Revised Chapter Four: Families and Children

MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE

NCJFCJ
est. 1937
NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES

REVISED 2022

Revised Chapter Four: Families and Children

Model Code on Domestic and Family Violence

Revised 2022

National Council of Juvenile and Family Court Judges

This project was supported by Grant No. 2017-TA-AX-K013 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women or the National Council of Juvenile and Family Court Judges.

Acknowledgment

We sincerely appreciate the contributions of the below members of the National Working Group. We thank the Working Group members for contributing their time, expertise, and guidance to the project, which informed the work of the NCJFCJ Model Code Drafting team. Each member brought a willingness to listen, be challenged, and compromise during this revision process, which took more than two years due to the COVID-19 pandemic and which required the Working Group to have difficult and nuanced discussions virtually since March 2020. After reviewing all input from the workgroup members and external sources, the document drafters were responsible for the ultimate decision on the language included in the final Revised Chapter Four of the Model Code on Domestic and Family Violence.

National Working Group

The listing of institutions and organizations reflects affiliations only and does not signify the institutions or organizations' endorsement of this document.

ALLEN M. BAILEY, JD, Attorney (Ret.), Alaska

HONORABLE SUSAN B. CARBON, Circuit Court Judge (Ret.), New Hampshire

HONORABLE ROSEMARY COLLINS, Circuit Court Judge (Ret.), Illinois

KRISTA DEL GALLO, Legislative Director, Texas

MIEKO FAILEY, JD, LGBTQ Center of Long Beach, California

GRETTA GARDNER, JD, General Counsel, Ujima Inc., The National Center on Violence Against Women in the Black Community, Washington D.C.

HONORABLE RAMONA GONZALEZ, Presiding Judge, Wisconsin

REBECCA HENRY, JD, Deputy Chief Counsel, American Bar Association Commission on Domestic and Sexual Violence, Washington D.C.

HONORABLE ANNE HIRSCH, Superior Court Judge (Ret.), Washington

PETER JAFFE, PhD, Psychologist and Professor Emeritus, Western University, London, Canada

ANADELLE MARTINEZ MULLEN, JD, Battered Women's Justice Project, Minnesota

JOAN MEIER, JD, National Family Violence Law Center Professor and Director, George Washington University Law School, Washington, D.C.

MAUREEN REID, MSW, RSW, Certified EMDR Therapist, London, Ontario

DANIEL G. SAUNDERS, PhD, Professor Emeritus, School of Social Work, University of Michigan

MAUREEN SHEERAN, Consultant, Nevada

External Reviewers and Contributors

We are also grateful for the work of many external reviewers that provided feedback on either specific sections or the full Revised Chapter. Their willingness to lend their time and expertise proved invaluable to the project.

The listing of institutions and organizations reflects affiliations only and does not signify the institutions or organizations' endorsement of this document.

After reviewing all input from the workgroup members and external sources, the document drafters were responsible for the ultimate decision on the language included in the final Revised Chapter Four of the Model Code on Domestic and Family Violence.

HONORABLE STEVE AYCOCK, (Ret.), Consultant

YASMIN CAMPOS-MENDEZ, MSW, Public Policy Manager, Esperanza United

FRANK DAVIS, PhD, Licensed Psychologist

KELLY GAINES STONER, JD, Victim Advocacy Legal Specialist, Tribal Law and Policy Institute

OLIVIA GARCIA, PhD, Director of Public Policy, Esperanza United

DEBORAH GOELMAN, JD, Director, Legal Resource Center on Violence Against Women, Inc.

GRACE HUANG, JD, Director of Policy, Asian Pacific Institute on Gender-Based Violence

TK LOGAN, PhD, Professor University of Kentucky

BETH MCNAMARA, Co-executive Director, Inspire Action for Social Change

LESLYE E. ORLOFF, JD, Director, National Immigrant Women's Advocacy Project, American University, Washington College of Law

JENNIFER ROSE, Co-executive Director, Inspire Action for Social Change

Staff and Consultants

JENNIFER ARSENIAN, JD, Senior Program Attorney, National Council of Juvenile and Family Court Judges

AMANDA KAY, JD, Senior Program Attorney, National Council of Juvenile and Family Court Judges

LORETTA FREDERICK, JD, Consultant, National Council of Juvenile and Family Court Judges

DARREN B. MITCHELL, JD, Consultant, National Council of Juvenile and Family Court Judges

AMY PINCOLINI-FORD, JD, Program Director, National Council of Juvenile and Family Court Judges

ANNETTE WILLIAMS, Technical Assistance and Training Coordinator, National Council of Juvenile and Family Court Judges

