child support in a pending or subsequent civil case pursuant to §741.30(6)(a)(4), Florida Statutes, so no two orders will conflict.
2. If the petitioner does not include a request for temporary child support in the Petition for Injunction for Protection against Domestic Violence the judge should not address child support unless the respondent is present and waives notice.
3. While the judge can always calculate temporary child support during the hearing, the following two options can save court time and promote accuracy:
 - a) Financial affidavits are filled out in court or ahead of time by both parties, and child support is calculated on the spot by using FinPlan, Divorce Power Analyzer, or similar software.

- b) Financial affidavits are filled out in court or ahead of time by both parties, and the domestic violence case manager calculates the guidelines amount of child support manually using Form 12.902(e), Child Support Guidelines Worksheet. If the judge orders child support in an amount which deviates from the guidelines by more than 5%, factual findings must be made to support that deviation.
4. In Title IV-D cases and in all cases utilizing an income deduction order the judge shall order temporary child support payments to be made through the State Disbursement Unit pursuant to §61.181, Florida Statutes. Income deduction orders should be used whenever possible, however, if payments are not being made by an income deduction order, the judge shall order that temporary child support be paid through the depository unless both parties request and the court finds that direct payments are in the best interest of the child pursuant to §61.13(1)(d), Florida Statutes. Direct payments to the petitioner should be avoided as this may increase the likelihood of contact between the petitioner and the respondent or disputes as to what was or was not actually paid.
5. Each child support order shall provide the full name and date of birth of each minor child who is the subject of the child support order. The respondent should be notified when his or her first payment is due and where the check should be sent. In addition to the court case number, the name of the person obligated to pay, also known as the obligor, and the name of the person to whom the payment is being made, also known as the obligee, must be included with payments. It would be helpful after each hearing for the respondent to receive a paper reminding him or her of this information. An example of this is:

The first payment shall be due on (date) and is payable to the State of Florida Disbursement Unit, PO Box 8500 Tallahassee, FL 32314-8500. Include the COUNTY, COURT CASE NUMBER, NAME of the person to whom the payment is being made, and your NAME, on each payment. No credit for payment will be given to you for any payment given directly to the custodial parent.

6. Income deduction is the preferred method for collecting child support payments and should be ordered whenever possible. Forms required for income deduction generally include federal form, OMB Form 0970-0154, Income Withholding for Support, and the Florida Addendum to Income Withholding Order, Florida Family Law Rules of Procedure Form 12.996(d), as well as an underlying order for support; however, §61.1301, Florida Statutes, does not require entry of a separate income deduction order for temporary support. The deputy clerk or other designee should mail or fax the forms to the obligor's employer within two business days. The amount of time it takes for the obligee to receive payment varies greatly depending on the employer and payroll procedures; therefore, the judge should consider alternative payment methods for the initial payment or payments.
7. The purpose of the Florida Addendum referred to in paragraph 6 is to supplement the federal OMB form by providing information required by Florida law; specifically, when the amount of child support initially ordered is automatically reduced or terminated as each child receiving support ages out of the need for support.

8. When ordering temporary child support the judge should explain the following to both parties:
 - a) This is temporary child support. The order for temporary child support will end when the injunction expires, or when a child support order is entered in another case;
 - b) The options for securing long-term child support, such as a paternity hearing;
 - c) That it is the petitioner's responsibility to notify the court if payments are not made;
 - d) The court's options for enforcing the child support order; and
 - e) The responsibilities of the petitioner and respondent to notify the court if the award needs to be modified due to a change in circumstance.
9. Before leaving court, both parties should receive documentation showing the judge's decision on temporary child support, and the respondent should receive information on how payments should be made. If income deduction is being used, both the respondent and petitioner should receive information on when payment will begin and how payments will be made until the deductions begin.

Follow-Up and Compliance

Follow-up and compliance with temporary child support can be done in several different ways:

1. One such method is the use of a tickler system that initiates compliance checks at key points in time. The tickler system should be used in the following manner:
 - a) The system may be set up as either an automated electronic system or a manual case file system.
 - b) The tickler system should alert the case manager to the timeframe or deadline contained in the injunction order for temporary child support payments.
 - c) After the deadline passes, if the respondent has not produced documentation of payment, the case manager should alert the court and proceed according to circuit procedures.
2. A second method is the use of compliance review hearings. These hearings should be conducted in the following manner:
 - a) An order setting review hearings for compliance with temporary child support and all other conditions of the injunction - such as batterers intervention participation - should be issued at the final hearing. Compliance hearings should be set for 30 days and 60 days after issuance of the final judgment with the respondent being the only person required to attend.

- b) At the compliance hearing the respondent must provide proof and documentation that child support is being paid as ordered by the court and that he or she is complying with all the requirements of the final judgment.
- c) If the respondent fails to provide proof of child support payments or other requirements at or before the scheduled review hearings, an Order to Show Cause should be issued and a hearing date should be set before the court for no later than two weeks.
- d) The respondent should have the opportunity to provide proof of compliance to either the clerk or designee prior to the scheduled review hearing. If proof is provided early, the respondent should then be excused from attending the hearing and should be provided with a document indicating that he or she was excused.
- e) If there is nonpayment of child support after the completion of the compliance review hearings, the petitioner should file a Motion for Enforcement with the clerk or obtain the services of the Department of Revenue Child Support Enforcement Unit to enforce compliance. The petitioner should be made aware of this responsibility in writing by the court at the end of the final hearing.

Extensions, Modifications and Termination

1. Either the petitioner or the respondent may request modification or dismissal of an injunction using the appropriate Florida Supreme Court Approved Family Law Form. (See Form 12.980(j) for the Motion for Modification of an Injunction.) The petitioner may also request an extension of an injunction by filing Florida Supreme Court Approved Family Law Form 12.980(i). A motion for extension of an injunction must be filed before the previously entered order expires.
2. If requested, domestic violence coordinators should provide information and referrals to both the petitioner and the respondent regarding changes to or termination of the injunction.
3. Upon filing, the motion to extend, modify or terminate the injunction will be sent to the signing judge for review and a hearing will be scheduled if necessary.
4. When there is an extension, modification or termination of an injunction requiring temporary child support payments made to the State Disbursement Unit, the clerk's office must notify the State Disbursement Unit of any changes. In addition, if income deduction is facilitating payment, an Order to Vacate should be sent by the clerk to the employer and the State Disbursement Unit when a modification or termination is entered.





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COMPARISON OF INJUNCTIONS UNDER CHAPTER 39 AND CHAPTER 741

CHAPTER 39	CHAPTER 741
Purpose is to protect and promote the best interests of the child in child abuse or domestic violence situations.	Purpose is to protect adults in domestic violence situations, but children may be included in terms of injunction.
DCF, a law enforcement officer, the state attorney, or a responsible adult may request, or the court on its own motion may issue, an injunction to prevent child abuse.	Victim is the petitioner and must file petition with the court. A parent can file a petition on behalf of a minor child.
The petitioner, respondent, or caregiver may move at any time to modify or dissolve the injunction. Best interest of the child, taking the preservation of the child's immediate family into consideration, is still the court's benchmark.	Either party may move to modify or dissolve the injunction at any time. Risk to children is not a factor.
Enjoins offender from abuse or violence. Injunction may order offender to obtain treatment, have limited or no contact with child, and comply with the terms of a safety plan implemented in the injunction. It may also award: costs of medical, psychiatric, or psychological treatment for the child incurred due to the abuse and similar costs for other family members; temporary support for the child or other family members; and exclusive use and possession of the dwelling to the caregiver or exclusion of the offender from the residence of the caregiver.	Enjoins respondent from committing any acts of domestic violence. Injunction may only order treatment for respondent, but may refer petitioner to certified domestic center. May award exclusive use of shared dwelling to petitioner or exclusion of respondent from petitioner's residence; may award temporary support for child or petitioner; may award 100% of time-sharing to petitioner. May order other relief court deems necessary for petitioner's protection.
Supervised visitation may be ordered with access to DCF visitation centers and supervision.	Supervised time-sharing may be ordered but will depend upon the availability of local programs.
Law enforcement has a duty and responsibility to enforce with specific authority to arrest.	Law enforcement has a duty and responsibility to enforce with specific authority to arrest.
Violation is a first degree misdemeanor.	Violation may be handled as civil or criminal contempt, or as a first degree misdemeanor.
Injunction ends when modified or dissolved by the court.	Injunction ends on a specific date or upon further order of the court.

CHAPTER 39 INJUNCTIONS

Chapter 39, Florida Statutes, provides a method for obtaining an injunction to protect a child from abuse or domestic violence. §39.504, Florida Statutes, allows a trial court to issue an injunction to prevent any act of child abuse upon the filing of a petition or upon its own motion at any time after a protective investigation has been initiated by the department pursuant to part III of chapter 39. Issuance of an injunction requires reasonable cause. A petition for an injunction may be filed by the department, a law enforcement officer, a state attorney, or other responsible person. As amended in 2012, §39.504, Florida Statutes, outlines a procedure similar to that followed in domestic violence proceedings. Upon the filing of a petition, the court shall set a hearing at the earliest possible time. A temporary ex parte injunction may be entered pending the hearing. Personal service of the petition, notice of hearing, and temporary injunction, if entered, is required upon the alleged offender. Following the hearing, the court may enter a final injunction which shall remain in effect until modified or dissolved by the court.

The Statute:

§39.504 Injunction pending disposition of petition; penalty.--

- (1) At any time after a protective investigation has been initiated pursuant to part III of this chapter, the court, upon the request of the department, a law enforcement officer, the state attorney, or other responsible person, or upon its own motion, may, if there is reasonable cause, issue an injunction to prevent any act of child abuse. Reasonable cause for the issuance of an injunction exists if there is evidence of child abuse or if there is a reasonable likelihood of such abuse occurring based upon a recent overt act or failure to act.
- (2) The petition must either be verified or accompanied by an affidavit. It must set forth the specific actions by the alleged offender from which protection for the child and remedies are sought. Upon filing of the petition, the court shall set a hearing to be held at the earliest possible time. The court may issue a temporary ex parte injunction pending the hearing. Personal service of the petition, notice of hearing, and temporary injunction, if entered, is required on the alleged offender. Following the hearing, the court may enter a final injunction which remains in effect until modified or dissolved. The court may grant a continuance of the hearing at any time for good cause shown by any party. If a temporary injunction has been entered, it shall be continued during the continuance.
- (3) If an injunction is issued under this section, the primary purpose of the injunction must be to protect and promote the best interests of the child, taking the preservation of the child's immediate family into consideration.
 - (a) The injunction applies to the alleged or actual offender in a case of child

abuse or acts of domestic violence. The conditions of the injunction shall be determined by the court, which may include ordering the alleged or actual offender to:

1. Refrain from further abuse or acts of domestic violence.
2. Participate in a specialized treatment program.
3. Limit contact or communication with the child victim, other children in the home, or any other child.
4. Refrain from contacting the child at home, school, work, or wherever the child may be found.
5. Have limited or supervised visitation with the child.
6. Vacate the home in which the child resides.

(b) Upon proper pleading, the court may award the following relief in a temporary ex parte or final injunction:

1. Exclusive use and possession of the dwelling to the caregiver or exclusion of the alleged or actual offender from the residence of the caregiver.
 2. Temporary support for the child or other family members.
 3. The costs of medical, psychiatric, and psychological treatment for the child incurred due to the abuse, and similar costs for other family members.
- This paragraph does not preclude an adult victim of domestic violence from seeking protection for himself or herself under §741.30, Florida Statutes.

(c) The terms of the final injunction shall remain in effect until modified or dissolved by the court. The petitioner, respondent, or caregiver may move at any time to modify or dissolve the injunction. Notice of hearing on the motion to modify or dissolve the injunction must be provided to all parties, including the department. The injunction is valid and enforceable in all counties in the state.

- (4) Service of process on the respondent shall be carried out pursuant to §741.30, Florida Statutes. The department shall deliver a copy of any injunction issued pursuant to this section to the protected party or to a parent, caregiver, or individual acting in the place of a parent who is not the respondent. Law enforcement officers may exercise their arrest powers as provided in §901.15(6), Florida Statutes, to enforce the terms of the injunction.
- (5) Any person who fails to comply with an injunction issued pursuant to this section commits a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, Florida Statutes.
- (6) The person against whom an injunction is entered under this section does not automatically become a party to a subsequent dependency action concerning the same child.



THE OFFICE OF COURT IMPROVEMENT'S FACT SHEET: VIOLENCE TOWARD FAMILY PETS

GENERAL INFORMATION:

Animal abuse is a particularly complex issue in domestic violence situations. Between 71% and 85% of women entering women's shelters reported that their batterer had also injured, maimed, killed or threatened a family pet for revenge or to psychologically control them.¹ Between 18 and 48% of battered women also delay their decision to leave a violent domestic situation out of fear of what a batterer may do to the family pet.² This issue is so serious that, to date, nineteen states have laws that afford family pets some form of protection in domestic violence situations, and several other states have legislation pending.³

The Florida Legislature has recognized that animal abuse is a serious concern in domestic violence situations, and has included a provision in the domestic violence injunction statute:

In determining whether a petitioner has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence, the court shall consider and evaluate all relevant factors alleged in the petition, including, but not limited to:

...

4. Whether the respondent has intentionally injured or killed a family pet.

§741.30(6)(b)4, Florida Statutes.

WHAT CAN THE COURT DO?

When reviewing the petition for an injunction:

§741.30(6)(b)4, Florida Statutes, indicates that the court may review alleged violence toward a family pet when considering whether the petitioner has a reasonable cause to believe he or she is in imminent danger of becoming a victim. The court should examine the petition carefully, looking for evidence of animal abuse. Further, if animal abuse is alleged, the court should include such in its evaluation of the danger the respondent poses to the petitioner.

At the injunction hearing:

The court can engage in a number of practices aimed at determining whether there has been any abuse directed toward a family pet. These practices include, but are not limited to, the following:

- Ask whether there is a family pet.
- Referring to the domestic violence injunction checklist (found under the Domestic Violence Injunction Hearing Tab of this Benchbook).
- Eliciting testimony from both parties about any alleged animal abuse.
- Detailing to the parties the factors the court may consider when determining whether the petitioner is in imminent danger of becoming a victim of domestic violence. It may often be the case that parties are unaware that the court may consider animal abuse to a family pet in a domestic violence hearing.

If the injunction is granted:

The final order of injunction lists several things that the court must include, and leaves space for optional, additional provisions. The court may include in the Contact portion of the injunction a provision barring the respondent from interacting with the family pet if the family pet is in a place or with people not protected by the injunction.

Further, if the respondent retains possession of the home, the court can authorize the petitioner to acquire the family pet when he or she goes to the home with the law enforcement officer to obtain clothes and other personal effects.

Conclusion:

Animal abuse is especially tragic when it is done as a method of control of or abuse to another person. The steps discussed above may increase petitioner safety, reduce violence, and protect family pets from harm.

¹ Ascione, F.R.; Weber, C. V.; & Wood, D. S. *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women who are Battered*. 5(3) *Society & Animals* 205-218 (1997). See also Creston, N. *Shelter for Pets of Domestic Violence Survivors Breaks Ground Saturday*. WMFE News (11/3/2011).

² Arkow, P. *Expanding Domestic Violence Protective Orders to Include Companion Animals*. 8 *Commission on Domestic Violence eNewsletter* 1 (Summer 2007).

³ American Veterinary Medical Association. *Protecting Animals in Households Affected by Domestic Violence*. (May, 2010).



Electronic Stalking in Domestic Violence

A Reference Guide to Electronic Stalking in Florida

June, 2014

Definitions

Stalking occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person. Fla. Stat. § 784.048(2) (2013).

Aggravated Stalking occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person. Fla. Stat. § 784.048(3) (2013).

Harass means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose. Fla. Stat. § 784.048(1)(a) (2013).

Course of Conduct means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests. Fla. Stat. § 784.048(1)(b) (2013).

Credible Threat means a verbal or nonverbal threat, or a combination of the two, including threats delivered by electronic communication or implied by a pattern of conduct, which places the person who is the target of the threat in reasonable fear for his or her safety or the safety of his or her family members or individuals closely associated with the person, and which is made with the apparent ability to carry out the threat to cause such harm. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat is not a bar to prosecution under this section. Fla. Stat. § 784.048(1)(c) (2013).

Cyberstalking means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose. Fla. Stat. § 784.048(1)(d) (2013).

Common Methods of Electronic Stalking

The methods for stalking via electronic means are increasing exponentially. As such, this list of common methods of electronic stalking should not be taken as a complete list; rather this list covers the more common methods of electronic stalking. Courts should take care to focus

on the particulars of the case in front of them to be sure that one of the more uncommon methods of electronic stalking is not overlooked.

Social Media Stalking



Facebook Stalking. As of the end of the calendar year 2012, the social media site Facebook has over one billion registered users.¹ Further, the average Facebook user has 130 friends, and is a member of 80 groups.² When you add to that the fact that Facebook no longer allows users to hide their profiles from public searches by name,³ it's no surprise that Facebook stalking is fast becoming an often-seen form of cyberstalking.

One of the more common forms of cyberstalking on Facebook is the use of so-called “clone accounts,” fake accounts of real people made by another person, not the real person him- or herself. The most common procedure for stalking via clone account is as follows:

1. The stalker selects the name of someone connected to the target, creates a fake profile, and adds legitimate information about the person named, including pictures, occupation and other personal information gleaned from a brief internet search.
2. The stalker sends out friend requests to people that the clone account and the target have in common - again, determined by viewing the real profile being spoofed, or by an internet search, or by information known or gotten by offline means. The stalker can add a personal message to the friend request, an innocuous message explain the friend request.
3. Once enough common friends have accepted the friend request, the clone account sends a friend request to the target Facebook user. The profile looks authentic, and with upwards of 130 or more friends, it may often be hard to know who one has already friended and who might have been accidentally unfriended. Once the target accepts the request, the cyberstalker has access to every bit of information that the target has posted on Facebook.⁴



Twitter Stalking. Twitter, a so-called “micro-blogging” website, was started in 2006, and as of January 2014 is one of the top ten most frequently visited websites on the Internet.⁵ In fact, there are over 645 million active registered users, who together produce a combined total of over 58 million “tweets” (as postings on Twitter are called)

¹ *Facebook Tops Billion-User Mark.* The Wall Street Journal (New York). October 4, 2012. Retrieved January 31, 2014.

² Liu, Yabing; Krishnamurthy, Balachander; Gummadi, Krishna; and Mislove, Alan. *Analyzing Facebook Privacy Setting: User Expectations Vs. Reality.* Usenix/ACM Internet Measurement Conference (IMC). Berlin, Germany. November 2011.

³ Wallace, Gregory. *Facebook kills search privacy.* CNN Money. October 11, 2013. Retrieved January 31, 2014.

⁴ *Making “clone” Facebook accounts can fool ANYONE into accepting a fake friend request within 24 hours – even security experts.* The Daily Mail (United Kingdom). December 2, 2011. Retrieved January 31, 2014.

⁵ Twitter Statistics acquired from a statistics collection website, Statistics Brain. URL: <http://www.statisticbrain.com/twitter-statistics/>, retrieved on February 5, 2014.

per day.⁶ The site allows users to write small messages of 140 characters or less (called “posts”) and share them with their “followers” (accounts that have elected to see the user’s posts). If an account is not following a specific user, that account will usually not be able to see the posts.

