WEST VIRGINIA DOMESTIC VIOLENCE BENCHBOOK

Supreme Court of Appeals of West Virginia

2019 Edition

West Virginia
Domestic Violence Benchbook

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PREFACE - ACKNOWLEDGMENTS

The *West Virginia Domestic Violence Benchbook* (hereinafter *Benchbook*) was made possible by funding through the West Virginia Department of Military Affairs and Public Safety, Division of Administrative Services/Justice and Community Services ("JCS"), the state administering agency for the STOP Violence Against Women Grant Program. Points of view or opinions expressed in this publication are those of the authors and do not necessarily represent the official views of JCS, the State of West Virginia, or the United States Department of Justice.

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The 2019 edition of the *Benchbook* was researched and written by Juston H. Moore, Esq. Additional support was provided by the Supreme Court of Appeals of West Virginia and its Administrative Office.

The statutes, rules, and cases contained and discussed in this *Benchbook* are current through December 2019. All relevant statutory amendments and new legislation enacted through the 2019 Regular Legislative Session are included.

This *Benchbook* is intended primarily as a resource for West Virginia magistrates and judges. Information contained in this publication may also be useful for other court personnel, law enforcement officers, legal professionals, and domestic violence service providers. All readers are advised that discussions and suggestions regarding these legal issues represent the collective professional judgment of the *Benchbook* authors and are **not** to be considered as authoritative statements or interpretations of the law by the Supreme Court of Appeals of West Virginia.

Comments and suggestions regarding the content of this *Benchbook* may be sent to dvbenchbook@courtswv.gov. Questions concerning local domestic violence procedures should be directed to the local court with jurisdiction over the case in question.

LIST OF RULE ABBREVIATIONS

ARMC	Administrative Rules for the Magistrate Courts
RAP	Rules of Appellate Procedure
R.R.A.P.	Revised Rules of Appellate Procedure
RCP	Rules of Civil Procedure
RCANP	Rules of Procedure for Child Abuse and Neglect Proceedings
R. Cr. P.	Rules of Criminal Procedure
RDVCP	Rules of Practice and Procedure for Domestic Violence Civil Proceedings
RFCP	Rules of Practice and Procedure for Family Court
RJDP	Rules of Judicial Disciplinary Procedure
RJP	Rules of Juvenile Procedure
RMGP	Rules of Practice and Procedure for Minor Guardianship Proceedings
RPAA	Rules of Procedure for Administrative Appeals
RPHCP	Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia
TCR	Trial Court Rules

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Chapter 1

DYNAMICS OF DOMESTIC VIOLENCE

Chapter Contents

A. Definition of Domestic Violence

According to the National Coalition on Domestic Violence, domestic violence is "the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another."[1] Domestic violence also occurs between family and household members who are not intimate partners. Acts of domestic violence include physical, psychological, and sexual violence as well as emotional abuse. Although each instance of domestic violence can vary greatly depending on the parties and circumstances, the one recurring component is the abuser's constant efforts to maintain power and control over his or her victim. Domestic violence does not discriminate – it affects every community regardless of race, gender, age, religion, sexual orientation, or economic status.

Domestic violence is often described as learned behavior that an abuser uses to control a victim.[2] For this reason, domestic violence should not be attributed to or excused by an abuser's anger, stress, alcohol or substance abuse, or the actions of the victim. Rather, an abuser uses domestic violence as a strategy to dominate a victim and to gain the victim's compliance.

B. Statutory Definitions of Domestic Violence

The Prevention and Treatment of Domestic Violence Act, West Virginia Code §§ 48-27-101 *et seq.*, defines "domestic violence" or "abuse" as one or more specific acts between family or household members that involve:

See Bench Cards 2 & 3, Appendix B.

> 1. Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
> 2. Placing another in reasonable apprehension of physical harm;
> 3. Creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts;
> 4. Committing either sexual assault or sexual abuse as those terms are defined in Articles eight-b [§§ 61-8B-1 *et seq*.] and eight-d [§§ 61-8D-1 *et seq.*], Chapter sixty-one of this code, and;

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[1] National Coalition Against Domestic Violence, *What is Domestic Violence?* https://ncadv.org/learn-more (accessed Sept. 29, 2018).

[2] Julie Kunce Field, *Screening for Domestic Violence: Meeting the Challenge of Identifying Domestic Relations Cases Involving Domestic Violence and Developing Strategies for Those Cases*, Court Review, Summer 2002, at 5.

5. Holding, confining, detaining or abducting another person against that person's will. W. Va. Code § 48-27-202.

The statutory definition of domestic violence is narrower than the commonly accepted definition of domestic violence because it primarily defines domestic violence as acts of physical violence, and only includes psychological abuse when it creates fear of physical harm. Although psychological abuse may not meet the statutory definition of domestic violence by itself, this type of abuse may be relevant to a proceeding involving domestic violence because it provides evidence of an abuser's motive, intent, or plan. Additionally, evidence of psychological abuse may provide insight into the actions of both the abuser and the victim.

In addition to the definitions set forth in West Virginia Code § 48-27-202, the West Virginia Legislature has criminalized acts of domestic assault and domestic battery by the enactment of West Virginia Code § 61-2-28. The distinction between domestic assault or battery and non-domestic assault or battery is that the domestic abuse must occur between intimate partners or other family or household members. The Legislature has also established enhanced penalties for subsequent domestic assault and battery convictions.[3] The enhanced penalties demonstrate that the Legislature recognizes the repetitive nature of domestic violence and punishes it accordingly.

Providing further protection for domestic violence victims, West Virginia Code § 61-2-9a criminalizes stalking, harassment, and threats. As with domestic assault and battery, this code section establishes enhanced penalties for subsequent convictions. It also authorizes a court to issue a restraining order for a period of up to ten years upon conviction. When a defendant is charged with either harassment or stalking, it is a condition of a bond that the defendant shall have no contact with the victim. Although this code section can be applied to situations that do not involve family or household members, it provides meaningful protection for domestic violence victims because it criminalizes behavior typically identified as domestic violence.

West Virginia Code § 61-2-14g, enacted in 2011, also provides protection for domestic violence victims by imposing criminal penalties for unlawful restraint. Similar to the stalking statute, this code section is broadly

[3] The enhanced penalty provisions in Section 61-2-28 are also triggered by prior convictions for unlawful restraint (W. Va. Code § 61-2-14g) or simple assault or battery (W. Va. Code § 61-2-9(a)-(b)) where the victim was a "current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense."

applicable and is not limited to domestic violence circumstances involving family or household members. But unlawful restraint is somewhat common in intimate partner relationships when domestic violence occurs; thus, this criminal provision adds further protection for domestic violence victims. Unlawful restraint convictions also trigger enhanced penalties for subsequent domestic violence convictions under West Virginia Code § 61-2-28.

A statute enacted in 2016, West Virginia Code § 61-2-9d, created the felony offense of strangling another person causing bodily injury or loss of consciousness. Although generally applicable to any circumstance involving strangulation, the law was enacted primarily to provide greater protection for domestic violence victims. Women involved with an intimate partner with a history of non-lethal strangulation were found to have more than seven-fold odds of becoming a victim of homicide.[4] Since strangulation often leaves no physical injury, a charge under the already existing malicious wounding statute was difficult. Misdemeanor charges for assault and battery and domestic assault and battery provide lesser penalties for this serious and potentially lethal conduct. Under the new felony offense of strangling another person, the perpetrator can be sentenced to one-to-five years in prison and fined up to $2,500 upon conviction, or both imprisoned and fined.

C. Acts of Domestic Violence

See Bench Cards 2 & 3, Appendix B.

Although the motive for domestic violence commonly involves domination and control, domestic violence perpetrators employ various methods to achieve that purpose. Common psychological tactics include emotional abuse, such as repeated and degrading insults, and threats. An abuser is often extremely jealous or possessive and may isolate a victim from friends, family, and other relationships. As another psychological tactic, an abuser may threaten to gain full custody of children. An abuser may also throw things, punch walls, or hurt pets. [5]

In addition to emotional abuse, an abuser may push, shove, shake, or grab a victim. Other forms of physical abuse include: slapping, kicking, biting, or twisting arms, legs or fingers. An abuser may choke, strangle, or smother a victim. An abuser may also threaten a victim with a weapon, such as a knife or a gun and may commit assault with a weapon. Rape or

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[4] Glass, et al., *Non-fatal Strangulation is Important Risk Factor for Homicide of Women*, Vol. 35, Issue 3, Journal of Emergency Medicine 329 (Oct. 2008).

[5] Lenore Walker, et al., American Judges Association, *Domestic Violence & The Courtroom Knowing the Issues . . . Understanding the Victim*, <http://aja.ncsc.dni.us/pdfs/domestic-violence-the-courtroom.pdf> (accessed Sept. 29, 2018).

other forced sexual contact is yet one more type of abuse. Physical acts of domestic violence may constitute criminal behaviors and must not be minimized or tolerated just because they are directed against family members.[6]

A common aspect of domestic abuse that has only recently been widely discussed is economic abuse.[7] Like domestic violence, it is rooted in the abuser's desire to control the victim. Economic abuse involves tactics designed to "control a women's ability to acquire, use, and maintain economic resources, thus threatening her economic security and potential for self sufficiency."[8]

This type of abuse involves both economic control and exploitation. Economic control consists of tactics such as preventing women from working, withholding resources from them, requiring that the victim account for how money is spent, and dictating precisely how the money is spent. Economic exploitation involves refusing to work, squandering money, acquiring debt in the victim's name, and destroying the victim's credit.

Economic exploitation includes coerced debt, which has been defined as "all nonconsensual, credit-related transactions that occur in a violent relationship, not just matters that depend on the express application of force."[9] It includes obtaining credit cards in the victim's name without his or her knowledge, forcing victims to obtain loans for the abuser, and tricking the victim into signing quitclaim deeds for the family home. Michigan State University completed a study where researchers interviewed 103 women who receive assistance from domestic abuse agencies. Of these women, 99% disclosed that their partner subjected them to economic abuse.[10] A similar study completed by Rutgers University found that 94.2% of the participants experienced some type of economic abuse.[11] Coerced debt and economic abuse is an especially

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[6] Walker, et al., *supra* note 5.

[7] Leigh Goodmark, *A Troubled Marriage: Domestic Violence and the Legal System,* 42 (2012). *See also* Susan Pollet, *Economic Abuse: The Unseen Side of Domestic Abuse*, 83-Feb. N.Y. St. B.J. 40 (2014).

[8] *A Troubled Marriage, supra* note 7.

[9] Christine Kim, *Credit Cards: Weapons for Domestic Violence*, 22 Duke J. Gender L. & Pol'y 281, 282 (2015).

[10] Adams, et al., *Development of the Scale of Economic Abuse*, 14 Violence Against Women 563, 570-71 (2008).

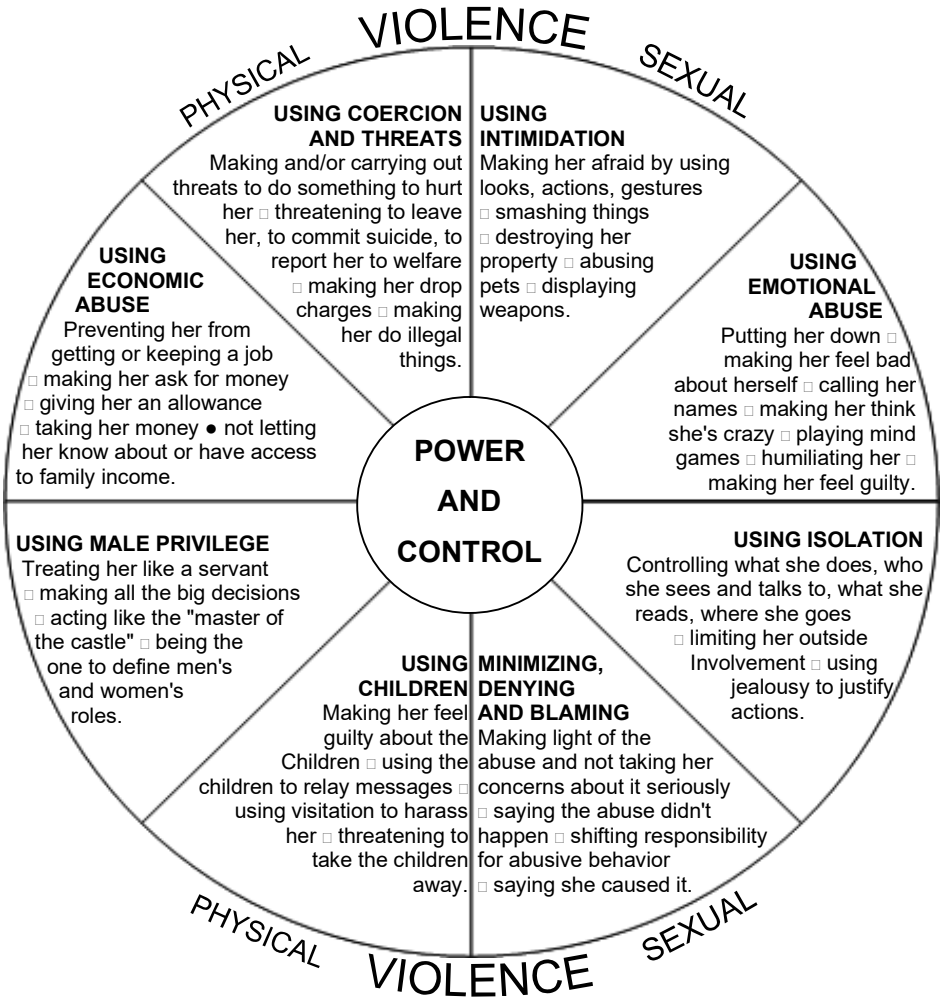
[11] Postmus, et al., *Understanding Economic Abuse in the Lives of Survivors*, 27 J. Interpersonal Violence 411, 419 (2012).

dangerous form of abuse because it creates a barrier preventing victims from leaving their abuser and effectively traps victims in abusive relationships.

D. The Power and Control Wheel

The Power and Control Wheel illustrates the methods and tactics an abuser uses to control a victim. It also depicts the relationship between physical abuse and other abusive behaviors, including psychological abuse. The wheel is a graphic illustration of the total dominance and control sought by an abuser and the methods used to achieve it.[12]

See Bench Cards 2 & 3, Appendix B.



[12] Reproduced with permission from the Domestic Abuse Intervention Project, 202 East Superior Street, Duluth, Minnesota 55802

E. Prevalence of Intimate Partner Violence as Indicated by the National Intimate Partner and Sexual Violence Survey

The National Intimate Partner and Sexual Violence Survey (NISVS), a telephone survey conducted by the Centers for Disease Control and Prevention, compiles statistics on an ongoing basis concerning sexual violence, stalking, and intimate partner violence.[13] The latest edition of the survey was released in November 2018. For the purposes of the survey, intimate partner violence included four types of violence: sexual violence, physical violence, stalking, and psychological aggression. Intimate partners were defined as a sexual or romantic partner and includes spouses, boyfriends, girlfriends, people with whom they dated, people they were currently seeing, or people they have "hooked up" with. The survey included both opposite-sex and same-sex couples.

According to the survey, an estimated 21.3% of women and 2.6% of men have been raped during their lifetime.[14] The report also found that 4.7% of women and 0.7% of men reported that they were raped within the 12 months preceding the survey. Over one-third (37.0%) of women and nearly one-fifth (17.9%) of men reported experiencing unwanted sexual contact in their lifetime.[15] The survey also tracked women and men being forced to penetrate someone else, finding that 1.2% of women and 7.1% of men were subjected to such conduct.[16]

The NISVS considered individuals stalking victims if (1) they had experienced multiple stalking tactics or a single tactic multiple times by the same perpetrator and (2) felt or believed that they or someone close to them would be harmed or killed as a result of the stalking. Some of the stalking tactics measured included: unwanted messages through email or social media, leaving strange and/or threatening items for the victim, or having someone approach the victim's house, school, or workplace when unwanted. The study reported that 16.0% of women and 5.8% of men

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[13] Sharon G. Smith, Xinjian Zhang, Kathleen C. Basile, Melissa T. Merrick, Jing Wang, Marcie-jo Kresnow, & Jieru Chen, *National Intimate Partner and Sexual Violence Survey, 2015 Data Brief – Updated Release, United States, 2015* < https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf > (accessed Feb. 4, 2019).

[14] For the purpose of the survey, rape included completed or attempted forced penetration and alcohol- or drug-facilitated penetration.

[15] Unwanted sexual contact is defined as "unwanted sexual experiences involving touch but not sexual penetration, such as being kissed in a sexual way, or having sexual body parts fondled, groped, or grabbed."

[16] Being made to penetrate another included a person being made to, or attempt to be made to, penetrate another person sexually without the victim's consent due to physical force, threat of physical harm, or inability to consent due to intoxication.

have been a victim of stalking during their lifetimes. Of these men and women, 3.7% of women and 1.9% of men were stalked in the last 12 months.

Many of the victims experienced victimization at a young age. Among females, 81.3% of victims of completed rape were raped before the age of 25; of these women, 43.2% were raped before the age of 18. Of male victims of rape, 70.8% were victimized before the age of 25; of these men, 51.3% were raped before the age of 18.

Additionally, stalking victims were victimized at an early age. Specifically, 54.1% of female stalking victims and 40.5% of male stalking victims were stalked before the age of 25. Lastly, of victims of contact sexual violence, physical violence, or stalking, 71.1% of women and 55.8% of men were first victimized before the age of 25. Of these women and men, 25.8% of women and 14.6% of men first experienced contact sexual violence, physical violence, or stalking before the age of 18.

Of the women who reported experiencing contact sexual violence, physical violence, or stalking, 25.1% experienced a negative impact as a result of the violence.[17] Among men, 10.9% experienced an impact.

F. Prevalence of Intimate Partner Violence or Domestic Violence Based Upon the National Crime Victimization Survey

As part of the National Crime Victimization Survey (NCVS), the Bureau of Justice Statistics has compiled data about intimate partner violence and other domestic violence.[18] Between 2003 and 2012, 21% of all nonfatal violent victimizations were attributed to domestic violence. For the purposes of the survey, domestic violence included rape, sexual assault, robbery, and assault committed by immediate family members, intimate partners, or relatives. Intimate partner violence accounted for 15% of all violent victimizations, violence committed by immediate family members accounted for 4%, and violence committed by other relatives accounted for 2%.

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[17] The impact of intimate partner violence was measured by asking participants if they had experienced any of the following: being fearful, being concerned for safety, post-traumatic stress disorder symptoms, being injured, needing healthcare, needing housing services, needing victim's advocate services, needing legal services, contacting a crisis hotline, missing days of work or school, and contracting a sexually transmitted disease or becoming pregnant after a rape.

[18] Bureau of Justice Statistics, *Nonfatal Domestic Violence, 2003-2012* <http://www.bjs.gov/content/pub/pdf/ndv0312.pdf> (accessed Feb. 4, 2019).

Females were more likely to be the victims of domestic and intimate partner violence. By comparison, 76% of domestic violence victimizations were against females and only 24% were against males. Of intimate partner violence, 82% of victimizations were against females and 18% were against males. Interestingly, domestic violence victimizations committed by an immediate family member or other relative were more evenly distributed against women (60%) and men (40%).

Of domestic violence committed against females, 39% of the incidents were perpetrated by the victim's current or former boyfriend or girlfriend and 25% were committed by a current or former spouse. Similarly, 30% of domestic violence against males was perpetrated by a current or former boyfriend or girlfriend; however, only 13% of domestic violence against males was perpetrated by a current or former spouse.

The NCVS also compiled statistics related to marital status and age. Based on those statistics from 2003 through 2012, the majority of domestic and intimate partner violence victims were between 18 to 24 years old. Rates of domestic and intimate partner violence were the lowest for persons 65 or older. The majority of victims of intimate partner violence were separated or divorced. Individuals who were married or widowed experienced lower rates of intimate partner violence.

G. Law Enforcement Response to Reports of Nonfatal Domestic Violence Based Upon the National Crime Victimization Survey

The Bureau of Justice Statistics conducted an additional study as part of the National Crime Victimization Survey (NCVS) which looked directly at the reporting of nonfatal domestic violence victimizations to law enforcement.[19] The study encompassed a period from 2006 to 2015 and provides insight into various issues of domestic violence, including the disparity in reported vs. unreported incidents as well as reasons for not reporting incidents. For purposes of the survey, nonfatal domestic violence includes serious violence (rape or sexual assault, robbery, and aggravated assault) and simple assaults committed by intimate partners, immediate family members, or other relatives.

In the time period from 2006 to 2015, there was an average of 1.3 million nonfatal domestic violence victimizations annually, and police were notified in over half (56%) of those incidents. This equates to an average of 716,429 annual incidents that were reported to police and an average of 581,754 annual incidents that went unreported.

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[19] Bureau of Justice Statistics, *Police Response to Domestic Violence, 2006-2015* <https://www.bjs.gov/content/pub/pdf/prdv0615.pdf> (accessed Feb. 10, 2019).

With regard to the incidents not reported to law enforcement, approximately one-fifth of victims did not report because they wished to protect the perpetrators (21%), they felt the crime was minor or unimportant (20%), or they feared reprisal from either the perpetrator or others (19%). Another reason for not reporting an incident to law enforcement was a belief that law enforcement was inefficient or biased, which accounted for 8% of victims.

The study revealed that incidents in which there was a female victim (24%) were four times as likely to go unreported as incidents in which there was a male victim (6%), and the reason cited for failing to report was fear of reprisal. A perpetrator was arrested or charges were filed in 39% of the incidents reported to law enforcement, and 23% of those incidents included an arrest during the initial response by law enforcement.

H. Phases of an Abusive Relationship

As described by Dr. Lenore E. Walker, abusive relationships may follow a pattern that involves three phases.[20] The first phase is the tension-building phase, and it involves comparatively minor acts of verbal and physical abuse. In this phase, the victim responds passively to the abuse and attempts to placate the abuser. Often, the victim will take responsibility or blame herself for the abuse. For example, the victim may believe that she caused or deserved the abuse because she burned dinner. During this phase, the victim's ability to placate the abuser decreases over time, and the tension increases. Sometimes, the tension increases to such an intolerable level that a victim may actually provoke an attack in order to seek release from the tension.

The second phase is termed the acute-battering phase. This phase involves more serious episodes of domestic violence, and may include assault with a weapon or even homicide. Usually, batterers in this phase can be described as brutal or out-of-control. Often, a domestic violence victim will not seek help during an acute-battering incident, but will do so several days later.
In the third phase, the tension and the violence dissipate. The batterer may be extremely contrite and loving. He may also beg for forgiveness. Even if a batterer is not contrite or loving, a period of relative calm typically occurs.

Although Dr. Walker has been recognized as a pioneer in the field of domestic violence, it has been noted that the cycle of violence is not

[20] Lenore E. Walker, *Terrifying Love* (1989). Except as otherwise noted, this section is based upon the source cited in this footnote.

present in all relationships involving domestic violence.[21] Alternative theories concerning domestic violence include the theories of "power and control" and the "continuum of violence." The "power and control" theory is based upon the different methods -- physical, psychological, emotional and financial -- that an abuser uses to control the victim. The "continuum of violence" theory "describes intimate partner violence that is constant and is expressed as verbal abuse to low level violence through serious assaults or possibly homicide, throughout the course of a relationship."[22]

I. Impact of Domestic Violence on Victims

The impact of domestic violence on victims is multifaceted.[23] Of course, domestic violence significantly affects the victim's physical health. Perpetrators may physically attack their victims, which could result in injuries. These injuries may be visible, such as bruises, cuts, bleeding, black eyes, broken limbs, bone fractures, or miscarriages. The victim may also suffer internal injuries that are not visible to the naked eye such as sprains or muscle pain.

Victims are also likely to suffer emotionally or psychologically. Abusers often make their victims feel inferior or dejected. In order to do this, they may call the victim names, verbally abuse him or her, criticize the victim's family, or threaten to take their children away. As a result, the victim will feel blameworthy, worthless, or lose self-confidence.

Victims also suffer from depression, anxiety, isolation, alienation, and feelings of helplessness. The violence may also affect the victim in such a way that he or she feels pessimistic or skeptical about the future. Women who are victims of domestic violence are more likely to use health services more often. However, gaining access to these services may be more difficult if the abuser controls the victim's finances.

In the specific context of intimate partner domestic violence, research shows that victims have an increased risk of developing depression, substance abuse issues, post-traumatic stress disorder, suicidal ideations and attempts, deliberate self-harm, eating disorders, and poor sleep.[24]

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[21] Jennifer Gentile Long and Dawn Doran Wilsey, *Understanding Battered Women Syndrome and Its Application to the Duress Defense*, 40-APR Prosecutor 36, 37 (2006).

[22] *Id.*

[23] Diksha Munjal, *Intimate Partner Violence--Is There A Solution?* 19 Duke J. Gender L. & Policy 347, 352 (2012). Except as otherwise noted, this section is based on the source cited in this footnote.

[24] National Center on Domestic Violence, Trauma & Mental Health, *Current Evidence: Intimate Partner Violence, Trauma-Related Mental Health Conditions & Chronic Illness*,

J. Why Victims Deviate from Terminating an Abusive Relationship

There are a multitude of reasons why domestic violence victims do not leave their abuser. Domestic violence impacts nearly every aspect of a victim's life, and because of this, the reasons for staying in an abusive relationship are varied and the decision to stay is often not the result of one specific factor.[25]

Based on either one or a combination of the factors listed below, a victim may initially find it difficult to completely leave the relationship. On average, a victim will attempt to leave five times before she ultimately does so.[26] However, even if a victim wishes to leave a battering relationship, she may decide that the costs of ending the relationship may be outweighed by the benefits of staying. Financial reasons may entice the victim to remain in a relationship. For instance, the abuser often controls the family's finances as a means of control, the victim is unemployed, or the combined family income is high, making the victim unwilling to leave. Furthermore, the victim often lacks the resources to relocate and, if she does leave, may be homeless.[27]

A victim may remain with her abuser because of a lack of support from family and friends. More specifically, friends and family often have negative attitudes toward a victim, which can lead a victim to believe that they are somehow to blame for the abuse. These negative attitudes from family and friends often stem from a mistaken belief that a victim can simply leave the relationship if she really wanted to without understanding the consequences of her leaving. Along those lines, abusers who were married were found in a study to more likely be excused from their

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<http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/10/FactSheet_IPVTraumaMHChronicIllness_2014_Final.pdf >(accessed Feb. 4, 2019).

[25]Niwako Yamawaki, Monica Ochoa-Shipp, Craig Pulsipher, Andrew Harlos, and Scott Swindler, *Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship With Her Abuser, and the Decision to Return to Her Abuser.* Journal of Interpersonal Violence 27, iss. 16, 2012, 3195-3212. Except as otherwise noted, this section is based on the source cited in this footnote.

[26] Okun, Lewis, *Woman Abuse: Facts Replacing Myths* (1986).

[27] A study showed that 38% of domestic violence survivors became homeless after leaving an abusing relationship. Baker, C.K., Cook, S.L., & Norris, F.H. (2003). *Domestic Violence and Housing Problems: A Contextual Analysis of Women's Help-seeking, Received Informal Support, and Formal System Response.* Violence Against Women, 9, 754-783.

conduct verses abusers who were not married, possibly due to the view that the married abusers were exercising familial discipline.[28]

Other reasons that a victim may choose to stay, at least initially, in a domestic violence relationship include fear of additional violence and/or retaliation from the abuser, fear of being a single parent, fear of losing custody of children, fear of the children's safety, religious or cultural beliefs, and lack of support from law enforcement.[29]

include child custody and other legal issues, terminating the emotional connection with the abuser, and retaliation from the abuser.

K. Domestic Violence Victims and Courts

Once a domestic violence victim leaves the abuser, he or she may struggle to navigate the fragmented court system.[30] It is likely that these victims will have to participate in civil court proceedings in relation to protective orders, custody, and child support, as well as court proceedings in relation to criminal charges against the abuser.

These different proceedings will require the victim to commit large amounts of time to various hearings, which may be difficult because the victim is also experiencing a new range of family responsibilities that may not have been encountered before leaving the abuser. These family responsibilities may cause the victim to place a low priority on the importance of court proceedings, and may cause the victim to miss them entirely.

Another obstacle encountered by domestic violence victims in the court system is that courts may not be able to adequately address the totality of a domestic violence victim's experience. Courts may find it difficult to recognize non-physical abuse, such as threats or intimidation. As such, a victim may not be sufficiently protected from her abuser by a protective order.

The way a victim presents herself in court may also create obstacles. Most courts will expect the victims "to present as meek and mild victims

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[28] Willis, C. E., Hallinan, M. N., & Melby, J. (1996). Effects of Sex Role Stereotyping Among European American Students on Domestic Violence Culpability Attributions. Sex Roles, 34(7-8), 475-491. doi:10.1007/BF01545027.

[29] National Coalition Against Domestic Violence, *Why Do Victims Stay?* < https://ncadv.org/why-do-victims-stay> (accessed Feb. 6, 2019).

[30] Talley Wood, *Relocation Law and Survivors of Domestic Violence*, 22 Duke J. Gender L. & Pol'y 263 (2015). This section is based on the source cited in this footnote.

with the perfect, single tear trickling down their cheeks at the mention of their abuse."[31] However, some victims may suffer from mental health issues or be wary of law enforcement or the court system as a whole. The victim's behavior in the courtroom may make it difficult for judges to determine the most appropriate relief, especially considering that the victim is often sitting within feet of the abuser, creating another mental obstacle for the victim.

Lastly, abusers may use the court system as another forum for harassing their victim. Once they become more educated about the court system, they may summon their victims to several hearings, such as protective order modifications, child support, or visitation hearings, as a way to maintain control over them. It is often difficult to prevent this harassment because "courts are rightly reluctant to deprive any litigant of the ability to petition the court for redress [and] . . . [a]s a result, batterers routinely manipulate the legal system to continue their abuse – a bitter lesson for the battered women who puts her trust in that system."[32] When addressing domestic violence, courts should recognize these difficulties in order to ensure that the victim is granted appropriate relief.

L. Domestic Violence Specific to LGBTQ Community

A 2015 report released by The Williams Institute at the UCLA School of Law reviewed 42 studies from 1989 to 2015 regarding intimate partner violence and sexual abuse among the LGBTQ community.[33] A majority of the studies found that there was a lifetime prevalence of intimate partner violence that was as high as or higher in LGBTQ individuals than the general United States population. Furthermore, there was a higher prevalence of both intimate partner violence and sexual violence in bisexual women than heterosexual women.

See Bench Card 3, Appendix B.

This study also addressed numerous barriers that the LGBTQ community uniquely faces due to their sexual orientation and gender identity. One barrier is an added risk of isolation and rejection from family, friends, and

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[31] *Id.* at 265.

[32] *Id*. at 266 (quoting Leaigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Woman*, 23 St. Louis U. Pub. L. Rev. 7, 34 (2004)).

[33] "LGBTQ" refers to lesbian, gay, bisexual, transgender, and queer/questioning. See Taylor N.T. Brown and Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research*, < https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf> (accessed Feb. 6, 2019). This section is based on the source cited in this footnote.

society. This can be especially prevalent when the victim has not come “out” to their friends and family.

Another barrier is a lack of resources for same-sex victims. Victims may need specialized resources, such as counseling or shelters that are unavailable. Even if there are resources available, a victim may not know about LGBTQ-specific or LGBTQ-friendly assistance resources.

There is also fear of the legal system and law enforcement that is specific to the LGBTQ community. For example, many states do not include protection for same-sex couples in their statutes involving domestic violence. Furthermore, there is often a lack of confidence in the sensitivity and effectiveness of courts and law enforcement with regard to LGBTQ individuals.

M. Domestic Violence Perpetrators

1. Personality Traits of a Batterer

Domestic violence is not the result of provocation by the victim or interactions with partners.[34] Instead, it is the effect of the batterer's learned behavioral responses. Although batterers often display common characteristics, the best predictor of future violence by an individual is a history of past violence. A history of past violence could include witnessing violence in their childhood home; perpetrating violent acts towards pets, inanimate objects, or other people; a criminal record; and previous instances of aggressive behavior.

Other indicators may be insecurity, jealousy, and possessiveness coupled with the ability to be manipulative and charming at times. Batterers have also reported similar childhood experiences that include a strict father and others whose discipline style is inconsistent. For example, the mother may alternate between being lenient and strict in order to avoid upsetting her abuser.

2. Types of Abusers

There are several types of abusers. The most common abuser is referred to as the "power and control" batterer.[35] This type of batterer uses violence against his partner to ensure that she does what he wants without concern for her own rights. The second type of batterer is the mentally ill batterer. Although this batterer may also have power and

[34] Lenore E. A. Walker, *The Battered Woman*, 15-16 (3d ed. 2009).

[35] *Id.* at 6-7.

control issues, his mental illness interacts with his aggressive behavior. Batterers with an abuse disorder may also suffer from paranoid and schizophrenic disorders or affective disorders, which include bipolar disorder and depression. Another example of this type of abuser is an individual who has a substance abuse disorder as well as an abuser disorder.

The third type is the "antisocial personality disordered" abuser. This abuser is one who displays "psychopathic character flaws that are difficult to change."[36] An example of this type of batterer is someone who suffered from an attachment disorder that resulted in borderline personality traits. Often, this type of abuser can be categorized as "pit bulls" or "cobras." Pit bulls are abusers that exhibit escalated signs of rage as they get angry. In contrast, cobras appear calm when they are angry and act more deliberately in terms of their dangerous actions.

In addition to referring batterers to appropriate intervention programs discussed in the next section, the following observations and recommendations should be considered when evaluating whether a batterer has successfully changed his or her behaviors.[37] First, any domestic violence perpetrator should be required to complete court-ordered counseling. Secondly, other issues such as substance abuse and unemployment should be addressed. Third, a successful batterer's program should focus on behavioral changes as opposed to "interruption methods."[38] Finally, the completion of a batterer's program should not be perceived or considered as actual change.

N. Intervention for Domestic Violence Perpetrators

Batterer intervention programs ("BIPs") were first introduced in the 1970s and though they are widespread throughout the country, there is no current accurate count of the number of BIPs that are in operation.[39] Forty-seven states currently provide standards which regulate BIPs. Although

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[36] *Id.* at 7.

[37] Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 Ky. L.J. 613, 647 (2004-2005). Although this article primarily addresses child welfare cases, as opposed to protective order cases, the recommendations from the article provide insight into evaluating whether a domestic violence perpetrator has changed.

[38] *Id.* at 646-47.

[39] Ferraro, Kathleen J., *Current Research on Batterer Intervention Programs and Implications for Policy* (2018). Unless otherwise noted, this section is based upon the source cited in this footnote.

programs can vary significantly, their common goals are typically victim safety, offender accountability, and rehabilitation.[40]

There are three major models of court-ordered BIPs: (1) the Duluth Model; (2) the cognitive behavioral therapy (CBT) model; and (3) psychodynamic approaches. However, many programs are not simply one of the three but instead combine elements of the three major models.

The three major models can be further classified into two major theories of causation regarding BIPs, which are (1) the individualistic model or (2) the societal model. The individualistic theory focuses on the underlying psychological distresses of the perpetrator. This theory is often preferred by mental health practitioners, who believe that the perpetrator needs health treatment to address their issues. The societal model is based on the belief that patriarchal sexism and men's historical subordination of women rather than any underlying mental health condition is the cause of domestic violence.

The most common form of batterer intervention program is the Duluth Model. This model focuses on education about the dynamics of domestic violence and the need for the perpetrator to change his behavior and beliefs. There is no "treatment" involved in the Duluth model but instead it is an "educational intervention."

CBT models are similar to the Duluth model; however, there is less focus on social and political issues and male-over-female power. Furthermore, CBT models concentrate on learning new ways to think about solving issues and building skills to respond non-violently the next time the perpetrator is faced with such a situation. Psychodynamic programs combine elements of traditional psychological treatment with skill-building in the CBT models. Psychodynamic programs are the least used of the three models.

There have been numerous studies on the effectiveness of BIPs. Many studies have provided evidence that these programs have worked for participants, victims, and their families by showing reduced re-arrests, reduced re-assaults, and self-reported improvements in victims' lives. One such study found that men who were sentenced to incarceration were significantly more likely to have a subsequent arrest than those who

[40] Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with A Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 Am. Crim. L. Rev. 541, 557 (2014).

underwent a program, which tended to show that treatment was more effective than jail.[41]

However, there have also been many studies that have failed to demonstrate positive results of BIPs. One study observed offenders in the Bronx Domestic Violence Court and found that there was little difference in recidivism in those who completed BIPs and those who did not, with both groups having a very high rate of recidivism overall.[42]

Despite the numerous contradictory studies with regard to BIPs, it is clear that there cannot be a "one size fit all" with regard to the type of program that needs to be implemented for all batterers. Different batterers have differing characteristics, such as criminal backgrounds and desires to change as well as substance abuse and mental health disorders. As such, pegging a batterer into a certain model of BIPs is likely to be ineffective but instead needs to be examined on a case-by-case basis.

O. Domestic Violence and Children

1. Number of Children Exposed to Domestic Violence and Intimate Partner Violence

There are a great number of children who are exposed to violence at home. The National Survey of Children's Exposure to Violence (NatSCEV), a telephone survey conducted by the Office of Juvenile Justice and Delinquency and the CDC, provides statistics regarding the prevalence of children's exposure to family violence.[43]

Based on the sample used in the survey, more than one in five (20.8%) were exposed to at least one form of family violence during their lifetime, and more than one in six (17.3%) witnessed one of their parents assault another parent or his or her partner. In terms of recency, 8.2% were exposed to some form of family violence in the preceding year including 6.1% who were exposed to intimate partner violence between their parents.

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[41] Boots, D. P., Wareham, J., Bartula, A., & Canas, R. (2016). A comparison of the batterer intervention and prevention program with alternative court dispositions on 12-month recidivism. *Violence Against Women*, 22(9), 1134-1157.10.1177/1077801215618806.

[42] Puffett, N., & Gavin, C. (2004). *Predictors of program outcome and recidivism at the Bronx Misdemeanor Domestic Violence Court*. New York: Center for Court Innovation.

[43] Sherry Hamby, David Finkelhor, Heather Turner, Anne Shattuck and Kristen Karcke, *National Survey of Children's Exposure to Violence* (September 2015).

2. Correlation Between Witnessing Family Violence and Child Maltreatment

There is also a significant overlap between a child's exposure to violence and maltreatment. The NatSCEV data was also used to examine the co-occurrence of witnessing partner violence and child maltreatment.[44] For purposes of the research, child maltreatment is composed of five different subtypes: physical abuse, psychological abuse, neglect, custodial interference, and sexual abuse by a known adult.

Children who witness partner violence are at a higher risk for maltreatment. A third (33.9%) of children who witnessed partner violence were also maltreated within the last year, compared to 8.6% of the children who did not witness family violence. Further, more than half of children (59.8%) who witnessed partner violence were maltreated within their lifetime. One in three (33.9%) children who witnessed partner violence also experienced physical abuse compared to 4.8% of children who did not witness family violence. Over 70% of children who had been sexually abused had also witnessed partner violence and 20.1% of children who witnessed violence also experienced custodial interference.

The study also examined the severity of maltreatment and found that the mistreatment of children who witnessed partner violence was more severe than maltreatment of children who did not witness violence. This link was most prevalent in instances of physical abuse. Children who witnessed partner violence and were physically abused were more likely to be injured, seek medical treatment, have incidents reported to the police, and be more fearful during the episode than non-witnesses.

3. Effects of Domestic Violence on Children

The effects of witnessing domestic violence are very similar to those of being the victim of abuse.[45] Research has found that witnessing domestic violence can cause the children to experience physical and mental results similar to those that maltreated children experience.[46] These children will likely experience immediate and long-term effects.

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[44] Sherry Hamby, David Finkelhor, Heather Turner, Richard Ormrod, *The Overlap of Witnessing Partner Violence with Child Maltreatment and Other Vicitimizations in a Nationally Representative Survey of Youth*, Child Abuse & Neglect 34 (2010) 734-41.

[45] Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. Va. L. Rev. 237, 245 (1999).

[45] *Id.*

Short-term harm is generally categorized as physical, emotional, behavioral, and cognitive. The physical harm may begin before the child is born because abuse victims are four times more likely to bear a low-weight infant. These children also have an increased number of health problems, and suffer from poor health, insomnia, and excessive screaming. It is also common for these children to experience headaches, stomach aches, diarrhea, asthma, and ulcers.

Witnessing violence also causes behavioral harm because batterers use psychological tactics to isolate their children and partners in order to ensure that they cannot seek assistance from the outside world. The emotional harm is also great and these children are likely to suffer from PTSD; depression; dissociative, anxiety and mood disorders; suicidal ideation; extreme crying, fear, passivity and dependency; aggressiveness; and impulsivity.

Witnessing violence can seriously impair a child's cognitive function and ability to learn. If the child is younger, he or she is likely to experience delays in development, which likely will lead to a range of problems at school.

There are also several long-term effects of witnessing domestic violence at a young age. Child witnesses are likely to experience trauma-related symptoms, depression, low self-esteem, and aggression.

Further, these children are also at a higher risk for violence in their future relationships. This is because, by witnessing violence, these children are more likely to view it as "an appropriate way of resolving conflicts in human relationships [and] [a]s adults, they are more likely to act in a manner consistent with these childhood lessons."[47] Accordingly, boys who witness domestic violence are at a higher risk of becoming batterers and girls may view victimization as a normal part of relationships and accept it as such.

Other long-term effects of witnessing family violence impact society as a whole. For example, domestic violence is a major cause of homelessness, and a large percentage of the males between the ages of 11 and 22 who are serving time for homicide killed their mother's batterers. Further, it has been estimated that 85% of federal offenders of violent crimes who are serving time were exposed to violence at home.

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[47] *Id*. at 250 (quoting Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 Law and Psychol. Rev. 137, 151 (1994)).

4. Domestic Violence, Children, and the Judiciary

See Bench Card 1, Appendix B.

Judicial officers should be cognizant of the negative effects that domestic violence has on children and should be aware that West Virginia statutory law recognizes these negative effects. W. Va. Code § 48-27-101(a)(2). Additionally, in caselaw the West Virginia Supreme Court has established that domestic violence should be a significant consideration in cases involving custody and visitation disputes, and that it can also be a factor in the termination of parental rights.[48]

See Bench Cards 11-14, Appendix B.

Providing statutory guidance, the West Virginia Legislature has established that domestic violence, as defined by West Virginia Code § 48-27-202, is a significant factor in the allocation of custodial responsibility. If a court finds that a parent has engaged in domestic violence, West Virginia Code § 48-9-209 requires a court to impose limits in a parenting plan that are designed to protect both the child and the child's victim-parent from harm. The statute further provides that a court may only allocate custodial or decision-making responsibility to a parent who has committed domestic violence if it makes specific findings that the limits in the parenting plan will protect the child and the child's victim-parent from harm. The purpose of West Virginia Code § 48-9-209 is similar to statutes in other states that recognize domestic violence as a significant factor when a court determines the custody of minor children.[49]

As another method to protect children from the harmful effects of domestic violence, at least 24 states and Puerto Rico specifically identify and protect child witnesses of domestic violence through criminal legislative provisions.[50] These states vary in terms of how they define what circumstances constitute "witnessing" domestic violence. Some states use specific language and state that witnessing by a child only occurs when the child is physically present or can hear or see the act of violence. Others broadly define witness to include instances when an act is committed in the presence of or perceived by the child. These states also differ with regard to the legal consequences of committing domestic violence in front of children. These legislative provisions often enhance criminal penalties for domestic violence committed in the presence of a

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[48] *D.B. v. J.R.*, 235 W. Va. 409, 774 S.E.2d 75 (2015); Syl. Pt. 1, *Henry v. Johnson*, 192 W. Va. 82, 450 S.E.2d 779 (1994); *Nancy Viola R. v. Randolph W.,* 177 W. Va. 710, 356 S.E.2d 464 (1987); *West Virginia DHHR ex rel. Mills v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997).

[49] *See Heck v. Reed*, 529 N.W.2d 155 (N.D. 1995); *Hicks v. Hicks*, 733 So. 2d 1261 (La. App. 1999).

[50] Child Welfare Information Gateway. (2016). Child witnesses to domestic violence. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

child, both by length of sentence and amount of fine; identify domestic violence committed in the presence of a child as an aggravating factor for sentencing purposes; designate domestic violence committed in the presence of a child as a separate crime; or place additional restrictions on a perpetrator, including, but not limited to, paying for victim child's counseling fees, requiring said perpetrator's child visitation to be supervised, and requiring said perpetrator to complete a batterer's intervention program prior to unsupervised visitation being granted. West Virginia does not currently have such legislation.

P. WV Judicial Guide to Child Safety in Custody Cases

Issues of domestic violence affect the safety of children and play a significant role in cases that involve the establishment of parenting plans or child custody. For that reason, the "WV Judicial Guide to Child Safety in Custody Cases" has been included in this benchbook as Appendix B and applicable references to it have been noted in the margins. It includes citations to applicable West Virginia statutes and rules. This guide was adapted from "A Judicial Guide to Child Safety" (© 2008 National Council of Juvenile and Family Court Judges). The guide is a series of 15 bench cards that address substantive topics, such as the effect of domestic violence on children, and also procedural topics, such as temporary and emergency orders. It is designed to assist judges with assessing whether a child is at risk, reviewing evidence, evaluating safety risks, making findings that prioritize safety concerns, and preparing orders that provide for family safety.

Q. Lethality Assessment

A lethality assessment is a tool that was "developed to provide law enforcement and other first responders with a simple and consistent method to measure the level of danger that a victim of intimate partner domestic violence is in given their current situation."[51] Using a consistent, research based process leads to a variety of potential benefits.[52] First, it will provide a more accurate basis for effective safety planning for victims and accountability for perpetrators. Second, it can assist law enforcement and other first responders, as well as judicial officers, in gathering critical information as well as placing incidents of domestic violence into context, which can result in a more effective way to respond to the situation. Third, it can help save lives.

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[51] Virginia Department of Criminal Justice Services, *Review of Lethality Assessment Programs (LAP)* (2013).

[52] West Virginia Coalition Against Domestic Violence Risk Assessment in Criminal and Civil Systems (RACCS) Committee, *Dangerous Lethality Assessment Guide*. This section is based upon the source cited in this footnote.

There are a number of identifiable indicators present in the escalation of domestic violence from an initial incident to either a highly dangerous or even potentially lethal level. The identifiable indicators, which are based on numerous studies, include the following: (1) direct threats to kill the victim, a member of the victim's family, or the perpetrator himself; (2) stalking behavior; (3) possession, access, and/or use of weapons, especially when the perpetrator is prohibited from said weapons; (4) intrusive coercive control and constant monitoring of the victim; (5) the perpetrator is unemployed; (6) forced sex; (7) the victim has a child with someone other than the perpetrator; (8) the perpetrator has substance abuse issues; (9) the victim has either left or is attempting to leave a relationship with the perpetrator; and (10) any other criminal behavior, including strangulation, toward the victim.

A four-step process provides the framework for which a professional can utilize in responding to domestic violence cases involving highly dangerous and potentially lethal behaviors. First, the professional must understand the nature and extent of the domestic violence. There are numerous differing contexts of domestic violence which must be assessed by the professional, which is done by asking "who is doing what to whom and with what impact?"

The second step is to identify the highly dangerous and potentially lethal behaviors by the perpetrator. This step can be performed by looking at previous criminal records and domestic violence protective orders involving the perpetrator, as well as interviewing the victim and any witnesses to the incident.

Third, the professional must increase safety for the victim. Measures to complete this step include sending the victim to a domestic violence shelter, encourage the victim to file for a domestic violence protective order, and if there are court proceedings, keeping the victim at a safe distance from the perpetrator.

Lastly, all professionals involved (law enforcement, magistrates, family court judges, etc.) must coordinate together to ensure that the victim is safe. Examples include a magistrate communicating conditions of a perpetrator's bond to law enforcement, or a family court judge ordering law enforcement to provide a safety check on a victim if the victim does not appear at a court proceeding.

R. Effectiveness and Advantages of Domestic Violence Protective Orders

Protective orders have been proven to be an effective measure used by courts to reduce intimate partner violence.[53] The University of New Hampshire Carsey Institute conducted a study where they measured the effectiveness of protective orders in three ways: (1) whether the order eliminated or reduced violence; (2) whether the order improved or lessened the victim's quality of life; and (3) whether the costs associated with protective order intervention outweighed the benefits.

The study sampled 213 women and focused on the differences in effectiveness in rural compared to urban areas. Half of the women sampled reported that a protective order stopped the violence entirely. The other half reported that the orders significantly reduced the violence. Half of the victims indicated that the protective orders issued were not violated. There were no differences in the percentage of rural or urban women who experienced a violation. [54]

The majority of both rural (86%) and urban (87%) women reported that the protective order was effective; however, rural women reported a higher number of days of distress and sleep loss during and after the issuance of the protective order. More rural women reported that they were fearful of future harm than urban women. Rural women also experienced problems with enforcement of the order.

Protective orders are a low-cost solution when compared to the social and personal costs associated with partner violence. To estimate costs, the study used actual claim averages and health care cost reports, average legal fees, and justice system costs, then compared these costs to the approximate cost of partner violence, which was estimated by days of lost productivity and emotional distress. After analyzing these numbers it was found that for every dollar spent on protective orders over 30 dollars of costs to society were avoided.

It is likely that protective orders are more effective because they have advantages over other civil and criminal proceedings. First, the primary advantage to a protective order proceeding is that it allows a victim to receive immediate, temporary protection until a final hearing is

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[53] TK Logan & Robert Walker, *Civil Protective Orders Effective in Stopping or Reducing Partner Violence: Challenges Remain in Rural Areas with Access and Enforcement*, 2011 Carsey Inst. Policy Brief 18.

[54] For the purposes of the study, protective order violations included "any property damage, threats to harm or kill, physical violence, any threats or use of a weapon, or victim perception that the protective order was violated (even if offender did none of the above tactics)."

conducted.[55] If domestic violence is only addressed criminally, a perpetrator is often released on bond pending the resolution of the criminal case and the victim lacks any judicial protection.[56] Also, it takes significantly more time to resolve a criminal case than a protective order proceeding.

Second, protective order proceedings allow a victim to choose the remedy. Allowing a victim to choose the remedy is important because the victim gains control over her unique situation. For example, a victim may not want to pursue criminal charges because the abuser is the sole source of financial support or because she fears the abuser's retaliation.

Third, protective order proceedings provide relief that is unavailable in criminal cases. For example, protective order proceedings may include orders regarding child custody, support, visitation, and possession of the residence. Protective orders can enjoin behavior, such as harassment, that may not be addressed in criminal proceedings.

A protective order proceeding also has the added advantage of a lower burden of proof. Often, there are no witnesses to domestic violence other than the abuser and the victim, and the evidence may not meet the criminal standard of proof of beyond a reasonable doubt.

S. Effective Judicial Responses to Domestic Violence

Within their judicial authority, judicial officers have the ability to create a courtroom atmosphere that is effective in addressing domestic violence. One primary concern is the management of areas outside of the actual courtroom, such as the reception area.[57] Judicial officers should ensure that domestic violence victims cannot be harassed, abused, or intimidated by a perpetrator or his family members when a victim seeks judicial redress. Separate waiting areas, as well as adequate staffing by security personnel, are common methods for maintaining a safe and secure courtroom facility.

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[55] Elizabeth Topliffe, *Why Civil Protection Orders are Effective Remedies for Domestic Violence But Mutual Protective Orders are Not*, 67 Ind. L. J. 1039, 1047-48 (Fall 1992). This source is the basis for the remaining paragraphs in this section.

[56] Imposition of a bond condition that the perpetrator stay away from the victim can provide some protection.

[57] Barbara J. Hart, *Safety and Accountability: The Underpinnings of a Just Justice System*, (May 1998); see also Walker, et al., *supra* note 5.

Effective docket management is another useful judicial tool for domestic violence cases.[58] Domestic violence petitions are to be given high priority on a court's docket. W. Va. Code § 48-27-309. Judicial officers should address domestic violence cases swiftly and should allow continuances only when justified by good cause.[59] During the pendency of lengthy proceedings such as divorce, a judge can extend protective order provisions in favor of domestic violence victims.[60]

Judicial demeanor is a key factor in addressing domestic violence.[61] According to the American Judges Association, first, a judge should listen carefully to determine if the petitioner is a victim. Second, a judge should identify acts of domestic violence and should be aware that both victims and perpetrators tend to deny, rationalize, and minimize acts of domestic violence. Third, a judge's actions should engender trust in the judicial system and in the solutions it offers to victims. Fourth, a judicial officer should explain legal options and relief available to a victim, especially when she is not represented by counsel. Fifth, a judge should make a clear and complete record and should elicit specific details concerning the allegations. Most important, a judicial officer should maintain a courtroom that is free of intimidation and that promotes "zero tolerance" of domestic violence.

See Bench Card 4, Appendix B.

T. Effects of Domestic Violence on Judicial Officers and Other Court Personnel

Judges and other court personnel can, and often do, experience negative effects after exposure to traumatic cases, including domestic violence cases.[62] Judges may experience burnout that includes withdrawal, cynicism, emotional and physical exhaustion, and psychological symptoms such as irritability, anxiety, sadness, sleep difficulties, and tension headaches.

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[58] Hart, *supra* note 55.

[59] In a protective order proceeding, West Virginia Code § 48-27-403 requires a family court to schedule a hearing within ten days of the entry of an emergency protective order by the magistrate.

[60] If a party is granted a protective order pursuant to West Virginia Code §§ 48-27-101 *et seq.* and subsequently becomes a party to a divorce, separate maintenance or annulment case, the provisions of the protective order are automatically extended until a temporary order has been entered in the divorce, separate maintenance or annulment action. W. Va. Code § 48-27-401.

[61] Walker, et al., *supra* note 5.

[62] Linda Baker, Ph.D. and Hon. Deloris J. Nibert, *Domestic Violence: Vicarious Trauma and Judges,* Address at the Family Court Judicial Education Conference (Oct. 1, 2003). This section is based upon the source cited in this footnote.

In addition to burnout, judges and court personnel may experience secondary or vicarious trauma, the effects of which can be both short-term and long-term. Short-term secondary trauma may involve anger, sadness, anxiety, and sleep disturbances. Long-term secondary trauma may involve cynicism, alcohol abuse, and even an inability to maintain intimate relationships.

For these reasons, judicial officers and other court personnel should be aware of the risk of burnout and secondary trauma when they handle cases involving domestic violence. Additionally, they should incorporate stress management techniques into their lives that include adequate nutrition, regular physical activity, rest and relaxation, social support, and a balance of personal and professional obligations.

Chapter 2

CIVIL PROTECTION PROCEEDINGS -- DEFINITIONS AND TIMELINE

Chapter Contents

A. Purposes of Domestic Violence Civil Protection Proceedings

Domestic violence presents significant safety, health, and law enforcement problems with enormous costs, in dollars and in lives, affecting the citizens in this State. Domestic violence impacts people in all socioeconomic, racial, and ethnic backgrounds. Serious attention to the problem through timely and effective legal intervention by law enforcement agencies and the courts can substantially deter and reduce the occurrence of acts of domestic violence.

The fundamental purposes of Chapter 48, Article 27 of the West Virginia Code (*Prevention and Treatment of Domestic Violence Act*) (hereinafter "Domestic Violence Act") are to assure victims of domestic violence protection from abuse; to create a speedy remedy to discourage violence against family or household members with whom the perpetrator has continuing contact; and to enhance the ability of law enforcement agencies to assist victims and effectively enforce the law to prevent acts of domestic violence. W. Va. Code § 48-27-101; *In the Matter of Browning*, 192 W. Va. 231, 238, 452 S.E.2d 34, 41 (1994). Likewise, the *Rules of Practice and Procedure for Domestic Violence Civil Proceedings* (RDVCP), which apply in magistrate court, family court, and circuit court, are intended to help resolve domestic violence cases in a just, speedy, and inexpensive manner. Rule 1, RDVCP.

B. Principal Definitions

1. Domestic Violence or Abuse

Under Chapter 48, Article 27, "domestic violence" or "abuse" means the occurrence of one or more of the following acts between family or household members:

See Bench Card 2, Appendix B.

> (1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
> (2) Placing another in reasonable apprehension of physical harm;
> (3) Creating fear of physical harm by harassment,[1] stalking, psychological abuse[2] or threatening acts;
> (4) Committing either sexual assault or sexual abuse as those terms are defined in articles eight-b and eight-d, chapter sixty-one of this code;[3] and
> (5) Holding, confining, detaining or abducting another person against that person's will. W. Va. Code § 48-27-202.

The five subsections of the statutory definition of domestic violence cover a broad range of conduct that perpetrators will engage in to maintain power and control over their victims. Physical harm to victims, attempted

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[1] West Virginia Code § 61-2-9a, the statute criminalizing stalking and harassment, defines harassment as "willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress." *See also*, *Thomas v. Morris*, 224 W. Va. 661, 687 S.E.2d 760 (2009) (holding that fear of physical harm may be proved by proof of harassment, psychological abuse, or overt or covert threatening acts).

[2] *See Christina L. v. Harry J. L. Jr.*, 1995 WL 788196 (Del. Fam. Ct., June 5, 1995): "The perpetrator of psychological abuse generally targets his victim and gradually erodes the victim's positive sense of self through one or a combination of the following actions: jokes about the victim's habits/faults, insults, ignores the victim's feelings, withholds approval of punishment, yells, name calls, repeats insults/targeted insults, repeats private and/or public humiliation, labels the victim as 'crazy,' 'bitch,' 'whore,' 'animal,' etc., threatens violence/retaliation, threatens abuse of the children or obtainment of their custody, and puts down the victim's abilities as a parent, worker and lover. This constant barrage of brainwashing results in the victim suffering a number of possible consequences, including: feelings of powerlessness or learned helplessness, sense of dependency and low self-esteem, emotional instability, nervous breakdown and/or depression, questioning her sense of reality." (citation omitted.)

[3] *See* W. Va. Code §§ 61-8B-3 (Sexual Assault in the First Degree); 61-8B-4 (Sexual Assault in the Second Degree); 61-8B-5 (Sexual Assault in the Third Degree); 61-8B-7 (Sexual Abuse in the First Degree); 61-8B-8 (Sexual Abuse in the Second Degree); 61-8B-9 (Sexual Abuse in the Third Degree); and 61-8D-5 (Sexual Abuse by a Parent, Guardian, Custodian or person in a position of trust to a child).

or actual, is covered under subsection (1) of the statute. Subsections (2) and (3) prohibit the various kinds of intimidation and psychological abuse often engaged in by perpetrators. Under subsection (4), sexual abuse or sexual assault against a family or household member can be the basis for a domestic violence protective order for the victim. Subsection (5) of the definition proscribes any acts where a victim is held or detained against his or her will, or abducted. Many of these acts can also subject the perpetrator to criminal charges.

A decision of the West Virginia Supreme Court in a domestic violence appeal emphasizes the need for magistrates and judges to make factual findings in these cases that relate to the applicable statutory definition. In Syllabus Point 2 of *John P.W. ex rel. Adam W. v. Dawn D.O.*, 214 W. Va. 702, 591 S.E.2d 260 (2003), the Supreme Court held that:

> To allow proper judicial review, a family court judge who issues a domestic violence protective order is required to make factual findings which describe the acts of domestic violence that have been established by the evidence presented and to identify which statutory definition of domestic violence such facts demonstrate.

Two cases decided by the West Virginia Supreme Court provide significant guidance about the definition of domestic violence under West Virginia Code § 48-27-202: *John P.W.*, 214 W. Va. 702, 591 S.E.2d 260 and *Thomas v. Morris*, 224 W. Va. 661, 687 S.E.2d 760 (2009).

See Bench Card 2, Appendix B.

The facts giving rise to *John P.W.* involved divorced parents with two teenage sons. After a brief altercation took place in which the mother took hold of her then 14 year-old son Adam during a disciplinary discussion, the father sought and obtained on behalf of the son a protective order against the mother.

The facts at issue in *Thomas* arose when the respondent came to his former girlfriend's residence and beat on the doors and windows for one to two hours in an attempt to cause her to communicate with him. In the two months before this incident, the respondent had called his former girlfriend approximately 150 times. At the protective order hearing, the petitioner testified that she was afraid because she recognized that the respondent was "agitated." She also testified that she knew the respondent carried a concealed weapon, that she did not have telephone service at her residence, and that she was not able to leave in her car because the respondent had partially blocked the driveway with his own car. The petitioner and her current boyfriend finally left the residence and traveled on foot to a neighbor's house, which was approximately a quarter of a mile

away. The family court denied the petition for a protective order, and the circuit court affirmed this ruling.

See Bench Card 2, Appendix B.

A review of the definitions of domestic violence as set forth in these two cases, *John P.W.* and *Thomas*, follows. First, with regard to the "physical harm" provision of subdivision (1) of West Virginia Code § 48-27-202, the Supreme Court in *John P.W.* observed as follows:

> Appellee views the record as conclusively demonstrating physical harm, based on photographs evidencing several scratch marks, we do not reach the same conclusion. We have carefully scrutinized the submitted photographs that Officer Limley took of Adam and we can barely discern the referenced scratch marks; we are completely unable to detect any red marks in the neck area. While we do not go so far as to hold that physical harm which does not require medical attention cannot qualify as domestic violence under the statute, in this case we do not find sufficient evidence of physical harm to meet the definition of domestic violence. Moreover, there is no finding by the family court judge that physical harm was inflicted upon Adam. 214 W. Va. at 707, 591 S.E.2d at 265.

With regard to the "reasonable apprehension of physical harm" definition in subdivision (2) of the statute, the Court in *John P.W.* examined the facts and found the evidence insufficient to support the issuance of the protective order under this definition. The Court analyzed the facts as follows:

> In similar conclusory fashion, Appellee makes the presumption that Adam was placed in "reasonable apprehension of physical harm." W. Va. Code § 48-27-202(2). Based on Adam's plea for "help" from his father who was sitting in a vehicle in the driveway, Appellee argues that the requisite fear of harm was demonstrated. Appellant notes that Adam never told Officer Limley that he was afraid. And, even the family court judge recognized that "the fact that his [Adam's] father was there and he knew that his father would be supportive and in disagreement with his mother is a factor that is worthy of consideration." Dr. Moses testified that there had been no past incidents of physical harm involving Appellant with either of her children. Without any testimony or statement from Adam that he was in fear of being harmed by his mother during this incident, we find the record devoid of evidence sufficient to meet the "reasonable apprehension of fear" definition of domestic violence under the statute at issue. *Id.*

In *Thomas*, the Supreme Court analyzed subsection (3) of West Virginia Code § 48-27-202 which involves "creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts." The circuit court in *Thomas* had reasoned that the petitioner had not proved that the respondent's actions had created fear of physical harm because the respondent had never explicitly threatened the petitioner with physical harm. Overruling the circuit court, the Supreme Court noted that the circuit court interpretation went beyond the literal meaning of the statute because the statute does not require a petitioner to show "some proof of an overt or explicit threat of harm by the alleged perpetrator . . .." 224 W. Va. at 668, 687 S.E.2d at 767. The Supreme Court also noted that the circuit court ruling "ignores the Legislature's directive that the statute be liberally construed to further the purposes of deterring, preventing and reducing domestic violence through legal intervention." *Id.* (citation omitted.) Adopting a syllabus point, the Court held that:

See Bench Card 2, Appendix B.

> The act of domestic violence defined in West Virginia Code 48-27-202(3) as "[c]reating fear of physical harm by harassment, psychological abuse or threatening acts" provides that fear of physical harm may be established with (1) proof of harassment, (2) proof of psychological abuse, or (3) proof of overt or covert threatening acts. Syl. Pt. 6, *Thomas*, *supra.*

In both *John P.W.* and *Thomas*, the Court analyzed the "holding, confining [or] detaining" definition set forth in subsection (5) of West Virginia Code § 48-27-202. Finding that the petitioner in *John P.W.* had **not** met the definition of subsection (5), the Court stated:

> The final basis upon which Appellee relies to assert domestic violence is the most disconcerting. To suggest that Appellant's attempt to hold or detain her child while she was attempting to speak with him about the deceptive and disrespectful conduct she caught him in the midst of carrying out is tantamount to suggesting that every parent who attempts to temporarily restrain their child while in the course of discussing inappropriate behavior is committing domestic violence. We do not think the Legislature intended that the statutory definition of "holding, confining, [or] detaining" be applied to everyday instances of parental discipline. Upon reflection, the terms used to convey this definition of domestic violence suggests that a temporal component is involved in qualifying factual instances. In this Court's opinion, to constitute domestic violence under the statutory definition of "holding, confining, detaining or abducting

> another person against that person's will" within the meaning of West Virginia Code § 48-27-202(5), a parent's alleged act of domestic violence toward his or her child should, as a general rule, take place over a temporally significant period and not be the momentary act of a parent in the midst of attempting to control a child within the proper boundaries of parental control. 214 W. Va. at 707-08, 591 S.E.2d at 265-66.

See Bench Card 2, Appendix B.

In facts that were markedly different from those in *John P.W.*, the family court in *Thomas* found that the petitioner had not proved that she had been confined or detained because the petitioner "*was not physically confined or restrained in her home*." 224 W. Va. at 667, 687 S.E.2d at 766 (emphasis in original). Reversing the lower courts, the Supreme Court observed that: "No direct or indirect reference is made in the statute regarding physical force or aggressive action being an element necessary to establish an act of domestic violence pursuant to subsection (5)." *Id.* The Court went on to note that: "[P]hysical imprisonment is hardly the only reason someone may not feel free to leave a situation -- depending on the circumstances, fear of retribution, potential harm to others could also serve the same end." *Id.* Providing definitive guidance with regard to subsection (5), the Court held that:

> The act of domestic violence defined in West Virginia Code 48-27-202(5) as "[h]olding, confining, detaining or abducting another person against that person's will" does not require proof of some overt physical exertion on the part of the alleged offender in order to justify issuance of a protective order. Syl. Pt. 5, *Thomas*, *supra.*

2. Family or Household Members

The domestic violence protections and remedies under Chapter 48, Article 27 are tied to occurrences of violence or abuse between "family or household members" as that term is defined under this Act. The only time a proceeding under this Act may involve parties other than "family or household members" is when the petitioner is seeking protection as one who reported or witnessed domestic violence. *See* W. Va. Code §§ 48-27-305(3); 48-27-504.

As provided in West Virginia Code § 48-27-204, "family or household members" means persons who:

> (1) Are or were married to each other;
> (2) Are or were living together as spouses;
> (3) Are or were sexual or intimate partners;

> (4) Are or were dating: Provided, that a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship;
> (5) Are or were residing together in the same household;
> (6) Have a child in common regardless of whether they have ever married or lived together;
> (7) Have the following relationships to another person: (A) Parent; (B) Stepparent; (C) Brother or sister; (D) Half-brother or half-sister; (E) Stepbrother or stepsister; (F) Father-in-law or mother-in-law; (G) Stepfather-in-law or stepmother-in-law; (H) Child or stepchild; (I) Daughter-in-law or son-in-law; (J) Stepdaughter-in-law or stepson-in-law; (K) Grandparent; (L) Stepgrandparent; (M) Aunt, aunt-in-law or stepaunt; (N) Uncle, uncle-in-law or stepuncle; (O) Niece or nephew; (P) First or second cousin; or
> (8) Have the relationships set forth in paragraphs (A) through (P), subdivision (7) of this section to a family or household member, as defined in subdivisions (1) through (6) of this section.

The length of this provision is the first indication that the class of persons covered by the term "family or household members" is fairly broad. The statutory definition can be generally broken down into three categories of covered persons. Determinations as to who falls within either of the first two categories is straightforward in most cases. More careful analysis is generally needed if the determination involves the third category of covered persons.

The first category, the "partner" relationships described in subsections (1) through (6) of the statute, encompass parties who are or were -- married; living together (whether in a spousal relationship or simply residing in the same household); sexual partners; dating; or parents of a child.[4] Second, the "kinship" categories, listed in subsections (7)(A) through (P), cover many of the family connections by blood or marriage. The third category, the subsection (8) "tie-in" provision, brings two parties within the "family or household member" class as long as one party has a "kinship" relationship [under subsection (7)(A)-(P)] with someone who has or had a "partner" relationship [under subsections (1)-(6)] with the other party.

The following Chart A is a graphic summary of the three categories of this "family and household member" definition.

[4] A former spouse who no longer resided in the household is a "family or household member" under the Domestic Violence Act. *Baldwin v. Moses*, 182 W. Va. 120, 386 S.E.2d 487 (1989).

Chart A

Family or Household Members
(W. Va. Code § 48-27-204)

1. If the parties are or were: →

1. Married to each other
2. Living together
3. Sexual partners
4. Dating
5. Parents of a child together

or

2. If one party is related to the other party as: →

- A. Parent
- B. Stepparent
- C. Brother or Sister
- D. Half-brother or Half-sister
- E. Stepbrother or Stepsister
- F. Father-in-law or Mother-in-law
- G. Stepfather-in-law or Stepmother-in-law
- H. Child or Stepchild
- I. Daughter-in-law or Son-in-law
- J. Stepdaughter-in-law or Stepson-in-law
- K. Grandparent
- L. Stepgrandparent
- M. Aunt, Aunt-in-law or Stepaunt
- N. Uncle, Uncle-in-law or Stepuncle
- O. Niece or Nephew
- P. First or Second Cousin

or

3. If one party is a:

- A. Parent
- B. Stepparent
- C. Brother or Sister
- D. Half-brother or Half-sister
- E. Stepbrother or Stepsister
- F. Father-in-law or Mother-in-law
- G. Stepfather-in-law or Stepmother-in-law
- H. Child or Stepchild
- I. Daughter-in-law or Son-in-law
- J. Stepdaughter-in-law or Stepson-in-law
- K. Grandparent
- L. Stepgrandparent
- M. Aunt, Aunt-in-law or Stepaunt
- N. Uncle, Uncle-in-law or Stepuncle
- O. Niece or Nephew
- P. First or Second Cousin

→ **of someone who is or was:**

1. Married to
2. Living with
3. Sexual partners with
4. Dating
5. Parents of a child with

↓

the other party

As earlier mentioned, in many cases the relationship between the victim and abuser is readily identified as falling within the long list of relationships specified in the statutory definition. This is particularly true in most situations involving direct "partner" or "kinship" relationships between the victim and abuser. But if the two parties are not "partners" under one of the categories in subsections (1) through (6), or do not have one of the "kinship" relationships specified under subsection (7)(A) through (P), the focus must shift to the two-part equation under subsection (8) to determine if the two parties are, under the statute, "family or household members." For subsection (8) to apply, there must be a **third-person** "tie-in" connection between the two parts of the equation. In other words, one party (petitioner/respondent) must have one of the "kinship" relationships with someone (non-party) who in turn has one of the "partner" relationships with the other party (petitioner/respondent). (*See* Category Number 3 on Chart A.)

The following examples further illustrate the determination to be made under the subsection (8) "tie-in" provision of West Virginia Code § 48-27-204:

- **Example 1**

A husband and wife reside together, with no one else sharing their home. The wife has a brother who lives elsewhere in the same town. After a heated argument leads to a physical attack upon the husband by the wife's brother, husband appears in magistrate court seeking to file a domestic violence petition against his brother-in-law. The potential petitioner and respondent have no "partner" relationship [subsections (1)-(6)], and they have no "kinship" connection since brothers-in-law are not among the subsection (7) listings of related persons. However, under the "tie-in" provisions of subsection (8), since the potential respondent (the brother-in-law) is a *brother* to someone (the wife) who is *married to* the potential petitioner (the husband), the two parties are "family or household members."

- **Example 2**

Two women move into a new apartment together. One of the women (Roommate A) is recently divorced. While Roommate A is out of town on a work assignment, her ex-husband begins following Roommate B around town, and engages in other harassing conduct directed solely toward Roommate B. Roommate A's ex-husband and Roommate B have no direct "partner" [subsections (1)-(6)] or "kinship" [subsection (7)(A)-(P)] connection. Roommate A is linked by "partner" relationships with both her ex-husband (was married to) and Roommate B (residing together); however, there is no "tie-in" under subsection (8), as neither party

connects with the other side of the equation -- a "kinship" relationship with Roommate A. Thus, the victim and perpetrator are not "family or household members" under West Virginia Code § 48-27-204. Rather than seeking protection through a civil domestic violence proceeding, Roommate B would need to contact the police or prosecutor about bringing stalking or harassment criminal charges against Roommate A's ex-husband under West Virginia Code § 61-2-9a. Alternatively or additionally, Roommate B could file a civil petition seeking a personal safety order pursuant to West Virginia Code §§ 53-8-1, *et seq.*

3. Hearings and Orders

The hearings and orders in domestic violence cases are classified according to the procedural stage and court, as follows:

> "Emergency hearing" means the hearing before a magistrate upon the filing of a petition for a protective order. An emergency hearing may be held *ex parte*. W. Va. Code § 48-27-203.
>
> "Emergency protective order" (EPO) refers to a protective order entered by a magistrate after an emergency hearing. Rule 2(a), RDVCP. If the magistrate denies the petition, the petitioner may appeal the denial to the family court within five days of the denial order. The family court judge would then either issue the EPO or affirm the magistrate's denial of the petition. Rule 18(b), RDVCP.
>
> "Temporary emergency protective order" (TEPO) refers to a protective order issued by a magistrate after an emergency hearing, in which the relief is limited by reason of an existing temporary order in a pending action for divorce, annulment, or separate maintenance involving the same parties. *See* W. Va. Code § 48-27-402.
>
> "Final hearing" means the hearing before a family court judge following the entry of an EPO (or TEPO) by a magistrate as a result of the emergency hearing. W. Va. Code § 48-27-205. A family court also conducts a final hearing when, after hearing an appeal of a denial of an EPO by a magistrate, it earlier granted an EPO. Rule 18(b), RDVCP. By reason of the concurrent jurisdiction of circuit courts, in some instances the final hearing may be before a circuit court. Rule 25, RDVCP.

"Domestic violence protective order" (DVPO) refers to the 90-day, 180-day, or one year (or longer) order entered after a final hearing. W. Va. Code § 48-27-505; Rule 2(b), RDVCP.

C. Law Enforcement Duties

Law enforcement agencies are required to: provide information and assistance to victims of domestic violence; serve petitions and protective orders; maintain records relating to domestic violence proceedings; and enforce existing protective orders through arrests or other appropriate action. Law enforcement agencies in West Virginia are defined to include the state police, county sheriff departments, municipal police departments, and any federal agency whose purpose includes enforcement, maintenance and gathering of information of both criminal and civil records relating to domestic violence under federal law. W. Va. Code § 48-27-206(a).[5] *See also* Code of State Regulations, Title 149, Series 3, *Protocol for Law Enforcement Response to Domestic Violence*, at § 149-3-3.12 (defining "law enforcement officer" to mean any member of a law enforcement agency authorized to maintain public peace and order, prevent and detect crime, make arrests, and enforce the laws of the state or any county or municipality of the state).

In appropriate context and circumstances relating to the domestic violence statutes, the term "law enforcement agency" may include the Department of Health and Human Resources (DHHR) -- in instances of child abuse reported to that agency that are not reported to any other law enforcement agency. W. Va. Code § 48-27-206(b). In such limited circumstances, the apparent statutory intent is that the DHHR provide the kinds of information and transportation assistance to domestic violence victims described as part of the duties of law enforcement agencies in West Virginia Code § 48-26-1101[6] and § 48-27-702;[7] rather than duties under the domestic

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[5] The "federal agency" language was added in 2010 for the purpose of authorizing the sharing of domestic violence records and information with federal agencies.

[6] W. Va. Code § 48-26-1101 provides: Where shelters are available, the law-enforcement officer or other public authority investigating an alleged incident of domestic violence shall advise the victim of the availability of the family protection shelter to which that person may be admitted.

[7] W. Va. Code § 48-27-702 provides: (a) Any law-enforcement officer responding to an alleged incident of domestic violence shall inform the parties of the availability of the possible remedies provided by this article and the possible applicability of the criminal laws of this state. Any law-enforcement officer investigating an alleged incident of domestic violence shall advise the victim of such violence of the availability of the family protection shelter to which such person may be admitted.

(b) If there is reasonable cause to believe that a person is a victim of domestic violence or is likely to be a victim of domestic violence, a law-enforcement officer

violence statutes appropriately handled only by police departments. *See also* W. Va. Code § 48-27-201 (incorporating Chapter 48, Article 27 definitions into Article 26).

Law enforcement officers responding to a domestic violence call must explain to the victim the right to file a domestic violence petition and inform the victim that appropriate criminal charges could be filed as well. Additionally, a victim of domestic violence must be advised of the availability of a local family protection shelter to which the person or family may be admitted. If requested by the victim, responding officers must also provide or arrange transportation to the shelter, or to an appropriate court, if there is reasonable cause to believe that domestic violence has occurred. Other appropriate measures may be required to be undertaken by law enforcement depending upon the particular circumstances presented (e.g., additional assistance for an elderly or physically dependent victim, or contacting the county humane officer if an animal is suspected to be a victim of cruel or inhumane treatment). W. Va. Code § 48-27-702; W. Va. C.S.R. §§ 149-3-9 and 10. If a protective order issued by a court of this State or any other jurisdiction is in effect, law enforcement officers must take appropriate actions to enforce the order. W. Va. C.S.R. § 149-3-6.5. This will include the warrantless arrest of an alleged violator in a wide range of circumstances involving domestic violence. (*See* Chapter 5 for further discussion regarding enforcement of protective orders.) In cases involving a protective order awarding child custody to a party that does not have physical custody of the child(ren), a law enforcement officer may also be ordered by a court to accompany the party who was awarded custody to obtain initial custody of the minor child(ren). Rule 10a, RDVCP.

Law enforcement officers must serve petitions and protective orders in domestic violence proceedings and may not refuse a request to serve other types of pleadings and orders filed or entered in these cases. Service of domestic violence pleadings and orders may be made on any day, including Sundays and legal holidays. Protective orders must be served without delay; and such service shall be attempted within at least 72 hours after receipt of the order, with continuing attempts until service is made. W. Va. Code § 48-27-701; Rule 11, RDVCP; W. Va. C.S.R.

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responding to an alleged incident of domestic violence shall, in addition to providing the information required in subsection (a) of this section, provide transportation for or facilitate transportation of the victim, upon the request of such victim, to a shelter or an appropriate court.

(c) Whenever a law-enforcement officer, pursuant to a response to an alleged incident of domestic violence, forms a reasonable suspicion that an animal is a victim of cruel or inhumane treatment, he or she shall report the suspicion and the grounds therefor to the county humane officer within twenty-four hours of the response to the alleged incident of domestic violence.

§ 149-3-4. Service may also be accomplished by a process server employed by the sheriff or other law enforcement agency. Rule 11(i), RDVCP.

Other situations involving service of a petition or protective order may place a duty on a law enforcement officer. One instance is if the petition involves information regarding firearms pursuant to Rule 8(c) of the RDVCP. If a respondent is ordered to surrender any and all firearms and ammunition pursuant to a protective order, and that surrender is made to a third party, the law enforcement officer shall determine if the third party is qualified to possess the firearms and is not otherwise prohibited from possessing firearms. Rule 10b(1), RDVCP. A second situation occurs when the respondent is entitled to a return of his or her firearms after a termination, dismissal or expiration of a dismissal order. After the respondent files a petition with the court, a law enforcement agency shall complete a criminal background check and provide it to the court to determine if the respondent is qualified to possess firearms. Rule 10b(4), RDVCP.

Previously West Virginia Code § 48-27-601(a) required that emergency protective orders and domestic violence protective orders provided to law enforcement agencies by the magistrate or family court must be kept in a confidential file. Following the establishment of the state domestic violence database, the statute was amended to provide that law enforcement agencies are not required to maintain a copy of the order after it has been served. W. Va. Code § 48-27-601(a). All domestic violence records in the court file are public record, except when the petitioner or respondent is a minor child. See Rule 6, RDVCP and Rule 6, RFCP. If the petitioner or respondent is a minor child, the records may be made available for public inspection only upon an order by a family court or circuit court judge. A circuit court may, upon motion two years after the entry of a domestic violence protective order, direct the law enforcement agencies to remove the order and any references to it from their files, and may further order that the court file be sealed. W. Va. Code § 48-27-511.

Law enforcement agencies must also make monthly reports to the West Virginia State Police providing detailed information on incidents of domestic violence. It is the duty of the West Virginia State Police to tabulate and analyze any statistical data obtained from these reports and submit this data in its Annual Uniform Crime Report. W. Va. Code § 48-27-801.

The West Virginia Supreme Court, in conjunction with the State Police, maintains a central registry of protective orders entered by courts from all counties in the State. W. Va. Code §§ 48-27-802(a); 51-1-21. Additionally, a petitioner who obtains a protective order in another

jurisdiction may register that order in the West Virginia Domestic Violence Registry. Registration of an out-of-state order is accomplished by the petitioner or his or her representative submitting a certified copy of the order to the West Virginia Supreme Court, along with an affidavit of the petitioner stating that, based upon best knowledge, the order is currently in effect. W. Va. Code §§ 48-27-802(b); 48-28-5; 51-1-21. However, registration is never to be viewed as a prerequisite for enforcement. W. Va. Code §§ 48-27-802(c); 51-1-21(c); W. Va. C.S.R. § 149-3-4.4.4.

If a law enforcement agency receives a missing person report regarding a victim who is the subject of a protective order in effect (or expired 30 days or less), the agency is required to immediately follow its procedures for investigating missing persons, without regard to any department policy delaying the initiation of such investigation. W. Va. Code § 48-27-601(d) and (e); W. Va. C.S.R. § 149-3-6.6.

D. Jurisdiction

"Circuit courts, family courts and magistrate courts, have concurrent jurisdiction over domestic violence proceedings." W. Va. Code § 48-27-301; Rule 25, RDVCP. Emergency proceedings are held before a magistrate upon the filing of a petition for a protective order. W. Va. Code § 48-27-203. Following the entry of an emergency protective order by a magistrate, final hearings are typically heard before a family court judge. W. Va. Code § 48-27-205. However, circuit court judges may assist family court judges in the disposition of domestic violence caseloads by conducting protective order proceedings. Rule 25, RDVCP.

Appellate jurisdiction from a magistrate's denial of an emergency protective order lies in the family court, and appeals from family court either granting or denying a final protective order are to the circuit court. W. Va. Code § 48-27-510; Rules 18 and 19, RDVCP. As in other types of cases, the West Virginia Supreme Court has jurisdiction to hear appeals from circuit court in domestic violence proceedings. W. Va. Const., art. VIII, § 3; W. Va. Code § 58-5-1.

E. Timeline Summary for Civil Proceedings

1. Emergency Proceedings

Upon the filing of a domestic violence petition alleging the occurrence of domestic violence as defined in West Virginia Code § 48-27-202, the magistrate may enter an EPO pursuant to West Virginia Code § 48-27-403, or a TEPO pursuant to West Virginia Code § 48-27-402.

a) *Emergency protective orders (EPOs)*

- May be entered when no divorce, annulment, or separate maintenance action is pending **or** when such an action is pending but no temporary order (other than a procedural order) is in effect in that action.

- May be entered *ex parte* for good cause if:

  - The petitioner or the petitioner's representative certifies in writing the efforts that were made to provide notice to the respondent; **or**

  - The petitioner shows just cause why notice should not be required. W. Va. Code § 48-27-403.

- Standard for issuance of EPO: Clear and convincing evidence of immediate and present danger of abuse to the petitioner or minor children. W. Va. Code § 48-27-403(a).

- An EPO must contain the provisions set forth in West Virginia Code § 48-27-502.

- The EPO may contain any of the provisions set forth in West Virginia Code § 48-27-503.

- A final hearing before the family court must be scheduled to take place not later than ten days following the entry of the EPO. W. Va. Code § 48-27-403(d).

b) *Temporary emergency protective orders (TEPOs)*

- May be entered when a divorce, annulment, or separate maintenance action is pending and a temporary order is in effect. W. Va. Code § 48-27-402.

- May be entered *ex parte* for good cause if:

  - The petitioner or the petitioner's representative certifies in writing the efforts that were made to provide notice to the respondent; **or**

  - The petitioner shows just cause why notice should not be required. W. Va. Code § 48-27-403.

- May only grant the relief permitted by West Virginia Code § 48-27-402(c) and (d).

- A final hearing before the family court must be scheduled to take place no later than ten days following the entry of the TEPO. W. Va. Code § 48-27-402(e).

- The magistrate must transmit a copy of the petition and the TEPO by mail or fax to the family court in which the domestic relations action is pending. W. Va. Code § 48-27-402(e)(1).

c) Service of EPO or TEPO on respondent

- If the respondent is present at the emergency hearing, a copy of the EPO or TEPO is served by the magistrate or court staff, along with a notice of the final hearing before the family court. Rule 11(a), RDVCP; W. Va. Code § 48-27-403(b) and (d).

- If the respondent is not present, law enforcement must immediately serve the EPO or TEPO. W. Va. Code § 48-27-701. If service by law enforcement is unsuccessful, the final hearing will be continued by the family court and the circuit clerk must serve the respondent by certified mail, restricted delivery.[8] If service by certified mail is unsuccessful, the court shall continue the final hearing and the circuit clerk must serve the respondent by publication in the last county of known residence. In the court's discretion, the clerk may be directed to serve the respondent by certified mail and publication simultaneously to expedite the proceeding. Rule 11(a), RDVCP. If the respondent is a nonresident or a resident who has left the state, service may be made to the Secretary of State as provided by West Virginia Code § 56-3-33a.

d) Notice to parties

- The petitioner must be provided with a copy of the EPO or TEPO, the notice of the final hearing before the family court, a statement of the right of the party to appear and participate in the final hearing, and consequences of a party's failure to appear. W. Va. Code § 48-27-403(b) and (d).

[8] West Virginia Code § 48-27-311 provides that if personal service by law enforcement is unsuccessful, the respondent shall be served by the circuit clerk via first class mail simultaneously with service by publication. However, the statutory language authorizing service by first class mail conflicts with Rule 11(a), RDVCP which requires service of an EPO or TEPO by certified mail, restricted delivery, return receipt requested, to the last known address of the respondent. Rule 1, RDVCP establishes that when a statute conflicts with a procedural rule, the procedural rule applies.

e) Transmission to Domestic Violence Database

- Upon the entry of an EPO or TEPO, the court must transmit a copy of the order to the domestic violence database for entry in the domestic violence registry. W. Va. Code §§ 48-27-601(a); 48-27-802(b); Rule 21, RDVCP.

f) Appeal

- A petitioner denied an EPO or TEPO may appeal to the family court. The petition for appeal must be filed no later than five days following the denial and must be heard by the family court within ten days from the date the appeal was filed. W. Va. Code § 48-27-510(a); Rule 18(a), RDVCP.

2. Final Hearings

a) Scheduling

- A final hearing before the family court must be scheduled to take place not later than ten days following the entry of the EPO or TEPO. W. Va. Code §§ 48-27-403(d) (EPO); 48-27-402(e)(1) (TEPO).

b) Standard of proof

- The petitioner must prove, by a preponderance of the evidence, the allegations of domestic violence set forth in the petition; unless the respondent elects not to contest the allegations or does not contest the relief sought. W. Va. Code § 48-27-501(a).

See Bench Card 4, Appendix B.

c) Outcome

- At the conclusion of the hearing, the family court shall either:

  - Dismiss the petition if the petitioner fails to prove the allegations of domestic violence; or

  - Enter a domestic violence protective order (DVPO) if sufficient evidence supports the allegations or the respondent elects not to contest the allegations or relief. W. Va. Code § 48-27-501(a).

d) Modification

- The court may modify the terms of a protective order at any time following a petition filed by any party. W. Va. Code § 48-27-501(b).

e) DVPO provisions

- The DVPO must contain the provisions set forth in West Virginia Code § 48-27-502.

- The DVPO may contain any of the provisions set forth in West Virginia Code § 48-27-503.

- The provisions for a DVPO protecting a person witnessing or reporting domestic violence are set forth in West Virginia Code § 48-27-504.

f) Service of DVPO

- Parties present at the final hearing shall be served by the judge or court staff at the conclusion of the hearing. Parties not present shall be immediately served the DVPO by law enforcement. If service by law enforcement is unsuccessful, the circuit clerk shall serve the party by first class mail and publication in the last known county of residence. To expedite service, in the clerk's discretion the respondent may be served by first class mail simultaneously with service by law enforcement. If service by the law enforcement officer is unsuccessful, the circuit clerk shall serve the respondent by first class mail as well as publication in the last known county of residence. Rule 11(b), RDVCP. W. Va. Code § 48-27-701.

g) Delivery to domestic violence database

- Upon entry of the DVPO, the family court or circuit clerk shall immediately provide a copy to the magistrate clerk, who shall upon receipt cause the DVPO to be entered in the domestic violence database and registry[9]. W. Va. Code § 48-27-802(b); Rule 21, RDVCP.

[9] Failure to promptly post orders to the Domestic Violence Registry could subject a judge to a suspension of his or her law license. *In re Watkins*, 233 W.Va. 170, 757 S.E.2d 594 (2013).

h) Duration

- The DVPO is effective for either 90 days or 180 days, in the discretion of the court. Upon written request of the petitioner prior to expiration of the original 90 or 180 day period, the court shall extend the DVPO for an additional 90 days. W. Va. Code § 48-27-505(a).

- If certain aggravating circumstances are found, the court may make the DVPO effective for one year. W. Va. Code § 48-27-505(b). A one-year DVPO may subsequently be extended for whatever period the court deems necessary if the court after a hearing finds that the respondent has committed a material violation of the DVPO or a protective order entered incident to a divorce action. W. Va. Code § 48-27-505(c).

- If a DVPO (of any duration period) is in effect on the date when an action seeking divorce, annulment, separate maintenance, child custody, paternity, child support, or other relief under Chapter 48 is filed or reopened, the DVPO will remain in effect until: 1) a temporary order (other than a procedural order) is entered in the domestic relations action; 2) an order is entered modifying the DVPO; or 3) entry of a final order in the domestic relations action. W. Va. Code § 48-27-401(d).

i) Appeal

- Any party may file a petition for appeal following the granting or denial of a DVPO. The petition must be filed within ten days following the decision of the family court. W. Va. Code § 48-27-510(b); Rule 19(a), RDVCP. The circuit court is required to hear the appeal within ten days following the filing of the petition. W. Va. Code § 48-27-510(c); Rule 19(a), RDVCP.

- The hearing in circuit court is on the record established in family court, and the circuit court shall enter an order immediately upon the conclusion of the hearing. Rule 19(b), RDVCP.

- Any order entered by the circuit court shall immediately be provided to the magistrate clerk for entry in the domestic violence database and registry. W. Va. Code § 48-27-802(b); Rule 21, RDVCP.

Chapter 3

COMMENCEMENT--EMERGENCY PROCEEDINGS

Chapter Contents

A. Filing a Petition

A domestic violence proceeding is initiated by the filing of a verified petition for a protective order in magistrate court. W. Va. Code §§ 48-27-203; 48-27-304(a); Rule 8(a), RDVCP. A domestic violence petition must be given priority over any other civil action before the court, except actions in which a trial is in progress. Petitions must be docketed immediately

upon filing. W. Va. Code § 48-27-309; Syl. Pt. 6, *In the Matter of Browning*, 192 W. Va. 231, 452 S.E.2d 34 (1994).

The petition must allege the occurrence of domestic violence or abuse (W. Va. Code § 48-27-202) between family or household members (W. Va. Code § 48-27-204). (See Chapter 2, section B. regarding these defined terms.) The petition should contain a short and plain statement of the facts showing entitlement to relief, and a demand for the kinds of relief sought. The petition should also provide information regarding the respondent's use, possession, and ownership of any firearms, including if known, a description and location of each firearm owned or possessed by the respondent. Rule 8(b) and (c), *Rules of Practice and Procedure for Domestic Violence Civil Proceedings* (RDVCP).

No person may be refused the right to file a petition; and if the petitioner presents facts sufficient for the issuance of an emergency protective order (EPO), appropriate relief must be granted. W. Va. Code § 48-27-304(b). The petitioner's right to relief may not be affected by his or her leaving a residence or household to avoid further abuse. W. Va. Code § 48-27-303. However, if an action for divorce, separate maintenance, or annulment is pending **and** a temporary order is in effect in that action, the nature and scope of any relief granted in the emergency proceeding is limited. (See section G. below regarding temporary emergency protective orders (TEPOs)).

When a petition is filed and an EPO is granted, no filing fees, fees for service of petitions and orders, for copies of orders, or any other costs associated with domestic violence proceedings may be imposed or assessed until the matter is brought before the family or circuit court for final resolution. W. Va. Code § 48-27-308. If the petition is denied and the magistrate finds that the petitioner is not a victim of domestic violence, sexual assault or stalking, court costs and fees must be assessed by the magistrate against the petitioner, unless a fee waiver affidavit has been approved. If the denial of the petition is appealed, however, payment of any assessed costs must be stayed pending the appeal. Rule 4(a), RDVCP.

B. Venue

Venue for domestic violence proceedings lies in: (a) the county in which the domestic violence occurred; or (b) the county in which the respondent is living or the county in which the petitioner is living, either temporarily or permanently; or (c) if the parties are married to each other, also in the county in which an action for divorce could be filed. W. Va. Code § 48-27-302.

C. Who May File

1. Types of Petitioners

A petition may be filed by: a) a person seeking relief for herself or himself; b) an adult family or household member[1] for the protection of the victim or any family or household member who is a minor or physically or mentally incapacitated to the extent that she or he cannot file on his or her own behalf; or c) a person who reported or was a witness to domestic violence, and as a result has been abused, threatened, harassed or has been the subject of other actions intended to intimidate the person. W. Va. Code § 48-27-305. An answer may be filed and served by a respondent, and does not need to be in verified form. Rule 9(a), RDVCP.

A respondent may file a separate petition. W. Va. Code § 48-27-507. A respondent may also file a verified counterclaim stating any claim that the respondent has against the petitioner that would be a basis for filing a petition. W. Va. Code § 48-27-306(a). A counterclaim shall be treated as a petition for protection, filed in magistrate court, and assigned a new magistrate court case number. Rule 9(b), RDVCP. Any person alleged in a petition or counterclaim to have committed domestic violence may assert any affirmative defense that may be available. W. Va. Code § 48-27-306(b). For good cause shown, pleadings may be amended at any stage of the proceedings, under terms satisfactory to the court. Rule 15, RDVCP.

Mutual emergency protective orders are prohibited unless each party has filed a separate petition (or counterclaim treated as a petition) and have each proven their own allegations by clear and convincing evidence of immediate and present danger. Each petition must be considered on its own merits. The court may, however, consolidate two (or more) petitions for hearing if it is determined that consolidation will further the interests of justice and judicial economy. Whether consolidated or not, the court must enter a separate order granting or denying relief for each petition filed. W. Va. Code § 48-27-507; Rule 9(b), RDVCP. Further discussion of the limitations regarding mutual protective orders may be found in Chapter 4, section H.

A petition may request protective relief for minor or mentally or physically incapacitated family or household members other than, or in addition to, the petitioner. W. Va. Code § 48-27-305(1) and (2). In cases where the petitioner is seeking protection for himself or herself as well as for other family or household members, only the person signing the petition should be named as the petitioner, with other persons for whom protection is

[1] *See* Chapter 2, section B.2. for the definition and discussion of the term "family and household member."

sought being named elsewhere in the petition. Protective relief for other affected family or household members is provided by identifying them as protected persons within the body of the protective order. If an adult family or household member is filing the petition solely for the protection of a minor or incapacitated person, the named petitioner shall be the individual in need of protection. The person filing on behalf of the child or incapacitated person is to be named in the petition as the parent, guardian or next friend. Rule 23a(a), RDVCP.

2. Persons Accompanying Petitioners

Any person accompanying an individual who is seeking to file a petition, or accompanying the petitioner in a hearing, must be allowed to be present if his or her presence is desired by the petitioner. The only exceptions to this rule would be: a) if the person is a witness in the hearing and a motion for sequestration is granted; or b) if the person's behavior is disruptive to the proceeding. W. Va. Code § 48-27-307; Rule 7(a), RDVCP. During the course of emergency proceedings, a magistrate may also find it necessary to punish a party or other person present due to misbehavior before the court. The authority of magistrates to punish persons guilty of direct contempt in magistrate court is set forth in West Virginia Code § 50-5-11.

See Bench Card 4, Appendix B.

3. Minors as Parties

a) As a petitioner

Domestic violence proceedings are unique in nature, with a purpose clearly distinct from typical civil cases. The development of a specialized body of domestic violence law and procedure is in recognition of the urgent and dangerous circumstances arising from the violent behavior directed at victims. There is a specific set of rules of procedure that govern domestic violence cases in all magistrate, family, and circuit courts; an expedited hearing process; and a mixture of civil and criminal remedies available. Therefore, domestic violence proceedings are not subject to the general requirement in civil cases that a minor may only file an action by a guardian or next friend. *See* W. Va. Code §§ 50-5-3; 56-4-9; Rule 17(c), RCP.

The Domestic Violence Act does not specifically state that minors are authorized to file a domestic violence petition on their own behalf. But various statutory provisions under the Act demonstrate a clear intention of the legislature to include minors as persons entitled to seek protection by filing a petition under the Act. *See* Syl. Pt. 6, *Katherine B.T. v. Jackson*, 220 W. Va. 219, 640 S.E.2d 569 (2006). Following that decision, Rule 23a of the Rules of Practice and Procedure for Domestic Violence Civil

Proceedings was added and expressly recognizes that a minor is entitled to file a petition on his or her own behalf. Rule 23a(b), RDVCP.

Once a minor files a domestic violence petition on his or her own behalf without a parent, guardian or next friend, the magistrate must immediately appoint a guardian *ad litem* to protect the minor's interests. Rule 23a(b), RDVCP; Syl. Pt. 7, *Katherine B.T.* Even if the emergency protective order is denied, the magistrate is still required to appoint a guardian *ad litem* because the denial may be appealed. A magistrate may appoint a guardian *ad litem* for a minor even when a minor files a petition with a parent, guardian or next friend. Rule 23a(b), RDVCP. However, in view of the urgent circumstances or late-night hours in many emergency proceedings, such an appointment should not be a prerequisite to a minor obtaining temporary protective relief. If the respondent is a parent or other household member and the minor-petitioner cannot return home due to safety concerns, the magistrate must immediately appoint a guardian *ad litem*. If there is reasonable cause to suspect that the child is abused or neglected or being subjected to conditions that are likely to lead to abuse or neglect, the magistrate is required to immediately make a referral to Child Protective Services (CPS) of the Department of Health and Human Resources. Rule 23a(b)(1), RDVCP. Further, if no responsible and appropriate family member or adult can be located to take temporary custody of the minor, the magistrate shall notify CPS. In turn, CPS shall immediately respond and assist the magistrate with finding a family member or other adult who may take temporary custody of the child. If no such person can be located, the Department may take custody of the child and file an abuse and neglect petition. Rule 23a(b)(1), RDVCP.

If a minor (or someone on the minor's behalf) seeks to file a domestic violence petition against one or both parents, the allegations of domestic violence or abuse should be carefully considered in view of the parent-child roles and relationship. In *John P.W. ex rel. Adam W. v. Dawn D.O.*, 214 W. Va. 702, 591 S.E.2d 260 (2003), the Supreme Court examined the statutory definition of domestic violence in the context of a case involving a 14-year old boy and his mother.[2] While recognizing that domestic violence could result during situations where attempts to discipline jeopardize a child's physical or mental health, the Supreme Court reasoned that the statutory definition is not intended to be applied to everyday instances of parental discipline. The Supreme Court further noted that the difficult but important task of the courts is to "distinguish between those acts of parental control for which the state cannot interfere based on the recognized liberty interest parents have in raising their

[2] A more detailed discussion of the facts and holding of this case can be found in Chapter 2, section B.1. and in Chapter 7.

children and those instances where the state's interest in protecting a child's welfare justifies intervention." *John P.W.,* at n. 17.

b) As a respondent

It is specifically recognized in the Domestic Violence Act that a minor may be named as a respondent in a domestic violence proceeding. West Virginia Code § 48-27-403(h) provides:

> Notwithstanding any other provision of this code to the contrary, a petition filed pursuant to this section that results in the issuance of an emergency protective order naming a juvenile as the respondent in which the petition for the emergency protective order is filed by or on behalf of the juvenile's parent, guardian or custodian or other person with whom the juvenile resides shall be treated as a petition authorized by section four hundred three, article twenty-seven, chapter forty-eight of this code, alleging the juvenile is a juvenile delinquent: *Provided*, That the magistrate court shall notify the prosecuting attorney in the county where the emergency protective order is issued within twenty-four hours of the issuance of the emergency protective order and the prosecuting attorney may file an amended verified petition to comply with the provisions of subsection (a) of section four hundred three, article twenty-seven, chapter forty-eight of this code within two judicial days.