Table of Contents

Acknowledgment **2**
National Working Group 2
External Reviewers and Contributors 3
Staff and Consultants 4
Table of Contents **5**
Drafting Process **7**
Preamble **9**
Overview 9
Terminology 13
New sections 14
Definition section 15
Best interest of the child section 17
Rebuttable presumption 19
Parenting time and visitation 21
Use of experts to assist with custody/parenting time decision-making in cases involving abuse 22
Alternative dispute resolution 24
Relocation 25
Modification and enforcement 26
Child-related relief in civil protection orders (CPO) 28
Final note 28
Section 401. Definitions **30**
Commentary 34
Section 402. Best Interest of the Child **52**
Commentary 57
Section 403. Rebuttable Presumption (in Applicable Jurisdictions) **64**
Commentary 67
Section 404. Parenting Time/Visitation **70**
Commentary 76
Section 405. Use of Experts to Assist Decision-Making **84**
Commentary 93

Section 406. Alternative Dispute Resolution 108
Commentary 111
Section 407. Relocation 116
Commentary 118
Section 408. Modification and Enforcement 123
Commentary 126
Section 409. Child-Related Relief in Civil Protection Orders 130
Commentary 134
Section 410. Education for Family Court Judges, Staff, and Practitioners 139
Commentary 140

Drafting Process

In 2018, the NCJFCJ was awarded funding from the Office on Violence Against Women (OVW) to revise Chapter Four of the *Model Code on Domestic and Family Violence.* Chapter Four primarily focuses on responding to custody matters involving family and domestic violence. The NCJFCJ began this revision process by conducting a series of issue-spotting discussions with the following professions: (1) advocates; (2) researchers/academicians; (3) judicial officers; (4) attorneys, and (5) family court practitioners. After compiling the information from the issue-spotting sessions, the NCJFCJ, in partnership with the American Bar Association's Commission on Domestic and Sexual Violence, convened the National Working Group to assist in revising the Model Code. The Working Group consisted of judges, attorneys, advocates, academicians, researchers, and family court practitioners.

This National Working Group met in Washington, D.C., in 2019 and identified the areas needing revision, suggested approaches, and provided guidance to the project staff. Additional in-person National Working Group meetings were planned but were canceled due to the COVID-19 pandemic.

For over 18 months, the National Working Group met via monthly virtual calls to continue the complex work of updating the language to reflect the changing landscape since the original Model Code was released. During the pandemic, the Working Group members participated in over 25 calls, reviewed multiple written draft versions, and provided commentary throughout the process. The final stages of the discussion process involved three opportunities for workgroup members to vote on specific language options to resolve areas where consensus was not reached through the regular discussions or written feedback process. The final stage included holding 12 preview sessions on portions of the Revised Chapter for family court practitioners and related professions and receiving feedback from external reviewers.

The drafting team, composed of NCJFCJ staff and consultants, completed the final revisions to 10 distinct segments. Each segment includes new code guidance and related commentary. Each completed segment was circulated for final comments from the National Working Group members. The NCJFCJ drafting team also sought external input from additional subject matter experts. After this full review process was completed for

each segment, the segment was submitted to the Office on Violence Against Women for review and approval.

Preamble

Overview

In 1994, after three years of intensive work by a multidisciplinary advisory committee funded by the Conrad N. Hilton Foundation, the National Council of Juvenile and Family Court Judges promulgated the *Model Code on Domestic and Family Violence* (Model Code). This comprehensive Model Code provides a statutory framework for promoting effective responses to domestic violence by the criminal, civil, and family courts, and it encourages consistency across the country. Its five chapters address: general provisions, criminal penalties and procedures, civil orders for protection, family and children, and prevention and treatment.

Chapter Four, the Family and Children chapter, had the most potential impact and was the most far-reaching: family courts process tens of thousands of contested custody cases each year, and a significant number involve domestic violence. That chapter elevated the safety of the abused parent and child above all other best interest of the child (BIC) factors and included a rebuttable presumption against awarding sole custody, joint legal custody, or joint physical custody to a perpetrator of domestic violence.