Cyberstalking a person on Twitter is both easier and more difficult than cyberstalking someone on Facebook, depending upon the situation. While Facebook requires people to use a registered name (and relies on the idea that people will use their given names), Twitter allows for any username, and does not require that a given name or personal picture be associated with a Twitter account. Thus, finding a victim’s account may be somewhat difficult, especially if they do not connect the Twitter profile to any personal identifying information. However, if the user “follows” (selects to have tweets from a user automatically post on their account home page) a user or a group of users who do include personally identifying information, the cyberstalker may have somewhat more ease in determining which account is the victim’s account.

Further, as no personal identifying information need be used, Twitter users often have “followers” (the category of people who on who’s page updates from the followed person automatically appear) that they may not recognize, or have never met. And as a user has no advance control over who may follow him or her (the user may block a follower after the fact) and receives no notice of a new follower, a cyberstalker may begin following the victim without the victim even knowing. Stalkers may be able to gain information as to the victim’s location, mood, day-to-day habits, and other personal information with which they can then stalk and harass the victim, online or offline.



Foursquare Stalking. The web service Foursquare bills itself as a location-based social networking site. The concept is fairly simple; a Foursquare user may “check in” whenever he or she goes somewhere. Each check-in gains the user points at that location. The user with the most points for a given location during a given time period is given the title of “Mayor of” that location, a title that can be displayed on the user’s profile and in the user’s check-ins. The Foursquare model of business is a fairly popular one; as of the end of 2013, Foursquare boasts approximately forty-five million registered users.⁷

As with other online services, a stalker may spoof a friend account to gain access to the victim’s profile. As Foursquare requires and displays a complete name for each user, a stalker will have an easier time finding his or her victim than if the users were not required to display their complete names. Once the stalker has gained access, he or she may select Foursquare’s “always on” feature, which means he or she receives automatic notifications every time the victim checks in at any location. Further, if the victim is a frequent patron of a location, the stalker may be able to access that frequency information, especially if the victim becomes

⁶ *Id.*

⁷ *Ending the year on a great note.* The Foursquare Blog. December 19, 2013. Retrieved on February 4, 2013.

“mayor” of a location. And if that weren’t enough, if the victim is a “mayor” of a given location, beyond giving the stalker information about where the victim frequents, the stalker may be able to wait at that location, knowing that the victim will very likely show up at that location again.

Cross-Service Cyberstalking. It is not enough that stalkers can access each of these web services separately. To increase visibility, ad revenue, and web presence, the web services discussed above can be interconnected. A user of Facebook and Foursquare can choose to have Foursquare auto post to Facebook whenever the user checks in to a location on Foursquare. Twitter, Foursquare, and Facebook have become so interconnected that a stalker may not need to actually friend the victim on more than one service to gain access to enough information to make the victim’s life very unpleasant.

Geo-tagged Photos

Almost every picture-taking device available on the market today - from digital camera to cellphone - comes equipped as factory-standard with the ability to save the location at which a given picture was taken. This feature is often referred to as “geo-tagging.”

The mechanism is fairly simple, once the terms are unraveled. All current cellphones, as well as the vast majority of smart cameras and video cameras, come with a built-in global positioning system (GPS) device. When a photograph is taken, the camera (or cell phone) automatically retrieves the GPS coordinates where the photo was taken. The software then writes the GPS coordinates into the code that creates the picture. Whenever the photo is copied and shared or displayed, that background code, along with the GPS data, is automatically copied and shared as well.

This geo-tagging feature is by default turned on; thus, an unsuspecting user could be broadcasting GPS coordinates without his or her knowledge. The good news is that this geo-tagging feature can be turned off. Each device has its own process, which can make turning off the geo-tag feature tricky, but there are numerous websites that can assist users in navigating through the process for their particular device.

Cellphone “Bugging”

While cellphones have made communication easy and virtually instantaneous, they have also opened up the door to a variety of abuses. In particular, they make “bugging,” or covertly listening in on the victim’s conversations, remarkably easy and virtually undetectable unless the victim knows what to look for.

There exist a number of software programs that act as cellphone spyware. An example of this is “Stealth Genie.”⁸ This software, touted as the most powerful spyware program available, is very easy to install on a victim’s phone. With nothing more than two minutes of unfettered

⁸ www.stealthgenie.com, last visited on May 29, 2014.

access to the phone, a stalker can download and install the application. Then, without any further physical contact with the phone, the stalker can use the application to do such things as record phone conversations, view texts, turn on the phone's microphone and record the sound even if no call is in progress, and remotely control the phone, allowing the stalker to effectively block the victim from using the phone at all. This is just one of a number of programs that are commercially available to anyone, with no regard for intent or outcome. The cost of such a program? Stealth Genie, the example above, costs between eight and sixteen dollars per month, depending on the features desired.⁹

Cellphone and GPS Tracking

In addition to bugging, cellphones can serve as location tracking devices, broadcasting GPS coordinates of the victim in real time to a watchful abuser. Numerous programs allow a user to be made aware of the location of another user's phone; some of these programs are offered by the cell service providers themselves. An example of such a service, Sprint's Family Locator service,¹⁰ advertises that with the service one can, "see your loved ones' location - instantly, any time."¹¹ While this may be comforting to a parent, an abuser may see this as a golden opportunity to track the victim's location without the victim having any idea.

Further, this GPS tracking isn't limited to cellphones. Standalone GPS devices have become compact, light-weight, and ultra-portable. Some are advertised as being smaller than a quarter.¹² Although they are designed with concerned parents in mind, the technology can easily be abused by a stalker intent on tracking his or her victim. The size and weight of these devices makes detection by the victim virtually impossible, and they appear to be designed to have a very long lifespan. An unsuspecting victim could carry around such a device for months - even years - without having any knowledge of its existence, during which time the abuser could know in real-time, any time, exactly where the victim is located.

Keystroke Logging

Keystroke logging is an older technique, but it's one that's being continually refined and tweaked, making it more and more difficult to detect. The basic concept behind keystroke logging is simple: the abuser uses a software program, or a device that he or she connects to the computer, to record every key that the victim types. This record is transmitted to the abuser, so that the abuser can learn the victim's passwords, commonly visited websites, and other computer-based habits. In only a few minutes of unobserved time with the victim's computer, the abuser can install the program or device. Once installation is complete, the abuser may never need to physically access the computer again.

⁹ <http://sales.stealthgenie.com/android-packages/>, last visited on June 3, 2013.

¹⁰ <https://sprint-locator.safely.com/welcome.htm>, last visited May 30, 2014.

¹¹ *Id.*

¹² Kelsey Atherton. *Put These Quarter-Sized GPS Trackers On Everything*. Popular Science, October 16, 2013. Retrieved May 30, 2014. Available online at: <http://www.popsci.com/article/gadgets/put-these-quarter-sized-gps-trackers-everything>.

These services - device or software - range in price from as low as twenty dollars to as much as several hundred dollars, depending on various factors, but all are available commercially on the internet. And all of them are designed to blend in with the computer's normal functions or hardware. The software options are written to operate in the computer background, making them just another part of the landscape and thus very difficult to identify unless the victim knows what to look for. The hardware options are similarly designed. As they do not install any software onto the computer, they are truly invisible from an internal process point of view. Thus, as with the software, the only way a victim can know the hardware is attached to their computer is to physically see it and recognize it for what it is. As a result, the hardware options are packaged in very small cases, often less than an inch in length, and match the general color patterns and shapes used by most computer companies.

Telephone ID Spoofing

The final technology to be discussed is another older technique, telephone ID spoofing. In the age of automatic caller ID on cellphones, ID spoofing has been modified to be able to do a number of different things. The most basic of these is where the Caller ID spoofing service simply fails to provide an identity, transmitting an "ID unavailable" notice to the victim's cellphone. More advanced caller ID spoofing services allow a caller to specify what name and telephone number he or she would like to appear on the recipient's caller ID. As such, the victim can believe he or she is getting a call from a trusted loved one, when in fact it is the abuser. The victim has no way of knowing in advance that the ID is spoofed. These services range in price, but most are inexpensive, charging less than a dollar per call.

As long as the victim has a cellphone and relies on it - trusts it to keep him or her connected to friends and family - the victim is vulnerable to caller ID spoofing. The abuser can use the spoofing services to turn the phone from a safety item into another avenue for abuse.

Crafting Court Orders

In addition to knowing about these forms of technological abuse, the court can provide specific protections to victims who have evidence of such abuse. By crafting very specific orders tailored to the situation at hand, the court can ensure that the abuse does not continue.

In each of the final protection orders, there is a space provided for additional provisions "necessary to protect the Petitioner from domestic violence."¹³ It is here that the court can

¹³ See any of the final injunction order forms, Florida Family Law Forms 12.980 (d)(1), (d)(2), (l), (p), (s), and (v) (2013).

This project was supported by Grant No. LN967 awarded to the Florida Coalition Against Domestic Violence (FCADV) by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the FCADV, the state or the U.S. Department of Justice, Office on Violence Against Women.

specify what forms of technology cannot be used and/or in what manner they can or cannot be used. The court can use such language as the following:

- The Respondent may not personally or through a third party use, access, purchase, or otherwise engage the services of any Caller ID spoofing service.
- The Respondent shall not contact or cause a third party to contact Petitioner via Facebook, Twitter or any other social media platform.

The forgoing language is a suggestion only; courts are encouraged to develop their own standard language to address situations where technological abuse is present. By crafting narrowly tailored orders, the court can exercise greater control to protect the Petitioner from further harm and hold the Respondent accountable for any future attempts to engage in technological abuse.





Florida, Firearms, and Domestic Violence

A Quick Reference Guide to Firearm Laws in Florida

Definition of Firearm

“Firearm” means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term “firearm” does not include an antique firearm unless the antique firearm is used in the commission of a crime. Fla. Stat. § 790.001(6); 18 U.S.C. 921(a)(3).

Surrender

Upon service of the injunction, if so ordered, the respondent must surrender all firearms and ammunition to the police, obtain a receipt of surrender, and file the receipt with the court.

Fla. Stat. § 790.233(1); 18 U.S.C. 922(g)(8).

Surrender of firearms is **mandatory** in domestic violence injunction cases; however, the court may order surrender of firearms in repeat, sexual, or dating violence injunction cases where the issue was presented or discussed during the hearing. Blaylock v. Zeller, 932 So. 2d 479 (Fla. 5th DCA, 1996).

Note: There are procedures for the return of firearms after a valid injunction has expired. These procedures may vary from circuit to circuit; please contact your circuit for more information regarding return of firearm procedures.

Surrender Exemption

Surrender of firearms shall not apply to a state or local law enforcement officer holding an active certification, who receives or possesses a firearm or ammunition for use in performing official duties on behalf of the officer’s employing agency, unless otherwise prohibited by the employing agency.
Fla. Stat. § 790.233(3).

Per federal law, a surrender exemption exists for law enforcement officers and active military who are the subject of a protection order; said exemption has been

interpreted by the Bureau of Alcohol, Tobacco and Firearm (ATF) to only allow “on-duty” possession of service weapons. 18 U.S.C. 925.

Prohibition Against Possessing Firearms Under Current Injunction

A person subject to a current final injunction Against Domestic Violence under §741.30 is prohibited from possessing firearms or ammunition. Fla. Stat. § 790.233(1).

Records Check

Florida Department of Law Enforcement (FDLE) is required to perform a records check for federal and state disqualifiers such as **injunctions** and **domestic violence convictions** prior to authorizing the purchase of a firearm. Fla. Stat. § 790.065(2).

Prohibition Against Issuance of Concealed Carry Permits

The Department of Agriculture and Consumer Services is **prohibited from issuing** a license to carry concealed weapons or firearms where the applicant has had adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled, or the record has been sealed or expunged. Fla. Stat. § 790.06(2)(k).

A license to carry a concealed weapon or firearm **may not be issued** to a person subject to a current injunction for protection against domestic or repeat violence. Fla. Stat. § 790.06(2)(l).

Punishment for Violations

All violations of federal law regarding firearms prohibitions due to domestic violence are punishable by up to 10 years imprisonment and/or a \$250,000 fine. 18 U.S.C. 924(a)(2).

A person who has possession of firearms or ammunition in prohibition of a domestic violence injunction commits a **misdemeanor of the first degree**, punishable as provided in § 775.082 or § 775.083. Fla. Stat. § 790.233(2).

Lautenberg Amendment

A person convicted of a “qualifying” (right to counsel, jury trial, and conviction not expunged) misdemeanor crime of domestic violence is **permanently disqualified** from possessing a firearm or ammunition. Defendant must be spouse, former spouse, co-parent, parent or guardian of victim, person who cohabits or has cohabited as spouse,

parent or guardian, or a person similarly situated. No “official use” exemption is applicable. 18 U.S.C. 922(g)(9).

Retention of Firearm Prohibition after Expungement

The court may retain the prohibition against firearm possession in any order for the expungement of a conviction. 18 U.S.C. 921(a)(33)(B)(ii).

This project was supported by Contract No. LN967 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence against Women.



ELDER ABUSE AS A FORM OF DOMESTIC VIOLENCE

By: Austin Newberry
(Updated by Susan Proctor)

THE FACE OF AN AGING POPULATION

How beautifully leaves grow old. How full of light and color are their last days.

John Burroughs (American Naturalist, Author: 1837-1921).

Nationwide, one of the fastest growing segments of the population is the oldest of the old, that is, people 85 years old and over. Between 2000 and 2010, all states experienced increases in this age group.¹ This segment of the population is expected to continue its increase as the generation known as the baby boomers grows older. By 2050, the surviving baby boomers will be over the age of 85.² The popular notion of Florida as a state with a large number of elderly citizens reflects this trend as it had the greatest share of the population 65 years and older in both 2000 and 2010.¹ Over 17% of Florida's population in 2000 and 2010 was over the age of 65.¹ In 2010, Florida was home to three of the top five counties in the country with the highest percentages of the population in the age group 65 years and older-- Sumter, Charlotte, and Highlands.¹ 2010 also saw Clearwater tie Honolulu as the city with the highest percentage of residents 85 years and older (3.5%), although Honolulu had a higher number of those residents.¹

As the numbers of the aging population continue to rise, the number of elderly individuals seeking various kinds of assistance from the courts will no doubt increase as well. Statistics regarding the age of domestic violence injunction petitioners in Florida, as well as the relationship of the respondent to the petitioner, are not readily available; however, nationwide, almost 90 percent of all elder abuse occurs in a domestic setting—usually by someone the victim knows.³ Unfortunately, it is estimated that for every case that is reported, 24 are not.³ The problem is two-fold: the abuse may be hidden under the shroud of family secrecy and the signs of elder abuse are not recognized; both situations lead to a gross under-reporting of the abuse⁴. Elder abuse can come in the form of physical, sexual, emotional, or psychological abuse as well as neglect, abandonment, or financial exploitation³. Florida had more than 40,000 reports of abuse and neglect in the last fiscal year.³ As Florida continues to experience an increase in its elderly population, it is likely that the state's domestic violence dockets will include more and more older individuals seeking injunctions against a variety of family members. The purpose of this article is to provide some helpful information regarding domestic violence perpetrated on the elderly by family members (often, but not always, caretakers) as well as the more commonly seen domestic violence cases in which a spouse or other intimate partner is the abuser.

WHAT IS ELDER ABUSE?

Elder abuse is a crime in Florida. §825.102(1), Florida Statutes defines elder abuse as the “[i]ntentional infliction of physical or psychological injury upon an elderly person or disabled adult; [an] [i]ntentional act that could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult; or [the] [a]ctive encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult.”

The term elder abuse tends to conjure up images of elderly patients suffering from bedsores and worse in nursing homes, victims of the abuse and/or neglect of nursing home staff. This type of abuse, often referred to as institutional abuse, captures one part of the elder abuse problem, but it certainly does not provide the whole picture.⁵ Domestic elder abuse generally refers to mistreatment committed by someone with whom the elder has a special relationship—a spouse, sibling, child, grandchild, friend, or caregiver.⁵ As noted above, elder abuse in domestic settings is a serious problem affecting hundreds of thousands of elderly people across the country, but one which is under-reported.⁴

Abuse of the elderly by spouses, intimate partners or other family members might lead to a Petition for Protection Against Domestic Violence and all of these potentially meet the requirements. While abuse of an elderly person by a spouse clearly meets the standard, many instances of abuse by other family members might as well. Pursuant to §741.30(1)(e), Florida Statutes, the filing of a domestic violence injunction petition requires that the petitioner and respondent must be family or household members. Under §741.28(3), Florida Statutes, the definition of a family or household member is fairly broad:

“Family or household member” means spouses, former spouses, persons related by blood or marriage, person who are presently living together as if a family or who have lived together in the past as if a family and persons who are parents of a child together regardless of whether or not they have been married or lived together. With the exception of persons who have a child in common, the family or household members must be currently residing together or have in the past resided together in the same single dwelling unit.

There are a number of reasons why abuse of the elderly is under-reported and, more importantly, why these elderly victims might not be showing up in domestic violence courts seeking injunctive relief. They may be reluctant to do so because the abuser is often their caregiver and, thus, in their eyes, the only person who helps them. Elders may also feel impeded by health problems; impairment to vision, hearing, or mobility; lack of reading skills or English fluency; limited access to transportation; or lack of funds to hire a lawyer⁶. Also, elders who are not computer literate have trouble navigating web based legal aids for self-represented litigants to find the information they need.⁶

DOMESTIC VIOLENCE BY FAMILY MEMBERS (NON SPOUSE OR INTIMATE PARTNER)

The U.S. Administration on Aging's National Center on Elder Abuse makes reference to several kinds of behaviors that constitute abuse and also meet Florida's statutory definition of domestic violence. The first, and the most obvious, is physical abuse. Sexual abuse, because it is relatively infrequent and because of societal views about older people, tends to be completely overlooked. Elder abuse also includes emotional and/or psychological abuse, neglect, abandonment, and financial or material exploitation.⁵ It is not uncommon for an elder to experience more than one type of mistreatment at the same time.⁵ Elder abuse may include behavior often seen in a traditional domestic violence case.

The perpetrators of non-intimate partner abuse are most often family members: children and grandchildren. Frequently, the perpetrator is single, unemployed and living with the victim. As with traditional domestic violence cases, alcohol and substance abuse are often a factor. To the extent that the elders involved are incapacitated, the perpetrator is sometimes the primary caretaker. As with traditional domestic violence, in many instances the motivation for the abuse is power and control rather than anger. Many of the same tactics are used as well but there some that are more specific to elders.