The same provision is also set out in the article governing juvenile proceedings. W. Va. Code § 49-4-704(f). *See also* Rule 15(a), RJP.

The above-quoted statute **only** pertains to domestic violence petitions filed against a minor by a parent, guardian or custodian or other person with whom the juvenile resides. Nevertheless, it is clear that other victims expressly covered by the scope of the Domestic Violence Act (W. Va. Code §§ 48-27-204 and -305) may seek protection under the Act against a minor. *See also* Rule 23a(c), RDVCP. For example, a female who is dating a 17 year-old juvenile and is abused by him may file a domestic violence petition and obtain a protective order. This sort of domestic violence proceeding would run its normal procedural course, except that the magistrate must appoint a guardian *ad litem* to protect the interests of the minor-respondent. Rule 23a(c), RDVCP.

If a petition is filed against a minor-respondent by a parent or another person who resides with the juvenile, the magistrate will also appoint a guardian *ad litem*. Upon issuance of the EPO, the EPO is served and

entered into the domestic violence registry, as is the procedure with any EPO. In addition, the family court hearing will also proceed.

There are, however, additional procedures that involve the initiation of a juvenile petition and placement of the juvenile that must be followed. Rule 15, RJP. First, the magistrate who issued the EPO must also notify the county prosecuting attorney within 24 hours of issuance of the EPO. The prosecuting attorney must treat the domestic violence petition as a juvenile delinquency petition under Article 4 of Chapter 49 of the West Virginia Code. (The prosecuting attorney may, if necessary, file an amended juvenile petition within two judicial days.) Any domestic violence order issued by the family court will remain in effect until an order is entered by the circuit court in the juvenile case or the EPO expires pursuant to its own terms.

Rule 15 of the Rules of Juvenile Procedure also establishes limitations and procedures for the placement of a juvenile, if temporary placement is necessary. If a juvenile-respondent named in an EPO is picked up by law enforcement and brought before a magistrate for a detention hearing, the magistrate is required to immediately notify the DHHR as required by W.Va. Code § 49-4-705(c)(3).

Rule 15(c) establishes a presumption for the release of the juvenile-respondent unless: 1) circumstances present an immediate threat of serious bodily harm to others or to the juvenile if released, or 2) no responsible adult can take custody of the juvenile. If there is no alternative to ordering a custodial placement, three things should be kept in mind by the magistrate. First, the juvenile needs to be held in a nonsecure or staff-secure facility, such as a local juvenile emergency shelter. The only exception would be if serious physical violence was the basis for the EPO or there is substantial and credible risk of bodily injury. In such circumstances, the magistrate can order custody in a hardware-secure detention facility. Rule 15(d), RJP. If a juvenile is placed in a secure or staff-secure facility, the magistrate must refer the matter to circuit court within 24 hours. In turn, the circuit court must conduct a detention review hearing within three judicial days. Second, in any order requiring out-of-home placement, the magistrate needs to make the contrary-to-welfare and reasonable efforts findings. Rule 15(f), RJP. Third, no bond is to be set at the time of the initial custodial placement. Bond is only to be addressed after the prosecuting attorney has been notified and given the opportunity to file an amended petition. Rule 15(g), RJP.

4. Multiple Respondents

If a petitioner is seeking protection against more than one respondent, each respondent should be the subject of a separate petition and protective order, with separate case numbers. This will avoid any possible confusion relating to subsequent modification or enforcement issues. As discussed above, separate petitions may be consolidated for hearing to promote judicial economy. But different respondents should be the subject of separate orders following a consolidated hearing. Rule 13(c), RDVCP.

5. Mandatory Reporting of Suspected Child Abuse or Neglect

During the course of domestic violence proceedings, allegations and evidence may indicate that a child (regardless of status as a party or as a child of one or both parties) has been subjected to acts, whether domestic violence or otherwise, that constitute abuse or neglect as those terms are defined in West Virginia Code § 49-1-201. In such situations, any magistrate, family court judge, or circuit court judge having reasonable cause to suspect that the child has been (or will likely be) subjected to abuse or neglect, has a mandatory duty to report these circumstances to the local Child Protective Services Office of the State Department of Health and Human Resources (DHHR). W. Va. Code § 49-2-803. The initial report to the county CPS office must be made by telephone immediately upon having reasonable cause to suspect the child abuse or neglect. A follow-up written report within forty-eight hours may be required if so requested by the DHHR. W. Va. Code § 49-2-809. Failure to provide this information regarding a suspected abused or neglected child may subject the magistrate or judge to prosecution for a misdemeanor offense. W. Va. Code § 49-2-812.[3]

See Bench Card 2, Appendix B.

D. Emergency Proceedings When No Divorce Action Pending or Divorce Action Pending with No Temporary Order

If the petition is based upon acts of domestic violence by a family or household member, the magistrate may enter an EPO if clear and convincing evidence of immediate and present danger of abuse to the victim or minor children is shown. W. Va. Code § 48-27-403(a). If the petitioner is seeking protection as one who witnessed or reported domestic violence, the magistrate may enter an EPO if it is shown that the respondent has abused, threatened or harassed the petitioner, or has taken other actions intended to intimidate the petitioner. W. Va. Code § 48-27-305(3).[4]

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[3] For further discussion on mandatory reporting, see Chapter 4, section E.4.

[4] See section E.4. of this chapter regarding relief to be afforded for one who seeks protection based upon witnessing or reporting domestic violence.

If the respondent is not present (which is almost always the case), the petitioner or his or her legal representative must provide to the court in writing what efforts have been made to notify the respondent of the proceeding, or present just cause of why notice should not be required. The order may then be entered *ex parte*. W. Va. Code § 48-27-403(a). Procedural due process with respect to the issuance of an emergency protective order does not require prior notice to a respondent where there is a showing of exigent circumstances. *See, e.g., Whitten v. Whitten*, 686 N.E.2d 19 (Ill. App. 3d Dist. 1997) (good cause based upon fear of retaliation if notice given).

If the respondent files a separate petition (or a counterclaim to be treated as a petition), upon the required showing of clear and convincing evidence the magistrate must enter an EPO. But any permissive relief granted must not contradict the relief in the EPO earlier granted involving the same parties. Rule 9(b), RDVCP.

Copies of medical reports or records may be admitted into evidence to the same extent as the original. In emergency proceedings, the custodian of the records does not have to be present to authenticate the records. W. Va. Code § 48-27-403(a).

E. Contents of Emergency Protective Order

1. Mandatory Provisions

Every EPO granting protection to the victim or minor children from domestic violence or abuse must contain the following four provisions set forth in West Virginia Code § 48-27-502:

> (1) directing the respondent to refrain from abusing, harassing, stalking, threatening or otherwise intimidating the petitioner or the minor children, or engaging in other conduct that would place the petitioner or the minor children in reasonable fear of bodily injury;
> (2) informing the respondent that he or she is prohibited from possessing any firearm or ammunition, notwithstanding the fact that the respondent may have a valid license to possess a firearm, and that possession of a firearm or ammunition while subject to the court's protective order is a criminal offense under state and federal law;
> (3) informing the respondent that the order is in full force and effect in every county of this state; and
> (4) setting forth on its face the following statement, printed in bold-faced type or in capital letters: "VIOLATION OF THIS ORDER MAY BE PUNISHED BY CONFINEMENT IN A

> REGIONAL OR COUNTY JAIL FOR AS LONG AS ONE YEAR AND BY A FINE OF AS MUCH AS TWO THOUSAND DOLLARS."

Additionally, as provided in Rule 10b(1) of the Rules for Domestic Violence Civil Proceedings, if the petition contains information regarding use, possession or ownership of firearms by the respondent, an EPO must direct the respondent to surrender all firearms and ammunition to the law enforcement officer serving the EPO. The EPO should further provide that, rather than surrendering all firearms and ammunition to the law enforcement officer, the respondent may transfer these items to a qualified third party. If a third-party transfer is contemplated, the law enforcement officer serving the EPO must determine prior to the transfer whether the third party is qualified to possess firearms, and not otherwise prohibited by law from such possession. Rule 10b does not specify what is meant by "qualified" to possess firearms. Beyond any legal prohibition (*e.g.,* prior felony conviction), at the very least a third party should be an adult who does not reside with the respondent; or if residing with the respondent, can securely store the firearms and ammunition off-premises.

2. Permissive Provisions

As provided in West Virginia Code § 48-27-503, the EPO may also include any of the following terms:

> (1) Granting possession to the petitioner of the residence or household jointly resided in at the time the abuse occurred;
> (2) Ordering the respondent to refrain from entering or being present in the immediate environs of the residence of the petitioner;
> (3) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children named in the order;[5]
> (4) Establishing terms of temporary visitation with regard to the minor children named in the order including, but not limited to, requiring third party supervision of visitations if necessary to protect the petitioner and/or the minor children; provided, that if the court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation (*see* West Virginia Code § 48-27-509(d));
> (5) Ordering the noncustodial parent to pay to the caretaker parent a sum for temporary support and maintenance of the petitioner and children, if any;

[5] A discussion of custody and visitation determinations in relation to protective orders is found in section E.3. below.

(6) Ordering the respondent to pay to the petitioner a sum for temporary support and maintenance of the petitioner, where appropriate;
(7) Ordering the respondent to refrain from entering the school, business or place of employment of the petitioner or household or family members for the purpose of violating the protective order;
(8) Ordering the respondent to participate in an intervention program for perpetrators;
(9) Ordering the respondent to refrain from contacting, telephoning, communicating, harassing or verbally abusing the petitioner;
(10) Providing for either party to obtain personal property or other items from a location, including granting temporary possession of motor vehicles owned by either or both of the parties, and providing for the safety of the parties while this occurs, including ordering a law-enforcement officer to accompany one or both of the parties;
(11) Ordering the respondent to reimburse the petitioner or other person for any expenses incurred as a result of the domestic violence, including, but not limited to, medical expenses, transportation and shelter;
(12) Ordering the petitioner and respondent to refrain from transferring, conveying, alienating, encumbering, or otherwise dealing with property which could otherwise be subject to the jurisdiction of the court or another court in an action for divorce or support, partition or in any other action affecting their interests in property;
(13) Awarding the petitioner the exclusive care, possession, or control of any animal owned, possessed, leased, kept or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent and prohibiting the respondent from taking, concealing, molesting, physically injuring, killing or otherwise disposing of the animal and limiting or precluding contact by the respondent with the animal; and
(14) Ordering any other relief the court deems necessary to protect the physical safety of petitioner or those persons for whom a petition may be filed as provided in subdivision (2), section three hundred five of this article.

3. Child Custody and Visitation

a) General considerations

As part of the relief granted in a protective order, a magistrate or family court judge may award temporary custody of any minor children involved in the proceedings, whether or not they have been subjected to acts of domestic violence. W. Va. Code § 48-27-503(3). However, if a temporary divorce or separate maintenance order is in effect, a magistrate issuing a TEPO may only modify any established custody or visitation award upon a showing, by clear and convincing evidence, that the child is a victim of the respondent's abuse. W. Va. Code § 48-27-402(d).[6] The TEPO modifying custody or visitation must clearly state which party has custody and the reason(s) why custody or visitation was modified. When an EPO awards custody of children -- and the children are in the physical custody of the other party, the other party's family members, or other persons -- for safety reasons the magistrate may order a law-enforcement officer to accompany the party awarded custody to obtain the physical custody of the children. Rule 10a, RDVCP.

When granting temporary custody or visitation in a protective order, the magistrate or family court judge should give paramount concern to the child's safety, as well as consider the lasting emotional harm to children from victimization and from exposure to domestic violence. *Henry v. Johnson*, 192 W. Va. 82, 450 S.E.2d 779 (1994). *See also D.B. v. J.R.*, 235 W. Va. 409, 774 S.E.2d 75 (2015). The court should also consider directing that child visitation with a respondent, when permitted, be supervised, particularly when the child has witnessed the abuse. *Lufft v. Lufft*, 188 W. Va. 339, 424 S.E.2d 266 (1992). Furthermore, the potential for recurring domestic violence should always be thoroughly evaluated. In some cases, a parent-victim escaping an abusive relationship may be forced to leave children behind due to threats or other misconduct by the abuser. This should not be considered as abandonment for purposes of determining custody. *See Feaster v. Feaster*, 192 W. Va. 337, 452 S.E.2d 428 (1994). The best interests of the child are always of primary consideration in awarding custody or visitation. *Dale Patrick D. v. Victoria Diane D.*, 203 W. Va. 438, 508 S.E.2d 375 (1998). *See also* W. Va. Code § 48-9-209(a)(3) (In allocating custodial responsibility in a domestic relations case, acts of domestic violence are to be considered in the determination).

[6] A discussion of custody determinations involving more than one state can be found in Chapter 4, section G. -- *Multi-Jurisdiction Custody Issues*.

b) Custody when a child and parent or other household member are adverse parties

If a petition is filed solely by or on behalf of a minor or a minor is the respondent, and the other party is a parent or household member, oftentimes the minor cannot return to his or her home due to obvious concerns for the safety of the minor or household members. In such circumstances, the magistrate is required to immediately appoint a guardian *ad litem* for the minor and contact the Child Protective Services Division of the DHHR. Rule 23a(b)(1) and (c)(1), RDVCP. *See also* Syl. Pt. 7, *Katherine B.T. v. Jackson*, 220 W. Va. 219, 640 S.E.2d 569 (2006) ("When a minor, without a next friend or guardian, files a petition for a protective order . . . the court in which the petition is filed shall immediately upon filing of the petition appoint a guardian *ad litem* for the minor."). Sometimes due to the EPO being issued in the middle of the night or on a weekend, the magistrate may be unable to contact the guardian *ad litem* being appointed; if so, the appointed guardian *ad litem* should be promptly notified the next judicial day. The local CPS office should always be contacted in these circumstances when a minor cannot be returned home in the custody of a parent. If the local CPS is closed at the time, the magistrate should make the contact through the DHHR 24-hour emergency hotline. In either circumstance, the magistrate should order that a CPS worker promptly appear when necessary to arrange a temporary placement for the minor.

The initial effort should be to find a responsible and appropriate family member or other adult into whose temporary custody the minor can be voluntarily placed. Rule 23a(b)(1), RDVCP; Rule 15, RJP. *See Katherine B.T.*, 220 W. Va. 219, 222, 640 S.E.2d 569, 572 (EPO issued for minor against mother; magistrate placed minor in temporary custody of minor's 27-year old sister who lived in nearby Maryland.). If no such family member or adult can be found, the magistrate should proceed in the following manner:

a) If the minor is the petitioner for whom the EPO is granted, the magistrate shall notify CPS, which is required to respond and assist the magistrate with identifying a responsible and appropriate family member or adult who can take custody of the child. If a family member or other adult cannot be located, CPS may take emergency custody and file a child abuse and neglect petition. Rule 23a(b)(1), RDVCP.

b) If the minor is the respondent against whom the EPO is granted and a law-enforcement officer takes the minor into custody, the magistrate shall then conduct a detention hearing as a juvenile delinquency matter -- and more

particularly -- pursuant to Rule 15 of the Rules of Juvenile Procedure (*Domestic Violence Emergency Protective Orders as Juvenile Petitions*). The magistrate must also notify the DHHR. Rule 15(b), RJP. Consistent with subsection (d) of Rule 15 of the Rules of Juvenile Proceedings, any temporary detention should normally be in a nonsecure or staff-secure facility. But if the magistrate makes a determination that serious physical violence is the basis for the EPO or that a substantial and credible risk of bodily injury is present, the magistrate may order the minor to be temporarily detained in a hardware-secure detention facility. In an order in which a magistrate requires a juvenile to be removed from his or her home and placed in a facility, whether it is non-secure, staff-secure or secure, the magistrate shall include the required Title IV-E findings that: 1) return to the home is contrary to the welfare of the child (and why); and 2) due to an emergency situation or imminent risk involving the safety or well-being of the child, it is reasonable to make no efforts to keep the child in the home (and why). Rule 15(f), RJP. If a magistrate places a juvenile in a staff-secure or detention facility, the magistrate, within 24 hours, must notify the circuit court, and that court must hold a detention review hearing within three judicial days. Rule 15(d), RJP.

c) Custody with a non-parent

As discussed above when a minor and parent or other household members are adverse parties, there are instances where the possibility exists that temporary custody may be awarded to a person who does not stand in a parent-child relationship with the children named in the protective order. In the earlier-cited case, *Katherine B. T.*, the EPO issued by the magistrate granted temporary custody of the minor to the minor's adult sister; and the DVPO issued by the family court continued the temporary custody with the minor's sister, but at the sister's request also approved placing physical custody of the minor with a family friend. 220 W. Va. at 222, 640 S.E.2d at 572. However, the care and custody of one's own child is a fundamental right, tempered only by a clear showing of parental unfitness affecting the welfare of the child. *See generally Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000); *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973); *see also In re Jade E.G.*, 212 W. Va. 715, 575 S.E.2d 325 (2002). Accordingly, "domestic violence proceedings are generally inappropriate for litigation of custodial claims by parties who do not have a pre-existing custodial relationship with the children." *J.M.R. v. S.T.R.*, 15 P.3d 253, 256 (Alaska 2001). Nevertheless, a protective order entered to restrain a respondent-parent from further acts of domestic violence involving the child may, under proper circumstances, include an

award of temporary custody to a non-parent when found necessary to protect the child. *See* W. Va. Code §§ 48-27-403(a); 48-27-503(2). *See also* Rule 23a(b), RDVCP.

d) Visitation

Visitation rights may also be established in a protective order. If appropriate, for the protection of the petitioner or children, the order may also require third party supervision of visitation exercised by the respondent. W. Va. Code § 48-27-503(3) and (4). Given the circumstances and short duration of EPOs, magistrates typically defer any determination of visitation rights for the noncustodial parent until the final hearing before the family court. A court may order visitation with a child by a parent who has committed domestic violence **only** if the court finds that adequate provision for the safety of the child and the petitioner can be made. W. Va. Code § 48-27-509(a). This finding should be based only upon sound, corroborated evidence. In many cases, the parties may be unable or unwilling to present complete and accurate information. For example, a parent-victim may fear retaliation, or the parent-abuser may present a false impression of cooperation to the court in order to regain control of the victim through the children. Prior to allowing visitation, particularly unsupervised visitation, the court should require sufficient investigation and evidence on circumstances which may pose a danger to the children or victim-parent. A guardian *ad litem* may be appointed by the magistrate court, family court or circuit court to provide an independent investigation and report when needed. Rule 26, RDVCP (incorporating Rule 21 of the Trial Court Rules).

See Bench Cards 12-14, Appendix B.

If the court finds that visitation can be safely accomplished, the court may order further protective measures as outlined in West Virginia Code § 48-27-509(b). Such protective measures may include, among other things, a neutral site for the exchange of children or for supervised visitation. Currently, in almost half of the counties in the State, these services are available through various agencies. (*See* Visitation Centers listed in Chapter 10, section A.) Regardless of whether any visitation is allowed, the court may order the address of the petitioner and any children be kept confidential. W. Va. Code § 48-27-509(c). Furthermore, if a family or household member is ordered to be the supervisor of visitation, the court shall establish the conditions to be followed during visitation. W. Va. Code § 48-27-509(d).

e) Clear and specific terms

Broadly termed custody or visitation order provisions may be beneficial in many divorce cases -- to encourage cooperation and allow for accommodation and flexibility in the parenting plan. However, in domestic

See Bench Card 14, Appendix B.

violence cases, such cooperative measures are far less feasible, and may increase the risk of further violent or abusive acts to the victim or the parties' children. Any vagueness in the terms of custody or visitation provisions in protective orders may provide the respondent-abuser with the opportunity to "work around" the order in an effort to regain control over the victim. For example, the respondent may attempt to directly manipulate the victim by imposing his own specifics upon a generally worded custody or visitation provision. Similarly, the respondent may seek indirectly to regain control over his partner by dictating when and where he will exercise his visitation rights.

Clear and specific terms in protective orders regarding custody and visitation provide the parties with readily understood and known parameters. Not only will such precise language decrease the abuser's ability to regain control -- specific terms are also more readily enforceable by the police and the courts if a violation occurs. Therefore, in any domestic violence case in which the parties have minor children, protective orders should clearly specify custodial rights, and if the court finds that child visitation with the respondent is appropriate, and can be exercised without endangering the petitioner or children, the court should impose detailed visitation terms, such as:

> a) How the parties will communicate with each other, if necessary, in making any child visitation arrangements, whether direct (*e.g.,* by telephone) or via a third-party;
> b) Whether any supervision is required for visitation and, if so, who is to supervise;
> c) Specific days of the week and times for visitation;
> d) Who is to provide transportation for the children before and after visits, with pick-up and drop-off locations;
> e) Where visitation may take place, whether it may be in the noncustodial parent's home or in a neutral location; and
> f) Restrictions upon the noncustodial parent's travel with the children during visitation periods, such as imposing a 50-mile limit or specifying permissible recreational sites.

See Bench Card 14, Appendix B.

A number of these conditions of visitation, among others, are summarized in West Virginia Code § 48-27-509. As provided in subsection (b)(7) of that statute, the court has the discretion to impose any condition for visitation considered necessary to provide for the safety of the petitioner, children, or any other family or household member. The circumstances will certainly vary from case to case and, therefore, the appropriate visitation conditions will differ. Whatever terms are imposed in each case, however, should be clear and precise.

4. Protection of Person Witnessing or Reporting

If the person to be protected by an EPO or TEPO is an individual who reported or was a witness to domestic violence, the court may order the respondent, pursuant to West Virginia Code § 48-27-504:

> (1) to refrain from abusing, contacting, telephoning, communicating, harassing, verbally abusing or otherwise intimidating the person to be protected;
> (2) to refrain from entering the school, business or place of employment of the person to be protected for the purpose of violating the protective order; and
> (3) to refrain from entering or being present in the immediate environs of the residence of the petitioner.

5. Scheduling Final Hearing

The final hearing in family court must be scheduled to take place not later than ten days following the entry of the EPO by the magistrate.[7] W. Va. Code § 48-27-403(d). To facilitate this scheduling, the family court must provide the magistrate court with prospective hearing dates and times. Rule 10(b), RDVCP. In counties having more than one family court judge, if a magistrate issuing a protective order learns that the parties are also involved in a family court case (e.g. divorce), the magistrate shall notice the domestic violence final hearing before the family court judge presiding over that other case. Rule 13(a), RDVCP. (Additional transfer and consolidation issues are discussed in Chapter 4, section C.)

F. Notice to Parties and Law Enforcement

1. Service on Respondent

If an EPO is granted and the respondent is present at the emergency hearing, the petition and order is to be served by the magistrate or magistrate designee. Rule 11(a), RDVCP. Otherwise, following the emergency hearing, the magistrate shall direct that the respondent be immediately served by law enforcement with the following: (a) the petition, (b) the EPO, (c) the notice of the final hearing before the family court, and (d) a statement of the rights of the parties to appear and participate in the final hearing (and the consequences for failing to appear). The notice must also include the name, mailing address, physical location and telephone number of the family court having jurisdiction over the proceedings.

[7] In calculating the 10-day period for scheduling, intermediate Saturdays, Sundays and legal holidays are excluded in the computation. See Rule 1(b) and Rule 28, RDVCP incorporating the time computation provisions of Rule 6, RCP.

W. Va. Code § 48-27-403(b) and (d); Rule 10(a), RDVCP. Failure to serve the EPO does not, however, stay its effect if the respondent has actual notice of the order and its contents. W. Va. Code § 48-27-601(c). No fees associated with service of petitions and orders, or fees for copies of orders, may be charged until the matter is brought before the family or circuit court for final resolution. W. Va. Code § 48-27-308; Rule 4(d)-(f), RDVCP. An order denying an EPO should be served on the respondent by the magistrate or magistrate designee if the respondent is present at the emergency hearing. Rule 11(a), RDVCP. If the respondent is not present, the order denying an EPO is **not** served upon or mailed to the respondent.[8]

Other than domestic violence orders, which are public records,[9] all documents contained in the court file are confidential and not available for public inspection. But any document in the file is generally available for inspection and copying by the parties, attorneys of record, and others specified by the applicable rule. Rule 6(a), RDVCP, incorporating Rule 6, RFCP. Therefore, if the petitioner has re-located somewhere unknown to the respondent the magistrate should consider sealing within the court file any document containing the petitioner's address, telephone number, or other contact information, until further order. Although this sealing of the petitioner's contact information should generally be done as a matter of safety precaution in all such cases, it is mandatory if requested by the petitioner. Rule 8(f), RDVCP. When the petitioner's address has been sealed, if the respondent needs to serve any document upon the petitioner, the respondent must deliver the document to the circuit clerk and direct the circuit clerk to make service upon the petitioner, who shall then do so. Rule 11(g), RDVCP. Even when the petitioner's contact information has not been sealed, any service involving direct contact between the parties is strictly prohibited. Rule 11(h), RDVCP.

Law enforcement officers are required to serve domestic violence petitions and orders, and are under a duty to promptly serve such process. W. Va. Code § 48-27-701; Rule 11, RDVCP. Service may also be accomplished by a process server employed by the sheriff's office or other law-enforcement agency. Rule 11(i), RDVCP. Notwithstanding any statutory prohibition in general, domestic violence process may be served on Sundays and legal holidays. West Virginia Code § 48-27-701. If law enforcement is unable to promptly serve the respondent with the EPO and related documents, when continuing the final hearing the family court should instruct the circuit clerk as to the manner to proceed with alternate methods of service. Rule 11(a) and Rule 14(e), RDVCP.

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[8] RDVCP Rule 11(d), providing for service by mail of an order denying a protective order, only applies to denial orders issued upon the final hearing in family court.

[9] If a minor is a petitioner or respondent in a domestic violence proceeding, the orders are not public records. Rule 6, RDVCP.

a) Out-of-state or nonresident service

Service on a respondent outside the State may be accomplished by different means in accordance with the applicable rules and statutes. One method of personal service commonly utilized is through an out-of-state law enforcement agency in the respondent's last known county of residence. Rule 11(j), RDVCP; W. Va. Code § 48-27-311. If personal service cannot be accomplished by law enforcement in the other jurisdiction, this rule and statute provide for service on the respondent through publication and by mail (first class and certified). In most instances, however, these alternate methods will be constructive service only.

A petition and protective order may be more effectively served on a nonresident[10] by the procedure provided in West Virginia Code § 56-3-33a. This recently enacted long-arm statute provides an effective and efficient means to obtain personal service on a respondent who is (1) a nonresident; (2) a resident who has left the State; or (3) a person whose residence is unknown. Under this statute, a person will be subject to jurisdiction in West Virginia if he or she commits specific conduct in the State or outside of the State as long as the conduct is *purposely directed* at a resident and has an *effect* within the State. W. Va. Code § 56-3-33a(a). The specified conduct includes: domestic violence or domestic abuse; conduct constituting a basis for seeking a personal safety order; or conduct in violation of a protective or restraining order, whether issued in this state or another jurisdiction, for the protection of someone in this state. W. Va. Code § 56-3-33a(b).

The long-arm provision in the statute provides that, if the respondent is alleged to have committed any conduct described in Section (b) then this is treated as the appointment by the nonresident of the Secretary of State as the nonresident's lawful agent upon whom any process may be served relating to any action that arises out of such conduct. W. Va. Code § 56-3-33a(c)(2).

Service through the Secretary of State may be completed by the court clerk mailing two copies of the petition and order to the Secretary of State’s office. Service upon the nonresident is completed and effective upon receipt by the Secretary of State's Office. Thereafter, notice of service and a copy of the petition and order will be mailed by the Secretary of State to the respondent via certified mail, return receipt requested, to his or her nonresident address. After the Secretary of

[10] The term "nonresident" is defined as: "any person who is not a resident of this state or a resident who has moved from this state subsequent to engaging in such acts or acts covered by this section." W. Va. Code § 56-3-33a(d)(2).

State's office receives notice from the post office that the receipt has been signed, that office will then notify the clerk's office of the issuing court. If the certified mail was refused or undeliverable, then the Secretary of State will return the mail to the clerk's office of the issuing court. W. Va. Code § 56-3-33a(c)(2)(A). Like other domestic violence or personal safety proceedings, no fees may be imposed or collected until the matter is brought before the appropriate court for final resolution. At such time, any fees ordinarily remitted to the Secretary of State or a law enforcement agency for service should be taxed in the costs of the action. *See* W. Va. Code §§ 56-3-33a(c)(2)(B); 48-27-308; and 53-8-13.

2. Notice to Petitioner

A copy of the EPO must be delivered to the petitioner, together with a notice of the final hearing before the family court, a statement of the right of petitioner to appear and participate in the final hearing, and a statement that the petitioner's failure to appear will result in a dismissal of the petition. W. Va. Code § 48-27-403(b). *See* Rule 10(a), RDVCP.

3. Domestic Violence Database and Registry

Upon entry of an EPO, the magistrate must immediately see that the order is entered in the West Virginia Domestic Violence Database and Domestic Violence National Registry. W. Va. Code § 48-27-802(b); Rule 21, RDVCP.

G. Emergency Proceedings When Temporary Divorce, Annulment, Separate Maintenance or Custody Order In Effect

When an action for divorce, separate maintenance, annulment or custody (hereinafter collectively referenced as "divorce") is pending **and** a temporary divorce order is in effect, the relief that may be granted incident to a domestic violence emergency proceeding is limited. Any relief granted will be in the form of a temporary emergency protective order (TEPO). W. Va. Code § 48-27-402. The TEPO may be issued only with respect to a petition alleging acts of domestic violence that occurred **after** the entry of the temporary divorce order in family court. W. Va. Code § 48-27-402(b). It is presumed under this statute that if there were acts of domestic violence preceding the temporary order in the divorce action, such conduct would have (or should have) been raised in the proceedings in family court leading to the entry of the temporary divorce order.

If a TEPO is issued, as set forth in subsections (c) and (d) of West Virginia Code § 48-27-402, the magistrate may only grant the following relief:

(1) directing the respondent to refrain from abusing the petitioner or minor children, or both;
(2) ordering the respondent to refrain from entering the school, business or place of employment of the petitioner or household members or family members for the purpose of violating the protective order;
(3) ordering the respondent to refrain from contacting, telephoning, communicating with, harassing or verbally abusing the petitioner; and
(4) modifying an award of custody or visitation only upon a showing, by clear and convincing evidence, of the respondent's abuse of a child (as defined in West Virginia Code § 48-27-202). The order shall clearly state which party has custody and describe why custody or visitation arrangements were modified. (*See* further discussion of custody and visitation in section E.3. of this chapter.)

Additionally, the TEPO must direct the respondent to surrender all firearms and ammunition. Rule 10b(1), RDVCP. (*See* section E.1. of this chapter for detailed discussion of the firearms surrender process.)

1. Service and Distribution

The magistrate must forthwith transmit a copy of the TEPO, along with a copy of the petition, by mail or fax, to the family court in which the action is pending, and to law enforcement agencies. W. Va. Code § 48-27-402(e)(1). Additionally, as stated in RDVCP Rules 10(a) and 11(a), the TEPO, petition, and notice of final hearing would be served upon the parties, similar to service of an EPO. (*See* section F above regarding service and distribution.)

2. Domestic Violence Database and Registry

Upon entry of a TEPO, the magistrate must immediately see that the order is entered in the West Virginia Domestic Violence Database and Domestic Violence National Registry. W. Va. Code § 48-27-802(b); Rule 21, RDVCP.

3. Return of TEPO by Family Court

If a magistrate issues a TEPO but it turns out that no temporary order has in fact been entered in the pending divorce action, the family court must forthwith return the TEPO to the magistrate, who shall vacate the order, noting the reason for the termination. The magistrate court clerk must transmit a copy of the order vacating the TEPO to the parties and to appropriate law enforcement agencies. W. Va. Code § 48-27-402(e)(2).

In this circumstance, upon the filing of a new petition, the magistrate would have jurisdiction to issue an EPO (rather than a TEPO) under West Virginia Code § 48-27-401. Additionally, the family court, incident to any subsequent temporary relief granted in the pending divorce action, could enter a protective order to remain in effect until a final order is entered in the divorce action unless earlier modified by the judge. W. Va. Code § 48-5-509. Any protective order entered by the family court as part of temporary relief must be by a separate order form approved by the Supreme Court. Rule 9a, RDVCP.

H. Appeal from Magistrate Court Denial of Emergency Protective Order

A petitioner denied an EPO or TEPO in magistrate court may appeal the denial by filing a petition for appeal to the family court. The petition for appeal must be filed no later than five days following the denial. The appeal petition is to be filed with the magistrate court clerk. W. Va. Code § 48-27-510(a); Rule 18(a), RDVCP. Any such appeal must be heard by the family court within 10 days from the date the appeal petition was filed. No appeal bond shall be required. W. Va. Code § 48-27-510(c); Rule 18(a), RDVCP. The filing and hearing timeframes for appeals from magistrate court to family court, and from family court to circuit court, would be calculated based upon Rule 6(a) of the Rules of Civil Procedure. *See* Rules 1(b) and 28, RDVCP.

At the conclusion of the appeal hearing, the family court judge may either enter an order affirming the magistrate's denial of the EPO/TEPO, or may grant the EPO/TEPO. If the EPO/TEPO is granted, the family court judge must enter the EPO/TEPO, set the matter for final hearing within 10 days of the order entry date, and serve the order in accordance with Rule 11. Rule 18(b), RDVCP.

Chapter 4

FINAL HEARINGS

Chapter Contents

A. Scheduling

If a magistrate issues an EPO or TEPO, a final hearing must be scheduled in family court to be held within 10 days following the entry of the emergency order. W. Va. Code §§ 48-27-403(d) (EPO); 48-27-402(e)(1) (TEPO); Rule 10, RDVCP. The scheduling limit is ten days, as domestic violence cases are to be given priority over all other pending civil actions, except trials in progress.[1] W. Va. Code § 48-27-309; Rule 10(b), RDVCP; Syl. Pt. 6, *In the Matter of Browning*, 192 W. Va. 231, 452 S.E.2d 34 (1994). *See* section D. of this chapter regarding continuances of the final hearing.

B. Notice and Service

The notice of the final hearing is prepared by the magistrate court when the emergency order is issued, scheduling the matter based upon available hearing dates and times for final hearings provided by the family court. W. Va. Code § 48-27-403(d); Rule 10(a), RDVCP. The notice of hearing must then be served upon the respondent by law enforcement, along with a copy of the petition, the emergency protective order, and statements regarding the right to participate in the hearing and consequences for failure to appear. W. Va. Code §§ 48-27-402(e)(1) (TEPO); 48-27-403(b) and (d) (EPO); Rule 11(a), RDVCP.

Failure to obtain service on the respondent does not constitute a basis to dismiss the domestic violence petition. If the respondent has not been served by law enforcement by the time of the final hearing, a continuance should be ordered and the hearing rescheduled no more than 30 days from the original date, so that service (with a re-scheduled hearing notice) may be completed. W. Va. Code § 48-27-403(e); Rules 11(a) and 14(d), RDVCP. The court is to then instruct the circuit clerk in the order of continuance to serve the respondent by certified mail, restricted delivery, to the respondent's last known address. If the return card indicating that the respondent received the certified mail is not received by the clerk within 30 days or service by mail is otherwise unsuccessful, the court must again continue or reschedule the hearing, and direct the clerk to serve the respondent through publication in the respondent's last known county of residence. To avoid unnecessary delay and the second continuance, in the court's discretion, the clerk may be directed to serve the respondent by certified mail and publication simultaneously. Rules 11(a) and 14(e), RDVCP.

[1] In calculating the 10-day period for scheduling, intermediate Saturdays, Sundays and legal holidays are excluded in the computation. Rule 28, RDVCP; Rule 6(a), RCP.

If the respondent is a nonresident (or a West Virginia resident who has left the state), the petition and EPO should be served by different means, in accordance with the applicable rules and statutes. See Chapter 3, Section F.1., subsection (a) for a discussion of alternate methods of out-of-state and nonresident service. If these methods were not utilized, the family court should direct the circuit clerk to effect service by these procedures. In most circumstances, the long-arm statute provides the most effective and efficient means to obtain personal service on nonresident respondents. W. Va. Code § 56-3-33a.

C. Transfer and Consolidation

1. Transfer

Transfer of a domestic violence case to a particular court is appropriate when there is a *pending* family court case (e.g., divorce or another domestic violence proceeding) in that court. First, in counties having more than one family court judge, if a magistrate conducting an emergency proceeding learns that the parties are also involved in a family court case, the magistrate must notice the domestic violence final hearing before the family court judge presiding over that pending case. Rule 13(a), RDVCP. Second, when a family court judge learns that the parties in a domestic violence proceeding have a family court case pending before another family court judge in the same or another county, if venue is proper, the family court judge having the domestic violence proceeding shall transfer that matter to the family court judge with the pending family court case. Rule 13(b), RDVCP.

When a case is transferred to another county, the originating county closes its case and the receiving county assigns a new family court case number. Following the final hearing, the family court is to fax the order to the magistrate clerk's office in the **originating** county for placement on the national registry and state database. The case file remains in the receiving county. Rule 13(d), RDVCP.

2. Consolidation

Different Courts -- If two domestic violence cases are pending before different family courts, the family court in which the first action was commenced **shall** order both cases, if venue is proper, transferred before it or before the other family court. Consolidation is then at the discretion of the court in which both cases are pending, as discussed in the following paragraph. Rule 13(c), RDVCP.

Same Court -- If, by reason of transfer or otherwise, two domestic violence cases involving the same parties are pending before the same family

court, the court may consolidate the two cases for hearing upon a determination that consolidation will further the interest of justice and judicial economy. W. Va. Code § 48-27-507; Rule 13(c), RDVCP. Any orders issued should be separate with respect to each action. Rule 13(c), RDVCP. This will avoid possible confusion with entry in the Domestic Violence Registry or if subsequent modification or enforcement action is necessary. As noted in subsection 1 above, if one of the cases was transferred from another county, the order issued in that case needs to be faxed to the magistrate clerk of that county for entry in the national registry and state database.

D. Continuances

A final hearing that is continued due to failure to obtain personal service by law enforcement must be rescheduled for no more than 30 days from the original date while alternate service is made. Rule 14(d), RDVCP. After service of process is accomplished, the family court may continue a final hearing only upon a showing of good cause by the moving party. Rule 14(b), RDVCP. A hearing may be held (if deemed appropriate or necessary by the court) on a motion for continuance after reasonable notice to the non-moving party. Rule 14(c), RDVCP. If a motion for continuance is granted, the hearing must be rescheduled for a date no more than seven days beyond the originally scheduled hearing date. Rule 14(d), RDVCP. The computation of the seven-day period would exclude any Saturday, Sunday, or legal holiday. Rules 1(b) and 28, RDVCP. When a continuance is ordered, the EPO or TEPO remains in effect, and the family court may modify the protective order as it deems necessary pending the final hearing. W. Va. Code § 48-27-403(g); Rule 14(d), RDVCP. An order modifying an EPO or TEPO must be immediately served in accordance with Rule 11(c), RDVCP.

E. Conducting the Final Hearing

If the respondent is present at the final hearing and elects not to contest the domestic violence allegations, or alternatively, does not contest the relief sought, the petitioner is not required to put on any evidence and the court may proceed to address the issues relating to the relief requested. W. Va. Code § 48-27-501(a). Otherwise, it is the petitioner's burden to prove, by a preponderance of the evidence, the allegations of domestic violence set forth in the petition. W. Va. Code § 48-27-403(e).

In the case of a petition filed by or on behalf of a victim under West Virginia Code § 48-27-305(1) or (2), the petitioner must prove, by a preponderance of the evidence, one or more of the following acts by the respondent against the petitioner or other family or household member who is a minor or physically or mentally incapacitated:

See Bench Card 4, Appendix B.

> (1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
> (2) Placing another in reasonable apprehension of physical harm;
> (3) Creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts;
> (4) Committing either sexual assault or sexual abuse as those terms are defined in articles eight-b and eight-d, chapter sixty-one of this code; and
> (5) Holding, confining, detaining or abducting another person against that person's will. W. Va. Code § 48-27-202.[2]

In the case of a witness petition filed under West Virginia Code § 48-27-305(3), the petitioner must show that:

> (1) he or she witnessed or reported a domestic violence incident; and
> (2) as a result the respondent has abused, threatened or harassed the witness, or has engaged in other actions intended to intimidate the witness. W. Va. Code § 48-27-403(e).

1. Regulating Conduct in Proceedings

During the final hearing, generally any person, including a domestic violence advocate,[3] whose presence is requested by either the petitioner or the respondent shall be allowed to remain in the courtroom. The two exceptions when non-parties may be excluded from the hearing are: (a) witnesses subject to a motion for sequestration that is granted; and (b) persons found by the court to be disruptive in the hearing. W. Va. Code § 48-27-403(f); Rule 7, RDVCP. Rule 7 further provides that any person or domestic violence advocate must be permitted to sit with a party during the hearing. Additionally, Rule 7 incorporates Rule 8 of the Rules of Practice and Procedure for Family Court prohibiting unauthorized photography or recording during proceedings and in areas adjacent to the courtroom. Any conduct obstructing or disrupting domestic violence proceedings in family court may be addressed by the exercise of contempt powers of family court judges provided under West Virginia Code § 51-2A-9(a).

See Bench Card 4, Appendix B.

[2] See Chapter 2, section B.1. for a discussion of the various terms used in this statutory definition.

[3] "Domestic violence advocate" is defined in Rule 7 as "an employee or representative of a licensed program for victims of domestic violence."

2. Evidentiary Considerations in the Final Hearing

Also see Case Law Digest Chapter 7, section F. – Evidentiary Issues Associated With Domestic Violence.

The West Virginia Rules of Evidence generally apply to domestic violence hearings. However, when a particular rule of evidence conflicts with any domestic violence rule or statute, the domestic violence rule or statute applies. Rule 1(a), RDVCP.

A husband and wife are competent witnesses in domestic violence hearings, and cannot refuse to testify based upon the spousal testimonial privilege that may be available in other types of proceedings. W. Va. Code § 48-27-304(c).

See Bench Card 5, Appendix B.

The testimony of children in domestic violence hearings is governed by Rules 8 and 9 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 23, RDVCP.

Evidence in the form of copies of medical records or reports may be admitted at the hearing upon proper authentication by the medical records custodian.[4] W. Va. Code § 48-27-403(e). The affidavit-authentication procedure for hospital records set forth in West Virginia Code §§ 57-5-4e could be utilized in appropriate circumstances.

3. Conclusion of the Final Hearing

Upon the conclusion of the hearing, the family court must either: (a) dismiss the petition if the petitioner failed to prove, by a preponderance of the evidence, the allegations of domestic violence; or (b) enter a domestic violence protective order (DVPO) if sufficient evidence supports the domestic violence allegations. W. Va. Code §§ 48-27-403(g); 48-27-501(a). The same alternatives are applicable to any counterclaim filed pursuant to West Virginia Code § 48-27-306, or cross-petition filed and consolidated pursuant to West Virginia Code § 48-27-507. (*But see* section H. in this chapter regarding limitations upon the issuance of "mutual" protective orders.) An order denying or granting a DVPO automatically terminates an earlier EPO or TEPO. Rule 17, RDVCP.

See Section J. of this chapter for discussion of allowable time periods for DVPOS.

In every protective order issued, the family court judge needs to set forth the portion of the statutory definition of domestic violence (W. Va. Code § 48-27-202) relied upon. Additionally, the court must make findings of fact as to the allegations of domestic violence which were proven by the evidence presented in the hearing. In *John P.W. ex rel. Adam W. v. Dawn D.O.*, 214 W. Va. 702, 591 S.E.2d 260 (2003), the Supreme Court, in Syllabus Point 2, specifically held that:

[4] It was previously noted in the discussion of emergency proceedings before a magistrate that this authentication requirement for medical records is not necessary at that earlier stage. W. Va. Code § 48-27-403(a).

> To allow proper judicial review, a family court judge who issues a domestic violence protective order is required to make factual findings which describe the acts of domestic violence that have been established by the evidence presented and to identify which statutory definition of domestic violence such facts demonstrate.

Similarly, if a DVPO is granted but some of the requested relief is denied, findings should be made specifying why the relief was not granted. A denial of a protective order may likewise be the subject of an appeal. In those cases, the court should set forth specific findings regarding the insufficiency of the evidence or other circumstances supporting the denial.

4. Mandatory Reporting of Suspected Child Abuse or Neglect

See Bench Cards 1, 2 and 8, Appendix B.

During the course of domestic violence proceedings, allegations and evidence may indicate that a child (regardless of status as a party or as a child of one or both parties) has been subjected to acts of domestic violence. Domestic violence can constitute child abuse if a child's health or welfare is harmed or threatened by such conduct. W. Va. Code § 49-1-201. In such situations, any magistrate, family court judge, or circuit court judge having reasonable cause to suspect that the child has been subjected to abuse or neglect (or observes the child being subjected to conditions likely to result in abuse or neglect), has a mandatory duty to report these circumstances to the local Child Protective Services (CPS) Office of the Department of Health and Human Resources. Furthermore, if a judge believes that the child has suffered serious physical abuse, sexual abuse, or sexual assault, the judge must immediately report the allegations to the West Virginia State Police or any law-enforcement agency having jurisdiction to investigate the allegations. W. Va. Code § 49-2-803. Even if the family court judge is aware that the magistrate who held the emergency hearing has already reported the matter to CPS, the Supreme Court has observed that the better practice is for the family court judge hearing the case to strictly follow the reporting requirements as well, to help assure that no case "slips through the cracks." *Katherine B.T. v. Jackson*, 220 W. Va. 219, 227-28, 640 S.E.2d 569, 577-78 (2006).

The initial report to the county CPS office must be made by telephone immediately upon having reasonable cause to suspect the child abuse or neglect. A follow-up written report may be required within forty-eight hours if requested by CPS. W. Va. Code § 49-2-809. Failure to provide this information regarding a suspected abused or neglected child may subject the magistrate or judge to prosecution for a misdemeanor offense. W. Va. Code § 49-2-812. In turn, CPS is to follow an established procedure to notify the person who made the report as to whether an investigation of

See Bench Cards 2, 3 and 8, Appendix B.

the suspected abuse or neglect has been initiated and when the investigation is completed. W. Va. Code § 49-2-804. Under DHHR policy:

> The duties of CPS, when receiving referrals from mandated reporters include:
>
> - Mail a notification letter within 2 business days of the disposition of the intake assessment informing the mandated reporter whether or not the referral has been accepted or screened for assessment.
> - Within 2 business days of the conclusion of the assessment, CPS shall mail a letter to the mandated reporter informing them that the assessment has been completed.
>
> WVDHHR, *BCF Office of Children and Adult Services, Child Protective Services Policy*, Section 1.8 (December 17, 2015).

Additionally, when a family court judge has reasonable cause to believe any child involved in family court proceedings has been abused or neglected, the judge also must immediately prepare and submit a written referral to the local CPS office, with copies submitted to the appropriate circuit court (as determined by the chief circuit judge) and prosecutor in the county where the family court proceedings are pending. Rule 16a, RDVCP. The written referral must set out the specific allegations or information that led to the judge's determination of reasonable cause to suspect that one or more children involved in family court proceedings has been abused or neglected. Rule 48(b), RFCP. This written referral requires the circuit court to enter an administrative order directing CPS to conduct an investigation regarding the suspected abuse or neglect. Rule 3a, RCANP; Rule 25a RDVCP. Following the investigation, CPS must, within the time specified in the administrative order, either submit a report of the investigation to the circuit court, referring family court and prosecuting attorney, or file an abuse and neglect petition in circuit court. Rule 3a(a), RCANP; Rule 48(c), RFCP; Rule 25a(a), RDVCP.

F. Matters Covered in Domestic Violence Protective Orders

1. Mandatory Provisions

Every DVPO granted by the court to protect a victim of domestic violence must cover the following matters set forth in West Virginia Code § 48-27-502:

> (a) Require the respondent to refrain from abusing, harassing, stalking, threatening or otherwise intimidating the

> petitioner or the minor children, or engaging in any other conduct that would place the petitioner or minor children in reasonable fear of bodily injury;
> (b) Prohibit the respondent from possessing any firearm or ammunition;
> (c) Inform the respondent of the prohibition against possessing any firearm or ammunition while subject to the DVPO, and that violation of such prohibition is a criminal violation of state and federal law;
> (d) Inform the respondent that the DVPO is in full force in every county of the State; and
> (e) State the potential jail time and monetary fines for violation of the DVPO, in bold-faced type or in capital letters as follows: "VIOLATION OF THIS ORDER MAY BE PUNISHED BY CONFINEMENT IN A REGIONAL JAIL FOR AS LONG AS ONE YEAR AND BY A FINE OF AS MUCH AS $2,000".

Additionally, if the petition contains information regarding the use, possession or ownership of firearms by the respondent, and the magistrate granted an EPO or TEPO, that emergency order should have directed the respondent to surrender all firearms and ammunition to the law enforcement officer serving the EPO/TEPO or transfer these items to a qualified third party. Rule 10b(1), RDVCP. (See Chapter 3, section E.1. regarding firearms surrender upon issuance of an EPO). Accordingly, if the family court judge is going to issue a DVPO, before the hearing is concluded the judge should require the respondent to provide proof that all firearms and ammunition have been surrendered or transferred. If the respondent does not provide such proof, the DVPO shall: a) again order the respondent to accomplish this surrender or transfer; and b) order the respondent to provide by a date and time set by the court written proof of compliance. Rule 10b(2)-(3), RDVCP. If the judge is not satisfied with the sufficiency of the respondent's written proof of surrender, the court may schedule a compliance hearing and require the respondent to appear and provide further proof. Rule 24a, RDVCP.

a) Costs

Also mandatory is the assessment of costs and fees against the respondent whenever relief is granted by DVPO, unless the respondent has an approved fee waiver affidavit. Rule 4(e), RDVCP. *See also* W. Va. Code § 48-27-508. No costs are to be assessed against the petitioner for failure to appear or present evidence at the final hearing, or for moving to terminate a protective order. Rule 4(b) and (c), RDVCP. However, the court may assess costs against a petitioner if, after the presentation of evidence, the court denies the DVPO **and further finds** that the petitioner

is not a victim of domestic violence, sexual assault, or stalking. Rule 4(d), RDVCP.

When a DVPO is granted, absent an approved fee waiver, court costs and fees must be assessed by the court against the respondent, to be paid within 10 days. Rule 4(e), RDVCP. The costs and fees include: 1) Family Court Fund -- $25.00; 2) Magistrate Court Fund -- $10.00; 3) Court Security Fund -- $5.00; and 4) Regional Jail Authority -- $10.00. Additionally, applicable service fees are to be assessed as follows: 1) for service of process by law enforcement -- $25.00; and 2) for certified mail service by the circuit clerk -- $20.00. Rule 4(f), RDVCP; W. Va. Code § 48-27-701. The court must require any party assessed costs to provide the court proof of payment within 10 days of the order. Rule 4(g), RDVCP.

Previously, there was a discrepancy in the rules because Rule 11(i) provides for personal service by either the sheriff's office or by another law enforcement agency and Rule 4(f) only authorized assessment of personal service fees when done by the sheriff's office. This limitation in Rule 4 was due to the relevant statutory provision authorizing sheriff's office but not other law enforcement agencies to charge for service of process. W. Va. Code § 59-1-14. In 2012, however, the Legislature amended West Virginia Code § 48-27-701 to expressly authorize *any* law enforcement agency that serves domestic violence pleadings and orders to receive the service fees provided by Rule 4. On February 13, 2013, the Supreme Court approved an amendment to Rule 4 so that it better correlates with the 2012 legislative amendments. Rule 4 now provides for the assessment of fees when service is made by a law enforcement agency. Rule 4, RDVCP.

In 2015, the Legislature amended West Virginia Code § 48-27-507. Although the statute still provides that mutual protective orders are prohibited unless two requirements are met, it now specifies that § 48-27-507 should not be construed in a way that prevents a family court from restricting contact between parties while an action is *pending*. *See* W. Va. Code §§ 48-27-507 and 51-2A-2a. Pursuant to West Virginia Code § 51-2A-2a(a), "a family court in its discretion may, at any time during the pendency of any action prosecuted under chapter forty-eight of this code, restrict contact between the parties thereto without a finding of domestic violence under article twenty-seven of said chapter." An order restricting conduct under West Virginia Code § 51-2A-2a is **not** a protective order. In fact, the statute was enacted to restrict behavior that is not severe enough to be addressed by a protective order. W. Va. Code § 51-2A-2a(f).

2. Permissive Provisions

See Bench Cards 13 and 14, Appendix B.

Consistent with the particular circumstances of a case, as provided under West Virginia Code § 48-27-503, any DVPO protecting a victim of domestic violence may also address one or more of the following matters:

> (1) Granting possession to the petitioner of the residence or household jointly resided in at the time the abuse occurred;
> (2) Ordering the respondent to refrain from entering or being present in the immediate environs of the residence of the petitioner;
> (3) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children named in the order;[5]
> (4) Establishing terms of temporary visitation with regard to the minor children named in the order including, but not limited to, requiring third party supervision of visitations if necessary to protect the petitioner and/or the minor children;[6]
> (5) Ordering the noncustodial parent to pay to the caretaker parent a sum for temporary support and maintenance of the petitioner and children, if any;
> (6) Ordering the respondent to pay to the petitioner a sum for temporary support and maintenance of the petitioner, where appropriate;
> (7) Ordering the respondent to refrain from entering the school, business or place of employment of the petitioner or household or family members for the purpose of violating the protective order;
> (8) Ordering the respondent to participate in an intervention program for perpetrators;
> (9) Ordering the respondent to refrain from contacting, telephoning, communicating, harassing or verbally abusing the petitioner;
> (10) Providing for either party to obtain personal property or other items from a location, including granting temporary possession of motor vehicles owned by either or both of the parties, and providing for the safety of the parties while this

[5] If the court is going to permit visitation of a child by a parent who has committed domestic violence, the court must first find that adequate provision for the safety of the child and petitioner can be made. W. Va. Code § 48-27-509(a). (*See* further discussion of custody and visitation issues in section F.4. below.)

[6] If the court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation. W. Va. Code § 48-27-509(d).

See Bench Cards 13 and 14, Appendix B.

> occurs, including ordering a law-enforcement officer to accompany one or both of the parties;
> (11) Ordering the respondent to reimburse the petitioner or other person for any expenses incurred as a result of the domestic violence, including, but not limited to, medical expenses, transportation and shelter; and
> (12) Ordering the petitioner and respondent to refrain from transferring, conveying, alienating, encumbering, or otherwise dealing with property which could otherwise be subject to the jurisdiction of the court or another court in an action for divorce or support, partition or in any other action affecting their interests in property;
> (13) Awarding the petitioner the exclusive care, possession, or control of any animal owned, possessed, leased, kept or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent and prohibiting the respondent from taking, concealing, molesting, physically injuring, killing or otherwise disposing of the animal and limiting or precluding contact by the respondent with the animal; and
> (14) Ordering any other relief the court deems necessary to protect the physical safety of petitioner or those persons for whom a petition may be filed as provided in subdivision (2), section three hundred five of this article.

No DVPO may directly modify or affect title to any real property. Both real and personal property, however, may become subject to a lien for a past due child support ordered under a DVPO pursuant to West Virginia Code § 48-27-503(5). *See* W. Va. Code § 48-27-506; *see also* W. Va. Code §§ 48-14-301 (liens against real estate for overdue support); 48-14-201 (liens against personal property for overdue support). Section 48-27-506 authorizes these liens only for past due child support; not for past due support for a petitioner granted in a DVPO under subsection (6) of West Virginia Code § 48-27-503.

3. Appointment of Guardian *ad litem*

If appropriate, the court may appoint an attorney to serve as guardian *ad litem* to protect the interests of any child indirectly involved in the domestic violence proceeding.[7] A guardian *ad litem* may be appointed for the child if the court believes such appointment would be helpful in making a determination of child-related issues in the case, such as custody and

[7] This discussion of appointment of guardians *ad litem* relates to those cases where the child or children are not parties, but there are significant child-related issues arising between the parties, typically the parents. For a discussion of the appointment of guardians *ad litem* for minors who are parties, see Chapter 3, section C.

See Bench Card 5, Appendix B.

visitation matters. Rule 26, RDVCP; Rule 21, TCR. The order of appointment should specify the roles, duties, and authority of the guardian *ad litem*. The duties of a guardian *ad litem* typically include conducting an investigation and reporting to the court concerning unresolved issues and making recommendations relevant to the child's best interests in the outcome of the case. Rule 21.03, TCR.

Rule 26 of the Domestic Violence Rules provides that Rule 21 of the Trial Court Rules governs the appointment of guardians *ad litem* in domestic violence cases. Rule 26, RDVCP. Trial Court Rule 21 primarily addresses eligibility and compensation matters relating to guardians *ad litem*. In 2012, the Supreme Court amended Rule 47 of the *Rules of Practice and Procedure for Family Court*. As an important part of these amendments, the Court incorporated into Rule 47 the *Guidelines for Guardians Ad Litem in Family Court Cases.* Rule 47(b), RFCP; Appendix B, RFCP. Domestic Violence proceedings are outside the scope of the Family Court Rules unless specifically referenced in a particular rule. Rule 1, RFCP. Rule 47 does not specifically refer to domestic violence proceedings, but it does state that Trial Court Rule 21, Rule 47 itself, and the GAL Guidelines "shall govern the appointment of guardians *ad litem in family court cases*." Rule 47(b), RFCP (emphasis added). The Guidelines provide essential standards for GALs and there is no reason to believe they should not apply to domestic violence cases. The comprehensive amendments to Family Court Rule 47 post-date the last amendments to Domestic Violence Rule 26 relating to GAL appointments in domestic violence cases. For these reasons, Family Court Rule 47 and the GAL Guidelines in Appendix B of those rules should be applied in domestic violence cases when a guardian *ad litem* is appointed. To clarify this point, any order of appointment of a guardian *ad litem* in a domestic violence case should specifically state that Family Court Rule 47 and the GAL Guidelines apply to the appointment.

Under Trial Court Rule 21, the issue of compensation of a guardian *ad* litem in a domestic violence case is handled in one of three possible ways. First, if the guardian *ad litem* serves voluntarily, the service may be without compensation. Second, a party-parent who is not subject to a fee waiver due to indigency could be directed to pay for the services of the guardian *ad litem*. If this second approach is being considered, there is one important limitation with regard to domestic violence cases to keep in mind. Although Trial Court Rule 21 would permit a court to order a non-indigent prevailing party to pay some or all of the guardian *ad litem* fees in other types of cases, a *prevailing* litigant in a domestic violence case may not be ordered to pay any court-related costs or fees, including guardian *ad litem* fees. *See* Rule 4(e), RDVCP. Third, if the proper criteria are

met,[8] payment may be made, normally not to exceed $3,000, by the Supreme Court Administrative Director. An appeal to the Supreme Court is to be treated as a separate case with regard to compensation by the Administrative Director. In exceptional cases, for good cause shown based upon a request of the appointing judge, the Administrative Director may authorize and pay a fee in excess of $3,000. Rule 21.06, TCR.

Office expenses (e.g., internal copying, postage, long-distance telephone, invoice preparation, etc.) are not subject to reimbursement by the Administrative Director. But copy charges imposed by others to obtain records and mileage expenses are subject to reimbursement. Reimbursed expenses are in addition to compensation (and therefore, outside of the compensation limits). In some circumstances (e.g., party or parties no longer qualifying indigents), the family or circuit court may tax the costs of an appointment of a child's guardian *ad litem* to either party, and require that any compensation previously paid by the Administrative Director be refunded. Rule 21.06, TCR. A prevailing party in a domestic violence proceeding, however, could not be taxed such costs in any event. Rule 4(e), RDVCP.

4. Child Custody and Visitation

See Bench Card 14, Appendix B.

As part of the relief granted in an emergency protective order, a magistrate may award temporary custody of any minor children involved directly or indirectly in the proceedings, whether or not they have been subjected to acts of domestic violence. W. Va. Code § 48-27-503(3). However, if a temporary divorce or separate maintenance order is in effect, a magistrate issuing a TEPO may only modify any established custody or visitation award upon a showing, by clear and convincing evidence, that the child is a victim of the respondent's abuse. W. Va. Code § 48-27-402(d).

Temporary custody and visitation rights may also be established by family or circuit court in a final protective order, and if appropriate for the protection of the petitioner or children, the order may further require third party supervision of visitation exercised by the respondent. W. Va. Code § 48-27-503(3) and (4). When granting temporary custody or visitation in a protective order, the judge should give paramount concern to the child's safety, as well as consider the lasting emotional harm to children from victimization and from exposure to domestic violence. *Henry v. Johnson*, 192 W. Va. 82, 450 S.E.2d 779 (1994). The court should also consider directing that any child visitation granted a respondent be supervised,

[8] For the present discussion, the relevant qualifying criteria for appointment of a guardian *ad litem* would be: "an infant of a party who is indigent or parties who are indigent, provided however, if both parents are parties to the action, both parents must be indigent." Rule 21.05(b), TCR.

See Bench Cards 1 and 2, Appendix B.

particularly when the child has witnessed the abuse. *Lufft v. Lufft*, 188 W. Va. 339, 424 S.E.2d 266 (1992). Furthermore, the potential for recurring domestic violence should always be thoroughly evaluated. In some cases, a parent-victim escaping an abusive relationship may be forced to leave children behind due to threats or other misconduct by the abuser. This should not be considered as abandonment for purposes of determining custody. *See Feaster v. Feaster*, 192 W. Va. 337, 452 S.E.2d 428 (1994). The best interests of the child are always of primary consideration in awarding custody or visitation. *Dale Patrick D. v. Victoria Diane D.*, 203 W. Va. 438, 508 S.E.2d 375 (1998). *See also* W. Va. Code § 48-9-209(a)(3) (In allocating custodial responsibility in a domestic relations case, acts of domestic violence are to be considered in the determination.).

See Bench Card 14, Appendix B.

A court may order visitation with a child by a parent who has committed domestic violence **only** if the court finds that adequate provision for the safety of the child and the petitioner can be made. W. Va. Code § 48-27-509(a). This finding should be based only upon reliable, corroborated evidence. In many cases, the parties may be unable or unwilling to present complete and accurate information. For example, a parent-victim may fear retaliation, or the parent-abuser may present a false impression of cooperation to the court in order to regain control of the victim through the children. In visitation as well as custody matters, the paramount consideration is the best interests of the child. Syl. Pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996); therefore, "[c]ases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syl. Pt. 7, *Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995). Prior to allowing visitation, particularly unsupervised visitation, the court should require sufficient investigation and evidence regarding any circumstances that may pose a danger to the children or victim-parent. A guardian *ad litem* should be appointed to provide an independent investigation and report when needed. Rule 26, RDVCP; Rule 21, TCR; Rule 47, RFCP.

If the court finds that visitation can be safely accomplished, the court may order various protective measures as outlined in West Virginia Code § 48-27-509(b). Such protective measures may include, among other things, a neutral site for the exchange of children or for supervised visitation. Currently, in two-thirds of the counties in the State, these services are available through various agencies. (*See* Visitation Centers listed in Chapter 10.) If a family or household member is authorized to supervise visitation, the court must specify the conditions to be followed during visitation. W. Va. Code § 48-27-509(d). Regardless of whether any visitation is allowed, the court may order the address of the petitioner and any children be kept confidential. W. Va. Code § 48-27-509(c).

a) Clear and specific terms

Broadly termed custody or visitation order provisions may be adequate or beneficial in some divorce cases -- to encourage cooperation and allow for accommodation and flexibility in the parenting plan. However, in domestic violence cases, such cooperative measures are generally unworkable, and may increase the risk of further violent or abusive acts against the victim or the parties' children. Any vagueness in the terms of custody or visitation provisions in protective orders may provide the respondent-abuser with the opportunity to "work around" the order in an effort to regain control over the victim. For example, the respondent may attempt to directly manipulate the victim by imposing his own specifics upon a generally worded custody or visitation provision. Similarly, the respondent may seek to indirectly regain control over his partner by dictating when and where he will exercise his visitation rights.

See Bench Card 14, Appendix B.

Clear and specific terms in protective orders regarding custody and visitation provide the parties with readily understood and known parameters. Not only will precise language decrease the abuser's ability to regain control -- specific terms are also more readily enforceable by the police and the courts if a violation occurs. Therefore, in any domestic violence case in which the parties have minor children, protective orders should clearly specify custodial rights, and if the court finds that child visitation with the respondent is appropriate, and can be exercised without endangering the petitioner or children, the court should impose detailed visitation terms, such as:

> a) How the parties will communicate with each other, if necessary, in making any child visitation arrangements, whether direct (e.g. by telephone) or via a third-party;
> b) Whether any supervision is required for visitation and, if so, who is to supervise;
> c) Specific days of the week and times for visitation;
> d) Who is to provide transportation for the children before and after visits, with pick-up and drop-off locations;
> e) Where visitation may take place, whether it may be in the noncustodial parent's home or in a neutral location; and
> f) Restrictions upon the noncustodial parent's travel with the children during visitation periods, such as imposing a 50-mile limit or specifying permissible recreational sites.

See Bench Card 14, Appendix B.

A number of these conditions of visitation listed above, among others, are summarized in West Virginia Code § 48-27-509. As provided in subsection (b)(7) of that statute, the court has the discretion to impose any condition for visitation considered necessary to provide for the safety of the petitioner, children, or any other family or household member. The

circumstances will certainly vary from case to case and, therefore, the appropriate visitation conditions will differ. Whatever terms are imposed in each case, they should be clear and precise.

b) Custody with a non-parent

There are instances where the possibility exists that temporary custody may be sought by a person who does not stand in a parent-child relationship with the children named in the domestic violence petition. Any family or household member (as defined in West Virginia Code § 48-27-204) may file a petition on behalf of a minor child who is the victim of domestic violence. W. Va. Code § 48-27-305(2). A minor also may file a petition on his or her own behalf. Rule 23a(b), RDVCP. Often these petitions filed by or on behalf of a minor name one or both parents as the respondents. If a protective order is to be granted, temporary custody with a non-parent may be necessary. However, the care and custody of one's own child is a fundamental right, tempered only by a clear showing of parental unfitness affecting the welfare of the child. *See generally Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000); *In re Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973); *In re Jade E.G.*, 212 W. Va. 715, 575 S.E.2d 325 (2002); *In re Antonio R.A.*, 228 W. Va. 380, 719 S.E.2d 850 (2011). Accordingly, "[w]hile the word 'petitioner' can mean people other than 'parents,' . . . domestic violence proceedings are generally inappropriate for litigation of custodial claims by parties who do not have a pre-existing custodial relationship with the children." *J.M.R. v. S.T.R.*, 15 P.3d 253, 256 (Alaska 2001).

Therefore, a protective order entered to restrain a respondent-parent from further acts of domestic violence involving the child may, under these circumstances, include an award of temporary custody to a non-parent when found necessary to protect the child. For example, the grandmother of a child who is the victim of domestic violence of a serious nature by a single-parent may file a petition naming that parent as the respondent, obtain a protective order on behalf of her grandchild, and be awarded temporary custody of the child. A real-life example involved the circumstances in *Katherine B.T. v. Jackson*, 220 W. Va. 219, 640 S.E.2d 569 (2006). Richard B., a 15-year-old, filed a domestic violence petition against his mother, a single parent. Richard B. alleged in his petition that his mother choked him and punched him in the face. The Jefferson County Magistrate entered an EPO and placed Richard B. in the temporary custody of his 27-year-old sister who lived in nearby Maryland.[9] At the final hearing, after hearing evidence from the petitioner-son and respondent-mother, the family court judge issued a 180-day protective order and granted temporary custody to the sister in Maryland, and further

[9] As a mandatory reporter, the magistrate promptly reported this incident to the DHHR.

granted permission to place Richard B. in the physical custody of Randall W., a family friend.[10]

(*See* section E.4. above regarding mandatory reporting of suspected child abuse.) (A discussion of custody determinations involving more than one state can be found in section G of this chapter.)

5. Child Support

A parent who is a party to a domestic violence proceeding may be ordered in a protective order to pay child support to the caretaker parent. W. Va. Code § 48-27-503(5). Child support awards must generally be calculated pursuant to the support guidelines. W. Va. Code § 48-13-701. The guidelines may be disregarded or adjusted only if the court finds, on the record and preferably in writing, that the formula should be disregarded or modified "to accommodate the needs of the child or the circumstances of the parent or parents." W. Va. Code § 48-13-702(a). *See also Soulsby v. Soulsby*, 222 W. Va. 236, 242-44, 664 S.E.2d 121, 127-30 (2008). Factors that may be possible reasons for deviating from the formula include:

> (1) Special needs of the child or support obligor, including, but not limited to, the special needs of a minor or adult child who is physically or mentally disabled;
> (2) Educational expenses for the child or the parent (i.e., those incurred for private, parochial, or trade schools, other secondary schools, or post-secondary education where there is tuition or costs beyond state and local tax contributions);
> (3) Families with more than six children;
> (4) Long distance visitation costs;
> (5) The child resides with third party;
> (6) The needs of another child or children to whom the obligor owes a duty of support;
> (7) The extent to which the obligor's income depends on nonrecurring or nonguaranteed income; or
> (8) Whether the total of spousal support, child support and child care costs subtracted from an obligor's income reduces that income to less than the federal poverty level and conversely, whether deviation from child support guidelines would reduce the income of the child's household to less than the federal poverty level. W. Va. Code § 48-13-702(b).

[10] The custody matter was not addressed in the Supreme Court appeal, as the parties reached an agreed settlement regarding Richard B.'s custody while the appeal was pending.

Any protective order directing that support be paid must provide for the automatic withholding from income of the party ordered to pay support. W. Va. Code § 48-14-401.[11] This provision is to be enforced by the DHHR Bureau for Child Support Enforcement (BCSE). W. Va. Code § 48-14-404. Any family or circuit court order (or order of extension) imposing, modifying, or terminating child support must be delivered (by hand or fax) to the local child support enforcement office (along with the completed BCSE IV-D application) no later than the next judicial day following the hearing date. Rule 22(b), RDVCP. Upon receipt of a copy of the order, BCSE will begin the process of withholding the child support from the responsible party's wages or other income source. The income withholding requirement may be avoided if the court finds good cause not to require income withholding, based upon consideration of the best interest of the child or children and, in the court's discretion, the obligor's past payment record. W. Va. Code § 48-14-403(2). Alternatively, if the parties agree in writing not to institute it, the income withholding requirement may be avoided, so long as the order provides the following assurances and conditions:

> (1) The order must provide that income withholding will begin immediately upon the occurrence of any of the following:
> (A) When the payments which the obligor has failed to make under the order are at least equal to the support payable for one month, if the order requires support to be paid in monthly installments;
> (B) When the payments which the obligor has failed to make under the order are at least equal to the support payable for four weeks, if the order requires support to be paid in weekly or biweekly installments.
> (C) When the obligor requests the bureau for child support enforcement to commence income withholding; or
> (D) When the obligee requests that such withholding begin, if the request is approved by the court in accordance with procedures and standards established by rules promulgated by the commission pursuant to this section and to chapter twenty-nine-a [§§ 29A-1-1 et seq.] of this code. W. Va. Code § 48-14-403.

Child support arrearage stands as a lien against the personal property of the party ordered to pay. W. Va. Code §§ 48-27-506; 48-14-201. Upon filing of the proper affidavit of accrued support, child support arrearage may also stand as a lien against any real estate owned by the obligor. W.

[11] Any order directing payment of support that does not expressly provide for automatic withholding from the obligor's income (or make written exception under W. Va. Code § 48-14-403), is nevertheless to be considered as authorizing such automatic withholding. W. Va. Code § 48-14-401(b).

Va. Code §§ 48-27-506; 48-14-301. The BCSE may also commence civil or criminal contempt proceedings for enforcement of unpaid support obligations. W. Va. Code § 48-14-501.[12] Finally, the BCSE may seek to suspend the various licenses listed in West Virginia Code § 48-15-201 if child support is overdue, and other statutory enforcement methods to collect the support arrearage have been exhausted or are not available. W. Va. Code § 48-15-203.

When a domestic violence case is dismissed in which a child support order has been entered, the court must enter an order terminating the support obligation, and hand deliver or fax the order to the local child support enforcement office by the next judicial day. The order must also state the date the support obligation shall end. Rule 22, RDVCP.

6. Other Support

Where appropriate, a respondent may be ordered in a domestic violence proceeding to pay temporary support to the petitioner. W. Va. Code § 48-27-503(6). In determining whether support should be awarded and the amount, the court may be guided by West Virginia Code § 48-5-510 (temporary support in divorce cases), which directs the family court to consider the financial needs of the parties, the income of each party, and the legal obligation of each party to support other people. Although W. Va. Code § 48-27-503(6) does not limit the court's authority to award support to a *spouse* only, support should only be awarded if there is some duty of the respondent to support the petitioner based upon the relationship of the parties or upon other circumstances.

7. Possession of Residence, Vehicle, and Other Property

The court may grant the petitioner the temporary possession of a residence shared with the respondent. W. Va. Code § 48-27-503(1). The court may also grant to either party the temporary possession of vehicles owned by either or both of the parties. W. Va. Code § 48-27-503(10). If necessary or appropriate, the court may also direct the respondent to pay the petitioner sums for house payments, rent, or car payments as part of temporary support and maintenance of the petitioner. W. Va. Code § 48-27-503(6). Additionally, either party may be permitted to take possession of personal property. The court may direct a law-enforcement officer to accompany one or both parties when obtaining a vehicle or other personal property. W. Va. Code § 48-27-503(10). The provisions of this subsection are most frequently used when the parties to a domestic violence proceeding reside together and the petitioner is awarded the temporary use of the residence. In such circumstances, the respondent, with a law-

[12] *See* Chapter 5 -- *Enforcement of Protective Orders* for a discussion of civil and criminal contempt jurisdiction and filing requirements.

enforcement officer present, may be permitted to remove clothing and other personal effects. The court may award the petitioner exclusive possession of any animal held by either party (or held by a child residing with either party) and further prohibit the respondent from engaging in any adverse action regarding the animal. W. Va. Code § 48-27-503(13).

8. Other Relief Necessary to Protect Physical Safety

The court has discretion to order any other relief deemed necessary to protect the physical safety of the petitioner and other household members. W. Va. Code § 48-27-503(14).

See Bench Cards 12-14, Appendix B.

9. Persons Witnessing or Reporting Domestic Violence

If the case relates to a witness petition, pursuant to West Virginia Code § 48-27-504, any DVPO issued by the court may order the respondent:

> (a) To refrain from abusing, contacting, telephoning, communicating, harassing, verbally abusing or otherwise intimidating the protected person;
> (b) To refrain from entering the school, business or place of employment of the protected person for the purpose of violating the DVPO; and
> (c) To refrain from entering or being present in the immediate environs of the petitioner's residence.

10. Modification of Domestic Violence Protective Orders

Upon the motion of any party, the family court may modify the terms of a DVPO. W. Va. Code § 48-27-505(f). Further, as provided under West Virginia Code § 48-27-501(b), the terms of any DVPO are also subject to modification if a subsequent domestic violence petition is filed by a party. Orders entered in divorce proceedings containing provisions enjoining abuse under West Virginia Code § 48-5-509, upon the motion of a party, may also be modified in order to provide appropriate protection for parties and children. W. Va. Code § 48-5-702.

G. Multi-Jurisdiction Custody Issues

Domestic violence in a relationship can often lead to either the victim or the abuser (or sometimes both) moving from one jurisdiction to another. When parties in a severed relationship have children, even in the absence of the compounding effects of domestic violence, complex issues regarding custody determinations frequently arise in a multi-jurisdictional dispute. The preliminary legal concerns for the courts are the jurisdictional questions surrounding which state should decide the custody issues; and

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if a custody order has already been issued in another jurisdiction, whether it should be given full faith and credit by another state.

The federal Parental Kidnapping Prevention Act (28 U.S.C. § 1738A) specifically addresses these interstate jurisdictional and enforcement matters for child custody proceedings. On the state level, West Virginia has enacted the model state code on this subject -- the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA codified at West Virginia Code §§ 48-20-101 *et seq.*[13] This Act provides many more specifics than the federal Act, but on the central issues regarding jurisdiction and interstate enforcement, the effect of the two laws is substantially similar. To the extent of any conflict, the requirements of the federal Act would preempt state law on the same issue by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2. The following discussion focuses upon how these Acts may relate to custody and visitation matters in domestic violence proceedings.

1. Federal Parental Kidnapping Prevention Act

See Bench Card 7, Appendix B.

The federal statute, 28 U.S.C. § 1738A, commonly referred to as the Parental Kidnapping Prevention Act (PKPA), is codified under the title -- "Full faith and credit given to child custody determinations."[14] The PKPA protects the exclusive jurisdiction of a state that initially makes the custody determination, and mandates that other states give the issuing state's order full faith and credit, provided the order satisfies the PKPA's due process and jurisdictional requirements. The PKPA establishes the jurisdictional ground rules for the states; it does not create any rights or remedies for litigants. *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513 (1988) (no implied federal cause of action under PKPA to resolve conflicting custody decrees).

The PKPA applies to both child custody and visitation determinations made by any court, and applies to temporary and permanent orders. 28 U.S.C. § 1738A(b)(3) and (9). Therefore, the jurisdiction provisions of the PKPA would be applicable to any protective order addressing custody or visitation matters issued in this State, whether issued by the magistrate, family, or circuit court. Even before any order is issued, if a proceeding

[13] Before adoption of the UCCJEA, West Virginia had adopted its predecessor, the Uniform Child Custody Jurisdiction Act.

[14] In addition to this statute providing for interstate enforcement of custody decrees by state courts, the PKPA added law enforcement mechanisms for use in parent-abductions, including making the Federal Parent Locator Service available to find abductors [42 U.S.C. § 654(17) and 663], and permitting the issuance of federal Unlawful Flight to Avoid Prosecution arrest warrants under the Fugitive Felon Act for abductors fleeing across state or international lines to avoid prosecution on state felony abduction charges [18 U.S.C. § 1073].

that will involve a custody determination is pending in a court of another state exercising jurisdiction consistently with the PKPA, then a court in West Virginia generally may not exercise jurisdiction over custody matters in any proceeding subsequently brought in this State, unless there is a basis for temporary emergency jurisdiction. 28 U.S.C. § 1738A(g). The PKPA also precludes other states from modifying a custody order issued by another state, except when all custodians and the child have moved from the issuing state or that state has declined jurisdiction. 28 U.S.C. § 1738A(f) and (h).

The principal enforcement and jurisdiction provisions of 28 U.S.C. § 1738A provide:

> (a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.
> . . .
> (c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--
> (1) such court has jurisdiction under the law of such State; and
> (2) one of the following conditions is met:
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;
> (B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;
> (C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling,

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> or parent of the child has been subjected to or threatened with mistreatment or abuse;
> (D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or
> (E) the court has continuing jurisdiction pursuant to subsection (d) of this section. (The full text of 28 U.S.C. § 1738A can be found in Chapter 9, section B -- *Federal Statutes*.)

Subsection (a) is the full faith and credit provision of the statute. This provision directs that if there is a custody order from another state meeting the PKPA's jurisdiction and notice requirements, subject to the limited exceptions authorizing modification, the order must be enforced. *Arbogast v. Arbogast*, 174 W. Va. 498, 327 S.E.2d 675 (1984) (PKPA extends full faith and credit principles to child custody decrees and requires every state to enforce sister state custody orders that are consistent with the Act); *Sheila L. v. Ronald P.M.*, 195 W. Va. 210, 465 S.E.2d 210 (1995). If there is no enforceable order from another state, subsection (c) sets out the standards for determining the appropriate jurisdiction to make the initial custody determination.

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It is clear from the language of the PKPA, particularly the terms of subsection (a), that this federal statute directly controls enforcement and modification of existing custody decrees. If no custody order is yet in place, and no proceeding pending in another jurisdiction [see subsection (g) of the statute], then the jurisdictional hierarchy set forth in subsection (c) only indirectly controls the forum choice. That is, subsection (c) does not mandate which jurisdiction must make the initial custody determination; rather, the PKPA simply provides that any order issued by a state court which does not satisfy the jurisdictional criteria will not be entitled to full faith and credit enforcement in other states.[15] The West Virginia Supreme Court, in *Sams v. Boston*, 181 W. Va. 706, 384 S.E.2d 151 (1989), made the following observations on this last point:

> [T]he Federal PKP Act gives a distinct priority to the state court exercising "home-state" jurisdiction to enter an initial custody decree. Therefore, the Federal PKP Act makes it judicially imprudent for a state court in one state to exercise

[15] In contrast, the UCCJEA, discussed in the following section, affords priority to the "home state" to make an initial custody determination. *See* W. Va. Code § 48-20-201.

> jurisdiction to enter an initial custody decree when a state court in another state has "home-state" jurisdiction and has not declined to exercise that jurisdiction; if conflicting decrees were issued, only the custody decree of the "home-state" court would be entitled to full faith and credit under the Federal PKP Act. 181 W. Va. at 712, 384 S.E.2d at 157.

This distinction between enforcement *requirements* and jurisdictional *considerations* under the federal PKPA has limited practical bearing on most multi-jurisdictional custody disputes; particularly when similar jurisdictional standards are imposed by state law under the UCCJEA. However, as later discussed, this distinction can be important in some cases where temporary emergency jurisdiction is exercised -- a circumstance most often arising in situations where domestic violence is involved. The PKPA expressly provides that an emergency custody determination is only entitled to full faith and credit if the state has jurisdiction under its own laws and when "the child is physically present in such state and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse." 28 U.S.C. § 1738A(c)(2)(C). Since West Virginia has adopted the UCCJEA, its effect upon similar provisions in the PKPA must be considered when the proper state to exercise jurisdiction over a custody dispute is at issue.

2. Uniform Child Custody Jurisdiction and Enforcement Act

The UCCJEA (codified at W. Va. Code §§ 48-20-101 *et seq.*) sets forth the jurisdictional standards that must be applied by the family courts in West Virginia when determining whether to exercise jurisdiction in interstate custody cases.[16] The UCCJEA generally provides that the family courts may make determinations or modifications in custody cases only when one of the jurisdiction provisions of West Virginia Code §§ 48-20-201, -202, or -203 apply. This will commonly involve either "home state" jurisdiction or "significant connection" jurisdiction.

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In many domestic violence cases where interstate custody questions may arise, however, the more common jurisdictional prerequisites have not been met in this State. In these instances, the most likely basis for West Virginia authority over the custody matter is temporary emergency

[16] The provisions of the UCCJEA expressly apply only to family courts in this State. W. Va. Code § 48-20-102(f). Nevertheless, when magistrate courts make initial custody determinations in domestic violence cases, the similar jurisdictional standards provided by the PKPA should be utilized so that an EPO or TEPO issued (which also meets the PKPA subsection (e) due process criteria) would be entitled to full faith and credit enforcement in other states.

jurisdiction under West Virginia Code § 48-20-204. Analogous to the emergency jurisdiction provision in subsection (c)(2)(C) of the PKPA, the UCCJEA provides that:

> A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or a parent of the child, is subjected to or threatened with mistreatment or abuse. W. Va. Code § 48-20-204(a).

Emergency jurisdiction is always a secondary, or supplemental, basis for a court's exercise of jurisdiction in an interstate custody matter. It is essentially a limited provision for *concurrent* jurisdiction when emergency circumstances are presented to a court. In this sense, this jurisdiction is truly temporary -- until the state with primary jurisdiction (based upon "home state," "significant connection," "continuing jurisdiction," or related principles) can act to resolve the dispute in a more comprehensive and final manner. W. Va. Code § 48-20-204(c). As summarized by the Arkansas Supreme Court in *Murphy v. Danforth*, 323 Ark. 482, 491, 915 S.W.2d 697, 702 (1996): "Emergency jurisdiction may be used to enter a temporary order giving a party custody only for as long as it takes to travel with the child to the proper forum to seek a permanent modification of custody, usually the home state." Similarly, the Rhode Island Supreme Court held that:

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> [E]ven though a court may invoke emergency jurisdiction if it is exercised consistently with the laws of the state wherein that court is located, this jurisdiction continues only for as long as the emergency exists or until a court that has jurisdiction to enter or modify a permanent custody order is apprised of the situation and accepts responsibility. In so holding, we join a growing number of jurisdictions that have likewise determined emergency to be merely temporary jurisdiction. *Nadeau v. Nadeau*, 716 A.2d 717, 725 (R.I. 1998) (citing cases).

In some cases, however, the temporary-jurisdiction state could end up also making the final custody determination, such as when the former primary-jurisdiction state finds the other state to be the more appropriate forum. *See* W. Va. Code § 48-20-204(b).

Under both the PKPA and the UCCJEA, emergency jurisdiction requires the child's physical presence in the state; and either abandonment of the child or an emergency situation requiring action to protect the child because either the child, or a sibling or parent, is being subjected to or

threatened with mistreatment or abuse. These emergency circumstances are most frequently presented to a court in a domestic violence proceeding. For example, a battered wife has fled her home state with her children in order to escape further violence and threats by the abusive husband. In the context of an initial appearance by the victim seeking an order of emergency protection for herself and providing for custody of her children, the court will likely be faced with the task of assessing whether a true emergency exists based upon the uncorroborated statements of the victim.[17] Although emergency jurisdiction is to be applied narrowly, the need for prompt action in domestic violence circumstances is an acknowledged fact. In *Sheila L. v. Ronald P. M.*, 195 W. Va. 210, 465 S.E.2d 210 (1995), after holding that emergency jurisdiction under the PKPA is appropriate when a child is in need of protection from continued violence or abuse, the Supreme Court further observed and held as follows:

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> We also are aware that emergency situations often initially do not provide a parent or a court with sufficient time to gather additional evidence beyond the mere statements of a parent; therefore, we further hold that a court may rely upon unsubstantiated statements to invoke emergency jurisdiction if the court finds it necessary to protect the child from actual or threats of mistreatment or abuse. If emergency jurisdiction is based upon the unsubstantiated statements of a parent, additional evidence should be gathered as quickly as reasonably possible to either affirm or negate the allegations. Moreover, temporary jurisdiction should last only so long as the emergency exists or until a court that has jurisdiction to enter or modify a permanent custody award is apprised of the situation and accepts responsibility to ensure that the child is protected. 195 W. Va. at 223, 465 S.E.2d at 223.

If there is no existing custody order issued by another state, and no action that will determine custody pending elsewhere, the West Virginia court's temporary custody determination made under emergency jurisdiction in a protective order will remain in effect until an order is obtained from a court in the state having primary jurisdiction. W. Va. Code § 48-20-204(b). There is nothing in the UCCJEA to support the proposition that a protective order issued under Chapter 48, Article 27 could be extended beyond its maximum statutory period should the primary-jurisdiction state

[17] If the battered wife in the example above had to leave her children behind when fleeing her home state to escape the abuse, a court in another state could issue her a protective order, but could not, on the basis of emergency jurisdiction, grant temporary child custody as part of that order. As earlier stated, the children must be physically present before a court may exercise emergency jurisdiction under the PKPA and UCCJEA.

take longer to reach a final custody determination. Prompt communication and cooperation between the courts of the two states should avoid any lapse where no custody order is in effect.

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If, at the time that a protective order is issued involving a temporary custody determination, there is a prior custody order in effect, or a custody proceeding already pending in a state having primary jurisdiction, the duties of the West Virginia court exercising the emergency jurisdiction are more specific. First, the court must specify in the order a period the court considers adequate to allow the temporary custodian to obtain an order from a court in the primary-jurisdiction state. The temporary custody determination in the protective order issued in West Virginia would remain in effect until the other order is obtained or the specified time period expires, whichever is earlier. W. Va. Code § 48-20-204(c). *See also*, *In re Marriage of Fernandez-Abin*, 191 Cal. App. 4th 1015, 1041, 120 Cal. Rptr. 3d 227, 247 (Cal. App. 4th Dist. 2011).

Second, the West Virginia court exercising this emergency jurisdiction must immediately communicate with the other court where the existing custody order was issued or the custody action is pending. W. Va. Code § 48-20-204(d). This will permit the courts to exchange information and records, and determine the jurisdiction best suited to ultimately resolve the custody dispute. The parties may be permitted to participate in the court communications. An electronic or written record needs to be made of court communications regarding any substantive issues and the parties promptly informed and granted access to the record. W. Va. Code § 48-20-110.

The PKPA differs from the UCCJEA with regard to temporary concurrent jurisdiction when a custody order is already in place or a proceeding to make that determination is pending. Although temporary emergency jurisdiction is recognized under the PKPA [28 U.S.C. § 1738A(c)(2)(C)], it is not an exception to the order modification limitations [28 U.S.C. § 1738A(f) and (h)]. There is also no emergency jurisdiction exception to the PKPA provision prohibiting simultaneous proceedings. [28 U.S.C. § 1738A(g)].

These PKPA enforcement requirements, therefore, could have an impact on the exercise of emergency jurisdiction in the face of a prior order or proceeding. If a West Virginia court exercises emergency jurisdiction when there is an existing custody order or pending custody action in another state, there is a chance the West Virginia order may not be given full faith and credit in other states. Therefore, as observed in *Sheila L. v. Ronald P. M.*, 195 W. Va. at 223, 465 S.E.2d at 223, to avoid any significant abrogation of the PKPA's prohibitions governing modifications of custody orders and simultaneous custody proceedings, any exercise of emergency

jurisdiction should be limited to temporary orders necessary to protect a child from substantial and imminent harm. Additionally, the temporary order, with a clear record of findings supporting the need to exercise emergency jurisdiction, should be promptly transmitted to the court that issued the existing order or has the pending action to encourage and facilitate cooperative enforcement efforts between the states. *See Steckler v. Steckler*, 921 So.2d 740 (Fla. 5th Dist. App. 2006); *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. App. 2007).

H. "Mutual" Protective Orders Strictly Limited

The practice of issuing "mutual" protective orders is expressly discouraged and limited under the Prevention and Treatment of Domestic Violence Act. West Virginia Code § 48-27-507 provides that mutual protective orders are prohibited **unless** two requirements are satisfied. First, both parties must have filed separate petitions under the Act. This separate petition requirement could be satisfied by a written counterclaim which, by statutory terms, must state a claim "that would be a basis for filing a petition under this article." W. Va. Code § 48-27-306(a). *See also* Rule 9(b), RDVCP. Second, mutual protective orders are prohibited unless both parties meet their respective burden of proof and have proven their allegations of domestic violence by a preponderance of the evidence.

If both conditions are met, the court must issue separate protective orders, with findings and relief specific to each party's respective circumstances. Rule 9(b), RDVCP. If only one party proves their allegations, only one protective order may be issued granting terms of relief. *See generally Pearson v. Pearson*, 200 W. Va. 139, 488 S.E.2d 414 (1997) (Workman J., concurring) (Mutual restraining orders, without proper evidentiary foundation, are "generally harmful and ineffective"); *Baker v. Baker*, 1995 Okla. Civ. App. 111, 904 P.2d 616 (1995) (Ex-wife who sought protective order regarding ex-husband was denied constitutional right to due process when trial court issued mutual protective orders); *Deacon v. Landers*, 68 Ohio App. 3d 26, 587 N.E.2d 395, 399 (1990) (Mutual order protecting the respondent issued without notice, separate application, and separate fact-finding deprived petitioner of due process); *Cooper v. Cooper*, 144 P.3d 451 (Alaska 2006) (holding that there must be an independent factual basis for each protective order that is issued).

West Virginia's limitations and requirements for issuance of mutual protective orders are similar to the federal criteria that must be met before one jurisdiction must accord full faith and credit to a mutual protective order issued by another U.S. jurisdiction. *See* 18 U.S.C. § 2265(c). Therefore, any mutual relief granted by a court in this State that fails to comply with the specific requirements of West Virginia Code § 48-27-507 (providing that each party must have filed a petition and proved the

allegations of domestic violence) would also present significant problems if a protected party sought enforcement of that order in another jurisdiction. (A more detailed discussion of full faith and credit issues, including the issues pertaining to mutual orders, may be found in Chapter 5, section B.)

I. Service Upon Parties and Notice to Law Enforcement

The parties must be promptly provided with a copy of the DVPO at the conclusion of the final hearing. If the respondent is not present at the hearing, the DVPO must immediately be served by law enforcement, and in the circuit clerk's discretion, may be simultaneously served by first class mail to the respondent's last known address to expedite the steps for successful service. Rule 11(b), RDVCP. If law enforcement does not file a return showing successful service within five days of the order being issued, the circuit clerk **must** serve the protective order via first class mail to the party's last known address and by publication in the respondent's last known county of residence. Rule 11(b), RDVCP. See also W. Va. Code § 48-27-311. Since personal jurisdiction over out-of-state respondents is obtained prior to holding the final hearing, service of the DVPO on these respondents is likewise accomplished under Rule 11(b). Failure to serve the DVPO in any case, however, does not stay its effect if the respondent has actual notice of the order and its contents. W. Va. § 48-27-601(c).

Copies of the DVPO must also be provided to the local offices of the municipal police, the county sheriff, and the West Virginia State Police no later than the close of the next business day. W. Va. Code § 48-27-601(a).

J. Effective Time Periods of Domestic Violence Protective Orders

1. Protective Order Timeframes Generally

Initially, at the court's discretion the DVPO period may be set for 90 or 180 days unless, as discussed in the next subsection, an aggravated-factor finding authorizes a longer DVPO period.[18] However, if the petitioner files a written extension request prior to the expiration of the protective order, regardless of whether the initial period was 90 or 180 days, the court must extend the DVPO for an additional 90-day period. W. Va. Code § 48-27-505(a). The order extending the protective order for an additional 90 days must be immediately served by law enforcement. If law enforcement does not file a return indicating successful service within five days, the circuit clerk must serve the respondent by first class mail to the last known

[18] The 90 or 180-day timeframe may also be altered (shortened or extended) if a domestic relations action is filed while the DVPO is in effect. W. Va. Code § 48-27-401(d). *See* subsection 4. below.

address and through publication in accordance with West Virginia Code § 48-27-311. It is also in the court's discretion to require the respondent be served through certified mail, restricted delivery, return receipt requested to the last known address. Rule 11(c), RDVCP.

2. One-Year Protective Orders

In addition to the 90 or 180-day protective orders, West Virginia Code § 48-27-505(b) authorizes the entry of a protective order for one year in certain circumstances. To obtain this type of protective order, a court must find by a preponderance of the evidence that at least one of the following aggravating factors has occurred:

> (1) That there has been a material violation of a previously entered protective order;
> (2) That two or more protective orders have been entered against the respondent within the previous five years;
> (3) That respondent has one or more prior convictions for domestic battery or assault or a felony crime of violence where the victim was a family or household member;
> (4) That the respondent has committed a violation of the provisions of West Virginia Code § 61-2-9a (stalking and harassment) against a person protected by an existing order of protection; or
> (5) That the totality of the circumstances require a one year period in order to protect the physical safety of the petitioner of those persons for whom a petition may be filed as established by West Virginia Code § 48-27-305(2). W. Va. Code § 48-27-505(b).

A one-year protective order based on aggravated circumstances may be subsequently extended by the court for a period that the court determines is necessary to protect the safety of the petitioner. To extend a one-year protective order, the court must provide notice, conduct a hearing, and find, by a preponderance of the evidence, that one of the following has occurred: 1) the respondent has materially violated the existing protective order or 2) the respondent has committed a material violation of a protective order that was entered in a divorce case. W. Va. Code § 48-27-505(c). If an order of extension is issued and the respondent is not present and served at the conclusion of the hearing, service is to be completed in the same manner outlined in the preceding subsection regarding 90-day extension orders.

3. Modification or Termination

Either party may, at any time while a DVPO is in effect, petition for modification of the order. W. Va. Code §§ 48-27-501(b); 48-27-505(f). If a modified order is issued, any party not served at the conclusion of the hearing should be served in the same manner outlined in subsection 1 above.

A petitioner may seek termination of a protective order still in effect by filing a petition to terminate. As long as the court is satisfied that the petitioner's request was not "coerced" by the respondent, the best practice is to grant the request for early termination. It is important that the domestic violence victim find that she has some control over the civil protection proceedings. Whether the family court grants or denies the motion to terminate, no court costs or fees may be assessed against the petitioner. Rule 4(c), RDVCP. An order terminating a protective order is served by first class mail by the circuit clerk to any party not present at the hearing. Rule 11(d), RDVCP.

4. Filing of Domestic Relations Action While Protective Order in Effect

A condition which will modify the 90 or 180-day periods for DVPOs is when any type of domestic relations action is filed *while a DVPO is in effect*. As provided by West Virginia Code § 48-27-401(d), regarding the interaction between domestic violence actions and the various types of domestic relations proceedings:

> Notwithstanding the provisions set forth in section 27-505, when an action seeking a divorce, an annulment or separate maintenance, the allocation of custodial responsibility or a habeas corpus action to establish custody, the establishment of paternity, the establishment or enforcement of child support, or other relief under the provisions of this chapter is filed or is reopened by petition, motion or otherwise, then any order issued pursuant to this article which is in effect on the day the action is filed or reopened shall remain in full force and effect by operation of this statute until: (1) A temporary or final order is entered pursuant to the provisions of part 5-501, *et seq*. or part 6-601 *et seq*. of this chapter; or (2) an order is entered modifying such order issued pursuant to this article; or (3) the entry of a final order granting or dismissing the action.

If the domestic relations action is a divorce, annulment, or separate maintenance proceeding (hereinafter "divorce action"), unless the family

court issues an order specifically modifying the DVPO, the DVPO will remain in effect until either a temporary or final order is entered in the divorce action under part 5-501 *et seq.* (W. Va. Code §§ 48-5-501 to 514) (temporary relief) or part 6-601 *et seq.* (W. Va. Code §§ 48-5-601 to 613) (final relief). Therefore, a DVPO could terminate early if in a subsequently filed divorce action a temporary or final divorce order is entered prior to expiration of the 90 or 180-day DVPO period. On the other hand, the DVPO would be automatically extended beyond its normal 90 or 180-day period if the later-filed divorce action does not result in a temporary or final order until sometime after the expiration of that period. Until any such divorce order is entered, the DVPO would remain in effect. W. Va. Code § 48-27-401(d).

If the Chapter 48 domestic relations proceeding filed subsequent to the domestic violence case is something other than a divorce action (e.g., paternity action or separate child custody or support action), the temporary relief provisions of part 5-501 *et seq.* and the final relief provisions of part 6-601 *et seq.* of Chapter 48 have no application. In this circumstance, the DVPO would remain in effect until either the family court issues an order specifically modifying the DVPO or a *final* order is entered in the domestic relations action. W. Va. Code § 48-27-401(d). If, for example, a paternity action was filed pursuant to Chapter 48, Article 24 while a DVPO was in effect, absent a specific order modifying the DVPO, the DVPO would remain in effect until a final order was entered in the paternity action. The fundamental point is that the duration of the later-filed domestic relations action (other than divorce) generally controls the effective period of the earlier protective order.

When a party with a DVPO currently in effect files or reopens a domestic relations case involving the same parties, they are to inform the circuit clerk of the existing protective order. Upon verification of this information, the clerk must issue a notice of automatic extension of the protective order. Copies of the notice are to be placed in both the domestic violence case file and the case file of the domestic relations action. Rule 9b, RDVCP. If the domestic violence case is in another county, the clerk should immediately forward a copy of the notice of extension to the circuit clerk in that county for inclusion of the notice in that case file. Service of the notice of automatic extension upon the parties is to be completed in accordance with RDVCP Rule 11(e). Service is to be handled by the circuit clerk in the county where the domestic relations action is filed or reopened, if a different county than where the domestic violence case was filed.