These provisions have been adopted at least in part in most states. As of 2018, all states and the District of Columbia (D.C.) required domestic violence to be considered in the best interest of the child analysis, with 26 states and D.C. giving domestic violence extra weight. Twenty-eight states and D.C. provide a statutory presumption against awarding custody to a perpetrator of domestic violence.[1]

Despite the three decades of statutory reform and implementation work, some children continue to be subjected to unsafe and unworkable court-ordered parenting arrangements, and many survivor parents still live with unrelenting harassment, threats, and danger. Several possible factors drive these poor outcomes, including persistent disbelief that abuse allegations are true, a continuing perception that allegations of abuse are simply attempts to manipulate the family court system, inattention to or inadequate information on the full nature and context of the abuse, ignorance of the

[1] Res. Ctr. Domes. Violence: Child Prot. & Custody (hereinafter RCDV:CPC), Nat'l Council Juv. & Fam. Ct. J., (hereinafter NCJFCJ), *State Custody Statutes Relevant to Domestic Violence* (2018).

potential effects of domestic abuse on abused parents and children, and a failure to account for the belief system of a parent who is abusive and how it can shape parenting and harm children.[2]

These persistent poor outcomes drove an intensive reexamination of Chapter Four of the Model Code provisions that guide courts and other practitioners in family law cases. While many factors other than the law determine outcomes in custody cases, the law does need to reflect what is now known about how existing custody laws are being interpreted and applied.

This new Family and Children Chapter of the Model Code consists of provisions that reflect what has been learned over the past three decades. Some provisions clarify and elucidate the former ones, and some address new issues. One section, setting forth provisions regarding child-related relief, has been added to Chapter Three of the Model Code, on Civil Protection Orders.

This revision to Chapter Four of the Model Code is intended to address family court systems' barriers to accurately identify domestic abuse and child abuse and adequately account for their effects on abused parents and children. These barriers undermine the core legal foundation of family court proceedings: to promote outcomes that are in the best interest of the child.

The revisions to this Chapter also reflect the understanding that only by recognizing culture can courts obtain necessary context to assess and meet the needs of individual families. Without sufficient information and recognition of the cultural context, information gaps may be filled with assumptions rooted in implicit or cultural bias.

---

[2] Debra Pogrund Stark, Jessica M. Choplin & Sarah E. Wellard, *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1 (2019); Daniel G. Saunders, *Research-based Recommendations for Child Custody Evaluation Practices and Policies in Cases of Intimate Partner Violence*, 12 (1) J. CHILD CUSTODY 71-92 (2015); Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?*, 42 J. SOC. WELFARE & FAM. L. 92 (2020); Peter G. Jaffe, Claire V. Crooks & Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. & FAM. CT. J. 57, 60, 62 (2003); Stephanie J. Dallam & Joyana L. Silberg, *Six Myths that Place Children at Risk in Custody Disputes*, 7 FAM. & INTIMATE PARTNER VIOLENCE Q. 65 (2014).

The focus of this chapter is on an approach that requires a careful analysis and tailored response, which means that adequate information is obtained (safely and ethically) and provided to the court, allowing for a comprehensive assessment of the context, nature, and effects of domestic abuse on the abused parent and children who experienced abuse.[3]

The careful analysis outlined in this Chapter also supports the constitutional requirement of due process and the principles of procedural fairness, ensuring parties have meaningful opportunities to be heard and fully participate in the legal proceeding. The family justice system can further support these concepts through neutral, yet informed, and unbiased judicial and non-judicial decision-makers; inclusion of due process protections, to the extent possible, in non-judicial court processes (custody evaluation, use of guardians ad litem, custody facilitators, etc.); informing parties of any limitations on due process rights; and access to legal representation or legal advice for all litigants.[4]

Some consistent themes are present throughout each section of this new Chapter. Each section drives family courts to account for the fact that domestic abuse can vary widely in its nature, context, and effects on adult and child victims, including the level of risk of lethality, physical harm, and other types of danger. These provisions also recognize that domestic abuse can co-occur with child abuse, can signal problematic parenting by the parent who is abusive, and can also harm children by compromising the parenting of the parent who is abused.

These provisions also call upon courts and practitioners to examine and account for the many contexts (individual, social, and cultural)[5] within which parents commit or experience abuse. These contexts can also aid the

---

[3] Fam. Ct. Enhanc. Proj. (hereinafter FCEP), NCJFCJ, *FCEP Identification & Assessment Lessons Learned*.

[4] FCEP, NCJFCJ, *Guiding Principles for Effectively Addressing Child Custody and Parenting Time in Cases Involving Domestic Viol*ence, at 2 (2019).

[5] *See*, Battered Women's Just. Proj. (hereinafter BWJP), *SAFeR: An Approach That is Right for the Movement* (Sept. 2020) (for more information on identifying Context); Asian Pacific Institute on Gender-Based Violence (hereinafter APIGBV), *Child Custody Evaluation: Domestic Violence & Cultural Contexts in Asian Families*.

parent who is abusive in entrapping the other parent and children and can, therefore, increase the level of danger and lasting trauma they face. Identifying domestic abuse is an important first step, but just knowing that abuse has occurred or is still occurring does not convey all information necessary to make informed decisions and take informed action. The specific nature and context of the abuse are required: who is doing what to whom, why, and to what effect. And, in the context of a custody case, specific details are needed about parenting and the health, safety, and well-being of the children, as well as the parent who is abused.