(Please refer to the following page for tactics used by abusive family members)

TACTICS USED BY ABUSIVE FAMILY MEMBERS⁸

PHYSICAL ABUSE

- Slaps, hits, punches
- Throws things
- Burns
- Chokes
- Breaks bones

SEXUAL ABUSE

- Makes demeaning remarks about intimate body parts
- Is rough with intimate body parts during care giving
- Takes advantage of physical or mental illness to engage in sex
- Forces the performance of unwelcome sex acts
- Forces the watching of pornographic movies

ABUSING DEPENDENCIES/NEGLECT

- Takes walker, wheelchair, glasses and dentures
- Takes advantage of confusion
- Denies or creates long waits for food, heat, care or medication
- Does not report medical problems
- Understands but fails to follow medical, therapy or safety recommendations
- Causes the victim to miss medical appointments

THREATS/INTIMIDATION

- Threatens to leave, commit suicide or institutionalize
- Abuses or kills pets or prized livestock
- Destroys property
- Displays or threatens with weapons

RIDICULING VALUES/SPIRITUALITY

- Denies access to church or clergy
- Makes fun of personal values
- Ignores or ridicules religious/cultural traditions

EMOTIONAL ABUSE

- Humiliates, demeans, ridicules
- Yells, insults, calls names
- Degrades, blames
- Withholds affection
- Engages in crazy-making behavior
- Uses silence or profanity

USING FAMILY MEMBERS

- Magnifies disagreements
- Misleads family members about extent and nature of illnesses/conditions
- Excludes or denies access to family
- Forces family to keep secrets

ISOLATION

- Controls visits and travel
- Limits time with friends and family
- Denies access to phone or mail

USING PRIVILEGE

- Creates a master/servant relationship
- Makes all major decisions

FINANCIAL EXPLOITATION

- Steals money, titles, or possessions
- Takes over accounts, bills, and spending without permission
- Abuses a power of attorney

POSSIBLE SOLUTIONS

An injunction for protection against domestic violence might be part of a good solution for older victims of abuse by family members. Domestic violence injunction cases are seldom simple and these types of cases present even more issues. The involvement of other family members if available and the provision of a variety of services will almost always be required for a positive outcome.

Most, if not all, batterers' intervention programs (BIPs) are focused on intimate partner/spouse violence perpetrated by men. Still, it would probably be preferable to send a male family member perpetrating elder abuse to a batter intervention program rather than to an anger management program. The same reasons this is true in spousal/intimate partner domestic violence cases apply here. Domestic violence has little or nothing to do with not being able to control one's temper. It is almost always a purposeful pattern of behavior designed to exercise power and control over another person. Having a dialogue with local BIP providers about the inclusion of brothers, sons and grandsons, etc. in groups with husbands and boyfriends would be very helpful. While the majority of perpetrators of domestic violence are men, women can be perpetrators as well. There are very few BIPs designed for women. This is also an issue that should be included in a dialogue with BIP providers.

ELDER ABUSE BY AN INTIMATE PARTNER

Good statistics on the actual percentage of people over the age of 65 experiencing domestic violence are hard to come by. It is also likely, for reasons that we have already seen regarding abuse in general, that domestic violence in the elder population is reported even less than in the general population.

In many cases, the domestic violence experienced by elders is simply a continuation of a pattern of violence that started much earlier. The National Committee for the Prevention of Elder Abuse refers to this as "domestic violence grown old."⁷ That Committee also identifies what it calls, "late onset domestic violence".⁷ In these cases, a strained relationship often coupled with emotional abuse becomes worse with age. "When abuse begins or is exacerbated in old age, it is likely to be linked to retirement, disability, changing roles of family members and/or sexual changes."⁷ Finally, as older individuals, particularly women, seek companionship, they sometimes enter into abusive relationships for the first time.⁷ Substance abuse by the perpetrator may also play a role in elder abuse by an intimate partner.⁷

Apart from the age difference of the petitioners, these cases are similar to most of the domestic violence cases heard in Florida courts. Recognizing the limited access of the elderly to the courts already discussed, the usual approach to the domestic violence injunction process applies. It is important, however, to consider the additional burdens that might be placed on both the petitioner and respondent when one or both are elderly. In terms of the petitioner, options for both shelter, should it be needed, and the provision of ongoing care, if

the respondent is the primary care giver, are probably limited. As for the respondent, there may be fewer possible alternative living arrangements outside the shared home and the respondent might also be in need of care.

CONCLUSION

As the number of aging citizens in Florida continues to grow, the court's assistance will be required in dealing with violence perpetrated against those citizens by spouses/intimate partners and/or other family members. The severity of personal losses associated with elder abuse coupled with data suggesting that victims of elder abuse have a shorter life expectancy underscore the importance of providing assistance to this fragile segment of the population.⁷ An injunction for protection against domestic violence is one of the more important tools currently available; however, there is much more that needs to be done.

Access to the courts for the elderly is an important concern which goes beyond meeting Americans with Disabilities Act requirements. Even in a time in which budget restraints limit resources of time and personnel, it is important to bear in mind how the courts can best meet the challenges presented by a growing elderly population. In 2002, the Superior Court of Alameda County, California, initiated the Elder Abuse Protection Court Project, a court calendar dedicated to elder abuse cases.⁶ The following procedures created for that project can serve as an outline on what needs to be in place in order for older citizens to take advantage of protections offered by domestic violence courts:

- Direct assistance to elders in navigating a court system that seems complex and intimidating to them.
- Coordination with various court personnel and programs to identify possible elder abuse when cases are filed and to help elders apply for protection.
- Efficient processing of elders' petitions for civil restraining orders.
- Links with legal and social agencies that can help elders and follow up on abuse cases.
- New protocols for investigating, tracking, and recording criminal information on parties.⁶

Some of Florida's judicial circuits have already begun to address the issue of access to the courts for the elderly. For example, the Thirteenth Judicial Circuit in Hillsborough County established an Elder Justice Center in 1999. Its mission is "[t]o remove barriers and enhance the linkages between seniors and the court system, as well as social and legal services." The goals of the center, especially "[c]oordinating access to existing agencies" and "[p]roviding assistance to senior victims of abuse and/or exploitation" are particularly apropos to the situation of elders and domestic violence.⁹

This article raises a large number of issues, some of which seem daunting in the current climate. It is important to remember that while budget and personnel issues may affect how the court approaches its mission, its mission and vision should remain unchanged. Three items from the Florida Judicial Branch's Mission Statement are directly applicable to the issue of elderly domestic violence victims:

To be **accessible**, the Florida justice system will be convenient, understandable, timely, and affordable to everyone. To be **fair**, it will respect the dignity of every person, regardless of race, class, gender or other characteristic. . . . To be **responsive**, it will anticipate and respond to the needs of all members of society. . . .¹⁰

RESOURCES

In addition to the links provided in the endnotes, information on and links to various elder abuse resources are presented below.

Florida Department of Elder Affairs <http://elderaffairs.state.fl.us/index.php> The Florida Department of Elder Affairs is the primary state agency administering human services programs to benefit Florida's elders.

National Adult Protective Services Association <http://www.napsa-now.org> The mission of NAPSAs is to improve the quality and availability of protective services for disabled adults and elderly persons who are abused, neglected, or exploited and are unable to protect their own interests.

National Center on Elder Abuse <http://www.ncea.aoa.gov> The National Center on Elder Abuse (NCEA), directed by the U.S. Administration on Aging, is committed to helping national, state, and local partners in the field be fully prepared to ensure that older Americans will live with dignity, integrity, independence, and without abuse, neglect, and exploitation. The NCEA is a resource for policy makers, social service and health care practitioners, the justice system, researchers, advocates, and families.

National Clearinghouse on Abuse in Later Life <http://www.ncall.us/> The National Clearinghouse on Abuse in Later Life (NCALL), a national project of the Wisconsin Coalition Against Domestic Violence, has provided training and technical assistance on abuse in later life and elder abuse to many audiences, including domestic violence and sexual assault programs, aging bureaus, adult protective services, criminal justice entities, health care providers, and legal personnel.

National Committee for the Prevention of Elder Abuse <http://www.preventelderabuse.org> The National Committee for the Prevention of Elder Abuse (NCPEA) is an association of researchers, practitioners, educators, and advocates dedicated to protecting the safety, security, and dignity of America's most vulnerable citizens. It was established in 1988 to achieve a clearer understanding of abuse and provide direction and leadership to prevent it. It is one of three partners that make up the National Center on Elder Abuse, which is funded by Congress to serve as the nation's clearinghouse for information on abuse and neglect.

SOURCES

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<http://www.census.gov/library/publications/2014/demo/p25-1140.html>

³Charles T. Corley, Secretary, Florida Department of Elder Affairs, *Focusing on Education and Outreach to Prevent Elder Abuse*, Elder Update, Volume 25, Number 4, July/August 2014.

http://www.elderaffairs.state.fl.us.doea/eu/2014/Elder%20Update_july%aug.pdf

⁴Toshio Tatara, Ph.D. and Lisa M. Kuzmeskus, M.A., *Reporting of Elder Abuse in Domestic Settings*, for the National Center on Elder Abuse (Washington DC: May 1996, updated November 1997 by Edward Duckhorn).

<http://www.ncea.aoa.gov/Resources/Publication/docsfact3.pdf>

⁵National Center on Elder Abuse, *Frequently Asked Questions*,

<http://www.ncea.aoa.gov/faq/index.aspx>

⁶Elder Abuse Protection Court Project of the Superior Court of Alameda County, California

http://www.courts.ca.gov/documents/Elder_Abuse_Protection_Court.pdf

⁷National Committee for the Prevention of Elder Abuse, *What is Elder Abuse?*

<http://www.preventelderabuse.org/elderabuse/>

⁸Cited in *Coalition Chronicles*, Newsletter of the Wisconsin Coalition Against Domestic Violence, Volume 29, Issue 2.

http://endabusewi.org/sites/default/files/resources/CoalitionChronicles_Oct2010.pdf

⁹Thirteenth Judicial Circuit Hillsborough County: Elder Justice Center FAQs

<http://www.fljud13.org/CourtPrograms/ElderJusticeCenter/FAQs.aspx>

¹⁰Florida State Courts, *Vision of the Florida Judicial Branch*

<http://www.flcourts.org/florida-courts/mission-and-vision.stml>

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MISSION STATEMENT

● Elder Abuse is a pervasive, but often hidden problem, affecting all levels of society. An elderly victim may appear in front of the court as a respondent, defendant, witness, juror, or victim. Courts have an obligation to craft responses that provide fair and equitable solutions to elderly victims of abuse, neglect, and financial exploitation.

ELDER ABUSE DEFINED

● The National Center on Elder Abuse defines Elder Abuse broadly as a term referring to any knowing, intentional, or negligent act by a caregiver, or any other person, that causes harm, or a serious risk of harm, to a vulnerable adult (age 60 or over). Implicit within these definitions are the important concepts of undue influence and capacity. Elder Abuse often occurs as a result of an abusive caregiver, coupled with an elder of marginal capacity. Undue influence is defined as an “improper use of power or trust in a way that deprives a person of free will and substitutes another’s objective.” Capacity is defined as the “ability or power to do or experience something” including physical and mental capabilities. Vulnerable elders are often people of minimal physical stature and mental ability who have a dominating person in their life exerting extensive control.

PHYSICAL ABUSE	● Inflicting, or threatening to inflict, physical pain or injury to a vulnerable elder, depriving them of a basic need.
EMOTIONAL ABUSE	● Inflicting mental pain, anguish, or distress on an elder person through verbal or nonverbal acts.
SEXUAL ABUSE	● Non-consensual sexual contact of any kind.
EXPLOITATION	● Illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder. This includes financial exploitation, which can be broadly categorized as 1) misuse of assets, 2) consumer fraud, 3) theft, and 4) negligent management of an elder’s financial accounting.
NEGLECT	● Refusal or failure to provide: food, shelter, health care or protection for a vulnerable elder.
ABANDONMENT	● The desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person.

HOW TO RECOGNIZE ABUSE OR NEGLECT

PHYSICAL ABUSE	● Unexplained injuries: bruises, scars, welts, wounds, cuts, burns, broken bones, sudden inexplicable weight loss, specific complaints of discomfort made by the elder.
EMOTIONAL ABUSE	● Controlling behavior you may witness from a caregiver, such as threatening, rude, humiliating or derogatory comments; ● Display of fear, agitation, hesitancy, depression, withdrawal, sudden behavior changes, unwillingness to communicate, disorientation, confusion, unjustified isolation on part of the elder or any specific complaints by the elder.
NEGLECT BY CAREGIVERS OR SELF-NEGLECT	● Smells of urine and/or feces ● Untreated physical conditions, such as bed sores ● Unsuitable clothing for the weather conditions ● Desertion of the elder at a public place ● Complaints by the elder
FINANCIAL EXPLOITATION	● Sudden changes in the elder’s financial condition ● Missing/stolen money or property or sudden unjustified selling of property ● Significant withdrawals from the elder’s accounts ● Suspicious changes in wills, power of attorney, titles, and policies ● Addition of names to the elder’s signature card

RELEVANT STATUTES

- Fla. Stat. Ann. §§ 825.101-106. This section makes abuse, neglect, exploitation, and/or lewd or lascivious acts toward an elder a felony offense. “A person who knowingly or willfully abuses an elderly person or disabled adult without causing great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a felony of the third degree.”
- Fla. Stat. Ann. §§ 415.101-113. This statutory section is Florida’s *Adult Protective Services Act*, which maintains a central abuse hotline, and requires mandatory reporting for any “state, county, or municipal criminal justice employee or law enforcement officer.”

IF ELDER ABUSE IS SUSPECTED THE FOLLOWING ACTION IS REQUIRED

- In compliance with *Florida’s Adult Protective Services Act*, any mandatory reporter that suspects Elder Abuse must report it by calling the Elder Abuse Hotline **1-800-96ABUSE (1-800-962-2873)**. **If preferred this report may be faxed to 1-800-914-0004 using the fax form available at <http://www.dcf.state.fl.us/as/reporting.shtml>**. Abuse may also be reported online at <http://www.dcf.state.fl.us/abuse/report/>. If abuse is suspected and you are uncertain whether to report it, contact the **Elder Justice Center (EJC) at (813) 276-2726** for a consultation. EJC can assist with alerting all relevant prosecutorial and/or law enforcement personal.
- For **Dementia**: *If someone appears to be a danger to themselves or others, utilize the **Baker Act** or contact the **Hillsborough Mental Health Care Mobile Crisis Response Team at (813) 272-2958**. If not in imminent danger use **Adult Protective Services**, accessed through Elder Abuse Hotline.*

REMEDICATION & CASE MANAGEMENT TOOLS

- Issue a restraining or “no contact” order that is tailored to individual circumstances.
- Schedule review hearings to ensure compliance with court orders, including treatment programs and restitution.
- Ensure plea agreements meet the needs of the older victims of abuse.
- Encourage the use of victim/witness advocates throughout the judicial process.
- Ensure the courtroom is accessible and accommodates physical and/or cognitive impairments.
- Expedite cases in which elder abuse is an underlying factor, including avoiding unnecessary continuances or delays.
- If possible, consolidate ancillary cases involving the same family or victim to create a consistent, efficient, and therapeutic outcome.
- Understand gradations in diminished capacity and calendar cases to accommodate medical needs and fluctuations in capacity and alertness.
- While preserving the defendant’s right of confrontation, consider procedures that assure the elder victim’s testimony is memorialized, such as videotaped examinations and conditional exams.

ADDITIONAL RESOURCES

CENTER FOR ELDERS AND THE COURTS	http://eldersandcourts.org
NATIONAL CENTER FOR STATE COURTS	http://www.ncsconline.org/wc/courttopics/ResourceGuide.asp?topic=EldAbu
NATIONAL CENTER ON ELDER ABUSE	http://www.ncea.aoa.gov
FLORIDA DEPT. OF ELDER AFFAIRS- HOTLINES	http://elderaffairs.state.fl.us/
ELDER ABUSE FOUNDATION	http://www.elder-abuse-foundation.com

OTHER LOCAL RESOURCES WILLING TO ASSIST

FLORIDA ABUSE HOTLINE	(800) 96ABUSE
FLORIDA DOMESTIC ABUSE HOTLINE	(800) 500-1119
BAY AREA LEGAL SERVICES	(813) 232-1343
HELP DESK – HEARING IMPAIRED DEVICES	(813) 272-6513

MANDATORY REPORTING OF ABUSE CHECKLIST

Who needs to report?

There are two types of reporters:

- ✦ Mandated reporter:
 - Any person who knows, or has reasonable cause to suspect, that a **child** is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare is a mandatory reporter. §39.201(1)(a), Florida Statutes.
 - Any person, including but not limited to state, county, or municipal criminal justice employees or law enforcement officers, who knows or has reasonable cause to suspect that a vulnerable **adult** has been or is being abused, neglected, or exploited must make a report. §415.1034(a), Florida Statutes.
- ✦ Professionally mandated reporter - Anyone who is legally obligated to report known abuse and must also identify themselves when reporting. These include:
 - Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, or hospital personnel engaged in the admission, examination, care, or treatment of persons;
 - Health or mental health professional;
 - Practitioner who relies solely on spiritual means for healing;
 - School teacher or other school official or personnel;
 - Social worker, day care center worker, or other professional child care, foster care, residential or institutional worker;
 - Law enforcement officer;
 - Judge, §39.201(1)(d)(1)-(7), Florida Statutes; or
 - Mediators. §44.405(4)(a)(3), Florida Statutes.
- ✦ Note: An officer or employee of the judicial branch is not required to again provide notice of reasonable cause to suspect child abuse, abandonment, or neglect when that child is currently being investigated by the Department of Children and Families, there is an existing dependency case, or the matter has previously been reported to the Department, provided that there is reasonable cause to believe that the information is already known to the department. This paragraph applies only when the information has been provided to the officer or employee in the course of carrying out his or her official duties. §39.201(1)(f), Florida Statutes.

What needs to be reported?

Child Abuse:

- ✦ A child in need of supervision who has no parent, legal custodian, or responsible adult. §39.201(1)(a), Florida Statutes.
- ✦ A child abused by a parent, caregiver, guardian, or other person responsible for the child's welfare. §39.201(1)(a), Florida Statutes.
- ✦ Child abuse, abandonment, or neglect by any adult. §39.201(1)(b), Florida Statutes.
- ✦ Child abuse by a known or suspected juvenile sex offender. §39.201(1)(c), Florida Statutes.
- ✦ If the report contains information of an instance of known or suspected child abuse involving impregnation of a child under 16 years of age by a person 21 years of age or older, the report shall be made immediately to the appropriate county sheriff's office or other appropriate law enforcement agency. §39.201(2)(e), Florida Statutes.
- ✦ Reports involving surrendered newborn infants shall be made and received by the department. §39.201(1)(g), Florida Statutes.

Sexual Battery:

- ✦ Section 794.027, Florida Statutes, requires that any person who observes a sexual battery and who has the ability to seek assistance for the victim without being exposed to a threat of physical violence must make a report.

Vulnerable adult abuse:

- ✦ Section 415.1034(1), Florida Statutes, states that any person, including, but not limited to any state, county, or municipal criminal justice employee or law enforcement officer, who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the central abuse hotline.

Who do you report it to?

- ✦ Child and adult abuse should be reported to the Florida Department of Children and Families (DCF) through either the DCF statewide hotline (call 1-800-96-ABUSE) (1-800-962-2873) or through the DCF website at <http://reportabuse.dcf.state.fl.us>. The hotline also accepts faxes at 1-800-914-0004 and web-based chat on their website. §39.201(2)(a), Florida Statutes.

- ✦ If the abuse is by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare, the report will be transferred by hotline staff to the appropriate county sheriff's office. §39.201(2)(b), Florida Statutes.
- ✦ If the abuse is by a known or suspected juvenile sex offender age 12 or under, the report will be transferred by hotline staff to a local county sheriff's office within 48 hours and a DCF assessment will be conducted. §39.201(2)(c)(2), Florida Statutes.
- ✦ If abuse is by a known or suspected juvenile sex offender age 13 or over, the report will be transferred to a local county sheriff's office by hotline staff within 48 hours. §39.201(2)(c)(3), Florida Statutes.

What happens if you don't report?