5. Obtaining Protective Order While Domestic Relations Action Pending

If *no DVPO is in effect* at the time a divorce action is filed, the time period for any subsequently issued protective order can also vary from the normal 90 or 180-day timeframes. If, following a magistrate's issuance of a TEPO, the domestic violence matter comes before the family court judge who has jurisdiction over the pending divorce action,[19] and the domestic violence petitioner shows entitlement to further protective relief, the family court may, pursuant to West Virginia Code § 48-5-509, either grant a protective order as part of a temporary order in the divorce action or grant a separate DVPO. In either situation, the protective order "shall remain in effect until a final order is entered in the divorce, unless otherwise ordered by the judge." W. Va. Code § 48-5-509(c). Additionally, after entering a protective order under West Virginia Code § 48-5-509, the family court may later, upon the motion of either party, modify the terms of the protective relief by entering a new order as determined appropriate under the particular circumstances. W. Va. Code § 48-5-702.

6. Extending Protective Order Relief at Time of Final Divorce Decree

Regardless of whether a DVPO or a divorce action is first pending, at the time of entry of the final divorce order, the family court may extend protective relief by different methods and for different timeframes. The varying treatment depends upon whether the particular conduct constitutes acts of "abuse" or additionally constitutes domestic violence warranting greater protective relief. As part of the final relief in any divorce action, the family court may *permanently* enjoin an abusive party from molesting or interfering with the other party; may permanently enjoin the offending party from entering the other party's school, business or place of employment for the purpose of molesting or harassing the other party, or entering or being present in the immediate vicinity of the other party's residence, or contacting the other party in person or by telephone for the purpose of harassment, verbal abuse, or threats. W. Va. Code § 48-5-608(a). The "abusive" conduct covered by Section 608(a) is "molesting or interfering with the other party; restraining a party's personal liberty; inter[fe]ring with custodial or visitation rights; molesting or harassing a party at school, business, or place of employment; entering the party's home environs; and phone or verbal harassment." *Riffle v. Riffle*, 235 W.

[19] When a divorce action is pending, a subsequent domestic violence case must be, in almost every instance, transferred to the family court judge hearing the divorce action. The only time such a transfer of the domestic violence proceeding would not be made is on the rare occasion involving cases in two counties, and venue for the domestic violence proceeding is not proper in the county where the divorce action is pending. *See* Rule 13(a)-(b), RDVCP.

Va. 430, 434, 774 S.E.2d 511, 515, n. 16 (2015). The Supreme Court's opinion in *Riffle* also provides instructive guidance on limiting the overuse of mutual restraining (or protective) orders in divorce cases.

To the extent a party to the divorce action proves grounds for further protection as a victim of domestic violence, any additional relief afforded under Chapter 48, Article 27 may be granted as part of the final relief in the divorce action. Any such protective order, whether it be part of the final divorce order or a separate order, may be placed in effect for the period of time ordered by the court not to exceed 180 days. W. Va. Code § 48-5-608(b)-(c). There is, however, a significant exception to this 180-day limitation. If the court determines that a violation occurred with respect to a DVPO entered during or extended by the divorce action, the court may extend the protective order "for whatever period the court deems necessary to protect the safety of the petitioner and others threatened or at risk." W. Va. Code § 48-5-608(c)(A). A court may also extend a protective order if the court finds that a violation of a final order entered under this section has occurred. W. Va. Code § 48-5-608(c)(B).

K. Appeal from Family Court

Upon entry of an order denying or granting a protective order following a final hearing in family court, any party may file a petition for appeal to the circuit court. The appeal petition must be filed within 10 days following entry of the family court order. W. Va. Code § 48-27-510(b); Rule 19(a), RDVCP. If the family court granted a protective order, it shall remain in effect pending the appeal, unless stayed by order of the circuit court. Rule 19(b), RDVCP.[20] Similar to appeals from magistrate court, no appeal bond is required for any appeal from family court. W. Va. Code § 48-27-510(b); Rule 19(a), RDVCP.

The circuit court is required to hear the appeal within 10 days following the filing of the appeal petition. W. Va. Code § 48-27-510(c); Rule 19(a), RDVCP. Although there is a 10-day timeframe, the circuit court appeal does not involve a *de novo* evidentiary hearing. The appeal is on the record established in family court. Rule 19(c), RDVCP. The findings of fact made by the family court are reviewed by the circuit court under a "clearly erroneous" standard. The family court's application of law to the

[20] Although West Virginia Code § 48-27-510(b) authorizes either the family court or the circuit court to stay a protective order during the pendency of an appeal, Rule 19(b) authorizes only the circuit court to issue such a stay. The Rule 19(b) provision supersedes the statutory provision. *See* Rule 1(a), RDVCP ("If these rules conflict with other rules or statutes, these rules shall apply."); *see also* Syl. Pts. 1 & 2, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988); *Games-Neely v. Real Property*, 211 W. Va. 236, 244-45, 565 S.E.2d 358, 366-67 (2002) (Under the Supreme Court's constitutional rule-making authority, rules promulgated by the Court have the force and effect of law, and supersede procedural statutes that conflict with them.).

facts is reviewed under an "abuse of discretion" standard. \W. Va. Code § 48-27-510(d). Accordingly, an appeal hearing before the circuit court would be for the purpose of providing the parties an opportunity to appear for oral argument. The Supreme Court clarified that, unless waived by the appellant, the circuit court must hold a hearing before ruling upon the appeal. In Syllabus Point 4 in *John P.W. ex rel. Adam W. v. Dawn D.O.*, 214 W. Va. 702, 591 S.E.2d 260 (2003) the Court held:

The statutory language "shall be heard" that is set forth in West Virginia Code § 48-27-510(c) connotes in mandatory terms the obligation of the circuit court to afford a petitioner seeking relief from a domestic violence protective order the opportunity to appear and present argument in person in connection with a timely filed appeal unless affirmatively waived by the appealing party.

L. Appeal from Circuit Court

Any party to an order of the circuit court in a domestic violence proceeding may file a petition for appeal seeking review in the West Virginia Supreme Court. Like other civil and criminal proceedings, a party must file a notice of appeal in the West Virginia Supreme Court within 30 days of the entry of the challenged order. A party may request an extension of the time period for filing a notice of appeal by filing a motion with the Supreme Court. Rule 5, RAP. Subsequent to the filing of a notice of appeal, a briefing schedule will be entered, and the parties will have the opportunity to submit briefs in support of their respective positions. Rule 5(d), RAP. Upon application, a stay of the order being appealed may be granted by the circuit court. If the circuit court denies a motion for a stay or if the relief afforded is not acceptable, a party may request a stay in the Supreme Court. Rule 28, RAP.

In *John P.W.*, it was noted that the standard of review utilized by the Supreme Court is the same standard used by the circuit court, under West Virginia Code § 48-27-510(d), when reviewing family court decisions in domestic violence cases. "Upon an appeal from a domestic violence protective order, this Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syl. Pt. 1, *John P.W., supra.*

Chapter 5

ENFORCEMENT OF PROTECTIVE ORDERS

Chapter Contents

A. Statewide Enforcement of Orders

1. Effective in Every County

Every protective order entered by a court under Chapter 48, Article 27 must contain language informing the respondent that the order is in full force and effect in every county in the State. W. Va. Code § 48-27-502(d). It is clear that this statewide reach applies to EPOs [*see* W. Va. Code § 48-27-403(b)] as well as to DVPOs [*see* W. Va. Code § 48-27-505(e)]. *See also* W. Va. Code § 48-27-310 ("Any protective order issued pursuant to this article shall be effective throughout the state in every county.").

In aid of statewide enforcement, every EPO and DVPO (or temporary divorce order providing similar protection) must be promptly transmitted by the court to the Domestic Violence National Registry and the West Virginia Domestic Violence Database. Rule 21, RDVCP; W. Va. Code § 48-27-802(b). Registration of an order is **not** a prerequisite to enforcement. W. Va. Code § 48-27-802(c). Once issued by the court, a protective order is enforceable in the county where issued or in any other county. Additionally, an individual who has a protective order from a jurisdiction outside of West Virginia (or his or her legal representative) may register the order with the West Virginia Supreme Court for entry in the registry. W. Va. Code §§ 48-27-802(b); 51-1-21. Although orders should be registered to facilitate enforcement, the failure to register them does not affect the enforceability of the order. *See* Chapter 3, sections F and G.

2. Entry of Residence

A party who has been awarded exclusive use and possession of the residence in a protective order may file with the court an affidavit attesting to the award and authorizing law enforcement agencies to enter the residence without a warrant for the purpose of enforcing the protective order. The authorization shall be transmitted to the appropriate law enforcement agencies with the order. W. Va. Code § 48-27-601(b).

B. Full Faith and Credit -- Other Jurisdictions' Orders

1. State Statutes

In addition to statewide enforcement of protective orders issued in any of the 55 counties within the State, all law enforcement agencies and courts in the State are directed to accord full faith and credit to any protection order issued by any other state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any territory or possession subject to the jurisdiction of the United States, or any Indian tribe or band that has jurisdiction to issue protection orders. All such jurisdictions are considered "states" for the purposes of the relevant statutes discussed below. W. Va. Code § 48-27-310. This provision specifically directs that any such order from another jurisdiction "shall be accorded full faith and credit and enforced in accordance with the provisions of article twenty-eight of this chapter."

In 2004, West Virginia adopted the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (hereinafter "Uniform Enforcement Act"). Under the Uniform Enforcement Act, codified at West Virginia Code §§ 48-28-1, *et seq.*, the term "protection order" is defined as any "injunction or other order, issued by a tribunal under the domestic violence, family violence or antistalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against,

harassment of, contact or communication with, or physical proximity to another individual." W. Va. Code § 48-28-2(6). This is a fairly comprehensive definition, but it is somewhat modified in scope by two other provisions of the Act. First, Section 48-28-3(b) provides the qualification that "[a] court of this state may not enforce a foreign protection order issued by a tribunal of a state that does not recognize the standing of a protected individual to seek enforcement of the order." This provision is simply an acknowledgement of the constitutional limitations proscribing one state from enforcing the *criminal* laws of another state. For example, if a criminal court from one state issues a criminal release order which, among other things, calls for the revocation of bond or probation if the defendant violates a condition imposed for the protection of a victim, a motion by the state prosecutor is typically necessary for enforcement. This kind of order would not come within the reach of interstate enforcement under the Uniform Enforcement Act. However, in some jurisdictions, the equivalent of a civil protection or restraining order, with the protected individual having standing to enforce it, may be issued by a criminal court. This type of order falls outside the "criminal" enforcement problem between two states that is acknowledged by section 48-28-3(b) and, therefore, could be enforced pursuant to the other provisions of the Uniform Enforcement Act.[1]

The second modification to the Section 48-28-2(6) definition of "protection order" is also found in Section 48-28-3. Subsection (c) of this statute clarifies that any provisions in a valid foreign civil protection order which govern child custody and visitation shall also be enforced, as long as these provisions were issued in accordance with the jurisdictional requirements governing custody and visitation orders under the laws of the issuing state and under federal law. Depending upon the issuing state, this will involve either the Uniform Child Custody Jurisdiction Act (UCCJA) or the more recent Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) codified at West Virginia Code §§ 48-20-101, *et seq.*, as well as the federal statute, 28 U.S.C. § 1738A, commonly referred to as the Parental Kidnapping Prevention Act (PKPA), which is codified under the title – "Full faith and credit given to child custody determinations." A detailed discussion of the issues arising under the UCCJEA and the PKPA can be found in Chapter 4, section G -- *Multi-Jurisdiction Custody Issues*. Finally, in relation to the issues of child custody and visitation, the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act does not provide for the enforcement of family *support* provisions contained in a

[1] To remove the constitutional restraints upon interstate enforcement of *another* state's criminal laws relating to domestic violence, a state may enact its *own* criminal laws providing for state prosecution of a violation of a foreign protection order that is a criminal order. The West Virginia Legislature has enacted provisions that criminalize violations of a foreign protection order that occur in West Virginia. *See* W. Va. Code §§ 48-27-903(a)(3); 48-28-7(a)(3).

foreign protection order. Such support provisions can be enforced under the Uniform Interstate Family Support Act (UIFSA) codified at West Virginia Code §§ 48-16-101, *et seq.* This statute has been enacted in every state.

To accord full faith and credit under the Uniform Enforcement Act, the qualifying threshold for another jurisdiction's protection order is, at least initially, fairly minimal. As long as a foreign protection order "appears authentic on its face" it is presumptively valid. W. Va. Code § 48-28-3(e). This presumption of validity may be contested by the respondent, and the "[a]bsence of any of the criteria for the validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order." W. Va. Code § 48-28-3(f). Any question regarding the validity of a foreign protection order would be an issue of law to be determined by the court in the enforcing state. Pursuant to the Uniform Enforcement Act, a West Virginia court should be satisfied that four conditions are met. A foreign protection order is valid if it:

> 1) Identifies the protected individual and the respondent;
> 2) Is currently in effect;
> 3) Was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing state; and
> 4) Was issued after the respondent was given reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an order ex parte, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the order was issued in a manner consistent with the respondent's rights to due process of law. W. Va. Code § 48-28-3(d).

The first validity condition, the identity of the parties, should obviously be stated in the order. Simple technical errors, such as a misspelling of a name, should not call into question the validity of the order. The second requirement, that the order still be in effect, should also normally be apparent on the face of the document. The third requirement – personal and subject matter jurisdiction of the issuing state, and the fourth requirement – notice to the respondent and opportunity to be heard, may or may not be as easily determined. In many jurisdictions, in order to facilitate interstate enforcement, these matters are stated in the conclusions of law in the protection order. In any event, if questions remain beyond what can be determined from the four corners of the order and any proffers by persons before the enforcing court, a request to the issuing court for further case information, records, or applicable state statutes should resolve any unanswered questions.

2. Federal Statute

The analogous federal statute is part of the Violence Against Women Act (VAWA). Under 18 U.S.C. § 2265, a protective order from another state,[2] territory or Indian tribe must be given full faith and credit if three conditions are met. First, the enforcing court must determine that the issuing court had jurisdiction over the parties. This may require satisfactory proof or acknowledgement of proper service of process under the law of the foreign jurisdiction. Second, the enforcing court should be satisfied that the issuing court possessed subject matter jurisdiction in the proceeding pursuant to state or tribal law. In other words, if the issuing court was authorized under the law of the issuing jurisdiction to enter the protective order, the order is enforceable under full faith and credit principles, even if particular terms and relief in the order would not be authorized under the law of the jurisdiction where enforcement is sought. Third, the enforcing court must find that reasonable notice and opportunity to be heard in the issuing jurisdiction were given to the person who is subject to the order. If the order was issued *ex parte*, such notice and opportunity to be heard must have been timely under the jurisdiction's law, and within sufficient time to satisfy due process rights. 18 U.S.C. § 2265(b). "Thus, if the out-of-state protection order is to be given full faith and credit, the party seeking enforcement must demonstrate that the person against whom the order was issued was given a reasonable opportunity to be heard in conformity with the law of the issuing state and consistent with due process." *People v. Hadley*, 172 Misc. 2d 697, 701, 658 N.Y.S.2d 814, 817 (1997) (interpreting federal law).

The relevant portions of 18 U.S.C. § 2265 provide:

> (a) Full Faith and Credit. - Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or territory as if it were the order of the enforcing State or tribe.
> (b) Protection Order. - A protection order issued by a State, tribal, or territorial court is consistent with this subsection if --
> (1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe or territory; and
> (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to

[2] The term "state" includes "a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States." 18 U.S.C. § 2266(8).

> protect the person's right to due process. In the case of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

A "protection order" is defined under the federal full faith and credit provisions of the VAWA as follows:

> Protection order. - The term "protection order" includes -- any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a *pendente lite* order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection. 18 U.S.C. § 2266(5)(A).

A protection order also includes:

> Any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. 18 U.S.C. § 2266(5)(B).

Beyond the typical order arising out of a civil protection proceeding in another jurisdiction, this federal definition would encompass any order entered in relation to other types of proceedings "for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person . . .." 18 U.S.C. § 2266(5). In such cases, the order is likely entitled to enforcement under the federal full faith and credit statute. Other types of "protection orders" coming within the federal definition would include any order arising out of a criminal proceeding in which the defendant is enjoined from being near or having contact with a protected crime victim. Examples would include injunctions or restraining orders associated with domestic or non-domestic crimes of violence or stalking convictions.

Under the federal definition, any otherwise valid order issued in connection with a divorce or other domestic relations case providing protection to another person would also appear to be entitled to full faith and credit under the VAWA statute. The federal definition could be viewed in this regard as more inclusive in terms of what would generally be considered a protective order entitled to enforcement under the Uniform Enforcement Act. Under West Virginia Code § 48-28-2(6), what constitutes a "protection order" from another jurisdiction is more specifically limited to orders arising out of "domestic violence, family violence or antistalking laws of the issuing state." Although in a West Virginia divorce action any domestic violence would likely result in a protection order linked to Chapter 48, Article 27; this may not be the case in some other "issuing" states. In any event, the federal statute would supersede any such restrictive reading of the West Virginia full faith and credit provisions. *See* U.S. Constitution, art. IV, sec. 1 (full faith and credit) and art. VI (supremacy clause). Accordingly, courts in this State should ultimately look to the federal definition of "protection order" when enforcement of another jurisdiction's order is sought and there is any doubt as to whether it comes within the Uniform Enforcement Act definition.

If, however, enforcement under the federal statute will also relate to "a support or child custody order *issued pursuant to State divorce or child custody laws*," full faith and credit provisions under other federal and state laws may be a necessary consideration. *See, e.g.*, 28 U.S.C. § 1738A (Full faith and credit given to child custody determinations); 28 U.S.C. § 1738B (Full faith and credit for child support orders); W. Va. Code §§ 48-20-101, *et seq.* (Uniform Child Custody Jurisdiction and Enforcement Act); W. Va. Code §§ 48-16-101, *et seq.* (Uniform Interstate Family Support Act). Nevertheless, it remains clear that support or child custody determinations made and issued in connection with *protection proceedings* in another state are subject to enforcement under the VAWA full faith and credit definition in 18 U.S.C. § 2266(5).

3. Enforcing Another Jurisdiction's Protective Order

a) No registration or filing required

As provided under both the federal and State statutes, enforcement of a protection order from another jurisdiction is not dependent upon prior registration or filing in this State. 18 U.S.C. § 2265(d)(2); W. Va. Code § 48-28-4(d). *See also* W. Va. Code §§ 48-27-802(c); 51-1-21(c). Additionally, under the federal statute, when an order from another jurisdiction is registered or filed in a state where enforcement will be sought, the enforcing state may not notify or require notification of the

respondent that the protective order has been registered or filed, unless requested to do so by the protected party. 18 U.S.C. § 2265(d)(1).

b) Enforced as if it were an order of this state

Under the federal statute, any protection order from another jurisdiction meeting the criteria as a valid order "shall be accorded full faith and credit . . . and enforced . . . as if it were the order of the enforcing State or tribe." 18 U.S.C. § 2265(a). The analogous provision under the Uniform Enforcement Act similarly provides, in greater detail, that:

> A person authorized by the law of this state to seek enforcement of a West Virginia protective order[3] may seek enforcement of a valid foreign protection order in a court of this state. The court shall enforce the terms of the order, including terms that provide relief that a court of this state would lack power to provide but for this section. The court shall enforce the order, whether the order was obtained by independent action or in another proceeding, if it was issued in response to a complaint, petition or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the court shall follow the procedures of this state for the enforcement of West Virginia protective orders. W. Va. Code § 48-28-3(a).

Under full faith and credit principles, issues such as "what" and "how" may arise in the enforcing state. Regarding "what" may be enforced, effective interstate enforcement of protection orders is based upon the principle that *all substantive terms* of the foreign order must be enforced. This would necessarily include terms that provide relief that a court in the enforcing jurisdiction would not be authorized to provide under its own laws. In West Virginia, for example, a court could not issue a protection order involving third cousins, since they are not "family or household members" as defined under West Virginia Code § 48-27-204. However, if a valid protection order was presented involving third cousins from an issuing

[3] Persons authorized to seek enforcement of a West Virginia protective order include: 1) "Any party to a protective order or a legal guardian or guardian ad litem" (W. Va. Code § 48-27-901(a)); and 2) "Any person authorized to file a petition pursuant to section three hundred five of this article, and any person authorized to file a petition for civil contempt pursuant to section nine hundred one . . .." W. Va. Code § 48-27-902(a). A person authorized pursuant to W.Va. Code § 48-27-305 include the following: (1) A person seeking relief under this article for herself or himself; (2) An adult family or household member for the protection of the victim or for any family or household member who is a minor child or physically or mentally incapacitated to the extent that he or she cannot file on his or her own behalf, or (3) A person who reported or was a witness to domestic violence and who, as a result, has been abused, threatened, harassed or who has been the subject of other actions intended to intimidate the person. For further discussion please see Chapter 3, Section C.

state with authority to grant such relief, a court in this State must enforce it. Another example would be if the law of the issuing state allowed protection orders to remain in effect for a longer period than the length of time permitted under West Virginia law. Courts and law enforcement agencies in West Virginia must enforce the order for the time authorized by the issuing state.

Regarding the issue of "how" to enforce the other jurisdiction's order, it is enforced as if it were an order of the enforcing state. Therefore, while the substantive terms (like the two examples above) are those of the issuing state, the *procedures* for enforcement and any *sanctions* imposed for violation of the protection order are those available under the enforcing state's laws. For example, if a respondent is present at a location (e.g., petitioner's place of employment) in West Virginia in willful violation of a protection order issued by another state, he may be subjected to arrest, conviction, and jail time in this state under West Virginia Code § 48-28-7 (or § 48-27-903). Enforcement procedures and sanctions are a matter of the enforcing state's law, even if the issuing state would have responded to the same violation differently, such as imposing civil contempt sanctions. *See* W. Va. Code § 48-28-3(a).

4. Limitations on Mutual Orders

Under both the VAWA full faith and credit statute and the Uniform Enforcement Act, there are limitations on the enforcement of mutual protection orders from other jurisdictions. The federal limitations are set forth in 18 U.S.C. § 2265(c), which provides:

> (c) Cross or Counter Petition. - A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if -
> (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or
> (2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

The term "spouse or intimate partner" used in Section 2265(c) is defined in 18 U.S.C. § 2266(7) as follows:

> (7) Spouse or intimate partner. - The term "spouse or intimate partner" includes -
> (A) for purposes of -

> (i) sections other than 2261A,[4] -
> (I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or
> (II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship; and
> (ii) section 2261A-
> (I) a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; or
> (II) a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
> (B) any other 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.

Under 18 U.S.C. § 2265(c), a protection order restraining the petitioner which is not based upon a separate petition or counterclaim is not entitled to full faith and credit in other jurisdictions. Additionally, a protection order entered against a petitioner is not entitled to full faith and credit even if a cross or counter petition was filed but the court did not make specific findings that each party was entitled to such an order. It is important to keep in mind what this provision does not restrict. Even if the order restraining the *petitioner* does not meet the separate petition and findings criteria, the order (or portion of a "combined" mutual order) imposing restraints upon the *respondent* is still entitled to full faith and credit.

See Bench Card 3, Appendix B.

The provisions of 18 U.S.C. § 2265(c) only limit full faith and credit enforcement of a non-conforming mutual order restraining a petitioner who is a "spouse or intimate partner." In West Virginia, there has been clearly expressed public policy against mutual protection orders unsupported by separate petitions and findings involving *any* parties. W. Va. Code § 48-27-507.[5] Under this provision alone, similar enforcement limitations could

[4] 18 U.S.C. § 2261A pertains to interstate stalking.

[5] In 2015, in Senate Bill 430, West Virginia Code § 48-28-507 was amended to ensure that the Legislature's prohibition of mutual protective orders does not interfere with the family court's ability to mutually restrict contact between parties not rising to the level of domestic violence during the pendency of any domestic relations proceeding pursuant to

be imposed upon any mutual order from another jurisdiction. *See People v. Hadley*, 172 Misc. 2d 697, 704, 658 N.Y.S.2d 814, 818-19 (1997) (public policy of New York considered when determining whether to enforce out-of-state protection order under federal full faith and credit statute). With the enactment of the Uniform Enforcement Act in this State, it is beyond question that courts in West Virginia will not enforce provisions of a mutual foreign protection order favoring a respondent unless: 1) the respondent filed a pleading seeking a protection order; and 2) the court in the issuing state made specific findings in favor of the respondent. W. Va. Code § 48-28-3(g). Unlike the federal statute limiting interstate enforcement of deficient mutual orders involving "a spouse or intimate partner," Section 48-28-3(g) precludes the enforcement of mutual provisions of foreign protection orders between **any parties** that do not meet the statutory requirements.

C. Criminal Violations of Protective Orders

1. Criminal Complaint Procedure

West Virginia Code § 48-27-902(a) allows a petitioner who obtained a protective order to file a criminal complaint in magistrate court that charges a respondent with the knowing and willful violations of certain terms of a protective order. A petitioner may file a criminal complaint on his or her own behalf, and may also file such a complaint if he or she is an adult family or household member of a minor or physically or mentally incapacitated individual and seeks enforcement of a protective order on their behalf. A petitioner who obtained a domestic violence protective order because he or she was a witness to domestic violence and was subject to abuse may also enforce a protective order in this manner. Finally, a legal guardian or guardian *ad litem* may file criminal complaint on behalf of his or her ward.

The types of provisions in a protective order that may be enforced by filing a criminal complaint generally include knowing and willful violation of measures that are designed to protect an individual but do not include ancillary relief that may be awarded in a protective order proceeding, such as spousal or child support or a return of personal property. W. Va. Code § 48-27-902(a). The provisions that may be the subject of a criminal complaint include an order that the respondent refrain from abusing, harassing, stalking, threatening, intimidating a protected person or

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West Virginia Code § 51-2A-2a, a new statute enacted in the same legislation. In circumstances involving domestic violence, however, "sound reasons exist for limiting the issuance of mutual protective orders to those cases where proper assertions of domestic violence or abuse have been established." *Riffle v. Riffle*, 235 W. Va. 430, 774 S.E.2d 511, 516 (2015) *See also Pearson v. Pearson*, 200 W. Va. 139, 488 S.E.2d 414 (1997) (Workman, J., concurring).

conduct that places a protected person in reasonable fear of bodily injury. W. Va. Code §§ 48-27-502(a); 48-27-902(a)(1)(A). Possession of a firearm is another violation of a protective order that may be enforced by a criminal complaint. W. Va. Code §§ 48-27-502(b); 48-27-902(a)(1)(A). Additionally, provisions that order a respondent from being near the environs of the protected person's residence and provisions that order a respondent from being around the protected individual's school or place of business for the purpose of violating a protective order are subject to criminal enforcement. W. Va. Code §§ 48-27-503(2) and (7); 48-27-902(a)(1)(B). Further, provisions that order a respondent from contacting, telephoning, communicating, harassing or verbally abusing the protected person may be enforced by the criminal complaint procedure. W. Va. Code §§ 48-27-503(9); 48-27-902(a)(1)(B).

The types of protective orders that may be enforced by the criminal complaint procedure include emergency or final domestic violence protective orders (W. Va. Code § 48-27-902(a)(1)), and both temporary and permanent protective orders that are awarded in a divorce proceeding. W. Va. Code §§ 48-5-509(b) and (c); 48-5-608(b) and (c); 48-27-902(a)(1)(C) and (D). In addition, protection orders from another state may be enforced in this manner. W. Va. Code § 48-27-902(a)(3). Further, if a condition of bail, probation or parole is designed to protect the personal safety of another person, a violation of such a provision may subject the respondent to further criminal charges. This procedure applies to both West Virginia orders and orders imposed by another state. W. Va. Code § 48-27-902(a)(2) and (4).

As noted previously, this statute specifically permits a petitioner to file a criminal complaint charging the respondent with violation of a protective order. This statutory authorization provides an exception to the general rule requiring private-citizen criminal complaints to be evaluated and presented by a prosecutor or law enforcement agency. As recognized in *Harman v. Frye*, 188 W. Va. 611, 425 S.E.2d 566 (1992):

> *Except where there is a specific statutory exception*, a magistrate may not issue a warrant or summons for a misdemeanor or felony solely upon the complaint of a private citizen without a prior evaluation of the citizen's complaint by the prosecuting attorney or an investigation by the appropriate law enforcement agency. Syl. Pt. 1, in part (emphasis added).

Upon a finding of probable cause to support the complaint, the court issues an arrest warrant charging the respondent with violation of a protective order, a misdemeanor offense under West Virginia Code § 48-

27-903 or, if the violation involves an order from another state, under West Virginia Code § 48-28-7. W. Va. Code § 48-27-902(b).

2. Warrantless Arrests for Violations of Protective Orders

When a law enforcement officer observes any respondent abuse a petitioner or minor child or observes the respondent's physical presence at any location in knowing and willful violation of an emergency or final protective order, the officer is required to immediately make the warrantless arrest of the respondent. W. Va. Code § 48-27-1001(a). *See also* W. Va. C.S.R., Title 149, Series 3, *Protocol for Law Enforcement Response to Domestic Violence*, at § 149-3-7 (the arrest decision).

If a family or household member is alleged to have committed (outside of the officer's presence) any such abuse or other violation of West Virginia Code § 48-27-903, or a violation of West Virginia Code § 48-28-7 involving an order from another state, the officer may arrest the perpetrator if the officer: 1) has observed credible corroborative evidence of the offense, as defined in West Virginia Code § 48-27-1002(b) (*e.g.*, physical condition of the alleged victim or accused, or damage or disarray at scene indicative of physical struggle); or 2) has received other credible evidence indicating that the accused committed the offense, such as statements made by the accused admitting to one or more elements of the offense, threats made by the accused in the officer's presence, audible evidence of a disturbance heard by the 911 dispatcher, or written statements by witnesses. W. Va. Code § 48-27-1001(b); *see also* C.S.R. § 149-3-3.2. [6]

Following a warrantless arrest, the accused shall be promptly presented before a circuit court judge or magistrate. Upon a finding of probable cause to support the alleged offense, a hearing shall be set in accordance with the West Virginia Rules of Criminal Procedure. W. Va. Code § 48-27-1001(d). In order to promote prompt action in domestic violence situations, law enforcement officers are afforded immunity from civil or criminal liability for any good faith act or omission arising out of the enforcement of a protective order or the detention or arrest of an alleged violator of a protective order. *See* W. Va. Code § 48-27-1004. *See also* W. Va. Code § 48-28-6 (immunity relating to enforcement of foreign protection order).

[6] Whenever any person is arrested for a violation of a protective order, with or without a warrant, the arresting officer is required to seize all weapons involved or threatened to be used during the domestic violence, and may also seize any weapon in plain view or discovered in the course of a consensual search. Further, the arresting officer may seize any weapons possessed in violation of a protective order. W. Va. Code § 48-27-1002(e).

3. Criminal Penalties for Violations of Protective Orders

A person who knowingly and willfully violates (1) a provision of an emergency or final protective order, (2) a condition of bail, probation, or parole intended for the protection of another person, or (3) a restraining order entered pursuant to a conviction for stalking under W.Va. Code § 61-2-9a, is guilty of a misdemeanor and is subject to both mandatory jail time and mandatory fines. The jail term must include actual confinement for at least one day and may be a sentence of up to one year, while the fine shall be at least $250 and may range up to $2,000. Subsequent convictions for this offense call for increased jail time and higher fines. W. Va. Code § 48-27-903. *See also* W. Va. Code § 48-28-7 (similar criminal offenses and penalties relating to violation of a foreign protection order).

4. Nonjudicial Enforcement of a Protective Order

In addition to judicial enforcement of an order, procedures have been established for the enforcement of protective orders by law enforcement officers. W. Va. Code § 48-27-1003 (nonjudicial enforcement of West Virginia protective orders); W. Va. Code § 48-28-4 (nonjudicial enforcement of foreign protective orders). Pursuant to these statutes, a law enforcement officer may enforce a protective order if the officer, faced with specific circumstances, has probable cause to believe that a valid protective order exists and it has been violated. The officer is authorized to enforce the protective order "pursuant to any authority to arrest under the code." W. Va. Code § 48-27-1003(a). *See also* W. Va. Code § 48-28-4(a) ("A law enforcement officer . . . shall enforce the order as if it were a West Virginia protective order."). Presumably, the most applicable code section that would authorize an arrest and enforcement would be West Virginia Code § 48-27-1001, the statute that governs warrantless arrests for violations of a protective order. *See* Section C.2. above for a discussion of these requirements.

To enforce an order, a law enforcement officer must determine that there is probable cause to believe that a valid protective order exists and that the order has been violated. W. Va. Code §§ 48-27-1003; 48-28-4. Probable cause to believe that a valid protective order is in effect may be established by the presentation of an order that identifies the protected individual and the respondent. It is not necessary for the copy to be certified. The statutes also indicate that the protective order may be "inscribed on a tangible medium" which presumably indicates that the person seeking enforcement of the order has a paper copy. The section also indicates that a law enforcement officer may consider an electronic version of the order. If a protective order is not presented to a law-enforcement officer, the officer may consider other credible information that a valid protective order exists. Although the statutes do not specify or

limit what may constitute "credible information," a law enforcement officer could verify the existence of a protective order through the database in which protective orders are entered for enforcement purposes. *See* W. Va. Code §§ 48-27-802; 51-1-21; Rule 21, RDVCP. *See also* C.S.R. § 149-3-6.5.1 (specifying in detail a procedure for verifying whether a protection order is in effect).

Although a valid protective order may be in effect, the respondent may not have been served with a copy of the order. W. Va. Code §§ 48-27-1003(c); 48-28-4(c). In these circumstances, the law enforcement officer must inform the respondent of the order, must make a reasonable effort to serve the protective order, and must give the respondent a reasonable opportunity to comply before enforcing the order.

D. Contempt

1. Civil Contempt

A party to a protective order, or a legal guardian or guardian *ad litem*, may file a petition for civil contempt alleging a violation of **any** term or condition of the protective order. Therefore, civil contempt proceedings serve as a remedy for enforcement of provisions related to the protection of a person and also for provisions, such as support obligations that are not directly related to the physical safety of an individual. W. Va. Code § 48-27-901(a).

See Bench Card 15, Appendix B.

2. Jurisdiction and Venue for Civil Contempt

If the civil contempt petition relates to a protective order entered in the family court, the petition shall be presented to the family court. If a circuit court entered the protective order, the contempt petition shall be presented to the circuit court. Venue for civil contempt proceedings in family court or circuit court is proper in either the county in which the alleged violation occurred or in the county in which the order was issued. W. Va. Code § 48-27-901(a). This statutory provision is silent as to the appropriate forum to hear a contempt petition alleging a violation of an emergency protective order issued by a magistrate. However, any petition alleging violation of an EPO could be heard in magistrate court pursuant to the applicable contempt rule which, by its terms, applies to any court. *See* Rule 24, RDVCP (domestic violence contempt bond).[7] If the petition is brought by BCSE alleging civil contempt solely relating to enforcement of

[7] Rule 24 of the Rules of Domestic Violence Civil Proceedings supersedes the conflicting provisions of Rule 23 of the Rules of Civil Procedure for Magistrate Courts. *See* Rule 1(a), RDVCP.

child support terms of a protective order, venue would be in the family court. W. Va. Code §§ 48-1-304(b); 48-14-501. (See section D.5. below.)

3. Civil Contempt Procedures and Sanctions

When a civil contempt petition is filed, the court may issue an order to show cause if it determines that the petition presents a sufficient basis for such an order. Rule 24(a), RDVCP. Alternatively, a court may conduct a hearing to determine whether a show cause order should be issued.[8] The court should issue a show cause order either immediately after an initial hearing or within five judicial days of the filing of the petition. A court, however, will not be divested of jurisdiction to hear a contempt petition if it does not enter an order within this timeframe.

If a show cause order is issued, the court should include the date and time for the hearing on the contempt petition. The date for the hearing on the petition should not exceed 10 judicial days from the entry of the show cause order. Rule 24(b), RDVCP.

See Bench Card 15, Appendix B.

If the court finds the respondent in contempt, it may order him or her to post a cash bond to ensure compliance with the court's order. The bond may not be a personal recognizance bond, and an approved fee waiver will not excuse a respondent from posting a cash bond. However, the court must make a finding that the respondent has the ability to post pond in the required amount. Rule 24(b), RDVCP; W. Va. Code § 48-27-901(c).

The respondent has 10 days in which to post the bond. If the respondent fails to post the bond within this time period, the clerk should notify the court. The court is required to order the respondent to appear and may impose any terms necessary for enforcement. Rule 24(b), RDVCP.

Bonds posted are thereafter subject to forfeiture upon the court's finding of a contemnor's failure to comply with the contempt order. Forfeiture proceedings are governed by Rule 24(c) of the Rules for Domestic Violence Civil Proceedings.

Beyond the contempt-bond sanction provided under West Virginia Code § 48-27-901, both the circuit courts and family courts could take enforcement measures under their more general civil contempt powers. Circuit courts, incident to their inherent constitutional authority to enforce

[8] Although West Virginia Code § 48-27-901(b) requires a court, prior to issuing a show cause order, to conduct a hearing on the contempt petition, Rule 24(a) of the Rules of Domestic Violence Civil Proceedings, permits the court to issue a show cause order without a hearing if the petition is sufficient on its face. This procedure in the rule supersedes the conflicting provision in the statute. Rule 1(a), RDVCP.

their orders, may impose general and appropriate civil contempt sanctions. *Czaja v. Czaja*, 208 W. Va. 62, 537 S.E.2d 908 (2000). Family courts, having jurisdiction in areas of family law and related matters as established by law (W. Va. Const., art. VII, sec. 16), may exercise specific authority to enforce any of their orders (which would necessarily include domestic violence protection orders) through their legislatively created civil contempt powers. W. Va. Code § 51-2A-9.[9]

As part of its contempt powers, a family court is expressly authorized to impose remedial or coercive sanctions that compensate a party for losses or that are designed to coerce obedience to the court's orders. Sanctions may include seizure or impoundment of property. Although a party may be incarcerated, a party who lacks the present ability to comply with an order may not be incarcerated or confined. W. Va. Code § 51-2A-9(b). Family courts are also authorized to impose the following civil-contempt sanctions: work release, a weekend jail program, a community service program, a day-report program, another type of community corrections program or home confinement program. These sanctions must be designed to allow parties to purge themselves of contempt. W. Va. Code § 51-2A-9(c).

See Bench Card 15 , Appendix B.

4. Compliance Hearings

Rule 24a of the Rules of Procedure for Domestic Violence Civil Proceedings authorizes a family court to conduct compliance hearings to monitor and enforce any protective order. A court may schedule these hearings even though a contempt petition has not been filed. The court may consider evidence and testimony concerning compliance with a protective order and may take action necessary to enforce the order. Rule 24a, RDVCP.

5. BCSE-Initiated Contempt Proceedings Regarding Protective Order Support Obligations

If there are allegations of the respondent's willful failure or refusal to pay child support as directed in a DVPO, the Bureau for Child Support Enforcement (BCSE) is authorized to institute a civil or criminal contempt proceeding by filing against the support obligor a petition for a show cause order. W. Va. Code § 48-14-501. If the BCSE petition seeks civil contempt sanctions, the matter would be heard in family court. W. Va. Code § 48-1-304(b). As provided in West Virginia Code § 48-1-304(e), the family court judge may exercise *capias* authority over the support obligor. Regardless of whether the court finds the support obligor in contempt, if the party is found in arrears in payment of support, the court

[9] The use of contempt sanctions to regulate conduct during domestic violence hearings is discussed in Chapter 4, section E.

must enter judgment for the arrearage, with interest, and may require security for payment of future installments if sufficient assets exist. W. Va. Code § 48-1-304(d).

If the party is found to be in civil contempt for willfully failing to comply with the DVPO support obligations, and the family court further finds the contemnor has the ability to purge himself of contempt, the court must afford the person a reasonable time and method to comply. W. Va. Code § 48-1-304(b). If the contemnor fails or refuses to purge the contempt, the court may do one or more of the following:

> 1) Impose additional terms and conditions consistent with the support order;
> 2) After notice to both parties, and a hearing if requested, modify the child support order;
> 3) Order all accrued support and interest be paid under court-specified terms and conditions;
> 4) Order the contemnor to pay support in accordance with a BCSE-approved plan, or participate in work activities deemed appropriate by the court;
> 5) Commit the contemnor to the regional jail for an indeterminate term, not to exceed six months or until such time as the contemnor has purged the contempt, whichever occurs first. If the court finds the support obligor's failure to comply with the order was due to financial inability to pay, the person may not be jailed; or
> 6) Commit the contemnor to the regional jail with the privilege of allowing him or her to be released for his or her employment. W. Va. Code §§ 48-1-304(b)-(d); 48-14-502; 48-14-503.

The BCSE may alternatively commence a criminal contempt proceeding seeking criminal sanctions for willful failure or refusal to comply with a protective order requiring the payment of child support. W. Va. Code § 48-14-501. A petition for an order to show cause why the respondent should not be held in criminal contempt must be heard in circuit court. W. Va. Code § 48-1-304. The petition should be filed with the circuit clerk. Rule 8(d), RDVCP. With respect to protective orders, criminal contempt sanctions under circuit court jurisdiction are limited to violations of protective orders issued in divorce actions [W. Va. Code § 48-5-509] and support obligations imposed in protective orders [W. Va. Code § 48-14-501]. *See* W. Va. Code § 48-1-304(a).

The criminal contempt proceedings must be tried in circuit court, before a jury unless the alleged contemnor waives the right to a jury and the circuit court and other party also consent to a bench trial. If convicted of criminal

contempt for willful failure or refusal to pay under a support order, the court may commit the contemnor to jail for a determinate sentence not to exceed six months. W. Va. Code § 48-1-304(a). If the circuit court finds criminal contempt (after a trial without a jury), the court may elect to treat the matter as a civil contempt; and upon further finding the support obligor has the ability to purge himself of contempt, the court must allow a reasonable time and method to pay the obligations due. If the contemnor fails or refuses to purge himself of contempt, the circuit court may impose a sanction of jail confinement for an indeterminate period not to exceed six months or until such time as the contemnor has purged himself, whichever shall occur first. W. Va. Code § 48-1-304(b).

Chapter 6

DOMESTIC VIOLENCE CRIMES

Chapter Contents

Apart from conduct which can constitute a criminal violation of a protective order,[1] domestic violence often involves behavior aimed at controlling and intimidating a spouse, or other household or family members. Although criminal behavior having its genesis in domestic violence can involve a broad variety of statutory crimes, the following criminal offenses are specific to, or commonly associated with domestic violence.

A. State Offenses

1. Domestic Battery and Domestic Assault

Any person who unlawfully and intentionally: a) makes physical contact of an insulting or provoking nature with his or her family or household member; or b) causes physical harm to his or her family or household member is subject to arrest and conviction for domestic battery. W. Va. Code § 61-2-28(a). Any person who unlawfully: a) attempts to commit a

For a consideration of criminal behavior in the context of a custody case, see Bench Cards 2, 7, 8, 9, 12 and 13, Appendix B.

[1] *See* Chapter 5, section C. -- *Criminal Violations of Protective Orders*.

violent injury against his or her family or household member; or b) commits an act that places his or her family or household member in reasonable apprehension of immediately receiving a violent injury is subject to arrest and conviction for domestic assault. W. Va. Code § 61-2-28(b). The term "family or household member" utilized in subsections (a) and (b) of this criminal statute incorporates the meaning of that term as defined in Chapter 48, article 27, section 204. W. Va. Code § 61-2-28(e). A first-offense misdemeanor conviction for domestic battery will subject the offender to a fine of up to $500 and a jail sentence of up to one year. A first-offense domestic assault misdemeanor conviction can result in a fine of up to $100 and up to six months in jail.

For a consideration of criminal behavior in the context of a custody case, see Bench Cards 2, 7, 8, 9, 12 and 13, Appendix B.

Any defendant convicted of domestic battery who has a prior conviction for either domestic battery or domestic assault, or who was previously granted a period of pretrial diversion pursuant to West Virginia Code § 61-11-22 for either charge, is subject to enhanced penalties of a 60-day minimum to one year in jail or a fine of up to $1,000, or both jail and a fine. W. Va. Code § 61-2-28(c). Similarly, any defendant convicted of domestic assault who has a prior conviction for either domestic battery or domestic assault, or who was granted a period of pretrial diversion for either charge, is subject to enhanced penalties of a 30-day minimum to six months in jail or a fine of up to $500, or both jail and a fine. W. Va. Code § 61-2-28(c).

A third or subsequent charge for these domestic offenses, with any combination of two or more prior convictions or a pretrial diversion for either of these offenses, elevates the charge to a felony if the offense occurs within 10 years of a prior conviction for any of the offenses noted above. It is not necessary for both of the underlying convictions to have occurred within 10 years of the current offense; it is only necessary for one of the prior convictions to have occurred within 10 years. Syl. Pt. 3, *State v. Gibson*, 226 W. Va. 568, 703 S.E.2d 539 (2010). Upon conviction of a third offense domestic assault or domestic battery, the defendant faces a prison sentence of one to five years and a fine of up to $2,500. W. Va. Code § 61-2-28(d).

a) Enhanced penalties based upon prior incidents of other offenses involving domestic violence

The enhanced penalties for repeated convictions of domestic battery and domestic assault are also applicable if a defendant is convicted of or receives a pretrial diversion for other offenses relating to domestic violence. The increased sanctions set forth in West Virginia Code § 61-2-28(c) are also triggered by prior convictions of simple assault and battery (W. Va. Code § 61-2-9(b) and (c)), and convictions of unlawful restraint (W. Va. Code § 61-2-14g) if the victim of the offense was the defendant's current or former spouse, current or former sexual or intimate partner,

person with whom the defendant cohabits or has cohabitated, a parent or guardian, the defendant's child or ward or member of the defendant's household at the time of the offense. W. Va. Code § 61-2-28(c). Similarly, if a defendant has received a prior pretrial diversion pursuant to West Virginia Code § 61-11-22 for simple assault, battery or unlawful restraint and he or she has or had a relationship with the victim as described above then he or she is subject to an enhanced sentence for subsequent offenses. A similar enhanced sanction provision for circumstances related to domestic violence is set forth in the simple assault and battery statute. *See* W. Va. Code § 61-2-9(d).

b) Limitations on pretrial diversions

West Virginia Code § 61-11-22(d) places limitations on pretrial diversions when the charged offense is domestic assault, domestic battery, or simple assault or battery if the victim is a family or household member. First, a person who is charged with domestic assault or domestic battery may only be granted a pretrial diversion if it is part of a community corrections program approved under the provisions of Chapter 61, Article 11c of the State Code. Next, a person who is charged with domestic assault, domestic battery, or simple assault or battery against a victim who is a family or household member may not participate in a pretrial diversion program if he or she has a prior conviction for the charged offense or if he or she has previously received a pretrial diversion for any of these offenses. Third, a defendant who is charged with a felony crime of violence against a family or household member may not participate in a pretrial diversion program. Finally, a person who has successfully completed a pretrial diversion for domestic assault or domestic battery resulting in dismissal of the charges is not eligible to have the records relating to the offense expunged pursuant to West Virginia Code § 61-11-25. W. Va. Code § 61-11-22(e).

c) Warrantless arrest powers for domestic battery and domestic assault

Similar to the expanded arrest authority for violations of protective orders discussed in Chapter 5, section C, warrantless arrest powers for law enforcement officers are broadened relating to the crimes of domestic battery and domestic assault arising under West Virginia Code § 61-2-28. Beyond the authority to arrest an offender without a warrant when the domestic battery or domestic assault is committed in the officer's presence, officers are authorized to make a warrantless arrest for domestic battery or domestic assault if: 1) the officer has observed credible corroborative evidence that such an offense has occurred;[2] and

[2] "[C]redible corroborative evidence means evidence that is worthy of belief and corresponds to the allegations of one or more elements of the offense." This may

either 2) the officer has either obtained an oral or written statement of the factual allegations from a witness or victim, or the officer has observed credible evidence[3] of that the accused committed an offense.[4] W. Va. Code § 48-27-1002(a). Whenever any person is arrested for domestic

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include, but is not limited to, the physical condition of the alleged victim or the accused, or the condition of the scene indicative of a struggle. W. Va. Code § 48-27-1002(b). *See also* CSR § 149-3-3.1 (similar definition).

[3] The Legislative Rule -- Protocol for Law Enforcement Response to Domestic Violence defines "credible evidence" in the following manner:

> 3.2. "Credible evidence" means evidence of the victim's condition may include, but is not limited to, one or more contusions, scratches, cuts, abrasions, swellings, or other signs of physical injury; missing hair; torn clothing or clothing in disarray consistent with a struggle; observable difficulty in breathing or breathlessness consistent with the effects of strangulation, choking or a body blow; observable difficulty in movement consistent with the effects of a body both or other unlawful physical contact.
>
> 3.2.1. Credible evidence of the condition of the accused may include, but is not limited to, physical injury or other conditions similar to those set out for the condition of the victim which is consistent with alleged offense or alleged acts of self defense by the victim.
>
> 3.2.2. Credible evidence of the condition of the scene may include, but is not limited to, damaged premises or furnishings or disarray or misplaced objects consistent with the effects of a struggle.
>
> 3.2.3. Other credible evidence may include, but is not limited to, statements by the accused admitting one or more elements of the offense; threats made by the accused in the presence of a law enforcement officer; audible evidence of a disturbance heard by the dispatcher or other agent receiving the request for police assistance; or written statements by witnesses. CSR § 149-3-3.2.

[4] The Legislative Rule -- Protocol for Law Enforcement Response to Domestic Violence provides a slightly different standard for a warrantless arrest for a domestic assault or battery not committed in the arresting officer's presence. The Legislative Rule provides:

> When the accused is alleged to have committed domestic assault or domestic battery or the violation of a valid protective order; law enforcement officer has authority to arrest the accused when:
> 7.2.5.a. The law enforcement officer has observed credible corroborative evidence that the offense has occurred or,
> 7.2.5.b. The law enforcement officer has received, from the victim or a witness, a verbal or written allegation of facts constituting a violation of a domestic assault or domestic battery or violation of a valid protective order, or
> 7.2.5.c. The law enforcement officer has observed credible evidence that the accused committed the offense. CSR § 149-3-7.2.5.

battery or domestic assault, with or without a warrant, the arresting officer is required to seize all weapons involved or threatened to be used incident to the domestic violence, and may also seize any weapon in plain view or discovered in the course of a consensual search, as necessary for the protection of the officer or other persons. Further, the officer may seize all weapons that are possessed in violation of a valid protective order. W. Va. Code § 48-27-1002(e). See also CSR § 149-3-7.6. The offender is to be promptly presented to a magistrate in the county where the alleged offense occurred. To promote prompt intervention in domestic violence situations, particularly with regard to warrantless arrests, law enforcement officers are afforded immunity from civil or criminal liability for any alleged false arrest or unlawful detention relating to any arrest for domestic battery or assault. W. Va. Code § 61-2-28(g).

2. Stalking and Harassment

a) Stalking

Under West Virginia Code § 61-2-9a, any person who repeatedly follows another and either knows or has reason to know that the conduct will cause the victim to reasonably fear for his or her safety or suffer significant emotional distress may be charged and convicted of the misdemeanor offense of stalking. The term "repeatedly" is defined as "two or more occasions." W. Va. Code § 61-2-9a(f)(5).

For a consideration of criminal behavior in the context of a custody case, see Bench Cards 2, 7, 8, 9, 12 and 13, Appendix B.

The West Virginia Supreme Court has provided guidance concerning the type of evidence that is sufficient to constitute "following" as defined by West Virginia Code § 61-2-9a. *State v. Malfregeot*, 224 W. Va. 264, 685 S.E.2d 237 (2009).[5] In *Malfregeot*, the defendant was a 50 year-old teacher and coach at a middle school, and the victim was a 13 year-old student at the school. Reviewing the evidence that was presented at trial, the Supreme Court held that the defendant's actions of repeatedly going to the victim's locker, initiating contact with the victim in various parts of the school and calling her on her personal cell phone were sufficient evidence of "following." The Court's findings and conclusion in this regard are instructive:

> Upon review of the record, this Court finds that there was sufficient evidence to conclude that the appellant willfully, actively, and repeatedly followed L.L. as required by W.Va. Code § 61–2–9a(a). As previously discussed, soon after meeting L.L., the appellant began visiting her at her school

[5] An earlier version of West Virginia Code § 61-2-9a was in effect at the time the offense in *Malfregeot* was committed. However, the Court's guidance concerning acts that can be considered "following" remain relevant under the current statute.

> locker everyday throughout the 2005–2006 academic year. Such visits eventually escalated to several encounters between the two during each school day in spite of the fact that L.L. did not invite the appellant to her locker. L.L. stated that she would find the appellant waiting for her in between classes at her locker. The appellant also initiated contact with L.L. in the lunchroom, in the hallway, in her gym class and other classes, and by calling her personal cell phone. There was no evidence to suggest that L.L. ever invited, enticed, or welcomed these repeated daily visits. The circuit court concluded that the acts of the appellant traveling to locations where the victim was present constituted a "following" for the purposes of W.Va. Code § 61–2–9a(a). When viewing all of the evidence and the entire record, this Court does not believe that the findings of the circuit court are clearly erroneous with regard to whether the appellant's actions amounted to a "following." This Court further fails to find error with the circuit court's finding that the appellant's act of calling L.L. on her personal cell phone and leaving a deceptive message constituted a following. Clearly, the word "follow" under these circumstances necessarily includes conduct engaged in for the purpose of maintaining contact with an individual. Accordingly, the evidence clearly supported the circuit court's finding that the appellant willfully and repeatedly followed L.L. *State v. Malfregeot*, 224 W.Va. 264, 270-71, 685 S.E.2d 237, 243-44 (2009).

b) Harassment

Established by West Virginia Code § 61-2-9a(b), the misdemeanor offense of harassment occurs when a person repeatedly harasses another person by engaging in "willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress." W. Va. Code § 61-2-9a(f)(3). Alternatively, the offense of harassment occurs when a person repeatedly makes credible threats against another. The term "credible threat" is defined as "a threat of bodily injury made with the apparent ability to carry out the threat and with the result that a reasonable person would believe that the threat could be carried out." W. Va. Code § 61-2-9a(f)(2).

For a consideration of criminal behavior in the context of a custody case, see Bench Cards 2, 7, 8, 9, 12 and 13, Appendix B.

The Supreme Court has also provided guidance about conduct that would be sufficient to constitute "harassment." *Malfregeot*, 224 W. Va. 264, 271, 685 S.E.2d 237, 244.[6] The Court noted that the defendant, a 50 year-old teacher, placed his arm around a 13 year-old student's shoulder. He held her hand, rubbed her shoulders, and flipped her hair. He also displayed photographs of her in his classroom after she had asked that they be taken down. Further, he called her on her personal cell phone under false pretenses and left a message that could have been considered an attempt to lure her to school on a non-school day. Finally, he showed her that her personal cell phone number was saved in his phone. The Supreme Court concluded that these facts were sufficient to meet the definition of the term "harassment."

The penalty for either stalking or harassment is a jail term of up to six months, a fine of up to $1,000, or both a jail term and a fine.

c) Stalking or harassment that violates a protective order -- misdemeanor offense

A person is guilty of a misdemeanor offense if he or she commits the offense of stalking or harassment, and the acts would also constitute a violation of a protective order in effect at the time of offense. W. Va. Code § 61-2-9a(c). The following types of domestic violence protective orders serve as an element of this offense: 1) an emergency protective order (EPO) entered by a magistrate; 2) a temporary emergency protective order (TEPO) entered by a magistrate; 3) a domestic violence protective order entered after a final hearing in family court or after an appeal in circuit court; 4) a temporary restraining order entered in a divorce case; or 5) a permanent restraining order entered in a divorce case. The enhanced penalties for this offense include a minimum jail term of 90 days (and up to one year), or a fine of not less than $2,000 (and up to $5,000), or both a jail term and a fine.

d) Stalking or harassment while protective order for injunctive relief is in effect -- felony offense

A person who commits the offense of stalking or harassment while a final protective order for injunctive relief is in effect is guilty of a felony and upon conviction is subject to a term of incarceration of at least one year and not more than five years, or a fine of $3,000 to $10,000, or both a prison term and a fine. W. Va. Code § 61-2-9a(e). The types of protective orders that constitute an element of this offense are final domestic

[6] As noted previously, West Virginia Code § 61-2-9a was amended after *Malfregeot* was decided. However, the Court's analysis of what evidence constitutes "harassment" continues to provide guidance concerning the definition of "harassment" as it is defined in the current version of the statute.

violence protective orders entered pursuant to West Virginia Code § 48-27-501, or permanent injunctive relief granted in a final divorce order pursuant to West Virginia Code § 48-5-608.[7]

e) Second or subsequent offenses of stalking or harassment

If a defendant has a previous conviction for an offense under West Virginia Code § 61-2-9a and he or she is subsequently convicted of a violation of West Virginia Code § 61-2-9a within five years of a previous conviction, he or she is guilty of a felony. Upon conviction, a defendant is subject to incarceration for a minimum of one year (and up to five years), a fine of not less than $3,000 (and up to $10,000), or both a prison term and a fine. W. Va. Code § 61-2-9a(d).

f) Alternative sentencing

If a person is convicted of a violation of West Virginia Code § 61-2-9a and granted probation or his or her sentence has been otherwise suspended, the court must require the defendant to participate in medical treatment or counseling. According to the statute, the court has the discretion to specify the requirements for the counseling or medical treatment. W. Va. Code § 61-2-9a(h). Home confinement with electronic monitoring is also an authorized alternative sentence. W. Va. Code § 61-2-9a(k).

g) Restraining order

A court has the authority to issue a restraining order for any person convicted of a violation of West Virginia Code § 61-2-9a. The maximum length of any restraining order is a period of 10 years, and such an order may only exceed five years if it is necessary to protect the victim or his or her immediate family. The court should consider the following factors when it establishes the duration of a restraining order: 1) the seriousness of the offense; 2) the probability of future violations; and 3) the safety of the victim and his or her immediate family members. W. Va. Code § 61-2-9a(i).

3. Strangulation

A statute enacted in 2016, West Virginia Code § 61-2-9d, created the felony offense of strangling another person without that person's consent and causing bodily injury or loss of consciousness. The term "strangling" is defined as knowingly and willfully restricting another person's air intake or

[7] In view of the similarities in the elements for the misdemeanor offense under W. Va. Code § 61-2-9(c) and the felony offense under W. Va. Code § 61-2-9a(e) it appears that in many instances a person could be charged under either provision.

blood flow by the application of pressure on the neck or throat. W. Va. Code § 61-2-9d.

Although generally applicable to any circumstance involving strangulation, the law was enacted primarily to provide greater protection for domestic violence victims. Women involved with an intimate partner with a history of non-lethal strangulation were found to have more than seven-fold odds of becoming a victim of homicide.[8] Since strangulation often leaves no physical injury, a charge under the already existing malicious wounding statute was difficult. Misdemeanor charges for assault and battery and domestic assault and battery provide lesser penalties for this serious and potentially lethal conduct. Under the felony offense of strangulation, the perpetrator can be sentenced to one-to-five years in prison and fined up to $2,500 upon conviction, or both fined and imprisoned.

4. Child Abuse Crimes

A common behavior of abusers is to use children in the household to manipulate and control their spouse or intimate partner. This tactic may involve acts or threats directed toward the children in an attempt to maintain power over the adult victim, or there may be injuries to children committed during episodes of violence against the adult victim. Criminal offenses against children that may be associated with domestic violence are listed below.

For a consideration of criminal behavior in the context of a custody case, see Bench Cards 2, 7, 8, 9, 12 and 13, Appendix B.

- Murder of a child by a parent, guardian or custodian or other person by refusal or failure to supply necessities, or by delivery, administration or ingestion of a controlled substance--W. Va. Code § 61-8D-2

- Death of a child by a parent, guardian, or custodian or other person by child abuse--W. Va. Code § 61-8D-2a

- Child abuse resulting in injury or creating risk of injury--W. Va. Code § 61-8D-3

- Child neglect resulting in injury or creating risk of injury--W. Va. Code § 61-8D-4

- Child neglect resulting in death--W. Va. Code § 61-8D-4a

- Sexual abuse by a parent, guardian, custodian or person in a position of trust to a child; parent, guardian, custodian or person

[8] Glass, et al., *Non-fatal Strangulation is Important Risk Factor for Homicide of Women*, Vol. 35, Issue 3, Journal of Emergency Medicine 329 (Oct. 2008).

in a position of trust allowing sexual abuse to be inflicted upon a child; displaying of sex organs by a parent, guardian, or custodian--W. Va. Code § 61-8D-5

- Sending, distributing, exhibiting, possessing, displaying or transporting material by a parent, guardian or custodian, depicting a child engaged in sexually explicit conduct--W. Va. Code § 61-8D-6

5. Other Crimes Often Associated with Domestic Violence

a) Crimes against the person

In addition to specific "domestic violence" crimes, any crime against a person may be incident to an abuser's pattern of behavior attempting to control his or her spouse or intimate partner. These control tactics may also involve offenses against the victim's family and friends. The offenses listed below may be associated with domestic violence.

Simple assault and battery offenses are subject to enhanced penalties for prior domestic-related offenses. See W. Va. Code § 61-2-9(d).

- Malicious or unlawful assault--W. Va. Code § 61-2-9(a)
- Assault--W. Va. Code § 61-2-9(b)
- Battery--W. Va. Code § 61-2-9(c)
- Unlawful shooting at another in public--W. Va. Code § 61-2-11
- Murder--W. Va. Code § 61-2-1
- Voluntary manslaughter--W. Va. Code § 61-2-4
- Attempt to kill or injure by poison--W. Va. Code § 61-2-7
- Abduction or kidnapping--W. Va. Code §§ 61-2-14 and-14A
- Concealment or removal of a minor child from custodian or person entitled to visitation--W. Va. Code § 61-2-14D
- Abuse or neglect of incapacitated adult--W. Va. Code § 61-2-29
- Intimidation, harassment, or retaliation against a witness--W. Va. Code § 61-5-27
- Brandishing--W. Va. Code § 61-7-11

- Wanton endangerment involving a firearm--W. Va. Code § 61-7-12
- Obscene or harassing telephone calls--W. Va. Code § 61-8-16
- Obscene, anonymous, harassing and threatening communications by computer, cell phones, or electronic communications device--W. Va. Code § 61-3C-14A
- Sexual assault or abuse--W. Va. Code §§ 61-8B-1 *et seq.*

b) Property offenses

In seeking to maintain control over a spouse or intimate partner, an abuser may commit criminal acts relating to the partner's property or animals.

- Burglary--W. Va. Code § 61-3-11
- Destruction of property--W. Va. Code § 61-3-30
- Trespass--W. Va. Code §§ 61-3B-1 *et seq.*
- Arson and attempted arson--W. Va. Code §§ 61-3-1 through -7
- Cruelty to animals--W. Va. Code § 61-8-19

6. Bail Provisions for Victim Protection

a) Bail provisions for crimes against family or household members

Under West Virginia Code § 62-1C-17c, a judicial officer has the discretion to prohibit a defendant from having any contact with a victim, if the victim is a family or household member. When imposed, the no-contact provision in a bail order should prohibit all forms of contact, including direct or indirect, verbal or physical, with the victim or complainant.

When a judicial officer determines bail conditions in cases of crimes between family or household members, he or she is required to consider whether the defendant is a threat to the victim or other family or household member. W. Va. Code § 62-1C-17c(b). If a person has been arrested for second offense domestic assault or domestic battery, that fact is *prima facie* evidence that the defendant presents a threat or danger to the victim or other family or household member. W. Va. Code § 48-27-1002(d). If the judicial officer concludes that the defendant presents a threat of

danger to the victim or other family or household member, the court is required to impose the following bail conditions: 1) the defendant may not enter the victim's residence or household, school, or place of employment; and 2) the defendant may not contact the victim. W. Va. Code § 62-1C-17c(b). If a law enforcement officer observes a defendant violating a condition of bail, including merely being present at the victim's home, the officer is required to arrest the defendant. The defendant must be detained pending a bail revocation hearing. W. Va. Code § 62-1C-17c(d). A violation of this type of bail provision may subject the defendant to further criminal charges. W. Va. Code §§ 48-27-903; 48-28-7.

b) Bail in stalking or harassment cases

If a person is accused of any stalking or harassment offense under West Virginia Code § 61-2-9a, a bail condition must be imposed that prohibits the defendant from having any form of contact with the victim. W. Va. Code § 61-2-9a(j). A violation of this type of bail condition may subject the defendant to further criminal charges. W. Va. Code §§ 48-27-903; and 48-28-7.

B. Federal Offenses

As a central component of the Violence Against Women Act of 1994 (VAWA), Congress relied upon its commerce clause powers to create three federal domestic violence crimes. Any person who crosses jurisdictional lines in furtherance of any activity prohibited under these statutes is subject to federal prosecution, with substantial sentences and fines upon conviction.[9] Additionally, pursuant to 18 U.S.C. § 2264, an order of restitution is to be imposed against each defendant convicted of a domestic violence or stalking offense under the VAWA. The defendant must be required to pay the full amount of victim's losses arising out of injuries and expenses suffered as a result of the offense.

[9] An element of the offenses contained in Title 18, Chapter 110A of the United States Code is that the defendant has crossed jurisdictional lines or geographic boundaries. The Government must establish that the defendant traveled or caused the victim to travel in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or he or she entered or left Indian county. Under the stalking statute it is sufficient for the Government to establish that the defendant used the mail, an interactive computer service, electronic communication service, electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce. 18 U.S.C. § 2261. Challenges to Congress's reliance upon commerce clause powers to enact the federal domestic violence crimes have been routinely rejected. *See, e.g.*, *U.S. v. Bailey*, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 522 U.S. 896 (1997).

1. Interstate Domestic Violence -- 18 U.S.C. § 2261

There are two kinds of conduct which may constitute a violation of this statute. Under subsection (a)(1), it is a crime for any person to travel in interstate commerce with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner and commit or attempt a crime of violence against that spouse, intimate partner, or dating partner.

It is a crime under subsection (a)(2) for a person to cause a spouse, intimate partner, or dating partner to travel in interstate commerce by force, coercion, duress, or fraud, and resulting from or in the course of such conduct, commit or attempt a crime of violence against that spouse, intimate partner, or dating partner.[10]

A "crime of violence," as that term is used in both sections of this statute, refers to "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). It may also be any "other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

2. Interstate Stalking -- 18 U.S.C. § 2261A

The federal crime of stalking may occur either by interstate travel, or by use of the mail, any interactive computer service, or other means of interstate commerce communication (*e.g.*, telephone, internet, *etc.*). A violation is committed if a person travels in interstate commerce with the intent to kill, injure, harass, or intimidate another person, and as a result places the victim in reasonable fear of death or serious bodily injury to the victim, or to an immediate family member, spouse, or intimate partner of the victim. 18 U.S.C. § 2261A(1). Alternatively, a stalking violation may occur even when the perpetrator does not leave his own state. It is a crime if the perpetrator, with the intent to kill or injure a victim in another state or place the victim in reasonable fear of death or serious bodily injury to the victim or to an immediate family member, spouse, or intimate partner of the victim, by use of the mail or other facility of interstate commerce (*e.g.,* telephone, internet, *etc.*) engages in a course of conduct that places the victim in such reasonable fear. 18 U.S.C. § 2261A(2).

[10] See *U.S. v. Helem*, 186 F.3d 449 (4th Cir. 1999), *cert. denied*, 528 U.S. 1053 (1999) (Defendant's conduct satisfied the "in the course or as a result of that conduct" requirement by beating his wife in their apartment before removing her from the state so that her condition would not be seen).

3. Interstate Violation of a Protective Order -- 18 U.S.C. § 2262

Similar to the domestic violence offense set forth in 18 U.S.C. § 2261, the offense of interstate violation of a protective order may involve either the offender crossing state lines, or wrongful conduct causing the victim to cross state lines. Under subsection (a)(1) of 18 U.S.C. § 2262, it is a crime for a person to travel in interstate commerce with the intent to violate terms of a protective order providing protection against violence, threats, or harassment against, contact or communication with, or physical proximity to a protected person, and to engage in such conduct in violation of the order.

Under subsection (a)(2), an offense is committed if the perpetrator, by force, coercion, duress, or fraud, causes a protected person to travel in interstate commerce, and as a result of such wrongful conduct violates the terms of a protective order prohibiting violence, threats, or harassment against, contact or communication with, or physical proximity to the protected person.

C. Offenses Involving Firearms Restrictions

1. State Offenses

Definition: "'Firearm' means any weapon which will expel a projectile by action of an explosion." W. Va. Code § 61-7-2(11). Unlike the federal definition of "firearm" (see next section), the West Virginia definition does not make an exception for antique firearms (e.g., muzzleloaders).

a) Possession of a firearm while a domestic violence protective order is in effect

Under West Virginia Code § 61-7-7(a)(7), it is a misdemeanor for a person who is subject to a domestic violence protective order (meeting the conditions set forth below) to possess a firearm. The prohibition against possessing firearms is enforceable for as long as the protective order remains in effect. The terms of this statute do not limit its application to protective orders issued by West Virginia courts. A protective order entitled to full faith and credit issued by any other jurisdiction would also be subject to this prohibition.

The qualifying conditions for application of the statutory firearms prohibition are that the protective order:

a) was issued after a hearing of which the respondent had actual notice and opportunity to participate;

b) restrains the respondent from harassing, stalking, or threatening an intimate partner or child of the intimate partner or respondent, or engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or child; and
c) includes a finding that the respondent is a credible threat to the physical safety of the intimate partner or child, or contains terms explicitly prohibiting the threatened, attempted or actual use of physical force against the intimate partner or child that would reasonably be expected to cause bodily harm. W. Va. Code § 61-7-7(a)(7).

b) Possession of a firearm following a conviction of a domestic violence offense or an offense relating to domestic violence

West Virginia Code § 61-7-7 prohibits a person who has been convicted of a misdemeanor crime of domestic violence or an offense involving or related to domestic violence from possessing a firearm. This firearm prohibition applies to convictions entered against a defendant in West Virginia or any other jurisdiction. It is a misdemeanor offense for anyone convicted in any court of a *misdemeanor crime of domestic violence* to possess a firearm. W. Va. Code § 61-7-7(a)(8). It is also a misdemeanor offense under subsection (a)(8) of this statute for anyone to possess a firearm if he or she was convicted of assault or battery (W. Va. Code § 61-2-9(b), (c)) and the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward, or a member of the defendant's household at the time of the offense.[11]

This statutory provision also makes it a felony offense for an individual to possess a firearm if previously convicted in this State or any other jurisdiction of a *felony crime of violence* against another person or a felony sexual offense. W. Va. Code § 61-7-7(b).[12] A violation of this subsection

[11] But *see Hollinghead v. Childers*, 226 W. Va. 714, 704 S.E.2d 714 (2010) (applicant for concealed weapons license previously convicted of simple battery could not have been charged with crime of domestic battery, where the statute in effect at time of offense did not include "nephew" in definition of "family/household member," and thus, such conviction was not a basis on which to deny applicant's concealed weapon license).

[12] Subsections (a) and (b) of West Virginia Code § 61-7-7 cover a number of circumstances under which persons are prohibited from possessing firearms under West Virginia law. The provisions discussed above are limited to those restrictions most directly related to domestic violence.

is a felony punishable by up to five years in prison, or a fine of up to $5,000, or both.

2. Federal Offenses

Definition: The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.
18 U.S.C. § 921(a)(3).

Under 18 U.S.C.§ 922(g)(8), it is a federal offense for any person who is subject to a protective order (meeting the conditions of this provision) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition shipped or transported in interstate or foreign commerce. Violation of this prohibition during the effective period of a protective order is a federal offense punishable by up to 10 years imprisonment. 18 U.S.C. § 924(a)(2).

This federal prohibition applies to persons subject to any court order that:

> 1) was issued after a hearing of which the person had actual notice and opportunity to participate;
> 2) restrains the person from harassing, stalking, or threatening an intimate partner[13] or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury; and
> 3) includes a finding that the person is a credible threat to the physical safety of an intimate partner or child, or contains terms explicitly prohibiting the threatened, attempted, or actual use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury.

It is also a federal offense for anyone convicted in any court of a *misdemeanor crime of domestic violence* to ship, transport, receive, or possess any firearm or ammunition in interstate or foreign commerce. 18 U.S.C. § 922(g)(9). The term "misdemeanor crime of domestic violence" is defined as a misdemeanor that "has, as an element, the use or

[13] Under 18 U.S.C. § 921(a)(32), "intimate partner" is defined as follows: The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(A)(ii).

Any *felony conviction*, related to domestic violence or otherwise, would also make the convicted person subject to the federal firearms restrictions. 18 U.S.C. § 922(g)(1). (See Chapter 9, section B for the text of these federal statutory provisions.)

3. Restoration of Rights Issues

Unlike the restraint against firearm possession applicable to persons while subject to active protective orders, the post-conviction restriction for persons convicted of a misdemeanor crime of domestic violence does not expire. Upholding the federal firearms restriction, a district court has found that "Section 922(g) furthers not only an exceedingly persuasive but a compelling government interest. Preventing or reducing severity of domestic violence in our country is of the utmost importance considering not only the prevalence of the problem, but the close link between domestic abusers and relevant levels of risk for intrafamily homicide or femicide." *U.S. v. Tooley*, 717 F. Supp. 2d 580 (S.D.W. Va. 2010).

The federal firearms prohibition pertaining to those persons convicted of a misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)) does have an exception for persons who have their civil rights restored following a loss of those rights upon conviction. 18 U.S.C. § 921(a)(33)(B)(ii). Under the express terms of the statute, a person is not considered to have been convicted of such an offense if his or her civil rights have been restored. However, because in West Virginia, as in many other states, persons convicted of misdemeanors do not suffer a loss of civil rights, the federal "restoration of rights" exception is generally deemed to not apply. *See, e.g., U.S. v. Jennings*, 323 F.3d 263 (4th Cir. 2003); *U.S. v. Smith*, 171 F.3d 617 (8th Cir. 1999); *In re Parsons*, 218 W. Va. 353, 624 S.E.2d 790 (2005).

With regard to persons convicted of a misdemeanor crime of domestic violence, the West Virginia Supreme Court held that a person who has been convicted of such an offense may not, under West Virginia Code § 61-7-7(c),[14] be allowed to regain his or her right to possess a firearm. *In*

[14] West Virginia Code § 61-7-7 was amended in in 2016. The current applicable subsection which addresses restoration of firearm rights is West Virginia Code § 61-7-7(f).

re Parsons, 218 W. Va. 353, 624 S.E.2d 790 (2005). In *Parsons*, the petitioner, who had been convicted of a misdemeanor crime of domestic violence, had requested that the circuit court restore his right to possess a firearm under West Virginia Code § 61-7-7(c). The circuit court declined because the petitioner would not be allowed to lawfully possess a firearm under federal law. Affirming the ruling, the West Virginia Supreme Court adopted two principles of federal law: a) that a person convicted of a misdemeanor crime of domestic violence does not lose his or her civil rights and cannot, therefore, fall into the restoration of civil rights exception established by 18 U.S.C. § 921(a)(33)(B)(ii); and b) that a person is subject to the firearms restriction even if the statute under which he or she was convicted did not, as an element, require a specific domestic relationship between the offender and victim. (Case law addressing this second principle is discussed in section 4, Predicate Offenses for Firearms Convictions). Because the petitioner's possession of a firearm would violate federal law, the West Virginia Supreme Court affirmed the circuit court ruling that declined to restore the petitioner's right to posses a firearm under West Virginia Code § 61-7-7(c). The Supreme Court specifically noted that West Virginia Code § 61-7-7(c)[15] allows firearm rights to be restored in some circumstances provided that possession of a firearm would not violate federal law.

The federal firearms prohibition governing those persons who have been convicted of a misdemeanor crime of domestic violence excludes persons whose conviction has been set aside, expunged or pardoned. 18 U.S.C. § 921(a)(33)(B)(ii). In a case involving a Wyoming expungement statute, the Tenth Circuit held that an expungement under the relevant statute did not qualify as an expungement under 18 U.S.C. § 921(a)(33)(B)(ii) because the effect of the expungement was to allow a person to possess a firearm, apply for a concealed weapon permit or purchase a firearm without a background check. *Wyoming v. U.S.*, 539 F.3d 1236 (10th Cir. 2008). An "expunged" conviction, however, could under Wyoming law still be used for sentence enhancement purposes. The Tenth Circuit concluded that the terms of "expunge" or "set aside" would "require a state procedure [to] completely remove the effects of a prior misdemeanor conviction . . .." 539 F.3d at 1249. Since the Wyoming statute did not meet this standard, the Tenth Circuit held that the purported expungement procedure did not meet the requirements of 18 U.S.C. § 921(a)(33)(B)(ii). *See also Jennings v. Mukasey*, 511 F.3d 894 (9th Cir. 2007) (holding that an expungement procedure under California law did not qualify for an expungement under 18 U.S.C. § 921(a)(33)(B)(ii) because a person had to disclose the conviction on state licensing applications and because the conviction could be used for sentence enhancement).

[15] See footnote on previous page concerning W. Va. Code § 61-7-7.

Similar to convictions that have been expunged or set aside, 18 U.S.C. § 921(a)(33)(B)(ii) provides that a person who has received a pardon for a misdemeanor crime of domestic violence is not considered to have been convicted. Unlike other terms in 18 U.S.C. § 921(a)(33)(B)(ii), the issue of pardons has not been extensively addressed and resolved by federal courts. However, the West Virginia Supreme Court has held that a gubernatorial pardon would not automatically restore a person's ability to possess a firearm. *Perito v. County of Brooke*, 215 W. Va. 178, 597 S.E.2d 311 (2004).[16] According to Syllabus Point 6 of *Perito*, a person who has received an unconditional gubernatorial pardon would be subject to the firearms restrictions established by West Virginia Code § 61-7-7. In *Perito*, the Supreme Court relied upon the conclusion that while a pardon would excuse a person from further punishment for a particular offense, "the *fact* of the conviction may nevertheless be considered under certain circumstances where no additional punishment for the pardoned crime is imposed upon the defendant." 215 W. Va. at 187, 597 S.E.2d at 320. Therefore, a gubernatorial pardon would not necessarily insulate a person from prosecution under 18 U.S.C. § 922(g), the federal law that imposes firearms restrictions for persons convicted of domestic violence crimes.

With regard to the federal firearms prohibition for persons convicted of a felony (18 U.S.C. § 922(g)(1)), there is also an exception for convicted felons who have had their civil rights restored under state law. 18 U.S.C. § 921(a)(20). Nevertheless, a person in West Virginia convicted of a felony crime of violence may not, pursuant to state law, regain his firearm rights. W. Va. Code § 61-7-7(b). This restriction does not expire, and cannot be removed by a circuit court under West Virginia Code § 61-7-7(f). This restoration-of-gun-rights provision applies only to convictions or circumstances listed within subsection (a) of this statute; and subsection (b)(2) expressly excludes any restoration possibility for a person convicted of a felony crime of violence. This particular firearm restriction could only be lifted if the felony conviction was set aside or pardoned. A pardon, even an unconditional pardon, however, does not automatically restore the right to possess firearms. *See Perito*, *supra*; *Rohrbaugh v. State*, 216 W. Va. 298, 607 S.E.2d 404 (2004).

4. Predicate Offenses for Firearms Convictions

If a defendant charged under state law with domestic battery or domestic assault pleads to a lesser offense (*e.g.*, simple battery rather than domestic battery), the conviction would still be subject to restrictions against possession of any firearm. W. Va. Code § 61-7-7(a)(8). Under

[16] The underlying criminal offense in *Perito* was malicious wounding, a felony. Under West Virginia Code § 61-7-7(a), a person who has been convicted of a felony crime of violence against another person may not be allowed to possess a firearm under West Virginia law.

the federal counterpart, 18 U.S.C. § 921(a)(33), the term "misdemeanor crime of domestic violence" is defined as any state or federal misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, 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, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim." This definition includes all misdemeanors that involve the use or attempted use of physical force if separate inquiry reveals that the offense was committed by a person within the section 921(a)(33) definition. While a violation of section 921(a)(33) requires proof of a domestic relationship, that domestic aspect does not have to be an element of the underlying offense. The predicate misdemeanor requires only one element – the use or attempted use of physical force or the threatened use of a deadly weapon. *U.S. v. Hayes*, 555 U.S. 415, 129 S. Ct. 1079 (2009) (holding that a West Virginia misdemeanor conviction for battery would qualify as a crime of domestic violence under 18 U.S.C. § 921(a)(33) because the statute that serves as the predicate offense need not require the existence of a domestic relationship between the offender and victim). *See also U.S. v. Smith*, 171 F.3d 617 (8th Cir. 1999); *U.S. v. Meade*, 175 F.3d 215 (1st Cir. 1999).

Subsequent to the decision by the United States Supreme Court in *Hayes*, the Fourth Circuit held that a domestic battery conviction was not a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. § 921(a)(33)(A)(ii) because a person can be convicted under the Virginia statute for an "offensive touching." *U.S. v. White*, 606 F.3d 144 (4th Cir. 2010). The Fourth Circuit concluded "that the phrase 'physical force' in § 921(a)(33)(A)(ii) means force, greater than a mere offensive touching, that is capable of causing physical pain or injury to the victim." 606 F.3d at 156. However, in 2014 the United States Supreme Court held that the "physical force" element of 18 U.S.C. § 921(a)(33)(A) is satisfied by "the degree of force that supports a common-law battery conviction." *U.S. v. Castleman*, 134 S. Ct. 1405, 1407 (2014). See also *U.S. v. Vincent*, 805 F.3d 120, 122-23 (2015). Therefore, a domestic battery conviction is considered a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. § 921(a)(33)(A)(ii).

Similar to federal law, under the provisions of West Virginia Code § 61-7-7(a)(8) the firearms restriction is not only applicable to misdemeanor convictions for domestic assault or battery under West Virginia Code § 61-2-28, but is also expressly applicable to any misdemeanor conviction for simple assault or battery under West Virginia Code § 61-2-9 if the victim is one of the persons identified in the statute. This firearms restriction in West Virginia also applies to a conviction from "any jurisdiction of a

comparable misdemeanor crime of domestic violence." W. Va. Code § 61-7-7(a)(8). Under West Virginia law, therefore, a person would be subject to a firearms restriction if he or she has a prior conviction for simple assault and battery and the victim meets the definition set forth in West Virginia Code § 61-7-7(a)(8).

Chapter 7

CASE LAW DIGEST

Chapter Contents

A. Domestic Violence - General Observations and Characteristics

Section A is not intended to be a complete summary or description of domestic violence research. It provides general observations, insights, and background regarding domestic violence issues as discussed in case law. The characteristics and issues associated with domestic violence are also discussed in Chapter 1 of this Benchbook – Dynamics of Domestic Violence.

1. Scope of the Problem of Domestic Violence

Hicks v. Hicks, 733 So. 2d 1261, 1263-1264 (La. App. 1999)

"Domestic violence has been recognized as one of this nation's great problems. Congress noted that it is estimated that at least two million women each year are battered by an intimate partner and that crime data from the Federal Bureau of Investigation records reveals that about 1,500 women are murdered by husbands or boyfriends each year."

2. Domestic Violence Defined

Thomas v. Morris, 224 W. Va. 661, 687 S.E.2d 760 (2009)

This protective order case involved the application and interpretation of the statutory definition of domestic violence set forth in West Virginia Code § 48-

27-202. The factual basis at issue arose when the respondent came to his former girlfriend's residence, a trailer, and beat on the doors and windows for one to two hours in an attempt to cause her to communicate with him. Before this incident, the respondent had called his former girlfriend at least 150 times between May and July of 2008. As a basis to establish fear, the petitioner testified that she had not come out of the trailer because she believed that the respondent was "agitated." She also testified that she knew he carried a concealed weapon and that she did not have telephone service at the residence. Further, the respondent's car was at least partially blocking the petitioner's driveway so that she could not leave in her car. Ultimately, she and her current boyfriend left the residence and traveled to a neighbor's house, which was approximately a quarter of a mile away.

Although the family court found that the petitioner had proved these facts, it did not award a protective order for two reasons. It concluded that the petitioner did not prove the elements established by West Virginia Code § 48-27-202(5), the definition of domestic violence that involves "holding, confining, detaining or abducting another person against that person's will," because she "*was not physically confined or restrained in her home*." 224 W. Va. 661, 687 S.E.2d 760 (emphasis in original). It also concluded that the respondent did not create fear of physical harm based on West Virginia Code § 48-27-202(3) because the respondent never expressly threatened the petitioner with physical harm. After reviewing the record, the circuit court affirmed the family court ruling.

In its opinion, the Supreme Court reasoned that the statutory language of subsection (5), the subsection that defines domestic violence as "holding, confining, detaining or abducting another person against that person's will," does not contain any language that requires a petitioner to prove that physical force or aggression caused the confinement. The Court also noted that controlling factors, such as threats of harm to third parties or fear of retribution, could result in someone being confined against his or her will. 224 W. Va. at 667, 687 S.E.2d at 766.

With regard to whether the respondent created "fear of physical harm by harassment, psychological abuse or threatening acts" (West Virginia Code § 48-27-202(3)), the lower courts, both the family and circuit courts, had noted that the respondent had never explicitly threatened the petitioner. However, the Supreme Court concluded that the lower courts erred because the statute does not require "some proof of an overt or explicit threat of harm by the alleged perpetrator . . .." 224 W. Va. at 668, 687 S.E.2d at 767. The Court further stated that "fear of physical harm may be established with (1) proof of harassment, (2) proof of psychological abuse, or (3) proof of overt or covert threatening acts." 224 W. Va. at 669, 687 S.E.2d at 768.
Reversing and remanding for the entry of a protective order, the Supreme Court held that:

> Syl. Pt. 5: The act of domestic violence defined in West Virginia Code 48-27-202(5) as "[h]olding, confining, detaining or abducting another person against that person's will" does not require proof of some overt physical exertion on the part of the alleged offender in order to justify issuance of a protective order.
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> Syl. Pt. 6: The act of domestic violence defined in West Virginia Code 48-27-202(3) as "[c]reating fear of physical harm by harassment, psychological abuse or threatening acts" provides that fear of physical harm may be established with (1) proof of harassment, (2) proof of psychological abuse, or (3) proof of overt or covert threatening acts.

John P.W. ex rel. Adam W. v. Dawn D.O., 214 W. Va. 702, 591 S.E.2d 260 (2003)

A domestic violence petition was filed on behalf of a minor child, then age 14, by his father. The parents of the child were divorced, shared physical custody of their two children fifty percent of the time, and jointly shared parenting decisions.

The facts that provided the basis for the entry of the protective order indicated that the mother confronted her son for taking possessions from her house that she required him to leave there.

In response to her questioning, the son was verbally abusive to his mother. In turn, the mother ran after her son, grabbed his shirt, and then grabbed the back of his pants. Although the facts of the incident are contested, the son was scratched and/or bruised. He did not require medical attention, however.

On appeal, the Supreme Court examined three of the definitions of domestic violence set forth in West Virginia Code § 48-27-202 to determine whether the protective order should have been granted. With regard to West Virginia Code § 48-27-202(1), the Court held that there was not sufficient evidence of physical harm to meet this statutory definition. With regard to West Virginia Code § 48-27-202(2), the Court held that there was insufficient evidence that the son had been placed in reasonable apprehension of fear of physical harm because he did not testify that he was afraid, nor was any other evidence presented supporting his fear.

With regard to West Virginia Code § 48-27-202(5), the Court noted that it "did not think the Legislature intended that the statutory definition of 'holding, confining, [or] detaining' be applied to everyday instances of parental

discipline." In footnote 17, the Court further explained that it was "trying to distinguish between those acts of parental control for which the state cannot interfere based on the recognized liberty interest parents have in raising their children and those instances where the state's interest in protecting a child's welfare justifies intervention." Finding that the alleged acts did not constitute domestic violence, the Court held:

> Syl. Pt. 3: To constitute domestic violence under the statutory definition of "[h]olding, confining, detaining or abducting another person against that person's will" within the meaning of West Virginia Code § 48-27-202(5), a parent's alleged act of domestic violence toward his or her child should, as a general rule, take place over a temporally significant period and not be the momentary act of a parent in the midst of attempting to control a child within the proper boundaries of parental control.

Christina L. v. Harry J. L., 1995 WL 788196 (Del. Fam. Ct.)

In this custody case, the Court defined domestic violence as follows:

> With regard to domestic violence, abuse is often defined as "a behavior which dominates or controls someone, or prevents someone from making a free choice," by either forcing the victim into involuntary action, or restraining the victim from voluntary action. In this context, abuse is primarily psychological or emotional, although lay people commonly attribute a physical aspect to the term. "Violence," another word frequently interchanged with abuse, is defined as "any action which causes fear," and includes the use of fear as a tool to control another person's behavior. Experts in the field of domestic abuse regard violence as ranging across a continuum of behaviors, including threatening to hit, breaking objects, or doing direct physical violence (i.e., physical contact of one person with another, extending from simple pushing or grabbing to hitting or slapping up to the use of weapons).
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> Psychological or emotional abuse, which includes intimidation, control, threats and intense and constant degradation, has been likened to brainwashing and often precedes displays of physical violence. (citations omitted).

In re J.P., 240 W.Va. 266, 810 S.E.2d 268 (2018)

This case involved the appeal of an adjudicatory order in an abuse and neglect case wherein the father was adjudicated as an abusing and neglectful parent. The DHHR had filed an amended petition after an incident

of domestic violence in which a stepdaughter witnessed the father physically attack the mother. After the attack, the father then took two other children and fled the home when he was angry. The lower court noted that the father's history of domestic violence was a factor in adjudicating him.

The Supreme Court affirmed the lower court's decision and pointed out that the father's fleeing of the house with the two children after committing domestic violence "directly affected those children." The Supreme Court also addressed what can constitute domestic violence by stating "[e]ven if a child is not harmed physically, psychological harm may occur by witnessing domestic violence or by knowing it is happening in the home." *See* M.L. McCoy, S. M. Keen, *Child Abuse and Neglect*, p. 103 (2nd ed. 2014).

Finally, the Supreme Court distinguished this case from *Lilith H.* because of the "level of domestic violence witnessed by the children over time." Specifically, the Supreme Court noted the father's conduct was not an "unexpected and isolated event" but rather, when considering his history of domestic violence, his involvement with CPS in several states, as well as this incident of domestic violence with the mother and children, it was clear that the lower court's decision to adjudicate the father was correct.

See also *In re J.F.,* 2016 WL 5900713 (W. Va. Sup. Ct., Oct. 11, 2016) (memo. op.)

3. Effects of Domestic Violence on Victims

Patricia Ann S. v. James Daniel S., 190 W. Va. 6, 435 S.E.2d 6, n. 6 (1993)

In footnote 6 of her dissenting opinion, Justice Workman defined an abused woman as "one who is repeatedly subjected to any forceful or physical or *psychological* behavior in order to coerce her to do something without any concern for her rights." (citing I. Bessenyey, *Visitation in Domestic Violence Context: Problems and Recommendations*, 14 Vt. L. Rev. 57 (1989).) (emphasis in original.)

Henry v. Johnson, 192 W. Va. 82, 450 S.E.2d 779 (1994)

Quoting from the legislative findings in the domestic violence act, the Court noted that "[c]hildren are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence."

Christina L. v. Harry J. L., 1995 WL 788196 (Del. Fam. Ct.)

The Delaware Family Court described the effects of domestic violence on a victim and the actions that create these characteristics as follows:

> Domestic abuse experts describe a victim of family violence as a manipulated person whose perceptions are controlled and whose view of reality is affected. The perpetrator of psychological abuse generally targets his victim and gradually erodes the victim's positive sense of self through one or a combination of the following actions: jokes about the victim's habits/faults, insults, ignores the victim's feelings, withholds approval of punishment, yells, name calls, repeats insults/targeted insults, repeats private and/or public humiliation, labels the victim as "crazy," "bitch," "whore," "animal," etc., threatens violence/retaliation, threatens abuse of the children or obtainment of their custody, and puts down the victim's abilities as a parent, worker and lover. This constant barrage of brainwashing results in the victim suffering a number of possible consequences, including: feelings of powerlessness or learned helplessness, sense of dependency and low self-esteem, emotional instability, nervous breakdown and/or depression, questioning her sense of reality. Such negative perceptions are also extremely common in women who have been physically abused by their partners on a repeated basis.
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> Whether physically and/or emotionally abused, a battered woman typically is a traditionalist about the home, strongly believing in family unity. She generally accepts responsibility for the batterer's actions, and presents a passive face to the world. Her sense of self, including any strong feelings of independence or competency with which she entered the relationship, is eroded by her abuser over time, and replaced by sensations of helplessness, confusion, isolation, depression and humiliation, as well as guilt and feelings of failure. In response to the severe stress generated by the emotional battering, the victim often suffers from such psychophysical ailments as headaches, fatigue or insomnia, or more serious illnesses. These somatic symptoms are often in addition to actual physical injuries which the abuser may inflict upon her. (citations omitted.)

4. Profile of a Domestic Violence Perpetrator

Heck v. Reed, 529 N.W.2d 155 (N.D. 1995)

The Court noted in this appeal of a custody determination that: "Domestic violence is not caused by stress in the perpetrator's life, alcohol consumption, or a particular victim's propensity to push a perpetrator's buttons. Rather,

domestic violence is a learned pattern of behavior aimed at gaining a victim's compliance." (citing Anne Ganley, et al., The Impact of Domestic Violence on the Defendant and the Victim in the Courtroom, *Domestic Violence: The Crucial Role of Judge in Criminal Court Cases. A National Model for Judicial Education*, The Family Violence Prevention Fund, 1991.)

5. Phases of an Abusive Relationship

State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984)

The New Jersey Supreme Court reversed a trial court that excluded expert testimony concerning battered women syndrome to establish self-defense. In reaching this decision, the Court described the phases associated with an abusive relationship.

As a basis to explain reasons why women remain in abusive relationships, the Court summarized the phases of an abusive relationship as reported by Dr. Lenore Walker in her book, *The Battered Woman*. Dr. Walker referred to the first phase as the "tension-building stage." This stage involves minor verbal and physical abuse, and the woman responds passively to ward off serious abuse. Phase two, named the "acute-battering incident," involves a more serious episode of domestic violence. Phase three, as the Court noted, "is characterized by extreme contrition and loving behavior on the part of the battering male." 97 N.J. at 194, 478 A.2d at 371. The third phase, as further observed by the Court, provides an incentive for a woman to remain in the relationship. (citing R. Langley & R. Levy, *Wife Beating: The Silent Crisis*, 112-14 (1977).)

As further explanation for the reasons a woman might not leave an abusive relationship, the Court noted that women may "sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation." 97 N.J. at 194, 478 A.2d at 372. Additionally, the Court noted that social and economic factors become barriers to leaving an abusive relationship, as well as an unwillingness to confide in friends, family, or police due to feelings of shame and humiliation, fear of the batterer, or fear they will not be believed. Finally, the Court noted that women are often reluctant to leave an abusive relationship because doing so may subject them to more serious, even lethal, attacks.

B. Civil Remedies for Domestic Violence Victims

1. Priority of Domestic Violence Cases

In the Matter of Browning, 192 W. Va. 231, 452 S.E.2d 34 (1994)

In this judicial disciplinary proceeding, a magistrate was disciplined for her failure to assist a domestic violence victim when the magistrate was on duty. The Court specifically noted that domestic violence cases must be recognized as being among the highest priority for the courts' attention.

Syl. Pt. 6: Domestic violence cases are among those that our courts must give priority status. In W. Va. Code 48-2A-1, *et. seq.*, the West Virginia Legislature took steps to ensure that these cases are handled both effectively and efficiently by law enforcement agencies and the judicial system.

See also Syl. Pt. 2, *In re: McCormick*, 206 W. Va. 69, 521 S.E.2d 792 (1999) (per curiam).

2. Duty of Magistrates to Assist Domestic Violence Victims

In the Matter of Browning, 192 W. Va. 231, 452 S.E.2d 34 (1994)

Syl. Pt. 7: Magistrates are statutorily required to provide an individual with any assistance necessary to complete a petition for a protective order. Once the petition is completed, the magistrate must file the petition and, upon a showing of sufficient facts, issue a protective order. If a magistrate believes that she or he is disqualified from handling the matter, the magistrate must examine carefully whether the rule of necessity applies. Under no circumstance should a victim of abuse be turned away from a magistrate or circuit judge without insuring the victim will receive prompt attention by another magistrate or judge.

In re: McCormick, 206 W. Va. 69, 521 S.E.2d 792 (1999) (per curiam)

In this judicial disciplinary proceeding, the Court held that a magistrate violated the Code of Judicial Conduct when she was on-call and advised a person over the telephone who sought a domestic violence petition that the situation would not be appropriately addressed by a domestic violence petition. The Court stated that an on-call magistrate has a duty to come immediately to the courthouse whenever a person wants to file a domestic violence petition; and that the on-call magistrate should not screen the situation over the telephone to determine whether to come to the courthouse.

3. Mutual Restraining Orders Disfavored

Riffle v. Riffle, 235 W. Va. 430, 774 S.E.2d 511 (2015)

This appeal focused solely upon the mutual restraining order included within the parties' final divorce decree. Shortly after the divorce, the petitioner sought to have his former wife found in contempt of the mutual restraining provision. The petitioner alleged that his ex-wife left a message on his

answering machine, and that she attempted contact with the petitioner through contact with a mutual colleague. The family court found the respondent in contempt with regard to these attempted contacts. The respondent filed an appeal with the circuit court challenging the contempt ruling and further challenging the inclusion of the mutual restraining order in the final divorce decree. The circuit court reversed the family court's issuance of a mutual restraining order, finding that it lacked any statutory or evidentiary basis.

In the subsequent appeal, the Supreme Court took the opportunity to address and narrow the "regular practice of inserting language in domestic relations orders aimed at restricting the conduct of each party."

The Court first discussed the statutory authority of courts to grant relief against harassment and abuse in divorce proceedings. Under West Virginia Code § 48-5-608, a court may enjoin an offending party from harassing or verbally abusing the other party. This form of restraining order can be imposed even if abusive conduct does not rise to the level of acts defined as "domestic violence" under Chapter 48, Article 27. The Court pointed out that by the language of section 608, rather than providing authority for mutual restraining orders, the statute authorizes relief against a singular "offending party" and only upon proof of "allegations of abuse."

The Court next addressed the related provisions in the Prevention of Domestic Violence Act, West Virginia Code § 48-27-507, restricting the use of mutual protective orders. The Court agreed with the circuit court's decision to set aside the mutual restraining order, concluding that mutual protective orders cannot be issued without qualifying allegations of domestic violence, or abuse, supported by evidentiary proof of those allegations. In a new syllabus point, the Court held:

> Pursuant to the provisions of West Virginia Code § 48-27-507 (2014), a court is prohibited from entering a mutual protective order unless each party has filed a petition asserting allegations of domestic violence against the other and established those allegations by a preponderance of the evidence. (Syl. Pt. 2)

The Court went on to note recently enacted West Virginia Code § 51-2A-2a, which authorizes family courts to restrict contact between parties in a divorce action when conduct does not arise to the level of domestic violence. The Court cautioned that even though this sort of order restricting contact is more limited than a DVPO, family courts should avoid the routine practice of entering mutual restraining orders. Such boilerplate orders can result in diminished protection, confuse police officers who are called to a domestic

violence scene, and jeopardize significant federal funds available under the Violence Against Women Act.

Pearson v. Pearson, 200 W. Va. 139, 488 S.E.2d 414 (1997)

In this divorce case, the family law master found that mutual restraining orders against the parties were appropriate based upon her own observations, but made no findings that either party proved that abuse had occurred. The circuit court, also without any findings, included the mutual restraining orders in the final divorce order. The Supreme Court held that the circuit court erred in issuing the restraining orders without findings of abuse.

Syl. Pt. 9: W. Va. Code § 48-2-15(b)(9) (1996) provides "[w]hen allegations of abuse have been proven, the court shall enjoin the offending party[.]" This provision makes it mandatory that a restraining order be entered against a spouse where it is shown by a preponderance of the evidence that such spouse abused the other spouse.

In her separate opinion, Justice Workman derided the use of mutual restraining orders without a proper evidentiary foundation, and described them as "generally harmful and ineffective." 200 W. Va. at 153, 488 S.E.2d at 428.