This new Chapter Four also incorporates provisions that require family courts to recognize and account for a range of abusive behaviors beyond the inflicted or attempted physical violence to which many statutory definitions of domestic violence (including that found in the existing 1994 Model Code) are limited. Among the violent behaviors that are not physical is "coercive controlling" domestic abuse, which can be associated with uniquely problematic and dangerous parenting. The term "coercive control" is increasingly being used worldwide to describe abuse that has the purpose or effect of restricting the victim's autonomy, entrapping them through such tactics as micromanagement of daily affairs[6] or using cultural practices or beliefs to instill fear to maintain control over another.

Finally, because the parent who is abusive and whose children resist contact with them may allege in family court that the parent who is abused is engaging in "parental alienation," the Chapter's definition of domestic abuse explicitly prohibits courts from adversely considering the actions of parents who are abused that are intended to protect themselves or their children from the risk of harm posed by the other parent.

While the new Families and Children Chapter stands alone, unlike the original Chapter, it reflects the understanding that the family court response to domestic abuse must be part of an integrated system, which includes criminal and civil protection order courts and the child welfare system. In order to avoid unintended negative consequences and to provide safe and workable custody arrangements and other interventions, any jurisdiction considering the adoption of these custody provisions must account for how

[6] Lisa A. Tucker, *Domestic Violence as a Factor In Child Custody Determinations: Considering Coercive Control*, 90 FORDHAM L. REV. 2674 (2022).

any changes, such as in the definition of domestic abuse, could have implications for other cases in these other parts of the legal system.

While the Model Code and this Revised Chapter focus on state codes, state courts should collaborate closely with Tribal courts and communities to enhance culturally responsive outcomes and promote enforcement of custody/parenting time orders issued by state and Tribal courts. The Model Code and this Revised Chapter do not apply directly to tribal codes or incorporate tribal beliefs towards Indian children or tribal familial structures. However, many of the suggestions herein may be useful to tribes.

The Revised Chapter Four offers code-related language, extensive commentary, and reference information for general guidance on improving system responses to domestic abuse through enhanced policies, practices, court rules, or code revisions.

Terminology

In recognition of the fact that a wide variety of terms are used to describe the concepts referenced in this new Chapter Four, the drafters have chosen the following language for use throughout:

"Domestic abuse" refers to a wide range of behaviors that can also be described as intimate partner violence, domestic violence, or battering, among other terms, and was chosen to reflect the reality that some very salient and dangerous abuse is not of the physically violent type. The full meaning of the term "domestic abuse" is found in the definition section of this Chapter.

The term "parent" applies to any person for whom legal parental status has been determined. Parental rights of non-biological/non-birth parents are determined by separate provisions of a jurisdiction's laws and governing case law, including laws and decisions setting forth the standards for second parent adoptions, parentage determinations, and parenting agreements.[7]

"Parent who is abused" refers to the parent who is experiencing or has experienced domestic abuse. The drafters are aware that other terms,

[7] This term is not defined to include tribal familial relationships that may vary from tribe to tribe and may exist without application of a jurisdiction's laws.

including survivor or victim, are sometimes used when referring to these parents.

“Parent who is abusive” is the term used herein to refer to the parent who uses or has used domestic abuse.

“Family court” refers to any court that makes decisions regarding child custody between parents, whether or not in the context of a divorce and regardless of the term used locally. Depending on the jurisdiction, this type of court may be called a family court, a juvenile court, a domestic relations court, or other term, and in many jurisdictions these cases are handled in the court of general trial jurisdiction.

In addition, the concepts and arrangements used in the family court context and addressed in this document are labeled differently across the country. Jurisdictions interested in adopting provisions from the Revised Chapter may use the following definitions to help determine what terminology within their family code best aligns with the meaning of the language used in the Revised Chapter. This document uses the following terms:

“Custody” is the term used to describe the allocation of both (1) physical or residential placement of a child, parenting time, and (2) legal custody or decision-making authority and responsibility.

“Visitation” is used only in Section 404 because this term is used throughout the Guiding Principles referenced in the Section. Otherwise, in the document, the term related to physical time with a child is referred to as parenting time.

"Parenting Time" refers to the time that a child is in the physical care of a parent.

New sections

Three new sections address topics and issues not covered in the original Model Code. Of two new sections in Chapter Four, one addresses relocation, and another speaks to custody evaluations in cases involving domestic abuse. The third new section, added to Chapter Three, deals with child-related relief (such as custody) in civil protection orders (CPO). It is included in this revision because so many child-related relief requests begin through the CPO process, it is directly related to child custody, and the issue-spotting sessions identified this matter as needing attention.