- ✦ Failure to report child abuse to DCF is a third degree felony. §39.205(1), Florida Statutes.
- ✦ Section 794.027, Florida Statutes, provides that a person who observes the commission of the crime of sexual battery is guilty of a first degree misdemeanor where that person 1) has reasonable grounds to believe that he or she has observed the commission of a sexual battery; 2) has the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer; 3) fails to seek such assistance; 4) would not be exposed to any threat of physical violence for seeking such assistance; 5) is not the husband, wife, parent, grandparent, child, grandchild, brother or sister of the offender or victim, by consanguinity or affinity; and 6) is not the victim of such sexual battery.

What happens after the report is made?

- ✦ Once a report is received, the hotline counselor sends the report within one hour to the county investigation office where the victim is located. An investigator is assigned and will respond as soon as possible if the victim is in imminent risk of harm, or within 24 hours if imminent risk is not present. The investigator may or may not contact the reporter during the investigation.

This project was supported by Contract No. LN967 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women.



VAWA 2013 Continues Vital Housing Protections for Survivors and Provides New Safeguards

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013 (VAWA 2013).¹ VAWA 2013 extends protections to victims on tribal land as well as LGBT and immigrant survivors of sexual assault and domestic violence. In addition, the law continues many of the housing protections that had been provided by the Violence Against Women Act of 2005 (VAWA 2005) and further expands these safeguards in several crucial ways. These changes include covering more federal housing programs; extending protections to survivors of sexual assault; allowing survivors who remain in the unit to establish eligibility or find new housing when a lease is bifurcated; providing survivors with emergency transfers; and notifying applicants and tenants of VAWA housing rights at three critical junctures. Another notable amendment concerns the mechanics of the revisions: VAWA 2013 makes the housing protections for all covered programs more consistent by repealing many of the prior provisions that had been replicated in several program statutes and consolidating them into a new section within the Violence Against Women Act.²

This article summarizes the major housing provisions of VAWA 2013 and highlights key differences between VAWA 2005 and VAWA 2013.

Housing covered. Previously, the housing protections of VAWA 2005 only applied to public housing, the Section 8 Housing Choice Voucher program, Section 8 project-based housing, Section 202 housing for the elderly and Section 811 housing for people with disabilities.³ All of these programs are administered by HUD. VAWA 2013 expanded the list of housing to which VAWA applies by including additional HUD programs and specific affordable housing programs administered by the Department of Agriculture and the Department of Treasury. VAWA 2013 applies to the following types of housing (“covered housing programs”):

- Department of Housing and Urban Development (HUD)
 - Public housing;
 - Section 8 Housing Choice Voucher program;
 - Section 8 project-based housing;
 - Section 202 housing for the elderly;
 - Section 811 housing for people with disabilities;
 - Section 236 multifamily rental housing;
 - Section 221(d)(3) Below Market Interest Rate (BMIR) housing;
 - HOME;
 - Housing Opportunities for People with Aids (HOPWA);
 - McKinney-Vento Act programs.
- Department of Agriculture
 - Rural Development (RD) multifamily housing programs.
- Department of Treasury
 - Low-Income Housing Tax Credit (LIHTC)⁴

While these changes substantially extend VAWA’s coverage to include most affordable housing programs, they provide no protection to tenants in private market-rate housing.

¹ 42 U.S.C.A. §§ 14043e-11, 1437d note (West 2014).

² See generally *id.*

³ See HUD Programs: Violence Against Women Act Conforming Amendments; Final Rule, 75 Fed. Reg. 66,246 (Oct. 27, 2010) (codified at 24 C.F.R. Parts 5, 91, 880, et al).

⁴ 42 U.S.C.A. § 14043e-11(a)(3) (West 2014).

Parties whom VAWA protects. VAWA 2013 expands the housing protections to cover survivors of sexual assault.⁵ As such, VAWA 2013 protects anyone who:

1. Is a victim of actual or threatened domestic violence, dating violence, sexual assault or stalking, or an “affiliated individual” of the victim (spouse, parent, brother, sister, or child of that victim; or an individual to whom that victim stands in loco parentis; or an individual, tenant or lawful occupant living in the victim’s household) AND
2. Is living in, or seeking admission to, any of the covered housing programs.⁶

Notably, VAWA 2013 gets rid of the requirement under VAWA 2005 that the household member be related by blood or marriage to the victim.⁷ Therefore, VAWA 2013 protects individuals who simply live in the victim’s household, regardless of whether they are related by marriage or blood to the victim.

Definitions of “domestic violence,” “dating violence,” “sexual assault” and “stalking.” The new law revised the definition of “domestic violence” to include crimes of violence committed by an intimate partner of the victim or by a person who has cohabitated with the victim as an intimate partner. VAWA 2013 further amended the definition of “stalking” by including a more general definition than had been provided by VAWA 2005.

VAWA 2013 defines the terms in the following manner:

- “Domestic violence” includes felony or misdemeanor crimes of violence committed by:
 - A current or former spouse or intimate partner of the victim;
 - A person with whom the victim shares a child;
 - A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner;
 - A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies; or
 - Any other person who committed a crime against an adult or youth victim who is protected under the domestic or family violence laws of the jurisdiction.⁸
- “Dating violence” is violence committed by a person:
 - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - The existence of such a relationship is determined based on the following factors:
 - Length of the relationship
 - Type of relationship
 - Frequency of interaction between the persons involved in the relationship.⁹
- “Sexual assault” means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.¹⁰
- “Stalking” is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for his or her safety or others; or

⁵ See generally 42 U.S.C.A. § 14043e-11 (West 2014).

⁶ *Id.*

⁷ 42 U.S.C.A. § 14043e-11(a)(1) (West 2014).

⁸ 42 U.S.C.A. § 13925(a)(8) (West 2014).

⁹ 42 U.S.C.A. § 13925(a)(10) (West 2014).

¹⁰ 42 U.S.C.A. § 13925(a)(29) (West 2014).

- Suffer substantial emotional distress.¹¹

Parties who must comply with VAWA. Public housing authorities, owners and managers participating in the covered housing programs must comply with VAWA 2013.¹²

Denials of admissions, termination of tenancy or assistance. VAWA 2013 continues VAWA 2005's protections that prohibit an applicant or tenant from being denied admission to, denied assistance under, terminated from participation in, or evicted from housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking. Like VAWA 2005, the new law indicates that an incident of actual or threatened domestic violence, dating violence, sexual assault or stalking will not be construed as a serious or repeated violation of the lease by the victim and will not be good cause for terminating the assistance or tenancy of the victim.¹³

Criminal activity directly related to the abuse. VAWA 2013 prohibits any person from being denied assistance, tenancy or occupancy rights to housing solely on the basis of criminal activity, if that activity is directly related to domestic violence, dating violence, sexual assault or stalking engaged in by a household member, guest or any person under the tenant's control, if the tenant or affiliated individual of the tenant is the victim.¹⁴

"Actual and imminent threat" provision. As previously authorized by VAWA 2005, a PHA, owner or manager may evict or terminate assistance to a victim if the PHA, owner or manager can demonstrate an actual and imminent threat to other tenants or employees at the property in the event that the tenant is not evicted or terminated from assistance.¹⁵

Like VAWA 2005, VAWA 2013 does not define "actual and imminent threat." Therefore, it will be critical for advocates to work with the federal agencies responsible for administering the covered housing programs, especially USDA's Rural Development or the Treasury's IRS, to include in their implementing regulations a clear definition of this crucial term as well as guidance. For example, current HUD regulations implementing VAWA 2005 define the term as a physical danger that is real, would occur within an immediate timeframe, and could result in death or serious bodily harm.¹⁶ Furthermore, the regulations provide that certain factors be considered in determining the existence of an "actual or imminent threat," including the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the length of time before the potential harm would occur.¹⁷ In addition, HUD indicated that eviction or termination of a victim's assistance under this provision should occur "only when there are no other actions that could be taken to reduce or eliminate the threat, including, but not limited to, transferring the victim to a different unit, barring the perpetrator

¹¹ 42 U.S.C.A. § 13925(a)(30) (West 2014).

¹² See generally 42 U.S.C.A. § 14043e-11 (West 2014).

¹³ See 42 U.S.C.A. § 14043e-11(b)(1), (b)(2) (West 2014). Note that VAWA 2013 did not strike VAWA 2005's protections concerning admissions in the Section 8 Voucher statute, 42 U.S.C.A. § 1437f(o)(6)(B) (West 2014). This is likely an oversight. Advocates should use the housing provisions of VAWA 2013 for these safeguards as applied to the Voucher program because they also cover sexual assault victims.

¹⁴ 42 U.S.C.A. § 14043e-11(b)(3)(A) (West 2014).

¹⁵ 42 U.S.C.A. § 14043e-11(b)(3)(C)(iii) (West 2014).

¹⁶ 24 C.F.R. § 5.2005(e) (2014).

¹⁷ *Id.*

from the property, contacting law enforcement to increase police presence or develop other plans to keep the property safe, or seeking other legal remedies to prevent the perpetrator from acting on a threat.”¹⁸

Victims must be held to the same standard as other tenants. As under VAWA 2005, for lease violations unrelated to the abuse, a PHA, owner or manager cannot subject an individual who is a victim of domestic violence, dating violence, sexual assault or stalking to a more demanding standard than other tenants in determining whether to evict or terminate assistance.¹⁹

Bifurcation. Like VAWA 2005, VAWA 2013 allows PHAs, owners and managers of the covered housing programs to bifurcate a lease to evict or terminate assistance to any tenant or lawful occupant who engages in criminal acts of violence against an affiliated individual or others. This action may be taken without penalizing the survivor who is also a tenant or lawful occupant.²⁰

Importantly, VAWA 2013 adds a new protection for tenants who remain in the housing as a result of the lease bifurcation. Specifically, if a PHA, owner or manager evicts, removes or terminates assistance to an individual because of criminal acts of violence against family members or others, and that individual is the only tenant eligible to receive the housing assistance, then any remaining tenant will have the opportunity to establish eligibility for the assistance. If no tenant can establish such eligibility, then the PHA, owner or manager must provide the tenant reasonable time (as determined by the respective federal agency) to find new housing or to establish eligibility under another covered housing program.²¹

Portability. VAWA 2013 makes no change to victims’ protections concerning portability of Section 8 vouchers, as provided by VAWA 2005. Therefore, a PHA may still permit a family with a Section 8 voucher to move to another jurisdiction if the family has complied with all other obligations of the program and is moving to protect the health or safety of an individual who is or has been the victim of domestic violence, dating violence or stalking. The PHA may permit the family to move even if the family’s lease term has not yet expired.²²

Because it left the portability provision untouched, VAWA 2013 failed to extend its coverage to victims of sexual assault. However, because this oversight clearly violates an important purpose of VAWA 2013’s housing provisions – to provide protections to sexual assault victims, advocates should ensure that this protection is clarified and included in the implementing regulations.

Court orders. Like VAWA 2005, VAWA 2013 requires that PHAs, owners and managers honor court orders addressing rights of access to or control of property, including civil protection orders issued to protect the victim, as well as orders addressing the distribution or possession of property among household members in a case.²³

Certification.

- Discretion of PHAs and owners. Like VAWA 2005, VAWA 2013 allows, but does not require, PHAs, owners and managers to make a written request to an individual for certification that he or

¹⁸ 24 C.F.R. § 5.2005(d)(3) (2014).

¹⁹ 42 U.S.C.A. § 14043e-11(b)(3)(C)(ii) (West 2014).

²⁰ 42 U.S.C.A. § 14043e-11(b)(3)(B)(i) (West 2014).

²¹ 42 U.S.C.A. § 14043e-11(b)(3)(B)(ii) (West 2014).

²² 42 U.S.C.A. § 1437f(r)(5) (West 2014).

²³ 42 U.S.C.A. § 14043e-11(b)(3)(C)(i) (West 2014).

she is a victim of domestic violence, dating violence, sexual assault or stalking when seeking VAWA's protections. At their discretion, PHAs, owners or managers may apply VAWA to an individual based solely on the individual's statement or other evidence.²⁴ Any requests for certification must be in writing.

- Agency-approved form. VAWA 2013 revised the certification process outlined under VAWA 2005 and implemented through forms HUD-50066 or HUD-91066. The new law permits PHAs, owners and managers to request that an individual certify via a form approved by the appropriate federal agency. This form must: (1) state that an applicant or tenant is a victim of domestic violence, dating violence, sexual assault or stalking; (2) state that the incident that is the ground for protection meets the requirements under the statute; and (3) include the name of perpetrator, if the name is known and safe to provide.²⁵
- Other permissible documents. VAWA 2013 expanded the forms of documentation to include one signed by a victim and a mental health professional in which the professional attests under penalty of perjury. In addition, a victim may now provide an administrative record to document the abuse. Under the new law, instead of the certification form, the applicant or tenant may provide:
 - Documentation signed by the victim and a victim service provider, an attorney, a medical professional, or a mental health professional in which the professional attests under penalty of perjury to his or her belief that the victim has experienced an incident of domestic violence, dating violence, sexual assault or stalking that meets the grounds for protection under the statute; or
 - A federal, state, tribal, territorial, or local law enforcement, court or administrative record.²⁶
- Timeline. After a PHA, owner or manager has requested certification in writing, an applicant or tenant has 14 business days to respond to the request. If an individual does not provide the documentation within the 14 days, a PHA, owner or manager may deny admission or assistance, terminate the assistance or bring eviction proceedings for good cause. However, a PHA, owner or manager may extend this timeframe.²⁷

Conflicting certification. In situations where the PHA, owner or manager receives documentation with conflicting information, VAWA 2013 provides that the PHA, owner or manager may require an applicant or tenant to submit any of the above-mentioned third-party documentation.²⁸ While VAWA 2005 did not cover this issue, the HUD regulations implementing VAWA 2005 did address the matter by similarly allowing third-party documentation in instances where two or more household members claimed to be the victim and named the other person as the perpetrator.²⁹

Emergency transfers. VAWA 2013 includes a new provision mandating that each federal agency adopt a model emergency transfer plan to be used by PHAs and owners or managers of housing assisted under the covered housing programs. This transfer plan must allow survivor tenants to transfer to another available and safe dwelling unit assisted under a covered housing program if: (1) the tenant expressly requests the transfer and (2) either the tenant reasonably believes that the tenant is threatened with

²⁴ 42 U.S.C.A. § 14043e-11(c)(3)(D), (c)(5) (West 2014).

²⁵ 42 U.S.C.A. § 14043e-11(c)(3)(A) (West 2014).

²⁶ 42 U.S.C.A. § 14043e-11(c)(3)(B), (C) (West 2014).

²⁷ 42 U.S.C.A. § 14043e-11(c)(2) (West 2014).

²⁸ 42 U.S.C.A. § 14043e-11(c)(7) (West 2014).

²⁹ See 24 C.F.R. § 5.2007(e) (2014).

imminent harm from further violence if the tenant remains within the same assisted dwelling unit, or where the tenant is a victim of sexual assault and the sexual assault occurred on the premises within 90 days before the transfer request. In addition, the transfer plan must incorporate reasonable confidentiality measures to ensure that the PHA, owner or manager does not disclose the location of the new unit to the abuser. Because the new statute fails to explicitly require PHAs and owners to adopt the model plan, regulatory clarifications concerning this duty appear necessary. VAWA 2013 further mandates that HUD establish policies and procedures under which a victim requesting an emergency transfer may receive a tenant protection voucher,³⁰ although the statute is unclear about whether a victim is entitled to receive a transfer voucher where other transfer options are infeasible.

Confidentiality. In addition to the confidentiality mandate under the new emergency transfer provision, VAWA 2013 further requires that a PHA, owner or manager keep confidential the information an individual provides to certify victim status, including the individual's status as a victim. Furthermore, this information cannot be entered into a shared database or disclosed to another entity or individual, unless the disclosure is: requested or consented to by the individual in writing; required for use in an eviction proceeding to determine whether the incident qualifies as a serious or repeated violation of the lease, good cause to terminate assistance or tenancy, or criminal activity directly relating to domestic violence, dating violence, sexual assault or stalking; or otherwise required by law.³¹

The HUD regulations implementing VAWA 2005 also prohibit employees of a PHA, owner or management agent from accessing the information regarding domestic violence unless they are specifically and explicitly authorized to access this information because it is necessary for their work.³² Presumably, this access limitation will remain effective under VAWA 2013, and, hopefully, will be expanded to the other newly covered housing programs.

Notification and language access. VAWA 2013 significantly revised the notification requirements for PHAs and owners or managers of the covered housing programs. The new law requires HUD to develop a notice of VAWA housing rights ("HUD notice"), which includes the right of confidentiality, for applicants and tenants. Specifically, PHAs, owners and managers must provide the HUD notice accompanied by the agency-approved, self-certification form to applicants and tenants: (1) at the time an applicant is denied residency; (2) at the time the individual is admitted; and (3) with any notification of eviction or termination of assistance.³³ In addition, the HUD notice must be available in multiple languages and be consistent with HUD guidance concerning language access for individuals with limited-English proficiency.³⁴

PHA plans. VAWA 2013 did not amend VAWA 2005's provisions concerning the PHA planning process. Therefore, a PHA must still include in its annual plan a description of any activities, services, or programs being undertaken to assist victims of domestic violence, dating violence, sexual assault or stalking.³⁵ In addition, a PHA must include in its five-year plan a description of any goals, objectives, policies, or programs it uses to serve victims' housing needs.³⁶ Furthermore, any local community that

³⁰ 42 U.S.C.A. § 14043e-11(e), (f) (West 2014).

³¹ 42 U.S.C.A. § 14043e-11(c)(4) (West 2014).

³² See 24 C.F.R. § 5.2007(b)(4) (2014).

³³ 42 U.S.C.A. § 14043e-11(d) (West 2014).

³⁴ 42 U.S.C.A. § 14043e-11(d)(2)(D) (West 2014).

³⁵ 42 U.S.C.A. § 1437c-1(d)(13) (West 2014).

³⁶ 42 U.S.C.A. § 1437c-1(a)(2) (West 2014).

receives HUD assistance must include in its consolidated planning process a description of the housing needs of victims of domestic violence, dating violence, sexual assault and stalking.³⁷

Preemption and impact on existing protections. VAWA 2013 does not preempt any Federal, State or local law that provides greater protections for victims of domestic violence, dating violence, sexual assault or stalking.³⁸ Further, the new law does not limit any rights or remedies available under Section 6 or 8 of the United States Housing Act of 1937 and the implementing regulations of VAWA 2005's housing provisions.³⁹ Accordingly, the implementing regulations for VAWA 2013 can only augment the existing regulatory protections.

³⁷ 42 U.S.C.A. § 12705(b)(1) (West 2014).

³⁸ 42 U.S.C.A. § 14043e-11(b)(3)(C)(iv), (c)(8) (West 2014).

³⁹ 42 U.S.C.A. § 1437d note (West 2014).

The Fundamental Question:

What If There Are No Resources for an Evaluation?

Is There a Need for an Emergency/Interim Assessment?

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

Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

REMEMBER: Not every case will require or need an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented 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.

Is this a case where I need assistance in determining:

- the presence and extent of physical or sexual violence or other assaultive or coercive behaviors used by one parent against the other;
- the impact of domestic violence on the children;
- the effect of domestic violence on the parenting of each party; and
- the impact of domestic violence on decisions about how to structure custody and visitation?

(See also supplemental material, INTRODUCTION, p. 7-11.)