Justice Workman further noted that: "The issuance of a restraining order without a petition and supporting evidence trivializes the complaint of the individual who has filed such a petition and has provided evidence in support thereof." *Id*. Encouraging the development of effective domestic violence policy, she asserted that: "Unjustified mutual restraining orders denigrate the very purpose of domestic violence restraining orders. It is vital that the judicial system treat domestic violence as a serious problem and that we work to create a system more responsive to those who seek protection." 200 W. Va. at 154, 488 S.E.2d at 429.

The current statutory provisions governing restraining orders issued incident to a divorce are found in West Virginia Code §§ 48-5-509 and 608. The limitations on the issuance of mutual protective orders in domestic violence cases are codified in West Virginia Code § 48-27-507.

Baker v. Baker, 1995 Okla. Civ. App. 111, 904 P.2d 616 (1995)

A woman filed a petition for a protective order, but her ex-husband did not. At the scheduled hearing, the trial court entered a protective order against both parties.

On appeal, the Court held that the entry of the order against the woman violated her due process rights. The Court reasoned that: "It is elementary

and fundamental that the phrase 'due process of law' encompasses more than a party's right to be heard; it begins with a party's right to *notice* of the pendency of an action against them, and of the nature of any relief sought." 904 P.2d at 618 (emphasis in original). Further, the Court stated that the trial court may not amend the pleadings unless a party seeking a protective order follows the procedures in the Oklahoma Domestic Violence Act.

Cooper v. Cooper, 144 P.3d 451 (Alaska 2006)

In the course of a divorce case, a judge issued mutual restraining orders against both a husband and wife based upon each parties' expression of concern for safety from the other party and because the parties had demonstrated a high level of animosity and distrust towards the other throughout the litigation. The husband, however, was the only person who had engaged in acts of domestic violence. Reversing the entry of the protective order against the wife, the Alaska Supreme Court noted that there must be an independent basis for each order and that "an expression of concern is insufficient to establish an independent basis for the order." 144 P.3d at 459. Further, the Court noted that "a general acknowledgement of animosity and distrust during a divorce is insufficient to establish an independent basis for the order." *Id.*

See also *Wee v. Eggener*, 225 P.3d 1120 (Alaska 2010) (holding that a mutual no-contact order issued to unmarried parties who were parents of a child was not supported by an independent factual basis and was not in accord with public policy).

4. Required Findings – Family Court

John P.W. ex rel. Adam W. v. Dawn D.O., 214 W. Va. 702, 591 S.E.2d 260 (2003)

When a family court granted a protective order but did not make a specific finding as to which statutory definition of domestic violence was proven, the Court held:

> Syl. Pt. 2: To allow proper judicial review, a family court judge who issues a domestic violence protective order is required to make factual findings which describe the acts of domestic violence that have been established by the evidence presented and to identify which statutory definition of domestic violence such facts demonstrate.

See also T.W.J. v. L.S.A., 2016 WL 5846616 (W. Va. Sup. Ct., Oct. 6, 2016) (memo. op.).

5. Who Can File a Petition for a Domestic Violence Protective Order

In re B.C., 233 W. Va. 130, 755 S.E.2d 664 (2014)

Syl. Pt. 4: Under *W.Va.Code* § 48–27–305 [2001], a petition for a domestic violence protective order may be pursued by three classes of people: (1) a person individually seeking relief from domestic violence; (2) an adult person seeking relief from domestic violence on behalf of a family or household member, such as a minor child; or (3) a person who is being abused, threatened or harassed because they witnessed or reported domestic violence.

Katherine B.T. v. Jackson, 220 W. Va. 219, 640 S.E.2d 569 (2006)

A fifteen-year-old boy filed a petition for a domestic violence protective order against his mother. The petition was granted by the family court. After an unsuccessful bid for extraordinary relief in circuit court, the mother appealed. On appeal to the Supreme Court, she claimed the family court exceeded its jurisdiction by issuing a domestic violence protective order upon a petition filed by a minor. Further, the mother/appellant argued that under state law, a minor is required to be represented by a "next friend."

In addressing these issues, the Supreme Court held:

> Syl. Pt. 6: Under W. Va. Code, 48-27-305, a minor may file a petition for a domestic violence protective order.
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> Syl. Pt. 7: When a minor, without a next friend or guardian, files a petition for a protective order under W. Va. Code, 48-27-101, et seq., the court in which the petition is filed shall immediately upon filing of the petition appoint a guardian *ad litem* for the minor.

6. Enforcement of Protective Orders Through Civil Contempt Proceedings

The following case states the general principles associated with civil contempt. Although the case does not directly address civil contempt in the context of a domestic violence protective order case, these general principles would apply.

State ex rel. Robinson v. Michael, 166 W. Va. 660, 276 S.E.2d 812 (1981)

Syl. Pt. 1: Whether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may

provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate.

Syl. Pt. 2: Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemnor so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil.

Syl. Pt. 3: The appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order.

In footnote 9, the Court distinguished between indirect and direct contempt as follows:

> In addition to the distinction between civil and criminal contempts discussed in detail in this opinion it is also possible to distinguish between direct or indirect contempt. Conduct that occurs in the actual physical presence of the court which the judge actually sees or hears in its entirety may be treated as a direct contempt. Any conduct that may constitute contempt which occurs entirely or partially outside of the actual physical presence of the court may only be treated as an indirect contempt. There are, therefore, four possible classifications of contempt: direct-criminal, indirect-criminal, direct-civil, and indirect-civil.

7. Dismissal or Termination of Protective Orders

Stevenson v. Stevenson, 314 N.J. Super. 350, 714 A.2d 986 (1998)

In a case involving significantly brutal acts of domestic violence, a victim requested the dissolution of a restraining order, but the trial court denied her request. On appeal, the Court held that dismissal is discretionary, and is dependent upon a showing of good cause under the particular facts of the case.

Affirming the denial of the dismissal request, the Court first relied upon the relevant New Jersey statute that requires a showing of good cause to dismiss a protective order. Second, the Court observed that the victim's request was consistent with the phase in a battering cycle "during which pleas for

forgiveness and protestations of devotion are often mixed with promises to seek counseling, stop drinking and refrain from further violence." 314 N.J. Super. at 362, 714 A.2d at 993.

The Court provided the following guidance with regard to dissolution requests. First, the trial court "must determine whether objective fear can be said to continue to exist, and also whether there is a real danger of domestic violence recurring, in the event the restraining order is dissolved." 314 N.J. Super. at 364, 714 A.2d at 994. Second, the court must independently find that a protective order is no longer necessary. Setting forth its rationale, the Court reiterated New Jersey public policy that supports maximum protection for domestic violence victims, the official response that domestic violence shall not be tolerated, and that courts must protect domestic violence victims through the use of appropriate sanctions and remedies.

I.J. v. I.S., 328 N.J. Super. 166, 744 A.2d 1246 (1999)

In a case decided a year later than *Stevenson*, cited above, the Court noted that: "If a plaintiff wishes to dissolve a restraining order, the act requires no further justification from plaintiff other than a showing that there is lack of coercion, voluntariness and that plaintiff understands the 'cycle of violence' and the consequences of dismissing a restraining order." 328 N.J. Super. at 177, 744 A.2d at 1252. The Court also noted that a plaintiff who sought to dismiss a protective order must be counseled on these issues by a member of the domestic violence unit. In addition, a court must conduct a hearing and also review these issues with the plaintiff. With regard to a request for dismissal by a defendant, the Court noted that a defendant, but not the plaintiff, would be required to show "good cause" for dismissal.

Tobkin v. State of Florida, 777 So.2d 1160 (Fla. Dist. Ct. App. 2001)

A woman was granted a domestic violence injunction against her husband, and she also initiated divorce proceedings.

Following reconciliation, the woman moved to dismiss both the domestic violence and divorce proceedings. After the trial judge failed to dismiss the domestic violence case, the parties jointly filed a writ of prohibition to prevent the trial court from proceeding. Relying on the relevant Florida statutes, the appellate court held that a petition for a domestic violence injunction is a private action that may be voluntarily dismissed like any other civil action.

8. Required Hearing – Appeal to Circuit Court

John P.W. ex rel. Adam W. v. Dawn D.O., 214 W. Va. 702, 591 S.E.2d 260 (2003)

After the entry of a protective order, the respondent appealed to the circuit court. The circuit court affirmed the family court without conducting a hearing. Reversing the circuit court, the Supreme Court held:

> Syl. Pt. 4: The statutory language "shall be heard" that is set forth in West Virginia Code § 48-27-510(c) connotes in mandatory terms the obligation of the circuit court to afford a petitioner seeking relief from a domestic violence protective order the opportunity to appear and present argument in person in connection with a timely filed appeal unless affirmatively waived by the appealing party.

As noted in this syllabus point, a party appealing the entry of a protective order has the right to present argument in support of the appeal.

9. Standard of Review – Supreme Court of Appeals of WV

John P.W. ex rel. Adam W. v. Dawn D.O., 214 W. Va. 702, 591 S.E.2d 260 (2003)

Syl. Pt. 1: Upon an appeal from a domestic violence protective order, this Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo.*

See also T.W.J. v. L.S.A., 2016 WL 5846616 (W. Va. Sup. Ct., Oct. 6, 2016) (memo. op.) and *Julia M. v. Noah M.*, 2013 WL 656684 (W. Va. Sup. Ct., Feb. 22, 2013) (memo. op.).

10. Civil Remedy Provision of Violence Against Women Act Is Unconstitutional

United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740 (2000)

The United States Supreme Court held that 42 U.S.C. § 13981, the civil remedy provision of the Violence Against Women Act, was unconstitutional for two reasons. First, the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce." Secondly, the Court found that Congress lacked authority to enact this remedy under § 5 of the Fourteenth Amendment because it was not directed at states or any state action.

C. Jurisdictional Issues in Cases Involving Domestic Violence

1. When Divorce Action Is Pending

Cases arising under former statutory provisions governing domestic violence proceedings (earlier codified at West Virginia Code §§ 48-2A-1, *et seq.*) held, consistent with those former code provisions, that the pendency of a divorce action precluded any jurisdiction for the issuance of domestic violence protective orders. *See In the Matter of McGraw*, 178 W. Va. 415, 359 S.E.2d 853 (1987); *Baldwin v. Moses*, 182 W. Va. 120, 386 S.E.2d 487 (1989).

The current statutes, West Virginia Code §§ 48-27-401 and 402, provide for certain exceptions when a domestic relations action is pending. First, if a temporary order, other than a procedural order, has not been entered in the divorce action, a person may seek relief under the Domestic Violence Prevention and Treatment Act. W. Va. Code § 48-27-401. Secondly, a party to a divorce action with a temporary order in effect may apply for and be granted a temporary emergency protective order (TEPO) in magistrate court for any acts of domestic violence occurring after the entry of the temporary order in the divorce action, with relief limited to provisions involving contact between the parties, and modification of child custody if there is clear and convincing evidence of the respondent's abuse of a child. W. Va. Code § 48-27-402(b)-(d).

2. When Divorce Is No Longer Pending

Baldwin v. Moses, 182 W. Va. 120, 386 S.E.2d 487 (1989)

Syl. Pt. 3: Once a final decree is entered in a divorce action, such action is no longer "pending" and a circuit or magistrate court may assert jurisdiction under the Prevention of Domestic Violence Act, West Virginia Code 48-2A-1, *et seq.* (now codified at W. Va. Code § 48-27-101, *et seq.*).

3. Effect of Prior Injunction or Restraining Order

Baldwin v. Moses, 182 W. Va. 120, 386 S.E.2d 487 (1989)

Syl. Pt. 5: The fact that the final divorce decree enjoins each party from molesting or annoying the other does not deprive a circuit or magistrate court of jurisdiction under the Prevention of Domestic Violence Act, W.Va. Code, 48-2A-1, *et seq*. (now codified at W. Va. Code § 48-27-101, *et seq.*).

4. Former Spouse or Partner

Baldwin v. Moses, 182 W. Va. 120, 386 S.E.2d 487 (1989)

Syl. Pt. 4: Under West Virginia Code 48-2A-2b, a former spouse who no longer resides in the household is subject to the Prevention of Domestic Violence Act.

(The current statutory provision, West Virginia Code § 48-27-204, by definition, continues to permit persons to seek relief against former spouses or partners.)

Note: West Virginia adopted the Uniform Child Custody Jurisdiction Act (UCCJA) in 1981, and some cases in the following sections relate to provisions in that Act. In 2001, West Virginia adopted the revised version, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is codified at West Virginia Code §§ 48-20-101, et seq. Given the substantial similarities between the original and revised Acts, cases decided under the UCCJA may still provide helpful guidance to cases involving interstate custody issues.

5. Jurisdiction Under the UCCJEA and the Parental Kidnapping Prevention Act

Rosen v. Rosen, 222 W. Va. 402, 664 S.E.2d 743 (2008)

This case did not involve domestic violence. However, the discussion of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), West Virginia Code §§ 48-20-101, *et seq.*, and the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A, provides guidance with regard to interstate custody issues that may arise in cases involving domestic violence.

In this case, a married couple had four children, three of whom were minors when this case began. While the parties were still married, the appellant moved to Ohio with two of her minor children. After she had lived in Ohio for four months, she filed for separation from her husband. Approximately 20 days later, the appellee filed for divorce in West Virginia.
In initial proceedings, the Ohio family court entered an order that found it had jurisdiction over custody of the minor children because, it reasoned, that the appellee had waived jurisdictional rights under the UCCJEA by agreeing to the children's relocation to Ohio. (Whether the appellee had, in fact, agreed to relocation was disputed.) The Ohio family court further found that Ohio was a more convenient forum to address the matter. While the West Virginia case was pending, the Ohio Supreme Court issued a writ of prohibition, *Rosen v. Celebrezze*, 117 Ohio St. 3d 241, 883 N.E.2d 420 (2008), to prevent the Ohio family court from addressing child custody because it lacked subject matter jurisdiction under the UCCJEA. *Rosen*, 222 W. Va. 402, 664 S.E.2d 743, n. 9.

Two months after the Ohio family court had entered its initial order, the West Virginia family court entered an order that found that West Virginia was the only "home state" for the minor children under the UCCJEA. The West Virginia family court also found that West Virginia would have to first decline to exercise jurisdiction based on a conclusion that it was an inconvenient

forum before Ohio could assume jurisdiction on the basis that it was a more convenient forum. The West Virginia family court further found that West Virginia was a more appropriate forum because the primary witnesses were West Virginia residents. On appeal to West Virginia circuit court, the West Virginia family court was affirmed.

As a starting point for its analysis, the West Virginia Supreme Court noted that both the West Virginia and Ohio legislatures had enacted almost identical versions of the UCCJEA. The Court also noted that the UCCJEA had changed a prior model act, the Uniform Child Custody Jurisdictional Act, so that jurisdictional priority was afforded to the "home state" as a means to avoid competition between courts over child custody disputes. 222 W. Va. at 406-07, 664 S.E.2d at 747-48. In Syllabus Point 6, the Court held that the UCCJEA is a jurisdictional statute, and its requirements must be met to confer subject matter jurisdiction on a court.

With regard to the instant case, the Court upheld the family court ruling that West Virginia was the home state for the minor children because the parties and their children had resided in West Virginia from 1992 until 2005 and that the two youngest children had only resided in Ohio for four months when the Ohio case was filed. See W. Va. Code § 48-20-102(g). The Court also held that the Ohio custody order was not entitled to full faith and credit under the PKPA because the Ohio court lacked subject matter jurisdiction under the UCCJEA. See 28 U.S.C. § 1738A. The Court further held that subject matter jurisdiction could not be established by consent, waiver or estoppel. Syl. Pt. 5, *Rosen*, 222 W. Va. 402, 664 S.E.2d 743.

With regard to whether Ohio was a more convenient forum, the West Virginia Supreme Court noted that, under the UCCJEA, the court with jurisdiction (the West Virginia family court in this case) has the discretion to determine whether there is a more convenient forum. See W. Va. Code § 48-20-201(a)(3). The Supreme Court also noted that the West Virginia family court had found that Ohio was not a more appropriate forum. The West Virginia Supreme Court affirmed this conclusion.

In four new syllabus points, the Court held that:

> Syl. Pt. 3: Pursuant to West Virginia Code § 48-20-102(g), "home state" means the state in which the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

> Syl. Pt. 4: Although foreign states' custody decrees should be enforced and recognized by West Virginia courts if they accord with the statutory jurisdictional provisions of the Uniform Child Custody Jurisdiction and Enforcement Act, West Virginia Code § 48- 20-101, *et seq*., and the Parental Kidnaping Prevention Act, 28 U.S.C.A. §1738A, in child custody matters where a foreign court lacks jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, the full faith and credit doctrine will not be applied.
>
> Syl. Pt. 5: Subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, West Virginia Code § 48-20-101, *et seq*., cannot be conferred by consent, waiver, or estoppel.
>
> Syl. Pt. 6: The Uniform Child Custody Jurisdiction and Enforcement Act, West Virginia Code § 48-20-101, *et seq*., is a jurisdictional statute, and the requirements of the statute must be met for a court to have the power to adjudicate child custody disputes.

Sams v. Boston, 181 W. Va. 706, 384 S.E.2d 151 (1989)

This case was decided when the earlier Uniform Child Custody Jurisdiction Act (UCCJA) was in effect. Given substantial similarities between the original and revised acts, the UCCJEA cases decided under the UCCJA may provide helpful guidance.

Syllabus: A state remains the "home state" of the children, for purposes of the Uniform Child Custody Jurisdiction Act, specifically, *W.Va. Code,* 48-10-2(5) and 48-10-3(a)(1), and for purposes of the Parental Kidnapping Prevention Act, specifically, 28 *U.S.C.* § 1738A(b)(4) and § 1738A(c)(2)(A), for a reasonable period of time, where the children have been abducted to and concealed in another state by one of the parents.

6. Full Faith and Credit Principles Applied to Child Custody Decrees

Arbogast v. Arbogast, 174 W. Va. 498, 327 S.E.2d 675 (1984)

This case was a custody dispute that did not involve domestic violence and it was decided under the earlier enacted uniform custody statute, the UCCJA. However, its discussion of both the PKPA and the UCCJA may be applicable to custody provisions in sister state protective orders.

Syl. Pt. 1: The Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, extends full faith and credit principles to child custody decrees and requires every state to enforce sister state custody determinations that are consistent with the act.

Syl. Pt. 2: Under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, our courts are required to enforce an out-of-state child custody modification decree if: (1) the initial decree was consistent with the act; (2) the court in the first state had jurisdiction under its laws to modify the initial decree; and (3) a child or one of the contestants in such proceeding has remained a resident of the first state.

Syl. Pt. 3: Before an out-of-state child custody decree can be enforced here, it must be demonstrated that the court making the decree had jurisdiction of the parties and of the subject matter of the dispute.

See also: Ellithorp v. Ellithorp, 212 W. Va. 484, 575 S.E.2d 94 (2002); *McAtee v. McAtee*, 174 W. Va. 129, 323 S.E.2d 611 (1984).

Thompson v. Thompson, 484 U.S. 174, 108 S. Ct. 513 (1988)

After two state courts entered conflicting custody decrees, the father sought injunctive and declaratory relief in a California federal district court. The district court dismissed the case, and the Ninth Circuit affirmed. On appeal, the United States Supreme Court held that there was no implied private cause of action in the PKPA which would allow a person to seek relief with regard to conflicting custody orders from different states in federal district court.

7. Modification of Sister State Custody Decrees

In the Interest of Brandon L.E., 183 W. Va. 113, 394 S.E.2d 515 (1990) (modified on other grounds by *Clifford K. v. Paul S.*, 217 W. Va. 625, 619 S.E.2d 138 (2005))

Although this custody dispute did not involve domestic violence, its guidance concerning the modification of custody decrees, as allowed by the UCCJA, may be applicable to domestic violence cases that involve custody disputes.

Syl. Pt. 1: The Uniform Child Custody Jurisdiction Act, W. Va. Code §§ 48-10-1 to -26, is premised on the theory that the best interests of a child are served by limiting jurisdiction to modify a child custody decree to the court which has the maximum amount of evidence regarding the child's present and future welfare.

Syl. Pt. 2: Notwithstanding their intent to require states adopting the Uniform Child Custody Jurisdiction Act to recognize custody decrees entered by sister states, the Act's drafters in no uncertain terms provided jurisdiction to both the original "custody court" and other courts to determine whether modifications of the initial custody decree is in the best interest of the child.

8. Emergency Jurisdiction Under the UCCJEA

Steckler v. Steckler, 921 So.2d 740 (Fl. 2006)

When a husband and wife separated in July 2003, the wife moved from Florida to North Dakota with the parties' three children. In 2004, a Florida court granted the parties a divorce and established terms of custody and visitation for the children. After the custody order was entered, a dispute about visitation arose because the father was denied the opportunity to visit with his children during the summer of 2004. As relief, the Florida court awarded the Christmas break to make up for his missed summer visitation. During the 2004 Thanksgiving holiday, the father visited the children in North Dakota. After he returned to Florida, his former wife obtained a temporary domestic violence order that modified custody of the children. At a final hearing, the father appeared by telephone and the North Dakota court granted a two-year protective order to the children's mother. Additionally, it modified the Florida custody order by finding that the father had waived his 2004 Christmas visitation with the children. In turn, the father sought relief in the Florida court based on its earlier order that granted him visitation for the 2004 Christmas vacation. The mother sought to stay the Florida proceedings based upon the North Dakota protective order case, but the Florida court denied this motion, found that jurisdiction for custody of the children remained in Florida and that the father would receive additional make-up visitation.

On appeal, the Florida appellate court found that the domestic violence protection order was entitled to fully faith and credit. Also, the Florida court found the custody provisions in the protective order were subject to the UCCJEA and that the North Dakota court had acted within the temporary emergency jurisdiction established by the UCCJEA. With regard to the mother's argument that the Florida family court was an inconvenient forum, the appellate court found that jurisdiction over custody properly remained with the Florida court. Further, the Florida appellate court found that the Florida family court should have communicated with the North Dakota judge to resolve the jurisdictional conflicts. Finally, the Florida appellate court found that the Florida family court should contact the North Dakota court and could then determine whether any make-up visitation should be awarded to the father.

Bissell v. Baumgardner, 236 S.W.3d 24 (Ky. 2007)

The facts of this case involved a couple who was residing in Utah while they were married. The wife traveled to Kentucky with the children (one of whom was the wife's child from a previous relationship) and then informed her husband that she would not be returning to Utah. In response, the husband filed for divorce in Utah. He came to Kentucky to visit his child and allegedly threatened his wife. In turn, the wife obtained a domestic violence protective order that granted custody of the parties' son to the wife. The husband appealed on various grounds, including lack of jurisdiction to adjudicate custody. On appeal, the Kentucky Court of Appeals held that the Kentucky family court had properly exercised emergency jurisdiction under the UCCJEA and did not impinge on the Utah court which had jurisdiction to make the final custody decision.

9. Emergency Jurisdiction Under the Parental Kidnapping Prevention Act

The following cases do not directly address domestic violence and were decided under the earlier enacted uniform custody statute, the UCCJA, not the UCCJEA. However, the explanation of emergency jurisdiction under the Parental Kidnapping Prevention Act provides guidance that may be applicable to cases involving domestic violence and interstate custody issues.

Sheila L. v. Ronald P.M., 195 W. Va. 210, 465 S.E.2d 210 (1995)

This case involved a custody dispute between unmarried parents. Initially, the child resided with his mother in West Virginia. Problems arose when the mother's stepfather was suspected of molesting the child and his half-brother. The child's father sought and was granted an emergency custody order by an Ohio Court when the child was visiting him. The mother sought relief in a West Virginia circuit court which held that the Ohio decree must be enforced. On appeal, the West Virginia Supreme Court reversed and found that the Ohio Court did not have subject matter jurisdiction to award permanent custody under the Parental Kidnapping Prevention Act.

Syl. Pt. 2: Under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A(d), a court may continue its jurisdiction if it has made a child custody determination consistent with the provisions of this section, if it maintains jurisdiction under its law, and if either the child or a contestant continues to reside in the state. A custody determination is defined in 28 U.S.C. § 1738A(b)(3) as a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications.

Syl. Pt. 3: To assume jurisdiction in an emergency situation under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(c)(1) and (2)(C), a state must have jurisdiction under its own law, the child must be physically present in the state, and the child must be either abandoned or in an emergency situation that necessitates action to protect the child being subjected to or threatened with mistreatment or abuse.

Syl. Pt. 4: Unsubstantiated statements of a parent that a child is being subjected to or threatened with mistreatment or abuse, by themselves, cannot serve as a basis to invoke jurisdiction of a court to enter or modify a permanent custody award under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(c). A parent is not precluded merely because of unsubstantiated statements from raising allegations of mistreatment or abuse in a court that has jurisdiction to enter or modify a permanent custody award on other grounds; nor is that court prevented from considering such unsubstantiated statements in entering a temporary order to protect a child from an emergency situation of abuse.

Syl. Pt. 5: It is consistent with the intent of the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, that a court without jurisdiction on other grounds may invoke temporary emergency jurisdiction if its exercise of jurisdiction is consistent with the laws of the state where the court is located, the child is physically present in that state, and the child is in need of protection as a result of being subjected to or threatened with mistreatment or abuse. 28 U.S.C. § 1738A(c)(1) and (2)(C).

Syl. Pt. 6: If emergency jurisdiction is based upon the unsubstantiated statements of a parent, additional evidence should be gathered as quickly as reasonably possible to either affirm or negate the allegations. Temporary jurisdiction should last only so long as the emergency exists or until a court that has jurisdiction to enter or modify a permanent custody award is apprised of the situation and accepts responsibility to ensure that the child is protected.

Syl. Pt. 7: Emergency custody matters should be among those cases given priority by our court systems and should be resolved as quickly as is reasonably feasible.

Murphy v. Danforth, 323 Ark. 482, 915 S.W.2d 697 (1996)

Affirming a trial court's refusal to exercise emergency jurisdiction under the PKPA, the Arkansas Supreme Court noted that a court should exercise emergency jurisdiction only when the child is physically present in the state and when an emergency such as abandonment or abuse exists. Furthermore, the Court recognized the limited nature of emergency jurisdiction by noting that "emergency jurisdiction may be used to enter a

temporary order giving a party custody only for as long as it takes to travel with the child to the proper forum to seek a permanent modification of custody, usually the home state." 323 Ark. at 491, 915 S.W.2d at 702 (citing Atkinson, *Modern Child Custody Practice*, § 3.18 at 148).

10. Guardianship Proceedings Involving Allegations of Abuse and Neglect

In re Guardianship of K.W., 240 W.Va. 501, 813 S.E.2d 154 (2018)

This matter began with a domestic violence petition filed by the mother against the father, seeking an order of protection for herself and the three minor children. The protective order was granted for a period of 180 days, initially granting the father supervised visitation, but after a motion to modify the DVPO, a Guardian *ad Litem* was appointed to investigate the case. Because the family court found that the mother "did not intend to expose the children to the father at that time," the family court did not remove the case to the circuit court.

The mother then filed for divorce; however, soon after the parties reconciled, and the mother dismissed the petition for divorce. Subsequently the maternal grandparents filed a petition for temporary guardianship for the three children with allegations that the children were in danger due to the previous domestic violence in the home. The family court granted the motion and removed the case to circuit court based on the allegations of abuse and neglect. CPS became involved and substantiated the abuse and neglect. However, the Guardian *ad Litem* recommended that the matter be remanded to family court due to the fact that the children were safe in the custody of their grandparents. The circuit court agreed, and the matter was remanded to family court for a hearing on permanent guardianship for the grandparents.

At the conclusion of the hearing, the family court found that the parents had exposed the children to domestic violence and awarded permanent guardianship to the grandparents. Following denials of a motion for reconsideration in family court and an appeal in circuit court, this appeal followed. The petitioners argued that the family court did not have subject matter jurisdiction of this matter once allegations of abuse or neglect were made, that the circuit court erred in remanding the matter to family court, and that both courts erred by granting and upholding the permanent guardianship to the grandparents without a finding of unfitness.

The Supreme Court agreed with the petitioners, finding that the lower courts violated Rule 13 of the Rules of Practice and Procedure for Minor Guardianship Proceedings and Rule 48a of the Rules of Practice and Procedure for Family Court. The Supreme Court held that "once a family court removes an infant guardianship case to circuit court because the basis

for the guardianship is, in part, abuse and neglect, the case, in its entirety, remains in circuit court and may not be remanded." Furthermore, the Court stated in Syllabus Point 4 that a "temporary guardianship granted over the natural parents' objection based on substantiated allegations of abuse and neglect does not provide a permanent solution for child custody such that it obviates the need for an abuse and neglect petition."

D. Domestic Violence and Child Custody

1. Harmful Effects of Domestic Violence on Children

Custody of Vaughn, 422 Mass. 590, 664 N.E.2d 434 (1996)

In this custody dispute, the trial court failed to make findings concerning the evidence of domestic violence and awarded custody to the father. The intermediate appellate court reversed and remanded the case with instructions that the trial court make appropriate findings concerning the acts of domestic violence. In response to the father's appeal, the Massachusetts Supreme Court affirmed the remand and noted that:

> We endorse the Appeals Court's commitment to the propositions that physical force within the family is both intolerable and too readily tolerated, and that a child who has been either the victim or the spectator of such abuse suffers a distinctly grievous kind of harm. It might be helpful to emphasize how fundamental these propositions are. Quite simply, abuse by a family member inflicted on those who are weaker and less able to defend themselves--almost invariably a child or a woman--is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one's daily life. What our study and the growing movement against family violence and violence against women add to this fundamental insight is that, for those who are its victims, force within the family and in intimate relationships is not less but more of a threat to this basic condition of civilized security, for it destroys the security that all should enjoy in the very place and context which is supposed to be the refuge against the harshness encountered in a world of strangers. Particularly for children the sense that the place which is supposed to be the place of security is the place of greatest danger is the ultimate denial that this is a world of justice and restraint, where people have rights and are entitled to respect. The recent literature also exposes the sham and hypocrisy that condemns violence among strangers and turns

> a blind eye to it where its manifestations are most corrosive. 422 Mass. at 596, 644 N.E.2d at 437.

Christina L. v. Harry J. L., 1995 WL 788196 (Del. Fam. Ct.)

The Delaware Family Court summarized the harmful effects of domestic violence on children generally as follows:

> Numerous studies indicate that children living in a home with severe parent-to-parent violence also suffer the consequences of the abuse, regardless of whether the abuse is directed at them. While parents may believe that they have shielded their children from their violent arguments, experts have determined that a highly significant percentage of the children bear witness to the abuse. Exposure to such an unstable environment has both short and long-term impact on children. Common effects include psychosomatic disorders such as stuttering, anxiety, fear, sleep disruption and school problems. Preschool children who witness domestic violence experience great confusion and insecurity that lead to such regressive behavior as excessive attachment to adults and a fear of being left alone. Latency age children (5-12 years) have a tendency to identify with the aggressor and lose respect for the victim, in addition to suffering from the aforementioned range of psychosomatic problems. Teenagers exposed to domestic abuse generally fare no better.
>
> Children raised in an atmosphere of domestic violence tend to develop the impression that violence is an appropriate form of conflict resolution and an acceptable way to gain respect and control, particularly in the context of an intimate relationship. They may view the abusive behavior by the batterer as excusable if the batterer has been drinking or if his victim "provokes" him. Numerous studies also indicate that domestic violence is inter-generational: a significant percentage of abusive husbands witnessed their own fathers abuse their mothers as they were growing up. And it must be noted that the aforementioned damaging effects are not restricted to children who witness physical violence in the household. Rather, children who are exposed to the psychological abuse of one parent by the other also suffer to varying degrees the previously discussed externalized and internalized problems. (citations omitted.)

2. Domestic Violence as a Factor in Child Custody Determinations

Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987)

"We have recognized that spousal abuse is a factor to be considered in determining parental fitness for child custody." (citing *Collins v. Collins*, 171 W. Va. 126, 297 S.E.2d 901 (1982)).

Patricia Ann S. v. James Daniel S., 190 W. Va. 6, 435 S.E.2d 6 (1993) (per curiam)

In this divorce and custody case, the Supreme Court affirmed an award of custody to the father and did not address domestic violence as a factor in determining custody. In her dissenting opinion, Justice Workman detailed the history of domestic violence in the marriage and strenuously supported the position that domestic violence should be a factor in determining custody. Justice Workman also noted that children in abusive relationships tend to identify with the aggressor and lose respect for their mother. 190 W. Va. at 15-23, 435 S.E.2d at 15-23.

Henry v. Johnson, 192 W. Va. 82, 450 S.E.2d 779 (1994)

In this writ of prohibition proceeding challenging a temporary custody order, the petitioner asserted that the family law master failed to consider the acts of domestic violence by the parent who had been awarded temporary custody. The Supreme Court reversed and held that domestic violence is a required consideration in a custody determination.

Syl. Pt. 1: Children are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account when making an award of temporary custody.

D.B. v. J.R., 235 W. Va. 409, 774 S.E.2d 75 (2015)

After the mother of a 3-year old died in an automobile accident, the grandparents filed a petition for guardianship of granddaughter. Mother and child had resided with the petitioner-grandparents for all but four months since the child was born. Prior to her death, the mother and respondent-father had been in a long-term relationship. At the evidentiary hearing on the guardianship petition, counsel for the petitioners presented testimony regarding several incidents of domestic violence by the respondent-father committed against the mother. The circuit court ruled that these incidents were not relevant to the present custody dispute between the grandparents and father, and awarded the father custody. On appeal, the Supreme Court

cited and discussed prior cases underscoring the importance that evidence of domestic violence plays in determinations of whether a parent is fit. Accordingly, the Supreme Court held that upon remand the incidents of domestic violence between the father and mother before her death were relevant and admissible during the grandparents' proceeding seeking permanent guardianship of the child.

Feaster v. Feaster, 192 W. Va. 337, 452 S.E.2d 428 (1994) (per curiam)

In a case in which a husband beat his wife and threatened her with further physical abuse when she attempted to take their son with her when she left the home, the circuit court declined to adopt the family law master's recommendation that the mother, as primary caretaker, should be awarded temporary custody.

The Supreme Court reversed the circuit court and noted in footnote 5 that the mother attempted to take her son with her when she left the abusive marriage, and her flight from her husband did not constitute abandonment of the child. The Court further noted that the father's care of the child during this period should not be considered as a factor in determining custody because it would reward him for his abusive behavior towards his wife.

Blankenship v. Blankenship, 200 W. Va. 374, 489 S.E.2d 756 (1997) (per curiam)

In this divorce case, the circuit court awarded custody of the parties' son to the father. In her appeal, the mother contended that the evidence of domestic violence by the father against the mother was not properly considered. The Supreme Court recognized that "spousal abuse is appropriately a factor to be considered in determining what is in the best interest of an infant child in a custody situation." However, the Court concluded that "the very weak and limited spousal-abuse evidence" in this case could not support a conclusion that the trial court erred in its custody determination.
See also Jeffrey S. v. Jennifer S., 2013 WL 310054 (W. Va. Sup. Ct., Jan. 25, 2013) (memo. op.).

3. Assessment of a Domestic Violence Perpetrator's Claim for Custody

Christina L. v. Harry J. L., 1995 WL 788196 (Del. Fam. Ct.)

The Delaware Family Court, in a custody dispute, cautioned against joint custody in cases involving domestic violence and provided insight into custody claims advanced by domestic violence perpetrators. The Court noted that:

When the abusive spouse ultimately recognizes that his departed partner has "successfully" left his sphere of direct domination, the abuser is desperate to find any means to regain his control over the victim. In the abusive marriage, these efforts generally translate into a custody battle, whereby the children are manipulated as pawns by the batterer in order to harass the former partner. Experts in the arena of domestic violence note that an abusive man who has served as a secondary parent often seeks custody for two reasons: (1) as punishment of his wife for leaving him; and, (2) as a method to maintain and control contact of the wife through the children. When a court awards joint custody to husband and wife in instances such as these, the court is effectively sanctioning the violent actions of the father and perpetuating the notion that the father's abusive and controlling behavior is an appropriate role model for the children, particularly any boys, to adopt. Moreover, it sends a message to mothers in abusive relationships that they may legitimately fear their husbands' threats to take their children away from them if they ever try to leave their abusive mates and escape from their world of domestic violence.

Experts caution that a judge must consider several questions, and their answers, in his/her assessment of the abusive father's fitness for custody. Specifically: is the father's abusiveness linked to this relationship alone, or will it be repeated in future relationships; can the abuser unlearn the violence, and if so, how; and, what is the abusive father's historical relationship with the children, and why is he seeking custody? Frequently, psychotherapists are asked to evaluate the fitness of both parents for custody of their children. It is well recognized that psychotherapists untrained in the unique dynamics of domestic violence frequently allow the abuser to blame, minimize and deny the abuse. The counselors thus inadvertently help the abuser in his attempts to convince the court that his partner is either "morally bankrupt or emotionally unfit to continue mothering." The abusive father presents himself in a sincere, positive image which, unfortunately, psychotherapists unfamiliar with the unique specifics of spouse abuse may fail to see beneath. Instead, the psychotherapists look for the "typical" abuser personality, and, finding no such signs, are generally accepting of the seemingly sociable, "appropriate" male's minimized version of the abuse. Indeed, the abuser is frequently quite successful in placing his victimized partner's mental health under a legal microscope,

> while his abusive behavior is often discharged as nothing more than an emotional reaction to the parties' separation. (citations omitted.)

4. Assessment of a Domestic Violence Victim's Claim for Custody

Christina L. v. Harry J. L., 1995 WL 788196 (Del. Fam. Ct.)

In this custody case, the Delaware Family Court noted factors that should be considered to assess a claim for custody advanced by a domestic violence victim. Additionally, the Court noted characteristics of a domestic violence victim that counselors often mistakenly assess as indicating a lack of fitness for custody. Discussing the unique position of a domestic violence victim seeking custody, the Court explained that:

> Just as there are issues to be considered in the assessment of the abuser's fitness for custody, so are there questions to be asked of the spouse abuse victim. Specifically, what is the likelihood of her entering into another abusive relationship and therefore exposing her children to violence; to what degree has her emotional stability been compromised by the abuse; and, how does she relate to her children and what is her rationale for seeking custody? Counselors trained in the dynamics of spouse abuse may shed useful light on these issues. However, once again, those psychotherapists unfamiliar with and untrained in the unique dynamics of domestic violence may inadvertently participate in blaming the victim because she did not leave the abusive relationship sooner. They may characterize her long-standing anger and other coping mechanisms and response behavior as pathological, and assume that the victim contributed to the violence, rather than recognize the attributes as an appropriate response to years of spousal abuse. Any emotional problems exhibited by the victim are often labeled as personality problems, rather than as a temporary response to the violent relationship or stress of separation. Finally, counselors lacking the appropriate training "criticize her [the victim] for focusing her anger on her husband, failing to see how his efforts to gain custody of the children is often seen by the victim as continuing abuse which constitutes the final, ultimate blow to the victim- more serious than the years of psychological and physical abuse." By all accounts, joint custody should rarely be recommended in such cases of domestic violence, where the notion of two equal parents cooperatively planning for their children's future is impossible. For the woman victim, an order of joint custody may prolong the violence and abuse of power and control by her ex-partner.

(citations omitted.)

5. Domestic Violence Committed by Both Parents

Krank v. Krank, 529 N.W.2d 844 (N.D. 1995)

In this custody dispute, the evidence indicated that both parents had committed acts of domestic violence. The trial court, however, applied the statutory presumption against awarding custody to a domestic violence perpetrator only against the father, and not the mother. Ultimately, the trial court awarded custody to the father based upon a finding that he had successfully rebutted the statutory presumption. The trial court based its ruling on evidence that five years had passed since the last domestic violence episode and that no domestic violence had occurred in the child's presence.

On appeal, the North Dakota Supreme Court provided guidance for cases involving domestic violence by both parties, concerning the application of the statutory presumption that a party who commits domestic violence may not be awarded custody. The Court indicated that:

> [A] proper construction of the statute requires that if domestic violence has been committed by both parents, the trial court measure the amount and extent of domestic violence inflicted by both parents. If the amount and extent of domestic violence inflicted by one parent is significantly greater than that inflicted by the other, the statutory presumption against awarding custody to the perpetrator will apply only to the parent who has inflicted the greater domestic violence, and will not apply to the parent who has inflicted the lesser. However, if the trial court finds that the amount and extent of the violence inflicted by one parent is roughly proportional to the violence inflicted by the other parent, and both parents are otherwise found to be fit parents, the presumption against awarding custody to either perpetrating parent ceases to exist. In such a case, the trial court is not bound by any presumption, but may consider the remaining customary best-interests factors in making its custody decision. 529 N.W.2d at 850.

R.H. v. B.F., 39 Mass. App. Ct. 29, 653 N.E.2d 195 (1995), *aff'd sub nom*, *Custody of Vaughn*, 422 Mass. 590, 664 N.E.2d 434 (1996)

The trial court found that both parents in this custody dispute had committed domestic violence against each other, and awarded custody to the father because the child had a slight preference for living with his father. At trial,

the mother had presented expert testimony that she suffered from battered women's syndrome, and the father claimed he had been abused.

The appellate court found that the trial court's finding concerning mutual domestic violence was clearly erroneous. The Court concluded that:

> [T]he finding is inconsistent with the evidence about which the trial judge made no findings, that is, that the mother suffers from battered women's syndrome and that most of her physical acts of force were defensive. In an area as critical as domestic violence, we are unable to conclude that the trial judge's simple finding of mutual battery implicitly rejects this evidence as incredible or irrelevant. 39 Mass. App. Ct. at 42, 653 N.E.2d at 202.

The Court further cautioned that "A subject of such gravity calls for a more detailed exploration and analysis of the evidence and an explication of the degree and nature of the respective risks to the child." *Id.*

See also Peters-Riemers v. Riemers, 2002 N.D. 72, 644 N.W.2d 197, 205 (2002) ("Acts of domestic violence are mitigated when committed in self defense.").

6. Domestic Violence as a Factor in Visitation Disputes

Lufft v. Lufft, 188 W. Va. 339, 424 S.E.2d 266 (1992)

Although the primary focus of the case was the name change of the minor child, the Court directed that the father's supervised visitation must continue, based upon his prior acts of domestic violence against his wife and current allegations of domestic violence against his girlfriend, until he could demonstrate that he is no longer violent.

Mary Ann P. v. William R. P. Jr., 197 W. Va. 1, 475 S.E.2d 1 (1996) (per curiam)

The evidence in this case indicated that the husband's physical and mental abuse toward his spouse created such emotional trauma in his children that the children did not want to visit him subsequent to the divorce. The circuit court ordered supervised visitation, but even under these conditions the children were extremely apprehensive about visiting their father.

The Supreme Court ruled that supervised visitation should not begin immediately, and that the circuit court should consider requiring the parties to undergo counseling to address the children's problematic relationship with their father. In so ruling, the Supreme Court applied its holding concerning

the detrimental effects of domestic violence on children in *Henry* to visitation disputes. Further, the Supreme Court noted that a court may condition supervised visitation upon the offending parent undergoing treatment.

Mary Ann McG. v. William R. P., 201 W. Va. 584, 499 S.E.2d 313 (1997) (per curiam)

In a follow-up case to *Mary Ann P.*, the mother objected to the circuit court order regarding the conditions for the children's visitation with their father. The Court again cited *Henry* for the proposition that domestic violence is relevant to visitation issues. Additionally, the Court affirmed the circuit court because the circuit court required the father to undergo and complete treatment for domestic violence before either family counseling or visitation could begin.

Dale Patrick D. v. Victoria Diane D., 203 W. Va. 438, 508 S.E.2d 375 (1998) (per curiam)

The plaintiff offered evidence in this case that the defendant had sexually abused their daughter, and that the defendant had engaged in acts of domestic violence against the plaintiff and her children from a previous marriage. The family law master found that the evidence of sexual abuse and domestic violence was not credible, but ordered supervised visitation. In turn, the circuit court adopted these findings.

The Supreme Court held that the circuit court did not err concerning the finding related to the alleged sexual abuse. However, the Court stated it was "greatly troubled by the history of domestic violence and the absence of meaningful lower court attention to the impact of such violence upon [the defendant's] visitation rights." 203 W. Va. at 442, 508 S.E.2d at 379. Although the Court did not find any error because supervised visitation had been instituted, the Court remanded with instructions that "the impact of the potential for domestic abuse must be evaluated, and the visitation determinations must be based upon the best interests of the child." 203 W. Va. at 442, 508 S.E.2d at 380.

State ex rel. DHHR v. Ruckman, 223 W. Va. 368, 674 S.E.2d 229 (2009)

Note: This case did not involve domestic violence, but it provides guidance concerning a family court judge's authority to order CPS to investigate potential harm to a child.

In a case in which supervised visitation had been previously ordered and a party was requesting unsupervised visitation, a family court judge ordered the local CPS office to conduct an investigation even though there were no current allegations of abuse and neglect. The DHHR sought a writ of

prohibition in circuit court, but the circuit court found that the family court had the authority to order such an investigation; however, the circuit court relieved the DHHR of the obligation to supervise visits while the investigation was pending. Affirming the circuit court, the Supreme Court adopted the following syllabus points:

> Syl. Pt. 3: In a circumstance where mandatory reporting of abuse or neglect pursuant to West Virginia Code § 49-6A-2 and Rule 48 of the Rules of Practice and Procedure for Family Court is not implicated, a family court judge has discretion pursuant to West Virginia Code § 48-9-301(a) to order an investigation to assess the potential of exposing a child to harm should a custodial decision such as ordering unsupervised visitation be made.
>
> Syl. Pt. 4: The West Virginia Department of Health and Human Resources falls within the classification in West Virginia Code § 48-9-301(a) of "professional social service organization experienced in counseling children and families" which in the course of a child custody proceeding a family or circuit court may order to conduct an investigation and report to the court.
>
> Syl. Pt. 5: Family court judges ordering an investigation pursuant to West Virginia Code § 48-9-301(a) should make every effort to determine the best available options for obtaining the information needed in a timely manner in each case and should only resort to ordering DHHR to perform an investigation and report to the family court when extraordinary circumstances exist.
>
> Syl. Pt. 9: A family court finding potential safety risks to minor children that warrant a court-ordered investigation pursuant to West Virginia Code § 48-9-301 may not order visitation between a child and the party posing the potential risks while the investigation proceeds. Supervised visitation may be ordered following the investigation if the court finds the investigation or other information supplies the requisite credible evidentiary basis to believe a child's safety will be jeopardized if visitation is not supervised. Where supervised visitation is contemplated, the family court should schedule a hearing, with notice to all parties and any proposed supervisors, regarding the most suitable source for supervision under the circumstances. The purpose of the hearing is to determine the most appropriate source for supervision by considering (1) whether the child is comfortable and familiar with a potential supervisor through prior contact or otherwise, and (2) whether

the potential supervisor is willing and has ability to fulfill the obligation. In order to provide an adequate basis for review, this determination should be incorporated as a finding of the family court judge in the order granting supervised visitation.

7. Limitation on Custody Determinations Within a Domestic Violence Proceeding

J.M.R. v. S.T.R., 15 P.3d 253 (Alaska 2001)

A grandmother sought domestic violence protective orders against her son and daughter-in-law for acts perpetrated against her, and further requested custody of her two grandchildren. Before filing the petition, the grandmother had never been awarded custody of the children. Her request for custody was based upon allegations that her son and daughter-in-law were unfit parents because of their drug abuse and violent tendencies toward one another, but did not allege that the children had been assaulted by either parent. Although the lower court granted the protective order both in an emergency hearing and a final hearing, it declined to award the grandmother custody of her grandchildren. The lower court reasoned that without any evidence that the children themselves were victims of domestic violence, the grandmother's custody request should not be addressed in an expedited domestic violence proceeding, and would best be pursued in a full-blown custody proceeding. 15 P.3d at 256.

The Alaska Supreme Court reviewed the purpose and procedure of the Alaska domestic violence statute, and reasoned that "the exclusive focus is domestic violence" and the "[s]hortcut domestic violence procedures are ill-suited to the adjudication of fundamental parental rights." 15 P.3d at 257. Affirming the lower court, it held that "trial courts have discretion to decline to permit litigation of custody claims asserted by non-parents or legal guardians in domestic violence proceedings." *Id*.

8. Rehabilitation of Domestic Violence Perpetrators in Relation to Claims for Child Custody

Heck v. Reed, 529 N.W.2d 155 (N.D. 1995)

In North Dakota, the legislature established a rebuttable statutory presumption that a domestic violence perpetrator ordinarily should not be awarded custody. In this case, the trial court had awarded custody to the domestic violence perpetrator by balancing "best-interest" factors against the rebuttable presumption. The trial court also found that it was unlikely that the perpetrator would commit future acts of domestic violence because approximately two years had passed since the last episode of domestic violence.

On appeal, the North Dakota Supreme Court reversed the trial court concerning the application of the custody statute and its finding that domestic violence would not likely occur again. With regard to this finding, the Court noted that "domestic violence is a learned pattern of behavior aimed at gaining a victim's compliance." 529 N.W.2d at 165. Specifically, because the perpetrator offered no evidence of participation in a treatment program or counseling, the Supreme Court rejected the trial court's finding concerning future domestic violence. The Court reasoned that "although treatment is not a fail-safe remedy, it may, in certain circumstances, support a finding that domestic violence is not likely to occur in the future." 529 N.W.2d 155, n. 6.

See also Krank v. Krank, 529 N.W.2d 844 (N.D. 1995) (Noting that the passage of five years since the last episode of domestic violence would not necessarily rebut the statutory presumption against awarding custody to a domestic violence perpetrator.).

E. Effect of Domestic Violence on Parental Fitness and Parental Rights

1. The Overlap of Issues of Domestic Violence and Child Abuse and Neglect

In re B.C., 233 W. Va. 130, 755 S.E.2d 664 (2014)

Mother who had previously sought a domestic violence protective order on behalf of her child against the father subsequently petitioned to initiate an abuse and neglect proceeding for the child under the same allegations of abuse. The circuit court dismissed the abuse and neglect petition as barred by *res judicata* and collateral estoppel principles based upon the prior domestic violence proceeding. On appeal, the Supreme Court reversed under the following holdings:

> Syl. Pt. 5: While a civil abuse and neglect action pursuant to *W.Va.Code* § 49–6–1 [2005] may be initiated by either the West Virginia Department of Health and Human Resources or "a reputable person," the action is pursued solely on behalf of the State of West Virginia in its role as *parens patriae.*
>
> Syl. Pt. 6: A petition for a domestic violence protective order under *W.Va.Code* § 48–27–101 *et seq.,* and a petition alleging abuse and/or neglect under *W.Va.Code* § 49–6–1 *et seq.,* may be filed upon the same facts without consequences under the doctrine of *res judicata* or the doctrine of collateral estoppel.

Katherine B.T. v. Jackson, 220 W. Va. 219, 640 S.E.2d 569 (2006)

A fifteen-year-old boy filed a petition for a domestic violence protective order against his mother. With regard to reporting the incident giving rise to the petition to DHHR the Court held:

> Syl. Pt. 8: When any circuit court judge, family court judge, or magistrate has reasonable cause to suspect that a child is neglected or abused, the circuit court judge, family court judge, or magistrate shall immediately report the suspected neglect or abuse to the state child protective services agency pursuant to W. Va. Code, 49-6A-2 and, if applicable, Rule 48 of the Rules of Practice and Procedure for Family Court.

Further, the Court stated:

> When a petition for domestic violence is filed (typically magistrate court) and the judge or magistrate has reasonable cause to suspect that a child is neglected or abused, it would also be the better practice for the court to require the attendance of a representative of the DHHR at all proceedings. 220 W. Va. at 228, 640 S.E.2d at 578.

In re A.S.-1, 2016 WL 6679015 (W. Va. Sup. Ct., Nov. 14, 2016) (memo. op.)

Courts may consider a parent's criminal conduct, including prior instances of domestic violence, when said conduct is "relevant to the issues of abuse and neglect upon which the petition was based."

2. Murder of a Child's Parent as Grounds to Terminate Parental Rights

Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987)

This case originated as a custody battle between a child's paternal uncle and maternal aunt after the child's father had been convicted of first degree murder of his wife, the child's mother. The aunt had been caring for the child after the murder, and the father had designated the uncle as the guardian of the child. The circuit court held that the father was a fit parent, despite the murder and incarceration, and awarded custody to the uncle.
The Supreme Court held that domestic violence against a spouse, including murder, was relevant to both custody and parental fitness. The Court terminated the father's rights under the relevant abuse and neglect statutes, awarded custody to the aunt, and permanent guardianship to the Department of Health and Human Resources.

Syl. Pt. 2: A conviction of first degree murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated.

Kenneth B. v. Elmer Jimmy S., 184 W. Va. 49, 399 S.E.2d 192 (1990) (per curiam)

In this custody dispute between maternal and paternal grandparents, the Court affirmed the termination of the father's parental rights because he had killed his wife, the mother of the minor child.

3. Domestic Violence as Grounds to Adjudicate Parent and/or Terminate Parental Rights

Note: West Virginia Code § 49-1-201 has established and defined the concept of a "battered parent" as a parent, guardian or custodian who could not stop the abuse or neglect of a child because he or she was a victim of domestic violence. Although a court is not statutorily prohibited from terminating the parental rights of a "battered parent," West Virginia Code § 49-4-604(a)(5) and (6) has expressly established two possible dispositions available to a "battered parent": 1) temporarily committing a child to DHHR custody if a "battered parent" is unable or unwilling to provide care for a child; 2) terminating the parental rights of an abusing or neglecting parent and placing a child in the sole custody of a "battered parent." See also In the Interest of Betty J. W., 179 W. Va. 605, 371 S.E.2d 326 (1988) for a discussion of domestic violence and improvement periods.

In re Lilith H., 231 W. Va. 170, 744 S.E.2d 280 (2013)

In this appeal of a child abuse and neglect case, the Supreme Court noted that the statutory definition of an "abused child" [now codified at W. Va. Code § 49-1-201] includes one "whose health or welfare is harmed or threatened by . . . [d]omestic violence as defined in section two hundred two [§ 48-27-202] article twenty-seven, chapter forty-eight of this code." While acknowledging that a child's exposure to domestic violence can constitute abuse, the Court held that a single altercation between the children's father and grandfather witnessed by the children, without more, was insufficient to constitute child abuse in this case.

In re J.P., 240 W.Va. 266, 810 S.E.2d 268 (2018)

This case involved the appeal of an adjudicatory order in an abuse and neglect case wherein the father was adjudicated as an abusing and neglectful parent. The DHHR had filed an amended petition after an incident

of domestic violence in which a stepdaughter witnessed the father physically attack the mother. After the attack, the father then took two other children and fled the home when he was angry. The lower court noted that the father's history of domestic violence was a factor in adjudicating him.

The Supreme Court affirmed the lower court's decision and pointed out that the father's fleeing of the house with the two children after committing domestic violence "directly affected those children." The Supreme Court also addressed what can constitute domestic violence by stating "[e]ven if a child is not harmed physically, psychological harm may occur by witnessing domestic violence or by knowing it is happening in the home." *See* M.L. McCoy, S. M. Keen, *Child Abuse and Neglect*, p. 103 (2nd ed. 2014).

Finally, the Supreme Court distinguished this case from *Lilith H.* because of the "level of domestic violence witnessed by the children over time." Specifically, the Supreme Court noted the father's conduct was not an "unexpected and isolated event" but rather, when considering his history of domestic violence, his involvement with CPS in several states, as well as this incident of domestic violence with the mother and children, it was clear that the lower court's decision to adjudicate the father was correct.

See also *In re J.F.,* 2016 WL 5900713 (W. Va. Sup. Ct., Oct. 11, 2016) (memo. op.) and *In re N.H.*, 2017 WL 3868498 (W. Va. Sup. Ct., Sept. 5, 2017) (memo. op.).
In re Erica C., 214 W. Va. 375, 589 S.E.2d 517 (2003) (per curiam)

In a per curiam opinion in which the termination of parental rights was affirmed, the Supreme Court noted that the adult respondents had a history of domestic violence, in addition to their abuse of prescription drugs and failure to supervise the children.

In the Interest of Betty J. W., 179 W. Va. 605, 371 S.E.2d 326 (1988)

A circuit court terminated a mother's parental rights based upon its conclusion that the mother knowingly allowed her husband to sexually abuse their daughter. Reversing the circuit court, the Supreme Court pointed out that the mother was a domestic violence victim and that she had intervened and was beaten by her husband and threatened with a knife when she tried to protect her daughter from the assault.

West Virginia DHS v. Tammy B., 180 W. Va. 295, 376 S.E.2d 309 (1988) (per curiam)

In an appeal of a termination of parental rights, the Supreme Court noted that repeated exposure to domestic violence, as well as other factors such as

alleged sexual abuse, constituted sufficient grounds to terminate parental rights.

West Virginia DHHR ex rel. Mills v. Billy Lee C., 199 W. Va. 541, 485 S.E.2d 710 (1997) (per curiam)

Affirming a circuit court termination of parental rights, the Supreme Court noted that the appellant had engaged in domestic violence against his wife, as well as the regular use of marijuana and alcohol.

In re K.W. and C.W., 2016 WL 6679001 (W. Va. Sup. Ct., Nov. 14, 2016) (memo. op.)

In this appeal of a child abuse and neglect case, the Supreme Court affirmed the trial court's denial of a second improvement period for the father and further affirmed the termination of his parental rights, based upon findings that the father failed to complete services offered to him, most notably the domestic violence intervention program; and that although the father admitted to certain acts of domestic violence, he continued to minimize his role in the acts of domestic violence against the children and mother.

See also In re C.S.-2, 2016 WL 5900714 (W. Va. Sup. Ct., Oct. 11, 2016) (memo. op.) and *In re J.F., M.C.-2 and N.C.*, 2016 WL 5900713 (W. Va. Sup. Ct., Oct. 11, 2016) (memo. op.).

In re N.H., C.H., and B.H., 241 W.Va. 648, 827 S.E.2d 436 (2019)

This matter involved the termination of a mother’s parental rights to three children due, in part, to domestic violence with her boyfriend. The allegations of domestic violence included the mother’s boyfriend had broken a television and vase during arguments; the mother told the children the boyfriend was “going to burn us”; and the boyfriend threatened to kill the mother in front of the children. The mother stipulated to these allegations and was placed on an improvement period, during which the mother’s boyfriend underwent counseling and anger management training.

At the conclusion of the mother’s improvement period, the mother continued to be in a relationship with the boyfriend and even had another child with him. At disposition, the circuit court found that the mother had substantially complied with the terms of her case plan. However, the court terminated her parental rights, in part, because the children were still traumatized by the domestic violence and continued to be afraid of the boyfriend, despite her compliance with the improvement period.

The Court noted that the mother “failed to understand her children’s fear of [boyfriend] and desire to have no further contact with him. According to the

record, the children were too afraid to participate in family counseling with [boyfriend] during the improvement period. In addition, N.H. testified that she was afraid that if she went home she would get hurt. She also stated that she did not think her brother and sister would be safe, either."

The Court further stated that "while the record shows the petitioner made some changes in order to comply with the requirements of her case plan, it also reflects that [she] did not modify her behavior to correct the conditions of abuse and neglect." The Court affirmed the circuit court's termination of the mother's parental rights based on the best interest of the children.

In re A.L., 2019 WL 1765071, (W. Va. Sup. Ct., April 19, 2019) (memo. op.)

The Supreme Court affirmed the circuit court's decision to terminate the parental rights of a mother adjudicated as neglectful based primarily on domestic violence. The mother stipulated at the adjudicatory hearing that she "refused to obtain a domestic violence protection order because she 'didn't want to get into trouble.'"

The circuit court found that the mother had partially complied with her case plan by taking drug screens and parenting and adult life screens. However, she "failed to address her biggest problem, domestic violence, and was presently unwilling or unable to provide adequately for the child's needs."

4. Domestic Violence as a Factor in Improvement Periods

In the Interest of Betty J. W., 179 W. Va. 605, 371 S.E.2d 326 (1988)

In this case, a mother appealed the denial of an improvement period and the subsequent termination of her parental rights. The circuit court had, in part, relied on the mother's status as a domestic violence victim, her continued association with her husband, and a finding that she had knowingly allowed her husband to sexually abuse her daughter.

In reversing the circuit court, the Supreme Court noted that a non-custodial improvement period was an appropriate method to address any concerns with the mother's continued association with the father. With regard to the finding that the mother knowingly allowed the sexual abuse to occur, the Court noted that the mother reported the abuse as soon as she was able to get away from her husband. The Court further noted that the mother had attempted to prevent the sexual abuse of the daughter, and that her husband, in response, beat her and threatened her with a knife.

In re B.S., 2016 WL 2979799 (W. Va. Sup. Ct., May 23, 2016) (memo. op.)

In this appeal in a child abuse and neglect case, the Supreme Court held that the father failed to meet his burden to justify extending his improvement period and affirmed the termination of his parental rights. The trial court was affirmed based upon the following circumstances: despite his participation in services designed to remedy the conditions of abuse and neglect, the father and the mother engaged in a severe domestic violence incident; the father physically and verbally abused the mother and killed the family dog, all in the child's presence; and the father injured the child during the incident and stopped participating in services after the incident.

5. Domestic Violence as a Factor in Guardianship Proceedings

D.B. v. J.R., 235 W. Va. 409, 774 S.E.2d 75 (2015)

After the mother of 3-year old died in an automobile accident, grandparents filed a petition for guardianship of their granddaughter. Mother and child had resided with the petitioner-grandparents for all but four months since the child was born. Prior to her death, the mother and respondent-father had been in a long-term relationship. At the evidentiary hearing on the guardianship petition, counsel for the petitioners presented testimony regarding several incidents of domestic violence by the respondent-father committed against the mother. The circuit court ruled that these incidents were not relevant to the present custody dispute between the grandparents and father and awarded the father custody. On appeal, the Supreme Court cited and discussed prior cases underscoring the importance that evidence of domestic violence plays in determinations of whether a parent is fit. Accordingly, the Supreme Court held that upon remand the incidents of domestic violence between the father and mother before her death were relevant and admissible during the grandparents' proceeding seeking permanent guardianship of the child.

F. Evidentiary Issues Associated with Domestic Violence

1. Evidence Sufficient to Establish that an Act of Domestic Violence Occurred

Thomas v. Morris, 224 W. Va. 661, 687 S.E.2d 760 (2009)

Petitioner sought a domestic violence protective order against her boyfriend after she ended their romantic relationship of 12 years. According to the petitioner, following the break-up, the respondent called her approximately 150 times at home and at work over the course of two months. On one occasion, the respondent came to the petitioner's home in an apparent attempt to rekindle the relationship; however, she did not answer the door. Instead of leaving, the respondent allegedly banged on the door and windows for one to two hours. He also banged a three-foot metal pipe

against the trailer. The respondent's car was positioned in the driveway in such a manner that the petitioner could not leave in her car. The petitioner testified that she felt trapped in the trailer; further, she stated that she was fearful because she knew the respondent carried a concealed weapon.

The respondent did not deny he made the phone calls, but asserted that the victim did nothing to deter him. With regard to the incident at her home, the respondent disputed that she was trapped or that she had a reason to fear him. On the second appeal, the circuit court affirmed the family court's denial of the protective order, affirming a finding that she failed to prove that an act of domestic violence, as defined by West Virginia Code § 48-27-202(1) to (5), occurred.

On appeal, the petitioner claimed that the lower courts erred when they found that "evidence of actual physical restraint was a necessary prerequisite to proving the commission of the domestic violence act of 'holding, confining, detaining or abducting another person against that person's will.'" The Supreme Court agreed with the petitioner/appellant, holding:

> Syl. Pt. 5: The act of domestic violence defined in West Virginia Code 48-27-202(5) as "[h]olding, confining, detaining or abducting another person against that person's will" does not require proof of some overt physical exertion on the part of the alleged offender in order to justify issuance of a protective order.

In the petitioner's case, she submitted sufficient evidence that she believed she was being prevented from leaving her home.

The petitioner also contended that the lower courts erred when they found she failed to establish that the respondent committed an act of domestic violence by "creating fear of physical harm by harassment, psychological abuse or threatening acts." Specifically, she argued that the lower courts erred when they found that fear of physical harm cannot be established without proof of an overt or explicit threat of harm by the alleged perpetrator. Again, the Supreme Court agreed, and held:

> Syl. Pt. 6: The act of domestic violence defined in West Virginia Code 48-27-202(3) as "[c]reating fear of physical harm by harassment, psychological abuse or threatening acts" provides that fear of physical harm may be established with (1) proof of harassment, (2) proof of psychological abuse, or (3) proof of overt or covert threatening acts.

M.J.P. v. M.E.P., 2013 WL 2157802 (W. Va. Sup. Ct., May 17, 2013) (memo. op.)

Wife's petition for a domestic violence protective order claimed that husband is bipolar and "may be off his meds, because he has threatened to do so" if she files for divorce; and that he is "unstable, dangerous, and threatening, such that I fear for the safety of my children and myself." The DVPO was granted by the family court and affirmed by the circuit court. On appeal, the husband argued that the family court erred in its factual finding that the wife gave credible evidence that the husband, "being bipolar, is violent off his meds," and abused its discretion in concluding that a "threatening act" had been made which established "reasonable apprehension" of physical harm under the statutory definition of domestic violence. The Supreme Court relied on its discussion in *Thomas v. Morris*, 224 W. Va. 661, 668-69, 687 S.E.2d 760, 767-68 (2009) regarding the varying ways that fear of physical harm can be demonstrated. The Court, therefore, found no error in the lower court findings of a threatening act sufficient to constitute domestic violence.

2. Threats as Admissions/Non-Hearsay

State v. Sutphin, 195 W. Va. 551, 466 S.E.2d 402 (1995)

The defendant was convicted of second-degree murder for the killing of his girlfriend, following a one-year relationship marked by episodes of domestic violence. On appeal, he challenged the admissibility of a threat he had made against his girlfriend which she had repeated to her father. The Supreme Court found no error in the admission of the threat into evidence.

Syl. Pt. 5: A threat to commit an act in the future, if made by the declarant/party and offered against the party, is not hearsay under W. Va. R. Evid. 801(d)(2).

3. Threats as Then Existing Mental, Emotional, or Physical Condition

State v. Sutphin, 195 W. Va. 551, 466 S.E.2d 402 (1995)

Syl. Pt. 6: A threat is a manifestation of the defendant's state of mind as it relates to the issue of premeditation and is therefore an exception to the hearsay rule under W. Va. R. Evid. 803(3).

4. Excited Utterance Exception to the Hearsay Rule

State v. Sutphin, 195 W. Va. 551, 466 S.E.2d 402 (1995)

Syl. Pt. 7: In order to qualify as an excited utterance under W. Va. R. Evid. 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or

excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition.

Syl. Pt. 8: Within a W. Va. R. Evid. 803(2) analysis, to assist in answering whether a statement was made while under the stress or excitement of the event and not from reflection and fabrication, several factors must be considered, including: (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements.

State v. Harris, 207 W. Va. 275, 531 S.E.2d 340 (2000)

Law enforcement officers responded to the scene of a domestic disturbance. Within 15 minutes of receiving the dispatch, they encountered the victim who was quite distraught and reported that she had been beaten by the defendant. The victim's facial injuries were consistent with what she reported. The victim repeated the same story to the officers at the hospital. The defendant was charged with domestic battery.

At trial, the victim did not testify. Over the objection of the defendant, however, the State was permitted to present the testimony of the law enforcement officers who arrived at the scene. The officers were permitted to recount what the victim stated to them under Rule 803(2), or the excited utterance exception to the rule prohibiting the admission of hearsay statements. The Supreme Court concluded that the officers' testimony was correctly admitted by the trial court. It was clear that the victim's statements met the criteria of an excited utterance established by the *Sutphin* Court.

5. Excited Utterance By An Anonymous Declarant

State v. Harris, 207 W. Va. 275, 531 S.E.2d 340 (2000)

The defendant was charged with domestic battery following a serious physical altercation with his girlfriend. At trial, the victim did not testify, however, the law enforcement officers who responded to the scene were permitted to repeat her statements, because the trial court determined that they constituted excited utterances under Rule 803(2) of the Rules of Evidence. In addition to the statements made by the victim, one of the officers recounted a statement made by an unknown member of the crowd that had gathered at the scene. Apparently, this anonymous declarant shouted upon the officers' arrival that the defendant had beat up the victim.

On appeal, the defendant argued that this statement was admitted in violation of the hearsay rule. As a matter of first impression, the Supreme Court held:

> Syl. Pt. 2: When a court in a criminal case is evaluating whether to apply the "excited utterance" exception of *W.Va.R.Evid.* 803(2) to a hearsay statement offered against the defendant by an unknown, anonymous, declarant, the court should ordinarily conclude that the statement does not meet the criteria for the 803(2) exception, unless the statement is accompanied by exceptional indicia of reliability and the ends of justice and fairness require that the statement be admitted into evidence.

Under this standard, the Court concluded that the trial court had erroneously admitted the statement, because it was not clear whether the anonymous member of the crowd had personal knowledge of the event.

6. Present Sense Impression Exception to the Hearsay Rule

State v. Sprinks, 239 W.Va. 588, 803 S.E.2d 558 (2017)

Syl. Pt. 6: “It is within a trial court's discretion to admit an out-of-court statement under Rule 803(1), the present sense impression exception, of the West Virginia Rules of Evidence if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge.”

In finding that the lower court did not abuse its discretion when it found that statements made fell under the present sense impression exception, the Supreme Court noted that (1) the statements made were “directly after the occurrence of the incident of domestic violence; (2) the statements described the event; and (3) the event giving rise to the statement was within [the declarant’s] personal knowledge.”

7. Testimonial Statements

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004)

In *Crawford*, the United States Supreme Court held that the admission of extrajudicial statements that are testimonial in nature are prohibited by the Confrontation Clause, unless the declarant is unavailable to testify, and the accused had a prior opportunity to cross-examine the individual. The *Crawford* Court found that the Confrontation Clause guarantees a criminal defendant the right to confront his or her accusers; and further, this right cannot be disregarded by evidentiary rules that permit the introduction of evidence that is untested by the adversarial process, such as testimonial statements. 541 U.S. at 62-63, 124 S. Ct. at 1354-55. Moreover, a judicial

determination that testimonial statements are reliable simply does not satisfy constitutional requirements imposed by the Confrontation Clause.

Crawford only applies to "'testimonial statements' that cause a declarant to be a 'witness'" against the defendant. 541 U.S. at 51-52, 124 S. Ct. at 1364. "Non-testimonial statements by an unavailable declarant, on the other had, are not precluded from use by the Confrontation Clause." *Id.* The *Crawford* Court provided some examples of declarations that can generally be characterized as testimonial statements, including: 1) *ex parte* in-court testimony; 2) the "functional" equivalent of *ex parte* testimony, such as, affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar statements that could be reasonably expected to be used against the defendant; 3) deposition testimony; 4) confessions; 5) statements that a witness could reasonably believe would be available for use at trial; and 6) statements taken by police during an interrogation. 541 U.S. at 51-52, 124 S. Ct. 1364. The Court also expressly noted that business records and statements made by a co-conspirator are not testimonial statements, and therefore, these types of extra-judicial statements are beyond the reach of *Crawford*.

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006)

In *Davis*, the United States Supreme Court further elucidated what is meant by testimonial statements. The Supreme Court expressly held that:

> [S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such on going emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 547 U.S. at 822, 126 S. Ct. 2273.

State v. Mechling, 219 W. Va. 366, 633 S.E.2d 311 (2006)

The West Virginia Supreme Court's holdings regarding testimonial statements are consistent with federal law. It has held:

> Syl. Pt. 6: Pursuant to *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the

> witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.
>
> Syl. Pt. 8: Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution,* a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.
>
> Syl. Pt. 9: Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution,* a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.
>
> Syl. Pt. 10: A court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions.

Ohio v. Clark, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015)

While the mother was out of town, the defendant, who was her boyfriend, was watching her three-year-old and eighteen-month-old children. The next day, a teacher of the three-year-old discovered red marks and other marks on the child, who identified the defendant as the abuser. Prosecutors presented the statements of the child but the child did not testify, as he was found not competent to testify under Ohio law. At the conclusion of trial, the defendant was found guilty on all counts except one count of assault.

The defendant's conviction was overturned by an appellate court on the ground that the introduction of the child's statements violated the Confrontation Clause. The Supreme Court of Ohio affirmed the appellate court, holding that the child's statements were testimonial "because the primary purpose of the teachers' questioning 'was not to deal with an existing

emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution.'"

The United States Supreme Court reversed the Supreme Court of Ohio's decision, finding that because neither the child nor his teachers had the primary purpose of assisting in the defendant's prosecution, the Confrontation Clause was not implicated.

The Court noted that the primary purpose was to "protect a vulnerable child who needed help." *Id*. at 2181. Furthermore, the Court highlighted the relevance of the child speaking to his teachers rather than law enforcement. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at 2182. Finally, the Court stated that statements by young children "rarely, if ever, implicate the Confrontation Clause." *Id*.

8. Marital Evidentiary Issues

a) Spousal testimonial privilege

State v. Evans, 170 W. Va. 3, 287 S.E.2d 922 (1982)

During a trial, a woman testified against her husband, who was convicted of second degree murder. At trial, the couple was in the process of obtaining a divorce, but a final order had not been entered. Reversing the trial court, the Supreme Court found that the couple was still married because no final order had been entered and the spousal testimonial privilege set forth in West Virginia Code § 57-3-3 still applied. The Court further noted that even if the divorce had been final at the time of trial, the wife still could not have testified since the statements at issue were made during the marriage. The Court recognized, however, that West Virginia Code § 57-3-3 would not preclude testimony in certain domestic violence cases.
Syl. Pt. 1: *W. Va. Code,* 57-3-3, which provides that a spouse may not testify against the other spouse without his or her acquiescence except in certain cases involving domestic violence, applies to married people who are in the process of getting a divorce.

State v. Ramsey, 209 W. Va. 248, 545 S.E.2d 853 (2000)

In this case involving manufacturing of a controlled substance, the Supreme Court noted that West Virginia Code § 57-3-3 applies to a spouse's in-court testimony, not to hearsay statements of a spouse.

b) Confidential marital communication privilege

State v. Robinson, 180 W. Va. 400, 376 S.E.2d 606 (1988)

The defendant was charged with two counts of manufacturing a controlled substance. Over the defendant's objection, the trial court permitted the defendant's ex-wife to testify for the State regarding things that occurred while the pair was married. On appeal, the Supreme Court found that the confidential marital communication privilege found in West Virginia Code § 57-3-4 prohibited such testimony.

Syl. Pt. 1: The privilege against disclosure of confidential marital communications embodied in W. Va. Code § 57-3-4 prohibits disclosure of knowledge derived from observation of the acts or conduct of one's spouse undertaken or performed in reliance on the confidence of the marital relation.

Syl. Pt. 2: The test of whether acts of a spouse come within the privilege against disclosure of confidential marital communications is whether the act or conduct was induced by or done in reliance of the confidence of the marital relation, i.e., whether there was an expectation of confidentiality.

State v. Richards, 182 W. Va. 664, 391 S.E.2d 354 (1990) (per curiam)

The Supreme Court affirmed the admissibility of threats a husband made against his estranged wife because the threat "was not induced by or done in reliance on the confidences of the marital relation and lacks the touchstones of privacy and confidentiality." 182 W. Va. at 669, 391 S.E.2d at 359. The husband was on trial for the murder of another man, and the testimony related to threats made against both the defendant's wife and the murder victim.

9. Other Act Evidence

a) Other act evidence admissible to prove element of charged offense

State v. Hanna, 180 W. Va. 598, 378 S.E.2d 640 (1989)

In this kidnapping case, the Supreme Court held that the defendant's history of domestic violence with regard to the victim, as well as the defendant's actions on the day of the kidnapping, was sufficient evidence to prove force or compulsion.

Syl. Pt. 4: Where force or compulsion is an element of the offense of kidnapping under W. Va. Code, 61-2-14(a), or abduction with intent to defile under W. Va. Code, 61-2-14, the State need not show that the accused used actual physical force or express threats of violence to accomplish the crime.

It is sufficient if the victim submits because of a reasonable fear of harm or injury from the accused.

State v. James B., 2016 WL 6678987 (W. Va. Sup. Ct., Nov. 14, 2016) (memo. op.)

Victim's testimony regarding prior incidents of domestic violence was admissible in prosecution for abduction and 2nd degree sexual assault because it was both intrinsic and necessary to complete victim's story of the crimes on trial.

State v. Ruben C., 2014 WL 2404301 (W. Va. Sup. Ct., May 30, 2014) (memo. op.)

On appeal from criminal convictions for 1st degree sexual assault, domestic battery, and violation of a domestic violence protective order, the Supreme Court held that the evidence of the domestic battery, which was the underlying act for which the victim sought and was awarded a domestic violence protective order, was inextricably intertwined with the crime for which defendant was charged, namely violation of the protective order, and thus, the circuit court did not abuse its discretion in admitting this evidence; without the evidence of the underlying domestic battery, it would not have been possible to appropriately present to the jury the complete story of the crime charged.

State v. Blickenstaff, 239 W.Va. 627, 804 S.E.2d 877 (2017)

The defendant kidnapped his daughter's mother with a knife while the mother, daughter and defendant were in a vehicle. The mother testified at trial that the defendant told her "not to do anything stupid, that it was going to be the worst day of [her] life, to get into the passenger seat, and he was taking over from here." The mother did not physically resist the defendant nor did she call out for help but instead she complied with the defendant's demands.

The State called an expert witness who testified that victims of domestic violence often comply with their abusers more so out of fear rather than consent. The State also introduced the defendant's previous conviction for second-degree domestic assault against the mother as evidence that the mother did not physically resist the kidnapping out of fear instead of consent.

The Supreme Court upheld the State's introduction of prior bad act evidence because, in part, it was introduced for a proper purpose, i.e., it was used to prove an element of the crime (lack of consent).

b) Other allowable purposes for prior bad act evidence

State v. Johnson, 73 Ohio Misc. 2d 1, 3, 657 N.E.2d 383, 384 (1994)

"[P]rior bad acts by a defendant against the same victim are also admissible in domestic violence cases to prove the defendant's intent, motive, and/or absence of mistake or accident."

See also State v. Lewis, 238 W.Va. 627, 797 S.E.2d 604 (2017).

State v. James B., 2016 WL 6678987 (W. Va. Sup. Ct., Nov. 14, 2016) (memo. op.)

Trial court did not abuse its discretion in allowing a witness, a friend and former co-worker of the victim, to testify about bruises she observed on the victim's body, in prosecution for abduction and 2nd degree sexual assault. The witness simply testified to her own observations of the victim, and stated her opinion that placement of certain bruises on the victim's body meant they were not accidental.

State v. Alan C., 2013 WL 2131054 (W. Va. Sup. Ct., May 16, 2013) (memo. op.)

On appeal from several criminal convictions, including domestic battery, the Supreme Court of Appeals held that prior bad act evidence, namely evidence of the defendant's past relationships with his former wife and stepchildren, showed his common plan to dominate and control his family through physical, mental, and emotional abuse, and thus, this evidence was admissible.

See also State v. Blonski, 125 Ohio App. 3d 103, 707 N.E.2d 1168 (1997).

c) When a domestic violence victim recants allegations

State v. Clark, 83 Hawaii 289, 926 P.2d 194 (1996)

The victim made an initial statement to police officers concerning a domestic violence incident. At trial, however, the victim's testimony contradicted her original statement. To explain this discrepancy, the state presented expert testimony about domestic violence and introduced other act evidence. Affirming the conviction, the Hawaii Supreme Court held that "where a victim recants allegations of abuse, evidence of prior incidents of violence between the victim and the defendant are relevant to show the trier of fact the context of the relationship between the victim and defendant, where, as here, that relationship is offered as a possible explanation for the victim's recantation." 83 Hawaii at 207, 926 P.2d at 302.

10. Impeachment of Hearsay Declarant

State v. Martisko, 211 W. Va. 387, 566 S.E.2d 274 (2002) (per curiam)

The defendant was convicted of misdemeanor domestic battery based solely upon the victim's hearsay statements that she made immediately after the battery to police officers. At trial, the victim did not appear even though both the State and the defendant planned to present her testimony.

To impeach the hearsay statements, the defendant attempted to introduce documents that indicated that the victim herself had previously been convicted of domestic battery. The defendant also attempted to introduce documents that indicated that the victim had filed domestic violence charges, but later recanted her testimony, in an incident with a previous boyfriend. The magistrate refused to admit the documents, and the circuit court affirmed this ruling.

Reversing the conviction, the Supreme Court noted that it was "uncomfortable with a conviction based entirely upon hearsay evidence where the defendant has no opportunity to impeach his chief accuser." 566 S.E.2d at 281. The Court instructed the lower court that the defendant should be able to impeach the victim's credibility by introducing the documents or questioning police witnesses about their knowledge of the evidence that had not been admitted.

It should be noted that the victim's statements, and statements similar to them, would now be subject to an analysis of whether they are testimonial or not. *Crawford v. Washington,* 124 S. Ct. 1354 (2004); S*ee also* subsection 6, "Testimonial Statements." For this reason, it is likely that a court would not ordinarily be confronted with the identical posture of *Martisko*. However, the Court's observations provide useful guidance for trial courts concerning a defendant's right to impeach a hearsay declarant.

G. State Criminal Liability for Acts of Domestic Violence

1. Relaxed Standard for Warrantless Arrest

State v. Forsythe, 194 W. Va. 496, 460 S.E.2d 742 (1995) (per curiam)

The defendant was charged with obstruction, as well as assault (as opposed to domestic assault) of his wife. He was convicted only of obstruction. He challenged this conviction on the basis that the officers lacked probable cause to arrest him for assault.

After examining the particular facts, the Supreme Court held that the arrest was lawful and affirmed the obstruction conviction. In so ruling, the Court

discussed the relaxed standard of probable cause for warrantless arrests in domestic violence situations. The Court specifically noted:

> [T]hat the arrest and prosecution of the appellant upon the assault charge, upon which he was found not guilty, was pursuant to W. Va. Code, 61-2-9(b), . . . rather than W. Va. Code, 61-2-28, specifically concerning domestic violence and W. Va. Code, 48-2A-14, a related statute concerning arrest in domestic violence matters. Although we need not definitively or preemptively address the latter two statutes in this case, we recognize that the standards of probable cause to make a warrantless arrest in domestic violence situations, under those statutes, are somewhat more relaxed than in other arrest situations.

(West Virginia Code § 48-27-1002 currently governs the relaxed standard of probable cause for warrantless arrests in domestic violence cases.)

State v. Davis, 199 W. Va. 84, 483 S.E.2d 84 (1996) (per curiam)

The facts in this case indicated that the defendant was intoxicated, was brandishing a firearm, and was engaged in an argument with his girlfriend. Affirming the conviction for obstruction, the Court relied on the statutory relaxation of the probable cause standard for warrantless arrests (then West Virginia Code § 48-2A-14, now West Virginia Code § 48-27-1002). Discussing the officers' actions, the Court specifically noted that: "Especially where the interests of another resident of the home are at stake, decisive and immediate intercession is necessary to properly conclude the predicament." 199 W. Va. at 88, 483 S.E.2d at 88.

2. Criminal Penalties for Protective Order Violations are Constitutional

People v. Blackwood, 131 Ill. App. 3d 1018, 476 N.E.2d 742, 87 Ill. Dec. 40 (1985)

The defendant challenged his misdemeanor conviction for violation of a protective order on the grounds that the Illinois Domestic Violence Act was void for vagueness and overbreadth. Rejecting the challenge of vagueness, the Court reasoned that: "The Domestic Violence Act contemplates the protection of a potential victim from the universe of physical and psychological abuses which only someone as close as a relative can inflict." 131 Ill. App. 3d at 1023, 476 N.E.2d at 745, 87 Ill. Dec. at 43. With this goal, the Court reasoned that the statute must define abuse in fairly general terms. The Court concluded that the statute is not vague because it prohibits

conduct by a specific individual against a specific individual or group of individuals.

With regard to the overbreadth challenge, the Court reasoned that the prohibitions on harassment did not violate the defendant's First Amendment rights because "[t]he only speech for which defendant could be reasonably punished under the Act is that form of expression which would not be subject to constitutional protection under any circumstances." 131 Ill. App. 3d at 1024, 476 N.E.2d at 746, 87 Ill. Dec. at 44.

People v. Whitfield, 147 Ill. App. 3d 675, 498 N.E.2d 262, 101 Ill. Dec. 80 (1986)

Relying on *Blackwood*, the Court rejected the defendant's challenge that the term "harass" as set forth in the Illinois Domestic Violence Act was unconstitutionally vague. Explaining its reasoning, the Court stated that: "It is a term limited in application to a specific class of individuals based upon conduct which is assessed by the trial court judge on a case-by-case basis." 147 Ill. App. 3d at 682, 498 N.E.2d at 267, 101 Ill. Dec. at 85.

3. Enhanced Penalties for Domestic Violence Crimes

a) Procedure for penalty enhancements

State v. Nichols, 208 W. Va. 432, 541 S.E.2d 310 (1999)

Although this case involved a DUI, it is relevant to criminal domestic violence cases because it established procedures for crimes with enhanced penalties for prior convictions. State statutes on domestic violence crimes similarly provide for enhanced penalties. *See*, *e.g.*, W. Va. Code §§ 48-27-903; 61-2-9a; and 61-2-28.

Syl. Pt. 3: When a prior conviction constitute(s) a status element of an offense, a defendant may offer to stipulate to such prior conviction(s). If a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s). When such a stipulation is made, the record must reflect a colloquy between the trial court, the defendant, defense counsel and the state indicating precisely the stipulation and illustrating that the stipulation was made voluntarily and knowingly by the defendant. To the extent that *State v. Hopkins*, 192 W. Va. 483, 453 S.E.2d 317 (1994) and its progeny are in conflict with this procedure they are expressly overruled.

Syl. Pt. 4: A defendant who has been charged with an offense that requires proof of a prior conviction to establish a status element of the offense

charged, and who seeks to contest the existence of an alleged prior conviction, may request that the trial court bifurcate the issue of the prior conviction from that of the underlying charge and hold separate jury proceedings for both matters. The decision of whether to bifurcate these issues is within the discretion of the trial court. In exercising this discretion, a trial court should hold a hearing for the purpose of determining whether the defendant has a meritorious claim that challenges the legitimacy of the prior conviction. If the trial court is satisfied that the defendant's challenge has merit, then a bifurcated proceeding should be permitted. However, should the trial court determine that the defendant's claim lacks any relevant and sufficient evidentiary support, bifurcation should be denied and a unitary trial held.

Syl. Pt. 5: At a hearing to determine the merits of a defendant's challenge of the legitimacy of a prior conviction pursuant to Syllabus point 4 of S*tate v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999), the defendant has the burden of presenting satisfactory evidence to show that the alleged prior conviction is invalid as against him or her.

b) Out-of-state convictions as basis for enhanced penalty

State v. Hulbert, 209 W. Va. 217, 544 S.E.2d 919 (2001)

The defendant was convicted of third offense domestic violence under West Virginia Code § 61-2-28, based upon two prior convictions from Michigan. The Supreme Court reversed the conviction because the State failed to produce sufficient evidence to establish the factual predicates for the Michigan domestic violence convictions to demonstrate these prior convictions would support a conviction as a West Virginia offense. The Court's holdings that govern the use of prior out-of-state convictions as a basis to enhance the penalty for a domestic assault or battery are as follows:

> Syl. Pt. 1: Prior domestic violence convictions in other states may be used to enhance the penalty for subsequent domestic violence convictions under West Virginia Code § 61-2-28.
>
> Syl. Pt. 2: An out-of-state conviction may be used as a predicate offense for penalty enhancement purposes under subsection (c) of West Virginia § 61-2-28 provided that the statute under which the defendant was convicted has the same elements as those required for an offense under West Virginia Code § 61-2-28. When the foreign statute contains different or additional elements, it must be further shown that the factual predicate upon which the prior conviction was obtained would have supported a conviction under West Virginia Code § 61-2-

> 28(a) or (b) in order to invoke the enhanced penalty contained in subsection (c).

The evidentiary requirements for proving any out-of-state convictions are as follows:

> Syl. Pt. 4: In proving the fact of an out-of-state conviction for punishment enhancement purposes under West Virginia Code § 61-2-28(c), the State may introduce a properly authenticated copy of the judgment of conviction that clearly indicates a defendant's identity and the fact of conviction. The conviction order may also include pertinent information regarding the offense and the foreign law under which the conviction was obtained. Additional means of proof include a properly authenticated copy of the warrant, indictment or other charging document, other comparable documents of record, or transcripts which establish the relevant facts pertinent to the offense and the conviction.

c) Time requirements for prior convictions

State v. Gibson, 226 W. Va. 568, 703 S.E.2d 539 (2010)

In a case involving a certified question, the Court held that the statute establishing the felony offense of domestic battery, West Virginia Code § 61-2-28(d), was not ambiguous and should be given its plain ordinary meaning. Therefore, the Court concluded that only one of the two required prior convictions for domestic violence must have occurred within ten years of the charged offense to establish the felony offense of domestic battery.

Syl. Pt. 3: A person convicted of a third or subsequent offense of domestic violence under W. Va. Code § 61-2-28(d) is guilty of a felony if the offense occurs within ten years of one of the prior convictions for any of the offenses of domestic violence enumerated in the statute.

4. Criminal Contempt

a) Criminal contempt defined

The following case generally addresses direct criminal contempt, although not in the context of a domestic violence proceeding.

State ex rel. Robinson v. Michael, 166 W. Va. 660, 276 S.E.2d 812 (1981)

Syl. Pt. 4: Where the purpose to be served by imposing a sanction for contempt is to punish the contemner for an affront to the dignity or authority

of the court, or to preserve to restore order in the court or respect for the court, the contempt is criminal.

Syl. Pt. 5: The appropriate sanction in a criminal contempt case is an order sentencing the contemner to a definite term of imprisonment or an order requiring the contemner to pay a fine in a determined amount.

b) Double jeopardy

U.S. v. Dixon, 509 U.S. 688, 113 S. Ct. 2849 (1993)

In *Dixon*, one of the defendants had been found guilty of criminal contempt for violations of a domestic violence protective order which ordered him not to assault his wife. Subsequent to the criminal contempt trial, the defendant was tried for the following crimes: assault, assault with intent to kill, and threats to injure or kidnap.

The United States Supreme Court noted that: "The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." 509 U.S. at 698, 113 S. Ct. at 2856. With regard to the assault charge, the Court held that the subsequent prosecution for assault could not pass the "same-elements" or *Blockburger* test, and therefore, violated double jeopardy principles. However, the Court held that the other charged crimes, assault with intent to kill and threats to injure or kidnap, contained additional elements not required to prove contempt for violations of the protective order. Under this analysis, the Court held that double jeopardy principles would not bar the subsequent prosecution for assault with intent to kill and threats to injure or kidnap.

c) Enforcement of out-of-state protective orders

People v. Hadley, 172 Misc. 2d 697, 658 N.Y.S.2d 814 (1997)

The defendant was subject to a New Jersey domestic violence protective order obtained by his wife. In New York, the defendant allegedly violated the order by following his daughter as she rode the subway. The New York Court framed the issue in the following question: "Can an order of protection issued in another State serve as the predicate for a charge of criminal contempt under the Penal Law of the State of New York?"

Resolving this issue affirmatively, the Court reasoned that protective orders are entitled to full faith and credit as established by 18 U.S.C. § 2265, provided that a person is afforded reasonable notice and an opportunity to be heard, and that the person has been informed of the contents of the order

and the prohibited conduct. The Court also concluded that the applicable New York criminal contempt statute did not limit its reach to New York protective orders. Further, the Court reasoned that a New Jersey protective order granted principally in favor of an adult that also protects minor children was entitled to full faith and credit by virtue of the language of 18 U.S.C. § 2265. Finally, the Court found that New York public policy would not be violated by the enforcement of an out-of-state protective order extending protection to a member of the victim's household.

The Court ultimately granted the defendant's motion to dismiss because the misdemeanor complaint failed to establish that the defendant had been granted notice and due process in conjunction with issuance of the New Jersey protective order. Such notice and due process is a prerequisite to full faith and credit enforcement. However, the Court granted the State leave to file a superseding information that demonstrated that the defendant had in fact been afforded notice and due process under the New Jersey order.

Commonwealth v. Shangkuan, 943 N.E.2d 466 (Mass. App. Ct. 2009)

This case involved a situation in which a respondent was served with a Massachusetts protective order in New Jersey by a New Jersey law enforcement officer. In a criminal prosecution for the violation of the Massachusetts protective order, the Massachusetts appellate court noted that "[T]he Violence Against Women Act, 18 U.S.C. § 2265 requires that a protective order of one State be accorded full faith and credit by law enforcement officers of the other state 'as if it were' an order of their own." 943 N.E.2d at 471. The Court went on to hold that the return of service filed by the New Jersey law enforcement officer was admissible under the public records hearsay exception and the return of service was nontestimonial.

5. West Virginia Code § 61-7-7 and Possession of a Firearm Following a Conviction for Certain Criminal Offenses

Note: The individuals in the cases cited below were not convicted of crimes of domestic violence. However, the Supreme Court's holdings in these cases provides guidance in the strict manner in which this statute is construed.

Rohrbaugh v. State, 216 W. Va. 298, 607 S.E.2d 404 (2004)

In 1991, Mr. Rohrbaugh was convicted of one count of third degree sexual assault. He was sentenced to an indeterminate term of one to five years in the state penitentiary; however, this sentence was suspended and Mr. Rohrbaugh was placed on five years of supervised probation. After completing his sentence and repaying all court costs and fines, Mr. Rohrbaugh petitioned the circuit court for the restoration of his right to possess a firearm pursuant to West Virginia Code § 61-7-7(c). In his petition,

Mr. Rohrbaugh presented evidence of his good character and the unlikelihood that he would re-offend. The circuit court construed Mr. Rohrbaugh's petition under the 1989 version of the statute, and granted the petition. The State appealed, arguing that restoration of Mr. Rohrbaugh's right to possess a firearm violated federal law, and that under the more recent version of West Virginia Code § 61-7-7(b), Mr. Rohrbaugh was precluded from seeking restoration of his right to possess a firearm.

The Supreme Court acknowledged that the version of West Virginia Code § 61-7-7 in force at the time of Mr. Rohrbaugh's conviction was different than the version of the statute in force when he petitioned for restoration of his right to possess a firearm; and further, that the earlier version would not have barred Mr. Rohrbaugh's petition. The Court analyzed the law and the changes to it to determine whether they violated the constitution prohibition against *ex post facto* laws. The Supreme Court found that West Virginia Code § 61-7-7 is a regulatory statute that does increase punishment for an existent crime or criminalize previously legal conduct, and it could be applied to those individuals convicted of a triggering offense after its enactment to regulate their post-release conduct.

Next, the Supreme Court addressed the applicability of West Virginia Code § 61-7-7 to those convicted of a felony sexual offense, holding:

> The plain language of W. Va. Code § 61-7-7(b) prohibits any person who has been convicted of a felony sexual offense from possessing a firearm or petitioning the circuit court of the county in which he/she resides for the restoration of his/her firearm rights.

The Court acknowledges that application of the statute may be harsh in some cases, even unfair. However, the Legislature did not make allowances for the severity of the offense, nor did it authorize consideration of any other mitigating factors.

Finally, the Supreme Court addressed the constitutionality of West Virginia Code § 61-7-7, and whether it infringes upon an individual's right to bear arms as guaranteed by the Second Amendment of the United States Constitution and Article III, Section 22 of the West Virginia Constitution. Citing previous holdings, the Court found that the "Legislature may enact laws limiting one's firearm rights in conjunction with its inherent police power." The Court concluded that the enactment of West Virginia Code § 61-7-7 was a lawful exercise of the Legislature's authority and it does not violate the Constitutions of the United States or West Virginia.

Perito v. The County of Brooke, 215 W. Va. 178, 597 S.E.2d 311 (2004)

Mr. Perito was convicted of two counts of malicious wounding in 1992, for shooting another individual with a firearm and then hitting him with an automobile. In 1996, Mr. Perito was granted a full and unconditional pardon by then Governor Gaston Caperton. Thereafter, Mr. Perito sought a declaratory judgment action in circuit court, seeking a declaration that the governor's pardon restored his: right to vote, right to hold public office, right to serve on a jury, right to hold certain employment, and his right to possess a firearm. Upon considering Mr. Perito's petition, the circuit court certified the following question to the Supreme Court:

> Whether a convicted felon who has been unconditionally pardoned by the Governor of the State of West Virginia is entitled to a restoration of rights such that the pardoned felon is exempted from the requirements of West Virginia Code § 61-7-7(c) requiring convicted felons to petition the Circuit Court and prove by clear and convincing evidence that the felon is competent and capable of exercising the responsibility concomitant with the possession of a firearm.

As a preliminary matter, the Supreme Court recognized that the Legislature may "reasonably regulate" the right to bear arms in this State. This necessarily includes the firearm restrictions imposed by West Virginia Code § 61-7-7 on those individuals who have been convicted of certain criminal offenses. With regard to the application of West Virginia Code § 61-7-7 to those persons who have received full pardons the Court held:

> West Virginia Code § 61-7-7, which prohibits certain persons from possessing firearms and provides a procedure for restoring the ability to possess firearms, applies to all individuals who have been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, even when the individual has received an unconditional pardon from the Governor with respect to the conviction.

In reaching this conclusion, the Supreme Court acknowledged that the common understanding of the effect of a gubernatorial pardon was that it restored the rights an individual enjoyed prior to his or her conviction. However, a pardon does not render an individual innocent, nor does it mean that the conviction cannot be considered for purposes that do not increase punishment for the crime previously committed. To that end, West Virginia Code § 61-7-7 is a regulatory statute that does not increase punishment for a crime. If the Legislature intended to exclude those persons receiving a pardon from its purview, it would have so stated.

6. West Virginia Code § 61-2-9a, Stalking and Harassment

State v. Malfregeot, 224 W. Va. 264, 685 S.E.2d 237 (2009)

Defendant, a middle school teacher, was convicted of stalking and harassing a thirteen-year old female student at his school in violation of West Virginia Code § 61-2-9a. A trial *de novo* was held in circuit court and the defendant was again convicted of stalking/harassment.

At trial, the victim testified that the defendant engaged in the following acts during the academic year: a) he spoke to her multiple times during the school day, primarily at her locker; b) he often waited near her locker despite the fact that his classroom was located in a different part of the school; c) he discussed personal matters with her; d) he walked around the school as a means to exercise and would invite her to walk with him; e) he made physical contact with her on several occasions, which made her uncomfortable; f) he rubbed her shoulders on one occasion, which made her feel uncomfortable; g) he called her to his classroom and asked her to type a letter for him, and she was not a student in any of his classes; h) he displayed photographs in his classroom of her alone and with other students, even after she asked that the photographs be removed; and i) on one occasion he called her personal cell number, and then demonstrated that he had saved the number in his cell phone. The victim related that the phone call scared her. The State argued that this evidence regarding the defendant's conduct satisfied the requirements of the statute.

On appeal, as he did at the trial court level, the defendant did not dispute many of these incidents, but argued that they were innocent, and that he had nothing more than a teacher-student relationship with the girl. The defendant claimed there was insufficient evidence to convict, particularly, he claimed that his actions did not constitute a "following" or "harassment" as provided by the statute. Further, he claimed the circuit court failed to consider all of the evidence and the context and setting in which the acts occurred.

With regard to the "following" element of the statute, the Supreme Court found no error, stating:

> Upon review of the record, this Court finds that there was sufficient evidence to conclude that the appellant willfully, actively, and repeatedly followed L.L. as required by W. Va. Code § 61-2-9a(a). As previously discussed, soon after meeting L.L., the appellant began visiting her at her school locker everyday throughout the 2005-2006 academic year. Such visits eventually escalated to several encounters between the two during each school day in spite of the fact that L.L. did not invite the appellant to her locker. L.L. stated that she would

> find the appellant waiting for her in between classes at her locker. The appellant also initiated contact with L.L. in the lunchroom, in the hallway, in her gym class and other classes, and by calling her personal cell phone. There was no evidence to suggest that L.L. ever invited, enticed, or welcomed these repeated daily visits. The circuit court concluded that the acts of the appellant traveling to locations where the victim was present constituted a "following" for the purposes of W. Va. Code § 61-2-9a(a). When viewing all of the evidence and the entire record, this Court does not believe that the findings of the circuit court are clearly erroneous with regard to whether the appellant's actions amounted to a "following." This Court further fails to find error with the circuit court's finding that the appellant's act of calling L.L. on her personal cell phone and leaving a deceptive message constituted a following. Clearly, the word "follow" under these circumstances necessarily includes conduct engaged in for the purpose of maintaining contact with an individual. 224 W. Va. at 270-71, 685 S.E.2d at 243-44.