Following is a brief description of each of this Chapter's sections. Each code provision provides a thorough commentary section detailing the rationale for the National Working Group's adoption of the provision and the rejection of alternative language.

The revisions to Chapter Four were drafted to provide a comprehensive approach to addressing domestic abuse in custody/parenting time cases. The creation of this comprehensive approach involved connecting each section to the core analysis detailed in the Best Interest of the Child section, thereby ensuring the Revised Chapter reflects consistent guidance for the family court system, rather than a siloed, piecemeal approach.

Definition section

Much is now known about the degree to which children can be harmed by being exposed to and experiencing domestic abuse, even nonphysically violent forms of abuse, and even when the children themselves are not physically harmed.[8]

Accordingly, the definition adopted for these custody code provisions includes forms of abuse in addition to physical assault or threats to cause bodily harm to another family member, including the use of firearms. These forms of abuse include stalking, sexual abuse, health-related abuse, coercive controlling abuse, technological abuse, financial abuse, and human trafficking. Several of these types of abusive behaviors are, themselves, further defined.

For each type of abusive behavior proposed for inclusion in the definition, the National Working Group wrestled with the same issues: could including this form of abuse in the definition: (1) guide courts to recognize and

[8] See, e.g., Peter G. Jaffe et al., *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* 12-13 (2014); Sibylle Artz et al., *A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth*, 5 INT'L J. CHILD, YOUTH & FAM. STUD. 493-587 (2014). For Indian children, see also Off. Juv. Just. & Delinq. Prevention, Off. Just. Programs, U.S. Dep't Just., *Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence: Ending Violence so Children can Thrive* (Nov. 2014).

address many kinds of problematic and dangerous parenting by parents who are abusive and their implications for child custody or parenting time determinations; (2) have unintended or negative consequences; and (3) be accessible, easy to interpret, and useful to all parents, including those who do not have legal representation or who face other barriers to meaningful legal system access.

How best to include “coercive controlling abuse” in the definition was one of the most difficult topics addressed by the National Working Group. Drafting a definition of coercive control necessitates the resolution of tension between two goals: (1) improving outcomes for children and parents who are abused by focusing courts on the kind of abusive behavior by a parent that does not include physical violence, but that is quite harmful to children and parents who are abused and (2) avoiding overbreadth or misapplication against the parent who is abused. The definition of coercive control that was adopted strives to find an appropriate balance between these goals.

This new Chapter Four refrains from the use of broad terminology in order to avoid two unintended outcomes. First, under very broad definitions, parents who are abusive could argue that their partners who are abused are “controlling and abusive” for criticizing the behavior of the parent who is abusive or seeking to protect the children from the parent who is abusive. Second, an extremely broad definition might be reasonably interpreted as applying to *most* couples whose post-separation relationships are highly conflictual. These outcomes would fail to do what the Chapter intends: focus family courts on the families with a parent who is abusive and whose children truly need careful and protective parenting arrangements and interventions.

The definition of coercive controlling abuse settled on for this Chapter is “a pattern of conduct that has the purpose or effect of substantially restricting the other parent's safety or autonomy through intimidation, implicit or explicit threats, or by compelling compliance.” The section includes an inexhaustive list of behaviors that may constitute coercive control if they are part of a pattern of conduct described in the definition above.

Finally, this section addresses the reality that many parents accused of domestic or child abuse claim that the parent who is alleging domestic or child abuse is “alienating” the child from the other parent, especially if the

child is resisting contact with the alleged abuser.[9] A parent who is abused can look, on the face of things, like an "unfriendly parent" or to be engaging in "alienating" or "controlling" behaviors, when in fact they are acting in a responsible and protective fashion. Such a parent can be seen as trying to control access to the child, but should not be deemed to be "controlling" in the same sense as is meant by the term that describes the very abusive and threatening, "coercive control." Accordingly, the new Chapter Four of the Model Code explicitly provides that conduct undertaken by a parent to protect themselves or their children from the risk of present or future harm posed by the other parent does not constitute coercive controlling abuse.

Best interest of the child section

This section focuses on identifying and responding to the effects of domestic abuse, as defined in the Chapter, on children and parents who are abused, including how domestic abuse impacts any other factors typically considered to determine the best interest of the child. This focus on domestic abuse does not preclude the court from considering any other necessary factor to promote the safety and well-being of the child.