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

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

NO, if a restraining/protection order is in place and provides needed relief, 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 is not adequate (e.g., fails to provide needed relief), or if there is no restraining/protection order in place, and you have reason to be concerned about the safety of one or both of the parties and/or their children. You may want an interim safety assessment performed by a qualified expert before issuing temporary orders to stabilize the situation pending a final resolution of the contested issues. *

FACTORS that might prompt an emergency/interim safety assessment include:

- credible allegations of child abuse, which often co-occurs with domestic violence;
- 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 in conjunction with evidence of assaultive or coercive behavior perpetrated by one parent against the other;
- evidence of stalking;
- evidence of harm or threats of harm to partner or children, or threats of harm to pets or property;
- evidence of suicide threats or threats of self-harm;
- evidence of threats of abduction of children;
- a history of drug or alcohol abuse;
- a prior record of restraining/protection orders involving this partner or a former partner (see also supplemental material, History of Physical Violence, p. 13, examining cases in which there may be a record against both parents);
- evidence of assaultive and coercive behaviors, even if there is no history of physical or sexual violence; and/or
- evidence of violations of prior or existing restraining/protection orders.

Is There a Need for an Emergency/ Interim Assessment? (cont.)

Once Safety Is Assessed and 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 2

An emergency/interim safety assessment 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 a domestic violence and risk assessment expert; 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/or
 - ◆ structuring the exchange of children in a safe setting with or without contact between the parents.

The answer may be **YES** when:

- the facts trigger a statutory obligation to obtain an evaluation;
- there is a documented history of physical or sexual violence, stalking, or a pattern of assaultive or coercive behaviors perpetrated by one parent against the other, but you are nonetheless inclined to permit contact with the abusive parent; and/or
- there are allegations that a parent has harmed or threatened to harm him- or herself or the other parent or the children, threatened injury to property or pets, or otherwise abused the other parent or the children.

The answer may *also* be **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; *
- a pattern of coercion and control even if there is no established history of physical or sexual violence;
- indications that the children are exhibiting symptoms consistent with, although not necessarily the result of, child abuse or their exposure to domestic violence. Such symptoms may include 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 a former partner or any of his or her children in this or another relationship;
- a history of court or social services involvement with the family;
- a stipulated or mediated agreement heavily favoring one party, thereby raising concerns of intimidation or coercion, especially if one or both of the parties are unrepresented; *
- allegations that a parent is turning the children against the other parent; * and
- indications that one or both parents are inattentive to the children's needs. *

(See also Card 1, Side 1, **FACTORS**, and Card 2, Side 2, **INFORMATION**.)

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 raises "red flags" warranting an investigation of domestic violence; or
- a party seeking custody is also making a contested request to relocate, particularly if there is a hint that the case may involve domestic violence and safety concerns may be an underlying reason for the request. *

Safety First



Frame the Inquiry



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.

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

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

REMEMBER: Not every case will require an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented 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.

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

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

Investigation, Evaluation, Recommendation

You need information to guide your own application of the relevant legal principles and rules. Whom you choose 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 factual.

For example:

- ♦ "What has happened in this family?"
- ♦ "What do the relevant records show?"
- ♦ "What does the child say about visiting with his mother or father?"
- ♦ "What is the history of each parent's relationship with each child?" (e.g., who fed, clothed, etc., the children?)

• Evaluation: *

You need an evaluation from a mental health professional to answer the following types of questions if they are relevant to the inquiry:

- ♦ "What is the psychological impact of parental behavior on a child?"
- ♦ "What are the personality, characteristics, functioning, or symptoms of a party or child?"
- ♦ "Are there clinical-level concerns about the mental health of one of the parents or the children?"

• Recommendations to the Court: *

Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that the judges, not evaluators, make the ultimate best-interests determination. If you or your court permits or requires custody evaluators to make recommendations, in order to make sure that you can make your own independent assessment, you must be able to determine:

- ♦ whether the recommendation is sufficiently supported by relevant facts;
- ♦ the level of support for the theory and methodology relied upon by the evaluator in his or her professional community; * and
- ♦ whether the evaluator impermissibly tried to negotiate a resolution of the matter, either through counsel or directly with the parties.

(See Card III, Side 2, ASSESSING THE RECOMMENDATIONS)

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.

Card II Side 2

Continued on Card **IIA**

It is important to choose an evaluator who has training and experience in: *

- ♦ the issues related to domestic violence and/or sexual assault, including the dangers associated with separation; *
- ♦ the link between partner abuse and child abuse;
- ♦ the impact of exposure to domestic violence on children;
- ♦ the impact of abuse on parenting; and
- ♦ the psychological, emotional, physical, and economic risks that continued exposure to the abusive parent's behavior can have on the abused parent and the children.

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 and up-to-date training on appropriate interviewing techniques.
- ♦ A mental health evaluation will require specialized expertise. The same is true for clinical diagnosis, in the rare case in which such diagnosis is a relevant and necessary aspect of the evaluation.
- ♦ Inquiries dependent upon 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:

- any facts that would trigger a statutory presumption or specific statutory obligations;
- incidents of physical violence, sexual abuse, threats, stalking, or intimidation;
- destruction of property or abuse of pets or threats to do so;
- threats of homicide, suicide, serious bodily injury, or child abduction;
- unprovoked behaviors designed to make a parent fearful for the children's safety or fearful that the children will be abducted;
- 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 relationship with the children or capacity to parent effectively;
- the exposure of children to incidents of physical violence, sexual abuse, threats, stalking, or intimidation; *
- the impact of all these behaviors on each parent, each child, and the relationship between each parent and each child; *
- any specific cultural context that is relevant to the inquiry;
- a parent's immigration status used as a means to maintain coercive control over that parent;
- each parent's history of meeting each child's needs;
- the current situation and needs of each child;
- the nature of the communication between the parents;
- the record of any criminal or civil legal proceeding or police involvement; and
- short- and long-term safety concerns raised by the behavior of a parent. *

(See also Card I, Side 1, **FACTORS**, and Card I, Side 2, **RED FLAGS**.)

IIA

Articulate Expected Sources of Information

Communicate Expectations about Any Information- Gathering Procedures and Safety Practices

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
- in extraordinary circumstances, psychological testing—although this, as explained in the supplementary materials, must be relevant and approached with caution. *

(See Card III, Side I, READ THE REPORT CRITICALLY)

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/protection orders;
- help unrepresented litigants understand the evaluation process, the risks of disclosing information that may be shared with the other party, and the risks of not disclosing information;
- advise the parties of an evaluator's duty to report suspected child abuse;
- whenever possible avoid identifying one party as the source of negative information about the other;
- warn the party at risk about disclosure of information in advance, if it becomes essential to share information with one party that may put the other at risk; *
- avoid attributing direct quotes to children; and
- use specialized techniques and understanding to obtain and interpret information from children. *

We propose that your order for a custody evaluation specifically include:

- the timeline with which you expect the evaluator and the parties or their attorneys to comply;
- the respective obligations of the parties, their attorneys, and the evaluator with respect to the completion of the evaluation;
- upon notice and opportunity to be heard, an order to produce records available to the courts but not directly available to the parties or their attorneys, including;
 - ♦ child protective services reports; and
 - ♦ criminal or court activity records;
- the assignment of costs of the evaluation and the costs of the parties' participation in the evaluation;
- the scope and purpose of the evaluation or investigation (you may want to invite input into the scope and purpose of the evaluation or investigation from the parties and their attorneys); and
- the specific questions you want answered in order to expedite the inquiry, to enhance the parties' safety and court efficiency, and to inform your decisions.

Define the Obligations of the Parties



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.

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

Card IIA Side 2

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, and upon advice of counsel if represented, of the implications and advisability of waiving any privilege involved (make sure the parties have access to information in their language or to qualified translators, or that proper attention is given to a party's literacy); *
- make themselves available to the evaluator; and
- provide the evaluator with access to their children.

B. The attorneys shall:

- participate in defining the proposed scope and purpose of the evaluation or investigation;
- assist their clients in fulfilling their responsibilities, ensuring that they understand what information is being sought and from which sources;
- provide information and documentary material to the evaluator in an organized and timely fashion as authorized by their client or as directed by the court; and
- advise their clients about what information may be disclosed to the other party and what information may otherwise be placed in the public record of the case.

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;
- refrain from engaging in any conflicting professional relationship with anyone involved in the case after accepting the appointment; *
- follow the terms of his or her licensure and any appropriate professional guidelines and standards;
- conduct the inquiry giving full consideration to the claims and concerns of each party;
- conduct the inquiry in a timely fashion;
- avoid creating situations that may violate the provisions of a restraining/protection order;
- with the permission of the court, draw on any necessary specialized resources; and
- refrain from negotiating a resolution of the matter, unless specifically instructed to do so by the court and with the knowledge of the parties and their attorneys.



This document was developed under grant number SJI-03-N-103 from the State Justice Institute. Reprints for this publication were made possible under Grant No. 90EV0378/06, awarded by the U.S. Department of Health and Human Services. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute or the U.S. Department of Health and Human Services.



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Safety First



Determine Whether to Admit the Report into Evidence

Read the Report Critically

(Note: The factors listed in this section could be used to determine the admissibility requirements under your state's rules of evidence.)



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.

★ 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 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 additional 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 pursuant to your state's laws and issue a restraining/protection order, or make a referral for safety planning or other needed services; or
- to involve child protective services in accordance with your state's reporting laws if you conclude from the report that a child is at imminent specific risk of physical or emotional harm.

It is important to remember that custody evaluation reports are a form of evidence, either written or oral, which requires an admissibility determination. Check your state's rules of evidence. See also the Federal Rules of Evidence (FRE): **FRE 401 and 402 (relevance), FRE 403 (probative value), and FRE 702 (experts).** (See supplemental material, **PARENT ALIENATION AND THE DAUBERT STANDARD**, p. 24.)

From the report, you should be able to determine whether 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;**
- **described instances** 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 his or her function is one of investigation rather than evaluation.

To assess the weight to give to the report, you will need to determine whether the report contains 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?
- **to assess the thoroughness of the factual investigation: ★**
 - ◆ Have relevant collateral sources been interviewed?
 - ◆ Have relevant written records been reviewed?
 - ◆ Have important facts been corroborated?
- **to 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 and coercion?

Read the Report Critically (cont.)

- **to 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, including giving each the opportunity to respond to allegations made by the other?
 - ♦ 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?
- **to identify what information was not available, and why:**
 - ♦ Does the report allow you to determine the extent to which missing information limits the value of the evaluator's conclusions or recommendations?
- **to 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 each 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?
- **to 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 (understanding that psychological testing is generally not appropriate in domestic violence situations)?
 - ♦ that the evaluator has the requisite mental health expertise to analyze, interpret and draw conclusions from the available data?

(For more information on reading the report critically, see the supplemental information regarding confirmatory bias, page 25; see also Card IIA, Side 1, SOURCES OF INFORMATION, and corresponding supplemental material, page 19-21.)

If domestic violence is identified as an issue, you will need to determine whether a qualified evaluator: ★

- ✎ demonstrated an understanding of the ongoing safety risks;
- offered recommendations that provide the security needed to allow healing from any existing trauma associated with abuse or exposure to abuse;
- 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;
 - ♦ placing total or partial, permanent or provisional, restrictions on contact between the abusive party and the children;
 - ♦ imposing formal or informal supervision of visitation, or of transfer/exchange; and
 - ♦ conditioning visitation rights on compliance with safety-related conditions; and
- offered recommendations that limit ongoing harassment or coercion.

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



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FLORIDA'S FIVE ORDERS OF PROTECTION AGAINST VIOLENCE: DISTINGUISHING THE DIFFERENCE

by Judge Amy Karan and Lauren Lazarus
(Updated by Susan Proctor)

As of October 1, 2012, Florida law provides for five distinct types of orders of protection against violence, also commonly known, locally and nationally, as *restraining orders*, and in Florida, legally called *injunctions*. These orders protect a person from domestic, repeat, dating, and sexual violence, and stalking. This article surveys the differences between these five types of injunctive relief, and serves as a guide for practitioners to navigate their way through the five distinct causes of action. It is intended to be a primer on the law in this area rather than an in depth analysis.

All five types of injunctions are civil proceedings, and the Florida Family Law Rules of Procedure and the Florida Rules of Evidence apply.¹ The Florida Supreme Court has promulgated forms, some of which are mandatory. In order to ensure statewide uniformity and recognition by law enforcement, all courts are required to use the Supreme Court's temporary injunction and final judgment of injunction forms.² The forms, including petitions, various motions and orders are available online for viewing, printing, and/or downloading at www.flcourts.org.

When filing a case, it is advisable to use the Florida Supreme Court Approved Family Law Form version of the petition, track the statutory language, or contact your clerk's office to obtain a copy of the version in use in your county. The clerk of the court shall provide assistance with filing a petition for anyone not represented by counsel. The petitioner is not charged a fee for either filing or serving the petition³

Once a petition has been filed, it is presented to a judge to consider whether an ex parte temporary injunction, valid for up to 15 days, should be granted.⁴ Florida law only requires the court to review the four corners of the petition to determine whether there appears to be "an immediate and present danger of violence," the standard for issuance of temporary injunctions.⁵ No police reports, photographs of injuries, or other supporting evidence need be presented.

If a temporary injunction is issued, a full evidentiary hearing must be scheduled within the 15-day period. The court may grant a continuance of the hearing for an additional 15 days, for good cause shown by either party. Both §§741(5)(c) and 784.0485(5)(c), Florida Statutes, specifically authorize a continuance of the hearing to obtain service of process and an extension, if necessary, for the injunction to remain in effect during the period of continuance.⁶

Both §§741.30(5)(b) and 784.0485(5)(b), Florida Statutes, require that the court state the legal grounds for denial of an ex parte temporary injunction in writing; if the only ground for denial is no appearance of an immediate and present danger, a final hearing must be granted. If the temporary injunction is denied because the petition is filed under the incorrect statute,

When determining which cause of action is appropriate the practitioner must first consider standing to file which is based solely upon the relationship between the parties.

a motion to amend to the correct statute should be filed. At the final hearing, the petitioner must prove the case by a preponderance of the evidence. As with the temporary injunction, no supporting documentation is required by law, although all admissible evidence should be presented.

“Final judgments” for protection against violence, commonly known as “permanent injunctions,” remain in effect until modified or dissolved by the court. Therefore, at the court’s discretion, the injunction may be indefinite or expire on a date certain. Petitioners should request the duration of the injunction they are seeking at the time of final hearing.

Injunctions may be extended beyond their expiration date, provided the request to extend is filed prior to actual expiration. In determining whether the injunction should be extended, the occurrence of new violence is not required. The court may consider the circumstances leading to the imposition of the original injunction, as well as subsequent events that may cause the petitioner to have continuing reasonable fear that violence is likely to recur in the future.⁷

When determining which cause of action is appropriate, the practitioner must first consider standing to file which is based solely upon the relationship between the parties. The five types of injunctions, the required standing, the elements of each cause of action, and the available relief will be discussed separately.

DOMESTIC VIOLENCE

§§741.28 through 741.31, Florida Statutes, define domestic violence, create a cause of action for an injunction for protection against domestic violence, outline the relief available and set forth the violations that constitute crimes. Chapter 741 is the exclusive civil method to obtain protection against domestic violence.⁸

“Domestic violence” is defined by §741.28, Florida Statutes, as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family household member by another.

Standing to file is conferred upon family or household members, which are defined as: spouses; former spouses; persons related by blood or marriage (including minors);⁹ any person who is or was residing within a single dwelling with petitioner as if a family;¹⁰ or a person with whom the petitioner has a child in common (regardless of marriage or cohabitation).

The petition may be filed in the circuit where the petitioner is currently or temporarily residing, where the respondent resides, or where the domestic violence occurred.¹¹ This allows a victim of violence, who has fled their home county, to obtain protection in their county of temporary residence without having to return to the site of the potential danger.

The court may issue an ex parte temporary injunction if the required relationship exists and the court finds that there is an immediate and present danger of domestic violence. The petitioner must plead and prove he or she has been a victim of domestic violence or that there is reasonable cause to believe he or she is in imminent danger of becoming a victim. Note that the statute is phrased in the disjunctive and only one of the two criteria need be satisfied: petitioner *has been* a victim, or has *reasonable fear* of imminent violence.¹²

When determining whether an immediate and present danger exists, the court considers the totality of the circumstances. There are ten specific factors which the court must take into account: the history between petitioner and respondent; whether respondent has attempted to harm petitioner, family members or close associates; whether respondent has threatened to conceal, kidnap, or harm petitioner's children; whether respondent has intentionally injured or killed a family pet; whether respondent has used or threatened to use guns or knives against petitioner; whether respondent has physically restrained petitioner from leaving the home or contacting law enforcement; whether respondent has a criminal history involving violence or the threat of violence; the existence of any orders of protection issued previously or from another jurisdiction; whether respondent has destroyed petitioner's personal property; and whether respondent's behavior leads petitioner to believe that he or she is in imminent danger of becoming a victim of domestic violence.¹³

If the court enters an ex parte temporary injunction, the court may award the following requested relief in addition to the standard injunctions against acts of violence and "the no contact within 500 feet" provisions: exclusive use of a shared dwelling (regardless of title); exclusion of the respondent from petitioner's residence, place of employment, school, or other designated places frequented by petitioner, family, or household members; temporary support for any minor children and petitioner; providing petitioner 100% of the time-sharing in a temporary parenting plan; and temporary surrender of firearms and ammunition.¹⁴

If the court awards exclusive use of a shared home, provisions will be made for the respondent to retrieve items of personal health and hygiene, tools of the trade, along with other property that the parties may agree on. The respondent will be allowed to return to the premises to retrieve these items at a designated time, in the presence of law enforcement, who will normally stand by for a short period of time (usually 30 minutes or less). In a Chapter 741 proceeding, the court has no authority to make any equitable distribution of property. All disputed matters regarding the division or distribution of property must be brought before the court in a Chapter 61 or other appropriate proceeding.

The domestic violence injunction statute specifically prohibits the entry of any form of "mutual" injunctions. Separate injunctions may be issued under individual and distinct case numbers, in circumstances where each party files for an order of protection, and pleads and proves sufficient facts to warrant the entry of an order.¹⁵

Violations of the injunction by the respondent, such as: refusing to vacate a shared dwelling; returning to the shared dwelling; coming within 500 feet of petitioner's home, place of employment, or other designated place; telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly; committing any act of domestic violence against the petitioner; and/or having any firearms in respondent's possession are first degree criminal misdemeanors.¹⁶ Other violations, such as failure to pay ordered support; failing to attend the court ordered counseling; or violation of visitation orders may result in contempt of court charges. Certain violations of the injunction, such as intentionally crossing a state line to violate an injunction; causing an intimate partner to cross state lines by force or fraud and causing bodily injury to that person in violation of an injunction; and interstate stalking are also crimes under the Federal Violence Against Women Act (VAWA).¹⁷ Even if the petitioner, or a third party, invites the respondent to come to the residence, or otherwise into contact with the petitioner, it is a violation of the injunction. However, petitioners who initiate contact with the respondent cannot be charged with violating the injunction. If petitioner

makes contact, the respondent should file a motion to dissolve the injunction or dismiss the case, although it is not always grounds for dismissal.