Similarly, with regard to the "stalking" element of the statute, the Supreme Court found:

> The term "harass" is defined in W. Va. Code § 61-2-9a(g)(1) as "willful conduct directed at a specific person which would cause a reasonable person mental injury or emotional distress." At trial, evidence was introduced that showed that the appellant's actions were directed specifically toward L.L., were willful, repeated, and would have caused a reasonable person mental injury or emotional distress. On several occasions, the appellant, a fifty-year-old teacher, placed his arm around L.L., a thirteen-year-old student. He also held her hand, he rubbed her shoulders, and he flipped her hair. He further displayed photographs of her in his classroom in spite of her repeated requests that they be removed. He then called her personal cell phone under false pretenses and left a message that a reasonable person could interpret as an attempt to lure L.L. to the school on a non-school day. The next day at school he showed L.L. that he had saved her phone number on his phone. 224 W. Va. at 271, 685 S.E.2d at 244.

7. Third or Subsequent Offense of Domestic Violence

State v. Gibson, 226 W. Va. 568, 703 S.E.2d 539 (2010)

Defendant was charged with third offense domestic battery under West Virginia Code § 61-2-28(d). The circuit court sent the following certified question to the Supreme Court:

> Must both of the two prior convictions for criminal acts of domestic violence [as defined and obtained in accord with West Virginia Code § 61-2-28], which are alleged within an indictment charging a current allegation of domestic violence as a third offense felony, have been obtained against a defendant within ten years of said current allegation, for said prior convictions to be properly used to charge the current allegation of domestic violence as a third offense felony?

The Supreme Court answered it in the negative, holding:

> Syl. Pt. 3: A person convicted of a third or subsequent offense of domestic violence under W. Va. Code § 61-2-28(d) is guilty of a felony if the offense occurs within ten years of one of the prior convictions for any of the offenses of domestic violence enumerated in the statute.

H. Federal Criminal Liability for Acts of Domestic Violence

1. Possession of Firearm When Subject to a Domestic Violence Protective Order

United States v. Bailes, 10 F. Supp. 2d 607 (S.D.W.Va. 1998)

The district court dismissed a charge of violation of 18 U.S.C. § 922(g), firearm possession while subject to a domestic violence protective order, because the protective order identified in the indictment had automatically expired by reason of the entry of a temporary order in a divorce proceeding prior to the time of arrest for firearm possession. Although the temporary order provided domestic violence relief, the temporary order had not been referenced in the indictment and could not provide the factual support for the indictment.

United States v. Bostic, 168 F.3d 718 (4th Cir.), *cert. denied*, 527 U.S. 1029, 119 S. Ct. 2383, 144 L. Ed. 2d 785 (1999)

The Fourth Circuit ruled that a domestic violence protective order, issued by the Magistrate Court of Greenbrier County, West Virginia, satisfied the requirements set forth in 18 U.S.C. § 922(g)(8) because the order directed that the defendant refrain from abusing his wife.

The Fourth Circuit also rejected several constitutional challenges to 18 U.S.C. § 922(g)(8). Concerning notice and fair warning, the Fourth Circuit relied upon the basic principle that ignorance of the law is no excuse. Second, the Fourth Circuit rejected the defendant's argument that § 922(g) exceeded Congress' Commerce Clause authority. Finally, the Fourth Circuit rejected the defendant's argument that § 922(g)(8) interfered with West Virginia's domestic relations laws in violation of the Tenth Amendment.

United States v. Henson, 55 F. Supp. 2d 528 (S.D.W.Va.1999)

The district court denied the defendant's motion to dismiss an indictment for violation of § 922(g)(8) on the grounds that it violates the Second Amendment. The district court relied upon prior Fourth Circuit holdings that the Second Amendment confers a collective right to bear arms, not an individual right to do so. Additionally, the district court relied on *U.S. v. Bostic* to reject the defendant's argument that § 922(g)(8) violates the notice and fair warning principles of the Fifth Amendment.

2. Interstate Domestic Violence

U.S. v. Bailey, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 522 U.S. 896, 118 S. Ct. 240, 139 L. Ed. 2d 170 (1997)

The defendant challenged his conviction under the interstate domestic violence statute, 18 U.S.C. § 2261(a), on the basis that Congress lacked authority under the Commerce Clause to enact the statute. Rejecting this argument, the Court held that the statute was valid for two reasons. First, the statute requires the crossing of a state line which places the act in interstate commerce. Second, the statute requires a crime of violence, which makes it analogous to the Mann Act, which forbids the transportation of women for prostitution or debauchery, and the White Slave Traffic Act of 1910, which forbids interstate transportation for the purposes of debauchery. *See Caminetti v. U.S.*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917); *Cleveland v. U.S.*, 329 U.S. 14, 67 S. Ct. 13, 91 L. Ed. 12 (1946).

See also U.S. v. Page, 167 F.3d 325 (6th Cir. 1999).

U.S. v. Helem, 186 F.3d 449 (4th Cir. 1999)

The defendant severely beat his wife, and then forcibly took her to North Carolina where he eventually sought medical treatment for her. He challenged his conviction under the interstate domestic violence act because the beating occurred before the interstate travel, not "in the course of, as a result of, or to facilitate such conduct or travel." *See* 18 U.S.C. § 2261(a)(2). Rejecting this argument, the Fourth Circuit held that "physical violence that occurs before interstate travel begins can satisfy the 'in the course of or as a

result of that conduct' requirement of 18 U.S.C. § 2261(a)(2)." 186 F.3d at 455.

U.S. v. Barnette, 211 F.3d 803 (4th Cir. 2000)

The defendant traveled from Charlotte, North Carolina, to Roanoke, Virginia, and firebombed the residence of his former girlfriend, and then returned to Charlotte. Approximately two months later, the defendant committed a carjacking and killed the car's owner in Charlotte. He then traveled to Roanoke, Virginia, in the car he had stolen. In Roanoke, he shot and killed his former girlfriend. He was tried, convicted, and sentenced to death in the Western District of North Carolina for violations of applicable federal statutes, including two counts of direct violations of VAWA.

On appeal, the defendant challenged the convictions and asserted that venue was proper only in Virginia, not in North Carolina. The Fourth Circuit relied on 18 U.S.C. § 2237(a), a general venue statute that establishes venue for offenses begun in one district and completed in another, to hold that venue was proper in both North Carolina and Virginia because the elements of the offense included both traveling and committing a violent act.

The defendant also challenged his conviction on the grounds that his former girlfriend did not meet the statutory definition of "intimate partner" established by 18 U.S.C. § 2266(A). The Fourth Circuit noted that the definition of "intimate partner" is "a person who 'has cohabited with the abuser as a spouse.'" 211 F.3d at 814. After reviewing the facts of this relationship, the Fourth Circuit concluded that the district court did not err when it used the words of the statute to instruct the jury and allowed the jury to determine whether or not the former girlfriend was an intimate partner of the defendant.

3. Federal Prohibition on Gun Possession Following a Conviction for a Crime of Domestic Violence in State Court

In re Parsons, 218 W. Va. 353, 624 S.E.2d 790 (2005)

Police officer entered a no contest plea to one misdemeanor count of domestic assault and was sentenced to six months probation. In compliance with West Virginia Code § 61-7-7(a)(8), the defendant was prohibited from using or possessing any firearms or any lethal weapons. After expiration of his term of probation, the defendant petitioned the circuit court pursuant to West Virginia Code § 61-7-7(c) to restore his right to possess a firearm. The circuit court denied the petition upon a finding that it would violate federal law.

The defendant raised several arguments on appeal. First, he claimed that his civil rights were restored within the meaning of 18 U.S.C. §

921(a)(33)(B)(ii) and that the circuit court's order did not contain a provision prohibiting him from possessing a firearm. Thus, according to the defendant, the federal prohibition on firearm possession did not apply to him.

The Supreme Court rejected this argument. Relying on *U.S. v. Jennings*, 323 F.3d 263 (4th Cir. 2003), the Court held:

> Syl. Pt. 1: A person who has been convicted of a misdemeanor crime of domestic violence and who does not lose his or her civil rights as a result of the conviction cannot have his or her civil rights "restored" for the purpose of 18 U.S.C. § 921(a)(33)(B)(ii) so as to fall within that provision's restoration exception to the prohibition on firearm possession in 18 U.S.C. § 922(g)(9).

Further, the Supreme Court rejected the contention that a "literal application of the word restored" would produce an absurd result, because misdemeanants who are not incarcerated would be treated more harshly than those who were incarcerated. When the federal law was enacted, Congress was cognizant of the differences in state law, and was aware that inconsistent results were likely to occur.

Next, the defendant claimed that his right to possess a firearm was a civil right within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii) and, therefore, was a right that could be restored. The Supreme Court found that the right to possess a firearm was not a civil right contemplated by the applicable federal statute, holding:

> The term "civil rights" in 18 U.S.C. § 921(a)(33)(B)(ii), which provides several exceptions to the prohibition in 18 U.S.C. § 922(g)(9) on the right of a person convicted of a misdemeanor crime of domestic violence to possess a firearm, generally refers to the rights to vote, hold elective office, and sit on a jury.

The defendant's misdemeanor conviction did not cause him to lose any of the pertinent civil rights under West Virginia law; therefore, there was no way for them to be restored.

Finally, the defendant claimed that the elements of a misdemeanor crime of domestic violence were not the same under federal and state law rendering the federal prohibitions on firearm possession inapplicable to him. Particularly, he claimed that West Virginia's definition of "family or household members" is broader than that contained in 18 U.S.C. § 921(a)(33)(A)(ii). Again, the Supreme Court discredited the defendant's argument, holding:

> A violation of 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by one who has a prior misdemeanor conviction for domestic violence, does not require that the underlying statute include as an element of the offense a domestic relationship between the victim of the domestic violence and the misdemeanant. It requires only that the misdemeanor was committed against a person who is enumerated in one of the domestic relationships with the misdemeanant specified in 18 U.S.C. § 921(a)(33)(A)(ii).

I. Battered Spouse Syndrome

1. Battered Spouse Syndrome Defined

State v. Steele, 178 W. Va. 330, 359 S.E.2d 558 (1987)

Syl. Pt. 5: Expert testimony can be utilized to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome.

State v. Wyatt, 198 W. Va. 530, 542, 482 S.E.2d 147, 159 (1996)

"[W]e recognize battered women's syndrome as a particularized version of post-traumatic stress disorder, of which, for instance rape-trauma syndrome is another example."

State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998)

In *Miller*, the defendant was charged and convicted of first degree murder for her participation in the killing of her husband. The uncontested evidence adduced at trial demonstrated that the defendant and her children suffered horrific abuse at the hands of her husband for nearly 20 years.

In his concurring opinion in *Miller*, Justice Starcher offered a colloquial yet exceeding apropos description of the type of abuse that may lead to a Battered Spouse Syndrome diagnosis; the type of abuse that may lead a victim of domestic violence to act out in violence herself as a means of self-preservation. He stated:

> David Stinson's threats, curses, and rages-his backhands to Penny Miller's face, his fist punching her belly, his foot kicking her as she lay on the floor-Penny's puffy lips and swollen eyes, her cuts and bruises and bandages, her loose teeth and bleeding gums-the nights of terror for Christopher and Cheyenne, the curses and the blows landing on their mother-the lies, the insults, the broken promises-the fear, shame,

> isolation, failure, resignation and numbness-all of this, the fruits of David Stinson's abuse-*came home to roost* when David Stinson was shot to death by his own son. One may wonder, as David Stinson lay bleeding on a trailer porch, did he have time to feel that he had finally been brought to account for his crimes--and by a person uniquely qualified to appreciate their gravity.

State v. Whittaker, 221 W. Va. 117, 650 S.E.2d 216 (2007)

In his dissenting opinion in *Whittaker*, Justice Albright took the majority to task, arguing that it failed to give due consideration to Battered Spouse Syndrome, and how this condition is relevant to a claim of self-defense. He discussed some of the factors that are typically present in an individual with Battered Spouse Syndrome. "[The] paradigm presented by a battered spouse is an individual who is prevented by emotional or financial obstacles, or both, from permanently escaping the environs of the abusing spouse." He went onto explain that a "prototypical pattern" of abuse may exist, including: "1) the escalation of the abuse in frequency and severity over time; 2) the existence of a three phase cycle of violence; and 3) the jealousy of the batterer." Further, the emotional state of someone with Battered Spouse Syndrome is one that develops over a period of time and includes a pattern of threats punctuated by acts of violence. He or she is one who perceives further violence from the abuser as an eventuality. (citations omitted).

State v. Stewart, 228 W. Va. 406, 719 S.E.2d 876 (2011)

"As a general proposition, Battered Woman's Syndrome provides a clinical explanation of the psychological mindset, and behavior, of a woman who has been physically or mentally abused over a period of time by a domestic partner." 228 W. Va. at ---, 719 S.E.2d at 884, (quoting Walker, Lenore, *"The Battered Woman"* (Harper & Row, 1979); Walker, Lenore, *"The Battered Woman Syndrome"* (2d ed., 2000); Lenore E. Walker, *Psychology and Law Symposium: Women and the Law,* 20 Pepp. L. Rev. 1170 (1993)).

2. Admissibility of Evidence Regarding Battered Spouse Syndrome

State v. Dozier, 163 W. Va. 192, 255 S.E.2d 552 (1979)

The Supreme Court granted a new trial to a defendant convicted of the murder of a man with whom she had been living with for approximately ten years. Holding that the defendant should be able to testify about the beatings she received from the murder victim, the Court noted: "While we do not view the record through the eyes of the defendant, we know the defense would be entitled, in the event of a retrial, to elicit testimony about the prior

physical beatings she received in order that the jury may fully evaluate and consider the defendant's mental state at the time of the commission of the offense."

State v. Riley, 201 W. Va. 708, 500 S.E.2d 524 (1997) (per curiam)

In footnote 6, the Court listed the three purposes for which evidence of battered spouse syndrome has been found admissible: (1) The defendant's mental state when self defense is claimed, *State v. Dozier*, 163 W. Va. 192, 197-98, 255 S.E.2d 552, 555 (1979); (2) To negate criminal intent, *State v. Lambert*, 173 W. Va. 60, 63-64, 312 S.E.2d 31, 35 (1984); and (3) To establish lack of malice, intention, or awareness and thus negate an element of the charged crime*, State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996).

The Court in *Riley* affirmed the trial court's limitations on evidence related to battered spouse syndrome under Rule 403 of the West Virginia Rules of Evidence.

Bechtel v. Oklahoma, 840 P.2d 1, 8, 1192 OK CR 55 (1992)

In *Bechtel*, the defendant was charged with first degree murder for the killing of her husband. She asserted a claim of self-defense based on Battered Woman Syndrome; however, the trial court excluded a great deal of pertinent evidence on the subject. The Court of Criminal Appeals of Oklahoma aptly described the need for expert testimony when Battered Spouse Syndrome is raised in conjunction with a claim of self-defense:

> Misconceptions regarding battered women abound, making it more likely than not that the average juror will draw from his or her own experience or common myths, which may lead to a wholly incorrect conclusion. Thus, we believe that expert testimony on the syndrome is necessary to counter these misconceptions.

The *Bechtel* Court also addressed the admissibility of previous statements made by an abuser to a victim of domestic violence. The Court decried the practice of summarily excluding such statements as hearsay, explaining:

> A defendant, in a self-defense case involving the syndrome, in order to establish her "fear" at the time of the commission of the offense and to establish the deceased as the aggressor, must be entitled to produce past violent encounters with the deceased and to introduce evidence of the turbulent and dangerous character or reputation of the deceased. This is an established method of proof in self-defense cases, because the law recognizes the fact that future conduct may be reasonably

inferred from past conduct. *See Roberson v. State,* 91 Okla. Crim. 217, 218 P.2d 414 (1950). Justice would not be served to hold that a defendant is limited to relating the physical act of past conduct without its accompanying words.

Inherent in self-defense cases involving the Battered Woman Syndrome, are issues involving both the state of mind of the deceased and the defendant. An out-of-court statement, regardless of its truth, may imply intention, knowledge, physical or emotional feeling, or other state of mind of the deceased declarant. If offered to prove such state of mind, the statement is not hearsay. An out-of-court statement, regardless of the truth, which elicits a state of mind *in another person* in consequence of the utterance is not hearsay. Such statements are circumstantial evidence and are recognized by the courts as such. We do not imply that said statements are to be admitted automatically. The trial judge may exercise his discretion to determine whether the inference sought to be drawn from the particular statement is reasonable and relevant. If not, the statement may be excluded for the lack of relevance, not on the ground of hearsay.

3. Evidence of Previous Abuse or Threats Used to Negate Criminal Intent or an Element of the Crime Charged

State v. Harden, 223 W. Va. 796, 679 S.E.2d 628 (2009)

Syl. Pt. 4: Where it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.

State v. Wyatt, 198 W. Va. 530, 482 S.E.2d 147 (1996)

The defendant was convicted of child abuse and neglect with bodily injury, malicious assault, and murder of a child by failure to provide medical care. In this appeal, the Court observed that expert testimony concerning battered women's syndrome could be offered in an attempt to negate criminal intent elements. The Court held "that the admission of expert testimony tending to negate the criminal intent elements of the crimes defined by W. Va. Code § 61-8D-2, by reason of the impact of a history of domestic abuse on the accused, must be preceded by a showing that such evidence as is admissible under the standards of *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 511 U.S. 1129, 114 S. Ct. 2137, 128 L. Ed. 2d 867 (1994)."

State v. Lambert, 173 W. Va. 60, 312 S.E.2d 31 (1984)

In the reversal of a conviction for welfare fraud, the Supreme Court recognized that a history of domestic violence can be a factor that may negate criminal intent, and held that "[n]ot only are defendants entitled to present evidence to support such theories as the battered spouse syndrome, which go to negate criminal intent, they are also entitled to receive proper instructions on those theories."

4. Battered Spouse Syndrome and a Claim of Self Defense

State v. Harden, 223 W. Va. 796, 679 S.E.2d 628 (2009)

This case involved a situation in which a woman killed her husband during a night in which he had beaten her so badly that even the prosecutor who tried the case conceded that the woman had been subject to a "night of terror." During a night in which he was drunk with a blood alcohol content of .22%, the decedent hit the defendant with the butt and barrel of a shotgun, beat the defendant with his fists and sexually assaulted her. He also threatened to kill the defendant's two children and a friend of one of the children who was spending the night. According to the defendant's testimony, the decedent was physically and verbally aggressive after the decedent had sexually assaulted her, and he dared the defendant to shoot him or that he would shoot her. At this point, the defendant got the decedent's shotgun and killed him. At trial, she was convicted of first degree murder with the possibility of parole.

The defendant had presented a case on the theory that she had acted in self-defense. The self-defense instruction given to the jury was based on Syllabus Point 6 of *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927) which provides that: "No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time that the defendant fired the fatal shot."
As an initial point for its analysis, the Supreme Court noted that more recent precedent had found that "*prior* physical and mental abuse by a decedent *is* relevant evidence on the issue of the reasonableness of a defendant's belief that death or serious bodily injury were imminent." 679 S.E.2d at 635 (emphasis in original). See *State v. Cain*, 20 W. Va. 679 (1882); *State v. Cook*, 204 W. Va. 591, 515 S.E.2d 127 (1999); *State v. Dozier*, 163 W. Va. 192, 255 S.E.2d 552 (1979); *State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996); *State v. Plumley*, 184 W. Va. 536, 401 S.E.2d 469 (1990); *State v. Summers*, 118 W. Va. 118, 188 S.E. 873 (1936). Holding that evidence of prior abuse is relevant to a claim of self defense, the Supreme Court adopted the following syllabus point:

> Syl. Pt. 3: Where a defendant has asserted a plea of self-defense, evidence showing that the decedent had previously abused or threatened the life of the defendant is relevant evidence of the defendant's state of mind at the time deadly force was used. In determining whether the circumstances formed a reasonable basis for the defendant to believe that he or she was at imminent risk of serious bodily injury or death at the hands of the decedent, the inquiry is two-fold. First, the defendant's belief must be subjectively reasonable, which is to say that the defendant actually believed, based upon all the circumstances perceived by him or her at the time deadly force was used, that such force was necessary to prevent death or serious bodily injury. Second, the defendant's belief must be objectively reasonable when considering all of the circumstances surrounding the defendant's use of deadly force, which is to say that another person, similarly situated, could have reasonably formed the same belief. Our holding in Syllabus Point 6 of *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927), is expressly overruled.

The Court also found that prior threats and abuse may be relevant to negate criminal intent even if it is determined that a defendant's actions were not reasonably taken in self-defense. See *State v. Lambert*, 173 W. Va. 60, 312 S.E.2d 31 (1984); *State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996). Therefore, the Court held that:

> Syl. Pt. 4: Where it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.

At trial, the State had argued that the defendant could have left her home to avoid further attacks. With regard to this issue, the Court noted that this argument implied that the defendant had a duty to retreat from her home. The Court then framed the issue as follows: "[W]hether we should continue to follow the proposition that an occupant of a home has a duty to retreat when a co-occupant of the same home has attacked or otherwise placed the occupant in danger of serious bodily injury or death." 223 W. Va. at 805, 679 S.E.2d at 637. After a careful review of *Weiand v. State*, 732 So.2d 1044 (Fla. 1999) and *People v. Tomlins*, 107 N.E. 496 (N.Y. 1914), and noting that prior caselaw in West Virginia was a minority view, the Court held that a co-occupant does not have a duty to retreat in these circumstances. In Syllabus Point 5, the Court held that:

> Syl. Pt. 5: An occupant who is, without provocation, attacked in his or her home, dwelling or place of temporary abode, by a co-occupant who also has a lawful right to be upon the premises, may invoke the law of self-defense and in such circumstances use deadly force, without retreating, where the occupant reasonably believes, and does believe, that he or she is at imminent risk of death or serious bodily injury. In determining whether the circumstances formed a reasonable basis for the occupant to believe that he or she was at imminent risk of death or serious bodily injury at the hands of the co-occupant, the inquiry is two-fold. First, the occupant's belief must be subjectively reasonable, which is to say that the occupant actually believed, based upon all the circumstances perceived by him or her at the time deadly force was used, that such force was necessary to prevent death or serious bodily injury. Second, the occupant's belief must be objectively reasonable when considering all of the circumstances surrounding the occupant's use of deadly force, which is to say that another person, similarly situated, could have reasonably formed the same belief. Our decision in Syllabus Point 2, *State v. Crawford*, 66 W.Va. 114, 66 S.E. 110 (1909), is expressly overruled.

After reaching these legal conclusions, the Court examined the evidence in detail and found that the defendant had presented sufficient evidence to create a reasonable doubt as to whether she acted in self-defense. The Court further concluded that the State did not meet its burden to prove beyond a reasonable doubt that the defendant did not act in self-defense. Accordingly, the Supreme Court vacated the defendant's conviction and directed the circuit court to enter a judgment of acquittal.

State v. Smith, 198 W. Va. 441, 481 S.E.2d 747 (1996) (per curiam)

The defendant was convicted of second degree murder of her live-in boyfriend. At the time of the murder, the victim was sleeping. Although the defendant's expert had concluded that the defendant did not meet all of the criteria for battered woman's syndrome, the defendant sought admission of the psychologist's testimony that she feared the decedent. The Supreme Court affirmed the circuit court ruling excluding the defendant's proffered expert psychological testimony. The Court also affirmed the circuit court refusal to instruct the jury on self-defense or voluntary manslaughter because the evidence (shooting the victim while he was sleeping) did not warrant either of these instructions.

J. Ethical Considerations

1. Confidentiality of Records from Domestic Violence Programs or Shelters

Thompson v. Branches-Domestic Violence Shelter, 207 W. Va. 479, 534 S.E.2d 33 (2000), *cert. denied*, 531 U.S. 1186, 121 S. Ct. 1176 (2000)

The Court recognized the confidentiality of domestic violence programs or shelters established by West Virginia Code § 48-2C-15 (now codified at 48-26-701). Although the Court affirmed the dismissal of the case because of the one-year statute of limitations, the Court expressly observed in footnote 5: "If employees of a domestic violence shelter leaked confidential information regarding a client, that is indeed appalling. Employees of domestic violence shelters clearly owe a statutory duty of confidentiality to their clients. If this claim had been filed within the statute of limitations, the shelter could be confronted with significant liability."

2. Conflicts of Interest

State ex rel. Bailey v. Facemire, 186 W. Va. 528, 413 S.E.2d 183 (1991)

Syl. Pt. 1: A prosecuting attorney is required to withdraw from representing a private client in a domestic proceeding in the event the attorney identifies a potential or actual conflict of interest between his/her duties owed to the state and the interests of the private client.

Syl. Pt. 2: A prosecuting attorney is required to use reasonable efforts to investigate whether conflicts of interest either are present or have the potential of arising prior to undertaking representation of private clients in domestic proceedings. "Reasonable effort" entails a review of pertinent records in the prosecuting attorney's office and other court records to ascertain whether a party to the subject or prospective litigation has filed a petition pursuant to the Prevention of Domestic Violence Act, W. Va. Code § § 48-2A-1 to -11, a petition alleging failure to pay child support, or has initiated any other civil or criminal proceeding which has the potential of involving the prosecutor's office for enforcement purposes.

Syl. Pt. 3: In the event a prosecuting attorney agrees to represent a private client in a domestic proceeding and no conflict of interest is apparent but subsequently arises, the prosecuting attorney must seek appointment of a special prosecuting attorney and remove himself from the case in all respects.

State ex rel. McClanahan v. Hamilton, 189 W. Va. 290, 430 S.E.2d 569 (1993)

A woman who was indicted for the malicious assault of her husband sought a writ of prohibition to disqualify the prosecutor because he had represented her in a divorce case against her husband approximately three years earlier. The grounds for divorce were cruel and inhuman treatment, but the divorce was not finalized because the couple reconciled. The Supreme Court found that the divorce and the criminal case were substantially related matters because the husband's abuse or mistreatment of his wife was a central issue in both cases. The Court noted that: "diligent prosecution would seek to discredit the relator's claim of self-defense and 'battered-wife syndrome.' This goal would be diametrically contrary to the position the prosecutor advanced on behalf of the relator in the earlier divorce case." 189 W. Va. at 296, 430 S.E.2d at 575. Therefore, the Supreme Court issued a writ of prohibition.

3. Attorney Contact with Commanding Officer of Domestic Violence Perpetrator

State ex rel. Scales v. Committee on Legal Ethics, 191 W. Va. 507, 446 S.E.2d 729 (1994) (per curiam)

The Supreme Court issued a writ of prohibition against the Committee of Legal Ethics of the State Bar to prevent proceedings on an ethics complaint. The facts of the complaint indicated that the attorney, in response to her client's request, had contacted the commanding officer of her client's husband regarding the husband's acts of domestic violence in an attempt to seek assistance from the military. The Court found that the attorney had neither violated a court order, nor violated Rules 1.2(c) or 4.4 of the Rules of Professional Conduct, because the attorney's purpose in contacting the commanding officer was an attempt to stop the repeated acts of domestic violence, which was not an improper purpose.

4. Failure to Post Orders to Domestic Violence Registry

In re Watkins, 233 W. Va. 170, 757 S.E.2d 594 (2013)

The *Code of Judicial Conduct* requires judicial officers to properly manage office and staff. Repeated disregard of duty to promptly post protective orders to the Domestic Violence Registry was held to be misconduct subject to sanctions.

5. Attorney Serving as Guardian *ad litem*

State ex rel. Ash v. Swope, 232 W. Va. 231, 751 S.E.2d 751 (2013)

The Supreme Court held that because many aspects of a guardian *ad litem's* representation of an incarcerated person in a family court domestic violence proceeding are duties performed by a lawyer on behalf of a client, an attorney-client relationship exists and the rules of professional conduct generally apply to that representation.

The Court further concluded, however, that the attorney-client privilege did not apply to the statement that the defendant directed his guardian *ad litem* to make on his behalf at family court hearing that he intended to kill the petitioner if she pursued domestic violence petition against him. Since it was intended to be disseminated to everyone at the family court hearing, the statement was not intended to be confidential.

Chapter 8

RULES OF PRACTICE AND PROCEDURE FOR DOMESTIC VIOLENCE CIVIL PROCEEDINGS

Chapter Contents

A. Rules of Practice and Procedure for Domestic Violence Civil Proceedings

Rule 1. Scope; Conflicts.

(a) These rules shall govern domestic violence civil proceedings in the circuit courts, family courts, and magistrate courts of the State of West Virginia. If these rules conflict with other rules or statutes, these rules shall apply. The purpose of these rules is to help resolve cases in a just, speedy, and inexpensive manner.
(b) Rule 6 of the Rules of Civil Procedure shall govern computation of time in domestic violence civil proceedings.

Rule 2. Terminology.

(a) "Emergency protective order" refers to the temporary protective order entered after a W. Va. Code § 48-27-203 emergency hearing.

(b) "Domestic violence protective order" refers to the ninety (90), one hundred eighty (180) day, one year or longer order entered after a W. Va. Code § 48-27-205 final hearing.

(c) "Protective order," as referred to in the West Virginia Code and these rules unless specifically stated otherwise, shall mean the order entered pursuant to W. Va. Code § 48-27-203 and W. Va. Code § 48-27-205.

(d) "Law Enforcement Agency" refers to all agencies provided in W. Va. Code § 48-27-206; provided, however, when the code or these rules require service of orders and pleadings filed in domestic violence proceedings, "law enforcement agency" does not include any federal agency or the department of health and human resources.

Rule 3. Effective Date.

These rules shall take effect on the first day of January 2002, and shall govern all domestic violence civil proceedings.

Rule 4. Fees.

(a) Assessment of Court Costs and Fees When Emergency Protective Order "Denied." If the petition is denied and the court finds that the petitioner is not a victim of domestic violence, sexual assault, or stalking as provided in W. Va. Code § 48-27-202, court costs and fees shall be assessed by the magistrate against the petitioner at the conclusion of the emergency hearing and shall be paid to the magistrate clerk as follows, unless a fee waiver affidavit has been filed:

(1) Magistrate Court Fund: $10.00;
(2) Court Security Fund: $5.00; and

(3) Regional Jail Authority: $10.00.

Costs and fees may not be assessed against a prevailing party. Partial payments of costs and fees shall be applied by the magistrate clerk in the following order: Magistrate Court Fund, Court Security Fund, Regional Jail Fund, and other costs, if any. If the denial of the petition is appealed, payment of costs shall be stayed until resolution of the appeal.

(b) Assessment of Court Costs and Fees When Petitioner Fails to Appear or Present Evidence. No court costs and fees shall be assessed against the petitioner for failure to appear or failure to present evidence at the final hearing in circuit or family court.

(c) Assessment of Court Costs and Fees When Petitioner Moves to Terminate Protective Order. No court costs or fees shall be assessed against a petitioner who moves to terminate a protective order, whether the court grants or denies the motion.

(d) Assessment of Court Costs and Fees When Protective Order Denied. If the court denies a protective order after the presentation of all evidence and testimony of the petitioner and respondent and further finds that the petitioner is not a victim of domestic violence, sexual assault, or stalking as provided in W. Va. Code § 48-27-202, the petitioner may be assessed the costs and fees provided in (e) and (f) herein unless a fee waiver affidavit has been filed.

(e) Assessment of Court Costs and Fees When Protective Order "Granted" by Circuit or Family Court. Except as in subsection (a) of this rule, court costs and fees shall be assessed by the family or circuit court at the conclusion of a proceeding, and shall be paid to the circuit clerk within ten (10) days by Respondent as follows, unless a fee waiver affidavit has been filed:

(1) Family Court Fund: $25.00;
(2) Magistrate Court Fund: $10.00;
(3) Court Security Fund: $5.00;
(4) Regional Jail Authority: $10.00.

Court costs and fees may not be assessed against a prevailing party. Partial payments of fees and costs shall be applied by the circuit clerk in the following order: Family Court Fund, Magistrate Court Fund, Court Security Fund, Regional Jail Fund, and other costs, if any as provided in subsection (e).

(f) Assessment of Other Costs and Fees. The following fees shall be assessed by the Court when pleadings and orders have been served by a

law enforcement agency and/or the circuit clerk. For service of process by law enforcement the sum of $25.00 as provided in W. Va. Code § 59-1-14. For service of process by the circuit clerk, by certified mail, restricted delivery, return receipt requested, the sum of $20.00 as provided in Rule 4(d)(1) of the Rules of Civil Procedure.

(g) Payment of Court Costs and Fees. The court shall require a party to appear before the court or show proof of payment of any costs and fees ordered by the court within ten (10) days of the entered order, unless the party qualifies for a fee waiver after review by the court pursuant to Rule 5 of these rules.

Rule 5. Waiver of Fees and Costs for Indigents.

A person seeking waiver of fees, costs, or security pursuant to W. Va. Code § 59-2-1, shall execute before the clerk where the matter is pending a fee waiver affidavit which shall be kept confidential. An additional fee waiver affidavit shall be filed whenever the financial condition of the person no longer conforms to the financial condition established by the Supreme Court of Appeals for determining inability to pay fees or whenever an order has been entered directing the filing of a new affidavit. The fee waiver affidavit shall be reviewed pursuant to W. Va. Code § 59-2-1(d) by the presiding court to determine whether the person seeking the waiver qualifies as established by the West Virginia Supreme Court. If the court determines that the person does not qualify, the court shall assess the costs and fees in Rule 4 of these rules.

Rule 6. Confidentiality of Court Records.

(a) Rule 6 of the Rules of Practice and Procedure for Family Court shall govern the confidentiality of the court records in domestic violence civil proceedings, provided however, if a minor child is the petitioner or respondent in a domestic violence civil proceeding, all records contained in the magistrate clerk's office and the circuit clerk's office shall be confidential and not subject to public inspection, except as otherwise provided in W.Va. Code, Chapter 48 and this rule, unless opened for inspection by an order of a Family Court Judge or Circuit Court Judge.

(b) Subpoena *Duces Tecum*, Orders Permitting Examination or Copying of File Contents. Pursuant to W. Va. Code § 48-27-312, any record in a domestic violence civil proceeding shall be supplied to any person presenting a subpoena *duces tecum* issued by a state or federal court in any criminal action or any domestic violence civil proceeding. Any record obtained under this rule shall be used only in the context of the case in which the subpoena was issued and not for any other purpose.

(c) West Virginia Domestic Violence Database. The information and records contained on the West Virginia domestic violence database pursuant to W.Va. Code § 51-1-21 shall not be open for public inspection. The West Virginia domestic violence database shall contain such information and records the West Virginia Supreme Court deems necessary for the service and enforcement of domestic violence protective orders issued by the court. The West Virginia Supreme Court may in its discretion provide access to the information and records contained on the West Virginia domestic violence database to any and all authorized court personnel, state and federal law enforcement agencies, the department of health and human services, or other state and federal agencies the court deems necessary in the furtherance of enforcement of the orders of the court and improvement of the database and response to domestic violence, provided however, if a minor child is the petitioner or respondent in a domestic violence civil proceeding and any protective order entered has expired or been terminated, said record shall remain confidential and not subject to inspection on the West Virginia domestic violence database unless by an order of a Family Court Judge or Circuit Court Judge. If the petitioner is a minor and the respondent is not a minor, then the petitioner's information only shall be redacted from the database.

Rule 7. Persons Allowed to be Present During Hearing; Unofficial Recording of Domestic Violence Civil Proceeding Prohibited.

(a) No person or domestic violence advocate accompanying a person who is seeking to file a petition is precluded from being present if his or her presence is desired by the person seeking a petition, W. Va. Code § 48-27-307, and no person or domestic violence advocate requested by a party to be present during a hearing on a petition for a protective order shall be precluded from being present unless such person is a witness in the proceeding and a motion for sequestration has been made and such motion has been granted. Any person or domestic violence advocate shall be permitted to sit with a party during the hearing. Any person or domestic violence advocate found by the court to be disruptive may be precluded from being present. W. Va. Code § 48-27-403(f). For purposes of this rule, a domestic violence advocate means an employee or representative of a licensed program for victims of domestic violence.

(b) Rule 8 of the Rules of Practice and Procedure for Family Law shall govern the unofficial recording of domestic violence civil proceedings.

Rule 8. Filing of Petitions and Other Pleadings.

(a) Commencement of Action. To commence an action for a protective order, a verified petition shall be filed in the magistrate court.

(b) Petition. The petition shall contain a short and plain statement of the facts showing that the petitioner is entitled to relief, and it shall contain a demand for the relief the petitioner seeks.

(c) Firearms. The petition shall contain information regarding the use, possession and ownership of firearms by the respondent which shall include a description and location, if known by the petitioner, of each firearm owned and/or possessed by the respondent.

(d) Pleadings Filed After Original Petition. All pleadings filed after the original petition, except as provided in Rule 9 herein, including petitions for criminal contempt shall be filed with the circuit clerk. Misdemeanor complaints for violation of protective orders shall be filed in the magistrate court.

(e) Other Required Documents. The original petition, and petitions for contempt or modification of a protective order, shall be accompanied by a completed domestic violence civil case information statement.

(f) Petitioner's Identifying Information. At petitioner's request, the magistrate court shall immediately seal within the file the portion of the domestic violence civil case information statement and any other document containing the address or other identifying information for the petitioner such as the petitioner's phone number, facsimile number, or e-mail address. The petitioner's identifying information shall remain sealed in the court file unless the court in a final hearing orders the release of the information and makes a finding that the release of the petitioner's identifying information does not increase the risk of harm or the threat of harm to the petitioner or other protected individuals, provided, however, the court may provide access to the petitioner's identifying information to a law enforcement agency.

Rule 9. Answer; Counterclaim by Respondent Treated as a Petition for Protective Order.

(a) An answer which need not be verified, may be filed and served by the respondent prior to the family court hearing. If the answer is filed thereafter, it shall be filed with the circuit clerk pursuant to Rule 8(d) of these rules.

(b) A counterclaim shall be treated as a petition for protection and shall be filed by the respondent in magistrate court on the domestic violence petition form approved by the West Virginia Supreme Court and assigned a new magistrate and family court case number. Upon the showing of clear and convincing evidence of domestic violence, as defined in Chapter 48, Article 27, Section 202, magistrate court shall enter a protective order

provided however any permissive relief granted shall not contradict the relief previously granted in a protective order by magistrate court involving the same parties and prior to a final hearing before family court. The counterclaim for protection and subsequent protective order may be heard by the court at the designated time set for the original petition so long as proper service has been obtained upon the opposing party. The court shall issue a separate order for each case.

Rule 9a. Protective Orders Entered Pursuant to a Divorce Action.

A protective order entered pursuant to West Virginia Code § 48-5-509(b) and (c) or § 48-5-608(b) and (c) shall be issued on the domestic violence protective order form approved by the West Virginia Supreme Court. Separate protective orders shall be issued by the court for each party requesting protective relief. The protective order shall refer to the party requesting relief as the petitioner. The court shall immediately upon issuance of the protective order place the protective order on the national domestic violence registry and the statewide domestic violence database pursuant to Rule 21 of these rules.

Rule 9b. Automatic Extensions of Protective Orders.

A party filing a Chapter 48 action or reopening a Chapter 48 action shall notify the circuit clerk that the party has a protective order in effect issued by a court in this state. Upon verifying that a protective order is in effect involving the same parties to the Chapter 48 action, the circuit clerk shall issue a notice of automatic extension of protective order on the form approved by the West Virginia Supreme Court and shall file the notice in the case file of the domestic violence action and the Chapter 48 action. The circuit clerk shall immediately by hand-delivery or facsimile forward the notice of automatic extension of protective order to magistrate court for inclusion in the national domestic violence registry and the statewide domestic violence database pursuant to Rule 21 of these rules. Service of the notice of automatic extension of protective order shall be pursuant to Rule 11 of these rules.

Rule 9c. Family Court Order Upon Issuance of Automatic Extension.

The Family court shall enter a separate order extending or dismissing the protective order at the temporary and/or final hearing in the chapter 48 action when the automatic extension pursuant to Rule 9b is issued.

Rule 10. Notice of Family Court Final Hearing.

(a) Magistrate Court Shall Serve Notice of Family Court Final Hearing. At the conclusion of the hearing during which an emergency

protective order or a temporary emergency protective order has been granted, the magistrate court shall cause the parties to be served with notice of the family court final hearing. If personal service is unsuccessful, the circuit clerk shall cause service to be made in accordance with Rule 11(a).

(b) Scheduling Information. Domestic violence proceedings shall be given priority on the family court docket. The family court shall provide the magistrate court with dates and times during which family court final hearings may be scheduled in accordance with Rule 1(b) of these rules.

Rule 10a. Protective Orders and Child Custody.

When a protective order awards custody of minor children and said children are in the physical custody of the other party, the other party's family members, or other individuals, the magistrate, family or circuit court may, for the safety of the parties, order a law enforcement officer to accompany the party awarded custody to obtain the initial custody of the minor children.

Rule 10b. Protective Orders and Firearms.

(1) Magistrate Court. If the petition for protection provides information regarding firearms pursuant to Rule 8(c) of these rules, magistrate court, to protect the physical safety of the petitioner and other protected individuals, shall provide in the protective order that the respondent shall surrender any and all firearms and ammunition to the law enforcement officer serving the protective order or shall allow the respondent to transfer any and all firearms and ammunition to a qualified third party, provided, however, in a third party transfer, the law enforcement officer serving the protective order shall be required to determine if the third party is qualified to possess firearms and is not otherwise prohibited by law from possessing firearms prior to the respondent transferring any firearms or ammunition to a third party.

(2) Family Court. If the petition for protection or evidence obtained at the hearing provides information regarding firearms pursuant to Rule 8(c) of these rules, family court during the final hearing shall require the respondent to provide proof that he or she has surrendered or transferred any and all firearms and ammunition owned or possessed by the respondent. If the respondent is unable to provide the required proof of surrender or transfer of firearms and ammunition, the court, to protect the physical safety of the petitioner and other protected individuals, shall order the respondent to surrender any and all firearms and ammunition to a law enforcement agency or shall allow the respondent to transfer any and all firearms and ammunition to a qualified third party, provided, however, in a

third party transfer, the court shall require a law enforcement agency to determine if the third party is qualified to possess firearms and is not otherwise prohibited by law from possessing firearms prior to the respondent transferring any firearms or ammunition to a third party. The respondent shall be ordered to appear before the court at a date and time set by the court to show proof of compliance with the court's order of firearm surrender or transfer.

(3) Proof of Surrender and Notice to Third Party. The respondent shall provide written proof of the firearms surrendered on the form approved by the West Virginia Supreme Court of Appeals. Written proof shall include a description of all firearms surrendered and the name and address individual having possession of respondent's firearms. The court upon receiving written proof from the respondent shall notify the individual having possession of respondent's firearms of his or her legal duties under both federal and state laws.

(4) Return of Firearms. Upon the termination, dismissal or expiration of a protective order, the respondent shall petition the court, on the form approved by the West Virginia Supreme Court of Appeals, for the return of any and all firearms and ammunition surrendered or transferred pursuant to the order of the court. The court shall by separate order provide for the return of all firearms and ammunition surrendered to law enforcement or transferred to a third party by the respondent, provided, however, prior to the return of respondent's firearms and ammunition, the court shall be provided a criminal background check, completed by a law enforcement agency, to determine whether the respondent is qualified to possess firearms and is not otherwise prohibited by law from possessing firearms and ammunition.

Rule 11. Service.

(a) Service of the Petition and Emergency Protective Orders or Temporary Emergency Protective Order. If the respondent is present at the emergency hearing, the order and petition shall be served by the magistrate or magistrate designee upon the respondent at the conclusion of the hearing. If the respondent is not present at the hearing, the petition and emergency protective order or temporary emergency protective order shall be immediately served by law enforcement. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the court finds that personal service by law enforcement has been unsuccessful and continues the scheduled final hearing, the court shall instruct the circuit clerk in the order of continuance to serve the respondent by certified mail, restricted delivery, return receipt requested, to the last known address, which is the most current address, of the respondent. If return of service is not received by the clerk within thirty

(30) days or service by mail is unsuccessful, then the court shall continue the final hearing and instruct the circuit clerk to serve the respondent through publication in the last known, which is the most current, county of residence in accordance with W. Va. Code § 48-27-311. Provided however, in the discretion of the court, the respondent may be served by certified mail, restricted delivery, return receipt requested to the last known address, which is the most current address, of the respondent and publication simultaneously to expedite the proceeding.

(b) Service of Domestic Violence Protective Order. If a party is present at the family court hearing where a domestic violence protective order has been entered, the domestic violence protective order shall be served by the family court judge or the judge's designee upon the party at the conclusion of the final hearing. If a party is not present at the final hearing, then the domestic violence protective order shall be immediately served by law enforcement upon the party who was not present and in the discretion of the circuit clerk, the clerk may serve the respondent by first class mail to the last known address, which is the most current address, simultaneously to expedite service. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the clerk does not receive the return of service from law enforcement within five (5) days of the entry of the order by the court, then personal service of the domestic violence protective order upon a party has been unsuccessful. The party shall be served by the circuit clerk by first class mail, and in the last known, which is the most current, county of residence through publication in accordance with W. Va. Code § 48-27-311.

(c) Service of an Order Continuing an Emergency Protective Order, an Extension of a Protective Order, an Order of Contempt of a Protective Order, an Order of Modification of a Protective Order, a Petition for the Contempt of a Protective Order, or an Order to Show Cause. An order of contempt of a protective order or order of modification of a protective order shall be served by the family court judge or the judge's designee upon the party at the conclusion of the final hearing. If a party is not present at the final hearing, then the order shall be served by law enforcement as provided herein. An order continuing an emergency protective order, an order extending a protective order for an additional ninety days, and a petition for the contempt or an order to show cause shall be served immediately by law enforcement. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the court finds that personal service by law enforcement has been unsuccessful and continues the scheduled hearing, the court shall instruct the circuit clerk to serve the respondent by first class mail to the last known address, which is the most current address, and to serve the respondent through publication in accordance with W. Va. Code § 48-27-311. Provided however, in the discretion of the court, the respondent

may also be served by certified mail, restricted delivery, return receipt requested to the last known address, which is the most current address, of the respondent.

(d) Service of Order Terminating Protective Order or Denying a Protective Order. The order terminating or denying a protective order shall be served on the parties in person by the judge or the judge's designee or by first class mail by the circuit clerk if the parties are not present at the hearing.

(e) Service of Notice of Automatic Extension of Protective Order. A notice of automatic extension of a protective order shall be served in person by the circuit clerk or the clerk's designee. If a party cannot be served in person by the clerk, then the notice of automatic extension of protective order shall be served immediately by law enforcement and in the discretion of the circuit clerk, the clerk may serve the respondent by first class mail to the last known address, which is the most current address, of the respondent, simultaneously to expedite service. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the clerk has not received the return of service from law enforcement within five (5) days of issuance, the clerk shall serve the respondent by first class mail, and through publication in accordance with W. Va. Code § 48-27-311.

(f) Service of Other Documents. Every document other than as provided in this rule shall be served upon each party as follows: if a party is represented by an attorney, service shall be made upon the attorney pursuant to Rule 5(b) of the West Virginia Rules of Civil Procedure. Otherwise, service shall be made by mailing a copy by first class mail to the party's last known address, which is the most current address.

(g) Service by Respondent When Petitioner's Identifying Information Has Been Sealed in the File. When the petitioner's address and other identifying information have been sealed in the file pursuant to these rules, and the respondent needs to make service on the petitioner, the respondent shall file any pleadings with the circuit clerk and direct the circuit clerk to make service upon the petitioner. Service shall be made by the circuit clerk if the petitioner's identifying information is sealed in the case file. No court employee shall reveal to anyone other than a court official or law enforcement officer the petitioner's address or other identifying information.

(h) Service allowing direct contact between the parties is strictly prohibited.

(i) Service by law enforcement may properly be accomplished by a process server employed by a sheriff's office, or by a process server employed by a law enforcement agency, both of whom shall provide returns on forms to be provided by the Supreme Court of Appeals and filed with the clerk's office within five (5) days of service.

(j) Out-of-state service is permissible in accordance with Rule 4 of the Rules of Civil Procedure. Provided however, the issuing court shall attempt to obtain personal service on the respondent by contacting the out-of-state law enforcement agency located in the last known, which is the most current, county of residence of the respondent and shall provide the petition and order issued by the court to said out-of-state law enforcement agency for service. If the court finds that personal service by law enforcement has been unsuccessful and continues the scheduled final hearing, the court shall instruct the circuit clerk to serve the respondent by first class mail to the last known address, which is the most current address, of the respondent and by publication in the last known, which is the most current, county of residence in accordance with W. Va. Code § 48-27-311. Provided however, in the discretion of the court, the respondent may also be served by certified mail, restricted delivery, return receipt requested, to the last known address, which is the most current address, of the respondent.

Rule 11a. Order of Publication.

The order of publication shall contain the following information: the name and last known address of the respondent; the magistrate court case number and civil action number; the county where the domestic violence action has been filed; any scheduled hearing date; and where the respondent can obtain a copy of the petition and order. The order of publication shall not contain the petitioner's name or any other identifying information of the petitioner.

Rule 12. Filing and Service by Facsimile Transmission.

Pleadings and other documents, including requests for hearings, may be filed with the circuit clerk and served upon law enforcement authorities by facsimile transmission in accordance with Rules 12.03, 12.04 and 12.05 of the Trial Court Rules for Trial Courts of Record.

Rule 13. Judicial Economy and Consolidation.

(a) Transfer by Magistrate to Family Court Judge Before Whom the Parties Have a Case Pending. If the petitioner indicates that the parties to the protective order proceeding are also parties in a case pending

before a family court judge in the same county, then the magistrate shall notice the final hearing before that family court judge.

(b) Transfer by Family Court Judge to Another Family Court Judge Before Whom the Parties Have a Family Court Case Pending. If a family court judge learns that the parties to a protective order proceeding have a family court case pending before another family court judge, then the family court judge before whom the domestic violence proceeding is pending shall transfer the case to the family court judge before whom the family court case is pending, if venue is proper.

(c) Consolidation. If a family court judge learns that the parties to a protective order proceeding have a second protective order proceeding pending before another family court judge, then the family court in which the first such action was commenced shall order both protective order proceedings transferred before it or any other family court in which another protective order proceeding is pending, if venue is proper. The court to which the actions are transferred may order a joint hearing of the matters in issue, and may make such other orders as may tend to avoid unnecessary cost or delay, provided, however, the court shall enter a separate order for each action.

(d) Transfer From County to County. When a domestic violence case is transferred between counties, the domestic violence case shall be closed in family court from the originating county and assigned a new family court case number in the county receiving the case. Upon holding the final hearing, the family court shall fax the order to the magistrate clerk's office of the originating county and the clerk shall immediately place the family court order on the national domestic violence registry and the statewide domestic violence database, provided, however, the original case file shall remain in the county where the final hearing is held.

Rule 14. Continuances.

(a) Filing of Motion for Continuance. A movant may file a motion for continuance with the circuit clerk, or with the court, at the convenience of the court.

(b) Requirements for a Continuance. A continuance may be granted upon a showing of good cause.

(c) Notice Requirements. A motion for continuance may be heard after such reasonable notice to the opposing party as required by the court.

(d) Continuance of a Final Hearing. A final hearing may be continued on motion of the respondent at the convenience of the court. A final hearing

continued for failure to obtain personal service by law enforcement shall be rescheduled no more than thirty (30) days form the scheduled hearing date, if the court orders the circuit clerk to attempt service by certified mail return receipt requested and or publication. Otherwise, a continuance of a final hearing by the court shall be rescheduled no more than seven days from the scheduled hearing date. If a hearing is continued, the court may modify the emergency protective order as it deems necessary.

(e) Continuance of Final Hearing When Personal Service Unsuccessful. If a hearing is continued by the court for lack of personal service by law enforcement and the court finds that a second attempt of personal service by law enforcement will not be successful, the court shall instruct the circuit clerk to serve the pleading and order by certified mail, restricted delivery, return receipt requested, to the last known address of respondent and may in the court's discretion require the circuit clerk to serve the respondent by publication in accordance with W. Va. Code § 48-27-311 simultaneously.

Rule 15. Amended Pleadings.

Upon request by any party and at any stage of the proceedings, a pleading may be amended for good cause shown upon such terms as the court may require.

Rule 16. Transfer of Case File from Magistrate to Circuit Court When Emergency Protective Order Granted.

(a) Transfer to the Circuit Clerk. Following the emergency hearing, the magistrate clerk shall cause the court file to be delivered to the circuit clerk immediately.

(b) Facsimile Machine. The circuit clerk and all family court staff shall leave the facsimile machine on 24-hours-a-day every day.

Rule 16a. Child Abuse and Neglect.

At any stage of domestic violence proceedings, if a family court judge has reasonable cause to suspect any minor child involved in the proceedings has been abused or neglected, in addition to mandatory reporting duties the judge shall follow the written referral procedures set forth in Rule 48(b) of the Rules of Practice and Procedure for Family Court and Rule 25a herein.

Rule 17. Termination of Emergency Protective Order.

An emergency protective order is terminated by the entry of a domestic violence protective order or an order denying a domestic violence protective order.

Rule 18. Appeal of Denial of Emergency Order.

(a) Time Periods. A person whose petition was denied by the magistrate court may, as a matter of right, present a petition for appeal to the family court by filing a petition for appeal in the magistrate court clerk's office within five (5) days of entry of the order denying the petition in the magistrate court, which petition shall be transferred to the family court immediately. The petition for appeal shall be heard by the family court within ten (10) days from the date of filing of the petition. No bond shall be required to appeal.

(b) Hearing. At the family court hearing on the petition for appeal, the family court judge shall enter an order either affirming the magistrate's denial of an emergency protective order, or granting an emergency protective order. If an emergency protective order is granted, the family court judge shall enter the emergency protective order and set the matter for final hearing within ten (10) days of the date of entry of the emergency protective order and serve the order in accordance with Rule 11 herein.

Rule 19. Appeal of family court order.

(a) Time Periods. Within ten (10) days following the entry of a family court order granting or refusing a domestic violence protective order, any party may appeal the order of the family court by filing a petition for appeal in the circuit clerk's office. The circuit court shall hear the petition for appeal within ten (10) days after the petition is filed. No bond shall be required for a petition for appeal.

(b) Order in Effect Pending Appeal. The family court order shall remain in effect pending an appeal unless stayed by the circuit court.

(c) Appeal Hearing. The petition for appeal is on the record established in family court. The circuit court shall enter an order immediately upon the conclusion of the hearing on a form approved by the West Virginia Supreme Court.

Rule 20. Disqualification of Family Court Judge.

Rule 17 of the West Virginia Trial Court Rules for Trial Courts of Record shall govern the disqualification of family court judges. Disqualification

appointments in domestic violence civil proceedings may be handled on an emergency basis.

Rule 21. Domestic Violence National Registry and the West Virginia Domestic Violence Database.

(a) Domestic Violence National Registry. The magistrate court shall cause any domestic violence-related order entered by magistrate court to be entered in the domestic violence national registry forthwith. Immediately upon the entry of any domestic violence-related order by the family or circuit court, the court shall provide the original order to the circuit clerk. The court and/or circuit clerk shall immediately provide a copy of the order by hand-delivery or facsimile to the magistrate clerk. The magistrate clerk and/or the magistrate assistant shall immediately, upon receipt of the order by family or circuit court, cause the order to be entered in the domestic violence national registry.

(b) The West Virginia Domestic Violence Database. The magistrate, family or circuit court shall immediately enter all domestic violence-related orders on the West Virginia domestic violence database.

Rule 22. Domestic Violence Support Orders.

(a) When a Case Is Dismissed in Which an Order of Support Has Been Entered. When a domestic violence protection order is dismissed in which an order of child and/or spousal support has been entered, an order shall be entered by the next judicial day stating the date that the support obligation shall end.

(b) Documentation to Local Child Support Enforcement Office. Any family or circuit court domestic violence-related order or order of extension imposing, modifying, or terminating child and/or spousal support shall be delivered, along with a copy of the completed IV-D application, by hand or by facsimile to the local child support enforcement office by the next judicial day following the hearing at which the order was made. The order shall state the date that the support obligation shall begin or end.

Rule 23. Testimony of Children.

Rules 8 and 9 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings shall govern the taking of testimony of children.

Rule 23a. Children and Incapacitated Family or Household Members as Parties.

(a) Individuals Filing on Behalf of a Person in Need of Protection. If an adult family or household member is filing on behalf of a child or physically or mentally incapacitated family or household member and not requesting protection for himself or herself, then the petitioner shall be the child or physically or mentally incapacitated family or household member in need of protection. The adult family or household member shall be recognized on the petition as the parent/guardian or next friend. The adult family or household member shall attend any hearing scheduled to protect the interest of the child or physically or mentally incapacitated family or household member.

(b) Child as a Petitioner. An individual under 18 years of age may file a domestic violence petition on his or her own behalf without a parent/guardian or next friend. If a child files a petition without a parent/guardian or next friend, the magistrate shall immediately appoint a guardian *ad litem* to protect the interest of the child: and this appointment shall be made even if an emergency protective order is denied since that denial may be appealed. The magistrate may also appoint a guardian *ad litem* in cases in which a child files a petition with a parent/guardian or next friend.

> **(1)** *Magistrate Court Proceeding.* If the child is the petitioner, and the respondent is a parent or household member, making it unsafe for the child to return to his or her residence, the magistrate shall immediately appoint a guardian *ad litem* for the child. If the magistrate has reasonable cause to suspect that the child is abused or neglected or observes the child being subjected to conditions that are likely to result in abuse or neglect, the magistrate shall immediately make a child abuse and neglect referral to Child Protective Services of the Department of Health and Human Resources. Further, if the magistrate is unable to locate a responsible and appropriate family member or adult into whose custody the child can be delivered, the magistrate shall notify Child Protective Services of the Department of Health and Human Resources, which shall immediately respond to assist the magistrate in identifying a responsible and appropriate family member or adult into whose custody the child can be delivered and, if determined by the Department to be necessary, take emergency custody and/or file a petition in accordance with West Virginia Code § 49-6-3.[1]

[1] In 2015, the Legislature recodified Chapter 49 of the West Virginia Code. Now, § 49-6-3 that is cross-referenced in Rule 23a(b)(1) above has been recodified as § 49-4-602.

(2) *Family Court Hearing.* The family court at the final hearing shall ensure that the child or incapacitated adult has a parent/guardian, next friend, and/or guardian *ad litem* representing his or her interests prior to conducting an evidentiary hearing. If the child or incapacitated adult is not properly represented, the family court shall continue the hearing, provide for the safety of the child or incapacitated adult and appoint a guardian *ad litem* to represent the child or incapacitated adult. If the family court finds that the child cannot return to his or her residence because there exists imminent danger to the physical well-being of the child, as defined in W. Va. Code § 49-1-3(g),[2] and no responsible and appropriate family member or adult can be found into whose custody the child can be delivered, the court shall immediately notify Child Protective Services of the Department of Health and Human Resources. Upon notification, Child Protective Services shall immediately respond and assist the family court in locating a responsible and appropriate family member or adult into whose custody the child can be delivered and, if determined by the Department to be necessary, take emergency custody and/or file a petition in accordance with West Virginia Code 49-6-3.[3]

(c) Child as a Respondent. An individual under 18 years of age may be made a respondent in a domestic violence proceeding. The magistrate shall immediately appoint a guardian *ad litem* to protect the interests of the child.

(1) *Magistrate Court Proceeding.* If the magistrate grants an emergency protective order against a child, and the petitioner is a parent or other household member residing with the child, then, pursuant to W. Va. Code § 48-27-403(h), the petition resulting in the emergency protective order shall also be treated as a juvenile delinquency petition under W. Va. Code § 49-5-7.[4] The magistrate shall follow the procedures detailed in Rule 15 of the Rules of the Juvenile Procedure.

(2) *Family Court Hearing.* If a child is the respondent, the petitioner is a parent or other household member residing with the child, and an emergency protective order was issued by the magistrate court, the family court entering a domestic violence protective order shall refer the issues of custody, visitation, and support to the circuit court hearing the related delinquency case. The family court retains jurisdiction to issue a domestic violence protective order to protect the safety of the parent or other household member. If the family

[2] § 49-1-3(g) has been recodified to § 49-1-201.
[3] See footnote on previous page regarding § 49-6-3.
[4] § 49-5-7 has been recodified to § 49-4-704.

court issuing a protective order determines during the final hearing that the issue of the child's temporary custody or placement is yet to be addressed by the circuit court in the delinquency case, that the temporary custodial arrangements with a responsible relative or other adult made at the time the emergency protective order was issued are no longer available or appropriate, that no other responsible and appropriate relative or adult can be found into whose custody the child can be delivered, and the circumstances present an imminent danger to the physical well-being of the child, as defended in W. Va. Code § 49-1-3(g),[5] or to others if released, the court shall take one or both of the following measures based upon the circumstances presented: 1) Notify the Youth Services Division of the Department of Health and Human Resources, which shall immediately respond to assist in locating a responsible and appropriate relative or other adult into whose custody the child can be delivered; and 2) Notify the sheriff or other law-enforcement official and direct that the child be taken into custody and presented without unnecessary delay before a magistrate or circuit judge for a detention hearing pursuant to W. Va. Code § 49-5-8a.[6]

Rule 24. Domestic Violence Civil Contempt Bond.

(a) Petition for Contempt. The court, upon review of the petition for civil contempt, may issue an order to show cause without holding a hearing, as provided in W. Va. Code § 48-27-901, if the petition is sufficient on its face and no further testimony of the party filing the petition is needed. The order to show cause shall be issued immediately upon the conclusion of the hearing or within five (5) judicial days of filing the petition, provided, however, the failure of the court to issue the order within the time provided shall not divest the court of jurisdiction of the contempt proceeding or void the contempt related orders of the court.

(b) Hearing on Order to Show Cause. The order to show cause shall provide for the hearing date not to exceed ten (10) judicial days from the date the order to show cause is issued. Upon the finding of contempt, the court may require the offending party to post a cash performance bond to ensure future compliance with the court's order. If payment of the bond is not made within ten (10) days of entry of the contempt order and proof of payment is not provided to the court by the contemnor, the court shall order the offending party to appear before the court and may take such action as the court deems necessary to enforce the order of the court. Failure of the court to hold the hearing within the time period provided shall not divest the court of jurisdiction of the contempt proceeding or void the contempt-related orders of the court.

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[5] See footnote on previous page regarding § 49-1-3(g).
[6] §49-5-8a has been recodified to § 49-4-706.

(c) Forfeiture of a Bond. Bond posted pursuant to these rules may be forfeited upon the court's finding that a party has failed to comply with a contempt order. In that case, the court shall render a judgment of default and order forfeiture of the bond amount. Upon collection, the circuit clerk shall deposit the proceeds with the state auditor, unless the Court orders that the amount forfeited shall be paid to the party not held in contempt. If payment of a bond is not made within 20 days of entry of the forfeiture order, the clerk shall undertake execution against the obligor(s) for recovery of the judgment amount.

Rule 24a. Compliance Hearings.

The family court may, in the court's discretion without a contempt action by a party, schedule as needed compliance hearings to monitor and enforce the protective order entered by the court. During the compliance hearings, the court may take such action as necessary to enforce the court's order. The court may require one or both parties to appear at the compliance hearings to provide evidence and testimony regarding compliance with the court's protective order.

Rule 25. Concurrent Jurisdiction.

The circuit courts may assist family court judges in the disposition of their case loads when and where the family courts and circuit courts deem appropriate by utilizing the provisions of: (a) W. Va. Code § 48-27-301 to conduct protective order proceedings; (b) W. Va. Code § 51-2A-2(b) to conduct actions for divorce, annulment or separate maintenance which do not require the establishment of a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child and do not require an award or any payment of child support and, at the time of the filing of the action, the parties also file a written property settlement agreement executed by both parties; or (c) W. Va. Code § 48-8-102 to conduct actions for spousal support only.

Rule 25a. Child Protection Investigations.

(a) Administrative Order Regarding Investigation. Upon receiving a written referral of possible child abuse and neglect from a family court pursuant to Rule 48(b) of the Rules of Practice and Procedure for Family Courts, a circuit court shall forthwith cause to be entered and served an administrative order in the name of and regarding the affected child or children directing the department of health and human resources to submit to the court an investigation report or appear before the court in not more than forty-five (45) days, at a scheduled hearing, to show cause why the department's investigation report has not been submitted to the circuit court and referring family court. If a circuit court, based upon a review of

the written referral from family court, determines that the allegations or other information present reason to believe a child may be in imminent danger, the circuit court may shorten the time for the department to act upon the referral and appear before the circuit court. The scheduled hearing may be mooted by the department's earlier submission of the investigation report or, in the alternative, the filing of an abuse and neglect petition under Chapter 49 of the West Virginia Code relating to the matters which were the subject of the family court referral and circuit court administrative order. The duties of the department under this rule shall be in addition to the department's obligations pursuant to W. Va. Code § 49-6A-2a[7] regarding notification of disposition to persons mandated to report suspected child abuse and neglect.

(b) *Mandamus* Relief. Following review of an investigation report in which the department concludes that a child abuse and neglect petition is unnecessary, if the circuit court believes that the information in the family court's written referral and the department's investigation report, considered together, suggest circumstances upon which the department would have a duty to file a such a petition, the court shall treat the written referral as a petition for a writ of mandamus in the name of and regarding the affected child or children. A show-cause order shall issue by the court setting a prompt hearing to determine whether the respondent department has a duty to file a child abuse and neglect petition under the particular circumstances set forth in the written referral and investigation report. If it is determined by the court that the department has a nondiscretionary duty pursuant to W. Va. Code § 49-6-5b[8] to file a petition seeking to terminate parental rights, the department shall be directed by writ to file a child abuse and neglect petition within a time period set by the court. If it is determined that the circumstances bring the filing decision within the department's discretionary authority, no such writ shall issue unless the court specifically finds aggravated circumstances, consistent with the meaning and usage of that term in W. Va. Code § 49-6-3(d)(1),[9] and that the department acted arbitrarily and capriciously in the exercise of its discretion.

(c) Service and Notice. Orders issued pursuant to this rule shall be served on the department by mail or facsimile transmission directed to the department's local child protective services office. Copies of such orders shall also be delivered to the prosecuting attorney.

(d) Confidentiality. All orders and other documents pertaining to matters arising under this rule, and docket entries regarding the same, shall be treated as confidential records concerning a child consistent with W. Va.

[7] § 49-6A-2a has been recodified to § 49-2-804.
[8] § 49-6-5b has been recodified to § 49-4-605.
[9] See previous footnote on § 49-6-3.

Code § 49-7-1[10]; and any hearings conducted pursuant to this rule may be attended by those persons provided notice under subsection (c) above, but shall be closed to the general public except that persons whom the circuit court determines have a legitimate interest in the proceedings may attend. If the case in family court that gave rise to the referral to the department was a domestic violence proceeding, staff from any involved licensed family protection program is entitled access to circuit court proceedings under this rule to the same extent such access is afforded under statutes and rules pertaining to domestic violence proceedings.

(e) Abuse and Neglect Co-Petitions for Child Protection. The petitioner for the protective order may appear as a co-petitioner on the child abuse and neglect petition filed by the department pursuant to W. Va. Code § 49-6-1, *et seq.*[11], if both so agree. Nothing herein shall be construed as either a requirement that the petitioner for the protective order be a co-petitioner under W. Va. Code § 49-6-1, *et seq.*, or a prohibition against the filing of a petition pursuant to W. Va. Code § 49-6-1, *et seq*. by the petitioner for the protective order should the department show cause why it will not file such a petition.

(f) Transfer of Administrative Proceedings. Within ten (10) days following service of an administrative order issued by a circuit court pursuant to subdivision (a), the department may file a motion with the issuing court seeking transfer of the administrative proceedings to the circuit court of another county based upon reasons relating to a more appropriate venue for the administrative proceedings and any abuse and neglect case which may result from such proceedings. Unless the court finds the basis for the motion to be clearly unreasonable under the particular circumstances presented, the administrative proceedings shall be transferred as requested. If the administrative proceedings are transferred, the department's obligations pursuant to W. Va. Code § 49-6A-2a[12] and Rule 48(c) of the Rules of Practice and Procedure for Family Court regarding the investigation and providing a copy of any investigative report remain applicable to the referring family court. The circuit clerk shall send certified copies of the order granting or denying the transfer motion to the referring family court and the prosecuting attorney. If the order grants the motion, certified copies shall also be sent to the circuit court and prosecuting attorney in the county where the administrative proceeding is transferred.

[10] § 49-7-1 has been recodified to § 49-5-101.
[11] § 49-6-1, et seq. has been recodified to § 49-6-601, et seq.
[12] See previous footnote on § 49-6A-2a.

Rule 26. Appointments of Guardians *ad Litem*.

Rule 21 of the West Virginia Trial Court Rules for Trial Courts of Record shall govern the appointment of guardians *ad litem* in domestic violence civil proceedings.

Rule 27. Telephonic and Videoconference Hearings.

Rule 18 of the Rules of Practice and Procedure for Family Court shall govern the telephonic and videoconference hearings in domestic violence civil proceedings.

Rule 28. Time Computation.

Rule 6 of the Rules of Civil Procedure shall govern the computation of any period of time. The computation of the time period of a protective order issued by family or circuit court shall begin on the day immediately following the issuance of the order by family or circuit court. The last day of the order shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

B. Other Rules

1. Rules of Practice and Procedure for Family Court

Rule 6. Court Files; Confidentiality; Access; Proceedings.

(a) General Provisions. All orders are public records. All pleadings, recordings, exhibits, transcripts, or other documents contained in a court file are confidential, and shall not be available for public inspection; but unless the file is sealed pursuant to this rule or access is otherwise prohibited by order, any document in the file shall be available for inspection and copying by the parties, attorneys of record, guardians ad litem, designees authorized by a party in writing, and any person with standing to modify or enforce a support order. A family court judge or circuit judge may open and inspect the entire contents of the court file in any case pending before the judge's court. When sensitive information has been disclosed in a hearing, pleading, or document filing, the court may order such information sealed in the court file. Sealed court files shall be opened only by order.

(b) Family Court Proceedings Are Not Open to the Public.

(c) Orders Permitting Examination or Copying of File Contents. Upon written motion, for good cause shown, the court may enter an order

permitting a person who is not permitted access to a court file under section (a) of this rule to examine and/or copy documents in a file. Such orders shall set forth specific findings which demonstrate why the interests of justice necessitate the examination and/or copying, and shall specify the particular documents to be examined and/or copied and the arrangements under which such examination and/or copying shall take place.

(d) Obtaining Confidential Records. Unless the person who is the subject of confidential records waives confidentiality in writing, such records may not be obtained by subpoena; but only by court order and upon full compliance with statutory and case law requirements. Such records include, but are not limited to: confidential medical and educational records; and confidential records of the West Virginia Department of Health and Human Resources; the Office of Social Services; the Office of Economic Services; the child support enforcement agency; West Virginia juvenile court proceedings; mental health treatment and counseling; substance abuse treatment; and domestic violence shelters.

Rule 8. Unofficial Recording of Proceedings.

Unless prior permission is granted by the family court, no person shall be permitted to make photographs, video recordings, sound recordings, or any other form of recording of proceedings, or any sound, video, or other form of transmission or broadcast of proceedings; and unless prior permission is granted by the court, such activities are not permitted in areas immediately adjacent to the courtroom. With prior approval of the court, photographs, video recordings, sound recordings, other forms of recordings, and sound, video, or other forms of transmissions or broadcasts may be made of ceremonial proceedings in the courtroom.

Rule 18. Telephonic and Videoconference Hearings.

The court may conduct any hearing, including an evidentiary hearing, telephonically or by videoconference, and may permit any witness to testify or be deposed by such methods. In telephonically conducted proceedings the official record shall be made in the manner prescribed by the court. Videoconference proceedings shall be conducted in accordance with the requirements established by the supreme court of appeals.

Rule 47. Attorneys and Guardians ad Litem for Children.

(a) Appointment of Guardian Ad Litem. Courts shall not routinely assign guardians ad litem for children in a domestic relations case. Where, however, the court is presented with substantial allegations of domestic

abuse, serious allegations of abuse and neglect, serious issues relating to the child's health and safety, or allegations involving disproving a child's paternity, a guardian ad litem shall be appointed by the court for the children.

(b) Order of Appointment of Guardian Ad Litem. The order appointing a guardian ad litem shall specify the terms of the appointment, including the guardian's role, duties and scope of authority, the issues to be investigated, as well as the specific reasons for the appointment and the expectations of the court for the guardian ad litem's report, including the date by which the written report is due. The order appointing a guardian ad litem shall also require the parties to fully cooperate with the guardian ad litem in terms of the investigation.

(c) Guardians Ad Litem. A guardian ad litem shall be an attorney licensed to practice law. A court-appointed guardian ad litem's services are provided to the court on behalf of the child. The guardian ad litem shall follow the Guidelines for Guardians Ad Litem in Family Court set forth in Appendix B of these rules and if the Guidelines conflict with other rules or statutes, the Guidelines shall apply. The guardian ad litem acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The guardian ad litem submits a written report to the court and is available to testify.

(d) Investigations by Guardians Ad Litem. West Virginia Code § 48-9-301, § 48-9-302, and the Guidelines for Guardians Ad Litem in Family Court set forth in Appendix B of these rules shall govern investigations by guardians ad litem. If the Guidelines for Guardians Ad Litem in Family Court conflict with other rules or statutes, the Guidelines shall apply.

(e) Timing of Written Report. A guardian ad litem shall submit a written report to the court and a copy to all parties on the date specified by the court not to exceed sixty (60) days from the date of entry of the order appointing the guardian ad litem. Upon proper petition of the guardian ad litem, the court, in its discretion, may seal the report or redact information that may place a child or other individual in danger.

(f) Payment of Guardians ad Litem Fees. The fees for a guardian ad litem appointed in a domestic relations case may be paid by a non-indigent party or, when applicable, in accordance with Trial Court Rule 21.

(g) Training of Guardians Ad Litem. On or after January 1, 2013, the court shall only appoint guardians ad litem who have completed the required training provided by the West Virginia Supreme Court.

APPENDIX B. Guidelines for Guardians Ad Litem in Family Court

1. A guardian *ad litem* appointment is a unique and complex assignment and, as such, requires education, training and experience with the regard to the needs of children. Every guardian *ad litem* shall complete eight (8) hours of continuing legal education credits every two years provided by the West Virginia Supreme Court comprising of: understanding the stages of child development from early childhood through adolescence; recognizing the signs and symptoms of abuse and neglect and their effects upon children; recognizing the signs and characteristics of domestic violence and their effects upon children; recognizing the signs and symptoms of drug and/or alcohol abuse and addiction in both children and adults; recognizing the emotional effects of parental conflict on children; preparing of parenting plans that adequately safeguard the child's opportunity to have a relationship with both parents unless otherwise contraindicated by the facts; interviewing techniques for both children and adults; analyzing facts and making meaningful recommendations to ensure child safety; and preparing written guardian ad litem reports and recommendations.

2. The guardian *ad litem* (GAL) shall accept an appointment only if he or she has a thorough understanding of the issues involved and the functions to be performed. If the GAL finds the appointment order to be unclear, the GAL should request clarification and/or modification of the order.

3. The GAL shall obtain and review the court file, as well as all relevant copies of school, medical, Child Protective Services, or other records necessary to thoroughly understand and investigate the case.

4. The GAL shall immediately make contact with the child and parents/caretakers upon appointment by the court.

5. The GAL shall schedule a face-to-face meeting with the child at a time and place that allows for observation and private consultation with the GAL unless the court specifically determines that such a meeting would be inappropriate given the age, medical and/or psychological condition of the child.

6. The GAL shall thoroughly explain to a child capable of understanding, parents/caretakers and the attorneys of record the general role of the GAL, the specific reasons for the GAL's appointment and the expectations of the court.

7. The GAL shall meet with both parents (if applicable) and/or caretakers to ascertain each party's concerns, needs, and responsibilities with regard to parenting the child. During the meeting with the parents and/or

caregivers, the GAL shall ascertain each party's understanding of the needs and concerns of the child.

8. When appropriate, the GAL shall conduct home visits of the child's parents/caretakers to observe their respective living environments and the interaction of the parents/caretakers with the child.

9. When appropriate, the GAL shall interview the child's caseworkers, therapists, school personnel and/or medical providers to obtain information about the child's needs and any concerns they have regarding the child. During such interview, the GAL should inquire about the roles and responsibilities each parent has in the child's life and each parent's relationship with the child.

10. When appropriate, the GAL shall interview relatives, neighbors and/or other individuals with relevant knowledge of the child or parents and the facts that gave rise to the allegations underlying the appointment of the GAL.

11. If the GAL believes that the parties and/or the child should undergo further evaluations, then the GAL shall file a motion with the court requesting same. Said motion shall clearly set forth the reasons why such evaluations are deemed necessary by the GAL.

12. The GAL shall complete his or her investigation with sufficient time between the interviews and court appearances for the GAL to thoroughly analyze the information gleaned, take appropriate actions and formulate meaningful arguments and written recommendations to the court.

13. The GAL shall disclose to the court the child's wishes unless the GAL believes such disclosure would jeopardize the child's safety. If the child's wishes are contrary to the GAL's assessment of the child's best interests, the GAL may request that an attorney be appointed to serve as counsel for the child. The court may appoint an attorney to represent the child if the court finds that a conflict of interest has arisen between the GAL and the child.

14. The GAL shall include in his or her written report to the court the following: the dates on which face-to-face contacts with the child occurred and any observations of the child with the parents or caretakers; an outline of all records and documents reviewed; a summary of all relevant portions of any records and documents reviewed; the name of each person interviewed and the manner in which they were interviewed (i.e. whether by telephone or in person); provided, however, the GAL may petition the court to seal or redact information as provided in Rule 47 of the Rules of Practice and Procedure for Family Court. The GAL shall also fully explain

any special needs, medical and/or psychological conditions of the child and the ability and willingness of each parent to provide for the needs of the child. The GAL may attach any necessary documents to the written recommendation. Medical and/or mental health records of the parents/caretakers relevant to the written report of the GAL shall be sealed in the court record and shall not be attached to the written report.

15. The GAL shall provide the court with sufficient information including specific recommendations for court action based on the findings of the interviews and independent investigation. In cases involving parenting responsibilities, the recommendations shall provide clear and concise requirements of both parents to accomplish the recommendations of the GAL. The GAL shall review all relevant statutory provisions regarding allocation of custodial responsibility and shall support the proposed allocation of custodial responsibility recommended to the court.

16. The GAL shall be prepared to explain and advocate his or her assessments and recommendations in all proceedings before the court.

17. The GAL shall be present at all court hearings and respond to all motions and appeals which affect the recommendations of the GAL or interests of the child during the pendency of the case. The GAL shall review all parenting agreements between the parents/caretakers and shall advise the court if he or she has any concerns regarding the agreement.

18. If appropriate, the court may require the GAL to monitor the case for a reasonable period set by the court to ensure the parties are complying with the court's order. The GAL shall provide a brief, written progress report consisting of whether the parties are following the order of the court; whether the recommendations made by the GAL are providing for the needs of the child; and any concerns the GAL may have regarding the child.

2. Rules of Procedure for Child Abuse and Neglect Proceedings

Rule 8. Testimony of Children; Inclusion of Children in Hearings and Multidisciplinary Treatment Team Meetings.

(a) Restrictions on the Testimony of Children. Notwithstanding any limitation on the ability to testify imposed by this rule, all children remain competent to testify in any proceeding before the court as determined by the Rules of Evidence and the Rules of Civil Procedure. However, there shall be a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and the court shall exclude this testimony if the potential psychological harm to the child

outweighs the necessity of the child's testimony. Further, the court may exclude the child's testimony if (A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than the other forms of evidence presented; and (C) the general purposes of these rules and the interest of justice will best be served by the exclusion of the child's testimony.

(b) Procedure for Taking Testimony From Children. The court may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the court determines that the presence of attorneys will be especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the court shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes. Under exceptional circumstances, the court may elect not to make the recording available to the attorneys but must place the basis for a finding of exceptional circumstances on the record. Under these exceptional circumstances, the recording only will be available for review by the Supreme Court of Appeals. When attorneys are present for an in camera interview of a child, the court may, before the interview, require the attorneys to submit questions for the court to ask the child witness rather than allow the attorneys to question the child directly, and the court may require the attorney to sit in an unobtrusive manner during the in camera interview. Whether or not the parties' attorneys are permitted to attend the in camera interview, they may submit interview questions and/or topics for consideration by the court.

(c) Sealing of Child's Testimony. If an interview was recorded and disclosed to the attorneys, the record of the child's testimony thereafter shall be sealed and shall not be opened unless:

(1) Ordered by the court for good cause shown; or
(2) For purposes of appeal.

(d) A child subject to a case may attend all or portions of hearings, unless the court deems such attendance inappropriate, and may attend all or portions of multidisciplinary treatment team meetings, unless the multidisciplinary treatment team deems such participation inappropriate. Consideration shall be given to the child's preferences and developmental maturity.

Rule 9. Use of Closed Circuit Television Testimony.

(a) In any case governed by these rules in which a child eleven (11) years old or less is to be a witness, the court, upon order of its own or upon motion of a party, may permit the child witness to testify through live, one-way, closed-circuit television whereby there shall be no transmission into the room from which the child witness is testifying.

(b) In any case in which a child over the age of eleven (11) years is to be a witness, the court, upon order of its own or upon motion of a party, and upon a finding of good cause, shall permit the child witness to testify through live, one-way, closed-circuit television whereby there shall be no transmission into the room from which the child witness is testifying.

(c) The testimony of the child witness shall be taken in any room, separate and apart from the courtroom, from which testimony of the child witness can be transmitted to the courtroom by means of live, one-way, closed-circuit television. The testimony shall be deemed as given in open court.

(d) The judge, the attorneys for the parties, and any other person the court permits for the purpose of providing support for the child in order to promote the ability of the child to testify shall be present in the testimonial room at all times during the testimony of the child witness. The judge may permit liberal consultation between counsel and the parties by adjournment, electronic means, or otherwise.

(e) The image and voice of the child witness, as well as the image of all other persons present in the testimony room, other than the operator, shall be transmitted live by means of live, one-way, closed-circuit television in the courtroom. The courtroom shall be equipped with monitors sufficient to permit the parties to observe the demeanor of the child witness during his or her testimony.

(f) The operator shall place herself or himself and the closed-circuit television equipment in a position that permits the entire testimony of the child witness to be transmitted to the courtroom.

(g) The child witness shall testify under oath, and the examination and cross-examination of the child witness shall, in all other respects, be conducted in the same manner as if the child witness testified in the courtroom.

(h) When the testimony of the child witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the testimony in the same manner as if the child witness testified in the courtroom.

(i) Under all circumstances, the image of the child witness transmitted shall include the entirety of his or her person ordinarily subject to observation by the human eye, subject to such limitations as may be unavoidable by reason of standard courtroom furnishings.

(j) Should it be required, for the purposes of identification that the person to be identified and the child witness be present in the courtroom at the same time, the court shall ensure that this meeting takes place after the child witness has completed his or her testimony; and this confrontation shall, to the extent possible, be accomplished in a manner that is nonthreatening to the child witness.

3. Rules of Juvenile Procedure

Rule 15. Domestic Violence Emergency Protective Orders as Juvenile Petitions.

(a) Emergency Protective Orders Treated as Juvenile Petitions. A domestic violence petition filed pursuant to West Virginia Code § 48-27-403 by or on behalf of the juvenile's parent, legal guardian or other person with whom the juvenile resides that results in the issuance of an emergency protective order naming the juvenile as the respondent shall be treated as a petition arising under W.Va. Code § 49-4-701, *et seq*., alleging the juvenile is a juvenile delinquent. The magistrate court shall notify the prosecuting attorney within 24 hours of the issuance of the emergency protective order, and the prosecuting attorney may file an amended verified petition within two judicial days, if desired. The appointment of a guardian ad litem and the family court hearing shall proceed; and any domestic violence order issued by the family court shall remain in effect until the juvenile petition is addressed by order in the circuit court or the protective order expires under its own terms.

(b) Notice to Department. If a law-enforcement official takes into custody a juvenile named as a respondent in an emergency protective order issued pursuant to West Virginia Code § 48-27-403 wherein the individual filing the domestic violence petition is the juvenile's parent or legal guardian or other person with whom the juvenile resides, upon presentment for a detention hearing the court shall immediately notify the department of health and human resources as required by West Virginia Code § 49-4-705(c)(3).

(c) Presumption for Release. The court shall release the juvenile unless:

(1) Circumstances present an immediate threat of serious bodily harm to the juvenile or others if released; or
(2) No responsible adult can be found into whose custody the

juvenile can be delivered. However, the detention order shall direct the custodial agency or facility: (i) to make a written record of all attempts to locate such a responsible adult; (ii) that this procedure must take place each day the juvenile is detained; and (iii) that the juvenile shall be returned to court forthwith if a responsible adult is found for the court's consideration of release of the juvenile to such adult.

(d) Detention. A juvenile detained by reason of subparagraph (c)(1) or (2) above may only be detained in a nonsecure or staff-secure facility. Provided, if the court determines that serious physical violence is the basis for the emergency protective order or that a substantial and credible risk of bodily injury is present, the court may order the juvenile detained in a secure facility. If the juvenile is placed in a secure or staff-secure facility by a magistrate, the magistrate shall within 24 hours refer the matter to circuit court, and the court shall hold a detention review hearing pursuant to Rule 16 within three judicial days.

(e) Less Restrictive Alternatives. In reaching the decision to detain a juvenile in a nonsecure or staff-secure facility, the magistrate or judge shall first consider all less restrictive alternatives, such as placement with a willing adult relative, and all reasonably ascertainable factors relevant to the permissible reasons for detention under subparagraph (c)(1) or (2) above.

(f) Additional Findings Necessary for Removal. In any order requiring the removal of the juvenile from his or her home, the court shall find and state in its order: that continuation in the home is contrary to the welfare of the juvenile with specific findings as to why; and whether the department of health and human resources made reasonable efforts to prevent the out-of-home placement or that the emergency situation made such efforts unreasonable or impossible.

(g) Bond. Should the juvenile be detained under this rule, release under bond may be addressed after the prosecuting attorney has been notified and given the opportunity to file an amended juvenile petition pursuant to West Virginia Code § 49-4-704(f).

4. Trial Court Rules

Rule 12.03. General Provisions.

(a) Availability of Facsimile Services. Each circuit clerk shall have a facsimile machine available for court-related business during regular business hours and such additional hours as may be established by the chief judge. Each magistrate clerk shall have a facsimile machine

available for court-related business twenty-four (24) hours per day, seven (7) days per week.

(b) Form and Format. All documents conveyed via facsimile transmission must conform in form and format to existing standards established by applicable statutes or rules of court. They should be received on, or the receiver shall make any necessary photocopies on, eight and one-half (8 1/2) by eleven (11) inch, twenty (20)-pound alkaline plain paper of archival quality, and satisfy all other requirements of these rules.

(c) Page Limitation. No facsimile transmission over twenty (20) pages in length (including the cover sheet) shall be accepted unless prior consent is given by the court or by the clerk of the court.

(d) Oversized Documents. Facsimile transmission of, or involving, any original document larger than eight and one-half (8 1/2) by eleven (11) inch is prohibited unless prior consent is given by the court or by the clerk of the court.

(e) Facsimile Cover Sheet. The sender must provide his or her or the entity's name, address, telephone number, facsimile number, the document(s) being transmitted by caption and matter, and the number of pages (including the cover sheet), and must provide clear and concise instructions as needed concerning processing.

(f) Signatures.

(1) *Presumption of Authenticity.* Any signature appearing on a facsimile copy of a court pleading or other document shall be presumed to be authentic.

(2) *Inspection of Originally Signed Document or Certified Copy.* Upon demand by the receiver, the sender of a fax shall make available to the receiver for inspection the original physically signed document or, if the court is the sender, a certified copy of the original physically signed document.

(g) Verification of Receipt. Court personnel shall verify, either orally or in writing, the receipt of documents filed by facsimile transmission upon proper inquiry by the sender.

(h) Filing Effective Upon Receipt of Transmission. A facsimile copy of a pleading or other document shall be deemed filed when it is received in its entirety on a clerk's facsimile machine without regard to the hours of operation of the clerk's office. Upon receiving a faxed filing, the clerk of the

court shall note on the facsimile copy the filing date, in the same manner as with pleadings or other documents filed by mail or in person.

(i) Payment of Fees.

(1) Any required filing or other fee shall be paid by mail or in person following a facsimile filing as follows: the required fee, accompanied by a copy of the facsimile filing cover sheet, shall be deposited with the court not later than seven (7) calendar days after the filing by fax.

(2) The clerk of the court may decline to process the pleading or other document until receipt of any required filing fee, and the court shall withhold the entry of judgment pending receipt of fees.

(3) If any required fee is not received by the court within seven (7) calendar days after the filing by fax, the filing shall be voidable and no further notice need be given any party.

(j) Filing of Original. The filing of the original shall not be required, unless otherwise ordered by the court or directed by the clerk of the court.

(k) Retention of Original. If filing of the original is not required, the sender must retain the original physically signed document in his or her possession or control.

(l) Photocopying Charges. The sender shall be responsible for any photocopying charges associated with the processing of any document filed by facsimile transmission.

(m) Transmission Error. If there is an error in any facsimile transmission, the clerk shall not accept or note the document as filed until a corrected, acceptable document is received.

(n) Notice of Transmission Error; Risk of Use of Facsimile Transmission. If the receiver discovers or suspects a transmission error, the receiver shall notify the sender as soon as possible. The sender bears any risk of using facsimile transmission to convey any document to a court. The potential receiver bears any risk of receiving any document by facsimile transmission from a court.

(o) Nunc Pro Tunc Filing. If the attempted facsimile transmission is not accepted as filed with the court because of a transmission error or other deficiency, the sending party may move acceptance nunc pro tunc by filing a written motion with the court. The motion shall be accompanied by the activity report or other documentation in order to verify the attempted transmission. The court, in the interest of justice, and upon the submission

of appropriate documentation, may entertain the motion and hold a hearing in its discretion.

(p) Facsimile Receipt and Transmission; Fees. The clerk may send or receive facsimile transmissions involving court-related business. With the exception of transmissions by or for parties authorized to receive the services of the court without cost, the clerk shall charge $2.00 per page transmitted at the request of any person other than a judicial officer or employee.

Rule 12.04. Filing and Service of Documents in Civil Actions by Facsimile Transmission.

(a) Method of Filing. Except for mental hygiene applications or where otherwise prohibited by law or court rule, a party may file any document in a civil action, other than a complaint or petition, by facsimile transmission to any clerk's office having a facsimile machine. The clerk shall accept the document as filed if the filing and the document comply with these and other applicable rules and statutes.

(b) Service. Service of any document in a civil action, other than original process, may be made by facsimile transmission subject to the provisions of these rules, other applicable rules and statutes, and W.Va. R.Civ.P. 5 or Rule 8 of the Rules of Civil Procedure for Magistrate Courts.

(c) When Service Complete. Service by fax is complete upon receipt of the entire document by the receiver's facsimile machine.

(d) Proof of Service. Where service is made by facsimile transmission, proof of service shall be made by affidavit of the person making service or by certificate of an attorney. Attached to such affidavit or certificate shall be a copy of the sender's facsimile machine transmission record.

Rule 12.05. Facsimile Transmission of Domestic Violence Petitions and Protective Orders.

(a) Petitions.

(1) Verified petitions for protective orders may be filed by fax. If transmission is made to the magistrate court after regular business hours, the on-call magistrate shall be notified before the transmission occurs.

(2) In addition to the information required by TCR 12.03(e), the fax cover sheet accompanying a domestic violence petition for a protective order shall include the telephone number where the petitioner may be reached.

(3) Any action taken by the judge or magistrate on a faxed petition shall be communicated as soon as feasible to the petitioner by return fax or other method.

(b) Protective Orders.

(1) *Temporary Orders.* A temporary protective order may issue based solely on the representations contained in a verified petition properly filed by fax.

(2) *Distribution to Law-Enforcement Agencies.* Any temporary or final protective order issued pursuant to the provisions of W.Va. Code §§ 48-2A-1 et seq. may be faxed to appropriate law-enforcement agencies to satisfy the statutory requirements for transmission of such documents by the court. The petition upon which a temporary order is issued shall be faxed to law-enforcement agencies with the temporary protective order.

(3) *Service of Process.* Any temporary or final protective order faxed to law-enforcement agencies shall be valid for their use in making personal service on the respondent named in the order.

Rule 21. Guardians ad Litem

Rule 21.01 Application Generally.

This Rule applies to all eligible guardian ad litem appointments in circuit court, family court and magistrate court. This Rule does not apply to guardians ad litem appointed in abuse and neglect proceedings.

Rule 21.02 Appointments Generally.

A guardian ad litem shall be selected independently of any nomination by the parties or counsel.

Appointed guardians ad litem may (a) serve on a voluntary basis without compensation, (b) be paid by a litigant or a litigant-parent of an infant for whom the appointment is made if the litigant or litigant-parent is not an indigent person, or (c) be paid by the Supreme Court of Appeals as provided in Rule 21.05.

Rule 21.03 Duties Generally.

A guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding and make recommendations to the court by testimony or in writing, unless otherwise ordered by the court.

Rule 21.04 Definitions.

For purposes of this Rule, the following definitions shall apply:

(a) “Indigent Person” means any person who qualifies for a waiver of fees pursuant to the provisions of W. Va. Code § 59-2-1.

(b) “Infant” means any person under the age of eighteen (18) years.

(c) "Incarcerated Person" means any person who is being held against the person's will in any facility operated under the authority of any governmental authority in the United States.

(d) “Incompetent Person” means any person who is admitted to a mental health facility or has been found by the court to be incompetent.

(e) “Nondiscretionary Appointment” means when substantial allegations of domestic abuse have been made, when serious allegations of abuse and neglect have been made, when there are serious issues relating to the child's health or safety, or in cases involving disproving a child's paternity.

Rule 21.05 Eligibility for a Supreme Court-Paid Guardian Ad Litem.

To be eligible for Supreme Court payment, an attorney must serve as the appointed guardian ad litem, and the person for whom the guardian is appointed must be:

(a) an infant-party who is indigent;

(b) an infant of a party or parties who are indigent, provided however, if both parents are parties to the action, both parents must be indigent;

(c) an incarcerated person who is indigent; or

(d) an incompetent person who is indigent;

provided however, in a domestic relations case the cost of a guardian ad litem for a party and/or an infant(s) of the parties may be ordered to be paid by a non-indigent party or if otherwise qualified, by the Supreme Court when the appointment is nondiscretionary, provided the order appointing the guardian ad litem complies with the requirements of Rule 47 of the Rules of Practice and Procedure for Family Court. The compensation payable by the Supreme Court is limited to the amounts set forth in Trial Court Rule 21.06.

The appointment shall end automatically when a person for whom a guardian ad litem has been appointed either (a) is no longer indigent, or is an infant of a party or parties who are no longer indigent, (b) reaches the age of eighteen (18) years, (c) is no longer an incarcerated person, (d) is released from a mental health facility, or (e) is found by the court to have regained competency. The guardian ad litem shall notify the appointing court when an appointment has been automatically terminated.

Rule 21.06 Compensation for a Supreme Court-Paid Guardian Ad Litem.

Payment shall be made from Supreme Court funds.

Supreme Court-paid guardians ad litem shall be compensated at $80 per hour for out-of-court services, and $100 per hour for in-court services.

The total compensation paid to a guardian ad litem appointed pursuant to the provisions of this rule shall not exceed $3,000 (“Three Thousand”) per appointment as of July 1, 2012. However, an appeal to the Supreme Court of Appeals of West Virginia shall be considered a separate case with regard to compensation. The Court will not reimburse the cost of office expenses including but not limited to copying costs, postage, long distance telephone calls and/or fees charged for invoice preparation; provided, however, that the costs of obtaining and copying court records, medical records, school records, and child protective services records will be reimbursed. Mileage will be reimbursed at the standard rate per mile as approved by the Supreme Court. Expenses shall be paid in addition to the compensation provided for herein.

Requests for payment shall be made on forms provided by the Administrative Director of the Court and shall follow all West Virginia State and West Virginia Supreme Court billing regulations, policies and procedures. Requests for payment shall be reviewed and recommended by order of the appointing court prior to submission to the Administrative Director of the Court for payment. The Administrative Director of the Court--or the Administrative Director's designee--shall review and approve all submissions for payment of fees to guardians ad litem.

The Administrative Director of the Court shall have the authority to approve and pay compensation in excess of the amounts stated above in exceptional cases and for good cause shown. Requests for excess compensation shall be made by the appointing judge and sent to the Administrative Director of the Court for approval.

As circumstances may warrant, the court in its discretion may at any time during the proceedings tax the costs of the appointment of a guardian ad

litem to the parties and require that any compensation previously paid from court funds be refunded to the Administrative Director of the Court.

Chapter 9

STATUTES

Chapter Contents

A. WEST VIRGINIA STATUTES

1. W. Va. Code §§ 48-27-101, *et seq.* -- Prevention and Treatment of Domestic Violence

PART 1. GENERAL PROVISIONS.

§48-27-101. Findings and purposes.

(a) The Legislature of this state finds that:

(1) Every person has a right to be safe and secure in his or her home and family and to be free from domestic violence.

(2) Children are often physically assaulted or witness violence against one of their parents or other family or household members, violence which

too often ultimately results in death. These children may suffer deep and lasting emotional harm from victimization and from exposure to domestic violence;

(3) Domestic violence is a major health and law-enforcement problem in this state with enormous costs to the state in both dollars and human lives. It affects people of all racial and ethnic backgrounds and all socioeconomic classes; and

(4) Domestic violence can be deterred, prevented or reduced by legal intervention that treats this problem with the seriousness that it deserves.

(b) This article shall be liberally construed and applied to promote the following purposes:

(1) To assure victims of domestic violence the maximum protection from abuse that the law can provide;

(2) To create a speedy remedy to discourage violence against family or household members with whom the perpetrator of domestic violence has continuing contact;

(3) To expand the ability of law-enforcement officers to assist victims, to enforce the domestic violence law more effectively, and to prevent further abuse;

(4) To facilitate equal enforcement of criminal law by deterring and punishing violence against family and household members as diligently as violence committed against strangers;

(5) To recognize that domestic violence constitutes serious criminal behavior with potentially tragic results and that it will no longer be excused or tolerated; and

(6) To recognize that the existence of a former or on-going familial or other relationship should not serve to excuse, explain or mitigate acts of domestic violence which are otherwise punishable as crimes under the laws of this state.

PART 2. DEFINITIONS.

§48-27-201. Applicability of definitions.

For the purposes of this article and article 26-101, et seq., of this chapter, the words or terms defined in this article, and any variation of those words or terms required by the context, have the meanings ascribed to them in this section. These definitions are applicable unless a different meaning clearly appears from the context.

§48-27-202. Domestic violence defined.

"Domestic violence" or "abuse" means the occurrence of one or more of the following acts between family or household members, as that term is defined in section two hundred four of this article:

(1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;

(2) Placing another in reasonable apprehension of physical harm;

(3) Creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts;

(4) Committing either sexual assault or sexual abuse as those terms are defined in articles eight-b and eight-d, chapter sixty-one of this code; and

(5) Holding, confining, detaining or abducting another person against that person's will.

§48-27-203. Emergency hearing defined.

"Emergency hearing" means the hearing before a magistrate upon the filing of a petition for a protective order. An emergency hearing may be held ex parte.

§48-27-204. Family or household members defined.