However, the section details, in several ways, how jurisdictions can structure the interrelationship between a best interest of the child analysis and any statutory presumptions, including those against placement of children in the custody of parents who have committed domestic abuse. This Chapter offers two sections, one which provides a model for a best interest approach, which should be considered by all jurisdictions as a replacement for their existing approach.[10] The second section provides

---

[9] Ctr. Rsch. & Educ. Violence Against Women and Child., *The Misuse of Parental Alienation in Family Court Proceedings with Allegations of Intimate Partner Violence, Part 1: Understanding the Issue*, 33 Learning Network: Mobilizing Knowledge to End Gender-Based Violence (Feb. 2021).

[10] The best interest of the child approach for Native American children may include an application of the Indian Child Welfare Act. Prior to 1978, Native American children were disproportionately taken from their homes by state and private welfare agencies, severing them from their families and their culture. Grounds for separation were often based upon cultural misunderstandings of Native American child-rearing practices and proceeded without due process. The Indian Child Welfare Act, 25.U.S.C. 1901 *et seq.* (ICWA), aimed to reduce the amount of Native American children removed from their families and to ensure that children who needed to be removed were placed within their extended families and in an environment that reflected their cultures and traditions. ICWA applies to four types of custody cases involving an Indian child in state court: foster care placements, terminations of parental rights, pre-adoptive placements, and

language for those states that have a statutory presumption and prefer to retain it. Regardless of the approach taken, this Chapter prioritizes the need for the courts to account for the nature, context, and effects of any domestic abuse and respond to the lived experience of the abuse as it appears in each individual family.

Four significant features of the section guide family courts to consider domestic abuse when analyzing the best interest of the child.

First, in light of the fact that domestic abuse can impact children and parenting in several important ways, the section outlines the four categories of factors which the court is called upon to consider and upon which to make findings: the nature, context, and effects of abuse on the child; the parenting behaviors and decisions of the parent perpetrating domestic abuse; the risk of harm to child or parent; and any abuse experienced by the child. This analysis must be done *before* the court moves to consider any other factors.

Second, the section guides courts to recognize that domestic abuse can cast a shadow on many (non-domestic abuse) aspects of parenting and child-rearing. This provision calls for every best interest of the child factor to be evaluated in light of any domestic abuse, and the court must make findings to reflect that analysis. In a related provision, there are four factors that jurisdictions should ensure are addressed in their best interest list and analysis, including how any domestic abuse affects (1) the child's historical and current relationships with each parent, (2) any protective behaviors of the parent who is being abused, (3) the child's adjustment to changes in daily life, and (4) how each parent is meeting the child's needs.

Third, this section requires courts, having assessed the nature, context, and effects of any abuse, to enter orders which address these effects. Included is an inexhaustive list of the types of provisions which promote a child's safety, recovery, and resilience.

Fourth, the best interest section deals with the common phenomenon of mutual allegations of domestic abuse. It is tempting for courts and practitioners to assume that if both parents have committed acts of domestic abuse, the abuse has the same impact and relevance or should

---

adoptive placements. Each of these terms are defined in ICWA found at 25 U.S.C. § 1903. For more information on ICWA, see KELLY GAINES STONER ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN, THIRD EDITION (ABA Family Law Section, 2018).

carry no weight at all in the analysis. But because the nature, context, and effect of abuse on children and parenting can vary so widely and dramatically, it is critical that courts take evidence of each party's allegations and make detailed findings. Among the issues the court must consider in these cases are: the nature and effects of the abuse; whether any parent is acting in self-defense or in response to abuse by the other parent; how the abuse reflects upon or affects parenting behaviors and attributes; how the abuse of each parent affects the child; and the likelihood of future acts of domestic abuse, as defined in this Revised Chapter, by each parent. Finally, if both parties are found to have committed domestic abuse, the court is to determine which of the parents is less likely to continue to commit domestic abuse and to pose the least risk of harm to the child.

This section addresses two related issues which can arise in cases involving domestic abuse: a child is resisting contact with a parent who is alleged to have committed domestic or child abuse or the parent who alleges abuse is requesting some limitation on custody or parenting time by the allegedly abusive parent. For the latter situation, the section offers language to address the impact of "friendly parent" factors which favor a parent who is more likely to facilitate contact or relationship of a child with the other parent. The provision specifies that efforts to protect a child from abuse are not to be considered as unwillingness to facilitate contact.