Final hearings for injunctions against domestic violence must be recorded at the court's expense. This eliminates the necessity for bringing a court reporter to the final hearing. The notice of hearing will set forth what type of recording the court provides.¹⁸

The injunctive relief which may be awarded in the permanent injunction against domestic violence include the same provisions for protection against violence and include injunctions against contact and acts of violence, award of 100% of time-sharing in a temporary parenting plan;¹⁹ child support;²⁰ and spousal support; ordering the respondent to attend a certified batterers' intervention program (BIP),²¹ parenting classes, substance abuse or other counseling; and a mandatory prohibition against possession of firearms and ammunition. Both federal and Florida law make it a crime for a respondent to possess any firearms or ammunition while subject to a qualifying order of protection against domestic violence.²² Surrender of all personal firearms is mandatory, although law enforcement officers, as defined by §943.10, Florida Statutes, may keep their service weapons while on official duty unless otherwise prohibited by the employing law enforcement agency.²³ Although a petitioner cannot be ordered to obtain a psychological evaluation²⁴ or attend a batterers' intervention program,²⁵ a trial court does have the authority to order the parent awarded time-sharing to attend parenting classes.²⁶

There is no statutory authority for an award of attorneys' fees in a Chapter 741 injunction proceeding. Neither trial nor appellate fees may be awarded under any theory, including §57.105, Florida Statutes.²⁷

While orders entered in a Chapter 61 proceeding take priority over those entered in an injunction action,²⁸ the circuits have varying procedures regarding where the injunction case is handled when there is a concurrent domestic relations case. Each circuit should have an administrative order on the issue, or it should be explained in the circuit's unified family court plan. The entry of a final judgment of dissolution of marriage does not automatically result in the dismissal of an injunction.²⁹ Similarly, if there is a pending temporary injunction against domestic violence, it is error for the court to dismiss the action simply because there is a pending dissolution of marriage action.³⁰

Florida injunctions are enforceable in all counties of the state as well as nationwide. Similarly, a qualifying final order of protection against domestic violence issued by a court of a foreign state, must be accorded full faith and credit by the courts of Florida and enforced by law enforcement as if they were Florida court orders.³¹

Cases discussing various aspects of domestic violence, as well as the other four types of injunctions, may be found at the Florida Supreme Court's website.

<http://www.flcourts.org/core/fileparse.php/248/urlt/DVCivilCaseSummariesInternet7-2-14.pdf>

REPEAT VIOLENCE

A petitioner who does not have a “domestic relationship” as defined in Chapter 741 may be eligible to obtain an injunction for protection under the repeat violence statute.³³ Since the enactment of laws providing for protection against dating and sexual violence, repeat violence cases have become mostly love triangle cases (new girlfriend vs. old girlfriend, former husband vs. new husband, etc.), employer-employee and co-worker relationships, schoolmates, neighborhood disputes, and roommates who do not have a dating or intimate relationship.

Any person who is the victim of repeat violence, or the parent or legal guardian of a minor child living at home who is the victim of repeat violence, has standing to file for an injunction against repeat violence.³²

In repeat violence cases, the petitioner must plead and prove he or she has been the victim of two incidents of violence, or stalking. Violence is defined as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment or any criminal offense resulting in physical injury or death. One of the incidents of violence or stalking must have occurred within six months of the filing of the petition and be directed against the petitioner or petitioner’s immediate family member.³³

The standard for relief here is much different than that in domestic violence cases. In domestic violence cases, no acts of violence need have occurred prior to the filing if petitioner has a reasonable fear that domestic violence is imminent. In repeat violence cases, not only must the violence have already occurred, there must be two acts of violence or a stalking in order for relief to be warranted. No matter how egregious the violence may be, if it is simply one act the petition will fail.³⁴

The failure to state a cause of action for repeat violence is generally due to an absence of competent, substantial evidence supporting the occurrence of two acts of violence.³⁵ It is not uncommon for Florida appellate courts to find that one or both of the alleged incidents did not rise to the level of violence required by the statute. Some earlier opinions had held that threatening phone calls and messages did not amount to repeat violence; however, the inclusion of stalking within the definition of repeat violence and as a separate cause of action may effectively overrule some of these cases. Although two acts of repeat violence are required for injunctive relief, the same is not true of stalking. At least one Florida appellate court has held that had the legislature intended to require two acts of stalking, it could have done so by having the statute read “*or two acts of stalking.*”³⁶

The following actions have been found *not* to constitute an act of violence under the repeat statute: keying a car³⁷; circling a restaurant in a car while pointing to a person in the restaurant³⁸; hand gestures and obscenities³⁹; situations in which the alleged incidents involved contact that served legitimate purpose and were not sufficient to cause a reasonable person emotional distress.⁴⁰

On the other hand, repeated videotaping of a neighbor constituted stalking for purposes of the issuance of a repeat violence injunction,⁴¹ and barking dogs coupled with threats were found sufficient where the petitioner was substantially and unreasonably disturbed.⁴²

The court may award the following relief in a repeat violence injunction: injunctions from committing acts of violence; ordering the respondent to appropriate counseling, and such other relief necessary for the protection of the petitioner.⁴³ Although, like domestic violence cases, there is no statutory provision for the imposition of attorney's fees,⁴⁴ fees have been awarded after the appellate court found the trial court abused its discretion in denying fees when a case was dismissed numerous times for failure to state a cause of action and without presenting a justiciable issue of fact or law.⁴⁵

There is no requirement that the court record the final hearing in any of the Chapter 784 injunction proceedings (repeat, dating or sexual violence), so counsel should bring a court reporter if a transcript is desired.

Although the firearms prohibition is not required in repeat violence injunctions, a respondent may be required to surrender firearms if the court finds it necessary to protect the petitioner;⁴⁶ however, if the issue is not presented or discussed during the final hearing, it should not be part of the final injunction.⁴⁷ A respondent who wants to regain his ability to own guns must be given an evidentiary hearing.⁴⁸

DATING VIOLENCE

Dating violence is contained in the same chapter of the Florida Statutes as repeat violence; however, in some respects, it is similar to domestic violence.

Any person who is the victim of dating violence, or the parent or legal guardian of a minor child living at home who is the victim of dating violence, has standing to file for an injunction under this section of the law.⁴⁹

"Dating violence" means violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature.⁵⁰ Unlike repeat violence, no acts of dating violence need have occurred prior to filing.⁵¹ Because the dynamics of a dating relationship are the same as those in traditional Chapter 741 "domestic" relationships, the standard for protection is the same.

There are three factors for the court to consider in determining whether a "dating relationship" exists: the relationship existed within the past six months⁵²; the relationship was characterized by the expectation of affection or sexual involvement between the parties; and the frequency and type of interaction was that the persons were involved over time and on a continuous basis during the course of the relationship.⁵³ A dating relationship does not exist in circumstances where contact between the parties has been that of a casual acquaintance or ordinary fraternization in a business or social context.⁵⁴

While the standard for issuance of the injunction is the same as the domestic violence statute, the available injunctive relief mirrors that of repeat violence cases. The court may award injunctions against acts of violence, referrals to appropriate counseling, and such other orders necessary to protect the petitioner.

Although there are fewer cases on dating violence than either domestic or repeat violence, the following guidelines have been established: petitioner must establish an objectively reasonable fear of imminent harm.⁵⁵ Evidence of an earlier occurrence of dating violence is not enough; petitioner must prove reasonable cause to believe he or she is in imminent

danger of becoming a victim of another act of dating violence.⁵⁶ In a similar vein, a single incidence of the presence of a former boyfriend on petitioner's porch, unaccompanied by any evidence that he had been violent or threatening was insufficient.⁵⁷

Because there is no specific provision regarding venue, a court should apply the general venue provision found in §47.011, Florida Statutes.⁵⁸ Although the number of domestic violence related cases may dictate that a court move quickly through its docket, the court should be mindful not to move so quickly that it risks denying fundamental due process.⁵⁹

SEXUAL VIOLENCE

"Sexual violence" is defined as one incident of sexual battery; a lewd or lascivious act committed upon, or in the presence of, a person younger than 16; luring or enticing a child's sexual performance; or any other forcible felony where a sexual act is committed or attempted.⁶⁰

A person who is the victim of an act of sexual violence, or the parent or legal guardian of a minor child living at home who is the victim of an act of sexual violence, has standing to file. The petitioner must have reported the incident to law enforcement and be cooperating in any criminal proceeding against the respondent; or, if the respondent was sentenced to a term of imprisonment for the act of sexual violence, the sentence must have expired, or be due to expire within 90 days.⁶¹

If the respondent is incarcerated, the temporary injunction is effective for 15 days following release from incarceration rather than 15 days from the date of issuance as with the other protective injunctions. The final hearing must be set prior to expiration of the temporary injunction.⁶²

This category of protection order was created to provide protection for persons, including minors, who are victims of *one* act of sexual violence but have no domestic or dating relationship with the perpetrator. Previously, the only remedy available was the repeat violence statute, where two acts are required; therefore, enactment of this statute closed a gap in protection for sex crime victims. The relief available is the same as in repeat violence cases. It should be noted that stalking is not an element of sexual violence.⁶³

STALKING

Effective October 1, 2012, §784.0485, Florida Statutes, states a cause of action for stalking, which includes cyberstalking. The procedures which must be followed after the filing of a petition for protection mirror those discussed above. Upon the filing of a petition, the court must set a hearing to be held at the earliest possible time.⁶⁴ An ex parte temporary injunction, pending a full hearing, may be issued if it appears to the court that stalking exists.⁶⁵ If a temporary injunction is issued, it is effective for 15 days during which time a hearing must be set. The court may grant a continuance of the hearing for good cause shown, which shall include a continuance to obtain service of process.⁶⁶ Service of the petition, a notice of hearing, and a temporary injunction, if issued, must be personally served upon the respondent.⁶⁴

A written order noting the legal grounds for denial is required if the court denies the petition for an ex parte injunction. If the only ground for denial is no appearance of immediate and

present danger of stalking, the court shall set a full hearing on the petition for injunction with notice as early as possible.⁶⁷ It should be noted that the stalking statute, like the domestic violence statute, contains this requirement that a hearing be set if the only ground for denial is the absence of appearance of immediate and present danger. The statute governing repeat, dating, and sexual violence does not contain this language; it requires that the court set a hearing as soon as possible upon the filing of a petition.

Although discovery is permitted in stalking cases, at the moment there is no a bright line regarding the scope of discovery. At least one appellate court has recently held that the scope of discovery should be somewhere between what can be completed in the fifteen day period prior to the return hearing and the “full panoply of discovery”; however, a court abuses its discretion if it completely quashes a respondent’s right to discovery⁶⁸.

Neither violence nor verbal threats are required to be proven for cyberstalking; numerous emails during a short period of time are sufficient;⁶⁹ however, allegations of offensive emails received from respondent coupled with allegations that respondent hacked into petitioner’s email accounts and deleted her emails may not support an injunction in the absence of competent, substantial evidence identifying the respondent as the perpetrator of those acts.⁷⁰ Courts have held that a reasonable person must suffer “substantial emotional distress” to support injunctive relief;⁷¹ furthermore, a legitimate purpose for contact, such as business-related contact⁷² or contact seeking repayment of a loan⁷³ may preclude a finding of stalking. In a opinion issued prior to the enactment of the stalking cause of action, a single incidence of the presence of a former boyfriend on petitioner’s porch, without any evidence that he had ever been violent or threatening towards her, was insufficient to support an injunction against stalking.⁷⁴ It is likely that some of the earlier opinions regarding stalking will apply to the new law as well. “Given the statute’s recent enactment, support for our holding comes from cases analyzing allegations of stalking in the context of section 784.046, which applies to injunctions for protection against repeat violence, sexual violence, and dating violence.”⁷²

The protection afforded by the temporary injunction and the final judgment of injunction, if issued, is similar to the types of injunctions discussed above. The respondent may be ordered to refrain from further stalking, to participate in treatment, intervention, or counseling—at his or her expense. The court may order relief it finds necessary for the protection of a victim of stalking or cyberstalking.⁷⁵

CONCLUSION

The authors hope this article has distinguished the differences between Florida’s five orders of protection against violence and stalking. The practitioner will best serve the client by becoming familiar with the five types of injunctions and the nuances of standing and proof necessary to warrant relief in each cause of action. The practitioner can then appropriately apply for, defend against, and have a reasonable expectation of prevailing in these important and often dangerous matters.

SOURCES

(Unless otherwise noted, all sections cited as § or §§ are to the Florida Statutes).

¹ Fla. Fam. L. R. P. 12.010; §90.103.

² Fla. Fam. L. R. P. 12.610 (C)(2)(A); Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (2), 12.980(d)(1) and (2), 12.980 (l), 12.980(m), 12.980(p) and 12.980(q).

³ §§741.30(2)(a); §784.046(3).

⁴ §§741.30(5)(b), 784.046(6)(c).

⁵ §§741.30(5)(b), 784.046(6)(b).

⁶ §§741.30(5)(c), 784.046 (6)(c).

⁷ *Spiegel v. Haas*, 697 So. 2d 222 (Fla. 3d D.C.A. 1997); *Patterson v. Simonek*, 709 So. 2d 189 (Fla.3d D.C.A. 1998).

⁸ *Orth v. Orndorff*, 835 So. 2d 1283 (Fla. 2d D.C.A. 2003); *Campbell v. Campbell*, 584 So. 2d 125 (Fla. 4th D.C.A. 1991).

⁹ Children may file against their parents, however no custody, visitation, or support issues may be addressed. *Rinas v. Rinas*, 847 So. 2d 555 (Fla. 5th D.C.A. 2003); *Rosenthal v. Roth*, 816 So. 2d 667 (Fla. 3d D.C.A. 2002) (brother and sister who had not lived together for over 40 years qualified under the plain meaning of this section).

¹⁰ *Slovenski v. Wright*, 849 So. 2d 349 (Fla. 2d D.C.A. 2003) (overnight visits are insufficient to establish “residing within a single dwelling”).

¹¹ §741.30(1)(j) (notwithstanding any provision of chapter 47).

¹² §741.30(5)(a).

¹³ §741.30(6)(b).

¹⁴ §741.30 (5)(a). At this juncture, the surrender of firearms is discretionary with the court; however, surrender of firearms pending final hearing is usually ordered to ensure safety.

¹⁵ §741.30(i); *Martin v. Hickey*, 733 So. 2d 600 (Fla. 3d D.C.A. 1999); *Hixson v. Hixson*, 698 So. 2d 639 (Fla. 4th D.C.A. 1997); *Brooks v. Barrett*, 694 So. 2d 38 (Fla. 1st D.C.A. 1997).

¹⁶ §741.31(4).

¹⁷ 18 U.S.C. §2261-2262.

¹⁸ §741.30(6)(h). In most courts only audiotape recordings are made by the court. If parties desire transcripts, they must arrange for the transcription of the audiotape at their own expense.

¹⁹ §741.30(6)(a)(3). Awards of temporary time-sharing are made on the same basis as provided in chapter 61, Florida Statutes, evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence as defined in §741.28 and chapter 775, creates a rebuttable presumption of detriment to the child.

²⁰ §741.30(6)(a)(4). Temporary child support is to be awarded on the same basis as provided in chapter 61, Florida Statutes.

²¹ §741.30(6)(e). The court must order the respondent to attend a certified batterer’s intervention program in three instances: (1) the respondent has willfully violated the temporary injunction; (2) the respondent has been convicted of, had adjudication withheld, or plead no contest to a crime involving violence or a threat of violence; (3) the respondent has had at any time a prior injunction for protection entered after a hearing with notice; all other referrals are at the court’s discretion.

²² The Gun Control Act, 18 U.S.C. §922(g)(8); §741.30(6)(g), Florida Statutes.

²³ §741.31(4)(b)(2). It is the intent of the legislature that the disabilities regarding possession of firearms and ammunition are consistent with federal law. 18 U.S.C. §925 provides for the “official use” exemption for law enforcement officers and military personnel.

²⁴ *Touchet v. Jones*, 135 So.3d 323 (Fla.5th DCA 2013).

- ²⁵*Chacoa v. Mahon*, 970 So.2d 909 (Fla.1st DCA 2007).
- ²⁶*Geiger v. Schrader*, 926 So.2d 432 (Fla.4th DCA 2006); *Cisneros v. Cisneros*, 831 So. 2d (Fla. 3d D.C.A. 2002); *Lewis v. Lewis*, 689 So. 2d (Fla. 1st D.C.A. 1997); *Baumgartner v. Baumgartner*, 693 So. 2d 84 (Fla. 2d D.C.A. 1997); *Belmont v. Belmont*, 761 So. 2d 406 (Fla. 2d D.C.A. 2000).
- ²⁷Fla. Stat. §741.30(1)(c).
- ²⁸*Farr v. Farr*, 840 So. 2d 1166 (Fla. 2d D.C.A. 2003).
- ²⁹*Kniph v. Kniph*, 777 So. 2d 437 (Fla. 1st D.C.A. 2001); *White v. Cannon*, 778 So. 2d 467 (Fla. 3d D.C.A. 2001).
- ³⁰§741.30(6)(d)(1); 18 U.S.C. §2265.
- ³¹§784.046.
- ³²§784.046 (2)(a).
- ³³§784.046(1)(b).
- ³⁴*Williams v. Gonder*, 133 So. 3d 593 (Fla.5th DCA 2014) (keying a car did not constitute violence; and there was no other competent, substantial evidence that respondent committed a second act of violence as required by statute); *Johns v. Penzotti*, 100 So.3d 212 (Fla.2d DCA 2012) (a person may obtain protection against repeat violence when two or more incidents of violence have occurred); *Titsch v. Butzin*, 59 So.3d 265 (Fla.2d DCA 2011) (hand gestures and obscenities alone do not constitute violence); also *Sorin v. Cole*, 929 So.2d 1092 (Fla.4th DCA 2006);
- ³⁵*Clement v. Ziemer*, 953 So.2d 700 (Fla.5th DCA 2007) (petitioner not entitled to injunction because she failed to prove two acts of violence supported by competent, substantial evidence as required by the statute); *Buerster v. Fermin*, 844 So. 2d 804 (Fla. 4th D.C.A. 2003) (although respondent threatened, yelled, and screamed at the petitioner for two years, petitioner's testified he was not in fear); *Long v. Edmundson*, 827 So. 2d 365 (Fla. 2d D.C.A. 2002) (only qualifying incident was one in which respondent waved a gun and pushed petitioner; threat on petitioner's answering machine did not qualify as second incident); *Darrow v. Moschella*, 805 So.2d 1068 (Fla. 4th D.C.A. 2002) (several physical altercations on same day with brief pause in between found insufficient).
- ³⁶*Lukacks v. Luton*, 982 So.2d 1217 (Fla.1st DCA 2008).
- ³⁷*Williams v. Gonder*, 133 So.3d 657 (Fla.1st DCA 2014);
- ³⁸*Smith v. Melcher*, 975 So.2d 500 (Fla.2d DCA 2008).
- ³⁹*Titsch v. Buzin*, 59 S.3d 265 (Fla.2d DCA 2011); *Santiago v. Towle*, 917 So.2d 909 (Fla.5th DCA 2005).
- ⁴⁰*Goudy v. Douquette*, 112 So.3d 716 (Fla.2d DCA 2013).
- ⁴¹*Goosen v. Walker*, 714 So. 2d 1149 (Fla. 4th D.C.A. 1998).
- ⁴²*Rae v. Flynn*, 690 So. 2d 1341 (Fla. 3d D.C.A. 1997).
- ⁴³§784.046(7). Note that all referrals to counseling under chapter 784 are discretionary.
- ⁴⁴*Dudley v. Schmidt*, 963 So.2d 297 (Fla.5th DCA 2007).
- ⁴⁵*Bierlin v. Lucibella*, 955 So.2d 1206 (Fla.4th DCA 2007).
- ⁴⁶*Langner v. Cox*, 826 So. 2d 475 (Fla. 1st D.C.A. 2002).
- ⁴⁷*Blaylock v. Zeller*, 932 So.2d 479 (Fla.5th DCA 2006).
- ⁴⁸*Goodwin v. Whitley*, 103 So.2d 932 (Fla.1st DCA 2012).
- ⁴⁹§784.046(2)(b).
- ⁵⁰§784.046(1)(d).
- ⁵¹§784.046(4)(b)3c.
- ⁵²§784.046(1)(d), *Schutt v. Alfred*, __So.3d__, (Fla.3d DCA 2014).
- ⁵³§784.046(1)(d)
- ⁵⁴§784.046(1)(d)
- ⁵⁵*Toubail v. White*, __So.3d__, (Fla.4th DCA 2014).