"Family or household members" means persons who:

(1) Are or were married to each other;

(2) Are or were living together as spouses;

(3) Are or were sexual or intimate partners;

(4) Are or were dating: Provided, That a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship;

(5) Are or were residing together in the same household;

(6) Have a child in common regardless of whether they have ever married or lived together;

(7) Have the following relationships to another person:

(A) Parent;

(B) Stepparent;

(C) Brother or sister;

(D) Half-brother or half-sister;

(E) Stepbrother or stepsister;

(F) Father-in-law or mother-in-law;

(G) Stepfather-in-law or stepmother-in-law;

(H) Child or stepchild;

(I) Daughter-in-law or son-in-law;

(J) Stepdaughter-in-law or stepson-in-law;

(K) Grandparent;

(L) Step grandparent;

(M) Aunt, aunt-in-law or step aunt;

(N) Uncle, uncle-in-law or step uncle;

(O) Niece or nephew;

(P) First or second cousin; or

(8) Have the relationships set forth in paragraphs (A) through (P), subdivision (7) of this section to a family or household member, as defined in subdivisions (1) through (6), of this section.

§48-27-205. Final hearing defined.

"Final hearing" means the hearing before a family court judge following the entry of an order by a magistrate as a result of the emergency hearing.

§48-27-206. Law-enforcement agency defined.

(a) "Law-enforcement agency" means and is limited to:

(1) The state police and its members;

(2) A county sheriff and his or her law-enforcement deputies; and

(3) A police department in any municipality as defined in section two, article one, chapter eight of this code;

(4) Any federal agency whose purpose includes enforcement, maintenance and gathering of information of both criminal and civil records relating to domestic violence under federal law.

(b) The term "law-enforcement agency" includes, but is not limited to, the Department of Health and Human Resources in those instances of child abuse reported to the department that are not otherwise reported to any other law-enforcement agency.

§48-27-207. Program for victims of domestic violence defined.

“Program for victims of domestic violence” means a licensed program for victims of domestic violence and their children, which program provides advocacy, shelter, crisis intervention, social services, treatment, counseling, education or training.

§48-27-208. Program of intervention for perpetrators defined.

“Program of intervention for perpetrators” means a licensed program, where available, or if no licensed program is available, a program that:

(1) Accepts perpetrators of domestic violence into educational intervention groups or counseling pursuant to a court order; or

(2) Offers educational intervention groups to perpetrators of domestic violence.

§48-27-209. Protective order defined.

"Protective order" means an emergency protective order entered by a magistrate as a result of the emergency hearing or a protective order entered by a family court judge upon final hearing.

PART 3. PROCEDURE.

§48-27-301. Jurisdiction.

(a) Circuit courts, family courts and magistrate courts have concurrent jurisdiction over domestic violence proceedings as provided in this article.

(b) The Supreme Court of Appeals is authorized to assign appropriate judicial officers for five domestic violence courts in any jurisdiction chosen by

the Supreme Court of Appeals. Judicial officers so assigned have the authority and jurisdiction to preside over criminal misdemeanor crimes of domestic violence involving family or household members as defined in subdivisions (1) through (6), inclusive, and paragraphs (A), (B) and (H), subdivision (7), section two hundred four of this article, relating to offenses under subsections (b) and (c), section nine, article two, chapter sixty-one of this code, misdemeanor violations of section nine-a, article two, chapter sixty-one of this code, misdemeanor violations of section twenty-eight, article two, chapter sixty-one of this code, misdemeanor offenses under article three, chapter sixty-one of this code where the alleged perpetrator and the victim are said family or household members, subdivisions (7) and (8), section seven, article seven, chapter sixty-one of this code and civil and criminal domestic violence protective order proceedings as provided in this article. The judicial officer chosen for any domestic violence court may be a current or senior status circuit judge, family court judge, temporary family court judge or magistrate. The Supreme Court of Appeals is requested to maintain statistical data to determine the feasibility and effectiveness of any domestic violence court established by the provisions of this section.

(c) The assigned judicial officer in a domestic violence court does not have jurisdiction to preside over any felony crimes unless the assigned judicial officer is a circuit court judge.

§48-27-302. Venue.

The action may be heard in the county in which the domestic violence occurred, in the county in which the respondent is living or in the county in which the petitioner is living, either temporarily or permanently. If the parties are married to each other, the action may also be brought in the county in which an action for divorce between the parties may be brought as provided by 5-106.

§48-27-303. Effect of petitioner leaving residence.

The petitioner's right to relief under this article shall not be affected by his or her leaving a residence or household to avoid further abuse.

§48-27-304. Commencement of proceeding.

(a) An action under this article is commenced by the filing of a verified petition in the magistrate court.

(b) No person shall be refused the right to file a petition under the provisions of this article. No person shall be denied relief under the provisions of this article if she or he presents facts sufficient under the provisions of this article for the relief sought.

(c) Husband and wife are competent witnesses in domestic violence proceedings and cannot refuse to testify on the grounds of the privileged nature of their communications.

§48-27-305. Persons who may file petition.

A petition for a protective order may be filed by:

(1) A person seeking relief under this article for herself or himself;

(2) An adult family or household member for the protection of the victim or for any family or household member who is a minor child or physically or mentally incapacitated to the extent that he or she cannot file on his or her own behalf, or

(3) A person who reported or was a witness to domestic violence and who, as a result, has been abused, threatened, harassed or who has been the subject of other actions intended to intimidate the person.

§48-27-306. Counterclaim or affirmative defenses.

(a) A respondent named in a petition alleging domestic violence may file a verified counterclaim stating any claim that the respondent has against the petitioner that would be a basis for filing a petition under this article.

(b) In response to a petition or counterclaim, the person alleged to have committed the domestic violence may assert any affirmative defense that he or she may have available.

§48-27-307. Persons accompanying petitioner.

No person accompanying a person who is seeking to file a petition under the provisions of this article is precluded from being present if his or her presence is desired by the person seeking a petition unless the person's behavior is disruptive to the proceeding.

§48-27-308. Charges for fees and costs postponed.

No fees shall be charged for the filing of petitions or other papers, service of petitions or orders, copies of orders, or other costs for services provided by, or associated with, any proceedings under this article until the matter is brought before the court for final resolution.

§48-27-309. Priority of petitions.

Any petition filed under the provisions of this article shall be given priority over any other civil action before the court, except actions in which trial is in progress, and shall be docketed immediately upon filing.

§48-27-310. Full faith and credit.

Any protective order issued pursuant to this article shall be effective throughout the state in every county. Any protection order issued by any other state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States or any Indian tribe or band that has jurisdiction to issue protection orders shall be accorded full faith and credit and enforced in accordance with the provisions of article twenty-eight of this chapter.

§48-27-311. Service of process.

A protective order may be served:

(1) On the respondent by means of a Class I legal advertisement published notice, with the publication area being the most current known county in which the respondent resides, published in accordance with the provisions of section two, article three, chapter fifty-nine of this code if personal service by law enforcement has been unsuccessful. Simultaneously with the publication, the respondent shall be served with the protective order and the order of publication by first class mail to the respondent's most current known residential address.

(2) Against nonresident persons by the manner prescribed in section thirty-three-a, article three, chapter fifty-six of this code.

Any protective order issued by the court of this state which is served in compliance with the provisions of Rule 4(f) of the West Virginia Rules of Civil Procedure served outside the boundaries of this state shall carry the same force and effect as if it had been personally served within this state's boundaries.

§48-27-312. Production of documents pursuant to a subpoena duces tecum.

Notwithstanding any provision of law or any procedural rule to the contrary, any record in a proceeding filed pursuant to this article shall be supplied to any person presenting a subpoena duces tecum issued by a state or federal court in any criminal action or action filed pursuant to this article. Any record in a proceeding filed pursuant to this article is not subject to disclosure pursuant to a subpoena if the subpoena was issued in a civil action. In civil proceedings a court, for good cause shown, may enter an order permitting a person who is not otherwise permitted access to a court file to examine and copy records of a proceeding filed pursuant to this article: Provided, That the court shall enter such order as may be necessary to protect any document containing the address or other contact information of a person who filed a petition under this article: Provided, however, That any records obtained pursuant to the provisions of this section shall be used only in the context of the case in which the subpoena was issued and not for any other purpose.

PART 4. COORDINATION WITH PENDING COURT ACTIONS.

§48-27-401. Interaction between domestic proceedings.

(a) During the pendency of a divorce action, a person may file for and be granted relief provided by this article until an order other than a procedural order is entered in the divorce action pursuant to Part 5-501, et seq.

(b) If a person who has been granted relief under this article should subsequently become a party to an action for divorce, separate maintenance or annulment, such person shall remain entitled to the relief provided under this article including the right to file for and obtain any further relief, so long as no temporary order other than a procedural order has been entered in the

action for divorce, annulment and separate maintenance, pursuant to Part 5-501, et seq.

(c) Except as provided in section 5-509 of this chapter and section 27-402 of this article for a petition and a temporary emergency protective order, no person who is a party to a pending action for divorce, separate maintenance or annulment in which an order other than a procedural order has been entered pursuant to Part 5-501, et seq. of this chapter, shall be entitled to file for or obtain relief against another party to that action under this article until after the entry of a final order which grants or dismisses the action for divorce, annulment or separate maintenance.

(d) Notwithstanding the provisions set forth in section 27-505, when an action seeking a divorce, an annulment or separate maintenance, the allocation of custodial responsibility or a habeas corpus action to establish custody, the establishment of paternity, the establishment or enforcement of child support, or other relief under the provisions of this chapter is filed or is reopened by petition, motion or otherwise, then any order issued pursuant to this article which is in effect on the day the action is filed or reopened shall remain in full force and effect by operation of this statute until: (1) A temporary order other than a procedural order or a final order is entered pursuant to the provisions of Part 5-501, et seq. or Part 6-601 et seq., of this chapter; or (2) an order is entered modifying such order issued pursuant to this article; or (3) the entry of a final order granting or dismissing the action. The Supreme Court of Appeals shall provide by rule for notice of the extension of the Domestic Violence Order to be provided to the parties, law enforcement and the domestic violence registry by the clerk of the court, or clerks of the courts, in which the action or actions are filed.

§48-27-402. Proceedings in magistrate court when temporary divorce, annulment, separate maintenance or custody order is in effect.

(a) The provisions of this section apply where a temporary order has been entered by a family court in an action for divorce, annulment, separate maintenance or custody, notwithstanding the provisions of subsection 27-401(c) of this article.

(b) A person who is a party to an action for divorce, annulment, separate maintenance or custody in which a temporary order has been entered pursuant to section 5-501 of this chapter may petition the magistrate court for a temporary emergency protective order pursuant to this section for any violation of the provisions of this article occurring after the date of entry of the temporary order pursuant to section 5-501 of this chapter.

(c) The only relief that a magistrate may award pursuant to this section is a temporary emergency protective order:

(1) Directing the respondent to refrain from abusing the petitioner or minor children, or both;

(2) Ordering the respondent to refrain from entering the school, business or place of employment of the petitioner or household members or family members for the purpose of violating the protective order; and

(3) Ordering the respondent to refrain from contacting, telephoning, communicating with, harassing or verbally abusing the petitioner.

(d) A temporary emergency protective order may modify an award of custody or visitation only upon a showing, by clear and convincing evidence, of the respondent's abuse of a child, as abuse is defined in section 27-202 of this article. An order of modification shall clearly state which party has custody and describe why custody or visitation arrangements were modified.

(e)(1) The magistrate shall forthwith transmit a copy of any temporary emergency protective order, together with a copy of the petition, by mail or by facsimile machine to the family court in which the action is pending and to law-enforcement agencies. The family court shall set a hearing on the matter to be held no later than ten days following the entry of the order by magistrate. The family court shall give notice of the hearing date, time and place to the parties and shall advise them of their opportunity to appear and participate in a hearing to determine whether the order entered by the magistrate should be extended by the family court to a date certain or should be vacated. The notice shall also provide that a party's failure to appear may result in the entry of an order extending the order entered by the magistrate to a date certain or vacating the order of the magistrate. Subsequent to the hearing, the family court shall forthwith enter an order and cause the same to be served on the parties and transmitted by mail or by facsimile machine to the issuing magistrate. The magistrate court clerk shall forward a copy of the family court order to law-enforcement agencies.

(2) If no temporary order has been entered in the pending action for divorce, annulment, separate maintenance or custody, the family court shall forthwith return the order with such explanation to the issuing magistrate. The magistrate who issued the order shall vacate the order, noting thereon the reason for termination. The magistrate court clerk shall transmit a copy of the vacated order to the parties and law-enforcement agencies.

(f) Notwithstanding any other provision of this code, if the family court extends the temporary emergency protective order entered by the magistrate or if, pursuant to the provisions of section 5-509, the family court enters a protective order as temporary relief in an action for divorce, the family court order shall be treated and enforced as a protective order issued under the provisions of this article.

§48-27-403. Emergency protective orders of court; hearings; persons present.

(a) Upon the filing of a verified petition under this article, the magistrate court may enter an emergency protective order as it may determine necessary to protect the petitioner or minor children from domestic violence and, upon good cause shown, may do so ex parte without the necessity of bond being given by the petitioner. Clear and convincing evidence of immediate and present danger of abuse to the petitioner or minor children constitutes good cause for the issuance of an emergency protective order pursuant to this section. If the respondent is not present at the

proceeding, the petitioner or the petitioner's legal representative shall certify to the court, in writing, the efforts which have been made to give notice to the respondent or just cause why notice should not be required. Copies of medical reports or records may be admitted into evidence to the same extent as though the original reports or records. The custodian of the records is not required to be present to authenticate the records for any proceeding held pursuant to this subsection. If the magistrate court determines to enter an emergency protective order, the order shall prohibit the respondent from possessing firearms.

(b) Following the proceeding, the magistrate court shall order a copy of the petition to be served immediately upon the respondent, together with a copy of any emergency protective order entered pursuant to the proceedings, a notice of the final hearing before the family court, and a statement of the right of the respondent to appear and participate in the final hearing, as provided in subsection (d) of this section. Copies of any order entered under the provisions of this section, a notice of the final hearing before the family court, and a statement of the right of the petitioner to appear and participate in the final hearing, as provided in subsection (d) of this section, shall also be delivered to the petitioner. Copies of any order entered shall also be delivered to any law-enforcement agency having jurisdiction to enforce the order, including municipal police, the county sheriff's office and local office of the State Police, within 24 hours of the entry of the order. An emergency protective order is effective until modified by order of the family court upon hearing as provided in subsection (d) of this section. The order is in full force and effect in every county in this state.

(c) Subsequent to the entry of the emergency protective order, service on the respondent, and the delivery to the petitioner and law-enforcement officers, the court file shall be transferred to the office of the clerk of the circuit court for use by the family court.

(d) The family court shall schedule a final hearing on each petition in which an emergency protective order has been entered by a magistrate. The hearing shall be scheduled not later than 10 days following the entry of the order by the magistrate. The notice of the final hearing shall be served on the respondent and delivered to the petitioner, as provided in subsection (b) of this section, and must set forth the hearing date, time, and place and include a statement of the right of the parties to appear and participate in the final hearing. The notice must also provide that the petitioner's failure to appear will result in a dismissal of the petition and that the respondent's failure to appear may result in the entry of a protective order against him or her for a period of 90 or 180 days, as determined by the court. The notice must also include the name, mailing address, physical location, and telephone number of the family court having jurisdiction over the proceedings. To facilitate the preparation of the notice of final hearing required by the provisions of this subsection, the family court must provide the magistrate court with a day and time in which final hearings may be scheduled before the family court within the time required by law.

(e) Upon final hearing the petitioner must prove, by a preponderance of the evidence, the allegation of domestic violence or that he or she reported or witnessed domestic violence against another and has, as a result, been abused, threatened, harassed, or has been the subject of other actions to attempt to intimidate him or her, or the petition shall be dismissed by the family court. If the respondent has not been served with notice of the emergency protective order, the hearing may be continued to permit service to be effected. The failure to obtain service upon the respondent does not constitute a basis to dismiss the petition. Copies of medical reports may be admitted into evidence to the same extent as though the original thereof, upon proper authentication, by the custodian of the records.

(f) A person requested by a party to be present during a hearing held under the provisions of this article shall not be precluded from being present unless that person is to be a witness in the proceeding and a motion for sequestration has been made and the motion has been granted. A person found by the court to be disruptive may be precluded from being present.

(g) Upon hearing, the family court may dismiss the petition or enter a protective order for a period of 90 days or, in the discretion of the court, for a period of 180 days. The hearing may be continued on motion of the respondent, at the convenience of the court. Otherwise, the hearing may be continued by the court no more than seven days. If a hearing is continued, the family court may modify the emergency protective order as it considers necessary.

(h) Notwithstanding any other provision of this code to the contrary, a petition filed pursuant to this section that results in the issuance of an emergency protective order naming a juvenile as the respondent in which the petition for the emergency protective order is filed by or on behalf of the juvenile's parent, guardian or custodian, or other person with whom the juvenile resides shall be treated as a petition authorized by § 49-4-704 of this code, alleging the juvenile is a juvenile delinquent: *Provided,* That the magistrate court shall notify the prosecuting attorney in the county where the emergency protective order is issued within 24 hours of the issuance of the emergency protective order and the prosecuting attorney may file an amended verified petition to comply with the provisions of § 49-4-704(a) of this code within two judicial days.

PART 5. PROTECTIVE ORDERS; VISITATION ORDERS.

§48-27-501. Issuance of protective order; modification of order.

(a) Upon final hearing, the court shall enter a protective order if it finds, after hearing the evidence, that the petitioner has proved the allegations of domestic violence by a preponderance of the evidence. If the respondent is present at the hearing and elects not to contest the allegations of domestic violence or does not contest the relief sought, the petitioner is not required to produce evidence and prove the allegations of domestic violence and the court may directly address the issues of the relief requested.

(b) The court may modify the terms of a protective order at any time upon subsequent petition filed by any party.

§48-27-502. Mandatory provisions in protective order.

(a) A protective order must order the respondent to refrain from abusing, harassing, stalking, threatening or otherwise intimidating the petitioner or the minor children, or engaging in other conduct that would place the petitioner or the minor children in reasonable fear of bodily injury.

(b) The protective order must prohibit the respondent from possessing any firearm or ammunition.

(c) The protective order must inform the respondent that he or she is prohibited from possessing any firearm or ammunition and that possession of a firearm or ammunition while subject to the court's protective order is a criminal offense under state and federal law, notwithstanding the fact that the respondent might otherwise have a right to possess a firearm.

(d) The protective order must inform the respondent that the order is in full force in every county of this state.

(e) The protective order must contain on its face the following statement, printed in bold-faced type or in capital letters:

"VIOLATION OF THIS ORDER MAY BE PUNISHED BY CONFINEMENT IN A REGIONAL JAIL FOR AS LONG AS ONE YEAR AND BY A FINE OF AS MUCH AS $2,000".

§48-27-503. Permissive provisions in protective order.

The terms of a protective order may include:

(1) Granting possession to the petitioner of the residence or household jointly resided in at the time the abuse occurred;

(2) Ordering the respondent to refrain from entering or being present in the immediate environs of the residence of the petitioner;

(3) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children named in the order;

(4) Establishing terms of temporary visitation with regard to the minor children named in the order including, but not limited to, requiring third party supervision of visitations if necessary to protect the petitioner and/or the minor children;

(5) Ordering the noncustodial parent to pay to the caretaker parent a sum for temporary support and maintenance of the petitioner and children, if any;

(6) Ordering the respondent to pay to the petitioner a sum for temporary support and maintenance of the petitioner, where appropriate;

(7) Ordering the respondent to refrain from entering the school, business or place of employment of the petitioner or household or family members for the purpose of violating the protective order;

(8) Ordering the respondent to participate in an intervention program for perpetrators;

(9) Ordering the respondent to refrain from contacting, telephoning, communicating, harassing or verbally abusing the petitioner;

(10) Providing for either party to obtain personal property or other items from a location, including granting temporary possession of motor vehicles owned by either or both of the parties, and providing for the safety of the parties while this occurs, including ordering a law-enforcement officer to accompany one or both of the parties;

(11) Ordering the respondent to reimburse the petitioner or other person for any expenses incurred as a result of the domestic violence, including, but not limited to, medical expenses, transportation and shelter;

(12) Ordering the petitioner and respondent to refrain from transferring, conveying, alienating, encumbering or otherwise dealing with property which could otherwise be subject to the jurisdiction of the court or another court in an action for divorce or support, partition or in any other action affecting their interests in property;

(13) Awarding the petitioner the exclusive care, possession, or control of any animal owned, possessed, leased, kept or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent and prohibiting the respondent from taking, concealing, molesting, physically injuring, killing or otherwise disposing of the animal and limiting or precluding contact by the respondent with the animal; and

(14) Ordering any other relief the court deems necessary to protect the physical safety of petitioner or those persons for whom a petition may be filed as provided in subdivision (2), section three hundred five of this article.

§48-27-504. Provisions in protective order for person witnessing or reporting domestic violence.

When the person to be protected is a person who reported or was a witness to the domestic violence, the terms of a protective order may order:

(1) The respondent to refrain from abusing, contacting, telephoning, communicating, harassing, verbally abusing or otherwise intimidating the person to be protected;

(2) The respondent to refrain from entering the school, business or place of employment of the person to be protected for the purpose of violating the protective order; and

(3) The respondent to refrain from entering or being present in the immediate environs of the residence of the petitioner.

§48-27-505. Time period a protective order is in effect; extension of order; notice of order or extension.

(a) Except as otherwise provided in subsection (d), section four hundred one of this article, a protective order, entered by the family court pursuant to this article, is effective for either ninety days or one hundred eighty days, in the discretion of the court. Upon receipt of a written request

for renewal from the petitioner prior to the expiration of the original order, the family court shall extend its order for an additional ninety-day period.

(b) Notwithstanding the provisions of subsection (a), the court may enter a protective order for a period of one year if the court finds by a preponderance of the evidence, after a hearing that any of the following aggravating factors are present:

(1) That there has been a material violation of a previously entered protective order;

(2) That two or more protective orders have been entered against the respondent within the previous five years;

(3) That respondent has one or more prior convictions for domestic battery or assault or a felony crime of violence where the victim was a family or household member;

(4) That the respondent has committed a violation of the provisions of section nine-a, article two, chapter sixty-one of this code against a person protected by an existing order of protection; or

(5) That the totality of the circumstances presented to the court require a one year period in order to protect the physical safety of the petitioner or those persons for whom a petition may be filed as provided in subdivision (2), section three hundred five of this article.

(c) The court may extend a protective order entered pursuant to subsection (b) of this section for whatever period the court considers necessary to protect the physical safety of the petitioner or those persons for whom a petition may be filed as provided in subdivision (2), section three hundred five of this article, if the court finds by a preponderance of evidence, after a hearing of which respondent has been given notice, that:

(1) A material violation of the existing protective order has occurred; or

(2) Respondent has committed a material violation of a provision of a final order entered pursuant to subsection (c), section six hundred eight, article five of this chapter has occurred.

(d) To be effective, a written request to renew a ninety or one hundred eighty-day order must be submitted to the court prior to the expiration of the original order period. A notice of the extension shall be sent by the clerk of the court to the respondent by first-class mail, addressed to the last known address of the respondent as indicated by the court file. The extension of time is effective upon mailing of the notice.

(e) Certified copies of any order entered or extension notice made under the provisions of this section shall be served upon the respondent by first class mail, addressed to the last known address of the respondent as indicated by the court file, and delivered to the petitioner and any law-enforcement agency having jurisdiction to enforce the order, including the city police, the county sheriff's office or local office of the West Virginia State Police within twenty-four hours of the entry of the order. The protective order shall be in full force and effect in every county of this state.

(f) The family court may modify the terms of a protective order upon motion of either party.

(g) The clerk of the circuit court shall cause a copy of any protective order entered by the family court pursuant to the provisions of this article or pursuant to the provisions of chapter forty-eight of this code to be forwarded to the magistrate or magistrate court clerk and the magistrate or magistrate court clerk shall forward a copy of the protective order to the appropriate state and federal agencies for registration of domestic violence offenders as required by state and federal law.

§48-27-506. Effect of protective order on real and personal property.

No order entered pursuant to this article may in any manner affect title to any real property, except as provided in section 14-301 for past due child support. The personal property of any person ordered to pay child support pursuant to the provisions of this article is subject to a lien for past due child support as provided in part 14-201, et seq.

§48-27-507. Mutual protective orders prohibited.

Mutual protective orders are prohibited unless both parties have filed a petition under part three of this article and have proven the allegations of domestic violence by a preponderance of the evidence. This shall not prevent other persons, including the respondent, from filing a separate petition. The court may consolidate two or more petitions if he or she determines that consolidation will further the interest of justice and judicial economy. The court shall enter a separate order for each petition filed: *Provided,* That nothing in this section shall preclude the court from entering an order restricting contact pursuant to section two-a, article two-a, chapter fifty-one of this code.

§48-27-508. Costs to be paid to family court fund.

Any person against whom a protective order is issued shall be assessed costs of twenty-five dollars. Such costs shall be paid to the family court fund established pursuant to section twenty-two, article two-a, chapter fifty-one of this code.

§48-27-509. Conditions of visitation in cases involving domestic violence.

(a) A court may award visitation of a child by a parent who has committed domestic violence only if the court finds that adequate provision for the safety of the child and the petitioner can be made.

(b) In a visitation order, a court may:

(1) Order an exchange of a child to occur in a protected setting;

(2) Order that supervision be provided by another person or agency;

(3) Order the perpetrator of domestic violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators as a condition of the visitation;

(4) Order the perpetrator of domestic violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for the twelve hours that precede the visitation;

(5) Order the perpetrator of domestic violence to pay the costs of supervised visitation, if any;

(6) Prohibit overnight visitation;

(7) Impose any other condition that the court considers necessary to provide for the safety of the child, the petitioner or any other family or household member.

(c) Regardless of whether visitation is allowed, the court may order that the address of the child and the petitioner be kept confidential.

(d) If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.

§48-27-510. Appeals.

(a) A petitioner who has been denied an emergency protective order may file a petition for appeal of the denial, within five days of the denial, to the family court.

(b) Any party who alleges that he or she will be adversely affected or aggrieved by a final protective order, or the denial or dismissal of a petition for a protective order, may file a petition for appeal with the circuit court within ten days of the entry of the order by the family court. The order shall remain in effect pending an appeal unless stayed by order of the family court sua sponte or upon motion of a party, or by order of the circuit court upon motion of a party. No bond shall be required for any appeal under this section.

(c) A petition for appeal filed pursuant to this section shall be heard by the court within ten days from the filing of the petition.

(d) The standard of review of findings of fact made by the family court is clearly erroneous and the standard of review of application of the law to the facts is an abuse of discretion standard.

§48-27-511. Purging of domestic violence files.

Two years after the entry of a final protective order, the circuit court may, upon motion, order that the protective order and references to the order be purged from the file maintained by any law-enforcement agency and may further order that the file maintained by the court be sealed and not opened except upon order of the court when such is in the interest of justice.

PART 6. DISPOSITION OF DOMESTIC VIOLENCE ORDERS.

§48-27-601. Transmitting orders to domestic violence database; affidavit as to award of possession of real property; service of order on respondent.

(a) Upon entry of an order pursuant to section 27-403 or part 27-501, *et seq.*, or an order entered pursuant to part 5-501, *et seq.*, granting relief provided for by this article, a copy of the order shall be immediately transmitted electronically by the court or the clerk of the court to the domestic violence database established pursuant to the provisions of section twenty-one, article one, chapter fifty-one of this code. No later than the close of the next business day the court or the clerk of the court shall transmit the order to

a local office of the municipal police, the county sheriff and the West Virginia State Police for service upon the respondent named in the order. The law-enforcement agency or agencies to which a copy of the order is supplied are not required to maintain a copy of the order after the respondent is served.

(b) A sworn affidavit may be executed by a party who has been awarded exclusive possession of the residence or household, pursuant to an order entered pursuant to section 27-503, and shall be delivered to law-enforcement agencies simultaneously with any order giving the party's consent for a law-enforcement officer to enter the residence or household, without a warrant, to enforce the protective order or temporary order.

(c) Orders shall be promptly served upon the respondent. Failure to serve a protective order on the respondent does not stay the effect of a valid order if the respondent has actual notice of the existence and contents of the order.

(d) Any law-enforcement agency in this state in possession of or with notice of the existence of an order issued pursuant to the provisions of sections 27-403 or 27-501 of this article or the provisions of section 5-509 of this chapter which is in effect or has been expired for thirty days or less that receives a report that a person protected by an order has been reported to be missing shall immediately follow its procedures for investigating missing persons. No agency or department policy delaying the beginning of an investigation has any force or effect.

(e) The provisions of subsection (d) of this section shall be applied where a report of a missing person is made which is accompanied by a sworn affidavit that the person alleged to be missing was, at the time of his or her alleged disappearance, being subjected to treatment which meets the definition of domestic battery or assault set forth in section twenty-eight, article two, chapter sixty-one of this code.

PART 7. LAW ENFORCEMENT RESPONSE TO DOMESTIC VIOLENCE.

§48-27-701. Service of pleadings and orders by law-enforcement officers

Notwithstanding any other provision of this code to the contrary, all law-enforcement officers are hereby authorized to serve all pleadings and orders filed or entered pursuant to this article on Sundays and legal holidays. No law-enforcement officer shall refuse to serve any pleadings or orders entered pursuant to this article. Law enforcement shall attempt to serve all protective orders without delay: *Provided,* That service of process shall be attempted within seventy-two hours of law enforcement's receipt of the order to every address provided by petitioner. Any law-enforcement agency that serves pleadings or orders pursuant to this section may receive the fee authorized therefor by Rule 4 of the Rules of Practice and Procedure for Domestic Violence Civil Proceedings. If service is not made, law enforcement shall continue to attempt service on the respondent until proper service is made.

§48-27-702. Law-enforcement officers to provide information, transportation and to report suspicions of animal cruelty.

(a) Any law-enforcement officer responding to an alleged incident of domestic violence shall inform the parties of the availability of the possible remedies provided by this article and the possible applicability of the criminal laws of this state. Any law-enforcement officer investigating an alleged incident of domestic violence shall advise the victim of such violence of the availability of the family protection shelter to which such person may be admitted.

(b) If there is reasonable cause to believe that a person is a victim of domestic violence or is likely to be a victim of domestic violence, a law-enforcement officer responding to an alleged incident of domestic violence shall, in addition to providing the information required in subsection (a) of this section, provide transportation for or facilitate transportation of the victim, upon the request of such victim, to a shelter or an appropriate court.

(c) Whenever a law-enforcement officer, pursuant to a response to an alleged incident of domestic violence, forms a reasonable suspicion that an animal is a victim of cruel or inhumane treatment, he or she shall report the suspicion and the grounds therefor to the county humane officer within twenty-four hours of the response to the alleged incident of domestic violence.

PART 8. RECORD-KEEPING BY LAW-ENFORCEMENT OFFICERS.

§48-27-801. Reports of domestic violence to state police.

(a) Each law-enforcement agency shall maintain records on all incidents of domestic violence reported to it and shall monthly make and deliver to the West Virginia state police a report on a form prescribed by the state police, listing all such incidents of domestic violence. Such reports shall include:

(1) The age and sex of the victim and the perpetrator of domestic violence;

(2) The relationship between the parties;

(3) The type and extent of abuse;

(4) The number and type of weapons involved;

(5) Whether the law-enforcement agency responded to the complaint and if so, the time involved, the action taken and the time lapse between the agency's action and the victim's request for assistance;

(6) Whether any prior reports have been made, received or filed regarding domestic violence on any prior occasion and if so, the number of such prior reports; and

(7) The effective dates and terms of any protective order issued prior to or following the incident to protect the victim: Provided, That no information which will permit the identification of the parties involved in any incident of domestic violence shall be included in such report.

(b) The West Virginia state police shall tabulate and analyze any statistical data derived from the reports made by law-enforcement agencies pursuant to this section and publish a statistical compilation in its annual uniform crime report, as provided for in section twenty-four, article two, chapter fifteen of this code. The statistical compilation shall include, but is not limited to, the following:

(1) The number of domestic violence complaints received;

(2) The number of complaints investigated;

(3) The number of complaints received from alleged victims of each sex;

(4) The average time lapse in responding to such complaints;

(5) The number of complaints received from alleged victims who have filed such complaints on prior occasions;

(6) The number of aggravated assaults and homicides resulting from such repeat incidents;

(7) The type of police action taken in disposition of the cases; and

(8) The number of alleged violations of protective orders.

§48-27-802. Maintenance of registry by state police.

(a) The West Virginia State Police shall maintain a registry in which it shall enter certified copies of protective orders entered by courts from every county in this state pursuant to the provisions of this article and of protection orders issued by a jurisdiction outside of this state pursuant to its law: *Provided,* That the provisions of this subsection are not effective until a central automated state law-enforcement information system is developed.

(b) Effective January 2, 2010, a court which enters a protective order pursuant to this article shall immediately register such order in the domestic violence database established pursuant to the provisions of section twenty-one, article one, chapter fifty-one of this code. A protected individual who obtains a protection order from a jurisdiction outside of this State pursuant to its law or his or her representative as provided in section five, article twenty-eight of this chapter may register that order with the West Virginia Supreme Court of Appeals for entry in the domestic violence database established pursuant to the provisions of section twenty-one, article one, chapter fifty-one of this code.

(c) Failure to register an order as provided in this section shall not affect its enforceability in any county or jurisdiction.

§48-27-803. Repealed.

PART 9. SANCTIONS.

§48-27-901. Civil contempt; violation of protective orders; order to show cause.

(a) Any party to a protective order or a legal guardian or guardian ad litem may file a petition for civil contempt alleging a violation of an order issued pursuant to the provisions of this article. The petition shall be filed in

the family court, if a family court entered an order or in the circuit court, if a circuit court entered the order, in the county in which the violation occurred or the county in which the order was issued.

(b) When a petition for an order to show cause is filed, a hearing on the petition shall be held within five days from the filing of the petition. Any order to show cause which is issued shall be served upon the alleged violator.

(c) Upon a finding of contempt, the court may order the violator to comply with specific provisions of the protective order and post a bond as surety for faithful compliance with the order. The bond may not be a personal recognizance bond and shall be in an amount that does not exceed the ability of the violator to post. The bond may not be waived by a fee waiver pursuant to the provisions of section one, article two, chapter fifty-nine of this code.

§48-27-902. Violations of protective orders; criminal complaints.

(a) Any person authorized to file a petition pursuant to section three hundred five of this article, and any person authorized to file a petition for civil contempt pursuant to section nine hundred one of this article may file a criminal complaint:

(1) Against a respondent who knowingly and willfully violates a provision of an emergency or final protective order entered pursuant to:

(A) subsection (a) or (b) of section five hundred two of this article;

(B) if the court has ordered such relief; subsection (2), (7) or (9) of section five hundred three of this article;

(C) subsection (b) or (c) of section five hundred nine, article five of this chapter; or

(D) subsection (b) or (c) of section six hundred eight, article five of this chapter;.

(2) Against a person who violates a condition of bail, probation or parole which has the express intent or effect of protecting the personal safety of a particular person or persons;

(3) Against a respondent who knowingly and willfully violates the terms of a protection order from another jurisdiction that is required to be enforced pursuant to section three, article twenty-eight of this chapter; or

(4) Against a person who, in violation of subdivision (3), subsection (a), section seven, article twenty-eight of this chapter, knowingly and willfully violates the terms of a condition of bail, probation or parole imposed in another state which has the express intent or effect of protecting the personal safety of a particular person or persons.

(b) If the court finds probable cause upon the complaint, the court shall issue a warrant for the arrest of the person charged.

§48-27-903. Misdemeanor offenses for violation of protective order; repeat offenses; penalties.

(a) A person is guilty of a misdemeanor if the person knowingly and willfully violates:

(1) A provision of an emergency or final protective order entered pursuant to:

(A) Subsection (a) or (b) of section five hundred two of this article;

(B) If the court has ordered such relief; subsection (2), (7), (9) or (14) of section five hundred three of this article;

(C) Subsection (b) or (c) of section five hundred nine, article five of this chapter; or

(D) Subsection (b) or (c) of section six hundred eight, article five of this chapter;

(2) A condition of bail, probation or parole which has the express intent or effect of protecting the personal safety of a particular person or persons; or

(3) A restraining order entered pursuant to section nine-a, article two, chapter sixty-one of this code.

Upon conviction thereof the person shall be confined in jail for a period of not less than one day nor more than one year, which jail term shall include actual confinement of not less than twenty-four hours, and shall be fined not less than $250 nor more than $2,000.

(b) Any person who is convicted of a second offense under subsection (a) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than three months nor more than one year, which jail term shall include actual confinement of not less than thirty days, and fined not less than $500 nor more than $3,000.

(c) A respondent who is convicted of a third or subsequent offense under subsection (a) of this section when the violation occurs within ten years of a prior conviction of this offense is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail not less than six months nor more than one year, which jail term shall include actual confinement of not less than six months, and fined not less than $500 nor more than $4,000.

PART 10. ARRESTS.

§48-27-1001. Arrest for violations of protective orders.

(a) When a law-enforcement officer observes any respondent abuse the petitioner or minor children or the respondent's physical presence at any location in knowing and willful violation of the terms of an emergency or final protective order issued under the provisions of this article or section 5-509 or 5-608 of this chapter granting the relief pursuant to the provisions of this article, in knowing and willful violation of the terms of a protection order from another jurisdiction that is required to be enforced pursuant to section four, article twenty-eight of this chapter, he or she shall immediately arrest the respondent.

(b) When a family or household member is alleged to have committed a violation of the provisions of section 27-903 or 28-7, a law-enforcement officer may arrest the perpetrator for said offense where:

(1) The law-enforcement officer has observed credible corroborative evidence, as defined in subsection 27-1002(b), that the offense has occurred; and

(2) The law-enforcement officer has received, from the victim or a witness, a verbal or written allegation of the facts constituting a violation of section 27-903; or

(3) The law-enforcement officer has observed credible evidence that the accused committed the offense.

(c) Any person who observes a violation of a protective order as described in this section, or the victim of such abuse or unlawful presence, may call a local law-enforcement agency, which shall verify the existence of a current order, and shall direct a law-enforcement officer to promptly investigate the alleged violation.

(d) Where there is an arrest, the officer shall take the arrested person before a circuit court or a magistrate and, upon a finding of probable cause to believe a violation of an order as set forth in this section has occurred, the court or magistrate shall set a time and place for a hearing in accordance with the West Virginia rules of criminal procedure.

§48-27-1002. Arrest in domestic violence matters; conditions.

(a) Notwithstanding any provision of this code to the contrary, if a person is alleged to have committed a violation of the provisions of subsection (a) or (b), section twenty-eight, article two, chapter sixty-one of this code against a family or household member, in addition to any other authority to arrest granted by this code, a law-enforcement officer has authority to arrest that person without first obtaining a warrant if:

(1) The law-enforcement officer has observed credible corroborative evidence that an offense has occurred; and either:

(2) The law-enforcement officer has received, from the victim or a witness, an oral or written allegation of facts constituting a violation of section twenty-eight, article two, chapter sixty-one of this code; or

(3) The law-enforcement officer has observed credible evidence that the accused committed the offense.

(b) For purposes of this section, credible corroborative evidence means evidence that is worthy of belief and corresponds to the allegations of one or more elements of the offense and may include, but is not limited to, the following:

(1) *Condition of the alleged victim.* -- One or more contusions, scratches, cuts, abrasions, or swellings; missing hair; torn clothing or clothing in disarray consistent with a struggle; observable difficulty in breathing or breathlessness consistent with the effects of choking or a body blow; observable difficulty in movement consistent with the effects of a body blow or other unlawful physical contact.

(2) *Condition of the accused.* -- Physical injury or other conditions similar to those set out for the condition of the victim which are consistent with the alleged offense or alleged acts of self-defense by the victim.

(3) *Condition of the scene.* -- Damaged premises or furnishings; disarray or misplaced objects consistent with the effects of a struggle.

(4) *Other conditions.* -- Statements by the accused admitting one or more elements of the offense; threats made by the accused in the presence of an officer; audible evidence of a disturbance heard by the dispatcher or other agent receiving the request for police assistance; written statements by witnesses.

(c) Whenever any person is arrested pursuant to subsection (a) of this section, the arrested person shall be taken before a magistrate within the county in which the offense charged is alleged to have been committed in a manner consistent with the provisions of Rule 1 of the Administrative Rules for the Magistrate Courts of West Virginia.

(d) If an arrest for a violation of subsection (c), section twenty-eight, article two, chapter sixty-one of this code is authorized pursuant to this section, that fact constitutes prima facie evidence that the accused constitutes a threat or danger to the victim or other family or household members for the purpose of setting conditions of bail pursuant to section seventeen-c, article one-c, chapter sixty-two of this code.

(e) Whenever any person is arrested pursuant to the provisions of this article or for a violation of an order issued pursuant to section five hundred nine or subsections (b) and (c), of section six hundred eight, article five of this chapter the arresting officer, subject to the requirements of the Constitutions of this state and of the United States:

(1) Shall seize all weapons that are alleged to have been involved or threatened to be used in the commission of domestic violence;

(2) May seize a weapon that is in plain view of the officer or was discovered pursuant to a consensual search, as necessary for the protection of the officer or other persons; and

(3) May seize all weapons that are possessed in violation of a valid protective order.

§48-27-1003. Nonjudicial enforcement of order.

(a) A law-enforcement officer of this state, upon determining that there is probable cause to believe that a valid protective order exists and that the order has been violated, shall enforce the order pursuant to any authority to arrest under the code. Presentation of a protective order that identifies both the protected individual and the respondent and that appears, on its face, to be authentic and currently in effect constitutes probable cause to believe that a valid protective order exists. For the purposes of this section, the protective order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protective order is not required for enforcement.

(b) If a protective order is not presented, a law-enforcement officer of this state may consider other credible information in determining whether there is probable cause to believe that a valid protective order exists.

(c) If a law-enforcement officer of this state determines that an otherwise valid protective order cannot be enforced because the respondent has not been notified of or served with the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order upon the respondent and allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

§48-27-1004. Immunity.

This state or a local governmental agency, or a law-enforcement officer, prosecuting attorney, clerk of court or any state or local governmental official acting in an official capacity, is immune from civil and criminal liability for an act or omission arising out of the enforcement of a protective order or the detention or arrest of an alleged violator of a protective order if the act or omission was done in good faith in an effort to comply with this article.

PART 11. MISCELLANEOUS PROVISIONS.

§48-27-1101. Rules of practice and procedure; forms to be provided; operative date.

(a) Pleadings, practice and procedure in domestic violence matters before the court are governed by the rules of practice and procedure for domestic violence civil proceedings promulgated by the West Virginia Supreme Court of Appeals.

(b) The West Virginia Supreme Court of Appeals shall prescribe forms which are necessary and convenient for proceedings pursuant to this article and the court shall distribute such forms to the clerk of the circuit court, the secretary-clerk of the family court and the clerk of magistrate court of each county within the state.

§48-27-1102. Authorization for the promulgation of legislative rules.

The governor's committee on crime, delinquency and correction shall develop and promulgate rules for state, county and municipal law-enforcement officers, law-enforcement agencies and communications and emergency operations centers which dispatch law-enforcement officers with regard to domestic violence: *Provided*, That such rules and procedures must be consistent with the priority criteria prescribed by generally applicable department procedures. Prior to the publication of proposed rules, the governor's committee on crime, delinquency and correction shall convene a meeting or meetings of an advisory committee to assist in the development of the rules. The advisory committee shall be composed of persons invited by the committee to represent state, county and local law-enforcement agencies and officers, to represent magistrates and court officials, to represent victims of domestic violence, to represent shelters receiving funding pursuant to article 26-101, *et seq.* of this chapter, to represent communications and emergency operations centers that dispatch law-enforcement officers and to represent other persons or organizations who, in the discretion of the

committee, have an interest in the rules. The rules and the revisions thereof as provided in this section shall be promulgated as legislative rules in accordance with chapter twenty-nine-a of this code. The committee shall meet at least annually to review the rules and to propose revisions as a result of changes in law or policy.

§48-27-1103. Training of law-enforcement officers in domestic violence.

All law-enforcement officers shall receive training relating to response to calls involving domestic violence.

§48-27-1104. Judicial education on domestic violence.

All circuit court judges may and magistrates and family courts shall receive a minimum of three hours training each year on domestic violence which shall include training on the psychology of domestic violence, the battered wife and child syndromes, sexual abuse, courtroom treatment of victims, offenders and witnesses, available sanctions and treatment standards for offenders, and available shelter and support services for victims. The supreme court of appeals may provide such training in conjunction with other judicial education programs offered by the supreme court.

§48-27-1105. Rule for time-keeping requirements.

The supreme court of appeals shall promulgate a procedural rule to establish time-keeping requirements for magistrates, magistrate court clerks and magistrate assistants so as to assure the maximum funding of incentive payments, grants and other funding sources available to the state for the processing of cases filed for the establishment of temporary orders of child support pursuant to the provisions of this article.

2. W. Va. Code §§ 48-28-1, *et seq.* -- Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

§48-28-1. Title.

This article may be cited as the "Uniform Interstate Enforcement of Domestic Violence Protection Orders Act".

§48-28-2. Definitions.

In this article:

(1) "Court" means a circuit court, family court or magistrate court which has jurisdiction over domestic violence proceedings pursuant to article twenty-seven of this chapter.

(2) "Foreign protection order" means a protection order issued by a tribunal of another state.

(3) "Issuing state" means the state whose tribunal issues a protection order.

(4) “Mutual foreign protection order” means a foreign protection order that includes provisions in favor of both the protected individual seeking enforcement of the order and the respondent.

(5) “Protected individual” means an individual protected by a protection order.

(6) “Protection order” means an injunction or other order, issued by a tribunal under the domestic violence, family violence or antistalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to another individual.

(7) “West Virginia protective order” means an order issued pursuant to article twenty-seven of this chapter or to section five hundred nine, article five of this chapter.

(8) “Respondent” means the individual against whom enforcement of a protection order is sought.

(9) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band that has jurisdiction to issue protection orders.

(10) “Tribunal” means a court, agency or other entity authorized by law to issue or modify a protection order.

§48-28-3. Judicial enforcement of order.

(a) A person authorized by the law of this state to seek enforcement of a West Virginia protective order may seek enforcement of a valid foreign protection order in a court of this state. The court shall enforce the terms of the order, including terms that provide relief that a court of this state would lack power to provide but for this section. The court shall enforce the order, whether the order was obtained by independent action or in another proceeding, if it was issued in response to a complaint, petition or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the court shall follow the procedures of this state for the enforcement of West Virginia protective orders.

(b) A court of this state may not enforce a foreign protection order issued by a tribunal of a state that does not recognize the standing of a protected individual to seek enforcement of the order.

(c) A court of this state shall enforce the provisions of a valid foreign protection order which govern custody and visitation if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing state or under federal law and with the requirements set out in subsection (d) of this section.

(d) A foreign protection order is valid if it:

(1) Identifies the protected individual and the respondent;

(2) Is currently in effect;

(3) Was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing state; and

(4) Was issued after the respondent was given reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an order ex parte, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the order was issued in a manner consistent with the respondent's rights to due process of law.

(e) A foreign protection order which appears authentic on its face is presumed to be valid.

(f) Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order.

(g) A court of this state may enforce provisions of a mutual foreign protection order which favor a respondent only if:

(1) The respondent filed a written pleading seeking a protection order from the tribunal of the issuing state; and

(2) The tribunal of the issuing state made specific findings in favor of the respondent.

§48-28-4. Nonjudicial enforcement of order.

(a) A law-enforcement officer of this state, upon determining that there is probable cause to believe that a valid foreign protection order exists and that the order has been violated, shall enforce the order as if it were a West Virginia protective order. Presentation of a foreign protection order that identifies both the protected individual and the respondent and that appears, on its face, to be authentic and currently in effect constitutes probable cause to believe that a valid foreign protection order exists. For the purposes of this section, the protection order may be inscribed on a tangible medium or may have been stored in an electronic or other medium if it is retrievable in perceivable form. Presentation of a certified copy of a protection order is not required for enforcement.

(b) If a foreign protection order is not presented, a law-enforcement officer of this state may consider other credible information in determining whether there is probable cause to believe that a valid foreign protection order exists.

(c) If a law-enforcement officer of this state determines that an otherwise valid foreign protection order cannot be enforced because the respondent has not been notified of or served with the order, the officer shall inform the respondent of the order, make a reasonable effort to serve the order upon the respondent and allow the respondent a reasonable opportunity to comply with the order before enforcing the order.

(d) Registration or filing of an order in this state is not required for the enforcement of a valid foreign protection order pursuant to this article.

§48-28-5. Registration of order.

(a) Any individual may register a foreign protection order in this state by:

Presenting a certified copy of the order to the West Virginia Supreme Court of Appeals for registration in accordance with the provisions of section eight hundred two, article twenty-seven of this chapter.

(b) An individual registering a foreign protection order shall file an affidavit by the protected individual stating that, to the best of the protected individual's knowledge, the order is currently in effect.

(c) Upon receipt of a foreign protection order for registration, the West Virginia Supreme Court of Appeals shall:

(1) Register the order in accordance with the provisions of this section and of section eight hundred two, article twenty-seven of this chapter;

(2) Furnish to the individual registering the order a copy of the proof of registration of the order.

(d) A registered foreign protection order that is shown to be inaccurate or not currently in effect must be corrected or removed from the registry.

(e) A foreign protection order registered under this article may be entered in any existing state or federal registry of protection orders in accordance with applicable law.

(f) A fee may not be charged for the registration of a foreign protection order.

§48-28-6. Immunity.

This state or a local governmental agency, or a law-enforcement officer, prosecuting attorney, clerk of court or any state or local governmental official acting in an official capacity, is immune from civil and criminal liability for an act or omission arising out of the registration or enforcement of a foreign protection order or the detention or arrest of an alleged violator of a foreign protection order if the act or omission was done in good faith in an effort to comply with this article.

§48-28-7. Criminal offenses and penalties.

(a) A respondent who abuses, as that term is defined in section two hundred two, article twenty-seven of this chapter, a protected individual or who is physically present at any location in knowing and willful violation of the terms of: (1) A valid foreign protection order; (2) a protection order entered in any pending foreign divorce action which enjoins the offending party from molesting or interfering with another party or interfering with the custodial or visitation rights of another person; or (3) a condition of bail, probation or parole imposed in another state which has the express intent or effect of protecting the personal safety of a particular person or persons is guilty of a misdemeanor and, upon conviction thereof, shall be confined in the county or regional jail for a period of not less than one day nor more than one year, which jail term shall include actual confinement of not less than twenty-four hours, and shall be fined not less than two hundred fifty dollars nor more than two thousand dollars.

(b) A respondent who is convicted of a second or subsequent offense under subsection (a) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be confined in the county or regional jail for not less than three months nor more than one year, which jail term shall include actual confinement of not less than twenty-four hours, and fined not less than five hundred dollars nor more than three thousand dollars.

§48-28-8. Other remedies.

A protected individual who pursues remedies under this article is not precluded from pursuing other legal or equitable remedies against the respondent.

§48-28-9. Uniformity of application and construction.

In applying and construing this act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§48-28-10. Transitional provision.

This article applies to:

(a) Foreign protection orders issued before the effective date of this article; and

(b) Continuing actions for enforcement of foreign protection orders commenced before the effective date of this article. A request for enforcement, made on or after the effective date of this article, of a foreign protection order based on violations which occurred before the effective date of this article is governed by this article.

3. W. Va. Code §§ 48-28A-101, *et seq.* -- Address Confidentiality Program

§48-28A-101. Purpose.

The Legislature finds that persons attempting to escape from actual or threatened domestic violence, sexual assault, or stalking frequently find it necessary to establish a new address in order to prevent their assailants or probable assailants from finding them. The purpose of this article is to enable state and local agencies to respond to requests for public records without disclosing the location of a victim of domestic abuse, sexual assault, or stalking; to enable interagency cooperation with the Secretary of State in providing address confidentiality for victims of domestic abuse, sexual assault, or stalking; and to enable state and local agencies to accept an address designated by the Secretary of State by a program participant as a substitute for a residential or mailing address.

§48-28A-102. Definitions.

As used in this article, unless the context otherwise indicates, the following terms have the following meanings.

(1) “Application assistant” means an employee of a state or local agency, or of a nonprofit program that provides counseling, referral, shelter or other specialized service to victims of domestic abuse, rape, sexual assault or stalking, and who has been designated by the respective agency or nonprofit program, and trained, accepted and registered by the Secretary of State to assist individuals in the completion of program participation applications.

(2) “Designated address” means the address assigned to a program participant by the Secretary of State pursuant to section one hundred three of this article.

(3) “Mailing address” means an address that is recognized for delivery by the United States Postal Service.

(4) “Program” means the Address Confidentiality Program established by this article.

(5) “Program participant” means a person certified by the Secretary of State to participate in the program.

(6) “Residential Address” means a residential street, school or work address of an individual, as specified on the individual's application to be a program participant under this article.

§48-28A-103. Address Confidentiality Program.

(a) On or after the effective date of the enactment of this article, the Secretary of State shall create an Address Confidentiality Program to be staffed by full time employees who have been subjected to a criminal history records search.

(b) Upon recommendation of an application assistant, an adult person, a parent or guardian acting on behalf of a minor, or a guardian acting on behalf of an incapacitated person may apply to the Secretary of State to have a designated address assigned by the Secretary of State.

(c) The Secretary of State may approve an application only if it is filed with the office of the Secretary of State in the manner established by rule and on a form prescribed by the Secretary of State. A completed application must contain the following information:

(1) The application preparation date, the applicant's signature and the signature and registration number of the application assistant who assisted the applicant in applying to be a program participant;

(2) A designation of the Secretary of State as agent for purposes of service of process and for receipt of certain first-class mail;

(3) The mailing address where the applicant may be contacted by the Secretary of State or a designee and the telephone number or numbers where the applicant may be contacted by the Secretary of State or the Secretary of State's designee; and

(4) A residential or mailing address or both types of addresses that the applicant requests not be disclosed for the reason that disclosure will jeopardize the applicant's safety or increase the risk of violence to the applicant or members of the applicant's household.

(d) Upon receipt of a properly completed application, the Secretary of State may certify the applicant as a program participant. A program participant is certified for a period of four years following the date of initial certification unless the certification is withdrawn or invalidated before that date. The Secretary of State shall send notification of a lapsing certification and a reapplication form to a program participant at least four weeks prior to the expiration of the program participant's certification.

(e) The Secretary of State shall forward to the program participant first-class mail received at the program participant's designated address.

(f)(1) An applicant may not file an application knowing that it:

(A) Contains false or incorrect information; or

(B) Falsely claims that disclosure of either the applicant's residential or mailing address or both types of addresses threatens the safety of the applicant or the applicant's children or the minor or incapacitated person on whose behalf the application is made.

(2) An application assistant may not assist or participate in the filing of an application that the application assistant knows:

(A) Contains false or incorrect information; or

(B) Falsely claims that disclosure of either the applicant's residential or mailing address or both types of addresses threatens the safety of the applicant or the applicant's children or the minor or incapacitated person on whose behalf the application is made.

(g) A person who violates the provisions of subsection (f) of this section shall be guilty of a misdemeanor, and upon conviction thereof, shall be confined in jail for a period of not more than one year.

§48-28A-104. Cancellation.

Certification for the program may be canceled if one or more of the following conditions apply:

(1) If the program participant obtains a name change, unless the program participant provides the Secretary of State with documentation of a legal name change within ten business days of the name change;

(2) If there is a change in the residential address of the program participant from the one listed on the application, unless the program participant provides the Secretary of State with notice of the change in a manner prescribed by the Secretary of State; or

(3) The applicant or program participant violates subsection (f), section one hundred three of this article.

§48-28A-105. Use of designated address.

(a) Upon demonstration of a program participant's certification in the program, state and local agencies and the courts of this state shall accept the designated address as a program participant's address for the purposes of creating a new public record unless the Secretary of State has determined that:

(1) The agency or court has a bona fide statutory or administrative requirement for the use of the program participant's residential or mailing address, such that the agency or court is unable to fulfill its statutory duties and obligations without the program participant's residential or mailing address; and

(2) The program participant's residential or mailing address will be used only for those statutory and administrative purposes, and shall be kept confidential, subject to the confidentiality provisions of section one hundred eight of this article.

(b) Notwithstanding the provisions of subsection (a) and upon the request of the Secretary of State, the Division of Motor Vehicles shall use the designated address for the purposes of issuing a driver's license or identification card: *Provided*, That the division of motor vehicles shall not be prohibited from collecting and retaining a program participant's residential or mailing address or both addresses to be used only for statutory and administrative purposes. Any residential or mailing address of a program participant collected and retained pursuant to this subsection shall be kept confidential, subject to the provisions of section one hundred eight of this article.

(c) A designated address may be a post office box and may be used by a participant for voter registration purposes, as long as the Secretary of State has on file for the participant a residential and mailing address, as provided in section one hundred three of this article.

§48-28A-106. Disclosure to law enforcement and state agencies.

(a) The Secretary of State may make a program participant's residential or mailing address available for inspection or copying, under the following circumstances:

(1) Upon request of a law-enforcement agency in the manner provided for by rule; or

(2) Upon request of the head of a state agency or designee in the manner provided for by rule and upon a showing of a bona fide statutory or administrative requirement for the use of the program participant's residential or mailing address, such that the agency head or designee is unable to fulfill statutory duties and obligations without the program participant's residential or mailing address.

§48-28A-107. Disclosure pursuant to court order or canceled certification.

(a) The Secretary of State shall make a program participant's residential or mailing address or both addresses available for inspection or copying to a person identified in a court order, upon receipt of a certified court order that specifically requires the disclosure of a particular program participant's residential or mailing address or both addresses and the reasons for the disclosure; or

(b) The Secretary of State may make a program participant's residential or mailing address or both addresses available for inspection or

copying if the program applicant or participant's certification has been canceled because the applicant or program participant has violated subsection (f), section one hundred three of this article.

§48-28A-108. Confidentiality.

A program participant's application and supporting materials are not a public record and shall be kept confidential by the Secretary of State. Any employee of any agency or court who willfully breaches the confidentiality of these records or willfully discloses the name, residential or mailing address both or addresses of a program participant in violation of the provisions of this article, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars or confined in jail not more than one year, or both fined and confined.

§48-28A-109. Secretary of state; liability.

This article creates no liability upon the Secretary of State for any transaction compromised by any illegal act or inappropriate uses associated with this article.

§48-28A-110. Rules.

The Secretary of State is hereby directed to propose legislative rules and emergency rules implementing the provisions of this article in accordance with the provisions of article three, chapter twenty-nine-a of this code.

4. W. Va. Code §§ 53-8-1, *et seq.* -- Personal Safety Orders

§53-8-1. Definitions.

In this article the following words have the meanings indicated.

(1) *Final personal safety order*. -- "Final personal safety order" means a personal safety order issued by a magistrate under section seven of this article.

(2) *Incapacitated adult*. -- "Incapacitated adult" means any person who by reason of physical, mental or other infirmity is unable to physically carry on the daily activities of life necessary to sustaining life and reasonable health.

(3) *Law-enforcement officer*. -- "Law-enforcement officer" means any duly authorized member of a law-enforcement agency who is authorized to maintain public personal safety and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof, other than parking ordinances.

(4) *Petitioner*. -- "Petitioner" means an individual who files a petition under section four of this article.

(5) *Place of employment*. -- "Place of employment" includes the grounds, parking areas, outbuildings and common or public areas in or surrounding the place of employment.

(6) *Residence*. -- "Residence" includes the yard, grounds, outbuildings and common or public areas in or surrounding the residence.

(7) *Respondent*. -- "Respondent" means an individual alleged in a petition to have committed an act specified in subsection (a), section four of this article against a petitioner.

(8) *School*. -- "School" means an educational facility comprised of one or more buildings, including school grounds, a school bus or any school-sponsored function or extracurricular activities. For the purpose of this subdivision, "school grounds" includes the land on which a school is built together with such other land used by students for play, recreation or athletic events while attending school. "Extracurricular activities" means voluntary activities sponsored by a school, a county board or an organization sanctioned by a county board or the State Board of Education and include, but are not limited to, preparation for and involvement in public performances, contests, athletic competitions, demonstrations, displays, organizations and clubs.

(9) *Sexual offense*. -- "Sexual offense" means the commission of any of the following sections:

(A) Section nine, article eight, chapter sixty-one of this code;

(B) Section twelve, article eight, chapter sixty-one of this code;

(C) Section two, article eight-a, chapter sixty-one of this code;

(D) Section four, article eight-a, chapter sixty-one of this code;

(E) Section five, article eight-a, chapter sixty-one of this code;

(F) Section three, article eight-b, chapter sixty-one of this code;

(G) Section four, article eight-b, chapter sixty-one of this code;

(H) Section five, article eight-b, chapter sixty-one of this code;

(I) Section seven, article eight-b, chapter sixty-one of this code;

(J) Section eight, article eight-b, chapter sixty-one of this code;

(K) Section nine, article eight-b, chapter sixty-one of this code;

(L) Section two, article eight-c, chapter sixty-one of this code;

(M) Section three, article eight-c, chapter sixty-one of this code;

(N) Section three-a, article eight-d, chapter sixty-one of this code;

(O) Section five, article eight-d, chapter sixty-one of this code; and

(P) Section six, article eight-d, chapter sixty-one of this code.

(10) *Temporary personal safety order*. -- "Temporary personal safety order" means a personal safety order issued by a magistrate under section five of this article.

§53-8-2. Confidentially of proceedings.

(a) *General Provisions*. -- All orders, findings, pleadings, recordings, exhibits, transcripts or other documents contained in a court file are confidential and are not available for public inspection: *Provided,* That unless the file is sealed pursuant to section eighteen of this article or access is

otherwise prohibited by order, any document in the file shall be available for inspection and copying by the parties, attorneys of record, guardians ad litem, designees authorized by a party in writing and law enforcement. A magistrate or circuit judge may open and inspect the entire contents of the court file in any case pending before the magistrate's or judge's court. When sensitive information has been disclosed in a hearing, pleading or document filing, the court may order such information sealed in the court file. Sealed court files shall be opened only pursuant to section eighteen of this article.

(b)(1) *Proceedings are not open to the public*. -- Hearings conducted pursuant to this article are closed to the general public except that persons whom the court determines have a legitimate interest in the proceedings may attend.

(2) A person accompanying the petitioner may not be excluded from being present if his or her presence is desired by the person seeking a petition unless the person's behavior is disruptive to the proceeding.

(c) *Orders permitting examination or copying of file contents*. -- Upon written motion, for good cause shown, the court may enter an order permitting a person who is not permitted access to a court file under subsection (a) to examine and/or copy documents in a file. Such orders shall set forth specific findings which demonstrate why the interests of justice necessitate the examination, copying, or both, and shall specify the particular documents to be examined and/or copied and the arrangements under which such examination, copying, or both, may take place.

(d) *Obtaining confidential records*. -- Unless both the petitioner and the respondent waive confidentiality in writing, records contained in the court file may not be obtained by subpoena but only by court order and upon full compliance with statutory and case law requirements.

§53-8-3. Who may file; exclusivity; applicability of article.

(a) *Who may file a petition*. -- A petition for relief under this article may be filed by:

(1) A person seeking relief under this article for herself or himself; or

(2) A parent, guardian or custodian on the behalf of a minor child or an incapacitated adult.

(b) *Other remedies generally not precluded*. -- By proceeding under this article, a petitioner is not limited to or precluded from pursuing any other legal remedy.

(c) *Circumstances where article is inapplicable*. -- This article does not apply to a petitioner who is a person eligible for relief under article twenty-seven, chapter forty-eight of this code.

(d) *Right to file*. -- No person may be refused the right to file a petition under the provisions of this article. No person may be denied relief under the provisions of this article if she or he presents facts sufficient under the provisions of this article for the relief sought.

§53-8-4. Petition seeking relief.

(a) *Underlying acts*. -- A petitioner may seek relief under this article by filing with a magistrate court a petition that alleges the commission of any of the following acts against the petitioner by the respondent:

(1) A sexual offense or attempted sexual offense as defined in section one of this article;

(2) A violation of subsection (a), section nine-a, article two, chapter sixty-one of this code; or

(3) repeated credible threats of bodily injury when the person making the threats knows or has reason to know that the threats cause another person to reasonably fear for his or her safety.

(b) *Contents*. --

The petition shall:

(1) Be verified and provide notice to the petitioner that an individual who knowingly provides false information in the petition is guilty of a misdemeanor and, on conviction, is subject to the penalties specified in subsection (d) of this section;

(2) Subject to the provisions of subsection (c) of this section, contain the address of the petitioner; and

(3) Include all information known to the petitioner of:

(A) The nature and extent of the act specified in subsection (a) of this section for which the relief is being sought, including information known to the petitioner concerning previous harm or injury resulting from an act specified in subsection (a) of this section by the respondent;

(B) Each previous and pending action between the parties in any court; and

(C) The whereabouts of the respondent.

(c) *Address may be stricken*. -- If, in a proceeding under this article, a petitioner alleges, and the court finds, that the disclosure of the address of the petitioner would risk further harm to the petitioner or a member of the petitioner's household, that address may be stricken from the petition and omitted from all other documents filed with, or transferred to, a court.

(d) *Providing false information*. -- An individual who knowingly provides false information in a petition filed under this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $50 nor more than $1,000 or confined in jail not more than ninety days, or both.

(e) *Withdrawal or dismissal of a petition prior to adjudication operates as a dismissal without prejudice*. -- No action for a personal safety order may be dismissed because the respondent is being prosecuted for a crime against the petitioner. For any action commenced under this article, dismissal of a case or a finding of not guilty, does not require dismissal of the action for a civil protection order.

(f) *Venue*. -- The action may be heard in the county in which any underlying act occurred for which relief is sought in the petition, in the county in which the respondent is living, or in the county in which the petitioner is living, either temporarily or permanently.

§53-8-5. Temporary personal safety orders.

(a) *Authorized; forms of relief available*. --

(1) If after a hearing on a petition, whether ex parte or otherwise, a magistrate finds that there is reasonable cause to believe that the respondent has committed an act specified in subsection (a), section four of this article, against the petitioner, the magistrate shall issue a temporary personal safety order to protect the petitioner.

(2) The temporary personal safety order may include any or all of the following relief:

(A) Order the respondent to refrain from committing or threatening to commit an act specified in subsection (a), section four of this article against the petitioner;

(B) Order the respondent to refrain from contacting, attempting to contact or harassing the petitioner directly, indirectly or through third parties regardless of whether those third parties know of the order;

(C) Order the respondent to refrain from entering the residence of the petitioner;

(D) Order the respondent to remain away from the place of employment, school or residence of the petitioner: *Provided*, That when the respondent is alleged to have committed an act specified in subdivision (2), subsection (a), section four of this article, the magistrate may not prohibit the respondent from entering the respondent's place of employment;

(E) Order the respondent not to visit, assault, molest or otherwise interfere with the petitioner and, if the petitioner is a child, the petitioner's siblings and minors residing in the household of the petitioner;

(F) The court, in its discretion, may prohibit a respondent from possessing a firearm as defined in section seven, article seven, chapter sixty-one of this code if:

(i) A weapon was used or threatened to be used in the commission of the offense predicating the petitioning for the personal safety order;

(ii) The respondent has violated any prior order as specified under this article; or

(iii) The respondent has been convicted of an offense involving the use of a firearm;

(G) Order either party to pay filing fees and costs of a proceeding pursuant to section thirteen of this article.

(3) If the magistrate issues an order under this section, the order shall contain only the relief necessary to protect the petitioner.

(b) *Immediate*. -- The temporary personal safety order shall be immediately served on the respondent by law enforcement, or at the option of the petitioner, pursuant to rules promulgated pursuant to section fifteen of this article.

(c) *Length of effectiveness*. --

(1) The temporary personal safety order shall be effective for not more than ten days after service of the order.

(2) The magistrate may extend the temporary personal safety order to effectuate service of the order or for other good cause. The failure to obtain service upon the respondent does not constitute a basis to dismiss the petition.

(d) *Final personal safety order hearing*. -- The magistrate may proceed with a final personal safety order hearing instead of a temporary personal safety order hearing if:

(1)(A) The respondent appears at the hearing; or

(B) The court otherwise has personal jurisdiction over the respondent; and

(2) The petitioner and the respondent expressly consent to waive the temporary personal safety order hearing.

§53-8-6. Respondent's opportunity to be heard; notice to respondent.

(a) *Respondent's opportunity to be heard*. -- A respondent shall have an opportunity to be heard on the question of whether the magistrate should issue a final personal safety order subject to the provisions of this section.

(b) *Personal safety order hearing*. -- Date and time; notice.

(1)(A) The temporary personal safety order shall state the date and time of the final personal safety order hearing.

(B) Unless continued for good cause, the final personal safety order hearing shall be held no later than ten days after the temporary personal safety order is served on the respondent.

(2) The temporary personal safety order shall include notice to the respondent:

(A) In at least ten-point bold type, that if the respondent fails to appear at the final personal safety order hearing, the respondent may be served by first-class mail at the respondent's last known address with the final personal safety order and all other notices concerning the final personal safety order;

(B) Specifying all the possible forms of relief under subsection (d) of section seven, that the final personal safety order may contain;

(C) That the final personal safety order shall be effective for the period stated in the order, not to exceed two years; and

(D) In at least ten-point bold type, that the respondent must notify the court in writing of any change of address.

§53-8-7. Personal safety hearing; forms of relief.

(a) *Final personal safety order hearing*. --

Proceeding; *issuance of order*. -- If the respondent appears for the final personal safety order hearing, has been served with a temporary personal safety order or the respondent waives personal service, the magistrate:

(1) May proceed with the final personal safety order hearing; and

(2) May issue a final personal safety order to protect the petitioner if the court finds by a preponderance of the evidence that:

(A)(i) The respondent has committed an act specified in subsection (a), section four of this article against the petitioner; and

(ii) The petitioner has a reasonable apprehension of continued unwanted or unwelcome contacts by the respondent; or

(B) The respondent consents to the entry of a personal safety order.

(b) A final personal safety order may be issued only to an individual who has filed a petition or on whose behalf a petition was filed under section three of this article.

(c) In cases where both parties file a petition under section four of this article, the court may issue mutual personal safety orders if the court finds by a preponderance of the evidence that:

(1) Each party has committed an act specified in subsection (a), section four of this article against the other party; and

(2) Each party has a reasonable apprehension of continued unwanted or unwelcome contacts by the other party.

(d) *Personal safety order -- Forms of relief*. --

(1) The final personal safety order may include any or all of the following relief:

(A) Order the respondent to refrain from committing or threatening to commit an act specified in subsection (a), section four of this article against the petitioner;

(B) Order the respondent to refrain from contacting, attempting to contact or harassing the petitioner directly, indirectly, or through third parties regardless of whether those third parties know of the order;

(C) Order the respondent to refrain from entering the residence of the petitioner;

(D) Order the respondent to remain away from the place of employment, school or residence of the petitioner;

(E) Order the respondent not to visit, assault, molest or otherwise interfere with the petitioner and, if the petitioner is a child, the petitioner's siblings and minors residing in the household of the petitioner;

(F) The court, in its discretion, may prohibit a respondent from possessing a firearm as defined in section seven, article seven, chapter sixty-one of this code if:

(i) A weapon was used or threatened to be used in the commission of the offense predicating the petitioning for the personal safety order;

(ii) The respondent has violated any prior order as specified under this article; or

(iii) The respondent has been convicted of an offense involving the use of a firearm; and

(G) Order either party to pay filing fees and costs of a proceeding pursuant to section thirteen of this article.

(2) If the magistrate issues an order under this section, the order shall contain only the relief necessary to protect the petitioner.

(e) *Personal safety order -- Service*. --

(1) A copy of the final personal safety order shall be served on the petitioner, the respondent, the appropriate law-enforcement agency and any other person the court determines is appropriate, including a county board of education, in open court or, if the person is not present at the final personal safety order hearing, by first-class mail to the person's last known address or by other means in the discretion of the court.

(2)(A) A copy of the final personal safety order served on the respondent in accordance with subdivision (1) of this subsection or the hearing of the announcement of the court's ruling in court, constitutes actual notice to the respondent of the contents of the final personal safety order.

(B) Service is complete upon mailing.

(f) *Length of effectiveness*. -- All relief granted in a final personal safety order shall be effective for the period stated in the order, not to exceed two years.

§53-8-8. Modification and rescission.

(a) A personal safety order may be modified or rescinded during the term of the personal safety order after:

(1) Giving notice to the petitioner and the respondent; and

(2) A hearing.

(b) Modification may include extending the term of the personal safety order if the order was previously issued for a term of less than the two-year maximum term set forth in section seven of this article.

§53-8-9. Appeals.

(a) If a magistrate grants or denies relief under a petition filed under this article, a respondent or a petitioner may appeal to the circuit court for the county where the magistrate court is located.

(b) An appeal taken under this section shall be heard de novo in the circuit court.

(c) (1) If an appeal is filed under this section, the magistrate court judgment shall remain in effect until superseded by a judgment of the circuit court; and

(2) Unless the circuit court orders otherwise, modification or enforcement of the magistrate court order shall be by the magistrate court.

§53-8-10. Statement concerning violations.

A temporary personal safety order and final personal safety order issued under this article shall state that a violation of the order may result in:

(1) Criminal prosecution; and

(2) Incarceration, fine or both.

§53-8-11. Penalties.

(a) *Fines or incarceration*. -- An individual who fails to comply with the relief granted in a temporary personal safety order or a final personal safety order entered pursuant to this article is guilty of a misdemeanor and, upon conviction thereof, shall:

(1) For a first offense, be fined not more than $1,000 or confined in jail not more than ninety days, or both; and

(2) For a second or subsequent offense, be fined not more than $2,500 or confined in jail not more than one year, or both.

(b) *Arrest*. -- A law-enforcement officer shall arrest with or without a warrant and take into custody an individual who the officer has probable cause to believe is in violation of a temporary or final personal safety order in effect at the time of the violation.

§53-8-12. Priority of petitions.

Any petition filed in magistrate court under the provisions of this article shall be given priority over any other civil action before the court, except actions pursuant to article twenty-seven, chapter forty-eight of this code and those in which trial is in progress, and shall be docketed immediately upon filing.

§53-8-13. Fees and costs.

(a) *Charges for fees and costs postponed*. -- No fees may be charged for the filing of petitions or other papers, service of petitions or orders, copies of orders or other costs for services provided by, or associated with, any proceedings under this article until the matter is brought before the court for final resolution.

(b) *Assessment of court costs and fees when temporary order is denied*. -- If the petition is denied, court costs and fees shall be assessed by the magistrate against the petitioner at the conclusion of the temporary hearing, unless a fee waiver affidavit reflecting inability to pay has been filed or prohibited by federal law.

(c) Costs and fees may not be assessed against a prevailing party.

(d) *Assessment of court costs and fees when personal safety order is granted*. -- Except as in subsection (c), court costs and fees shall be assessed by the court at the conclusion of a proceeding, unless a fee waiver affidavit reflecting inability to pay has been filed.

(e) *Assessment of court costs and fees when petitioner moves to terminate order*. -- No court costs or fees shall be assessed against a petitioner who moves to terminate an order, whether the court grants or denies the motion.

(f) A person seeking waiver of fees, costs or security pursuant to section one, article two, chapter fifty-nine of this code shall execute before the clerk where the matter is pending a fee waiver affidavit which shall be kept confidential. An additional fee waiver affidavit shall be filed whenever the financial condition of the person no longer conforms to the financial condition established by the Supreme Court of Appeals for determining inability to pay

fees or whenever an order has been entered directing the filing of a new affidavit.

§53-8-14. Service by law enforcement.

Notwithstanding any other provision of this code to the contrary, all law-enforcement officers are hereby authorized and required to serve all pleadings and orders filed or entered pursuant to this article on Sundays and legal holidays. No law-enforcement officer may refuse to serve any pleadings or orders entered pursuant to this article. Law enforcement shall attempt to serve all orders without delay: *Provided,* That service of process shall be attempted within seventy-two hours of law enforcement's receipt of the order. If service is not made, law enforcement shall continue to attempt service on the respondent until proper service is made.

§53-8-15. Rules and forms.

(a) *Authorized*. -- The Supreme Court of Appeals may adopt rules and forms to implement the provisions of this article.

(b) *Petition form*. --

(1) The Supreme Court of Appeals is requested to adopt a form for a petition under this article.

(2) A petition form shall contain notice to a petitioner that an individual who knowingly provides false information in a petition filed under this subtitle is guilty of a misdemeanor and, on conviction, is subject to the penalties specified in section four of this article.

§53-8-16. Limitation on use of information.

Nothing in this article authorizes the inclusion of information contained in petition, pleadings or orders provided for by this article to be submitted to any local, state, interstate, national or international systems of criminal identification pursuant to section twenty-four, article two, chapter fifteen of this code. Nothing in this section prohibits the West Virginia State Police from processing information through its criminal identification bureau with respect to any actual charge or conviction of a crime.

§53-8-17. Sealing of records.

(a) *Definitions*. --

(1) In this section the following words have the meanings indicated.

(2) “Court record” means an official record of a court about a proceeding that the clerk of a court or other court personnel keeps. “Court record” includes an index, a docket entry, a petition or other pleading, a memorandum, a transcription of proceedings, an electronic recording, an order and a judgment.

(3) “Seal” means to remove information from public inspection in accordance with this section.

(4) “Sealing” means:

(A) With respect to a record kept in a courthouse, removing to a separate secure area to which persons who do not have a legitimate reason for access are denied access;

(B) With respect to electronic information about a proceeding on the website maintained by the magistrate court, circuit court or the Supreme Court of Appeals, removing the information from the public website; and

(C) With respect to a record maintained by any law-enforcement agency, by removing to a separate secure area to which persons who do not have a legitimate reason for access are denied access.

(b) *Written request*. -- Either party to a petition filed pursuant to this article may file a written request with the clerk to seal all court records relating to the proceeding.

(c) *Timing*. -- A request for sealing under this section may not be filed within two years after the entry of a final order, or the denial or dismissal of the petition.

(d) *Notice, hearing and findings*. --

(1) On the filing of a request for sealing under this section, the court shall schedule a hearing on the request.

(2) The court shall give notice of the hearing to the parties.

(3) After the hearing, the court shall order the sealing of all court records relating to the proceeding if the court finds:

(A) Good cause to grant the request. In determining whether there is good cause to grant the request to seal court records, the court shall balance the privacy and potential danger of adverse consequences to the parties against the potential risk of future harm and danger to the petitioner and the community; and

(B) That none of the following are pending at the time of the hearing:

(i) A temporary personal safety order or protective order issued against the respondent in a proceeding between the petitioner and the respondent; or

(ii) A criminal charge against the respondent arising from an alleged act described in subsection (a) section four of this article in which the petitioner is the victim.

(e) *Access to a sealed record*. --

(1) This section does not preclude the following persons from accessing a sealed record for a legitimate reason:

(A) A law-enforcement officer;

(B) An attorney who represents or has represented the petitioner or the respondent in a proceeding;

(C) A prosecuting attorney; or

(D) An employee of the Department of Health and Human Resources.

(2)(A) A person not listed in subdivision (1) of this subsection may subpoena or file a motion for access to a record sealed under this section.

(B) If the court finds that the person has a legitimate reason for access, the court may grant the person access to the sealed record under the terms and conditions that the court determines.

(C) In ruling on a motion under this subdivision, the court shall balance the person's need for access to the record with the respondent's right to privacy and the potential harm of unwarranted adverse consequences to the respondent that the disclosure may create.

(f) *Compliance with order*. -- Within sixty days after entry of an order under subdivision (3), subsection (d) of this section, each custodian of court records that are subject to the order of sealing shall advise in writing the court and the parties of compliance with the order.

5. Other West Virginia Statutes

§48-5-106. Venue of actions for divorce.

(a) If the respondent in an action for divorce is a resident of this state, the petitioner has an option to bring the action in the county in which the parties last cohabited or in the county where the respondent resides.

(b) If the respondent in an action for divorce is not a resident of this state, the petitioner has an option to bring the action in the county in which the parties last cohabited or in the county where the petitioner resides.

§48-5-509. Enjoining abuse, emergency protective order.

(a) The court may enjoin the offending party from molesting or interfering with the other, or otherwise imposing any restraint on the personal liberty of the other, or interfering with the custodial or visitation rights of the other. This order may enjoin the offending party from:

(1) Entering the school, business or place of employment of the other for the purpose of molesting or harassing the other;

(2) Contacting the other, in person or by telephone, for the purpose of harassment or threats; or

(3) Harassing or verbally abusing the other in a public place.

(b) Any order entered by the court to protect a party from abuse may grant any other relief authorized by the provisions of article twenty-seven of this chapter, if the party seeking the relief has established the grounds for that relief as required by the provisions of said article.

(c) The court, in its discretion, may enter a protective order, as provided in article twenty-seven of this chapter, as part of the final relief granted in a divorce action, either as a part of an order for temporary relief or as part of a separate order. Notwithstanding the provisions of section five hundred five of said article, a protective order entered pursuant to the provisions of this subsection shall remain in effect until a final order is entered in the divorce, unless otherwise ordered by the judge.

§48-5-608. Injunctive relief or protective orders.

(a) When allegations of abuse have been proved, the court shall enjoin the offending party from molesting or interfering with the other, or otherwise imposing any restraint on the personal liberty of the other or interfering with the custodial or visitation rights of the other. The order may

permanently enjoin the offending party from entering the school, business or place of employment of the other for the purpose of molesting or harassing the other or from entering or being present in the immediate environs of the residence of the petitioner or from contacting the other, in person or by telephone, for the purpose of harassment or threats; or from harassing or verbally abusing the other. The relief afforded by the provisions of this subsection may be ordered whether or not there are grounds for relief under subsection (c) of this section and whether or not an order is entered pursuant to such subsection.

(b) Any order entered by the court to protect a party from abuse may grant any other relief authorized to be awarded by the provisions of article twenty-seven of this chapter, if the party seeking the relief has established the grounds for that relief as required by the provisions of said article. The relief afforded by the provisions of this subsection may be ordered whether or not there are grounds for relief under subsection (c) of this section and whether or not an order is entered pursuant to subsection (c) of this section.

(c) The court, in its discretion, may enter a protective order, as provided by the provisions of article twenty-seven of this chapter, as part of the final relief in a divorce action, either as a part of a order for final relief or in a separate written order. A protective order entered pursuant to the provisions of this subsection shall remain in effect for the period of time ordered by the court not to exceed one hundred eighty days: *Provided*, That the court may extend the protective order for whatever period the court deems necessary to protect the safety of the petitioner and others threatened or at risk, if the court determines:

(A) That a violation of a protective order entered during or extended by the divorce action has occurred; or

(B) Upon a motion for modification, that a violation of a provision of a final order entered pursuant to this section has occurred.

§48-5-702. Revision of order enjoining abuse.

After entering an order enjoining abuse in accordance with the provisions of section 5-509, the court may, from time to time afterward, upon motion of either of the parties and upon proper service, revise the order and enter a new order concerning the same as the circumstances of the parties and the benefit of children may require.

§48-9-201. Parenting agreements.

(a) If the parents agree to one or more provisions of a parenting plan, the court shall so order, unless it makes specific findings that:

(1) The agreement is not knowing or voluntary; or

(2) The plan would be harmful to the child.

(b) The court, at its discretion and on any basis it deems sufficient, may conduct an evidentiary hearing to determine whether there is a factual

basis for a finding under subdivision (1) or (2), subsection (a) of this section. When there is credible information that child abuse as defined by section 49-1-3 of this code or domestic violence as defined by section 27-202 of this code has occurred, a hearing is mandatory and if the court determines that abuse has occurred, appropriate protective measures shall be ordered.

(c) If an agreement, in whole or in part, is not accepted by the court under the standards set forth in subsection (a) of this section, the court shall allow the parents the opportunity to negotiate another agreement.

§48-9-202. Court-ordered services.

(a)(1) The court shall inform the parents, or require them to be informed, about:

(A) How to prepare a parenting plan;

(B) The impact of family dissolution on children and how the needs of children facing family dissolution can best be addressed;

(C) The impact of domestic abuse on children and resources for addressing domestic abuse; and

(D) Mediation or other nonjudicial procedures designed to help them achieve an agreement.

(2) The court shall require the parents to attend parent education classes.

(3) If parents are unable to resolve issues and agree to a parenting plan, the court shall require mediation unless application of the procedural rules promulgated pursuant to the provisions of subsection (b) of this section indicates that mediation is inappropriate in the particular case.

(b) The supreme court of appeals shall make and promulgate rules that will provide for premediation screening procedures to determine whether domestic violence, child abuse or neglect, acts or threats of duress or coercion, substance abuse, mental illness or other such elements would adversely affect the safety of a party, the ability of a party to meaningfully participate in the mediation or the capacity of a party to freely and voluntarily consent to any proposed agreement reached as a result of the mediation. Such rules shall authorize a family court judge to consider alternatives to mediation which may aid the parties in establishing a parenting plan. Such rules shall not establish a per se bar to mediation if domestic violence, child abuse or neglect, acts or threats of duress or coercion, substance abuse, mental illness or other such elements exist, but may be the basis for the court, in its discretion, not to order services under subsection (a) of this section or not to require a parent to have face-to-face meetings with the other parent.

(c) A mediator shall not make a recommendation to the court and may not reveal information that either parent has disclosed during mediation under a reasonable expectation of confidentiality, except that a mediator may reveal to the court credible information that he or she has received concerning domestic violence or child abuse.

(d) Mediation services authorized under subsection (a) of this section shall be ordered at an hourly cost that is reasonable in light of the financial circumstances of each parent, assessed on a uniform sliding scale. Where one parent's ability to pay for such services is significantly greater than the other, the court may order that parent to pay some or all of the expenses of the other. State revenues shall not be used to defray the costs for the services of a mediator: Provided, That the supreme court of appeals may use a portion of its budget to pay administrative costs associated with establishing and operating mediation programs: Provided, however, That grants and gifts to the state that may be used to fund mediation are not to be considered as state revenues for purposes of this subsection.

(e) The supreme court of appeals shall establish standards for the qualification and training of mediators.

§48-9-205. Permanent parenting plan.

(a) A party seeking a judicial allocation of custodial responsibility or decision-making responsibility under this article shall file a proposed parenting plan with the court. Parties may file a joint plan. A proposed plan shall be verified and shall state, to the extent known or reasonably discoverable by the filing party or parties:

(1) The name, address, and length of residence of any adults with whom the child has lived for one year or more, or in the case of a child less than one year of age, any adults with whom the child has lived since the child's birth;

(2) The name and address of each of the child's parents and any other individuals with standing to participate in the action under § 48-9-103 of this code;

(3) A description of the allocation of caretaking and other parenting responsibilities performed by each person named in § 48-9-205(a)(1) and § 48-9-205(a)(2) of this code;

(4) A description of the work and child-care schedules of any person seeking an allocation of custodial responsibility and any expected changes to these schedules in the near future;

(5) A description of the child's school and extracurricular activities;

(6) A description of any of the limiting factors as described in § 48-9-209 of this code that are present, including any restraining orders against either parent to prevent domestic or family violence, by case number and jurisdiction;

(7) Required financial information; and

(8) A description of the known areas of agreement and disagreement with any other parenting plan submitted in the case.

The court shall maintain the confidentiality of any information required to be filed under this section when the person giving that information has a reasonable fear of domestic abuse, and disclosure of the information would increase that fear.

(b) The court shall develop a process to identify cases in which there is credible information that child abuse or neglect as defined in § 49-1-201 of this code or domestic violence as defined in § 48-27-202 of this code has occurred. The process shall include assistance for possible victims of domestic abuse in complying with § 48-9-205(a)(6) of this code and referral to appropriate resources for safe shelter, counseling, safety planning, information regarding the potential impact of domestic abuse on children, and information regarding civil and criminal remedies for domestic abuse. The process shall also include a system for ensuring that jointly submitted parenting plans that are filed in cases in which there is credible information that child abuse or domestic abuse has occurred receive the court review that is mandated by § 48-9-202(b) of this code.

(c) Upon motion of a party and after consideration of the evidence, the court shall order a parenting plan consistent with the provisions of § 48-9-206 through § 48-9-209 of this code, containing:

(1) A provision for the child's living arrangements and each parent's custodial responsibility, which shall include either:

(A) A custodial schedule that designates in which parent's home each minor child will reside on given days of the year; or

(B) A formula or method for determining a schedule in sufficient detail that, if necessary, the schedule can be enforced in subsequent proceedings by the court;

(2) An allocation of decision-making responsibility as to significant matters reasonably likely to arise with respect to the child;

(3) A provision consistent with § 48-9-202 of this code for resolution of disputes that arise under the plan and remedies for violations of the plan; and

(4) A plan for the custody of the child should one or both of the parents as a member of the National Guard, a reserve component, or an active duty component be mobilized, deployed, or called to active duty.

(d) A parenting plan may, at the court's discretion, contain provisions that address matters that are expected to arise in the event of a party's relocation, or provide for future modifications in the parenting plan if specified contingencies occur.

§48-9-207. Allocation of significant decision-making responsibility.

(a) Unless otherwise resolved by agreement of the parents under section 9-201, the court shall allocate responsibility for making significant life decisions on behalf of the child, including the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interest, in light of:

(1) The allocation of custodial responsibility under section 9-206 of this article;

(2) The level of each parent's participation in past decision-making on behalf of the child;

(3) The wishes of the parents;

(4) The level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child;

(5) Prior agreements of the parties; and

(6) The existence of any limiting factors, as set forth in section 9-209 of this article.

(b) If each of the child's legal parents has been exercising a reasonable share of parenting functions for the child, the court shall presume that an allocation of decision-making responsibility to both parents jointly is in the child's best interests. The presumption is overcome if there is a history of domestic abuse, or by a showing that joint allocation of decision-making responsibility is not in the child's best interest.

(c) Unless otherwise provided or agreed by the parents, each parent who is exercising custodial responsibility shall be given sole responsibility for day-to-day decisions for the child, while the child is in that parent's care and control, including emergency decisions affecting the health and safety of the child.

§48-9-209. Parenting plan; limiting factors.

(a) If either of the parents so requests, or upon receipt of credible information thereof, the court shall determine whether a parent who would otherwise be allocated responsibility under a parenting plan:

(1) Has abused, neglected or abandoned a child, as defined by state law;

(2) Has sexually assaulted or sexually abused a child as those terms are defined in articles eight-b and eight-d, chapter sixty-one of this code;

(3) Has committed domestic violence, as defined in section 27-202;

(4) Has interfered persistently with the other parent's access to the child, except in the case of actions taken for the purpose of protecting the safety of the child or the interfering parent or another family member, pending adjudication of the facts underlying that belief; or

(5) Has made one or more fraudulent reports of domestic violence or child abuse: *Provided*, That a person's withdrawal of or failure to pursue a report of domestic violence or child support shall not alone be sufficient to consider that report fraudulent.

(b) If a parent is found to have engaged in any activity specified by subsection (a) of this section, the court shall impose limits that are reasonably calculated to protect the child or child's parent from harm. The limitations that the court shall consider include, but are not limited to:

(1) An adjustment of the custodial responsibility of the parents, including but not limited to:

(A) Increased parenting time with the child to make up for any parenting time the other parent lost as a result of the proscribed activity;

(B) An additional allocation of parenting time in order to repair any adverse effect upon the relationship between the child and the other parent resulting from the proscribed activity; or

(C) The allocation of exclusive custodial responsibility to one of them;

(2) Supervision of the custodial time between a parent and the child;

(3) Exchange of the child between parents through an intermediary, or in a protected setting;

(4) Restraints on the parent from communication with or proximity to the other parent or the child;

(5) A requirement that the parent abstain from possession or consumption of alcohol or nonprescribed drugs while exercising custodial responsibility and in the twenty-four hour period immediately preceding such exercise;

(6) Denial of overnight custodial responsibility;

(7) Restrictions on the presence of specific persons while the parent is with the child;

(8) A requirement that the parent post a bond to secure return of the child following a period in which the parent is exercising custodial responsibility or to secure other performance required by the court;

(9) A requirement that the parent complete a program of intervention for perpetrators of domestic violence, for drug or alcohol abuse, or a program designed to correct another factor; or

(10) Any other constraints or conditions that the court deems necessary to provide for the safety of the child, a child's parent or any person whose safety immediately affects the child's welfare.

(c) If a parent is found to have engaged in any activity specified in subsection (a) of this section, the court may not allocate custodial responsibility or decision-making responsibility to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose under subsection (b) of this section. The parent found to have engaged in the behavior specified in subsection (a) of this section has the burden of proving that an allocation of custodial responsibility or decision-making responsibility to that parent will not endanger the child or the other parent.

(d) If the court determines, based on the investigation described in part three of this article or other evidence presented to it, that an accusation of child abuse or neglect, or domestic violence made during a child custody proceeding is false and the parent making the accusation knew it to be false at the time the accusation was made, the court may order reimbursement to be paid by the person making the accusations of costs resulting from defending against the accusations. Such reimbursement may not exceed the actual reasonable costs incurred by the accused party as a result of defending against the accusation and reasonable attorney's fees incurred.

(e)(1) A parent who believes he or she is the subject of activities by the other parent described in subdivision (5) of subsection (a), may move the court pursuant to subdivision (4), subsection (b), section one hundred and one, article five, chapter forty-nine of this code for the Department of Health and Human Resources to disclose whether the other parent was the source of the allegation and, if so, whether the department found the report to be:

(A) Substantiated;

(B) Unsubstantiated;
(C) Inconclusive; or
(D) Still under investigation.

(2) If the court grants a motion pursuant to this subsection, disclosure by the Department of Health and Human Resources shall be in camera. The court may disclose to the parties information received from the department only if it has reason to believe a parent knowingly made a false report.

§48-9-302. Appointment of guardian [family court].

(a) In its discretion, the court may appoint a guardian ad litem to represent the child's best interests. The court shall specify the terms of the appointment, including the guardian's role, duties and scope of authority.

(b) In its discretion, the court may appoint a lawyer to represent the child, if the child is competent to direct the terms of the representation and court has a reasonable basis for finding that the appointment would be helpful in resolving the issues of the case. The court shall specify the terms of the appointment, including the lawyer's role, duties and scope of authority.

(c) When substantial allegations of domestic abuse have been made, the court shall order an investigation under section 9-301 or make an appointment under subsection (a) or (b) of this section, unless the court is satisfied that the information necessary to evaluate the allegations will be adequately presented to the court without such order or appointment.

(d) Subject to whatever restrictions the court may impose or that may be imposed by the attorney-client privilege or by subsection 9-202(d), the court may require the child or parent to provide information to an individual or agency appointed by the court under section 9-301 or subsection (a) or (b) of this section, and it may require any person having information about the child or parent to provide that information, even in the absence of consent by a parent or by the child, except if the information is otherwise protected by law.

(e) The investigator who submits a report or evidence to the court that has been requested under section 9-301 and a guardian ad litem appointed under subsection (a) of this section who submits information or recommendations to the court are subject to cross-examination by the parties. A lawyer appointed under subsection (b) of this section may not be a witness in the proceedings, except as allowed under standards applicable in other civil proceedings.

(f) Services and tests ordered under this section shall be ordered only if at no cost to the individuals involved, or at a cost that is reasonable in light of the available financial resources.

Uniform Child Custody Jurisdiction and Enforcement Act.

PART 1. GENERAL PROVISIONS.

§48-20-101. Short title.

This article may be cited as the "Uniform Child Custody Jurisdiction

and Enforcement Act."

§48-20-102. Definitions.

(a) “Abandoned” means left without provision for reasonable and necessary care or supervision.

(b) “Child” means an individual who has not attained eighteen years of age.

(c) “Child custody determination” means a judgment, decree or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(d) “Child custody proceeding” means a proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation or enforcement under part 20-301, et seq.

(e) “Commencement” means the filing of the first pleading in a proceeding.

(f) “Court” means an entity authorized under the law of a state to establish, enforce or modify a child custody determination. Reference to a court of West Virginia means the family court.

(g) “Home state” means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(h) “Initial determination” means the first child custody determination concerning a particular child.

(i) “Issuing court” means the court that makes a child custody determination for which enforcement is sought under this chapter.

(j) “Issuing state” means the state in which a child custody determination is made.

(k) “Modification” means a child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(l) “Person” means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government, governmental subdivision, agency or instrumentality; public corporation; or any other legal or commercial entity.

(m) “Person acting as a parent” means a person, other than a parent, who:

(1) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(2) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(n) "Physical custody" means the physical care and supervision of a child.

(o) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(p) "Tribe" means an Indian tribe or band or Alaskan Native village which is recognized by federal law or formally acknowledged by a state.

(q) "Warrant" means an order issued by a court authorizing law-enforcement officers to take physical custody of a child.

§48-20-103. Proceedings governed by other law.

This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

§48-20-104. Application to Indian tribes.

(a) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for purposes of applying parts 1 and 2.

(c) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under part 3.

§48-20-105. International application of chapter.

(a) A court of this state shall treat a foreign country as if it were a state of the United States for purpose of applying parts 1 and 2.

(b) Except as otherwise provided in subsection (c) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under article three of this chapter.

(c) A court of this state need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights.

§48-20-106. Effect of child custody determination.

A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with section

20-108 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

§48-20-107. Priority.

If a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

§48-20-108. Notice to persons outside state.

(a) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

§48-20-109. Appearance and limited immunity.

(a) A party to a child custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child custody determination is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or having been physically present for the purpose of participating, in the proceeding.

(b) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(c) The immunity granted by subsection (a) of this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this chapter committed by an individual while present in this state.

§48-20-110. Communication between courts.

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, calendars, court

records and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Except as otherwise provided in subsection (c) of this section, a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

§48-20-111. Taking testimony in another state.

(a) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

§48-20-112. Cooperation between courts; preservation of records.

(a) A court of this state may request the appropriate court of another state to:

(1) Hold an evidentiary hearing;

(2) Order a person to produce or give evidence pursuant to procedures of that state;

(3) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(4) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented and any evaluation prepared in compliance with the request; and

(5) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (a) of this section.

(c) Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) of this section may be assessed against the

parties according to the law of this state.

(d) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations and other pertinent records with respect to a child custody proceeding until the child attains eighteen years of age. Upon appropriate request by a court or law-enforcement official of another state, the court shall forward a certified copy of those records.

PART 2. JURISDICTION.

§48-20-201. Initial child custody jurisdiction.

(a) Except as otherwise provided in section 20-204, a court of this state has jurisdiction to make an initial child custody determination only if:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) A court of another state does not have jurisdiction under subdivision (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 20-207 or 20-208, and:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) of this subdivision have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under section 20-207 or 20-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2) or (3) of this subsection.

(b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

§48-20-202. Exclusive, continuing jurisdiction.

(a) Except as otherwise provided in section 20-204, a court of this state which has made a child custody determination consistent with section 20-201 or 20-203 has exclusive, continuing jurisdiction over the determination until:

(1) A court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal

relationships; or

(2) A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state.

(b) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 20-201.

§48-20-203. Jurisdiction to modify determination.

Except as otherwise provided in section 20-204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under subdivision (1) or (2), subsection (a), section 20-201 and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under section 20-202 or that a court of this state would be a more convenient forum under section 20-207; or

(2) A court of this state or a court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state.

§48-20-204. Temporary emergency jurisdiction.

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 20-201 through 20-203, inclusive, of this article, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 20-201 through 20-203, inclusive, of this article. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 20-201 through 20-203, inclusive, of this article, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

(c) If there is a previous child custody determination that is entitled to be enforced under this chapter, or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 20-201 through 20-203, inclusive, of this article, any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 20-201 through 20-203,

inclusive, of this article. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this state which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under sections 20-201 through 20-203, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to sections 20-201 through 20-203, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

§48-20-205. Notice; opportunity to be heard; joinder.

(a) Before a child custody determination is made under this chapter, notice and an opportunity to be heard in accordance with the standards of section 20-108, must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated and any person having physical custody of the child.

(b) This chapter does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(c) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the law of this state as in child custody proceedings between residents of this state.

§48-20-206. Simultaneous proceedings.

(a) Except as otherwise provided in section 20-204, a court of this state may not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under 20-207.

(b) Except as otherwise provided in section 20-204, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to section 20-209. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(c) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(1) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(2) Enjoin the parties from continuing with the proceeding for enforcement; or

(3) Proceed with the modification under conditions it considers appropriate.

§48-20-207. Inconvenient forum.

(a) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon the motion of a party, the court's own motion or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) The length of time the child has resided outside this state;

(3) The distance between the court in this state and the court in the state that would assume jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

§48-20-208. Jurisdiction declined by reason of conduct.