The related section, addressing allegations that a child resists, refuses, or shows reluctance toward contact with a parent, requires the court first to determine whether the child is, in fact, resisting contact and, if so, to assess the domestic abuse or child abuse allegations before moving on to considering the child's behavior and whether it stems from domestic or child abuse perpetrated by that parent. If it does, in whole or in part, arise from the abuse, the court is to address those issues by the standards set in the best interest of the child section of this Chapter. Two other provisions state that: (1) the court is not to presume that in these cases that the other parent is the cause, and (2) the court is not to order programs for the child to address the issue unless it meets the relevant standards of practice and is accepted in research, is effective in addressing the abuse's effect on the child, and addresses the safety of the child and the parent who is abused.

Rebuttable presumption

Since the release of the original Model Code in 1994, approximately half of the states have enacted some version of a rebuttable presumption against

awards of shared or sole legal or physical custody to parents who have been found to have committed domestic abuse.[11] Experience has shown that the implementation of such provisions in some jurisdictions has been fraught: sometimes backfiring on parents who are abused and, in some cases, not resulting in nuanced custody arrangements that account for the nature and context of the abuse in individual cases.

This version of Chapter Four of the Model Code offers an alternative, a best interest of the child approach which focuses decision-makers on the nature and context of the abuse in each case, the future risk to the parent who is abused and the child, and the ability and willingness of the parent who is abusive to safely focus on the needs of the child. However, the drafters are aware that many states with presumptions will keep them in place, and, therefore, specific guidance is provided for application of the domestic abuse definition in this section.

The definitions of abuse that trigger many of these presumptions are narrow and can be limited to physical violence, but we know now that the abusive behaviors that harm children can be nonphysical. In recognition of this fact, this new Chapter provision *expands the definition* of the kind of domestic abuse that triggers the presumption against awards of custody to parents who are abusive. However, it is critical to note that the list of abusive behaviors that trigger the presumption is *more restrictive* than is used in the other provisions of Chapter Four because the consequences of a finding are so significant, so determinative, and can have unintended negative consequences. The applicable definition is a “pattern or serious act” of the kind of “domestic abuse” used elsewhere in this Chapter.

One issue plaguing some states with rebuttable presumption statutes is that they do not clearly outline the factors which should be considered by the court to determine when the abusive parent has adequately rebutted the presumption.[12] This Chapter requires courts to consider several listed types of evidence of domestic abuse, including evidence related to the nature and context of the abuse. Further, the court is to consider whether the parent who is abusive will and can prioritize the child’s safety and well-being, can and will safely make shared decisions, has acknowledged the harm caused, and has changed their behavior. The best interest of the

[11] RCDV: CPC, NCJFCJ, *Rebuttable Presumption States* (2014).
[12] *Id.*

child remains the overarching value and issue in this version of a rebuttable presumption, as it should be.

Parenting time and visitation

Because domestic abuse may be accompanied by and reflect numerous significant custody or parenting time problems, this Chapter requires a court, once it has determined that some kind of custody, parenting time, or visitation can be safe and appropriate, to put in place the conditions and provisions that will promote the safety and physical and psychological well-being of the child and the parent who is abused. In addition, because parents are entitled to know what kind of proof of behavior changes are required in order to satisfy the court that the safety provisions could be modified, courts are guided to include in their orders those expectations, as well as the duration of the protective conditions, if any.

This section includes an extensive and useful list of potential ways a court can minimize the risk to children or to a parent who is abused. When the court orders supervised visitation or exchange, it needs to be provided by a supervised visitation center using qualified, trained professionals in domestic abuse and operated in conformity with the current version of the Guiding Principles for Supervised Visitation and Safe Exchange (Guiding Principles) developed by the U.S. Department of Justice, Office on Violence Against Women (OVW).

Although it is not the preferred practice in domestic abuse cases, unfortunately courts are often faced with allowing a family member, household member, or other specified third party or nonprofessional to supervise visitation. This Chapter requires that where the use of professional supervised visitation services is not feasible or unavailable, the court should require supervision by someone who has the ability to ensure the necessary safety conditions are met. The commentary to this section refers to a set of policy considerations for nonprofessional supervisors, which is also included the Toolkit.[13]

A related section on specialized visitation centers lays out what courts should know about the available options for supervised visitation and

[13] The Commentary to each section is part of this document. The Revised Chapter's Toolkit is a separate electronic resource that includes links to articles, tools, and other resources that may be helpful to implement this code. While an early version is released together with this new Chapter Four, more resources will be added to the Toolkit on an ongoing basis.

exchange before making referrals. One of the most critical needs in this area is for courts to engage with supervised visitation centers to ensure that courts receive reports in order to enforce court orders or modify orders in the event of abusive behavior during the exchange or visitation, but to specify that the reports include *only* information about critical incidents, abusive behavior observed during the visitation or exchange, and a parent's noncompliance with the court ordered provisions related to the supervised visitation.