- ⁵⁶*Alderman v. Thomas*, __So.3d__, (Fla.2d DCA 2014).
⁵⁷*C.S., ex rel D.A.S. v. T.S.P. ex rel A.M.P.*, 82 So.3d 1132 (Fla.2d DCA 2012).
⁵⁸*Weimorts v. Shockley*, 47 So.3d 386 (Fla.1st DCA 2010).
⁵⁹*Niederkorn v. Trivino*, 68 So.3d 991 (Fla.5th DCA 2011).
⁶⁰§784.046(1)(c).
⁶¹§784.046(6)(c).
⁶²§784.046(6)(c).
⁶³§784.046(1)(c), *Morrell v. Chadwick*, 965 So.2d 1277 (Fla.2d DCA 2007).
⁶⁴§784.0485(4).
⁶⁵§784.0485(5)(a).
⁶⁶§784.0485(5)(c).
⁶⁷§784.0485(5)(b).
⁶⁸*Nettles v. Hoyos*, 138 So.3d 593 (Fla.5th DCA 2014).
⁶⁹*Branson v. Rodriguez-Linares*, __So.3d__, 2014 WL 367881, (Fla.2d DCA 2014).
⁷⁰*Murphy v. Reynolds*, 55 So.3d 716 (Fla.1st DCA 2011).
⁷¹*Goudy v. Duquette*, 112 So.3d 716, 717-718 (Fla.2d DCA 2013).
⁷²*Touhey v. Seda*, 133 So.3d 1203 (Fla.2d DCA 2014).
⁷³*Alter v. Paquette*, 98 So.3d 220 (Fla.2d DCA 2012).
⁷⁴*C.S., ex rel D.A.S. v. T.S.P. ex rel A.M.P.*, 82 So.3d 1132 (Fla.2d DCA 2012).
⁷⁵§784.0485(6)(a).

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DATING VIOLENCE CHECKLIST

DEFINITION

- ☐ Violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on the consideration of the following factors:
 1. A dating relationship must have existed in the past 6 months;
 2. The nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and
 3. The frequency and type of interaction between the persons involved in the relationship must have included that the persons have been involved over time and on a continuous basis during the course of the relationship.
- ☐ The term does not include violence in a casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context. §784.046(1)(d), Florida Statutes.

STANDING

- ☐ Any person who is the victim of dating violence and has reasonable cause to believe he or she is in imminent danger of becoming the victim of another act of dating violence, or any person who has reasonable cause to believe he or she is in imminent danger of becoming the victim of an act of dating violence, or the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against dating violence on behalf of that minor child, has standing in the circuit court to file a sworn petition for an injunction for protection against dating violence. §784.046(2)(b), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf against a respondent who is not the minor child's parent, stepparent, or legal guardian the following must be met:

- (a) The minor child must also be living at home with the parent or legal guardian, who is filing as the petitioner on their behalf, and
- (b) The parent or legal guardian must have reasonable cause to believe that the minor child is a victim of dating violence. §784.046(4)(a)(2), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a child's behalf against a parent, stepparent, or legal guardian of the minor child the following requirements must also be met:

- (a) The minor child must be living at home with the parent or legal guardian, who is filing as the petitioner on the child's behalf, and
- (b) The parent or legal guardian must have been an eyewitness to, or have direct physical evidence or affidavits from eyewitnesses of, the specific facts and circumstances of the violence. §784.046(4)(a)(1), Florida Statutes.

- ☐ Petitioner must allege the incidents of dating violence and shall include the specific facts and circumstances that form the basis upon which relief is sought. §784.046(4)(a), Florida Statutes.
- ☐ No bond shall be required for entry of an injunction. §784.046(3)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).
- ☐ Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3).
- ☐ The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(2)(B).

TEMPORARY INJUNCTIONS

- ☐ Determine whether it appears to the court that an immediate and present danger of dating violence exists. §784.046(6)(a), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ The court shall only consider the verified pleadings/affidavits, unless the respondent appears at the hearing or has received reasonable notice of the hearing. §784.046(6)(b), Florida Statutes.
- ☐ Amended petitions and affidavits must be considered by the court as if originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ When the only ground for denial is that there does not exist “an appearance of an immediate and present danger of dating violence,” the ex parte temporary injunction may be denied but the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(1).
- ☐ If the ex parte (temporary) injunction is granted:
 - Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).
 - A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §784.046(6)(c), Florida Statutes; Fla. Fam. L. R. P. 12.610(c)(4).

- The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good cause shown by any party, or upon its own motion for good cause, including failure to obtain service. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

POSSIBLE RELIEF GRANTED WITH TEMPORARY INJUNCTIONS

- ☐ Restrain the respondent from committing any act of violence. §784.046(7)(a), Florida Statutes.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(o).
- ☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(o).
- ☐ Restrain respondent from knowingly coming within 100 feet of the petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(o).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(o).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence
 - the petitioner's current or any subsequent place of employment or school
 - the places frequented regularly by the petitioner and/or petitioner's minor child(ren).Florida Supreme Court Approved Family Law Form 12.980(k).

FINAL INJUNCTIONS

- ☐ No electronic or audio tape recording or court reporting services are provided by the court in dating violence cases. Florida Supreme Court Approved Family Law Forms 12.980(b)(1), 12.980(p).
- ☐ Upon notice and hearing, when it appears to the court that an immediate and present danger of violence exists, the court may grant such relief as the court deems proper, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7), Florida Statutes.
- ☐ If a final injunction is granted:
 - Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rule of Procedure 12.610(c)(4)(B), Florida Supreme Court Approved Family Law Form 12.980(p).

- The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil and criminal remedies. §784.046(7)(c), Florida Statutes.
- Upon petition of the victim, the court may extend the injunction for successive periods or until further order of the court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

POSSIBLE RELIEF GRANTED WITH FINAL INJUNCTIONS

- ☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(p).
- ☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b) Florida Statutes, Florida Supreme Court Approved Family Law Form 12.980(p).
- ☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(p).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(p).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence
 - the petitioner's current or any subsequent place of employment or school
 - the places frequented regularly by the petitioner and/or petitioner's minor child(ren).
 Florida Supreme Court Approved Family Law Form 12.980(p).

REQUIREMENTS FOR TEMPORARY AND FINAL ORDERS

- ☐ The temporary and final judgment should indicate on its face that:
 - The injunction is valid and enforceable in all counties of the State of Florida.
 - Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
 - The court had jurisdiction over the parties and matter.
 - Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect that person's right to due process.
 - The date respondent was served with the temporary or final order, if obtainable. §784.046(7)(d)(1-4), Florida Statutes.

MODIFICATIONS AND TERMINATIONS

The petitioner or respondent may move the court to modify or dissolve an injunction at any time. §784.046(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6).

ENFORCEMENT

- ☐ The Florida Department of Law Enforcement has established and maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic, dating, sexual, and repeat violence injunctions issued by the courts throughout the state. **The Department must have the respondent's name, race, sex and date of birth.** §784.046(8)(b), Florida Statutes.
- ☐ The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. §784.046(9)(a), Florida Statutes.
- ☐ If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).
- ☐ If the respondent is arrested under §901.15(6), Florida Statutes, for committing an act of repeat, dating or sexual violence in violation of an injunction for protection, the respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing. §784.046(9)(b), Florida Statutes.

FIRST DEGREE MISDEMEANOR

- ☐ A person who willfully violates a condition of pretrial release when the original arrest was for dating violence is guilty of a first degree misdemeanor. The offender must be held in custody until his or her first appearance. §784.046(15), Florida Statutes.
- ☐ A person who willfully violates an injunction for protection against dating violence issued pursuant to §784.046, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes, commits a misdemeanor of the first degree punishable as provided in §§775.082 or 775.083, Florida Statutes. §784.047, Florida Statutes.



REPEAT VIOLENCE CHECKLIST

DEFINITION

- ☐ Two incidents of violence or stalking committed by the respondent, which are directed against the petitioner or the petitioner's immediate family member. §784.046(1)(b), Florida Statutes.
- ☐ One of the two incidents of violence or stalking must have been within 6 months of the filing of the petition. §784.046(1)(b), Florida Statutes.

STANDING

- ☐ Any person who is the victim of repeat violence or the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against repeat violence on behalf of the minor child has standing in the circuit court to file a sworn petition for an injunction for protection against repeat violence. §784.046(2)(a), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf against a respondent who is not the minor child's parent, stepparent, or legal guardian the following must be met:

- (a) The minor child must also be living at home with the parent or legal guardian, who is filing as the petitioner on their behalf, and
- (b) The parent or legal guardian must have reasonable cause to believe that the minor child is a victim of repeat violence. §784.046(4)(a)(2), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf against a parent, stepparent, or legal guardian of the minor child the following requirements must also be met:

- (a) The minor child must be living at home with the parent or legal guardian who is filing as the petitioner on the child's behalf and
- (b) The parent or legal guardian must have been an eyewitness to, or have direct physical evidence or affidavits from eyewitnesses of, the specific facts and circumstances of the violence. §784.046(4)(a)(1), Florida Statutes.

- ☐ Petitioner must allege the incidents of repeat violence and shall include the specific facts and circumstances that form the basis upon which relief is sought. §784.046(4)(a), Florida Statutes.

- ☐ No bond shall be required for entry of an injunction. §784.046(3)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).
- ☐ Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3).
- ☐ The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(2)(B).

TEMPORARY INJUNCTIONS

- ☐ Determine whether it appears to the court that an immediate and present danger of repeat violence exists. §784.046(6)(a), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ The court can only consider the verified pleadings/affidavits unless the respondent appears at the hearing or has received reasonable notice of the hearing. §784.046(6)(b), Florida Statutes.
- ☐ Amended petitions and affidavits must be considered by the court as if originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ If the ex parte (temporary) injunction is granted:
 - Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4)(A).
 - A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4)(A).
 - The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good caused shown by any party, or upon its own motion for good cause, including failure to obtain service. §784.046(6)(c), Florida Statutes.

POSSIBLE RELIEF GRANTED WITH TEMPORARY INJUNCTIONS

- ☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(k).
- ☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(k).
- ☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(k).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(k).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence;
 - the petitioner's current or any subsequent place of employment or school; or
 - the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(k).

FINAL INJUNCTIONS

- ☐ No electronic or audio tape recording or court reporting services are provided by the court in repeat violence cases. Florida Supreme Court Approved Family Law Form 12.980(b)(1).
- ☐ Upon notice and hearing, when it appears to the court that an immediate and present danger exists, the court may grant such relief as the court deems proper, including injunctions or directives to law enforcement agencies as provided in this section. § 784.046(7)(b), Florida Statutes.

- ☐ If a final injunction is granted:
 - Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rule of Procedure 12.610(c)(4)(B), Florida Supreme Court Approved Family Law Form 12.980(l).
 - The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil and criminal remedies. §784.046(7)(c), Florida Statutes.
 - Upon petition of the victim, the court may extend the injunction for successive periods or until further order of the court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

POSSIBLE RELIEF GRANTED WITH FINAL INJUNCTIONS

- ☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(l).
- ☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(l).
- ☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(l).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(l).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence;
 - the petitioner's current or any subsequent place of employment or school; or
 - the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(l).

REQUIREMENTS FOR TEMPORARY AND FINAL ORDERS

- The temporary and final judgment should indicate on its face that:
 - The injunction is valid and enforceable in all counties of the State of Florida.
 - Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
 - The court had jurisdiction over the parties and matter.
 - Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect that person's right to due process.
 - The date respondent was served with the temporary or final order, if obtainable. §784.046(7)(d)(1-4), Florida Statutes.

MODIFICATIONS AND TERMINATIONS

The petitioner or respondent may move the court to modify or vacate an injunction at any time. §784.046(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6). For modifications see Florida Supreme Court Approved Family Law Form 12.980(j).

ENFORCEMENT

- The Florida Department of Law Enforcement has established and maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic, dating, sexual, and repeat violence injunctions issued by the courts throughout the state. §784.046(8)(b), Florida Statutes.
- The court shall enforce, through a civil or criminal contempt proceeding, a violation of injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. §784.046(9)(a), Florida Statutes.
- The court may enforce violations of an injunction for protection against repeat violence in civil contempt proceedings (governed by Rule 12.570), or in criminal contempt proceedings, which are governed by Florida Rule of Criminal Procedure 3.840. If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).
- If the respondent is arrested under §901.15(6), Florida Statutes, for committing an act of repeat, dating or sexual violence in violation of an injunction for protection, the

respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing. §784.046(9)(b), Florida Statutes.

FIRST DEGREE MISDEMEANOR

A person who willfully violates an injunction for protection against repeat violence issued pursuant to §784.046, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes by:

- Refusing to vacate the dwelling that the parties share;
- Going to, or being within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
- Committing an act of repeat violence, sexual violence, or dating violence against the petitioner;
- Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;
- Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;
- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not the vehicle is occupied;
- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or
- Refusing to surrender firearms or ammunition if ordered to do so by the court,

commits a misdemeanor of the first degree punishable as provided in §775.082, Florida Statutes, or §775.083, Florida Statutes. §784.047, Florida Statutes.

SEXUAL VIOLENCE CHECKLIST

DEFINITION

Any one incident of:

1. Sexual battery, as defined in chapter 794;
2. A lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age;
3. Luring or enticing a child, as described in chapter 787;
4. Sexual performance by a child, as described in chapter 827; or
5. Any other forcible felony wherein a sexual act is committed or attempted,

Any one of the incidents listed above meet the definition, *regardless of whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney.* §784.046(1)(c), Florida Statutes.

STANDING

- ☐ Any person who is the victim of sexual violence, OR
- ☐ The parent or legal guardian of a minor child who is the victim of sexual violence has standing in the circuit court to file a sworn petition for an injunction for protection against sexual violence on his or her own behalf or on behalf of the minor child if:
 - ☐
 1. The petitioner (person who is the victim, or parent or guardian of the minor child victim) reported the sexual violence to law enforcement and is cooperating in any criminal proceeding against the respondent, regardless of whether criminal charges based on the sexual violence have been filed, reduced, or dismissed by the state attorney; or
 2. The respondent who committed the sexual violence against the victim or minor child was sentenced to a term of imprisonment in state prison for the sexual violence and the respondent's term of imprisonment has expired or is due to expire within 90 days following the date the petition is filed. §784.046(2)(c), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf against a respondent who is not the minor child's parent, stepparent, or legal guardian the following must be met:

- (a) The minor child must also be living at home with the parent or legal guardian, who is filing as the petitioner on their behalf, and

- (b) The parent or legal guardian must have reasonable cause to believe that the minor child is a victim of sexual violence. § 784.046(4)(a)(2), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a child's behalf against a parent, stepparent, or legal guardian of the minor child the following requirements must also be met:

(a) The minor child must be living at home with the parent or legal guardian who is filing as the petitioner on the child's behalf and

(b) The parent or legal guardian must have been an eyewitness to, or have direct physical evidence or affidavits from eyewitnesses of, the specific facts and circumstances of the violence. §784.046(4)(a)(1), Florida Statutes.

- ☐ Petitioner must allege the incidents of sexual violence and shall include the specific facts and circumstances that form the basis upon which relief is sought. §784.046(4)(a), Florida Statutes.
- ☐ No bond shall be required for entry of an injunction. §784.046(3)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).
- ☐ Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3).
- ☐ The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(2)(B).

TEMPORARY INJUNCTIONS

- ☐ Determine whether it appears to the court that an immediate and present danger of sexual violence exists. §784.046(6)(a), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ The court can only consider the verified pleadings/affidavits unless the respondent appears at the hearing or has received reasonable notice of the hearing. §784.046(6)(b), Florida Statutes.
- ☐ Amended petitions and affidavits must be considered by the court as if originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ If the ex parte (temporary) injunction is granted:

- Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. § 784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).
- If the respondent who committed the sexual violence against the victim or minor child was sentenced to a term of imprisonment in state prison for the sexual violence, then the ex parte temporary injunction shall be effective for 15 days following the date the respondent is released from incarceration. §784.046(6)(c), Florida Statutes.
- A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).
- The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good cause shown by any party, or upon its own motion for good cause, including failure to obtain service. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

POSSIBLE RELIEF GRANTED WITH TEMPORARY INJUNCTIONS

- ☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(r).
- ☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(r).
- ☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(r).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(r).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence
 - the petitioner's current or any subsequent place of employment or school
 - the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(r).

FINAL INJUNCTIONS

- ☐ No electronic or audio tape recording or court reporting services are provided by the court in sexual violence cases. Florida Supreme Court Approved Family Law Forms 12.980(b)(1), 12.980(s).
- ☐ Upon notice and hearing, when it appears to the court that an immediate and present danger of violence exists, the court may grant such relief as the court deems proper, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7), Florida Statutes.
- ☐ If a final injunction is granted:
 - Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rule of Procedure 12.610(c)(4)(B), 12.980(s).
 - The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil and criminal remedies. §784.046(7)(c).
 - Upon petition of the victim, the court may extend the injunction for successive periods or until further order of the court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

POSSIBLE RELIEF GRANTED WITH FINAL INJUNCTIONS

- ☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(s).
- ☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(s).
- ☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(s).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(s).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence

- the petitioner's current or any subsequent place of employment or school
- the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(s).

REQUIREMENTS FOR TEMPORARY AND FINAL ORDERS

The temporary and final judgment should indicate on its face that:

- The injunction is valid and enforceable in all counties of the State of Florida.
- Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
- The court had jurisdiction over the parties and matter.
- Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect the person's right to due process.
- The date respondent was served with the temporary or final order, if obtainable. §784.046(7)(d)(1-4), Florida Statutes.

MODIFICATIONS AND TERMINATIONS

The petitioner or respondent may move the court to modify or vacate an injunction at any time. §784.046(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6). For modifications see Florida Supreme Court Approved Family Law Form 12.980(j).

ENFORCEMENT

- ☐ The Florida Department of Law Enforcement has established and maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic, dating, sexual, and repeat violence injunctions issued by the courts throughout the state. **The Department must have the respondent's name, race, sex and date of birth.** §784.046(8)(b), Florida Statutes.
- ☐ The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment or incarceration. §784.046(9)(a), Florida Statutes.
- ☐ If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).

- If the respondent is arrested upon §901.15(6), Florida Statutes, for committing an act of repeat, dating or sexual violence in violation of an injunction for protection, the respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing. §784.046(9)(b), Florida Statutes.

FIRST DEGREE MISDEMEANOR

A person who willfully violates an injunction for protection against sexual violence issued pursuant to §784.046, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes, commits a misdemeanor of the first degree punishable as provided in §775.082 or §775.083, Florida Statutes. §784.047, Florida Statutes.

STALKING CHECKLIST

DEFINITION

Stalking means the willful, malicious, and repeatedly following or harassment of another person. It includes cyberstalking which means to engage in a course of conduct to communicate, or cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.