(a) Except as otherwise provided in section 20-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(2) A court of the state otherwise having jurisdiction under sections 20-201 through 20-203, inclusive, of this article determines that this state is a more appropriate forum under section 20-207; or

(3) No court of any other state would have jurisdiction under the criteria specified in sections 20-201 through 20-203, inclusive, of this article.

(b) If a court of this state declines to exercise its jurisdiction pursuant to subsection (a) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under sections 20-201 through 20-203, inclusive, of this article.

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a) of this section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs or expenses against this state unless authorized by law other than this chapter.

§48-20-209. Information to be submitted to court.

(a) Subject to local law providing for the confidentiality of procedures, addresses and other identifying information in a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number and the date of the child custody determination, if any;

(2) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions, and, if so, identify the court, the case number and the nature of the proceeding; and

(3) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(b) If the information required by subsection (a) of this section is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) If the declaration as to any of the items described in subdivisions (1) through (3), inclusive, subsection (a) of this section is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(e) If a party alleges in an affidavit or a pleading under oath that the health, safety or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety or liberty of the party or child and determines that the disclosure is in the interest of justice.

§48-20-210. Appearance of parties and child.

(a) In a child custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(b) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to section 20-108 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(c) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(d) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (b) of this section or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

PART 3. ENFORCEMENT.

§48-20-301. Definitions.

(a) "Petitioner" means a person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

(b) "Respondent" means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

§48-20-302. Enforcement under Hague convention.

Under this article a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

§48-20-303. Duty to enforce.

(a) A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this article and the determination has not been modified in accordance with this article.

(b) A court of this state may utilize any remedy available under other law of this state to enforce a child custody determination made by a court of another state. The remedies provided in this article are cumulative and do not affect the availability of other remedies to enforce a child custody determination.

§48-20-304. Temporary visitation.

(a) A court of this state which does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing:

(1) A visitation schedule made by a court of another state; or

(2) The visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule.

(b) If a court of this state makes an order under subdivision (2), subsection (a) of this section, it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in part 2 of this article. The order remains in effect until an order is obtained from the other court or the period expires.

§48-20-305. Registration of child custody determination.

(a) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the appropriate court in this state:

(1) A letter or other document requesting registration;

(2) Two copies, including one certified copy, of the determination

sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

(3) Except as otherwise provided in section 20-209, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

(b) On receipt of the documents required by subsection (a) of this section, the registering court shall:

(1) Cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

(2) Serve notice upon the persons named pursuant to subdivision (3), subsection (a) of this section and provide them with an opportunity to contest the registration in accordance with this section.

(c) The notice required by subdivision (2), subsection (b) of this section must state that:

(1) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(2) A hearing to contest the validity of the registered determination must be requested in writing to the court within twenty days after service of notice; and

(3) Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) A person seeking to contest the validity of a registered order must request a hearing within twenty days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(1) The issuing court did not have jurisdiction under part 2 of this article;

(2) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under 20-201, et seq.; or

(3) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of section 20-108 in the proceedings before the court that issued the order for which registration is sought.

(e) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(f) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

§48-20-306. Enforcement of registered determination.

(a) A court of this state may grant any relief normally available under the law of this state to enforce a registered child custody determination made by a court of another state.

(b) A court of this state shall recognize and enforce, but may not modify, except in accordance with article two of this chapter, a registered child custody determination of a court of another state.

§48-20-307. Simultaneous proceedings.

If a proceeding for enforcement under this article is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under part two of this article, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

§48-20-308. Expedited enforcement of child custody determination.

(a) A petition under this article must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(b) A petition for enforcement of a child custody determination must state:

(1) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(2) Whether the determination for which enforcement is sought has been vacated, stayed or modified by a court whose decision must be enforced under this chapter and, if so, identify the court, the case number and the nature of the proceeding;

(3) Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights and adoptions and, if so, identify the court, the case number and the nature of the proceeding;

(4) The present physical address of the child and the respondent, if known;

(5) Whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law-enforcement officials and, if so, the relief sought; and

(6) If the child custody determination has been registered and confirmed under section 20-305 of this article, the date and place of registration.

(c) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and

may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(d) An order issued under subsection (c) of this section must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs and expenses under section 20-312, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(1) The child custody determination has not been registered and confirmed under section 20-305, and that:

(A) The issuing court did not have jurisdiction under part 20-201, et seq.;

(B) The child custody determination for which enforcement is sought has been vacated, stayed or modified by a court having jurisdiction to do so under part 20-201, et seq.;

(C) The respondent was entitled to notice, but notice was not given in accordance with the standards of section 20-108, in the proceedings before the court that issued the order for which enforcement is sought; or

(2) The child custody determination for which enforcement is sought was registered and confirmed under section 20-305, but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under article two of this chapter; or

(3) There is credible evidence of abuse or neglect of the child or children who are the subject of the petition and the credible evidence has been reported to a child welfare agency, a law-enforcement officer, a licensed physician, a licensed social worker, or a licensed mental health professional and an investigation or other proceeding has not been concluded: Provided, That the court may continue the hearing to a day certain to monitor the investigation or proceedings or take any further action as the circumstances and the best interest of the child may warrant.

§48-20-309. Service of petition and order.

Except as otherwise provided in section 20-311, the petition and order must be served, by any method authorized by the law of this state, upon respondent and any person who has physical custody of the child.

§48-20-310. Hearing and order.

(a) Unless the court issues a temporary emergency order pursuant to section 20-204, upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) The child custody determination has not been registered and

confirmed under section 20-305 and that:

(A) The issuing court did not have jurisdiction under part 20-201 et seq., of this chapter;

(B) The child custody determination for which enforcement is sought has been vacated, stayed or modified by a court of a state having jurisdiction to do so under part 20-201, et seq.; or

(C) The respondent was entitled to notice, but notice was not given in accordance with the standards of section 20-108, in the proceedings before the court that issued the order for which enforcement is sought; or

(2) The child custody determination for which enforcement is sought was registered and confirmed under section 20-305, but has been vacated, stayed or modified by a court of a state having jurisdiction to do so under part 20-201, et seq.; or

(3) There is credible evidence of abuse or neglect of the child or children who are the subject of the petition and the credible evidence has been reported to a child welfare agency, a law-enforcement officer, a licensed physician, a licensed social worker, or a licensed mental health professional and an investigation or other proceeding has not been concluded: Provided, That the court may continue the hearing to a day certain to monitor the investigation or proceedings or take any further action as the circumstances and the best interest of the child may warrant.

(b) The court shall award the fees, costs and expenses authorized under section 20-312 and may grant additional relief, including a request for the assistance of law-enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(c) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(d) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this article.

§48-20-311. Warrant to take physical custody of child.

(a) Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is imminently likely to suffer serious physical harm or be removed from this state.

(b) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by subsection 20-308(b).

(c) A warrant to take physical custody of a child must:

(1) Recite the facts upon which a conclusion of imminent serious

physical harm or removal from the jurisdiction is based;

(2) Direct law-enforcement officers to take physical custody of the child immediately; and

(3) Provide for the placement of the child pending final relief.

(d) The respondent must be served with the petition, warrant and order immediately after the child is taken into physical custody.

(e) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law-enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law-enforcement officers to make a forcible entry at any hour.

(f) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

§48-20-312. Costs, fees and expenses.

(a) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(b) The court may not assess fees, costs or expenses against a state unless authorized by law other than this chapter.

§48-20-313. Recognition and enforcement.

A court of this state shall accord full faith and credit to an order issued by another state and consistent with this chapter which enforces a child custody determination by a court of another state unless the order has been vacated, stayed or modified by a court having jurisdiction to do so under part 20-201, et seq.

§48-20-314. Appeals.

An appeal may be taken from a final order in a proceeding under this article in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under section 20-204, the enforcing court may not stay an order enforcing a child custody determination pending appeal.

§48-20-315. Role of prosecutor or public official.

(a) In a case arising under this chapter or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor or other appropriate public official may take any lawful action, including resort to a proceeding under this article or any other available civil proceeding, to locate a child, obtain the return of a child or enforce a child custody determination if there is:

(1) An existing child custody determination;

(2) A request to do so from a court in a pending child custody proceeding;

(3) A reasonable belief that a criminal statute has been violated; or

(4) A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(b) A prosecutor or appropriate public official acting under this section acts on behalf of the court and may not represent any party.

§48-20-316. Role of law enforcement.

At the request of a prosecutor or other appropriate public official acting under section 20-315, a law-enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a prosecutor or appropriate public official with responsibilities under said section.

§48-20-317. Costs and expenses.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor or other appropriate public official and law-enforcement officers under section 20-315 or 20-316.

PART 4. MISCELLANEOUS PROVISIONS.

§48-20-401. Application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§48-20-402. Severability clause.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

§48-20-403. Effective date.

This article takes effect on the first day of July, two thousand.

§48-20-404. Transitional provision.

A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before the first day of July, two thousand, is governed by the law in effect at the time the motion or other request was made.

Domestic Violence Act

PART 1. GENERAL PROVISIONS.

§48-26-101. Title.

This article shall be known as the “West Virginia Domestic Violence Act”.

PART 2. DEFINITIONS.

§48-26-201. Applicability of definitions.

For purposes of this article, the words or terms defined in this article, and any variation of those words or terms required by the context, have the meanings ascribed to them. These definitions are applicable unless a different meaning clearly appears from the context.

§48-26-202. Advocacy defined.

“Advocacy” means assisting victims and survivors of domestic violence, dating violence, sexual assault, stalking or human trafficking, and their children, in securing rights, remedies and services, by directly providing for, or referring to public and private agencies to provide for, safety planning; shelter; housing; legal services; outreach; counseling; case management; information and referral; training; employment; child care; health care; transportation; financial literacy education, financial planning and related economic empowerment services; parenting and other educational services; and other support services.

§48-26-203. Batterer Intervention and Prevention Program defined.

“Batterer intervention and prevention program”, previously referred to as a program of intervention for perpetrators, means a licensed educational program that provides classes to individuals who commit acts of domestic violence or abuse, offering nonviolent strategies and values that promote respect and equality in intimate partner relationships.

§48-26-204. Board defined.

“Board” means the Family Protection Services Board created pursuant to Chapter 53 of the Acts of the Legislature of 1989 and subsequently recodified by this article.

§48-26-205. Closure defined.

“Closure” means the temporary or permanent prohibition of specified services and the corresponding suspension of licensure of a program or program component that violates the standards established by the board or

that threatens the health, well being or safety of its program participants or staff.

§48-26-206. Department defined.

"Department" means the Department of Health and Human Resources.

§48-26-207. Domestic Violence Legal Services Fund defined.

"Domestic Violence Legal Services Fund" means the special revenue account established by section six hundred three of this article for the purposes set forth in that section.

§48-26-208. Domestic violence program defined.

"Domestic violence program" means a licensed program of a locally controlled nonprofit organization, established primarily for the purpose of providing advocacy services, comprising both a shelter component and an outreach component, to victims of domestic violence, dating violence, sexual assault, stalking or human trafficking, and their children: Provided, That the board may temporarily or permanently close either the shelter component or the outreach component of a domestic violence program.

§48-26-209. Family Protection Fund defined.

"Family Protection Fund" means the special revenue account established by Chapter 74 of the Acts of the Legislature of 1981, held by the department, for the purpose of collecting marriage license fees pursuant to section ten, article one, chapter fifty-nine of this code, divorce surcharge fees pursuant to section twenty-eight-a, article one, chapter fifty-nine of this code, fees for failure to present a premarital education course completion certificate pursuant to section ten, article one, chapter fifty-nine of this code and any other funding source, including any source created in another section of this code, and distributed to licensed domestic violence programs, in accordance with the formula designated by the board.

§48-26-210. Intimate partner defined.

"Intimate partner" means a current or former spouse, a person with whom one shares a child in common, a person with whom one is cohabiting or has cohabited, or a person with whom one is or has been in a relationship of a romantic or intimate nature.

§48-26-211. Licenses defined.

(a) "Conditional license" means a license issued for up to ninety days, to programs that have violations of safety or accountability standards that may threaten the health, well-being or safety of its program participants or staff, or the responsible operation of the program, or that have a history or pattern of noncompliance with established standards.

(b) “Provisional license” means a license issued for up to one hundred and eighty days, to programs that are not in compliance with nonlife threatening safety, programmatic, facility or administrative standards, that may be extended for an additional six months, if the board determines that the program is making active progress toward compliance.

(c) “Full license” means a license issued for up to the maximum licensure period of three years, to programs that are in compliance with the standards established by the board and have no violations of safety or accountability standards that may threaten the health, well-being or safety of its program participants or staff, or the responsible operation of the program.

§48-26-212. Monitored parenting and exchange defined.

(a) “Monitored parenting” means the contact between a parent without custodial responsibility, guardian or other adult and one or more children, in the presence of a third person who monitors the contact to promote the safety of the participants.

(b) “Monitored exchange” means the observation of movement of a child or children from the custodial responsibility of one parent or guardian to the custodial responsibility of the other parent or other adult without allowing contact between the adults.

(c) “Monitored parenting and exchange program” means a licensed program offered by a locally controlled nonprofit organization for purposes of providing a neutral, safe and child-friendly environment to allow the child or children access to a parent or other adult without allowing contact between the adults.

§48-26-213. Outreach defined.

“Outreach” means a licensed domestic violence program's community-based activities that increase awareness and availability of services, in every county within the program's regional service area, to victims and survivors of domestic violence, dating violence, sexual assault, stalking or human trafficking, and their children.

§48-26-214. Shelter defined.

“Shelter” means residential services offered by a licensed domestic violence program on a temporary basis, to persons who are victims of domestic violence, dating violence, sexual assault, stalking or human trafficking, and their children.

PART 3. FAMILY PROTECTION SERVICES BOARD.

§48-26-301. Family protection services board continued; terms.

(a) The family protection services board, is continued.

(b) Membership of the board is comprised of seven persons. The Governor, with the advice and consent of the Senate, shall appoint five members of the board who meet the following qualifications:

(1) One member must be a director of a licensed domestic violence program;

(2) One member must be a representative of the West Virginia Coalition Against Domestic Violence;

(3) One member must be a representative of a batterer intervention and prevention program licensed by the board;

(4) One member must be a representative of the West Virginia Supreme Court of Appeals who is familiar with monitored parenting and exchange program services; and

(5) One member must be a citizen who is a resident of this state and who is not employed by, under contract with or a volunteer for a program licensed by the board, and who is knowledgeable about services for victims and survivors of domestic violence;

(c) The secretary of the Department of Health and Human Resources, or his or her designee, and the chair of the Governor's Committee on Crime, Delinquency and Correction, or his or her designee shall serve as ex officio voting members.

(d) The terms of the five members appointed by the Governor are for three years, staggered in accordance with prior enactments of this act.

(e) No person who is employed by, under contract with or volunteers for an organization that is licensed to operate any program under the provisions of this article may serve on the board at the same time as another person who is employed by, under contract with or volunteers for that organization.

(f) If a member resigns or is unable to complete his or her term or ceases to be qualified, the Governor shall appoint within ninety days a person who meets the qualifications of this section to serve the remainder of the unexpired term.

§48-26-401. Powers and duties of board.

(a) The board shall:

(1) Propose rules for legislative approval, in accordance with the provisions of article three, chapter twenty-nine-a of this code, to implement the provisions of this article and any applicable federal guidelines;

(2) Receive and consider applications for licensure of domestic violence programs, batterer intervention and prevention programs and monitored parenting and exchange programs;

(3) Assess the need for domestic violence programs, batterer intervention and prevention programs and monitored parenting and exchange programs, including licensure preapplication and application processes;

(4) Conduct licensure renewal reviews of domestic violence programs, batterer intervention and prevention programs and monitored parenting and

exchange programs, that will ensure the safety, well-being and health of the programs' participants and staff;

(5) For each fiscal year, expend from the Family Protection Fund a sum not to exceed fifteen percent for the costs of administering the provisions of this article, and direct the Department of Health and Human Resources to distribute one half of the remaining funds equally and the other half of the remaining funds in accordance with a formula determined by the board, to licensed domestic violence programs;

(6) Submit an annual report on the status of programs licensed under the provisions of this article to the Governor and the Joint Committee on Government and Finance;

(7) Conduct hearings as necessary under this article; and

(8) Collect data about licensed programs for use in the annual report of the board.

(b) The board may:

(1) Advise the Secretary of the Department of Health and Human Resources and the Chair of the Governor's Committee on Crime, Delinquency and Correction on matters of concern relative to their responsibilities under this article;

(2) Delegate to the Secretary of the Department of Health and Human Resources such powers and duties of the board as the board considers appropriate to delegate, including, but not limited to, the authority to approve, disapprove, revoke or suspend licenses;

(3) Advise administrators of state or federal funds of licensure violations and closures of programs; and

(4) Exercise all other powers necessary to implement the provisions of this article.

§48-26-402. Requirements, qualifications and terms of licensure; collaboration to assist programs.

(a) No domestic violence program, batterer intervention and prevention program or monitored parenting and exchange program may represent that it is licensed unless it is licensed by the board pursuant to the provisions of this article and the legislative rules promulgated pursuant to this article.

(b) The board shall establish preliminary application and full application forms for the initial licensing of domestic violence programs, batterer intervention and prevention programs and monitored parenting and exchange programs.

(1) To meet basic eligibility requirements an applicant for licensure must complete a preliminary application form to demonstrate local need for the proposed service, method of governance and accountability, administrative and programmatic design, and fiscal efficiency. The board shall respond in writing within sixty days of receipt of the preliminary application;

(2) If the board approves the preliminary application, the applicant may complete a full application form;

(3) The board shall determine whether all documentation set forth on the licensure checklist has been submitted, and may request supplemental or clarifying information or documentation; and

(4) The board shall grant or deny a license within sixty days of the receipt of the completed full application form and all supplemental or clarifying information or documentation requested by the board.

(c) Licenses may be granted or renewed for periods not to exceed three years: *Provided*, That the board may conduct licensure reviews at any time during the licensure period, and may downgrade, suspend or revoke a license in accordance with the provisions of this article.

(d) The license granted by the board shall be prominently displayed by the licensees.

(e) The board may grant a provisional license for up to one hundred and eighty days, to a program that is not in compliance with non-life threatening safety, programmatic, facility or administrative standards. A provisional license may be extended for up to an additional one hundred and eighty days, if the board, in its sole discretion, determines that the program is making active progress toward compliance.

(f) The board may grant a conditional license for up to ninety days to a program that has violations of safety or accountability standards that may threaten the health, well-being or safety of its participants or staff, or the responsible operation of the program, or that have a history or pattern of noncompliance with established standards. If a program does not correct the violations within the conditional license period, the board may institute closure proceedings.

(g) The Department of Health and Human Resources, the Division of Justice and Community Services, the Family Protection Services Board, the WV Coalition Against Domestic Violence, the West Virginia Supreme Court of Appeals and the Division of Corrections may, collectively or in any combination as appropriate to the program, collaborate to provide technical assistance to prevent and resolve deficiencies in a program's ability to meet the standards to operate and maintain licensure.

(h) If the board obtains information that a person or persons has engaged in, is engaging in or is about to engage in an act that constitutes or will constitute a violation of the provisions of this article or the legislative rules promulgated pursuant to this article, it may issue a notice to the person or persons to cease and desist the act, or apply to the circuit court for an order enjoining the act. Upon a showing that the person has engaged, is engaging or is about to engage in such an act, the court may order an injunction, restraining order or other order as the court considers appropriate.

§48-26-403. Legislative rules.

(a) The board shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to effectuate the provisions of this article.

(b) The rules shall include, at a minimum:

(1) Operating procedures of the board;

(2) Minimum standards, including, but not limited to, governance, administration, safety, referral process, intake, services, financial accountability, staffing, personnel policies, communication, program participant records, service plans, confidentiality, program evaluation, facility requirements, reports, restrictions, and other requirements in this article, for licensure of:

(A) Domestic violence programs, including requirements for both shelter and outreach components;

(B) Community-based, local government and Division of Corrections batterer intervention and prevention programs; and

(C) Monitored parenting and exchange programs; and

(3) A licensure checklist to determine the ability of applicants and licensees to meet licensure standards, to determine eligibility for a full license, provisional license, conditional license or no license.

(c) The rules in effect as of the effective date of the reenactment of this section will remain in effect until modified, amended or repealed provided that they are not inconsistent with this article.

§48-26-404. Repealed.

§48-26-405. Repealed.

§48-26-406. Closure of programs.

(a) The board may close any program that violates the standards established under this article or that threatens the health, well-being or safety of its participants or staff: *Provided,* That if a shelter is closed, the governing body of the program, in conjunction with the board, shall establish a plan to place the participants in other shelters or alternative housing.

(b) In order to close a domestic violence program or one of its components, a batterer intervention and prevention program or a monitored parenting and exchange program, the board must vote unanimously in the affirmative.

(c) If either the shelter component or the outreach component of a domestic violence program is closed, the remaining component of the program may continue to be licensed and to receive funds.

§48-26-407. Domestic violence shelters not in violations of zoning rules and resolutions as to use.

Domestic violence shelters established pursuant to section four hundred two of this article, called the Domestic Violence Act, shall not be subject to the enforcement of municipal zoning ordinances on the basis of

being in noncompliance or variance with a particular use district: Provided, That as to all other provisions of those ordinances, the ordinances will control.

§48-26-408. Hearing procures; judicial review.

(a) When a license for a program is downgraded or discontinued through permanent or temporary closure, the program's governing body is entitled to a hearing before the board.

(b) Hearings shall be held in accordance with the provisions of article five, chapter twenty-nine-a of this code.

(c) The board may conduct the hearing or elect to have a hearing examiner or an administrative law judge conduct the hearing. If the hearing is conducted by a hearing examiner or an administrative law judge:

(1) The hearing examiner or administrative law judge shall be licensed to practice law in this state and shall conform to the Code of Conduct for Administrative Law Judges as set forth by the Ethics Commission in legislative rule;

(2) At the conclusion of a hearing, the hearing examiner or administrative law judge shall prepare a proposed written order containing recommended findings of fact and conclusions of law and may include recommended sanctions, including closure, if the board so directs;

(3) The board may accept, reject, modify or amend the recommendations of the hearing examiner or administrative law judge; and

(4) If the board rejects, modifies or amends the recommendations, the board shall state in the order a reasoned, articulate justification based on the record for the rejection, modification or amendment.

(d) Pursuant to the provisions of section one, article five, chapter twenty-nine-a of this code, informal disposition may also be made by the board by stipulation, agreed settlement, consent order or default. Further, the board may suspend its decision and place a license on conditional or provisional status.

(e) A licensee adversely affected by a decision of the board entered after a hearing may seek an appeal to the Circuit Court, in accordance with the provisions of section four, article five, chapter twenty-nine-a of this code, and may appeal a decision of the Circuit Court to the West Virginia Supreme Court of Appeals, in accordance with the provisions of article six, chapter twenty-nine-a of this code.

PART 5. DUTIES OF THE BUREAU FOR PUBLIC HEALTH.

§48-26-501. Development of state public health plan for reducing domestic violence.

(a) The bureau for public health of the department of health and human resources, in consultation with the family protection services board, shall:

(1) Assess the impact of domestic violence on public health; and

(2) Develop a state public health plan for reducing the incidence of domestic violence in this state.

(b) The state public health plan shall:

(1) Include, but not be limited to, public education, including the use of the various communication media to set forth the public health perspective on domestic violence;

(2) Be developed in consultation with public and private agencies that provide programs for victims of domestic violence, advocates for victims, organizations representing the interests of shelters, and persons who have demonstrated expertise and experience in providing health care to victims of domestic violence and their children; and

(3) Be completed on or before the first day of January, two thousand.

(c) The bureau for public health of the department of health and human resources shall:

(1) Transmit a copy of the state public health plan to the governor and the Legislature; and

(2) Review and update the state public health plan annually.

§48-26-502. Notice of victims' rights, remedies and available services; required information.

(a) The bureau for public health of the department of health and human resources shall make available to health care facilities and practitioners a written form notice of the rights of victims and the remedies and services available to victims of domestic violence.

(b) A health care practitioner whose patient has injuries or conditions consistent with domestic violence shall provide to the patient, and every health care facility shall make available to all patients, a written form notice of the rights of victims and the remedies and services available to victims of domestic violence.

§48-26-503. Standards, procedures and curricula.

(a) The bureau for public health of the department of health and human resources shall publish model standards, including specialized procedures and curricula, concerning domestic violence for health care facilities, practitioners and personnel.

(b) The procedures and curricula shall be developed in consultation with public and private agencies that provide programs for victims of domestic violence, advocates for victims, organizations representing the interests of shelters and personnel who have demonstrated expertise and experience in providing health care to victims of domestic violence and their children.

PART 6. FUNDING.

§48-26-601. Repealed.

§48-26-602. Repealed.

§48-26-603. Domestic Violence Legal Services Fund.

(a) There is continued in the State Treasury a special revenue account, designated as the “Domestic Violence Legal Services Fund,” that shall be an appropriated fund for receipt of grants, gifts, fees, or federal or state funds designated for legal services for domestic violence victims. Expenditures from the fund shall be limited to attorneys employed or contracted by licensed domestic violence programs, or employed or contracted by West Virginia's federally designated legal services program, its successor organization or other nonprofit organization as determined by the department, that establish a collaborative relationship with a licensed domestic violence program, to provide civil legal services to victims of domestic violence.

(b) Any court of this state may order a nonprevailing party to pay an amount equivalent to the reasonable attorney's fee to which the prevailing litigant would be entitled into the Domestic Violence Legal Services Fund, established in subsection (a) of this section, if the following circumstances occur:

(1) A prevailing litigant is entitled by statute or common law to a reasonable attorney's fee, and

(2) The prevailing litigant's legal counsel informs the court that no fee will be requested.

§48-26-604. Annual reports of licensed programs.

(a) All programs licensed pursuant to this article shall report specific information annually as required by the board.

(b) No information contained in a report may identify any person served by the program or enable any person to determine the identity of any such person.

PART 7. CONFIDENTIALITY.

§48-26-701. Confidentiality.

(a) A program licensed pursuant to this article may not disclose, reveal, or release or be compelled to disclose, reveal, or release, any written records or personal or personally identifying information about a program participant created or maintained in providing services, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected, pursuant to this article except:

(1) Upon written consent, or upon oral consent in emergency situations defined by legislative rule, of the person seeking or who has sought services from the program;

(2) In any proceeding brought under § 9-6-4 and § 9-6-5 of this code or § 49-4-601 through § 49-4-610 of this code;

(3) As mandated by § 49-2-801 through § 49-2-814 and § 9-6-1 *et seq.* of this code;

(4) Pursuant to an order of any court based upon a finding that the information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section;

(5) To protect against a clear and substantial danger of imminent injury by a person receiving services to himself or herself or another; or

(6) As authorized by the releases signed by batterer intervention and prevention program participants pursuant to the provisions of subsection (b) of this section.

(b) Batterer intervention and prevention program participants shall authorize the release of information by signing the following releases:

(1) Allowing the provider to inform the victim or alleged victim and the victim's advocates that the batterer is participating in a batterer intervention and prevention program with the provider and to provide information to the victim or alleged victim and her or his advocates, if necessary, for the victim's or alleged victim's safety;

(2) Allowing prior and current service providers to provide information about the batterer to the provider;

(3) Allowing the provider, for good cause, to provide information about the batterer to relevant legal entities, including courts, parole officers, probation officers, child protective services, adult protective services, law enforcement, licensed domestic violence programs, or other referral agencies;

(4) Allowing the provider to report to the court, if the participation was court ordered, and to the victim or alleged victim, if she or he requests and provides a method of notification, and to her or his advocate, any assault, failure to comply with program requirements, failure to attend the program, threat of harm by the batterer, reason for termination, and recommendations for changes in the court order; and

(5) Allowing the provider to report to the victim or alleged victim, or her or his advocate, without the participant's authorization, all perceived threats of harm, the participant's failure to attend, and reason for termination.

(c) Monitored parenting and exchange programs may disclose to one parent or guardian, without the permission of the other parent or guardian, any perceived threat of harm or violation of the court order or violation of the monitored parenting and exchange program rules by the other parent or guardian.

(d) A monitored parenting and exchange program may not release information about the child without consent of the parent with custodial responsibility or guardian.

(e) In addition to the provisions set forth in this section, the release of a victim's personally identifying information is subject to the provisions of 42 U.S.C. § 13925(b)(2).

(f) A consent or authorization for the transmission or disclosure of confidential information is not effective unless it is signed by the program participant whose information is being disclosed. Every person signing an authorization shall be given a copy.

(g) A victim of domestic violence, dating violence, sexual assault, or stalking shall not be required to provide consent to release his or her personally identifying information as a condition of eligibility for the services, nor may any personally identifying information be shared in order to comply with federal or state reporting, evaluation, or data collection requirements: *Provided,* That nothing in this section prohibits a program from reporting suspected abuse or neglect, as defined by law, when the program is mandated by law to report suspected abuse or neglect.

PART 8. EDUCATION CONCERNING DOMESTIC VIOLENCE.

§48-26-801. Continuing education for certain state employees.

(a)(1) Subject to the provisions of subdivision (2) of this subsection, the department of health and human resources shall provide or require continuing education concerning domestic violence for child protective services workers, adult protective services workers, social services workers, family support workers and workers in the bureau for child support enforcement.

(2) Funding for the continuing education provided or required under subdivision (1) of this section may not exceed the amounts allocated for that purpose by the spending unit from existing appropriations. No provision of this section may be construed to require the Legislature to make any appropriation.

(b) The courses or requirements shall be prepared and presented in consultation with public and private agencies that provide programs for victims of domestic violence or programs of intervention for perpetrators, advocates for victims, organizations representing the interests of shelters and the family protection services board.

§48-26-802. Continuing education for law-enforcement officers concerning domestic violence.

(a)(1) Subject to the provisions of subdivision (2) of this subsection, as a part of the initial law-enforcement officer training required before a person may be employed as a law-enforcement officer pursuant to article twenty-nine, chapter thirty of this code, all law-enforcement officers shall receive training concerning domestic violence.

(2) Funding for the training required under subdivision (1) of this section may not exceed the amounts allocated by the spending unit for that purpose from existing appropriations. No provision of this section may be construed to require the Legislature to make any appropriation.

(b) The course of instruction and the objectives in learning and performance for the education of law-enforcement officers required pursuant

to this section shall be developed and presented in consultation with public and private providers of programs for victims of domestic violence and programs of intervention for perpetrators, persons who have demonstrated expertise in training and education concerning domestic violence and organizations representing the interests of shelters.

§48-26-803. Judicial education on domestic violence.

(a)(1) Subject to the provisions of subdivision (2) of this subsection, as a part of existing training for court personnel, the supreme court of appeals shall develop and present courses of continuing education concerning domestic violence for magistrates assistants, and juvenile and adult probation officers.

(2) Funding for the continuing education required under subdivision (1) of this section may not exceed the amounts allocated for that purpose by the supreme court of appeals from existing appropriations. No provision of this section may be construed to require the Legislature to make any appropriation.

(b) The course of instruction shall be prepared and may be presented in consultation with public and private agencies that provide programs for victims of domestic violence and programs of intervention for perpetrators, advocates for victims, persons who have demonstrated expertise in training and education concerning domestic violence, organizations representing the interests of shelters and the family protection services board.

§48-26-804. Required curricula for public education system.

(a)(1) Subject to the provisions of subdivision (2) of this subsection, the state board of education shall select or develop:

(A) Curricula that are appropriate for various ages for pupils concerning the dynamics of violence, prevention of violence, including domestic violence; and

(B) Curricula for school counselors, health care personnel, administrators and teachers concerning domestic violence.

(2) Funding for selecting or developing the curricula required under subdivision (1) of this section may not exceed the amounts allocated for that purpose by the spending unit from existing appropriations. No provision of this section may be construed to require the Legislature to make any appropriation.

(b) The curricula shall be selected or developed by the state board of education in consultation with public and private agencies that provide programs for conflict resolution, violence prevention, victims of domestic violence and programs of intervention for perpetrators of domestic violence, advocates for victims, organizations representing the interests of shelters, persons who have demonstrated expertise and experience in education and domestic violence and the family protection services board.

§48-26-805. Continuing education for school personnel who are required to report child abuse and neglect.

(a)(1) Subject to the provisions of subdivision (2) of this subsection, the state department of education shall provide or require courses of continuing education concerning domestic violence for employees who are required by law to report child abuse or neglect.

(2) Funding for the continuing education provided or required under subdivision (1) of this section may not exceed the amounts allocated for that purpose by the spending unit from existing appropriations. No provision of this section may be construed to require the Legislature to make any appropriation.

(b) The courses or requirements shall be prepared and presented in consultation with public and private agencies that provide programs for victims of domestic violence, persons who have demonstrated expertise in education and domestic violence, advocates for victims, organizations representing the interests of shelters and the family protection services board.

PART 9. LOCAL ADVISORY COUNSELS.

§48-26-901. Repealed.

§48-26-902. Repealed.

PART 10. CHILDREN'S CENTERS FOR THE MONITORING OF CUSTODIAL RESPONSIBILITY.

§48-26-1001. Court orders; use of monitored parenting and exchange programs without court order.

(a) Judges and magistrates may order persons to apply to a licensed monitored parenting and exchange program for monitored parenting or monitored exchange of children: *Provided,* That a licensed monitored parenting and exchange program may not be required to perform duties that are beyond the program's capacity or scope of services.

(b) Judges and magistrates may require a person to pay a reasonable amount based on ability to pay and other relevant criteria for any fee charged by a monitored parenting and exchange program.

(c) Licensed monitored parenting and exchange programs may receive referrals from judges, magistrates, child protective services, attorneys and other agencies, for services under the terms and conditions of those services as set forth in rules promulgated by the board.

(d) Licensed monitored parenting and exchange programs may serve self-referrals when the adult parties agree to the use of the program.

§48-26-1002. Exclusions.

The provisions of this part do not apply to therapeutic or supervised visitation or exchanges or any activity conducted by the state or others in abuse and neglect proceedings pursuant to § 49-2-801 through § 49-2-814 and § 49-4-601 through § 49-4-610 of this code in which assessment, evaluation, formulation of a treatment plan, case management, counseling, therapy, or similar activities occur.

§48-26-1003. Repealed.

§48-26-1004. Contract by persons using program.

Every program shall require that the parent, guardian or other adult sign a written contract prior to using the program and that the use of the services provided by the program can be terminated by the program for violation of the contract.

§48-26-1005. Repealed.

§48-26-1006. Repealed.

§48-26-1007. Repealed.

PART 11. MISCELLANEOUS PROVISIONS.

§48-26-1101. Referral to shelters.

Where shelters are available, the law-enforcement officer or other public authority investigating an alleged incident of domestic violence shall advise the victim of the availability of the family protection shelter to which that person may be admitted.

§48-26-1102. Repealed.

§49-4-704. Institution of proceedings by petition; notice to juvenile and parents; preliminary hearings; subpoena.

Previously codified at § 49-5-7.

(a)(1) A petition alleging that a juvenile is a status offender or a juvenile delinquent may be filed by a person who has knowledge of or information concerning the facts alleged. The petition shall be verified by the petitioner, shall set forth the name and address of the juvenile's parents, guardians or custodians, if known to the petitioner, and shall be filed in the circuit court in the county where the alleged status offense or act of delinquency occurred. However, a proceeding under this chapter may be removed, for good cause shown, in accordance with section one, article nine, chapter fifty-six of this code. The petition shall contain specific allegations of the conduct and facts upon which the petition is based, including the approximate time and place of the alleged conduct; a statement of the right to

have counsel appointed and consult with counsel at every stage of the proceedings; and the relief sought.

(2) Upon the filing of the petition, the court shall set a time and place for a preliminary hearing and may appoint counsel. A copy of the petition and summons may be served upon the respondent juvenile by first class mail or personal service of process. If a juvenile does not appear in response to a summons served by mail, no further proceeding may be held until the juvenile is served a copy of the petition and summons by personal service of process. If a juvenile fails to appear in response to a summons served in person upon him or her, an order of arrest may be issued by the court for that reason alone.

(b) The parents, guardians or custodians shall be named in the petition as respondents and shall be served with notice of the proceedings in the same manner as provided in subsection (a) of this section for service upon the juvenile and required to appear with the juvenile at the time and place set for the proceedings unless the respondent cannot be found after diligent search. If a respondent cannot be found after diligent search, the court may proceed without further requirement of notice. However, the court may order service by first class mail to the last known address of the respondent. The respondent shall be afforded fifteen days after the date of mailing to appear or answer.

(c) The court or referee may order the issuance of a subpoena against the person having custody and control of the juvenile ordering him or her to bring the juvenile before the court.

(d) When any case of a juvenile charged with the commission of a crime is certified or transferred to the circuit court, the court shall forthwith cause the juvenile and his or her parents, guardians or custodians to be served with a petition as provided in subsections (a) and (b) of this section. In the event the juvenile is in custody, the petition shall be served upon the juvenile within ninety-six hours of the time custody began and if the petition is not served within that time, the juvenile shall be released forthwith.

(e) The clerk of the court shall notify, within two judicial days, the local office of the Department of Health and Human Resources of all proceedings under this article, which is responsible for convening and directing the multidisciplinary treatment planning process in accordance with section four hundred six of this article. In status offense or delinquency cases where a case manager has not been assigned, the juvenile probation officer is responsible for notifying the local office of the Department of Health and Human Services which will assign a case manager who will initiate assessment and be responsible for convening and directing the multidisciplinary treatment planning process.

(f) Notwithstanding any other provision of this code to the contrary, a petition filed pursuant to section four hundred three, article twenty-seven, chapter forty-eight of this code in which the petition for the emergency protective order is filed by or on behalf of the juvenile's parent, guardian or custodian or other person with whom the juvenile resides and that results in

the issuance of an emergency protective order naming a juvenile as the respondent, shall be treated as a petition authorized by this section, alleging the juvenile is a juvenile delinquent. However, the magistrate court shall notify the prosecuting attorney in the county where the emergency protective order is issued within twenty-four hours of the issuance of the emergency protective order and the prosecuting attorney may file an amended verified petition to comply with subsection (a) of this section within two judicial days.

§49-4-705. Taking a juvenile into custody; requirements; existing conditions; detention centers; medical aid.

Previously codified at § 49-5-8.

(a) In proceedings formally instituted by the filing of a juvenile petition, the circuit court or a magistrate may issue an order directing that a juvenile be taken into custody before adjudication only upon a showing of probable cause to believe that one of the following conditions exists: (1) The petition shows that grounds exist for the arrest of an adult in identical circumstances; (2) the health, safety and welfare of the juvenile demand custody; (3) the juvenile is a fugitive from a lawful custody or commitment order of a juvenile court; or (4) the juvenile is alleged to be a juvenile delinquent with a record of willful failure to appear at juvenile proceedings and custody is necessary to assure his or her presence before the court. A detention hearing pursuant to section seven hundred six of this article shall be held by the judge or magistrate authorized to conduct the hearings without unnecessary delay and in no event may any delay exceed the next day.

(b) Absent a court order, a juvenile may be taken into custody by a law-enforcement official only if one of the following conditions exists:

(1) Grounds exist for the arrest of an adult in identical circumstances;

(2) Emergency conditions exist which, in the judgment of the officer, pose imminent danger to the health, safety and welfare of the juvenile;

(3) The official has reasonable grounds to believe that the juvenile has left the care of his or her parents, guardian or custodian without the consent of the person and the health, safety and welfare of the juvenile is endangered;

(4) The juvenile is a fugitive from a lawful custody or commitment order of a juvenile court;

(5) The official has reasonable grounds to believe the juvenile to have been driving a motor vehicle with any amount of alcohol in his or her blood; or

(6) The juvenile is the named respondent in an emergency domestic violence protective order issued pursuant to section four hundred three, article twenty-seven, chapter forty-eight of this code and the individual filing the petition for the emergency protective order is the juvenile's parent, guardian or custodian or other person with whom the juvenile resides.

(c) Upon taking a juvenile into custody, with or without a court order, the official shall:

(1) Immediately notify the juvenile's parent, guardian, custodian or, if the parent, guardian or custodian cannot be located, a close relative;

(2) Release the juvenile into the custody of his or her parent, guardian or custodian unless:

(A) Circumstances present an immediate threat of serious bodily harm to the juvenile if released;

(B) No responsible adult can be found into whose custody the juvenile can be delivered. Each day the juvenile is detained, a written record must be made of all attempts to locate a responsible adult; or

(C) The juvenile has been taken into custody for an alleged act of delinquency for which secure detention is permissible.

(3) If the juvenile is an alleged status offender or has been taken into custody pursuant to subdivision (6), subsection (b) of this section, immediately notify the Department of Health and Human Resources and, if the circumstances of either paragraph (A) or (B), subdivision (2) of this subsection exist and the requirements therein are met, the official may detain the juvenile, but only in a nonsecure or staff-secure facility;

(4) Take the juvenile without unnecessary delay before a judge of the circuit court for a detention hearing pursuant to section seven hundred six of this article. If a circuit court judge is not available in the county, the official shall take the juvenile without unnecessary delay before any magistrate available in the county for the sole purpose of conducting the detention hearing. In no event may any delay in presenting the juvenile for a detention hearing exceed the next day after he or she is taken into custody.

(d) In the event that a juvenile is delivered into the custody of a sheriff or director of a detention facility, the sheriff or director shall immediately notify the sheriff or director shall immediately provide to every juvenile who is delivered into his or her custody a written statement explaining the juvenile's right to a prompt detention hearing, his or her right to counsel, including appointed counsel if he or she cannot afford counsel, and his or her privilege against self-incrimination. In all cases when a juvenile is delivered into a sheriff's or detention center director's custody, that official shall release the juvenile to his or her parent, guardian or custodian by the end of the next day unless the juvenile has been placed in detention after a hearing conducted pursuant to section seven hundred six of this article.

(e) The law-enforcement agency that takes a juvenile into custody or places a juvenile under arrest is responsible for the juvenile's initial transportation to a juvenile detention center or other Division of Juvenile Services' residential facility.

(f) Notwithstanding any other provision of this code, a juvenile detention center, or other Division of Juvenile Services' residential facility, is not required to accept a juvenile if the juvenile appears to be in need of medical attention of a degree necessitating treatment by a physician. If a juvenile is refused pursuant to this subsection, the juvenile detention center, or other Division of Juvenile Services' residential facility, may not subsequently accept the juvenile for detention until the arresting or transporting officer provides the juvenile detention center, or other Division of Juvenile Services' residential facility, with a written clearance from a licensed

physician reflecting that the juvenile has been examined and, if necessary, treated and which states that in the physician's medical opinion the juvenile can be safely confined in the juvenile detention center or other Division of Juvenile Services' residential facility.

§50-5-3. Appointment of guardian ad litem [magistrate court].

No infant, incompetent person or incarcerated convict shall proceed or be proceeded against in a civil action in magistrate court unless the provisions of this section are complied with.

Whenever an infant, incompetent person or incarcerated convict has a duly qualified representative, such as a guardian, curator, committee or other like fiduciary, such representative may sue or defend on behalf of the infant, incompetent person or convict. If a person under any disability does not have a duly qualified representative he may sue by his next friend. The magistrate shall appoint some suitable person who shall not be required to be an attorney-at-law as guardian ad litem for an infant, incompetent person or incarcerated convict not otherwise represented in an action.

§51-1-21. Authority to maintain domestic violence database.

(a) The West Virginia Supreme Court of Appeals is hereby authorized to maintain a domestic violence database containing copies of protective orders entered by the courts of this state and granted pursuant to the provisions of article twenty-seven, chapter forty-eight of this code. Further, the domestic violence database shall also include, upon request, protection orders issued by a jurisdiction outside of this state pursuant to its law.

(b) Only a protected individual who obtains a protection order from a jurisdiction other than this state pursuant to its law or his or her representative as provided in section five article, twenty-eight of this chapter may register that order with the West Virginia Supreme Court of Appeals.

(c) Failure to register an order as provided in this section shall not affect its enforceability in any county or jurisdiction.

§51-2A-2. Family court jurisdiction; exceptions; limitations.

(a) The family court shall exercise jurisdiction over the following matters:

(1) All actions for divorce, annulment or separate maintenance brought under the provisions of § 48-3-1 et seq., § 48-4-1 et seq., or § 48-5-1 et seq. of this code, except as provided in subsections (b) and (c) of this section;

(2) All actions to obtain orders of child support brought under the provisions of § 48-11-1 et seq., § 48-12-1 et seq., and § 48-14-1 et seq. of this code;

(3) All actions to establish paternity brought under the provisions of § 48-24-1 et seq. of this code and any dependent claims related to such actions regarding child support, parenting plans or other allocation of custodial responsibility or decision-making responsibility for a child;

(4) All actions for grandparent visitation brought under the provisions of § 48-10-1 et seq. of this code;

(5) All actions for the interstate enforcement of family support brought under § 48-16-1 et seq. of this code and for the interstate enforcement of child custody brought under the provisions of § 48-20-1 et seq. of this code;

(6) All actions for the establishment of a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child, including actions brought under the Uniform Child Custody Jurisdiction and Enforcement Act, as provided in § 48-20-1 et seq. of this code;

(7) All petitions for writs of habeas corpus in which the issue contested is custodial responsibility for a child;

(8) All motions for temporary relief affecting parenting plans or other allocation of custodial responsibility or decision-making responsibility for a child, child support, spousal support or domestic violence;

(9) All motions for modification of an order providing for a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child or for child support or spousal support;

(10) All actions brought, including civil contempt proceedings, to enforce an order of spousal or child support or to enforce an order for a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child;

(11) All actions brought by an obligor to contest the enforcement of an order of support through the withholding from income of amounts payable as support or to contest an affidavit of accrued support, filed with the circuit clerk, which seeks to collect an arrearage;

(12) All final hearings in domestic violence proceedings;

(13) Petitions for a change of name, exercising concurrent jurisdiction with the circuit court;

(14) All proceedings for payment of attorney fees if the family court judge has jurisdiction of the underlying action;

(15) All proceedings for property distribution brought under § 48-7-1 et seq. of this code;

(16) All proceedings to obtain spousal support brought under § 48-8-1 et seq. of this code;

(17) All proceedings relating to the appointment of guardians or curators of minor children brought pursuant to § 44-10-3, § 44-10-4 and § 44-10-6 of this code, exercising concurrent jurisdiction with the circuit court; and

(18) All proceedings relating to petitions for sibling visitation.

(b) If an action for divorce, annulment, or separate maintenance does not require the establishment of a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child and does not require an award or any payment of child support, the circuit court has concurrent jurisdiction with the family court over the action if, at the time of the filing of the action, the parties also file a written property settlement agreement executed by both parties.

(c) If an action for divorce, annulment, or separate maintenance is pending and a petition is filed pursuant to the provisions of § 49-4-601 through § 49-4-610 of this code alleging abuse or neglect of a child by either of the parties to the divorce, annulment, or separate maintenance action, the orders of the circuit court in which the abuse or neglect petition is filed shall supersede and take precedence over an order of the family court respecting the allocation of custodial and decision-making responsibility for the child between the parents. If no order for the allocation of custodial and decision-making responsibility for the child between the parents has been entered by the family court in the pending action for divorce, annulment, or separate maintenance, the family court shall stay any further proceedings concerning the allocation of custodial and decision-making responsibility for the child between the parents and defer to the orders of the circuit court in the abuse or neglect proceedings.

(d) If a family court judge is assigned as a judicial officer of a domestic violence court then jurisdiction of all proceedings relating to criminal misdemeanor crimes of domestic violence as referenced in § 48-27-301 of this code involving a family or household member as referenced in § 48-27-204(1) through § 48-27-204(6) and § 48-27-204(7)(A), § 48-27-204(7)(B), and § 48-27-204(7)(H) of this code shall be concurrent with the circuit and magistrate courts.

(e) A family court is a court of limited jurisdiction. A family court is a court of record only for the purpose of exercising jurisdiction in the matters for which the jurisdiction of the family court is specifically authorized in this section and in chapter 48 of this code. A family court may not exercise the powers given courts of record in § 51-5-1 of this code or exercise any other powers provided for courts of record in this code unless specifically authorized by the Legislature. A family court judge is not a “judge of any court of record” or a “judge of a court of record” as the terms are defined and used in § 51-9-1 et seq. of this code.

§ 51-2A-2a. Family court jurisdiction to restrict contact between parties.

(a) A family court in its discretion may, at any time during the pendency of any action prosecuted under chapter forty-eight of this code, restrict contact between the parties thereto without a finding of domestic violence under article twenty-seven of said chapter. This order shall not be considered a protective order for purposes of section five hundred seven, article twenty-seven, chapter forty-eight of this code. A court may enter a standing order regarding the conduct expected of the parties during the proceeding. Any standing order may restrict the parties from:

(1) Entering the home, school, business or place of employment of the other for the purpose of bothering or annoying the other;

(2) Contacting the other, in person, in writing, electronically or by telephone, for purposes not clearly necessary for the prosecution of the underlying action or any obligation related thereto or resulting therefrom.

(b) Upon a finding of misconduct by a party, the court shall enter an order against the offending party enjoining the conduct which disturbs or interferes with the peace or liberty of the other party so long as such conduct does not rise to the level of or constitute domestic violence as defined in article twenty-seven, chapter forty-eight of this code. The court shall not issue orders under this section in cases where the conduct of either party has previously risen to the level of domestic violence.

(c) Nothing in this section shall preclude the court from entering an emergency protective order, or final protective order, as provided in article twenty-seven, chapter forty-eight of this code.

(d) Notwithstanding the provisions of section five hundred five, article twenty-seven, chapter forty-eight of this code, an order entered pursuant to the provisions of this section shall remain in effect for a period of time as specified in the order.

(e) The court may enforce orders under this section against the offending party through its powers of contempt, pursuant to section nine of this article.

(f) It is the express intent of the Legislature that orders issued pursuant to this section are to restrict behavior which is not of sufficient severity to implicate the provisions of article twenty-seven, chapter forty-eight of this code and 18 U. S. C. § 922(g)(8).

§51-2A-9. Contempt powers of family court judge.

(a) In addition to the powers of contempt established in chapter forty-eight of this code, a family court judge may:

(1) Sanction persons through civil contempt proceedings when necessary to preserve and enforce the rights of private parties or to administer remedies granted by the court;

(2) Regulate all proceedings in a hearing before the family court judge; and

(3) Punish direct contempts that are committed in the presence of the court or that obstruct, disrupt or corrupt the proceedings of the court.

(b) A family court judge may enforce compliance with his or her lawful orders with remedial or coercive sanctions designed to compensate a complainant for losses sustained and to coerce obedience for the benefit of the complainant. Sanctions must give the contemnor an opportunity to purge himself or herself. In selecting sanctions, the court must use the least possible power adequate to the end proposed. A person who lacks the present ability to comply with the order of the court may not be confined for a civil contempt. Sanctions may include, but are not limited to, seizure or impoundment of property to secure compliance with a prior order. Ancillary relief may provide for an award of attorney's fees.

(c) Upon a finding that a person is in civil contempt, the court, when otherwise appropriate and in its discretion, and as an alternative to incarceration, may place the person on work release, in a weekend jail program, in an existing community service program, in an existing day-

reporting center program, in any other existing community corrections program or on home confinement until the person has purged himself or herself of the contempt.

§56-3-33a. Actions against nonresident persons by petitioners seeking domestic violence or personal safety relief; service of process; authorizing Secretary of State to receive process against nonresidents.

(a) Any person who is:

(1) Not a resident of this state; or

(2) A resident of this state who has left this state; or

(3) A person whose residence is unknown shall be considered to have submitted to the jurisdiction of the courts of this state as to any action arising from the conduct specified in subsection (b) of this section, if such conduct was:

(A) Committed in this state; or

(B) If such conduct was not committed in this state if the conduct was purposely directed at a resident and has an effect within this state.

(b) Conduct compelling application of this section consists of:

(1) Any act constituting domestic violence or abuse as defined in section two hundred two, article twenty-seven, chapter forty-eight of this code; or

(2) Any act constituting a basis for seeking personal safety relief as defined in section four, article eight, chapter fifty-three of this code; or

(3) Any act or omission violating the provisions of a duly authorized protective or restraining order, whether issued by this state or another jurisdiction, for the protection of any person within this state.

(c) Any person subject to or considered to have submitted to the jurisdiction of the courts of this state who is made a respondent in an action may be served with the petition and order initiating such action either:

(1) By law-enforcement officers, wherever the respondent may be found, whether inside or outside the boundaries of this state; or

(2) If the respondent is alleged to have committed conduct specified in subsection (b) of this section, this shall be considered equivalent to an appointment by such nonresident of the Secretary of State, or his or her successor in office, to be his or her true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her, in any court in this state, for a cause of action arising from or growing out of such conduct, and the engaging in such conduct is a signification of such nonresident's agreement that any such process against him or her, which is served in the manner hereinafter provided, is of the same legal force and validity as though such nonresident were personally served within this state.

(A) Such service shall be made by leaving two copies of both the petition and order, with the Secretary of State, or in his or her office, and such service shall be sufficient upon such nonresident: *Provided,* That notice of such service and a copy of the petition and order shall forthwith be sent by registered or certified mail, return receipt requested, by a means which may

include electronic issuance and acceptance of electronic return receipts, by the Secretary of State to the respondent at his or her nonresident address and the respondent's return receipt signed by himself or herself or his or her duly authorized agent or the registered or certified mail so sent by the Secretary of State which is refused by the addressee and which registered or certified mail is returned to the Secretary of State, or to his or her office, showing thereon the stamp of the post-office department that delivery has been refused. After receiving verification from the United States Postal Service that acceptance of the notice, petition and order has been signed, the Secretary of State shall notify the clerk's office of the court from which the petition and order were issued by a means which may include electronic notification. If the notice, petition and order were refused or undeliverable by the United States Postal Service, the Secretary of State shall create a preservation duplicate from which a reproduction of the stored record may be retrieved which truly and accurately depicts the image of the original record. The Secretary of State may destroy or otherwise dispose of the original returned or undeliverable mail. Written notice of the action by the Secretary of State must then be provided by certified mail, return receipt requested, facsimile, or by electronic mail, to the clerk's office of the court from which the process, notice or demand was issued. If any respondent served with a petition and order fails to appear and defend at the time and place set forth in the order, judgment may be rendered against him or her at any time thereafter. The court may order such continuances as may be reasonable to afford the respondent an opportunity to defend the action or proceeding.

(B) As provided in section three hundred eight, article twenty-seven, chapter forty-eight of this code regarding domestic violence proceedings and in section thirteen, article eight, chapter fifty-three of this code regarding personal safety proceedings, no fees may be charged for service of petitions or orders until the matter is brought before the appropriate court for final resolution. Any fees ordinarily remitted to the Secretary of State or to a law-enforcement agency at the time of service shall be deferred and taxed in the costs of the action or proceeding.

(C) Data and records regarding service maintained by law-enforcement agencies and by the office of the Secretary of State for purposes of fulfilling the obligations of this section are not public records subject to disclosure under the provisions of article one, chapter twenty-nine-b of this code.

(d) The following words and phrases, when used in this section, shall for the purpose of this section and unless a different intent be apparent from the context, have the following meanings:

(1) “Duly authorized agent” means and includes among others a person who, at the direction of or with the knowledge or acquiescence of a nonresident, engages in such act or acts and includes among others a member of the family of such nonresident or a person who, at the residence, place of business or post office of such nonresident, usually receives and receipts for mail addressed to such nonresident.

(2) “Nonresident” means any person who is not a resident of this state or a resident who has moved from this state subsequent to engaging in such acts or acts covered by this section.

§57-3-3. Testimony of husband and wife in criminal cases.

In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by anyone.

§61-2-9. Malicious or unlawful assault; assault; battery; penalties.

(a) If any person maliciously shoots, stabs, cuts or wounds any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill, he or she, except where it is otherwise provided, is guilty of a felony and, upon conviction thereof, shall be punished by confinement in a state correctional facility not less than two nor more than ten years. If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and, upon conviction thereof, shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding $500.

(b) *Assault*. -- Any person who unlawfully attempts to commit a violent injury to the person of another or unlawfully commits an act that places another in reasonable apprehension of immediately receiving a violent injury is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six months or fined not more than $100, or both fined and confined.

(c) *Battery*. -- Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature to the person of another or unlawfully and intentionally causes physical harm to another person is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than twelve months or fined not more than $500, or both fined and confined.

(d) Any person convicted of a violation of subsection (b) or (c) of this section who has, in the ten years prior to the conviction, been convicted of a violation of either subsection (b) or (c) of this section where the victim was a current or former spouse, current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian or the defendant's child or ward at the time of the offense or convicted of a violation of section twenty-eight of this article or has served a period of pretrial

diversion for an alleged violation of subsection (b) or (c) of this section or section twenty-eight of this article when the victim has a present or past relationship, upon conviction, is subject to the penalties set forth in section twenty-eight of this article for a second, third or subsequent criminal act of domestic violence offense, as appropriate.

§61-2-9a. Stalking; harassment; penalties; definitions.

(a) Any person who repeatedly follows another knowing or having reason to know that the conduct causes the person followed to reasonably fear for his or her safety or suffer significant emotional distress, is guilty of a misdemeanor and, upon conviction thereof, shall be incarcerated in the county or regional jail for not more than six months or fined not more than one thousand dollars, or both.

(b) Any person who repeatedly harasses or repeatedly makes credible threats against another is guilty of a misdemeanor and, upon conviction thereof, shall be incarcerated in the county or regional jail for not more than six months or fined not more than one thousand dollars, or both.

(c) Notwithstanding any provision of this code to the contrary, any person who violates the provisions of subsection (a) or (b) of this section in violation of an order entered by a circuit court, magistrate court or family court judge, in effect and entered pursuant to part 48-5-501, et seq., part 48-5-601, et seq. or 48-27-403 of this code is guilty of a misdemeanor and, upon conviction thereof, shall be incarcerated in the county jail for not less than ninety days nor more than one year or fined not less than two thousand dollars nor more than five thousand dollars, or both.

(d) A second or subsequent conviction for a violation of this section occurring within five years of a prior conviction is a felony punishable by incarceration in a state correctional facility for not less than one year nor more than five years or fined not less than three thousand dollars nor more than ten thousand dollars, or both.

(e) Notwithstanding any provision of this code to the contrary, any person against whom a protective order for injunctive relief is in effect pursuant to the provisions of section five hundred one, article twenty-seven, chapter forty-eight of this code who has been served with a copy of said order or section six hundred eight, article five, chapter forty-eight of this code who is convicted of a violation of the provisions of this section shall be guilty of a felony and punishable by incarceration in a state correctional facility for not less than one year nor more than five years or fined not less than three thousand dollars nor more than ten thousand dollars, or both.

(f) For the purposes of this section:

(1) “Bodily injury” means substantial physical pain, illness or any impairment of physical condition;

(2) “Credible threat” means a threat of bodily injury made with the apparent ability to carry out the threat and with the result that a reasonable person would believe that the threat could be carried out;

(3) “Harasses” means willful conduct directed at a specific person or

persons which would cause a reasonable person mental injury or emotional distress

(4) “Immediate family” means a spouse, parent, stepparent, mother-in-law, father-in-law, child, stepchild, sibling, or any person who regularly resides in the household or within the prior six months regularly resided in the household; and

(5) “Repeatedly” means on two or more occasions.

(g) Nothing in this section shall be construed to prevent lawful assembly and petition for the lawful redress of grievances, including, but not limited to: Any labor or employment relations issue; demonstration at the seat of federal, state, county or municipal government; activities protected by the West Virginia constitution or the United States Constitution or any statute of this state or the United States.

(h) Any person convicted under the provisions of this section who is granted probation or for whom execution or imposition of a sentence or incarceration is suspended is to have as a condition of probation or suspension of sentence that he or she participate in counseling or medical treatment as directed by the court.

(i) Upon conviction, the court may issue an order restraining the defendant from any contact with the victim for a period not to exceed ten years. The length of any restraining order shall be based upon the seriousness of the violation before the court, the probability of future violations, and the safety of the victim or his or her immediate family. The duration of the restraining order may be longer than five years only in cases when a longer duration is necessary to protect the safety of the victim or his or her immediate family.

(j) It is a condition of bond for any person accused of the offense described in this section that the person is to have no contact, direct or indirect, verbal or physical, with the alleged victim.

(k) Nothing in this section may be construed to preclude a sentencing court from exercising its power to impose home confinement with electronic monitoring as an alternative sentence.

(l) The Governor's Committee on Crime, Delinquency and Correction, after consultation with representatives of labor, licensed domestic violence programs and rape crisis centers which meet the standards of the West Virginia Foundation for Rape Information and Services, is authorized to promulgate legislative rules and emergency rules pursuant to article three, chapter twenty-nine-a of this code, establishing appropriate standards for the enforcement of this section by state, county, and municipal law-enforcement officers and agencies.

§61-2-9d. Strangulation; definitions; penalties.

(a) As used in this section:

(1) “Bodily injury” means substantial physical pain, illness or any impairment of physical condition;

(2) “Strangle” means knowingly and willfully restricting another

person's air intake or blood flow by the application of pressure on the neck or throat;

(b) Any person who strangles another without that person's consent and thereby causes the other person bodily injury or loss of consciousness is guilty of a felony and, upon conviction thereof, shall be fined not more than $2,500 or imprisoned in a state correctional facility not less than one year or more than five years, or both fined and imprisoned.

§61-2-14d. Concealment or removal of minor child from custodian or from person entitled to visitation; penalties; defenses.

(a) Any person who conceals, takes or removes a minor child in violation of any court order and with the intent to deprive another person of lawful custody or visitation rights shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years, or in the discretion of the court, shall be imprisoned in the county jail not more than one year or fined not more than one thousand dollars, or both fined and imprisoned.

(b) Any person who violates this section and in so doing removes the minor child from this State or conceals the minor child in another state shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years, or fined not more than one thousand dollars, or both fined and imprisoned.

(c) It shall be a defense under this section that the accused reasonably believed such action was necessary to preserve the welfare of the minor child. The mere failure to return a minor child at the expiration of any lawful custody or visitation period without the intent to deprive another person of lawful custody or visitation rights shall not constitute an offense under this section.

§61-2-14g. Unlawful restraint; penalties.

(a) Any person who, without legal authority intentionally restrains another with the intent that the other person not be allowed to leave the place of restraint and who does so by physical force or by overt or implied threat of violence or by actual physical restraint but without the intent to obtain any other concession or advantage as those terms are used in section fourteen-a of this article is guilty of a misdemeanor and upon conviction shall be confined in jail for not more than one year, fined not more than $1,000, or both.

(b) In any prosecution under this section, it is an affirmative defense that:

(1) The defendant acted reasonably and in good faith to protect the person from imminent physical danger; or

(2) The person restrained was a child less than eighteen years old and that the actor was a parent or legal guardian, or a person acting under authority granted by a parent or legal guardian of such child, or by a teacher or other school personnel acting under authority granted by section one,

article five, chapter eighteen-a of this code, and that his or her sole purpose was to assume control of such child.

(c) As used in this section to “restrain” means to restrict a persons movement without his or her consent.

(d) This section shall not apply to acts done by a law-enforcement officer in the lawful exercise of his or her duties.

§61-2-28. Domestic violence -- criminal acts.

(a) *Domestic battery*. -- Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than twelve months or fined not more than $500, or both fined and confined.

(b) *Domestic assault*. -- Any person who unlawfully attempts to commit a violent injury against his or her family or household member, or unlawfully commits an act that places his or her family or household member in reasonable apprehension of immediately receiving a violent injury, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six months or fined not more than $100, or both fined and confined.

(c) *Second offense*. -- Domestic assault or domestic battery.

A person convicted of a violation of subsection (a) of this section after having been previously convicted of a violation of subsection (a) or (b) of this section, after having been convicted of a violation of subsection (b) or (c), section nine of this article or subsection (a), section fourteen-g of this article, where the victim was his or her current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or who has previously been granted a period of pretrial diversion pursuant to section twenty-two, article eleven of this chapter for a violation of subsection (a) or (b) of this section, or a violation of subsection (b) or (c), section nine of this article or subsection (a), section fourteen-g of this article where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than sixty days nor more than one year or fined not more than $1,000, or both fined and confined.

A person convicted of a violation of subsection (b) of this section after having been previously convicted of a violation of subsection (a) or (b) of this section, after having been convicted of a violation of subsection (b) or (c), section nine of this article or subsection (a), section fourteen-g of this article,

where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or having previously been granted a period of pretrial diversion pursuant to section twenty-two, article eleven of this chapter for a violation of subsection (a) or (b) of this section or subsection (b) or (c), section nine of this article or subsection (a), section fourteen-g of this article where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense shall be confined in jail for not less than thirty days nor more than six months or fined not more than $500, or both fined and confined.

(d) Any person who has been convicted of a third or subsequent violation of the provisions of subsection (a) or (b) of this section, a third or subsequent violation of the provisions of section nine of this article or subsection (a), section fourteen-g of this article, where the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or who has previously been granted a period of pretrial diversion pursuant to section twenty-two, article eleven of this chapter for a violation of subsection (a) or (b) of this section or a violation of the provisions of section nine of this article or subsection (a), section fourteen-g of this article in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense, or any combination of convictions or diversions for these offenses, is guilty of a felony if the offense occurs within ten years of a prior conviction of any of these offenses and, upon conviction thereof, shall be confined in a state correctional facility not less than one nor more than five years or fined not more than $2,500, or both fined and confined.

(e) As used in this section, “family or household member” means “family or household member” as defined in section two hundred four, article twenty-seven, chapter forty-eight of this code.

(f) A person charged with a violation of this section may not also be charged with a violation of subsection (b) or (c), section nine of this article for the same act.

(g) No law-enforcement officer may be subject to any civil or criminal action for false arrest or unlawful detention for effecting an arrest pursuant to

this section or pursuant to section one thousand two, article twenty-seven, chapter forty-eight of this code.

§61-7-4. License to carry deadly weapons; how obtained.

(a) Except as provided in subsection (h) of this section, any person desiring to obtain a state license to carry a concealed deadly weapon shall apply to the sheriff of his or her county for the license, and pay to the sheriff, at the time of application, a fee of $75, of which $15 of that amount shall be deposited in the Courthouse Facilities Improvement Fund created by section six, article twenty-six, chapter twenty-nine of this code. Concealed weapons license may only be issued for pistols and revolvers. Each applicant shall file with the sheriff a complete application, as prepared by the Superintendent of the West Virginia State Police, in writing, duly verified, which sets forth only the following licensing requirements:

(1) The applicant's full name, date of birth, Social Security number, a description of the applicant's physical features, the applicant's place of birth, the applicant's country of citizenship and, if the applicant is not a United States citizen, any alien or admission number issued by the United States Bureau of Immigration and Customs Enforcement, and any basis, if applicable, for an exception to the prohibitions of 18 U. S. C. § 922(g)(5)(B);

(2) That, on the date the application is made, the applicant is a bona fide United States citizen or legal resident thereof and resident of this state and of the county in which the application is made and has a valid driver's license or other state-issued photo identification showing the residence;

(3) That the applicant is twenty-one years of age or older;

(4) That the applicant is not addicted to alcohol, a controlled substance or a drug and is not an unlawful user thereof as evidenced by either of the following within the three years immediately prior to the application:

(A) Residential or court-ordered treatment for alcoholism or alcohol detoxification or drug treatment; or

(B) Two or more convictions for driving while under the influence or driving while impaired;

(5) That the applicant has not been convicted of a felony unless the conviction has been expunged or set aside or the applicant's civil rights have been restored or the applicant has been unconditionally pardoned for the offense;

(6) That the applicant has not been convicted of a misdemeanor crime of violence other than an offense set forth in subdivision (7) of this section in the five years immediately preceding the application;

(7) That the applicant has not been convicted of a misdemeanor crime of domestic violence as defined in 18 U. S. C. § 921(a)(33), or a misdemeanor offense of assault or battery either under section twenty-eight, article two of this chapter or subsection (b) or (c), section nine, article two of this chapter in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant cohabits

or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense, or a misdemeanor offense with similar essential elements in a jurisdiction other than this state;

(8) That the applicant is not under indictment for a felony offense or is not currently serving a sentence of confinement, parole, probation or other court-ordered supervision imposed by a court of any jurisdiction or is the subject of an emergency or temporary domestic violence protective order or is the subject of a final domestic violence protective order entered by a court of any jurisdiction;

(9) That the applicant has not been adjudicated to be mentally incompetent or involuntarily committed to a mental institution. If the applicant has been adjudicated mentally incompetent or involuntarily committed the applicant must provide a court order reflecting that the applicant is no longer under such disability and the applicant's right to possess or receive a firearm has been restored;

(10) That the applicant is not prohibited under the provisions of section seven of this article or federal law, including 18 U. S. C. § 922(g) or (n), from receiving, possessing or transporting a firearm;

(11) That the applicant has qualified under the minimum requirements set forth in subsection (d) of this section for handling and firing the weapon: *Provided,* That this requirement shall be waived in the case of a renewal applicant who has previously qualified; and

(12) That the applicant authorizes the sheriff of the county, or his or her designee, to conduct an investigation relative to the information contained in the application.

(b) For both initial and renewal applications, the sheriff shall conduct an investigation including a nationwide criminal background check consisting of inquiries of the National Instant Criminal Background Check System, the West Virginia criminal history record responses and the National Interstate Identification Index and shall review the information received in order to verify that the information required in subsection (a) of this section is true and correct. A license may not be issued unless the issuing sheriff has verified through the National Instant Criminal Background Check System that the information available to him or her does not indicate that receipt or possession of a firearm by the applicant would be in violation of the provisions of section seven of this article or federal law, including 18 U. S. C. § 922(g) or (n).

(c) Sixty dollars of the application fee and any fees for replacement of lost or stolen licenses received by the sheriff shall be deposited by the sheriff into a concealed weapons license administration fund. The fund shall be administered by the sheriff and shall take the form of an interest-bearing account with any interest earned to be compounded to the fund. Any funds deposited in this concealed weapon license administration fund are to be expended by the sheriff to pay the costs associated with issuing concealed weapons licenses. Any surplus in the fund on hand at the end of each fiscal

year may be expended for other law-enforcement purposes or operating needs of the sheriff's office, as the sheriff considers appropriate.

(d) All persons applying for a license must complete a training course in handling and firing a handgun, which includes the actual live firing of ammunition by the applicant. The successful completion of any of the following courses fulfills this training requirement: *Provided*, That the completed course includes the actual live firing of ammunition by the applicant:

(1) Any official National Rifle Association handgun safety or training course;

(2) Any handgun safety or training course or class available to the general public offered by an official law-enforcement organization, community college, junior college, college or private or public institution or organization or handgun training school utilizing instructors certified by the institution;

(3) Any handgun training or safety course or class conducted by a handgun instructor certified as such by the state or by the National Rifle Association;

(4) Any handgun training or safety course or class conducted by any branch of the United States military, reserve or National Guard or proof of other handgun qualification received while serving in any branch of the United States military, reserve or National Guard.

A photocopy of a certificate of completion of any of the courses or classes or an affidavit from the instructor, school, club, organization or group that conducted or taught the course or class attesting to the successful completion of the course or class by the applicant or a copy of any document which shows successful completion of the course or class is evidence of qualification under this section and shall include the instructor's name, signature and NRA or state instructor identification number, if applicable.

(e) All concealed weapons license applications must be notarized by a notary public duly licensed under article four, chapter twenty-nine of this code. Falsification of any portion of the application constitutes false swearing and is punishable under section two, article five, chapter sixty-one of this code.

(f) The sheriff shall issue a license unless he or she determines that the application is incomplete, that it contains statements that are materially false or incorrect or that applicant otherwise does not meet the requirements set forth in this section. The sheriff shall issue, reissue or deny the license within forty-five days after the application is filed if all required background checks authorized by this section are completed.

(g) Before any approved license is issued or is effective, the applicant shall pay to the sheriff a fee in the amount of $25 which the sheriff shall forward to the Superintendent of the West Virginia State Police within thirty days of receipt. The license is valid for five years throughout the state, unless sooner revoked.

(h) Each license shall contain the full name and address of the licensee and a space upon which the signature of the licensee shall be

signed with pen and ink. The issuing sheriff shall sign and attach his or her seal to all license cards. The sheriff shall provide to each new licensee a duplicate license card, in size similar to other state identification cards and licenses, suitable for carrying in a wallet, and the license card is considered a license for the purposes of this section. All duplicate license cards issued on or after July 1, 2017, shall be uniform across all fifty-five counties in size, appearance and information and shall feature a photograph of the licensee.

(i) The Superintendent of the West Virginia State Police, in cooperation with the West Virginia Sheriffs' Bureau of Professional Standards, shall prepare uniform applications for licenses and license cards showing that the license has been granted and shall do any other act required to be done to protect the state and see to the enforcement of this section.

(j) If an application is denied, the specific reasons for the denial shall be stated by the sheriff denying the application. Any person denied a license may file, in the circuit court of the county in which the application was made, a petition seeking review of the denial. The petition shall be filed within thirty days of the denial. The court shall then determine whether the applicant is entitled to the issuance of a license under the criteria set forth in this section. The applicant may be represented by counsel, but in no case is the court required to appoint counsel for an applicant. The final order of the court shall include the court's findings of fact and conclusions of law. If the final order upholds the denial, the applicant may file an appeal in accordance with the Rules of Appellate Procedure of the Supreme Court of Appeals. If the findings of fact and conclusions of law of the court fail to uphold the denial, the applicant may be entitled to reasonable costs and attorney's fees, payable by the sheriff's office which issued the denial.

(k) If a license is lost or destroyed, the person to whom the license was issued may obtain a duplicate or substitute license for a fee of $5 by filing a notarized statement with the sheriff indicating that the license has been lost or destroyed.

(l) Whenever any person after applying for and receiving a concealed weapon license moves from the address named in the application to another county within the state, the license remains valid for the remainder of the five years unless the sheriff of the new county has determined that the person is no longer eligible for a concealed weapon license under this article, and the sheriff shall issue a new license bearing the person's new address and the original expiration date for a fee not to exceed $5: *Provided,* That the licensee, within twenty days thereafter, notifies the sheriff in the new county of residence in writing of the old and new addresses.

(m) The sheriff shall, immediately after the license is granted as aforesaid, furnish the Superintendent of the West Virginia State Police a certified copy of the approved application. The sheriff shall furnish to the Superintendent of the West Virginia State Police at any time so requested a certified list of all licenses issued in the county. The Superintendent of the

West Virginia State Police shall maintain a registry of all persons who have been issued concealed weapons licenses.

(n) The sheriff shall deny any application or revoke any existing license upon determination that any of the licensing application requirements established in this section have been violated by the licensee.

(o) A person who is engaged in the receipt, review or in the issuance or revocation of a concealed weapon license does not incur any civil liability as the result of the lawful performance of his or her duties under this article.

(p) Notwithstanding subsection (a) of this section, with respect to application by a former law-enforcement officer honorably retired from agencies governed by article fourteen, chapter seven of this code; article fourteen, chapter eight of this code; article two, chapter fifteen of this code; and article seven, chapter twenty of this code, an honorably retired officer is exempt from payment of fees and costs as otherwise required by this section. All other application and background check requirements set forth in this section are applicable to these applicants.

(q) Information collected under this section, including applications, supporting documents, permits, renewals or any other information that would identify an applicant for or holder of a concealed weapon license, is confidential: *Provided*: That this information may be disclosed to a law-enforcement agency or officer: (i) To determine the validity of a license; (ii) to assist in a criminal investigation or prosecution; or (iii) for other lawful law-enforcement purposes. A person who violates this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $50 or more than $200 for each offense.

(r) A person who pays fees for training or application pursuant to this article after the effective date of this section is entitled to a tax credit equal to the amount actually paid for training not to exceed $50: *Provided,* That if such training was provided for free or for less than $50, then such tax credit may be applied to the fees associated with the initial application.

(s) Except as restricted or prohibited by the provisions of this article or as otherwise prohibited by law, the issuance of a concealed weapon license issued in accordance with the provisions of this section authorizes the holder of the license to carry a concealed pistol or revolver on the lands or waters of this state.

§61-7-4a. Provisional license to carry deadly weapons; how obtained.

(a) Any person who is at least eighteen years of age and less than twenty-one years of age who desires to obtain a state license to carry a concealed deadly weapon shall apply to the sheriff of his or her county for a provisional license, and pay to the sheriff, at the time of application, a fee of $25, of which $5 of that amount shall be deposited in the Courthouse Facilities Improvement Fund created by section six, article twenty-six, chapter twenty-nine of this code. Provisional licenses may only be issued for pistols or revolvers. Each applicant shall file with the sheriff a complete application, as prepared by the Superintendent of the West Virginia State

Police, in writing, duly verified, which sets forth only the following licensing requirements:

(1) The applicant's full name, date of birth, Social Security number, a description of the applicant's physical features, the applicant's place of birth, the applicant's country of citizenship and, if the applicant is not a United States citizen, any alien or admission number issued by the United States Bureau of Immigration and Customs Enforcement, and any basis, if applicable, for an exception to the prohibitions of 18 U. S. C. § 922(g)(5)(B);

(2) That, on the date the application is made, the applicant is a bona fide resident of this state and of the county in which the application is made and has a valid driver's license or other state-issued photo identification showing the residence;

(3) That the applicant is at least eighteen years of age and less than twenty-one years of age;

(4) That the applicant is not addicted to alcohol, a controlled substance or a drug and is not an unlawful user thereof as evidenced by either of the following within the three years immediately prior to the application:

(A) Residential or court-ordered treatment for alcoholism or alcohol detoxification or drug treatment; or

(B) Two or more convictions for driving while under the influence or driving while impaired;

(5) That the applicant has not been convicted of a felony unless the conviction has been expunged or set aside, or the applicant's civil rights have been restored or the applicant has been unconditionally pardoned for the offense;

(6) That the applicant has not been convicted of a misdemeanor crime of violence other than an offense set forth in subdivision (7) of this section within five years immediately preceding the application;

(7) That the applicant has not been convicted of a misdemeanor crime of domestic violence as defined in 18 U. S. C. § 921(a)(33), or a misdemeanor offense of assault or battery under either section twenty-eight, article two of this chapter or subsection (b) or (c), section nine, article two of this chapter in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense, or a misdemeanor offense with similar essential elements in a jurisdiction other than this state;

(8) That the applicant is not under indictment for a felony offense or is not currently serving a sentence of confinement, parole, probation or other court-ordered supervision imposed by a court of any jurisdiction, or is the subject of an emergency or temporary domestic violence protective order or is the subject of a final domestic violence protective order entered by a court of any jurisdiction;

(9) That the applicant has not been adjudicated to be mentally incompetent or involuntarily committed to a mental institution. If the applicant has been adjudicated mentally incompetent or involuntarily committed, the applicant must provide a court order reflecting that the applicant is no longer under such disability and the applicant's right to possess or receive a firearm has been restored;

(10) That the applicant is not prohibited under section seven of this article or federal law, including 18 U. S. C. § 922(g) or (n), from receiving, possessing or transporting a firearm;

(11) That the applicant has qualified under the minimum requirements set forth in subsection (d) of this section for handling and firing the weapon;

(12) That the applicant authorizes the sheriff of the county, or his or her designee, to conduct an investigation relative to the information contained in the application.

(b) For provisional license applications, the sheriff shall conduct an investigation including a nationwide criminal background check consisting of inquiries of the National Instant Criminal Background Check System, the West Virginia criminal history record responses and the National Interstate Identification Index, and shall review the information received in order to verify that the information required in subsection (a) of this section is true and correct. A provisional license may not be issued unless the issuing sheriff has verified through the National Instant Criminal Background Check System that the information available does not indicate that receipt of or possession of a firearm by the applicant would be in violation of the provisions of section seven of this article or federal law, including 18 U. S. C. § 922(g) or (n).

(c) Twenty dollars of the application fee and any fees for replacement of lost or stolen provisional licenses received by the sheriff shall be deposited by the sheriff into a concealed weapons license administration fund. The fund shall be administered by the sheriff and shall take the form of an interest-bearing account with any interest earned to be compounded to the fund. Any funds deposited in said fund are to be expended by the sheriff to pay the costs associated with issuing concealed weapons provisional licenses. Any surplus in the fund on hand at the end of each fiscal year may be expended for other law-enforcement purposes or operating needs of the sheriff's office, as the sheriff considers appropriate.

(d) All persons applying for a provisional license must complete a training course in handling and firing a handgun, which includes the actual live firing of ammunition by the applicant. The successful completion of any of the following courses fulfills this training requirement: *Provided*, That the completed course included the actual live firing of ammunition by the applicant:

(1) Any official National Rifle Association handgun safety or training course;

(2) Any handgun safety or training course or class available to the general public offered by an official law-enforcement organization, community

college, junior college, college, or private or public institution, or organization or handgun training school utilizing instructors certified by the institution;

(3) Any handgun training or safety course or class conducted by a handgun instructor certified as such by the state or by the National Rifle Association;

(4) Any proof of current or former service in the United States armed forces, armed forces reserves or National Guard.

A photocopy of a certificate of completion of any of the courses or classes or an affidavit from the instructor, school, club, organization or group that conducted or taught the course or class attesting to the successful completion of the course or class by the applicant, or a copy of any document which shows successful completion of the course or class, is evidence of qualification under this section. Certificates, affidavits or other documents submitted to show completion of a course or class shall include instructor information and proof of instructor certification, including, if applicable, the instructor's NRA instructor certification number.

(e) All provisional license applications must be notarized by a notary public duly licensed under article four, chapter twenty-nine of this code. Falsification of any portion of the application constitutes false swearing and is punishable under section two, article five of this chapter.

(f) The sheriff shall issue a provisional license unless the sheriff determines that the application is incomplete, that it contains statements that are materially false or incorrect or that applicant otherwise does not meet the requirements set forth in this section. The sheriff shall issue, reissue or deny the license within forty-five days after the application is filed once all required background checks authorized by this section are completed.

(g) Before any approved license is issued or is effective, the applicant shall pay to the sheriff a fee in the amount of $15 which the sheriff shall forward to the Superintendent of the West Virginia State Police within thirty days of receipt. The provisional license is valid until the licensee turns twenty-one years of age, unless sooner revoked.

(h) Each provisional license shall contain the full name and address of the licensee and a space upon which the signature of the licensee shall be signed with pen and ink. The issuing sheriff shall sign and attach his or her seal to all provisional license cards. The sheriff shall provide to each new licensee a duplicate license card, in size similar to other state identification cards and licenses, suitable for carrying in a wallet, and the license card is considered a license for the purposes of this section. Duplicate license cards issued shall be uniform across all fifty-five counties in size, appearance and information and must feature a photograph of the licensee. The provisional license shall be readily distinguishable from a license issued pursuant to section four of this article and shall state: “NOT NICS EXEMPT. This license confers the same rights and privileges to carry a concealed pistol or revolver on the lands or waters of this state as a license issued pursuant to section four, article seven, chapter sixty-one of this code, except that this license does not satisfy the requirements of 18 U. S. C. § 922(t)(3). A NICS check

must be performed prior to purchase of a firearm from a federally licensed firearm dealer."

(i) The Superintendent of the West Virginia State Police, in coordination with the West Virginia Sheriffs' Bureau of Professional Standards, shall prepare uniform applications for provisional licenses and license cards showing that the license has been granted and shall perform any other act required to protect the state and to enforce of section.

(j) If an application is denied, the specific reasons for the denial shall be stated by the sheriff denying the application. Any person denied a provisional license may file, in the circuit court of the county in which the application was made, a petition seeking review of the denial. The petition shall be filed within thirty days of the denial. The court shall then determine whether the applicant is entitled to the issuance of a provisional license under the criteria set forth in this section. The applicant may be represented by counsel, but in no case is the court required to appoint counsel for an applicant. The final order of the court shall include the court's findings of fact and conclusions of law. If the final order upholds the denial, the applicant may file an appeal in accordance with the Rules of Appellate Procedure of the Supreme Court of Appeals. If the findings of fact and conclusions of law of the court fail to uphold the denial, the applicant may be entitled to reasonable costs and attorney's fees, payable by the sheriff's office which issued the denial.

(k) If a provisional license is lost or destroyed, the person to whom the license was issued may obtain a duplicate or substitute license for a fee of $5 by filing a notarized statement with the sheriff indicating that the license has been lost or destroyed.

(l) Whenever any person after applying for and receiving a provisional concealed weapon license moves from the address named in the application to another county within the state, the license remains valid until the licensee turns twenty-one years of age unless the sheriff of the new county has determined that the person is no longer eligible for a provisional concealed weapon license under this article, and the sheriff shall issue a new provisional license bearing the person's new address and the original expiration date for a fee not to exceed $5: *Provided*, That the licensee within twenty days thereafter notifies the sheriff in the new county of residence in writing of the old and new addresses.

(m) The sheriff shall, immediately after the provisional license is granted, furnish the Superintendent of the West Virginia State Police a certified copy of the approved application. The sheriff shall furnish to the Superintendent of the West Virginia State Police, at any time so requested, a certified list of all provisional licenses issued in the county. The Superintendent of the West Virginia State Police shall maintain a registry of all persons who have been issued provisional concealed weapon licenses.

(n) The sheriff shall deny any application or revoke any existing provisional license upon determination that any of the licensing application requirements established in this section have been violated by the licensee.

(o) A person who is engaged in the receipt, review or in the issuance or revocation of a concealed weapon provisional license does not incur any civil liability as the result of the lawful performance of his or her duties under this article.

(p) Information collected under this section, including applications, supporting documents, permits, renewals, or any other information that would identify an applicant for or holder of a concealed weapon provisional license, is confidential: *Provided*, That this information may be disclosed to a law enforcement agency or officer: (i) To determine the validity of a provisional license; (ii) to assist in a criminal investigation or prosecution; or (iii) for other lawful law-enforcement purposes. A person who violates this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $50 or more than $200 for each offense.

(q) Except as restricted or prohibited by the provisions of this article or as otherwise prohibited by law, the issuance of a provisional concealed weapon license issued in accordance with the provisions of this section authorizes the holder of the license to carry a concealed pistol or revolver on the lands or waters of this state.

§61-7-7. Persons prohibited from possessing firearms; classifications; right of nonprohibited persons over twenty-one years of age to carry concealed deadly weapons; offenses and penalties; reinstatement of rights to possess; offenses; penalties.

(a) Except as provided in this section, no person shall possess a firearm, as such is defined in section two of this article, who:

(1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) Is habitually addicted to alcohol;

(3) Is an unlawful user of or habitually addicted to any controlled substance;

(4) Has been adjudicated to be mentally incompetent or who has been involuntarily committed to a mental institution pursuant to the provisions of chapter twenty-seven of this code or in similar law of another jurisdiction: *Provided*, That once an individual has been adjudicated as a mental defective or involuntarily committed to a mental institution, he or she shall be duly notified that they are to immediately surrender any firearms in their ownership or possession: *Provided, however*, That the mental hygiene commissioner or circuit judge shall first make a determination of the appropriate public or private individual or entity to act as conservator for the surrendered property;

(5) Is an alien illegally or unlawfully in the United States;

(6) Has been discharged from the armed forces under dishonorable conditions;

(7) Is subject to a domestic violence protective order that:

(A) Was issued after a hearing of which such person received actual notice and at which such person had an opportunity to participate;

(B) Restrains such person from harassing, stalking or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) By its terms explicitly prohibits the use, attempted use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(8) Has been convicted of a misdemeanor offense of assault or battery either under the provisions of section twenty-eight, article two of this chapter or the provisions of subsection (b) or (c), section nine of said article or a federal or state statute with the same essential elements in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or has been convicted in any court of any jurisdiction of a comparable misdemeanor crime of domestic violence.

Any person who violates the provisions of this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $100 nor more than $1,000 or confined in the county jail for not less than ninety days nor more than one year, or both.

(b) Notwithstanding the provisions of subsection (a) of this section, any person:

(1) Who has been convicted in this state or any other jurisdiction of a felony crime of violence against the person of another or of a felony sexual offense; or

(2) Who has been convicted in this state or any other jurisdiction of a felony controlled substance offense involving a Schedule I controlled substance other than marijuana, a Schedule II or a Schedule III controlled substance as such are defined in sections two hundred four, two hundred five and two hundred six, article two, chapter sixty-a of this code and who possesses a firearm as such is defined in section two of this article shall be guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than five years or fined not more than $5,000, or both. The provisions of subsection (f) of this section shall not apply to persons convicted of offenses referred to in this subsection or to persons convicted of a violation of this subsection.

(c) Any person may carry a concealed deadly weapon without a license therefor who is:

(1) At least twenty-one years of age;

(2) A United States citizen or legal resident thereof;

(3) Not prohibited from possessing a firearm under the provisions of this section; and

(4) Not prohibited from possessing a firearm under the provisions of 18 U. S. C. § 922(g) or (n).

(d) As a separate and additional offense to the offense provided for in subsection (a) of this section, and in addition to any other offenses outlined in this code, and except as provided by subsection (e) of this section, any person prohibited by subsection (a) of this section from possessing a firearm who carries a concealed firearm is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than three years or fined not more than $5,000, or both.

(e) As a separate and additional offense to the offense described in subsection (b) of this section, and in additional to any other offenses outlined in this code, any person prohibited by subsection (b) of this section from possessing a firearm who carries a concealed firearm is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than ten years or fined not more than $10,000, or both.

(f) Any person prohibited from possessing a firearm by the provisions of subsection (a) of this section may petition the circuit court of the county in which he or she resides to regain the ability to possess a firearm and if the court finds by clear and convincing evidence that the person is competent and capable of exercising the responsibility concomitant with the possession of a firearm, the court may enter an order allowing the person to possess a firearm if such possession would not violate any federal law: *Provided*, That a person prohibited from possessing a firearm by the provisions of subdivision (4), subsection (a) of this section may petition to regain the ability to possess a firearm in accordance with the provisions of section five, article seven-a of this chapter.

(g) Any person who has been convicted of an offense which disqualifies him or her from possessing a firearm by virtue of a criminal conviction whose conviction was expunged or set aside or who subsequent thereto receives an unconditional pardon for said offense shall not be prohibited from possessing a firearm by the provisions of the section.

§61-11-22. Pretrial diversion agreements; conditions; drug court programs.

(a) A prosecuting attorney of any county of this state or a person acting as a special prosecutor may enter into a pretrial diversion agreement with a person under investigation or charged with an offense against the state of West Virginia, when he or she considers it to be in the interests of justice. The agreement is to be in writing and is to be executed in the presence of the person's attorney, unless the person has executed a waiver of counsel.

(b) Any agreement entered into pursuant to the provisions of subsection (a) of this section may not exceed twenty-four months in duration. The duration of the agreement must be specified in the agreement. The terms of any agreement entered into pursuant to the provisions of this section may include conditions similar to those set forth in section nine, article twelve, chapter sixty-two of this code relating to conditions of probation. The

agreement may require supervision by a probation officer of the circuit court, with the consent of the court. An agreement entered into pursuant to this section must include a provision that the applicable statute of limitations be tolled for the period of the agreement.

(c) A person who has entered into an agreement for pretrial diversion with a prosecuting attorney and who has successfully complied with the terms of the agreement is not subject to prosecution for the offense or offenses described in the agreement or for the underlying conduct or transaction constituting the offense or offenses described in the agreement, unless the agreement includes a provision that upon compliance the person agrees to plead guilty or nolo contendere to a specific related offense, with or without a specific sentencing recommendation by the prosecuting attorney.

(d) No person charged with a violation of the provisions of section two, article five, chapter seventeen-c of this code may participate in a pretrial diversion program: *Provided*, That a court may defer proceedings in accordance with section two-b, article five, chapter seventeen-c of this code. No person charged with a violation of the provisions of section twenty-eight, article two of this chapter may participate in a pretrial diversion program unless the program is part of a community corrections program approved pursuant to the provisions of article eleven-c, chapter sixty-two of this code. No person indicted for a felony crime of violence against the person where the alleged victim is a family or household member as defined in section two hundred three, article twenty-seven, chapter forty-eight of this code or indicted for a violation of the provisions of sections three, four or seven, article eight-b of this chapter is eligible to participate in a pretrial diversion program. No defendant charged with a violation of the provisions of section twenty-eight, article two of this chapter or subsections (b) or (c), section nine, article two of this chapter where the alleged victim is a family or household member is eligible for pretrial diversion programs if he or she has a prior conviction for the offense charged or if he or she has previously been granted a period of pretrial diversion pursuant to this section for the offense charged. Notwithstanding any provision of this code to the contrary, defendants charged with violations of the provisions of section twenty-eight, article two, chapter sixty-one of this code or the provisions of subsection (b) or (c), section nine, article two of said chapter where the alleged victim is a family or household member as defined by the provisions of section two hundred three, article twenty-seven, chapter forty-eight of this code are ineligible for participation in a pretrial diversion program before the July 1, 2002, and before the community corrections subcommittee of the Governor's Committee on Crime, Delinquency and Correction established pursuant to the provisions of section two, article eleven-c, chapter sixty-two of this code, in consultation with the working group of the subcommittee, has approved guidelines for a safe and effective program for diverting defendants charged with domestic violence.

(e) The provisions of section twenty-five of this article are inapplicable to defendants participating in pretrial diversion programs who are charged

with a violation of the provisions of section twenty-eight, article two, chapter sixty-one of this code. The community corrections subcommittee of the Governor's Committee on Crime, Delinquency and Correction established pursuant to the provisions of section two, article eleven-c, chapter sixty-two of this code shall, upon approving any program of pretrial diversion for persons charged with violations of the provisions of section twenty-eight, article two, chapter sixty-one of this code, establish and maintain a central registry of the participants in the programs which may be accessed by judicial officers and court personnel.

§62-1C-17c. Bail in cases of crimes between family or household members.

(a) When the offense charged is a crime against a family or household member, it may be a condition of bond that the defendant shall not have any contact whatsoever, direct or indirect, verbal or physical, with the victim or complainant.

(b) In determining conditions of release, the issuing authority shall consider whether the defendant poses a threat or danger to the victim or other family or household member. If the issuing authority makes such a determination, it shall require as a condition of bail that the defendant refrain from entering the residence or household of the victim, the victim's school, and the victim's place of employment or otherwise contacting the victim and/or minor child or household member in any manner whatsoever, and shall refrain from having any further contact with the victim. A violation of this condition may be punishable by the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding the defendant to custody or a modification of the terms of bail.

(c) The clerk of the court issuing an order pursuant to this section shall issue certified copies of the conditions of bail to the victim upon request without cost.

(d) Where a law-enforcement officer observes any violation of bail condition, including the presence of the defendant or at the home of the victim, the officer shall immediately arrest the defendant, and detain the defendant pending a hearing for revocation of bail.

B. FEDERAL STATUTES

18 U.S.C. § 921. Definitions [(a)(3) "firearm"; (a)(32) "intimate partner"; and (a)(33) "misdemeanor crime of domestic violence"].

(a) As used in this chapter -

. . .

(3) The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

. . .

(32) The term “intimate partner” means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

. . .

(33)(A) Except as provided in subparagraph (C),[2] the term “misdemeanor crime of domestic violence” means an offense that--

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 922(g)(8) and (9). Unlawful acts [(g)(8) and (9) firearms restrictions relating to domestic violence].

(g) It shall be unlawful for any person--

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 2261. Interstate domestic violence.

(a) Offenses.--

(1) Travel or conduct of offender.--A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

(2) Causing travel of victim.--A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating 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, imprisoned--

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) 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;

(4) 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

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

(6) 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.

18 U.S.C. §2261A. Stalking.

Whoever--

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--

(A) places that person in reasonable fear of the death of, or serious bodily injury to--

(i) that person;

(ii) an immediate family member (as defined in section 115) of that person; or

(iii) a spouse or intimate partner of that person; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2261(b) of this title.

18 U.S.C. § 2262. Interstate violation of protection order.

(a) Offenses.--

(1) Travel or conduct of offender.--A person who travels in interstate or foreign commerce, or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b).

(2) Causing travel of victim.--A person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical

proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, shall be punished as provided in subsection (b).

(b) Penalties.--A person who violates this section shall be fined under this title, imprisoned--

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) 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;

(4) 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

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

18 U.S.C. § 2265. Full faith and credit given to protection orders.

(a) Full Faith and Credit.--Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory1 as if it were the order of the enforcing State or tribe.

(b) Protection order.--A protection order issued by a State, tribal, or territorial court is consistent with this subsection if--

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

(c) Cross or counter petition.--A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if--

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

(d) Notification and registration.--

(1) Notification.--A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory

shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.

(2) No prior registration or filing as prerequisite for enforcement.--Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.

(3) Limits on Internet publication of registration information.--A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction2 in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

(e) Tribal court jurisdiction.--For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

18 U.S.C. § 2266. Definitions.

In this chapter:

(1) Bodily injury.--The term "bodily injury" means any act, except one done in self-defense, that results in physical injury or sexual abuse.

(2) Course of conduct.--The term "course of conduct" means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.

(3) Enter or leave Indian country.--The term "enter or leave Indian country" includes leaving the jurisdiction of 1 tribal government and entering the jurisdiction of another tribal government.

(4) Indian country.--The term "Indian country" has the meaning stated in section 1151 of this title.

(5) Protection order.--The term "protection order" includes--

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil

or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.

(6) Serious bodily injury.--The term "serious bodily injury" has the meaning stated in section 2119(2).

(7) Spouse or intimate partner.--The term "spouse or intimate partner" includes--

(A) for purposes of--

(i) sections other than 2261A--

(I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or

(II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship; and

(ii) section 2261A--

(I) a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; or

(II) a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship.

(B) any other 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.

(8) State.--The term "State" includes a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States.

(9) Travel in interstate or foreign commerce.--The term "travel in interstate or foreign commerce" does not include travel from 1 State to another by an individual who is a member of an Indian tribe and who remains at all times in the territory of the Indian tribe of which the individual is a member.

(10) Dating partner.--The term "dating partner" refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. The existence of such a relationship is based on a consideration of--

(A) the length of the relationship; and

(B) the type of relationship; and

(C) the frequency of interaction between the persons involved in the relationship.

28 U.S.C. § 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term—

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention

by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

Chapter 10

RESOURCES

Chapter Contents

The Supreme Court of Appeals of West Virginia and the Domestic Violence Training Grant Program do not endorse any specific agency listed in this chapter and do not provide any assurance for the type or quality of service provided by any listed agency.