STANDING

Any person who is the victim of stalking *or* the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against stalking on behalf of the minor child has standing in the circuit court to file a sworn petition for an injunction for protection against stalking. §784.0485(1), Florida Statutes.

- ☐ Petitioner must allege that he or she is a victim of stalking because the respondent has done one or more of the following:
 - Committed stalking;
 - Previously threatened, harassed, stalked, cyberstalked, or physically abused petitioner;
 - Threatened to harm petitioner, family members, or individuals closely associated with petitioner;
 - Intentionally injured or killed a family pet;
 - Used, or threatened to use any weapons such as guns or knives against petitioner;
 - A criminal history involving violence or the threat of violence, if known;
 - A previous protective order or one from another issued against him or her, if known;
 - Destroyed personal property, including, but not limited to telephones or other communication equipment, clothing, or other items belonging to petitioner. §784.0485(3), Florida Statutes.

- ☐ No bond shall be required for entry of an injunction. §784.0485(2)(b), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).

- ☐ Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. §784.0485(4), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3).
- ☐ The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. §784.0485(4), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(2)(B).

TEMPORARY INJUNCTIONS

- ☐ Determine whether it appears to the court that stalking exists. §784.0485(5)(a), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ The court shall only consider the verified pleadings/affidavits, unless the respondent appears at the hearing or has received reasonable notice of the hearing. §784.0485(5)(b), Florida Statutes.
- ☐ Amended petitions and affidavits must be considered by the court as if originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).
- ☐ A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. §784.0485(5)(b), Florida Statutes. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(1).
- ☐ When the only ground for denial is no appearance of an immediate and present danger of stalking, the ex parte temporary injunction may be denied but the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. §784.0485(5)(b), Florida Statutes. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(1).
- ☐ If the ex parte (temporary) injunction is granted:
 - Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. §784.0485(5)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).
 - A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §784.0485(5)(c), Florida Statutes; Fla. Fam. L. R. P. 12.610(c)(4).
 - The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good cause shown by any party,

which shall include failure to obtain service. §784.0485(5)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

POSSIBLE RELIEF GRANTED WITH TEMPORARY INJUNCTIONS

- ☐ Restrain the respondent from committing any act of stalking. §784.0485(5)(a), Florida Statutes.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(u).
- ☐ Restrain respondent from knowingly coming within 100 feet of the petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(u).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(u).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence
 - the petitioner's current or any subsequent place of employment or school
 - the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(u).

FINAL INJUNCTIONS

- ☐ Stalking proceedings shall be recorded. Recording may be by electronic means as provided in the Rules of Judicial Administration. §784.0485(6)(f), Florida Statutes.
- ☐ Upon notice and hearing, when it appears to the court that stalking exists, the court may grant such relief as the court deems proper, including injunctions or directives to law enforcement agencies as provided in this section. §784.0485(6)(a)4, Florida Statutes.
- ☐ If a final injunction is granted:
 - Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rule of Procedure 12.610(c)(4)(B), Florida Supreme Court Approved Family Law Form 12.980(v).
 - The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the

injunction. Such relief may be granted in addition to other civil and criminal remedies. §784.0485(6)(b), Florida Statutes.

POSSIBLE RELIEF GRANTED WITH FINAL INJUNCTIONS

- ☐ Restrain the respondent from committing any acts of stalking. §784.0485(6)(a)1, Florida Statutes.
- ☐ Order the respondent to participate in treatment, intervention, or counseling services to be paid for by respondent.
- ☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(v).
- ☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.0485(6)(a) Florida Statutes, Florida Supreme Court Approved Family Law Form 12.980(v).
- ☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(v).
- ☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(v).
- ☐ Restrain respondent from going to, in, or within 500 feet of:
 - the petitioner's current or future residence
 - the petitioner's current or any subsequent place of employment or school
 - the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(v).

REQUIREMENTS FOR TEMPORARY AND FINAL ORDERS

- ☐ The temporary and final judgment should indicate on its face that:
 - The injunction is valid and enforceable in all counties of the State of Florida.
 - Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
 - The court had jurisdiction over the parties and matter.

- Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect that person's right to due process.
- The date respondent was served with the temporary or final order, if obtainable. §784.0485(6)(c)(1-4), Florida Statutes.

MODIFICATIONS AND TERMINATION

- ☐ The petitioner or respondent may move the court to modify or dissolve an injunction at any time. §784.0485(6)(b), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6). For modifications, see Florida Supreme Court Approved Family Law Form 12.980(j).

ENFORCEMENT

- ☐ The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. §784.0485(9)(a), Florida Statutes.
- ☐ If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).
- ☐ If the respondent is arrested under §901.15(6), Florida Statutes, for committing an act of stalking in violation of an injunction for protection, the respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing. §784.0485(9)(b), Florida Statutes.

FIRST DEGREE MISDEMEANOR

- ☐ A person who willfully violates an injunction for protection against stalking issued pursuant to §784.0485, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes, commits a misdemeanor of the first degree punishable as provided in §§775.082 or 775.083, Florida Statutes. §784.0487(4), Florida Statutes.



Case Law Updates - Sexual Violence, Repeat Violence, Dating Violence and Stalking

Barile v. Gayheart, 80 So.3d 1085 (Fla. 2d DCA 2012) [PETITION FOR REPEAT VIOLENCE REVERSED](#) The petitioner requested an injunction against repeat violence against her former employer to whom she is related neither by blood nor marriage. After an evidentiary hearing the trial court entered an injunction against domestic violence and the respondent appealed, claiming that the trial court erred in sua sponte issuing an injunction against domestic violence when the petitioner sought an injunction against repeat violence. The notice for the hearing informed the respondent that he would be defending himself against a charge of repeat violence, however, without notice, the trial court switched issues to one which the respondent was not expecting and for which he was unprepared. Because the hearing went forward on the petitioner's petition as amended on the spot by the trial court, the respondent was denied due process and the injunction entered was reversed and vacated. Feb. 17, 2012.

Cirillo v. Jones, 84 So.3d 1174 (Fla. 4th DCA 2012) [REPEAT VIOLENCE INJUNCTION REVERSED](#) The respondent appealed after the trial court entered a final judgment of injunction for protection against repeat violence after two incidents of violence. During the first incident, the respondent poked the petitioner in the chest and spat on him while cursing and threatening him. The second incident occurred at a board meeting where the respondent was cursing at the petitioner and then ended it by saying "I will kill you or sue you." In his defense, the respondent testified that what he was trying to say was "I will sue you and kill you in court." The appellate court noted that during the incident at the board meeting, the evidence did not show that the respondent made any overt acts at the time of the threat which indicated an ability to carry out the threats or justified a reasonable belief by the petitioner that violence was imminent, as required by statute. Therefore, the court concluded that the evidence was insufficient to prove two incidents of violence occurred, and reversed. April 4, 2012.

Shawver v. Scarvelli, 84 So.3d 452 (Fla. 5th DCA 2012) [REPEAT VIOLENCE INJUNCTION REVERSED](#) The respondent appealed a final judgment of injunction for protection against repeat violence and claimed that the trial court erred by entering the injunction where the petition only alleged one act of violence and the evidence presented by petitioner was only sufficient to support a finding of one act of violence. The appellate court agreed and reversed, noting that §784.046(2)(b), Florida Statutes, requires two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition. April 05, 2012.

Giddens v. Tisty, 87 So.3d 843 (Fla. 1st DCA 2012) **REPEAT VIOLENCE INJUNCTION REVERSED** The appellant appealed a final injunction for protection against repeat violence. The trial court made no findings of fact and therefore did not explicitly find two incidents of violence or stalking as required by §784.046(1)(b), Florida Statutes. Because the final injunction was not supported by competent, substantial evidence, the appellate court reversed. May 23, 2012.

Strogis v. Mutty, 91 So.3d 259 (Fla. 5th DCA 2012) **REPEAT VIOLENCE INJUNCTION UPHeld** The respondent appealed a final judgment of injunction for protection against repeat violence-no hostile contact. She asserted that the trial court erred by denying her motion to dismiss the petition because the petition failed to meet the legal requirements of §784.046(4)(a), Florida Statutes. She also argued that there was not competent, substantial evidence in the record to establish the predicate two acts of violence. The facts underlying this proceeding involve long-standing animosity between the two parties and both acts of violence alleged during the hearing involved brief shoving or punching at crowded off-campus parties. The evidence offered at the hearing as to whether the contact was intentional or which of the two young women was the aggressor was in complete conflict. The appellate court found no merit in the appellant's claim of reversible error based on the legal insufficiency of the petition, and that the testimony was legally sufficient to support the trial court's decision, and affirmed the lower court's decision. June 29, 2012.

In re Amendments to Florida Family Law Rules of Procedure, 95 So.3d 126 (Fla. 2012) **RULES AMENDED** In response to newly passed legislation, the court approved changes to the family law rules that amended references throughout the rules to injunctions for domestic, repeat, dating and sexual violence to include stalking. The amendments will take effect on October 1, 2012 at the same time that the cause of action for an injunction for protection against stalking becomes effective. July 12, 2012.

Johns v. Penzotti, 100 So.3d 212 (Fla. 2d DCA 2012) **REPEAT VIOLENCE INJUNCTION REVERSED** The appellant appeals the trial court's final judgment of injunction for protection against repeat violence entered against him. Because the requisite instances of violence or stalking were not established at the hearing, the appellate court reversed. Section 784.046, Florida Statutes (2011), provides that a person may obtain protection against repeat violence when two or more incidents of violence have occurred. October 31, 2012.

Goodwin v. Whitley, 103 So.3d 932 (Fla. 1st DCA 2012) **DENIAL OF MOTION TO DISSOLVE AN INJUNCTION REVERSED** The appellant appealed a circuit court order that denied his motion to dissolve an injunction against repeat violence. Section 784.06(11), Florida Statutes, provides that a party to an injunction may file a motion to modify or dissolve an injunction at any time. The appellant filed his motion and claimed that he wanted to regain his ability to own guns. He also stated that he had never violated the injunction and posed no danger to the appellee, however, the appellee testified that she felt that she still needed the protection. The court

decided to deny the motion without offering the appellant a chance to cross examine the appellee, to testify, or to present argument to the court. Because he was not given an opportunity to be heard on his motion, the appellate court reversed and remanded the case for a full evidentiary hearing. November 13, 2012.

Lotridge v. Lobasso, 101 So.3d 402 (Fla. 4th DCA 2012) **DENIAL OF MOTION WITHOUT HEARING REVERSED** Appellant moved to vacate a final injunction for protection against repeat violence and alleged changed circumstances and also argued that the injunction had served its purpose. The circuit court denied the motion without a hearing, but the appellate court reversed the lower court and remanded the case for a hearing on appellant's motion, so he could have "a meaningful opportunity to be heard." November 21, 2012.

Waddell v. Delorenzo, 105 So.3d 591 (Fla 5th DCA 2012) **REPEAT INJUNCTION REVERSED** The appellant appeals from the entry of a Final Judgment of Injunction for Protection Against Repeat Violence, which prohibits him from having any contact with his neighbor. During the hearing, the appellee did not testify to a single of violence against him, however, the trial judge still issued the injunction. Because petitioner's evidence was legally insufficient to support the entry of a repeat violence injunction, the court reversed. December 28, 2012.

McNulty ex rel. G.M. v. Douglas ex rel. K.D., 111 So.3d 231 (Fla. 2d DCA 2013) **DATING VIOLENCE INJUNCTION REVERSED** A father petitioned for an injunction against a minor boy for protection against dating violence on behalf of his minor daughter. The court granted the injunction and the father of the minor boy appealed. The appellate court reversed and remanded the case for a full hearing because the trial court did not allow the minor boy to call witnesses or cross-examine the petitioner and therefore was not allowed due process. April 10, 2013.

In re Amendments to Florida Supreme Court Approved Family Law Forms, 113 So.3d 781 (Fla. 2013) **FORMS AMENDED AND CREATED** The Supreme Court reviewed the Florida Supreme Court Approved Family Law Forms and determined that new forms and amendments to several existing forms were needed due to recent legislation relating to injunctions for protection against stalking. The existing forms were amended to: (1) add the term "stalking" to the forms' respective titles, bodies, footers, and instructions, where appropriate; (2) add language to the instructions to form 12.980(g) regarding what information to include in a supplemental affidavit in support of a petition for injunction for protection against stalking; (3) add a blank textbox to the supplemental affidavit in support of a petition for injunction for protection against stalking for the petitioner to describe the alleged stalking; and (4) renumber several forms. New forms were also adopted: 12.980(t) (Petition for Injunction for Protection Against Stalking), 12.980(u) (Temporary Injunction for Protection Against Stalking), and 12.980(v) (Final Judgment for Protection Against Stalking). The new forms may be used immediately. May 9, 2013.

Goudy v. Duquette, 112 So.3d 716 (Fla. 2d DCA 2013) **REPEAT VIOLENCE INJUNCTION REVERSED** A dance team coach obtained an injunction for protection against repeat violence against a dancer's parent and the parent appealed. The court held that most of the contact served legitimate purposes and were not sufficient to cause a reasonable person emotional distress. Since there was no repeated harassment or malicious following there was no proof of stalking, and without stalking there was no proof of repeat violence, and the court reversed the injunction. May 08, 2013.

Kirton v. McKissick, 120 So.3d 193 (Fla. 5th DCA 2013) **INJUNCTION EXTENSION UPHeld** The appellant appealed an amended final judgment that granted an extension of an injunction for protection against repeat violence. He claimed that the trial court abused its discretion in determining that the appellee's continuing fear of violence by the appellant was reasonable. The trial court held an evidentiary hearing on the motion and granted the extension, even though the appellant argued that he had not committed any additional acts of violence against the appellee during the initial injunction period. The appellate court affirmed the decision and noted that the trial court's analysis "is not limited to determining whether the respondent committed additional acts of violence during the pendency of the initial injunction. Rather, the appropriate analysis focuses on whether the petitioner's professed continuing fear of future violence is reasonable under the circumstances." August 23, 2013.

In re Amendments to Florida Family Law Rules of Procedure, 126 So.3d 228 (Fla. 2013) **FAMILY LAW RULES AMENDED** The Family Law Rules of Procedure were amended to reflect s. 784.0485, Florida Statutes, which established an injunction for protection against stalking. Forms 12.900(h) and 12.928 were amended as well as rule 12.610. The forms are ready for use. November 14, 2013.

In re Standard Jury Instructions In Criminal Cases - Report NO. 2012-05, 131 So.3d 755 (Fla. 2013) **NEW JURY INSTRUCTIONS** The Supreme Court proposed new standard criminal jury instructions and/or amended several existing standard criminal jury instructions for crimes including aggravated stalking, violation of a stalking injunction, aggravated assault on an elderly person, sexual battery of a victim less than 12 years of age and several others. The instructions are ready to be published and used. December 5, 2013.

Schutt v. Alfred, 130 So.3d 772 (Fla. 3d DCA 2014) **DATING INJUNCTION REVERSED** The respondent appealed a permanent injunction for protection against dating violence issued against her. During the hearing, testimony revealed that the petitioner and the respondent had not been in a dating relationship since November of 2011. However, s. 784.046(2), Florida Statutes (2013), states that to receive an injunction against dating violence, two individuals must have had a dating relationship within the past 6 months. The dating violence statute does not provide relief to those who may have experienced violence in a "casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context."

The court vacated the permanent injunction without prejudice to the petitioner filing a timely petition for an injunction for protection against stalking. January 29, 2014.

Cannon v. Thomas ex rel. Jewett, 133 So.3d 634 (Fla. 1st DCA 2014) **REPEAT INJUNCTION VACATED** A mother was granted an injunction for repeat violence on behalf of a child and against another child. The appellate court reversed since there was no evidence that the aggressive student committed the requisite two acts of violence. The court also noted that sending threatening messages through social media (Facebook) the night before did not constitute assault under s. 784.011, Florida Statutes, since the child did not believe the violence was imminent. A concurring opinion urges the legislature to consider creating an injunction that would apply to school-related violence. March 12, 2014.

Touhey v. Seda, 133 So.3d 1203 (Fla. 2d DCA 2014) **STALKING INJUNCTION REVERSED** The petitioner was granted an injunction for protection against stalking issued against a business acquaintance and the respondent appealed. The court held that the record did not contain sufficient evidence to support the injunction. The respondent has a legitimate reason to contact the petitioner, the respondent's behavior was not malicious, and a reasonable person would not have suffered substantial emotional distress from the respondent's behavior. March 12, 2014.

Williams v. Gonder, 133 So.3d 657 (Fla. 1st DCA 2014) **REPEAT VIOLENCE INJUNCTION REVERSED** A petitioner was granted an injunction for repeat violence based on two alleged incidents of vehicle vandalism and the respondent appealed. The appellate court reversed and stated that keying a car did not constitute violence. There was also no competent substantial evidence that the respondent committed two separate acts as required by the statute. March 18, 2014.

McCord v. Cassady ex rel. Cassady, 138 So.3d 1135 (Fla. 1st DCA 2014) **REPEAT VIOLENCE INJUNCTION REVERSED** A parent petitioned for an injunction against repeat violence against another minor child which the court granted. The appellate court reversed and stated that there was no evidence of an act of violence or stalking within six months as required by statute. The court also noted that a no contact order created by the court could not be treated as an injunction for protection against repeat violence. May 14, 2014.

Barfield v. Kay, 140 So.3d 703 (Fla. 5th DCA 2014) **DENIAL OF MOTION TO VACATE REPEAT INJUNCTION REVERSED** The appellate court reversed the summary denial of a motion to vacate or modify an injunction for protection against repeat violence and stated that due process required a hearing. June 13, 2014.

Toubail v. White, --- So.3d ----, 2014 WL 2740875 (Fla. 4th DCA 2014) **DATING VIOLENCE INJUNCTION REVERSED** The respondent appealed an injunction against dating violence and the appellate court reversed because the petitioner failed to prove that she had a reasonable fear of imminent harm. June 18, 2014.

Alderman v. Thomas, --- So.3d ----, 2014 WL 2783463 (Fla. 2d DCA 2014) **DATING VIOLENCE INJUNCTION REVERSED** The petitioner appealed a final judgment of injunction for protection against dating violence. Although she presented evidence that dating violence had occurred in the past, she did not prove that she believed she was in imminent danger of becoming the victim of another act of dating violence. Therefore, the court reversed the final judgment of injunction. June 20, 2014.

Branson v. Rodriguez-Linares, --- So.3d ----, 2014 WL 3673881 (Fla. 2d DCA 2014) **INJUNCTION PROTECTING AGAINST CYBERSTALKING AFFIRMED** The respondent appealed a final judgment of injunction for protection against domestic violence that was issued to protect the petitioner from cyberstalking. Although the respondent did not verbally threaten the petitioner, the trial court found that he did stalk her with about 300 emails during a 1.5 month period. The respondent claimed that his actions did not constitute violence under the statute, however, the court found that “the statute plainly permits the entry of an injunction for a person who is the victim of “stalking.” Thus, the court held that proof of recent stalking can be sufficient to establish the act of “violence” required for the issuance of a section 741.30(1)(a) domestic violence injunction.” If such an act of violence is sufficiently established and if it is between “family or household member[s]” as defined in section 741.28(3), the petitioner is not also required to demonstrate reasonable cause to believe that he or she is in imminent danger of becoming the victim of any future act of domestic violence. The court also noted that “some of the offenses described in the statute, such as assault, battery, kidnapping, false imprisonment, aggravated stalking, and stalking, do not need to result in physical injury or death to qualify as acts of domestic violence.” July 25, 2014.