Visitation Centers in West Virginia - 2019

County	Agency/*Type of Agency*	Services Provided
Cabell Lincoln Mason Putnam Wayne	Branches, Inc. PO Box 403 Huntington, WV 25708 304-529-2382 *DV Shelter*	Neutral exchange Supervised visitation Monitored visitation Adult/Child counseling Childcare for clients during hearings Parenting classes Support groups
Doddridge Gilmer Harrison Lewis Marion	HOPE, Inc. P.O. Box 626 Fairmont, WV 26555-0626 304-367-1100 *DV Shelter*	Counseling Advocacy and support
Mercer McDowell Wyoming	Stop Abusive Family Environments P.O. Box 669 Welch, WV 24801 304-436-8117 *DV Shelter*	Monitored supervision Supervised visitation in facility Supervised in community or in the home if requested Social workers for Therapeutic visits if requested by Court or DHHR Neutral exchanges
Calhoun Jackson Pleasants Ritchie Roane Tyler Wirt Wood	Family Crisis Intervention Center PO Box 695 Parkersburg, WV 26102 304-428-2333 *Visitation Center*	Neutral exchange Monitored visitation Supervised visitation Legal Advocacy Support groups

Visitation Centers

County	Agency/*Type of Agency*	Services Provided
Greenbrier Monroe Pocahontas	Family Refuge Center PO Box 249 Lewisburg, WV 24901 304-645-6334 (Family Protection Services Board) *DV Program*	Monitored exchange Monitored visitation Emergency DV shelter 24-hour Hotline Outreach-advocacy and case management support Children's programs Sexual assault services Batterer's intervention Adult basic education Support groups
Brooke Hancock	Lighthouse Domestic Violence Awareness Center P.O. Box 275 Weirton, WV 26062 304-797-7233 *DV Shelter*	Counseling & support Advocacy
Berkeley Jefferson Morgan	Eastern Panhandle Empowerment Center 236 W. Martin Street Martinsburg, WV 25401 304-263-8292 *DV and Sexual Assault*	Counseling Specialized support Advocacy EPO preparation 911 cell phones Professional training Safety planning
Monongalia Preston Taylor	Rape and Domestic Violence Information Center P.O. Box 4228 Morgantown, WV 26505 304-292-5100 *DV Shelter*	Counseling Support groups Advocacy Community education

Visitation Centers

County	**Agency/*Type of Agency***	**Services Provided**
Marshall Ohio Wetzel	YWCA Family Violence Prevention Program Center 1100 Chapline Street Wheeling, WV 26003 304-232-2748	Emergency shelter Advocacy Monitored visitation & exchange Support groups
Boone Clay Kanawha	YWCA Resolve Family Abuse Program 1426 Kanawha Blvd., East Charleston, WV 25301 304-340-3549 *DV Shelter*	Monitored visitation Exchange program
Grant Hampshire Hardy Mineral Pendleton	Family Crisis Center P.O. Box 207 Keyser, WV 26726 304-788-6061 *DV Shelter*	Support groups Counseling Advocacy Community education
Logan Mingo	Tug Valley Recovery Shelter P.O. Box 677 Williamson, WV 25661 304-235-6121 *DV Shelter*	Counseling Support
Barbour Braxton Randolph Tucker Upshur Webster	Centers Against Violence P.O. Box 2062 Elkins, WV 26241 304-636-8433 *DV Shelter*	Outreach services Counseling & support Legal services Life skills & parenting Advocacy

Domestic Violence/Crime Victim Service Provider Directory 2019 State of West Virginia

BARBOUR COUNTY

Centers Against Violence P.O. Box 2062 Elkins, WV 26241 Phone: (304) 636-8433 Fax: (304) 636-5564 HOTLINE: (800) 339-1185	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal and Personal Advocacy *Filing Compensation Claims

BERKELEY COUNTY

Berkeley County Victim/Witness Program Berkeley County Prosecutor's Office 380 W. South Street, #100 Martinsburg, WV 25401 Phone: (843) 719-4455	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Personal Advocacy
CASA of the Eastern Panhandle 336 S. Queen Street Martinsburg, WV 25401 Phone: (304) 263-5100 Fax: (304) 263-5111 Beth@mycasaep.org del@mycasaep.org	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *CJ Support/Advocacy *Filing Compensation Claims *Personal Advocacy
Eastern Panhandle Empowerment Center 236 West Martin Street Martinsburg, WV 25401	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence

Phone: (304) 263-8522 Fax: (304) 263-8559 HOTLINE: (304) 263-8292	*Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Group Treatment *Legal Advocacy *Personal Advocacy

BRAXTON COUNTY

Centers Against Violence 307 Main Street Court Annex - Third Floor Sutton, WV 26601 Phone: (304) 765-2848 Fax: (304) 765-2848 HOTLINE: (800) 339-1185	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Mountain CAP of WV, Inc. A CDC CASA Program 541 Enterprise Drive Gassaway, WV 26624 Phone: (304) 364-2330 Fax: (304) 364-2340 TOLL FREE: (800) 871-1503	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *Information & Referral *CJ Support /Advocacy *Personal Advocacy *Filing Compensation Claims

BROOKE COUNTY

A Child's Place CASA, Ltd. 613 Main Street Follansbee, WV 26037 Phone: (304) 737-4444 Fax: (304) 737-4445	VICTIMS SERVED *Child Victims of Abuse and Neglect *Child Victims of Sexual Abuse SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Legal Advocacy *Personal Advocacy
Brooke, Hancock & Ohio Counties Victim Assistance Program 840 Charles Street	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence

Wellsburg, WV 26070 Phone: (304) 737-2515 Fax: (304) 737-3597	*Victims of Robbery *Victims of Assault *Victims of DUI *Victims of Elder Abuse *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Therapy
The Lighthouse (CHANGE, Inc.) 3058 West Street Weirton, WV 26062 Phone: (304) 748-0332 HOTLINE: (304) 797-7233	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Group Treatment *Legal and Personal Advocacy *Emergency Financial Assistance
Upper Ohio Valley Sexual Assault Help Center PO Box 6764 Wheeling, WV 26003 Phone: (304) 234-1783 Fax: (304) 234-8231 HOTLINE: (800) 884-7242 or (304) 234-8519	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Adult Victims of Sexual Assault *Adults Molested as Children SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *Legal and Personal Advocacy *CJ Support/Advocacy *Preventative Education *Filing Compensation Claims

CABELL COUNTY

Branches Domestic Violence Shelter PO Box 403 Huntington, WV 25708 Phone: (304) 529-2382	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling

Fax: (304) 529-2398	*Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims
Cabell County Victim/Witness Program Cabell County Courthouse 750 5th Avenue, Suite 350 Huntington, WV 25701 Phone: (304) 526-9874 Fax: (304) 526-8679	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Robbery *Victims of Assault *Victims of DUI *Victims of Elder Abuse *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims
Contact Huntington Rape Crisis Center PO Box 2963 Huntington, WV 25728 Phone: (304) 523-3447 Fax: (304) 523-0558 HOTLINE: (304) 399-1111 (866) 399-7273 (Toll Free)	VICTIMS SERVED *Adult Victims of Sexual Assault *Victims of Stalking SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Hospital Advocacy *Police Advocacy *Legal Advocacy

Family Services, A Division of Goodwill 1102 W. Memorial Blvd. P.O. Box 7365 Huntington, WV 25704 Phone: (304) 525-7034	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Adult Victims of Sexual Assault *Victims of Domestic Violence *Adults Molested as Children *Survivors of Homicide Victims SERVICES OFFERED *Individual Therapy *Group Treatment *Family Therapy *CJ Support/Advocacy *Filing Compensation Claims
Team for WV Children MAILING PO Box 1653 Huntington, WV 25717 PHYSICAL 1002 Third Avenue Huntington, WV 25701 Phone: (304) 523-9587 Fax: (304) 523-9595	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Child Victims of Neglect SERVICES OFFERED *Personal Advocacy *Other Services *Filing Compensation Claims

CALHOUN COUNTY

DART (Domestic Abuse Response Team) Family Crisis Intervention Center PO Box 585 Grantsville, WV 26147 Phone: (304) 354-9254 Fax: (304) 354-9346 HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims

CLAY COUNTY

YWCA Resolve Family Abuse Program PO Box 742 Clay, WV 25043 Phone: (304) 587-7243 Fax: (304) 587-7243	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal & Personal Advocacy *Filing Compensation Claims

DODDRIDGE COUNTY

Task Force on Domestic Violence & Sexual Assault "Hope", Inc. PO Box 626 Fairmont, WV 26555 Phone: (304) 873-1416 Fax: (304) 873-1416 HOTLINE: (304) 367-1100 (Collect calls accepted)	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims

FAYETTE COUNTY

Women's Resource Center 139 S. Court Street Fayetteville, WV 25840 Phone: (304) 574-0500 HOTLINE: (888) 825-7836	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Elder Abuse *Survivors of Homicide Victims SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims

Just for Kids, Inc. 129 Main Street, Suite 406 Beckley, WV 25801 Phone: (304) 255-4834 Fax: (304) 255-2637	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Therapy *Emergency Legal Advocacy

GILMER COUNTY

Task Force on Domestic Violence & Sexual Assault "Hope", Inc. 10 Howard Street Glenville, WV 26351 Phone: (304) 462-5352 Fax: (304) 462-5352 HOTLINE: (304) 367-1100 (Collect calls accepted)	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims

GRANT COUNTY

Family Crisis Center, Inc. 7 Park Street Petersburg, WV 26847 Phone: (304) 257-4606 Fax: (304) 257-4606 HOTLINE: (800) 698-1240	VICTIMS SERVED *Victims of Domestic Violence *Victims of Sexual Assault SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

GREENBRIER COUNTY

Family Refuge Center PO Box 249 Lewisburg, WV 24901 Phone: (304) 645-6334 Fax: (304) 645-7368 Toll Free: (844) 340-9101	VICTIMS SERVED *Victims of Sexual Assault *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Emergency Legal Advocacy *Information & Referral *CJ Support/Advocacy *Adult Basic Education
Greenbrier County Child and Youth Advocacy Center 112 Courtney Drive Lewisburg, WV 24901 Phone: (304) 645-4668 Fax: (304) 793-4669	VICTIMS SERVED *Child Victims of Sexual Abuse *Child Victims of Physical Abuse SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Forensic Interviews & Evaluations

HAMPSHIRE COUNTY

Family Crisis Center, Inc. 28 N. F Street Keyser, WV 26726 Phone: (304) 788-6061 Fax: (304) 788-6374 HOTLINE: (800) 698-1240	VICTIMS SERVED *Victims of Sexual Assault *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

HANCOCK COUNTY

A Child's Place CASA, Ltd. 736 Charles Street Wellsburg, WV 26070 Phone: (304) 737-4444 Fax: (304) 737-4445	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Child Victims of Neglect SERVICES OFFERED *Information & Referral Legal & Personal Advocacy *CJ Support/Advocacy *Filing Compensation Claims
Brooke, Hancock & Ohio Counties	VICTIMS SERVED

Victim Assistance Program 102 North Court Street, Suite 310 PO Box 924 New Cumberland, WV 26047 Phone: (304) 564-4277 Fax: (304) 564-3935	*Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Robbery *Victims of Assault *Victims of DUI *Victims of Elder Abuse *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Therapy *Personal Advocacy *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
The Lighthouse 3058 West Street Weirton, WV 26062 Phone: (304) 797-0332 HOTLINE: (304) 797-0332	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Group Treatment *Legal and Personal Advocacy *Emergency Financial Assistance
Upper Ohio Valley Sexual Assault Help Center 2000 Eoff Street P.O. Box 6764 Wheeling, WV 26003 Phone: (304) 234-1783 Fax: (304) 234-8231 HOTLINE: (800) 884-7242 or (304) 234-8519	VICTIMS SERVED *Victims of Sexual Abuse/Assault SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Preventative Education *Personal Advocacy *Filing Compensation Claims

HARDY COUNTY

Family Crisis Center, Inc. 7 Park Street Petersburg, WV 26847	VICTIMS SERVED *Victims of Domestic Violence *Victims of Sexual Assault

Phone: (304) 257-4606 Fax: (304) 257-4606 HOTLINE: (800) 698-1240	SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

HARRISON COUNTY

Harrison County CASA Program PO Box 1876 Clarksburg, WV 26302 Phone: (304) 623-5749 Fax: (304) 622-3891 Email:	VICTIMS SERVED *Child Victims of Physical and Sexual Abuse SERVICES OFFERED *CJ Support/Advocacy *Filing Compensation Claims
Task Force of Domestic Violence & Sexual Assault "Hope" Inc. Wine Press Building 916 West Pike Street, Box 101 Clarksburg, WV 26301 Phone: (304) 624-9835 Fax: (304) 624-9835 HOTLINE: (304) 367-1100 (Collect Calls Accepted)	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Cell Phone Program

JACKSON COUNTY

Family Crisis Intervention Center P.O. Box 695 Parkersburg, WV 26102 Phone: (304) 428-2333 Hotline: (800) 794-2335	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *CJ Support/Advocacy *Grout Treatment *Information & Referral *Child Exchange & Monitored Visitation Center

Jackson County Victim Assistance Program 100 North Court Street P.O. Box 811 Ripley, WV 25271 Phone:(304) 373-2275 Fax: (304) 372-3094 Email: victimsadvocate@jacksoncountywv.com	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy
Family Counseling Connection 630 S. Church Street Ripley, WV 25271 Phone: (304) 340-3676 Fax: (304) 340-3688	VICTIMS SERVED *Child Victims of Sexual Assault *Adult Victim of Sexual Assault *Domestic Violence Victims *Survivors of Homicide Victims *Adults Molested as Children *Other Victims of Violent Crime SERVICES OFFERED *Therapy *Crisis Counseling *Information and Referral *Group Treatment *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims

JEFFERSON COUNTY

CASA of the Eastern Panhandle 336 S. Queen Street Martinsburg, WV 25401 Phone: (304) 263-5100 Fax: (304) 263-5111 Email: beth@mycasaep.org del@mycasaep.org	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *CJ Support/Advocacy *Filing Compensation Claims *Personal Advocacy
Jefferson County Victim Assistance Program 120 S. George Street PO Box 729 Charles Town, WV 25414	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Robbery

Phone: (304) 725-6550 Fax: (304) 728-3293 Email:	*Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Eastern Panhandle Empowerment Center 113 East Third Avenue Ranson, WV 25438 Phone: (304) 725-7080 Fax: (304) 728-1080 HOTLINE: (304) 263-8292 (Collect Calls Accepted)	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Adults Molested as Children SERVICES OFFERED *Shelter *Therapy *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Cell Phone Program

KANAWHA COUNTY

Charleston Domestic Violence Program Charleston Police Department PO Box 2749 Charleston, WV 25330 Phone: (304) 348-6480 Fax: (304) 348-0743	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Other Services
Children's Home Society 1422 Kanawha Blvd. East P.O. Box 2942 Charleston, WV 25330 Phone: (304) 346-0795 Fax: (304) 346-1062	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims
WV Division of Corrections Victims Services 1409 Greenbrier Street Charleston, WV 25311	VICTIMS SERVED *All Types of Victims of Crime SERVICES OFFERED *Automated Victim Information &

Phone: (304) 558-2036, ext 53492 Fax: (304) 558-5934	Notification *Information & Referral *Assistance at Parole Board Hearings *CJ Support & Advocacy
Family Service of Kanawha Valley 1021 Quarrier Street, Ste. 414 Charleston, WV 25301 Phone: (304) 340-3676 Fax: (304) 340-3575 HOTLINE: 1 (800) 656-4673	VICTIMS SERVED *Child Victims of Sexual Assault *Adult Victim of Sexual Assault *Domestic Violence Victims *Survivors of Homicide Victims *Adults Molested as Children *Other Victims of Violent Crime SERVICES OFFERED *Therapy *Crisis Counseling *Information and Referral *Group Treatment *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Other Services
Kanawha County Sheriff's Department Victim Assistance Program 301 Virginia Street, East Charleston, WV 25375 Phone: (304) 357-0200 (304) 357-0499 (304) 357-0155 Fax: (304) 357-0516	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Personal Advocacy *Filing Compensation Claims
Kanawha County Prosecutor's Office Victim/Witness Assistance Program 301 Virginia Street, East Charleston, WV 25301 Phone: (304) 357-0300 Fax: (304) 357-0616	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Elder Abuse *Survivors of Homicide Victims *Robbery *Assault *Other Violent Crimes SERVICES OFFERED *Information & Referral

	*CJ Support/Advocacy *Filing Compensation Claims
Kanawha County Prosecutor's Office Violence Against Women Advocate 700 Washington Street, East Geary Plaza Charleston, WV 25301 Phone: (304) 357-0876 Fax: (304) 357-0616	VICTIMS SERVED *Victims of Domestic Violence *Victims of Sexual Assault *Victims of Stalking SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Team Agape 885 Westminster Way Charleston, WV 25314 Phone: (304) 720-7773	VICTIMS SERVED *Child Victims of Sexual Assault *Adult Victims of Sexual Assault *Victims of Domestic Violence *Victims of Elder Abuse *Adults Molested as Children SERVICES OFFERED *Crisis Counseling *Information & Referral *Group Treatment *Personal Advocacy *Filing Compensation Claims
Family Counseling Connection 1021 Quarrier Street, Ste. 414 Charleston, WV 25301 Phone: (304) 340-3676 Fax: (304) 340-3688	VICTIMS SERVED *Child Victims of Sexual Assault *Adult Victim of Sexual Assault *Domestic Violence Victims *Survivors of Homicide Victims *Adults Molested as Children *Other Victims of Violent Crime SERVICES OFFERED *Therapy *Crisis Counseling *Information and Referral *Group Treatment *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims

LEWIS COUNTY

Task Force on Domestic Violence & Sexual Assault "Hope", Inc. PO Box 52 Weston, WV 26452 Phone: (304) 269-8233 Fax: (304) 269-8253 HOTLINE: (304) 367-1100 (Collect Calls Accepted)	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Lewis County Victim Assistance Program PO Box 150 Weston, WV 26452 Phone: (304) 269-8251 Fax: (304) 269-2644	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Assault *Victims of DUI *Victims of Robbery *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims

LINCOLN COUNTY

Branches Domestic Violence Shelter 352 Mansion Street Hamlin, WV 25523 Phone: (304) 824-2600 Fax: (304) 824-2601	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims
Lincoln County Victim Assistance Program Probation Department 8000 Court Avenue Hamlin, WV 25523	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Assault *Victims of Domestic Violence *Victims of DUI *Victims of Elder Abuse

Phone:(304) 824-7919 ext 257 Fax: (304) 824-7310	*Victims of Robbery *Victims of Assault *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims *Therapy *Group Treatment

LOGAN COUNTY

Logan County Victim/Witness Program 420 Main Street Logan, WV 25601 Phone: (304) 792-8670 Fax: (304) 792-8677	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims
Tug Valley Recovery Shelter 515 Harvey Street Williamson, WV 25661 Phone: (304) 235-6121 HOTLINE: (800) 340-0639	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Assault *Victims of Domestic Violence *Victims of Elder Abuse *Other Victims of Violent Crime SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims
Contact Huntington Rape Crisis Center P.O. Box 213 Delbarton, WV 25670	VICTIMS SERVED *Adult Victims of Sexual Assault *Victims of Stalking SERVICES OFFERED

Phone: (304) 792-8208 HOTLINE: (304) 729-7233 (866) 399-7273 (Toll Free)	*Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Hospital Advocacy *Police Advocacy *Legal Advocacy

MARION COUNTY

Marion County CASA 112 Adams Street Room 203 Fairmont, WV 26554 Phone: (304) 366-4198 Fax: (304) 366-4695	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *CJ Support/Advocacy *Personal Advocacy
Task Force of Domestic Violence & Sexual Assault "HOPE", Inc. PO Box 626 Fairmont, WV 26555 Phone: (304) 367-1100 Fax: (304) 367-0362 HOTLINE: (304) 367-1100 (Collect Calls Accepted)	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Try Again Homes 1800 Locust Avenue Fairmont, WV 26554 Phone: (304) 363-5863 Fax: (304) 363-1345	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Other Victims of Crime *Adults Molested as Children *Survivors of Homicide Victims SERVICES OFFERED *Information & Referral *Therapy *Filing Compensation Claims
Marion County Victim Assistance Program Prosecuting Attorney's Office	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault

County Courthouse-Second Floor 213 Jackson Street Fairmont, WV 26554 Phone: (304) 367-5380 Fax: (304) 368-0930	*Victims of Domestic Violence *Survivors of Homicide Victims *Victims of Robbery/Assault SERVICES OFFERED *Information & Referral *Filing Compensation Claims *CJ Support/Advocacy *Personal Advocacy

MARSHALL COUNTY

Harmony House Ohio Valley Medical Center 2000 Eoff Street Wheeling, WV 26003 Phone:(304) 230-2205 Fax: (304) 234-8479	VICTIMS SERVED *Child Victims of Sexual Abuse *Child Victims of Physical Abuse *Child Victims of Life Threatening Neglect *Secondary Victims of Child Abuse, Physical and Sexual Abuse SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims
Marshall County Victim Assistance Program Marshall County Prosecutor's Office 700 Seventh Street Moundsville, WV 26041 Phone:(304) 845-3580 Fax: (304) 843-0320	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *DUI Victims *Elder Abuse Victims *Survivors of Homicide Victims *Victims of Robbery *Victims of Other Violent Crimes SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
YWCA Family Violence Prevention Program PO Box 667 Moundsville, WV 26041 Phone: (304) 845-9150 HOTLINE: (800) 698-1247	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *Legal & Personal Advocacy *Filing Compensation Claims

	*CJ Support/Advocacy *Emergency Financial Assistance

MASON COUNTY

Branches Domestic Violence Shelter 501 1/2 Main Street Point Pleasant, WV 25550 Phone: (304) 675-4968 Fax: (304) 529-2398 HOTLINE: (304) 529-2382	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims *Food & Clothing *Visitation & Exchange Center
Mason County Victim Assistance Program PO Box 433 Point Pleasant, WV 25550 Phone: (304) 675-5717 Fax: (304) 675-8704	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Contact Huntington Rape Crisis Center P.O. Box 94 Point Pleasant, WV 25550 Phone: (304) 675-6724 Fax: (304) 675-6725 HOTLINE: (304) 399-1111 (866) 399-7273 (Toll Free)	VICTIMS SERVED *Adult Victims of Sexual Assault *Victims of Stalking SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Hospital Advocacy *Police Advocacy *Legal Advocacy

MCDOWELL COUNTY

McDowell County Domestic Violence/Victim Assistance Program 93 Wyoming Street	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence

Suite 207 Welch, WV 24801 Phone: (304) 436-8553 Fax: (304) 436-8573	*Victims of Elder Abuse *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Stop Abusive Family Environments (SAFE), Inc. PO Box 669 Welch, WV 24801 Phone: (304) 436-8163 Fax: (304) 436-6528 HOTLINE: (800) 688-6157	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims

MERCER COUNTY

Childlaw Services, Inc. 1505 Princeton Avenue Princeton, WV 24740 Phone: (304) 425-9973 Fax: (304) 487-5573	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Victims of Domestic Violence SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims *Personal Advocacy
Child Protect of Mercer County, Inc. 120 Shaker Lane Princeton, WV 24740 Phone: (304) 425-2710	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Adults Molested as Children SERVICES OFFERED *Therapy *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Group Treatment

	*Filing Compensation Claims *Forensic Interviews
Children's Home Society We Can Program 200 Davis Street Princeton, WV 24739 Phone: (304) 425-8738 ext 2122 Fax: (304) 487-3589	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Neglect *Child Victims of Sexual Abuse SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims
Mercer County Prosecutor's Office Victim Assistance Program 120 Scott Street, Ste. 200 Princeton, WV 24700 Phone: (304) 487-8355 Fax: (304) 487-8357	VICTIMS SERVED *Victims of Domestic Violence *Victims of Sexual Abuse/Assault *Victims of Stalking SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Crisis Counseling *Filing Compensation Claims
Stop Abusive Family Environment (SAFE), Inc. 704 Bland Street, Ste. 112 Bluefield, WV 24701 Phone: (304) 324-7820 Fax: (304) 324-7820 TOLL FREE: (800) 688-6157	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Victims of Assault *Victims of Elder Abuse *Other Victims of Violent Crime SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims
Family Refuge Center PO Box 249 Lewisburg, WV 24901 Phone: (681) 282-5577 Toll Free: (844) 340-9101	VICTIMS SERVED *Victims of Sexual Assault SERVICES OFFERED *Shelter *Crisis Counseling *Emergency Legal Advocacy *Information & Referral *CJ Support/Advocacy

	*Adult Basic Education

MINERAL COUNTY

Family Crisis Center, Inc. Mineral County 28 N. F Street Keyser, WV 26726 Phone: (304) 788-6061 Fax: (304) 788-6374 HOTLINE: (800) 698-1240	VICTIMS SERVED *Victims of Sexual Assault *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

MINGO COUNTY

Tug Valley Recovery Shelter 515 North Harvey Street Williamson, WV 25661 Phone: (304) 235-6121 Fax: (304) 235-6167 HOTLINE: (800) 340-0639	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Assault *Other Victims of Violent Crime SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims
Contact Huntington Rape Crisis Center P.O. Box 213 Delbarton, WV 25670 Phone: (304) 475-4356 HOTLINE: (304) 729-7233 (866) 399-7273 (Toll Free)	VICTIMS SERVED *Adult Victims of Sexual Assault *Victims of Stalking SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Hospital Advocacy *Police Advocacy *Legal Advocacy

MONONGALIA COUNTY

CASA for Kids Program 408 Donley Street, Suite 103-D Morgantown, WV 26501	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse

Phone: (304) 599-1087 Fax: (304) 715-3550 Email: Kayla@casaforkidsmpc.org Kara@casaforkidsmpc.org	SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Personal Advocacy
Monongalia County Victim/Witness Program Monongalia County Justice Center 75 High Street Morgantown, WV 26505 Phone: (304) 291-7286 Fax: (304) 291-7285	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Personal Advocacy *Filing Compensation Claims
Pressley Ridge Richwood 11 Commerce Street Morgantown, WV 26501 Phone: (304) 296-0944 Fax: (304) 296-9562	VICTIMS SERVED *Child Victims of Abuse SERVICES OFFERED *Crisis Counseling *Therapy *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Outpatient Services
Rape & Domestic Violence Information Center PO Box 4228 Morgantown, WV 26504 Phone: (304) 292-5100 Fax: (304) 292-0204 HOTLINE: (304) 292-5100	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment

	*Information & Referral *Personal Advocacy *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

MONROE COUNTY

Family Refuge Center 515 North Street (Route 3) PO Box 414 Union, WV 24983 Outreach Office: (304) 772-5005 Fax: (304) 772-4900 TOLL FREE: (844) 340-9101	VICTIMS SERVED *Victims of Sexual Abuse/Assault *Victims of Domestic Violence SERVCIES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

MORGAN COUNTY

CASA of the Eastern Panhandle 336 S. Queen Street Martinsburg, WV 25401 Phone: (304) 263-5100 Fax: (304) 263-5111	VICTIMS SERVED *Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *CJ Support/Advocacy *Filing Compensation Claims *Personal Advocacy
Eastern Panhandle Empowerment Center 106 Sandmine Road, Suite #3 Berkeley Springs, WV 25411 Phone: (304) 258-1078	VICTIMS SERVED *Victims of Domestic Violence *Victims of Sexual Assault *Victims of LGBT Targeting *Victims of Stalking *Victims of Human Trafficking SERVICES OFFERED *Counseling *Legal Advocacy *EPO Preparation

NICHOLAS COUNTY

Women's Resource Center 717 Main Street., Ste. 201 Summersville, WV 26651 Phone: (304) 872-7875 Toll free: (888)-825-7836	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Survivors of Homicide Victims SERVICES OFFERED *Shelter *Crisis Counseling

	*Group Treatment *Information & Referral *CJ Support/Advocacy

OHIO COUNTY

Brooke, Hancock & Ohio Counties Victim Assistance Program 1500 Chapline Street Wheeling, WV 26003 Phone: (304) 234-3631 Fax: (304) 234-3870	VICTIMS SERVED *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Robbery & Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Therapy *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Personal Advocacy *Filing Compensation Claims
The Children's Home of Wheeling 14 Orchard Road Wheeling, WV 26003 Phone: (304) 233-2367 Fax: (304) 234-3246	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse/Assault SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims
Harmony House Ohio Valley Medical Center 2000 Eoff Street Wheeling, WV 260003 Phone: (304) 230-2205 Fax: (304) 234-8479	VICTIMS SERVED *Child Victims of Sexual Abuse *Child Victims of Physical Abuse *Child Victims of Life Threatening Abuse *Secondary Victims of Child Abuse *Physical & Sexual Abuse SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims

Upper Ohio Valley Sexual Assault Help Center PO Box 6764 Wheeling, WV 26003 Phone: (304) 234-1783 Fax: (304) 234-8231 HOTLINE: (800) 884-7242 or (304) 234-8519	VICTIMS SERVED *Victims of Sexual Abuse/Assault SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Preventative Education *Personal Advocacy *Filing Compensation Claims
YWCA CASA of Wheeling 1100 Chapline Street Wheeling, WV 26003 Phone: (304) 232-0511 Fax: (304) 232-0513	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *CJ Support/Advocacy *Personal Advocacy
YWCA Family Violence Prevention Program 1100 Chapline Street Wheeling, WV 26003 Phone: (304) 232-2748 Fax: (304) 232-0513 HOTLINE: (800) 698-1247	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *Personal Advocacy *Legal Advocacy *Filing Compensation Claims *CJ Support/Advocacy *Emergency Financial Assistance

PENDLETON COUNTY

Family Crisis Center P.O. Box 207 Keyser, WV 26847 Phone: (304) 257-4606 Fax: (304) 257-4606 HOTLINE: (800) 698-1240	VICTIMS SERVED *Victims of Domestic Violence *Victims of Sexual Assault SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

PLEASANTS COUNTY

C.O.F.I. House (Center on Family Issues) 213 2nd Street St. Marys, WV 26170 Phone: (304) 684-3961 Fax: (304) 684-3964 Email: coffeehouse@wirefire.com HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Physical Abuse *Victims of Domestic Violence *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims

POCAHONTAS COUNTY

Family Refuge Center PO Box 249 Lewisburg, WV 24901 Outreach Office: (304) 799-4400 Fax: (304) 645-7368 TOLL FREE: 1-844-340-9101	VICTIMS SERVED *Victims of Sexual Abuse/Assault *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

PRESTON COUNTY

CASA for Kids - Preston County 202 Tunnelton Street Kingwood, WV 26537 Phone: (304) 329-3401 Fax: (304) 715-3550	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Personal Advocacy
Preston County Victim/Witness Program	VICTIMS SERVED *Victims of Physical Abuse

106 West Main Street, Rm. 201 Kingwood, WV 26537 Phone: (304) 329-2795 Fax: (304) 329-0372	*Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Rape & Domestic Violence Information Center PO Box 4228 Morgantown, WV 26505 Phone: (304) 329-1687 Fax: (304) 329-1626	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/ Assault *Victims of Domestic Violence *Victims of Elder Abuse *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Personal Advocacy *Filing Compensation Claims

PUTNAM COUNTY

Branches Domestic Violence Shelter PO Box 403 Huntington, WV 25708 Phone: (304) 586-3865 Fax: (304) 586-3866 TOLL FREE: (888) 538-9838 HOTLINE: (304) 529-2382	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims *Food & Clothing *Visitation & Exchange Center
Putnam County Victim/Witness Program Putnam County Prosecutor's Office	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence

3389 Winfield Road Winfield, WV 25313 Phone: (304) 586-0205, Ext. 199 Fax: (304) 586-0269	*Victims of Elder Abuse *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Family Counseling Connection 1021 Quarrier Street, Ste. 414 Charleston, WV 25301 Phone: (304) 340-3676 Fax: (304) 340-3688 HOTLINE: (800) 656-4673	VICTIMS SERVED *Child Victims of Sexual Assault *Adult Victim of Sexual Assault *Domestic Violence Victims *Survivors of Homicide Victims *Adults Molested as Children *Other Victims of Violent Crime SERVICES OFFERED *Therapy *Crisis Counseling *Information and Referral *Group Treatment *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims

RALEIGH COUNTY

Just for Kids, Inc. 129 Main Street, Suite 406 Beckley, WV 25801 Phone: (304) 255-4834	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Crisis Counseling *Therapy *Group Treatment *Emergency Legal Advocacy
Women's Resource Center Shelter PO Box 1476 Beckley, WV 25802-1476	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse

Phone: (304) 255-2559 Fax: (304) 255-1585 Outreach Office 205 Woodlawn Avenue Beckley, WV 25801 Phone: (304) 255-4066	*Survivors of Homicide Victims SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims

RANDOLPH COUNTY

Centers Against Violence P.O. Box 2062 Elkins, WV 26241 Phone: (304) 636-8433	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims
Randolph County Victim Assistance Program 4 Randolph Avenue – Courthouse Annex, 2nd Floor – Prosecuting Attorney's Office Elkins, WV 26241 Phone: (304) 636-2053 Fax: (304) 636-4198	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Assault *Victims of DUI *Victims of Robbery *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Centers Against Violence PO Box 2062 Elkins, WV 26241 Phone: (304) 636-8433 Fax: (304) 636-5564	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED

HOTLINE: (800) 339-1185	*Shelter *Crisis Counseling *Group Counseling *Information & Referral *CJ Support/Advocacy *Legal & Personal Advocacy *Filing Compensation Claims *Cell Phone Program *Community Education

RITCHIE COUNTY

Family Crisis Intervention Center 2479 Ellenboro Road Harrisville, WV 26362 Phone: (304) 643-2407 Fax: (304) 643-4407 Email: outreach@ruralnet.org HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims *Visitation Center
Family Crisis Intervention Center of Ritchie County PO Box 695 Parkersburg, WV 26102 Phone: (304) 428-2333 HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *CJ Support/Advocacy *Legal Advocacy *Crisis Counseling *Services for Children
Ritchie County Sheriff's Victim Assistance Program 15 East Main Street Harrisville, WV 26362 Phone: (304) 643-2164 ext 269 Fax: (304) 643-2464	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault *DUI Victims *Other Victims of Violent Crime

	SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Personal Advocacy *Filing Compensation Claims

ROANE COUNTY

E.V.E 207 Court Street P.O. Box 518 Spencer, WV 25276 Phone: (304) 927-3707 Fax: (304) 927-3707 Email: eve@wirefire.com HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims *Visitation Center
Family Crisis Intervention Center P.O. Box 695 Parkersburg, WV 26102 Phone: (304) 428-2333 HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims *Parenting Classes *Visitation & Exchange Center

SUMMERS COUNTY

Women's Resource Center 411 Temple Street Hinton, WV 25951 Phone: (304) 466-2226 TOLL FREE: (888) 825-7836	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Information & Referral *Crisis Counseling

TAYLOR COUNTY

Rape & Domestic Violence Information Center PO Box 4228 Morgantown, WV 26505 Phone: (304) 265-6534 Fax: (304) 292-0204	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Domestic Violence *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Personal Advocacy *Filing Compensation Claims

TUCKER COUNTY

Centers Against Violence 203 ½ Main Street Parsons, WV 26287 Phone: (304) 478-4552 Fax*: (304) 478-4552 HOTLINE: (800) 339-1185	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Personal Advocacy *Filing Compensation Claims

TYLER COUNTY

Family Crisis Intervention Center of Region V. Inc. P.O. Box 695 Parkersburg, WV 26101 Phone: (304) 428-2333 HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy

	*Legal Advocacy *Filing Compensation Claims *Parenting Classes *Visitation & Exchange Center
Tyler County Victim Assistance Program Tyler County Prosecutor's Office PO Box 125 Middlebourne, WV 26149 Phone: (304) 758-0869 Fax: (304) 758-2895	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault *DUI Victims *Other Victims of Violent Crime SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims

UPSHUR COUNTY

Mountain CAP of WV, Inc. A CDC CASA Program 26 N. Kanawha Street, Suite 201 Buckhannon, WV 26201 Phone: (304) 472-1500 Fax: (304) 472-9064 TOLL FREE: (800) 871-1503	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *Information & Referral *CJ Support /Advocacy *Personal Advocacy *Filing Compensation Claims
Upshur County Victim/Witness Program Upshur County Prosecutor's Office J.D. Jennings Annex Room 202 38 West Main Street Buckhannon, WV 26201 Phone: (304) 472-1970 Fax: (304) 472-1452	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Crisis Counseling *Information & Referral

	*CJ Support/Advocacy *Filing Compensation Claims
Centers Against Violence PO Box 2548 Buckhannon, WV 26201 Phone: (304) 473-0106 Fax: (304) 473-0070 HOTLINE: (800) 339-1185	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal & Personal Advocacy *Filing Compensation Claims

WAYNE COUNTY

Branches Domestic Violence Shelter PO Box 403 Huntington, WV 25708 Phone: (304) 529-2382 Fax: (304) 529-2398	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Team for WV Children PO Box 1653 Huntington, WV 25717 Phone: (304) 523-9587 Fax: (304) 523-9595	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse SERVICES OFFERED *Personal Advocacy *Help Filing Compensation Claims *Information & Referral *CJ Support/Advocacy
Contact Huntington Rape Crisis Center P.O. Box 212 Wayne, WV 25570 Phone: (304) 272-2503	VICTIMS SERVED *Adult Victims of Sexual Assault *Victims of Stalking SERVICES OFFERED *Crisis Counseling

HOTLINE: (866) 399-7273 or (304) 399-1111	*Group Treatment *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Filing Compensation Claims *Hospital Advocacy *Police Advocacy *Legal Advocacy
Family Services, A Division of Goodwill PO Box 7365 Huntington, WV 25776 Phone: (304) 523-9454 Fax: (304) 523-7060	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Adult Victims of Sexual Assault *Victims of Domestic Violence *Adults Molested as Children *Survivors of Homicide Victims SERVICES OFFERED *Individual Therapy *Group Treatment *Family Therapy *CJ Support/Advocacy *Filing Compensation Claims

WEBSTER COUNTY

Centers Against Violence 25 Bennett Avenue Webster Springs, WV 26288 Phone: (304) 847-2211 Fax: (304) 847-2211 HOTLINE: (800) 339-1185	VICTIMES SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal & Personal Advocacy *Filing Compensation Claims

WETZEL COUNTY

YWCA Family Violence Prevention Program 203 Main Street 2nd Floor New Martinsville, WV 26155 Phone: (304) 455-6400 Fax: (304) 232-0513	VICTIMS SERVED *Victims of Domestic Violence SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *Personal Advocacy

HOTLINE: (800) 698-1247	*Legal Advocacy *Filing Compensation Claims *CJ Support/Advocacy *Emergency Financial Assistance
Wetzel County Victim Assistance Program P.O. Drawer 548 New Martinsville, WV 26155 Phone: (304) 455-8220 Fax: (304) 455-0174	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *DUI Victims *Elder Abuse Victims *Survivors of Homicide Victims *Victims of Robbery *Victims of Assault *Victims of Other Violent Crimes SERVICES OFFERED *Crisis Counseling *Information & Referral *Personal Advocacy *Filing Compensation Claims
Upper Ohio Valley Sexual Assault Help Center PO Box 6764 Wheeling, WV 26003 Phone: (304) 234-1783 Fax: (304) 234-8231 HOTLINE: (800) 884-7242 or (304) 234-8519	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Adult Victims of Sexual Assault *Adults Molested as Children SERVICES OFFERED *Crisis Counseling *Group Treatment *Information & Referral *Legal and Personal Advocacy *CJ Support/Advocacy *Preventative Education *Filing Compensation Claims

WIRT COUNTY

CASA 305 ½ Fourth Street, Suite 1 Parkersburg, WV 26101 Phone: (304) 422-3390 Fax: (304) 422-3683	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Child Victims of Neglect SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims

WOOD COUNTY

Family Crisis Intervention Center of Region V, Inc. 156 Main Avenue Parkersburg, WV 26101 Phone: (304) 428-2333 HOTLINE: (800) 794-2335	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Elder Abuse *Victims of Assault SERVICES OFFERED *Shelter *Crisis Counseling *Group Treatment *Information & Referral *CJ Support/Advocacy *Legal Advocacy *Filing Compensation Claims *Visitation & Exchange Center
CASA 305 ½ Fourth Street, Suite 1 Parkersburg, WV 26101 Phone: (304) 422-3390 Fax: (304) 422-3683	VICTIMS SERVED *Child Victims of Physical Abuse *Child Victims of Sexual Abuse *Child Victims of Neglect SERVICES OFFERED *Information & Referral *CJ Support/Advocacy *Filing Compensation Claims
Wood County Victim/Witness Program Wood County Courthouse 317 Market Street Parkersburg, WV 26101 Phone: (304) 424-1793 Fax: (304) 424-1785	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse/Assault *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Robbery *Victims of Assault *Victims of DUI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Personal Advocacy *Filing Compensation Claims

WYOMING COUNTY

Stop Abusive Family Environment (SAFE), Inc. 66 Main Avenue, Suite 21 Pineville, WV 24874 Phone: (304) 732-8176	VICTIMS SERVED *Victims of Physical Abuse *Victims of Sexual Abuse *Victims of Domestic Violence *Victims of Elder Abuse *Victims of Assault *Other Victims of Violent Crime SERVICES OFFERED *Shelter *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Emergency Legal Advocacy *Filing Compensation Claims
Wyoming County Victim/Witness Assistance Program Wyoming County Prosecuting Attorney's Office PO Box 462 Pineville, WV 24874 Phone: (304) 732-8000 ext. 262 Fax: (304) 732-6052	VICTIMS SERVED *Victims of Physical Abuse *Child Victims of Sexual Assault *Victims of Elder Abuse *Victims of DUI & DWI *Survivors of Homicide Victims *Other Victims of Violent Crime SERVICES OFFERED *Crisis Counseling *Information & Referral *CJ Support/Advocacy *Personal Advocacy *Emergency Legal Advocacy *Filing Compensation Claims

NATIONAL RESOURCE NUMBERS

Battered Women's Justice Project	(800) 903-0111
Center for Women Policy Studies	(202) 872-1770
Childhelp USA/Forrester National Child Abuse Hotline	(800) 422-4458
Crime Victim Study Center	(203) 932-7041
The Family Violence Prevention Fund	(415) 252-8900
Justice Statistics Clearinghouse	(800) 732-3277
Juvenile Justice Clearinghouse	(800) 638-8736
National Association of Crime Victim Compensation Boards	(703) 780-3200
National Center on Elder Abuse	(855) 500-3537
National Center for Missing & Exploited Children	(855) 500-3537
National Clearinghouse for Alcohol & Drug Information	(800) 729-6686
National Center for Victims of Crime	(800) 394-2255
National Clearinghouse on Child Abuse & Neglect	(800) 394-3366
National Clearinghouse for Defense of Battered Women	(800) 903-0111
National Coalition Against Domestic Violence	(303) 839-1852
National Criminal Justice Reference Service	(800) 851-3420
National Council on Child Abuse & Family Violence	(202) 429-6695
National Crime Prevention Council	(443) 292-4565
National Domestic Violence Hotline	(800) 799-7233
TTY	(800) 787-3224
National Mothers Against Drunk Driving (MADD)	(877) 275-6233
National Parents of Murdered Children	(513) 721-5683
National Resource Center on Domestic Violence	(800) 537-2238
National Sexual Violence Resource Center	(877) 739-3895
TTY	(717) 909-0715
National Organization for Victim Assistance (NOVA)	(800) 879-6682
Rape, Abuse & Incest National Network	(800) 656-4673

WEST VIRGINIA RESOURCE NUMBERS

United States Attorneys Office (Southern District)	(304) 345-2200
United States Attorneys Office (Northern District)	(304) 234-0100
West Virginia Attorney General's Office	(304) 558-2021
WV Coalition Against Domestic Violence	(304) 965-3552
WV Crime Victims Compensation Fund	(304) 347-4850
Toll Free	(800) 642-8650
WV Division of Corrections	(304) 558-2036
WV Foundation for Rape Information & Services, Inc.	(304) 366-9500
WV Human Rights Commission	(304) 558-2616
TDD	(304) 558-2976
Hate Crimes Hotlines	(888) 676-5546
WV Prosecuting Attorneys Institute	(304) 558-3348
WV State Police	(304) 746-2100
WV Women's Commission	(304) 558-6073

NATIONAL VICTIM RELATED WEBSITES

American Bar Association's Center on Children and the Law	www.americanbar.org/groups/child_law.html
American Professional Society on the Abuse of Children	www.apsac.org/
Bureau of Justice Assistance	www.bja.gov
Bureau of Justice Statistics	www.bjs.gov
Campus Safety	www.campussafetymagazine.com
Child Abuse Prevention Association	www.childabuseprevention.org
Child Welfare Information Gateway	www.childwelfare.gov
Childhelp	www.childhelp.org
Federal Criminal Case Processing Statistics	https://www.bjs.gov/fjsrc/index.cfm
FLETC (Federal Law Enforcement Training Centers)	https://www.fletc.gov
Fraud.org	www.fraud.org
Human Trafficking Search	www.humantraffickingsearch.org
Identity Theft Resource Center	www.idtheftcenter.org
Mothers Against Drunk Driving	www.madd.org
National Association of Crime Victim Compensation Board	www.nacvcb.org
National Center for Missing & Exploited Children	www.missingkids.com
National Center for Victims of Crime	www.victimsofcrime.org
National Center on Elder Abuse	https://ncea.acl.gov
National Children's Alliance	www.nationalchildrensalliance.org
National Coalition Against Domestic Violence	www.ncadv.org
National Criminal Justice Reference Service	www.ncjrs.gov

National Crime Victims Research & Treatment Center	www.musc.edu/cvc/
National Domestic Violence Hotline	www.thehotline.org
National Institute of Justice	www.ojp.usdoj.gov/nij/
National Network to End Domestic Violence	www.nnedv.org
National Organization for Victim Assistance (NOVA)	www.try-nova.org
National Organization of Parents of Murdered Children	www.pomc.com
National Resource Center on Domestic Violence	www.nrcdv.org
National Sexual Violence Resource Center	www.nsvrc.org
National Sex Offender Public Website	www.nsopr.gov
Office of Justice Programs	www.ojp.usdoj.gov/
Office on Violence Against Women (OVW)	www.usdoj.gov/ovw
Office for Victims of Crime (OVC)	www.ojp.usdoj.gov/ovc/
Substance Abuse and Mental Health Services Administration	https://www.samhsa.gov/find-help/national-helpline
Uniform Crime Reporting Program	www.fbi.gov/stats-services/crimestats
US Dept. of Education Campus Security	www2.ed.gov/admins/lead/safety/campus.html
US Dept. of Health & Human Services Grants	www.hhs.gov/grants/
US Department of Justice	www.justice.gov
Violence Policy Center	www.vpc.org

WEST VIRGINIA VICTIM RELATED WEBSITES

West Virginia Coalition Against Domestic Violence	www.wvcadv.org
Sex Offender Registry	https://apps.wv.gov/StatePolice/SexOffender/

LEGAL RESEARCH & MEDIA RESOURCES

Congress.gov	www.congress.gov
Findlaw	www.findlaw.com/
Government Publishing Office	https://www.gpo.gov/
Guide to Law Online	http://www.loc.gov/law/help/guide.php
Legal Information Institute	https://www.law.cornell.edu/
Library of Congress Guide to Law Online	http://www.loc.gov/law/help/guide.php
Public Library of Law (Fastcase)	http://www.plol.org/Pages/Search.aspx
US Supreme Court Decisions	www.law.cornell.edu/supct/
West Virginia Court System	www.courtswv.gov

BATTERER INTERVENTION AND PREVENTION PROGRAMS

COMMUNITY-BASED NONPROFIT

Community Alternatives to Violence
Carolyn Zdziera, Executive Director
czdziera@msn.com
891 Auto Parts Place, Box 136
Martinsburg, WV 25404
304-262-4424 Fax: 304-263-7599
Class sites: Berkeley Springs, Charles Town, Martinsburg

Goodwill Industries of KYOWVA Area, Inc.
Family Services Division
Leah Losh, Director of Family Services
llosh@goodwillhunting.org
1102 Memorial Boulevard West
Huntington, WV 25701
304-523-9454
Class site: Huntington

Rape & Domestic Violence Information Center, Inc.
Judy King, Facilitator
jking.rdvic@gmail.com
Cory Russell, Facilitator
crussell.drc@gmail.com
Shelly Moreland, Facilitator
smoreland1990@yahoo.com
Ashley Seum, Facilitator
ashleys@rdvic.org
P.O. Box 4228
Morgantown, West Virginia 26504
304-292-5100
Class Sites: Morgantown, Kingwood

YWCA Family Violence Prevention Program
Patricia Flanigan, Director
fvppdeputydirector@hotmail.com
John Nardone, Facilitator
jnardone@ywcawheeling.org
1100 Chapline Street
Wheeling, West Virginia 26003
304-232-2748 Fax: 304-232-0513
Stephen Lulla, Facilitator
steve_lulla@comcast.net
3549 Main Street, Weirton, WV 26062
304-748-8043
Class Sites: Moundsville, Weirton, Wheeling

Fayette County Day Report Center
Jeri Sarafin, Program Director
jeri.l.sarafin@wv.gov
2389 Lochgelly Road
Oak Hill, WV 25901
304-222-9887
Class Site: Oak Hill

WV DIVISION OF CORRECTIONS

WV Dept. of Military Affairs & Public Safety –
Division of Corrections and Rehabilitation

Judy Acree, PSIMED, Program Mentor
304-265-6111 Fax 304-265-6482
c/o Pruntytown Correctional Center
Admin 2 Building, P.O. Box 159
2006 Trap Springs Road
Grafton, WV 26354
jacree@psimedinc.com

West Virginia Division of Corrections
Class Sites:

Anthony Correctional Center
Beckley Correctional Facility
Charleston Correctional Center
Denmar Correctional Center
Huntington Work Release
Huttonsville Correctional Center
McDowell Stevens Correctional Center
Mt. Olive Correctional Center
Northern Correctional Facility
Parkersburg Correctional Center
Pruntytown Correctional Center
Salem Correctional Center
St. Mary's Correctional Center

COMMUNITY-BASED CORRECTIONS

Greenbrier County Day Report Center
Laura Legg, Program Director
laura_legg@yahoo.com
147 Main Street West
Ronceverte, WV 24970
304-647-1389
Class Site: Ronceverte

26th Judicial Circuit Community Corrections Day Report Center
Cheyenne Walters, Director
chevellegirl90@gmail.com
43 WBUC Road
Buckhannon, WV 26201
304-472-9548
Class Site: Buckhannon

McDowell County Day Report Center
Donald Bowen, Program Director
donbowen0@gmail.com
109 Wyoming Street
Welch, WV 24801
304-436-4351
Class Site: Welch

Marion County Community Corrections Day Report Center
Brandi Corley, Director
bcorley@marioncountywv.com
211 Adams Street, Suite 100
Fairmont, WV 26554
304-333-2445
Class Site: Fairmont

Mason County Day Report Center
Jessica Lloyd, Director
jessica.lloyd@masoncountyoes.com 710 Viand Street
Point Pleasant, WV 25550
304-675-7001
Class Site: Point Pleasant
(Not Currently Accepting Referrals)

Mid-Ohio Valley Day Report Center
Hernando Escandon, Director
hescandon@woodcountywv.com
1531 Garfield Avenue
Parkersburg, WV 26101
304-422-8570 Fax: 304-422-8579
Class Sites: Parkersburg, Ripley, Spencer

North Central Community Corrections
Erin Golden, Director
Shari Wince, Facilitator
sheri.l.wince@wv.gov
5 Randolph Avenue, Suite 2
Elkins, WV 26241
304-636-5273 Fax: 304-636-7576
Class Site: Elkins

Pocahontas County Day Report Center
Daniel Arbogast, Program Director
300A Second Avenue
Marlinton, WV 24954
304-799-6650

Putnam County Day Report Center
Jamey Hunt, Director
Kimberly Sanford, BIPP Coordinator
ksanfordpdrc@gmail.com
11624 Winfield Road, Unit 1
Winfield, WV 25213
304-204-1406
Class Site: Winfield

Southern Regional Community Corrections Day Report Center
Bill Jessee, Director
billmercerdrc@frontiernet.net
Judy Smith, Facilitator
judy.smith1a8a57@va.gov
108 South Walker Street
Princeton, WV 24740
304-487-8485 Fax: 304-487-6618
Class Site: Princeton

Tucker County Day Report Center
Dustin Luzier, Director
dustinluzier@hotmail.com
213 First Street
Parsons, WV 26287
304-478-2833 Fax: 304-478-4473
Class Site: Parsons

Appendix A

INDEX OF CASES

West Virginia Cases

Brandon L.E., *In the Interest of*, 183 W. Va. 113, 394 S.E.2d 515 (1990)

Brian D., Matter of, 194 W. Va. 623, 461 S.E.2d 129(1995)

Browning, In the Matter of, 192 W. Va. 231, 452 S.E.2d 34 (1994)

C.S.-2 (In re), 2016 WL 5900714 (W. Va. Sup. Ct., Oct. 11, 2016) (memo. op.)

Cain (State v.), 20 W. Va. 679 (1882)

Carper (State ex rel.) v. West Virginia Parole Board, 203 W. Va. 583, 509 S.E.2d 864 (1998)

Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996)

Cook (State v.), 204 W. Va. 591, 515 S.E.2d 127 (1999)

Crawford (State v.), 66 W. Va. 114, 66 S.E. 110 (1909)

Czaja v. Czaja, 208 W. Va. 62, 537 S.E.2d 908 (2000)

D.B. v. J.R., 235 W. Va. 409, 774 S.E.2d 75 (2015)

Dale Patrick D. v. Victoria Diane D., 203 W. Va. 438, 508 S.E.2d 375 (1998)

Davis (State v.), 199 W. Va. 84, 483 S.E.2d 84 (1996)

DHHR (State ex rel.) v. Ruckman, 223 W. Va. 368, 674 S.E.2d 229 (2009)

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Erica C. (*In re*), 214 W. Va. 375, 589 S.E.2d 517 (2003)

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Feaster v. Feaster, 192 W. Va. 337, 452 S.E.2d 428 (1994)

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Games-Neely v. Real Property, 211 W. Va. 236, 565 S.E.2d 358 (2002)

Gibson (State v.), 226 W. Va. 568, 703 S.E.2d 539 (2010)

Guardianship of K.W. (In re), 240 W.Va. 501, 813 S.E.2d 154 (2018)

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Hopkins (State v.), 192 W. Va. 483, 453 S.E.2d 317 (1994)

Hulbert (State v.), 209 W. Va. 217, 544 S.E.2d 919 (2001)

J.F. (In re), 2016 WL 5900713 (W. Va. Sup. Ct., Oct. 11, 2016) (memo. op.)

J.F., M.C.-2 and N.C. (In re), 2016 WL 5900713 (W. Va. Sup. Ct., Oct. 11, 2016) (memo. op.)

J.P., 240 W.Va. 266, 810 S.E.2d 268 (2018)

Jade E.G. (*In re*), 212 W. Va. 715, 575 S.E.2d 325 (2002)

James B. (State v.), 2016 WL 6678987 (W. Va. Sup. Ct., Nov. 14, 2016) (memo. op.)

Jeffrey S. v. Jennifer S., 2013 WL 310054 (W. Va. Sup. Ct., Jan. 25, 2013) (memo. op.)

John P.W. ex rel. Adam W. v. Dawn D.O., 214 W. Va. 702, 591 S.E.2d 260 (2003)

Julia M. v. Noah M., 2013 WL 656684 (W. Va. Sup. Ct., Feb. 22, 2013) (memo. op.)

K.W. and C.W. (In re), 2016 WL 6679001 (W. Va. Sup. Ct., Nov. 14, 2016) (memo. op.)

Katherine B.T. v. Jackson, 220 W. Va. 219, 640 S.E.2d 569 (2006)

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Lewis (State v.), 238 W.Va. 627, 797 S.E.2d 604 (2017)

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Malfregeot (State v.), 224 W. Va. 264, 685 S.E.2d 237 (2009)

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WV Judicial Guide to Child Safety In Custody Cases

Introduction

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

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

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

Organization of the Bench Tool

The following pages consist of bench cards. The flow of the cards follows your decision-making from the initial filing through drafting and enforcing the order. While much of the material is presented in procedural order, there are also bench cards devoted to topics and issues that can arise throughout litigation.

The authors suggest that you first read the cards as an introduction to the topics addressed.

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Children, Abuse & Custody

Remember: Like adults, children who are exposed to violence respond in a variety of ways.

Children who experience abuse directly or who have acts of violence or threats of violence committed in their family can experience difficulties in their development and in their abilities to function successfully in key areas of their lives. **Some signs that a child is experiencing such difficulties can be the following:**

- ❑ Behavioral or academic problems in school (including truancy)
- ❑ Loss of appetite or overeating, problems falling or staying asleep at night or nightmares
- ❑ An increase in physical complaints like headaches, stomach aches, bed wetting, etc.
- ❑ Initiation or increase in substance abuse or associating with negative peers
- ❑ Emotional stress (depression, anxiety, nervousness, isolation, chronic anger)
- ❑ Oppositional behaviors
- ❑ A + "Perfect" behavior
- ❑ Acting like the parent or attempting to protect other family members
- ❑ Anger toward one or both parents
- ❑ Abusive behavior toward one parent, usually the at-risk parent.

Emotional abuse can be as damaging as physical abuse in terms of causing injury to the child's self-confidence, self-esteem, and potentially hindering their overall course of child development. Being exposed to abusive and violent behavior is not in the best interest of the child. Research shows that children who have been subjected or exposed to violence in their homes have a better chance of minimizing the harm sustained to them if all systems intervene, **maximizing their exposure to supportive roles with caring adults, especially the non-violent parent**, and minimizing the exposure to the violence and its accompanying behaviors.

If your findings of fact support the conclusion that abusive behavior has occurred in the presence of or toward the child, follow CPS reporting mandates and consider ordering no visits or only **supervised visitation with clear guidelines and controls** and appropriate interventions for the abusive parent. Monitor progress and ease contact restrictions if you determine that the interventions are proving effective and if safety permits. In the alternative, limit visitation until conditions are met.

While psychological testing of the child or parents may be helpful to raise, issues within the family or individual psychological needs, **testing is not determinative** of whether an individual is an abusive parent or an at-risk parent. **No psychological test exists that can accurately determine whether a parent is abusive.**

Mandated reporting to CPS

If a judge has reasonable cause to suspect that a child has been abused or neglected he/she shall:

- **Report abuse/neglect to CPS within 24 hours**
- **Send copy of written referral to CPS, Circuit Court and Prosecutor**

§49-2-803 & FC Rule 48

See Card 14

Safety options for visitation and exchange

Notes:

Abusive Behavior & Evidence of Risk

Forms of abuse include abuse toward the children's caregivers (**Domestic Violence**) or directly toward the children (**Child Abuse**).

While all children exposed to domestic violence are impacted, not all exposure to domestic violence would be considered child abuse or neglect. Additionally, not all child abuse or neglect is in the context of a pattern of coercive control.

When assessing the context of violence, the fundamental question is "who is doing what to whom and with what impact?"

§ 49-1-201

Definitions relating to abuse and neglect

It is important to get an overall picture of the family's history, dynamics, and the totality of circumstances that impact the child's physical, emotional, psychological & social safety

Domestic Violence

Legally, domestic violence is basically defined as a threat of harm, actual harm, or perceived threat of harm to a family or household member (§48-27-202). The impact on the family includes a wide range of behaviors and differing contexts:

- **Coercive control** is a pattern of abusive behaviors where one person has power and control over the other family members. This form of violence is often misunderstood as a loss of control, but in reality involves **intentional control** using emotional, psychological, financial, physical, sexual, abuse as well as tactics involving using/harming the children, isolation, and male privilege.
- Fear, intimidation, and psychological damage to adults and children from coercive control violence extends beyond the physical injuries.
- **Children exposed to this pattern of violence and intimidation are affected as detrimentally as direct child abuse/neglect.**
- Domestic violence also occurs in other contexts: **resistive violence** by the adult victim of coercive control violence; **situational violence** that does not include a pattern of coercive control; and **pathological violence** (due to illness/pathology with no pattern of coercive control).

Forms of Child Abuse and Neglect Include:

Abuse: the child's health or welfare is harmed or threatened by the following:

- Knowingly or intentionally inflicting, or knowingly allowing another person to inflict, physical injury or mental or emotional injury;
- Sexual abuse, or sexual exploitation;
- The sale or attempted sale of a child; or
- Domestic violence
- Human Trafficking
- Child conceived as a result of sexual assault

Neglect: physical or mental health is harmed or threatened by absence of the caretaker, refusal, failure or inability of the caretaker to supply the child with necessary food, clothing, shelter, supervision, medical care or education, not due primarily to a lack of financial means.

Imminent Danger: an emergency situation where the welfare or life of the child is threatened including a reasonable cause to believe any child in the home has experienced sexual abuse/exploitation, nonaccidental trauma, battered child syndrome, nutritional deprivation, abandonment, inadequate treatment of serious illness or disease, substantial emotional injury or sale/attempted sale of the child and the parent, guardian or custodian's abuse of alcohol, drugs or other controlled substance has impaired parenting skills posing imminent risk to a child's health or safety.

Parental substance usage in and of itself does not constitute child abuse or neglect. If substance usage is occurring to the degree that the child's health or welfare is harmed or threatened, a report must be made to CPS.

Notes:

Highly Dangerous, Potentially Lethal Indicators

In proceedings involving domestic violence, determine the nature and extent of the domestic violence.

Observe for researched indicators **for highly dangerous/ potentially lethal behavior** from victim, and other evidence available (i.e. law enforcement report, arrest records, DVPO's, criminal history, etc.)

The **presence** of these factors can indicate **elevated** risk of serious injury or lethality. The **absence** of these factors is not, however, evidence of the absence of risk of lethality:

The presence of these research based, highly dangerous, potentially indicators create a substantial risk of harm to children

§48-9-209

Limiting factors

If indicators are present, provide a heightened response that increases safety for adult and child victims and reduce the dangerousness of the offender.

Possession, access and use of weapons and/or possession of weapon when prohibited.
Direct Threats to Kill—anyone in the family, including self
Victim perceives that offender might kill her/him
Stalking behavior—following victim, leaving threatening/ intimidating messages, following victim's family/friends, soliciting others to follow victim or check up on victim, electronic monitoring
Strangulation (choking) - restriction of airway
Intrusive coercive control (i.e. control most of daily activities, constant monitoring, controlling personal autonomy, violently or constantly jealous)
Forced sex
Victim is has left or is attempting to leave the relationship
Offender is unemployed
Victim has a child that is not the offenders biological child
Violence is escalating
Substance abuse may exacerbate highly dangerous/potentially lethal behaviors

Notes:

Analyzing the Evidence

Remember: When there is conflicting testimony, fact-finding requires more than simply determining credibility; it requires you to assess bias, motive, and the perspective of the parties.

Definition:

Abusive Parent: Parent who uses abusive behaviors towards the other parent and/or the children

At-Risk Parent: Parent who has experienced abusive behaviors by the other parent

Cross-allegations of abuse are not uncommon. Sometimes, the abusive parent raises issues of abuse in an effort to discredit the at-risk parent. To sort through this type of testimony, try the following:

- ❑ Determine whether any alleged physical act was part of a pattern of emotional, physical, financial, or sexual abuse.
- ❑ Determine whether any alleged physical acts were done in response or in reaction to other serious forms of abuse and/or control, including financial control, isolation, physical violence, sexual abuse, or humiliation.
- ❑ Consider whether one parent inflicted more harm.
- ❑ Consider the impact of the alleged abusive behavior on the other parent or the child.

Remember this:

Do not make assumptions about in-court behaviors

As you assess bias, motive, and the perspective of the parties, you will be tempted to consider the in-court behavior of the parties as evidence of whether abuse has occurred. Do not assume that either an abusive parent or an at-risk parent will act or respond in uniform, stereotypical, or predictable ways.

For example, in court:

An abusive parent might:

- ❑ Minimize, deny, or blame others for his or her behavior, or apologize for it.
- ❑ Be well-behaved, sophisticated, charming, or articulate, or cry.
- ❑ Focus on his or her professional stature or community prominence.
- ❑ Use disrespectful or gender-biased language.
- ❑ Focus on his or her “rights” and not the best interest of the child.
- ❑ Profess deep love of the child.

An at-risk parent might:

- ❑ Mistrust third party professionals.
- ❑ Speak either aggressively or without affect.
- ❑ Minimize or deny the abuse, take responsibility for it, or deny fear.
- ❑ Minimize the effect of abuse on the children.
- ❑ Have an inability to articulate or have difficulty focusing.
- ❑ Agree with the abusive parent or act ambivalently about the outcome of the case.
- ❑ Raise his or her voice, shake, or demonstrate some other physical response to fear.
- ❑ Have little or no eye contact.

Notes:

Respectful Interaction & Safety Provisions

Remember: The attorneys appearing before you and the third-party professionals whom you rely on for information may not be trained to detect or elicit evidence of abuse.

As a judge, you may take steps that require a parent to act or to refrain from action. One of the most important steps you can take when you recognize abuse is to remind yourself that the abusive parent must be held accountable for the abusive behaviors

The at-risk parent or child may be re-traumatized by the presence of the abusive parent, which may affect how and whether his or her testimony is presented. Techniques exist that can help you get the information you need and control the presentation of evidence. Consider using these even when one or both parties are represented by counsel. (Techniques and considerations around child testimony are presented on card 5.)

Considerations around adult testimony

- If a parent is unrepresented, explain generally what rules of evidence and rules of the court are, and the fact that they apply in this case.
- If a parent is unrepresented, and you suspect an imbalance of power, consider having the unrepresented party direct questions to you.
- If both parents are unrepresented, do not allow the abusive parent to question the at-risk parent directly.
- Explain the ground rules for presentation of the case (e.g., no interruptions, each side will have an opportunity to speak and rebut, time limitations, etc.).
- Explain that represented parties are permitted to speak if asked a question by you, or either attorney, depending upon the type of hearing.
- Make suggestions about how the parent can comply with the ground rules (e.g., take notes and address issues when it is that parent's "turn").
- Ask specific questions about allegations of abuse since the at-risk parent might be too fearful or overwhelmed to respond to open-ended questions.
- Enforce the ground rules.

A note about using interpreters: if the at-risk parent is giving testimony through an interpreter, keep in mind that translations are often not exact, and the details of the abuse may not be completely reported. Follow-up questions by the court can fill in gaps in information.

Notes:

Techniques and Considerations for Child Testimony

Remember: When considering child testimony, there is a presumption that potential psychological harm to the child outweighs the necessity of the child's testimony.

FC Rule 17

Testimony of Children

Child Abuse & Neglect Rules 8 & 9 govern the taking of testimony of children.
In re J.S., 758SE 2d 747 (W.Va. 2014)

WV mandates are very protective of children and the impact of testifying on child well-being. While all children can be considered competent to testify in any proceeding, the impact of the testimony on the child must be considered. There is a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony.

The judge **should** exclude the child's testimony if:

- ❑ The equivalent evidence can be procured through other reasonable efforts;
- ❑ The child's testimony is not more probative on the issue than the other forms of evidence presented;
- ❑ The interest of justice will best be served by the exclusion of the child's testimony.

The procedure for taking testimony from children:

- ❑ In camera interview may be conducted outside the presence of parents.
- ❑ Court may permit child to testify through live one-way, closed-circuit television.
- ❑ If the interview is recorded, the record shall be sealed unless the judge orders it opened for good cause or the case is appealed.

Boarman v Boarman
190 W.Va. 533,438 S.E.2d 876 (1993)

When serious allegations of child abuse or neglect are made in a custody case, the protections afforded children under abuse and neglect law should apply. Such protections include:

- ❑ Appointment of guardian *ad litem*
- ❑ Full inquiry into the allegations by CPS
- ❑ Recognizing child abuse and neglect cases as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.
- ❑ Ordering emergency custody in limited circumstances under W.Va. Code §49-4-302

Notes:

Establishing Jurisdiction Based on Safety

Remember: Parties may move to or from your jurisdiction for reasons concerning the safety of a child or parent.

State & Federal Mandates

§48-20-204. Temporary emergency jurisdiction

UCCJEA
Uniform Child Custody Jurisdiction and Enforcement Act
§48-20-101, et seq

Rule 6—Circuit Court exclusive jurisdiction

For more Information see:

§48-9-403
Relocation of a parent

§48-20-201
Initial custody jurisdiction

§48-5-106
Venue for divorce proceedings

WV has temporary emergency jurisdiction if the child is in this state and has been abandoned or it is necessary to protect the child because the child, a sibling or parent of the child is subjected to or threatened with mistreatment or abuse. §48-20-204(a) WV code and rules will govern procedures for establishing jurisdiction and for communicating with judges in other jurisdictions.

If a parent is in WV and in seeking emergency protection to escape child abuse or domestic violence, it is important to identify the reasons behind the parents presence in WV as you ascertain jurisdiction. Questions you can answer to determine jurisdictional issues include:

- ❑ Does an emergency exist?
- ❑ Is the home state an inconvenient forum?
- ❑ Are there significant connection with our state?
- ❑ Are there orders in place that require the child's return?
- ❑ Are there protective orders in place in either jurisdiction?
- ❑ Has either parent sought a domestic violence intervention or services?
- ❑ Are there warrants against either party in the child's home state?
- ❑ Are there any safety concerns regarding either parent or the child?
- ❑ Do circumstances require that you take immediate action?

If safety is an issue and you do not have concurrent jurisdiction:
If an emergency custody determination is needed, upon being informed that another state has made a prior custody determination, the judge shall immediately communicate with the other court to resolve the emergency, protect the safety of the parties and the child and determine a period for the duration of the temporary order. Even if abuse is not apparent, consider whether the family's history supports the parent's safety concerns. For example:

- ❑ Has the abusive parent increased the use of non-violence coercive measures, such as non-payment of child support or other family financial obligations?
- ❑ Has the abusive parent recently become unemployed or underemployed?
- ❑ Has the child shown any signs of distress or other behavior changes before or after a visit with the allegedly abusive parent?

Being sensitive to the escalation of non-physical forms of abuse can assist you in determining safety risks to the child.

Notes:

Temporary & Emergency Orders

§48-5-512

Ex parte orders granting temporary relief

If a **temporary order** will be in place prior to the issuance of the final order, you may wish to take steps to ensure the safety and best interest of the child.

Ex parte orders granting temporary relief may be needed if it appears that immediate and irreparable injury, loss, or damage will result to the at risk parent or child by appearing before the abusive parent. Such injury, loss, or damage may be anticipated in circumstances including the following:

- ❑ Real and present threat of physical injury
- ❑ The abusive parent is preparing to leave the state with the child(ren)
- ❑ The abusive parent is preparing to remove/deal with property

An emergency order for custody will be appropriate where

- ❑ Notice to a parent that a custody, visitation, or other action has been filed increases safety concerns for the child or other parent.
- ❑ The child is scheduled in the near future to be with a parent who allegedly puts the child or the other parent at heightened risk.
- ❑ There is heightened risk for the at-risk parent, and existing orders do not adequately address the safety concerns of that parent.

Ultimately your decision should be based on what is safest for the child and the parties.

Sometimes, a parent will take the child out of the jurisdiction for his or her safety or that of the child. **While you may find that removal of the child was inappropriate, it is essential that you address the underlying safety concerns that caused the parent to relocate.** If you determine that a child who has been inappropriately removed is with the safe parent, consider fashioning an order that is least disruptive to the child.

Remember: Safety issues may exist that need to be addressed between the time of initial filing and the final order.

What you can do:

- ❑ Defer your decision, or rule on the motion subject further hearing when the parties have completed discovery, or you have received the necessary information.
- ❑ Establish an expedited review date to determine how the temporary custody arrangement is working.
- ❑ Consider appointing a guardian *ad litem*, attorney for the child, or other third party who is competent to address any emotional and physical safety risks to the child and other family members.
- ❑ Order an interim safety assessment performed by a qualified expert with a limited and specific focus on safety.
- ❑ Order that either parent may bring the matter before the court again once counsel has been retained, discovery has been completed, or another triggering event has occurred.
- ❑ Make sure that all parties understand the process and legal notices.

Emergencies can exist that require an immediate decision prior to notice being received by one of the parties.

Notes:

Initial Filing

Remember

Determining whether safety is an issue is the necessary first step in all custody and visitation cases.

Remember: It is important to review thoroughly the content of the pleadings and the litigants' court history very early on. Most judges feel the pressure of a busy docket and know the claims pled and remedies requested may change. Taking time to consider the information that initial filings contain is a good use of resources. Spending time considering what is—and what is not—contained in the pleadings may save substantial time as the litigation proceeds. The earlier you become aware that safety may be a consideration in the case, the earlier you can issue appropriate orders.

A few factors that might require you to explore the family's safety issues further include the following:

- ❑ Was cruelty or abuse alleged in the pleadings?
- ❑ Is either parent seeking sole physical or sole decision-making authority over the child?
- ❑ Has either parent ever applied for a protection order against the other party or had a protection order entered against him or her?
- ❑ Are there any prior or pending court actions concerning any family member (criminal, child support, delinquency matters, or other)?
- ❑ Have there been any arrests or court proceedings that involved crimes against people or animals or destruction of personal property?
- ❑ Has child protective services (CPS) ever been involved with these parties?
- ❑ Has either parent requested that information be kept confidential, particularly from the other party?
- ❑ Are there any other indicators that a child or parent could be unsafe?

Keep in mind that none of the above factors is determinative of which party is or may be abusive. The factors are indicators, however, that abuse may be present in the family and that further inquiry is warranted to determine the existence or source of the abuse.

Are there allegations that have raised safety concerns?

IF YES: Suggested measures you can take include these:

- ❑ Set the matter for a pretrial hearing to explore safety issues.
- ❑ Consider requiring that the parties appear before the court prior to entry of any orders, if your jurisdiction is one that permits entry of orders without a hearing. Consider taking this step even where there is no opposition to the motion or other request.
- ❑ Appoint a guardian *ad litem* or other investigator who is well-versed in matters of abuse in the family setting.

IF NO: Proceed in your usual fashion, with the understanding that safety issues may emerge over time. Periodically, you may want to check court information systems for any orders of protection or other pending civil and criminal cases.

[49-6a 2 & FC Rule 48]

Mandated reporting to CPS

If a judge has reasonable cause to suspect that a child has been abused or neglected he/she shall:

- **Report abuse/neglect to CPS within 24 hours**
- **Send copy of written referral to CPS, Circuit Court and Prosecutor**

Periodically check for orders of protection or other pending cases

Notes:

The Pretrial Process

Remember: Abusive parents often use the pretrial process as a tool of coercion and continued abuse.

Abusive parents often file excessive motions, requests for discovery, and other pleadings so that the at-risk parent must make frequent court appearances or incur increased expenses.

You can protect the at-risk parent and control the litigation by

- ❑ Permitting the at-risk parent to appear or be available to counsel by telephone or videoconference.
- ❑ Sanctioning parents who refuse to produce discovery, particularly financial information.
- ❑ Requiring that no hearing in the case be scheduled without your review and approval.
- ❑ Awarding attorneys fees, compensation for lost wages, and other financial sanctions to the parent required to respond to frivolous or excessive pretrial motions.

When making temporary, interim, or emergency custody orders, you can maximize safety for the child and the at-risk parent by

- ❑ Prohibiting the abusive parent from attending the deposition of the at-risk parent, if the abusive parent is represented by counsel.
- ❑ Ordering third-party transportation of the child for visitation, if feasible.
- ❑ Ordering professionally supervised visitation or exchange where there are resources in your jurisdiction.
- ❑ Permitting the at-risk parent to leave the courthouse earlier than the abusive parent.
- ❑ Ordering third-party professionals, such as guardians *ad litem*, or custody evaluators, to investigate thoroughly the abuse allegations, assess the safety of the at-risk parent and child, and file safety plans with the court before conducting an investigation, in order to ensure the safety of the child and the at-risk parent.
- ❑ Appointing only professionals who are competent in abuse and safety issues.
- ❑ Awarding *pendente lite* attorneys' fees or other economic relief to the non-abusive parent so that he or she may have access to counsel and other professionals.

Sometimes *ex parte* orders are requested by the coercive parent who is seeking to maintain control over the other parent or the child. When presented with an *ex parte* request for custody, take steps to explore whether there are ulterior motives for filing the ex parte motion.

Consequences for repeated appearances and other techniques of abuse include:

- **Ordering payment of lost wages & expenses by abusive parent**
- **Order no court appearances without your approval**
- **Deny requests for excessive or unnecessary delay**

When a situation requires a third-party professional and the safety of the child or parent is at issue, it is critical that you appoint professionals who are qualified.

WV Trial Court Rule 21.3
Family Court Rule 47

Notes:

Mediation

Remember: Mediation is generally not appropriate where safety issues (domestic violence, stalking, coercion, sexual assault, or child abuse) of a parent or child are identified - FC Rule 401c and §48-9-202(b)

Although safety risks, abuse, or coercion might not be identified at the point of initial filing, risk issues might arise as the case proceeds. You should examine whether cases labeled "high-conflict" are appropriate for mediation, because many high-conflict cases have abuse or coercion as a component.

Does the case before you have abuse of a parent as a component?
If YES: Mediation is generally not an appropriate form of resolution.

- ❑ Amend any standard order to remove the obligation for the parties to mediate.
- ❑ If mediation is ordered, use only mediators who are competent in abuse/safety issues; and instruct the mediator to terminate mediation if it becomes a coercive or lop-sided situation.
- ❑ On occasion, the at-risk parent may insist upon mediation. In this case, mediation should be permitted only under the following circumstances:
  - The parties do not meet face-to-face or at the same time.
  - The mediator submits a safety plan that satisfies the court that steps have been taken to ensure the at-risk parent's safety.
  - The mediator is instructed to terminate the mediation if either the mediator or the at-risk parent feels that the at-risk parent is not safe.
  - The at-risk parent is permitted to have in attendance a supporting person of his or her choice, including, but not limited to, an attorney or advocate.

If NO: Periodically review the case for safety issues because disclosures of abuse often occur over time.

The safety of the child can never be mediated. If the case before you has abuse of a child as a component, mediation is not recommended.

- ❑ CPS must provide the judge with a copy of the family functioning assessment and safety plan when CPS completes them on any case involved in family court proceedings.
- ❑ CPS has a duty to notify Family Court when a "Material Change of Circumstance" occurs.
- ❑ **The judge should assure that the safety plan and the court order are not in conflict.** If the court learns that CPS has implemented a safety plan that is in conflict with the courts order, the CPS worker should be notified immediately.
- ❑ Even if CPS does not substantiate child abuse/neglect, if the judge still has safety concerns, mediation is not recommended.

See Card 2

ABUSIVE BEHAVIOR & EVIDENCE OF RISK for assistance with answering.

CPS policy 1.8.1

Reporting & communication with the family and circuit courts (http://www.dhhr.wv.gov/policy)

Family Court Rule 48

Notes:

Settlements & the Uncontested Case

§48-9-201

The parenting plan must meet the needs of the child.

Remember: An agreement might have been coerced and compromises safety, even though the matter appears to be uncontested.

Some warning signs that the agreement was the result of coercion might be:

- ❑ The agreement contains clearly unbalanced, lop-sided, or unusual custody, visitation, or support provisions.
- ❑ The parent who is seemingly disfavored in the agreement or who seems to be giving the most away is not represented by counsel.
- ❑ The parent who is seemingly disfavored in the agreement or who seems to be giving the most away is an immigrant, has a disability, or is the lesser-earning parent.
- ❑ If there are allegations of child abuse or domestic violence.

Remember: The court must find that the agreement is not harmful to the child.

In Re Katie S.
198 W. Va. 79, 479 S. E. 2d 589 (1996)

"Although parents have substantial rights that must be protected the primary goal in all family law matters must be the health and welfare of children."

If the agreement seems unreasonable, compromises safety or you suspect there could be issues of unequal bargaining power, consider the following:

- ❑ Set the matter for a hearing. At the hearing:
  - Inquire about the safety concerns.
    - ⇒ Have there been any problems since your separation involving the children?
    - ⇒ Have there been any concerns about parenting around safety or well-being of the child?
    - ⇒ Has there been any DV and/or DVPO?
  - Inquire about how the agreement was reached.
    - ⇒ Were there any threats or promises?
    - ⇒ Did you have time to consult with your attorney, family or friends?
    - ⇒ Do you feel the agreement is in the best interest of your child?
  - Make a specific inquiry if a DVPO is being dropped.
- ❑ Request that qualified court personnel or third-party professionals interview the parties separately to determine whether there are issues of safety, coercion, or control.
- ❑ Appoint a guardian *ad litem* to represent the child and do an independent investigation.
- ❑ You have the authority to reject the agreement.

Notes:

The Hearing—Findings of Fact

See Card 2

ABUSIVE BEHAVIOR & EVIDENCE OF RISK

Actively obtaining the information you need to make an informed decision does not compromise your neutrality.

Factors to consider:

- ❑ Have the pleadings raised emotional or physical abuse issues?
- ❑ Has a parent or a third-party neutral or evaluator identified emotional or physical abuse, sexual assault, or stalking?
- ❑ Do any identified mental health or substance abuse issues indicate a lack of safety in the home?
- ❑ Have you independently determined from file review, evidence, or information from criminal or other civil cases that safety issues exist?
- ❑ Has one of the parents engaged in any strategies to protect himself or herself from abuse?

§48-9-206

Allocation of custodial responsibility

§48-9-207 Allocation of significant decision making responsibility

§48-9-209

Limiting factors

Determining which parent is or historically has been the primary caregiver is important to the decision-making process. Interruption of a child's routine or bonding may have negative consequences to development and well-being.

Safety and well-being are paramount. You may wish to elicit the following:

- ❑ Which parent historically provided the day-to-day care for the physical and emotional needs of the child?
- ❑ What parenting routines and rituals fostered nurturing of the child? (e.g., What are the bedtime routines? Who prepares the child for school or day care each day? Has the involvement in school extracurricular activities been nurturing?)
- ❑ How the parent consoles the child.
- ❑ Whether the child is closely bonded to one parent, and if so, if the bond created from traumatic experiences.
- ❑ Whether the child afraid to "misbehave" with one parent.
- ❑ Whether the parent views his or her role and time with the child as an entitlement or as a privilege.
- ❑ The impact any emotional or physical abuse of either a child or the other parent had on the child's behavior and development.
- ❑ Whether shared decision-making will result in the child and/or parent's continued exposure to abuse of either the child or the other parent.
- ❑ Whether the parenting time, exchange, and communication in the parent's plan exposes the child or parent to abuse.

Notes:

The Hearing—Conclusions of Law

Remember: In all custody and visitation decisions, be sure to support your conclusions and judgment with appropriate findings of fact.

When determining if your conclusions of law are in the child's best interest, keep in mind:

- ❑ Whether you need an expert trained in child maltreatment and DV in order to determine the appropriateness of ongoing contact between the child and parents.
- ❑ Whether you should order preconditions to visitation.
- ❑ Whether the parent who abused the other parent has strictly adhered to court orders.
- ❑ Whether you need additional information in order to make appropriate findings of fact and conclusions of law.

An additional hearing may mean 30 minutes of your time, but may make all the difference in the world to a child.

Joint shared parenting time and joint decision-making (shared parenting) may not be appropriate where there is evidence of one parent emotionally, sexually, physically, or mentally abusing or controlling the other parent or child.

Although it is one of the most difficult decisions you make, consider ordering **no contact** between a child and parent, even on a trial basis, when

- ❑ Either the other parent or the child has been physically abused.
- ❑ One parent has a history of non-compliance with court orders.
- ❑ One parent refuses treatment for substance abuse, mental health, or abuse issues, and fails to address the issues that create a safety risk for the child.
- ❑ There is an existing no-contact order between the parent and child and there has been no improvement in the underlying behavior that formed the basis for the no-contact order.
- ❑ Contact with the child places the other parent or child at high risk of further abuse.
- ❑ One parent is using the children to continue the abuse of the other parent or other children.
- ❑ If you allow contact, make sure you have included safety provisions in the order:
    - Professionally supervised visitation or exchange
    - Third party exchange (i.e., grandma)
    - Public exchange
    - Specific limitations on behavior or contact with third parties (i.e., no drinking)

Remember:
If the parent is abusive to the child, report to CPS is mandated within 24 hours (§49—2-803 & FC Rule 48).

If a Chapter 49 Child Abuse/Neglect Petition has been filed <u>at any time</u>, circuit court has jurisdiction for proceedings involving the child. (§49-4-606, Family Court Rule 48, Child Abuse and Neglect Rules 6 and 46).

Remember:
If evidence of abuse or neglect (including domestic violence) supports permanently ordering no contact between a child and a parent, a CPS referral is warranted (see cards 1 & 2).

Notes:

Drafting the Order

Remember: Precision and attention to details minimize the need to return to court and can enhance safety by reducing the need for contact between the parents.

When safety of a parent or child is an issue:

- ❑ Draft an order that eliminates or minimizes the need for contact between the parties.
- ❑ Make sure schedules and arrangements for exchange of the child are drafted with detail as to time, place, and length of stay.
- ❑ Include holidays and vacation schedules in the order.
- ❑ Allow no detail to be left to negotiation between the parents.
- ❑ Name a reliable contact for emergency communication.
- ❑ If visits are to be supervised, detail the rules of supervision (e.g., the conditions under which the supervisor may terminate visits, etc.).
- ❑ Where safety is an issue, state the concern in the order.
- ❑ Draft the order so that, in the event of a dispute, police and other third-party professionals will understand that it is designed to protect the child and the at-risk parent.
- ❑ Remember that best interest of the child does not always permit equal access by the parents, particularly when safety is an issue.
- ❑ If the child is to have a new residence, include visitation details if the location of the child's new residence is known at the time of your decision and is not confidential.
- ❑ If the child's residence is confidential, ensure that it remains confidential and set out a specific plan for professionally supervised visitations and exchanges.
- ❑ Support your order with adequate findings of fact and conclusions of law.

Notes:

Enforcing the Order

Family Court Rule 24d

Compliance Hearings

Enforcement of orders and holding abusers accountable for violations is critical to assuring that the child and the at-risk parent remain safe.

You can help keep children and the at-risk parent safe by

- ❑ Insisting upon strict compliance with all provisions of the order.
- ❑ Holding periodic reviews where the at-risk parent need not be present in order to ensure compliance.
- ❑ Modifying the order if the original terms had a detrimental effect on the child or at-risk parent.
- ❑ Compensating the at-risk parent through awards of attorney's fees, compensation for lost pay, etc.

Remember: Not respecting rules and boundaries is part of abusive behavior, and abusers often use non-compliance with orders to continue control over the child and the other parent.

Sometimes it is the at-risk parent who violates the court order. If you have identified the at-risk parent and that parent violates the order, you should inquire:

- ❑ Was the at-risk parent or a child threatened explicitly or implicitly?
- ❑ Has any incident occurred since the order was entered that made the at-risk parent or child feel unsafe?
- ❑ Was the violation a response to the threat or otherwise an attempt to protect the child or the at-risk parent?
- ❑ Was the violation an inappropriate response to the abusive parent's non-compliance?

Even if you find that the information you receive is not sufficient to excuse the non-compliance, the responses may assist you in determining whether some revision of the order is necessary to protect the at-risk parent or child.

Notes:

WV Judicial Guide to Child Safety In Custody Cases

Dangerousness Lethality Assessment Guide

D-LAG

Recognize

Highly Dangerous Potentially Lethal

Behaviors of Domestic Violence Offenders

A research-based guide for systems interacting with families experiencing domestic violence.

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WEST VIRGINIA STATE POLICE

Justice & Community Services

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Dangerousness Lethality Assessment Guide

The escalation of domestic violence to a highly dangerous/ potentially lethal level follows a pattern with identifiable indicators[1].

If it is identifiable, it is predictable.

This guide will help professionals move through the following four steps in assessing domestic violence perpetrators for highly dangerous/potentially lethal behaviors and provide an effective response that heightens both safety measures for victims and accountability for highly dangerous/ potentially lethal perpetrators:

Why should we assess for indicators of highly dangerous/potentially lethal indicators in domestic violence cases?

A consistent, research based process will:

- Provide a more accurate basis for effective safety planning with victims and accountability for perpetrators;
- Alleviate potentially inaccurate assumptions about dangerousness and lethality;
- Provide a process for communicating potentially dangerous indicators across systems;
- Help professionals gather critical information and put individual incidents of violence into context to make decisions about how to respond; and
- Can SAVE LIVES.

[1]These indicators are validated by a number of studies. See Campbell, Jacquelyn, et at, "Intimate Partner Violence Risk Assessment Validations Study: The RAVE Study Practitioner Summary and Recommendations: Validation of Tools for Assessing Risk form Violence Intimate partners", National Institute of Justice (December, 2005); Heckert and Gondolf, "Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault", Journal of Interpersonal Violence Vol 19, No 7 (July 2004).

Before assessing for indicators, it is important to understand the nature and extent of the domestic violence. While the legal definition of domestic violence meets a standard defined in WV statutes, families may experience behaviors that is contextually different and broader than the legal definition. Researchers have found that behaviors typically classified as domestic violence can look like:

Coercive controlling violence—include patterned behaviors such as physical, sexual, psychological/emotional and financial abuse, intimidation, threats, isolation, using children, using privilege, and minimization. The person using this type of violence has power over others in the family and operates from a belief that they are entitled to use such tactics of control.

Resistive violence—is produced and shaped by coercive controlling violence. Victims of coercive controlling violence resist or "fight back" in self defense and/ or use passive violence or retaliatory violence.

Non-coercive controlling violence—is violence between intimate partners or family members that does not include a pattern of behaviors where one person controls or has power over other members of the family.

"In the (intimate partner) femicide study, the majority of victims or perpetrators (up to 83%) or both had contact with criminal justice, victim assistance and/or health care agencies in the year prior to the homicide.

(Campbell, J., PhD, R.N., F.A.A.N., Johns Hopkins University, *Intimate Partner Homicide: Review and Implications of Research and Policy*)

Considerations When Assessing Indicators:

- **Lack of indicators does not guarantee a victim is safe.**
- **Expert judgment should guide intervention when danger is perceived.**
- **Indicators should never be used to limit services.**
- **Understanding indicators is an ongoing process—not a one time assessment.**
- **Consider victim protective strategies as well as danger indicators.**

Dangerousness Lethality Assessment Guide

The following four steps will guide professionals through a process for responding to domestic violence cases where highly dangerous, potentially lethal behaviors are indicated.

1

Understand the nature and extent of the domestic violence.
Prior training on recognizing the differing contexts of domestic violence is critical in assessing the impact on families. Differentiating context involves asking who is doing what to whom and with what impact:

- Coercive controlling violence;
- Resistive violence—produced and shaped by coercive control;
- Non-coercive controlling violence.

2

Identify highly dangerous/potentially lethal behaviors.
This guide will assist in gathering specific information and questions to determine if there are indicators for highly dangerous/potentially lethal behaviors. The best predictions of risk are a combination of victim's perception of risk and a risk evaluation instrument. *(Heckert, D. A., & Gondolf, E. W. (2004). Battered women's perceptions of risk versus risk factors and instruments in predicting repeat reassault. Journal of Interpersonal Violence 19(7), 778-800.*)

3

Provide a heightened response when indicators are present.
Provide immediate safety planning and/or referrals to increase the safety for victim(s). Increase measures to contain and reduce the dangerousness of offenders. A heightened response includes immediate actions using strongest measures possible.

4

Coordinate responses across systems.
Coordinating assessments and responses is best practice for achieving victim safety and containing perpetrator behaviors. Remember confidentiality procedures/limitations applicable to your discipline when sharing information. Confidentiality is connected to victim safety.

Magistrate Response

Researched indicators of highly dangerous/potentially lethal behaviors:

Possession, access and use of weapons and/or possession of weapons when prohibited

Direct threats to kill—anyone in the family, including self

Stalking behavior—following victim, leaving threatening/ intimidating messages, electronic monitoring

Strangulation ("choking") restriction of airway/blood flow

Intrusive coercive control—control most of daily activities, constant monitoring

Forced sex

Victim has left or is attempting to leave the relationship

Offender is unemployed

Victim has a child who is not the offender's biological child

Violence is escalating

Substance abuse may exacerbate highly dangerous/potentially lethal behaviors

1 Who is doing what to whom and with what impact

In proceedings involving domestic violence, observe for the nature and extent of the domestic violence.

The history and severity of the violence, likelihood of future injury, use of reasonable force acted in self defense and presence of highly dangerous/potentially lethal behaviors of will help to determine the predominant aggressor if both parties are using violence.

2

Observe for indicators of highly dangerous/potentially lethal behaviors in complaint and other evidence if available (i.e. law enforcement report, arrest records, criminal backgrounds, etc.).

If the officer is present, ask what they observed.

In EPO proceedings, gather information from victim. Gathering information from a petitioner—when possible—is best practice for obtaining these indicators and getting a more accurate assessment of lethality. Do not ask the victim to say in front of offender that they are afraid.

Victim behavior may not appear appropriate or "normal" based on the trauma they have experienced. Each victim responds differently. While gathering information from the victim is helpful in determining the presence of indicators, some victims may be afraid or further traumatized when being interviewed or questioned.

Never refuse to allow anyone to file an EPO petition (§48-27-304(b).

The **presence** of these factors can indicate **elevated** risk of serious injury or lethality. The **absence** of these factors is not, however, evidence of the absence of risk of lethality.

Magistrate Response

3 If indicators for highly dangerous, potentially lethal behaviors are present, **consider the following enhanced response options** to:

Increase Safety for Victim

When the victim is present (EPO proceedings or if they appear in criminal proceedings):

- Review the petition and listen to the victim for indicators.
- Discuss the highly dangerous, potentially lethal indicators and express heightened concern for victim and child(ren) safety.
- Indicators for adult victims are also indicators for substantial risk of harm to children.
- Discuss Immediate referral to a domestic violence advocate and advocate at the prosecutor's office (or prosecutor in the absence of prosecutor based advocate.

Know that to stay safe, some victims will use the Address Confidentiality Program out of the WV Secretary of State's Office (Legislative Rule 153CSR37).

Reduce Dangerousness of Offender

When setting bond consider:

- Cross reference DV registry when arraigned for EPO or DVPO for outstanding service.
- Setting high property or cash bond—not PR .
- Setting bond conditions of no contact with victim (§62-1C-17c) and review hearings (*Rules of Criminal Procedure for Magistrate Courts* 5(f)(4).
- Setting home confinement with GPS - confirm where perpetrator will be living separate from victim.

When sentencing consider:

- Appropriate sentence considering potential for lethality such as:
  - Jail time;
  - Home confinement (not in home with victim-§62-11-B-6(d));
  - Home confinement with GPS;
  - Suspended jail with day report or community corrections.
- Plea agreements in cases with highly dangerous/ potentially lethal indicators are discouraged
- Pretrial diversion not permitted in any DV case - §61-11-22(d and e).

EPO proceedings:

- Locate and seize all firearms listed on EPO petition.
- Check DV registry and criminal history before issuing 3rd party transfer of firearms.

4

System Collaboration

- If children or vulnerable adults are exposed to potentially lethal offender behaviors, make referral to CPS or APS, and document indicators on verbal/ written report.
- Refer to advocates. Providing time and safe space before/after proceedings for advocates to talk with victims can improve safety.
- Communicate bond conditions to law enforcement.
- Flag EPO for expedited service and officer safety.
- Understand how other systems assess for indicators.

Family Court Response

Researched indicators of highly dangerous/potentially lethal behaviors:

Possession, access and use of weapons and/or possession of weapons when prohibited

Direct threats to kill—anyone in the family, including self

Stalking behavior—following victim, leaving threatening/ intimidating messages, electronic monitoring

Strangulation ("choking") restriction of airway/blood flow

Intrusive coercive control—control most of daily activities, constant monitoring

Forced sex

Victim has left or is attempting to leave the relationship

Offender is unemployed

Victim has a child who is not the offender's biological child

Violence is escalating

Substance abuse may exacerbate highly dangerous/potentially lethal behaviors

1 Who is doing what to whom and with what impact

In proceedings involving domestic violence, determine the nature and extent of the domestic violence.

2

Observe for indicators for highly dangerous/potentially lethal behavior from victim, and other evidence available—pursuant to Chapter §48-27-505 (i.e. law enforcement report, arrest records, DVPO's, criminal history, etc.).

Case coordinators can ask about indicators when screening for domestic violence in mediation cases. If indicators are found during this screening, Case Coordinators can refer victims to safe services, but cannot give information about indicators in ex-parte communications with the judge.

Encourage attorneys to provide information on the indicators to the court.

The level and type of risk can change over time. The most dangerous time period is the days to months after the offender discovers that the victim is making attempts to leave or terminate the relationship or has disclosed the abuse to others—especially in the legal system.

Victim behavior may not appear appropriate or "normal" based on the trauma they have experienced. Each victim responds differently. While gathering information from the victim is helpful in determining the presence of indicators, some victims may be afraid or further traumatized when being interviewed or questioned.

The **presence** of these factors can indicate **elevated** risk of serious injury or lethality. The **absence** of these factors is not, however, evidence of the absence of risk of lethality.

Family Court Response

3 If indicators for highly dangerous, potentially lethal behaviors are present, **consider the following enhanced response options** to:

Increase Safety for Victim

- Do not elicit safety or risk information from victims in open court—safety concerns can affect the victim's ability to provide accurate information in open court.
- Identify highly dangerous, potentially lethal indicators and express heightened concern for victim and child (ren) safety -Indicators for adult victims are also indicators for substantial risk of harm to children.
- Discuss Immediate referral to a domestic violence advocate.
- Create safe and separate waiting spaces.
- Know that to stay safe, some victims will use the Address Confidentiality Program out of the WV Secretary of State's Office (Legislative Rule 153CSR37).

Reduce Dangerousness of Offender

DVPO Proceedings:

- Conduct compliance hearings to ensure perpetrator is abiding by order and firearms prohibitions are being followed.
- Conduct hearing (to assess safety) before dismissing DVPO (when petitioner appears for hearing).
- Attach petition for return of firearms to the final order in the civil domestic violence case.

Offenders using highly dangerous/potentially lethality behaviors create risk of harm to children.

Parenting time proceedings:

- Order supervised visitation.
- Use third party transportation for visitation.
- Use visitation and exchange centers.
- Order no visitation.

The history and severity of the violence will help to determine the predominant aggressor (Title §149-3, section 7.5) if both parties are using violence. However, the victim of a predominant aggressor may be the respondent in some cases.

4

System Collaboration

- If children or vulnerable adults are exposed to potentially lethal offender behaviors, make referral to CPS or APS, and document indicators on verbal/ written report.
- Refer to community and system based advocates. Providing time and safe space before/after proceedings for advocates to talk with victims can improve safety.
- Consider ordering law enforcement to provide safety check on petitioner if they do not appear at DVPO proceedings.
- Understand how other systems assess for indicators.

Circuit Court Response

Researched indicators of highly dangerous/potentially lethal behaviors:

Possession, access and use of weapons and/or possession of weapons when prohibited

Direct threats to kill—anyone in the family, including self

Stalking behavior—following victim, leaving threatening/ intimidating messages, electronic monitoring

Strangulation ("choking") restriction of airway/blood flow

Intrusive coercive control—control most of daily activities, constant monitoring

Forced sex

Victim has left or is attempting to leave the relationship

Offender is unemployed

Victim has a child who is not the offender's biological child

Violence is escalating

Substance abuse may exacerbate highly dangerous/potentially lethal behaviors

1 Who is doing what to whom and with what impact

In proceedings involving domestic violence, determine the nature and extent of the domestic violence.

2

Observe for indicators for highly dangerous/potentially lethal behavior from victim, and other records if available (i.e. law enforcement report, arrest records, DVPO's, criminal backgrounds, etc.).

Information on behaviors that potentially indicate lethality can inform judicial discretion.

Encourage attorneys, practitioners, and officers of the court to provide information on lethality indicators to the court.

The level and type of risk can change over time. The most dangerous time period is the days to months after the offender discovers that the victim is making attempts to leave or terminate the relationship or has disclosed the abuse to others—especially in the legal system.

Victim behavior may not appear appropriate or "normal" based on the trauma they have experienced. Each victim responds differently. While gathering information from the victim is helpful in determining the presence of indicators, some victims may be afraid or further traumatized when being interviewed or questioned.

These materials represent a partial list of resources currently available when weighing risk factors and making lethality assessments. These resources could be used as a starting point for any analysis on this topic.

The **presence** of these factors can indicate **elevated** risk of serious injury or lethality. The **absence** of these factors is not, however, evidence of the absence of risk of lethality.

Circuit Court Response

3 If indicators for highly dangerous, potentially lethal behaviors are present, **consider the following enhanced response options** to:

Increase Safety for Victim

- Do not elicit safety or risk information from victims in open court.
- Identify highly dangerous, potentially lethal indicators and express heightened concern for victim and child(ren) safety - Indicators for adult victims are also indicators for substantial risk of harm to children.
- Discuss Immediate referral to a domestic violence advocate
- Know that to stay safe, some victims will use the Address Confidentiality Program out of the WV Secretary of State's Office (Legislative Rule 153CSR37).

Reduce Dangerousness of Offender

Child abuse and neglect proceedings:

- Highly dangerous/potentially lethal behaviors create substantial risk of harm to children that could rise to the level of aggravated circumstances.

Criminal proceedings:

- Reduction of the following crimes is discouraged:
  - Malicious or unlawful wounding,
  - Strangulation,
  - Attempted murder,
  - Wanton endangerment,
  - Sexual assault/abuse if forced,
  - Stalking,
  - Child abuse,
  - Child endangerment,
  - Non-DV specific charges.
- Bond reduction is not recommended– consider high property or cash bond.
- Pretrial diversion not permitted in any DV case -§61-11-22(d and e).
- Inquire about indicators in Probation reports.

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System Collaboration

- If children or vulnerable adults are exposed to potentially lethal offender behaviors, make referral to CPS or APS, and document indicators on verbal/ written report.
- Refer to community and system based advocates. Time and safe space before/ after proceedings for advocates to talk with victims can improve safety.
- Consider ordering law enforcement to provide safety check on petitioner if they do not appear at proceedings.
- Understand how other systems assess for indicators.