Courts are required by the terms of this section to refer cases for supervision only to centers which meet the requirements as laid out in that section of this Chapter and which meet the standards set out in the Guiding Principles. The section also requires courts to create referral processes that provide critical information to a supervisor about the conditions or problems that the supervision is intended to address, to facilitate compliance with relevant court orders.

Finally, this section codifies the best practices for supervised visitation centers in these cases.

Use of experts to assist with custody/parenting time decision-making in cases involving abuse

The Revised Chapter Four of the Model Code requires courts, as part of the best interest of the child analysis, to assess the nature, context, and effects of any domestic abuse that has been identified and to craft parenting arrangements and interventions that address these features of the abuse. Some courts call upon third-party experts (usually called "custody evaluators") to assist in this assessment, and this section is intended to set forth standards for courts' use of experts in cases involving domestic abuse. Inclusion of this new section does not imply that courts are expected to use custody evaluations in each case involving domestic abuse. The commentary clarifies that courts are called upon to assess the benefits, limitations, and possible risks of custody evaluation in each case and provides some considerations.

The purpose of evaluations in these cases is detailed in this section and reflects the approach outlined in the Association of Family and Conciliation Courts' Guidelines for Examining Intimate Partner Violence:[14] the evaluator

[14] Ass'n Fam. Conciliation Cts. (hereinafter AFCC*), Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation* (2016).

collects, analyzes, and synthesizes information regarding the family and may make recommendations to the court. Regardless of what the process is called in a jurisdiction, including when the process is a brief focused assessment, the requirements laid out in this section are intended to apply.

The section details the qualifications which should be required of a custody evaluator in these cases. It calls for an evaluator to be a licensed mental health professional with the described training, skills, and expertise, including in completing a full custody evaluation. The requirement that the person be a licensed mental health professional (as opposed to, for example, an attorney) reflects the opinion of the majority of, but not every member of, the Working Group. Some members view legal training and expertise in the applicable law as advantageous.

The drafting committee recognizes that some courts are relying on other, non-mental health providers, including many guardians ad litem, to conduct all or parts of custody evaluations. This may be in response to a number of challenges, including that the cost of evaluation can be prohibitive, as few jurisdictions can provide them to families at affordable rates, and that there is a dearth of mental health professionals available. While the Model Code does not recommend the substitution of guardians ad litem for full custody evaluations in cases where an evaluation is needed, such a neutral may be employed to conduct one or both of the first two processes of a custody evaluation (information-gathering and analysis, within their professional ethical guidelines), but not the synthesis and recommendations processes, which requires mental health expertise.

To the extent that a jurisdiction enacting this section of Chapter Four of the Model Code intends to continue using non-mental health professionals such as guardians ad litem or attorney evaluators, it should codify the requirements in this section to the greatest degree possible and make them applicable to guardians ad litem and other non-mental health professionals conducting full evaluations.

The section details the areas of competence required of evaluators in these cases, including language capacity, cultural competence, humility, and responsiveness, and expertise in the specific issues impacting the families. It further requires courts to include in their orders for appointment information about the issues or concerns that have led to the need for the

evaluation and any other expectations, including that the evaluator screen for and assess any domestic abuse in the case.

Alternative dispute resolution

The growing use of alternative dispute resolution (ADR) processes, including mediation, in family law cases, as well as the evolution of ADR practices and the field's understanding of the implications for domestic abuse cases, lead to this detailed section in Chapter Four of the Model Code addressing the issues.

The section is founded on a few fundamental principles. First, ADR professionals must not only screen for physical violence, but also for coercive control (the most salient form of abuse for purposes of ADR), and in a manner that contextualizes the inquiry. The party being screened must be helped to understand the reason for the screening questions and the issues being explored. In order to contextualize the screening, the professional must provide an orientation that describes the process to be used, the prerequisites for successfully conducting the process, the implications of domestic abuse for the process, and the advantages and disadvantages of the process.

The second fundamental principle reflected in these provisions is that screening is not done exclusively for the purpose of deciding whether to proceed, but also in order to account for any abuse-related deficits in either party’s capacity or willingness to fully and safely participate, should both parties desire to proceed.

ADR programs and professionals are required by this section to adopt and implement policies and practices in four areas: screening for domestic abuse, to include coercive control; the provision of full information about the process and the requirement that each party consent to participation; the establishment of safety procedures covering all aspects of the process from screening through the outcome of the process; and the qualifications required for handling domestic abuse cases, including a minimum of 10 hours of training on domestic abuse, its effects, including trauma, and its implications for ADR.

The section also includes provisions triggered by the provider’s determination or an assertion by any party that domestic abuse is an issue. ADR shall not be conducted unless the parent who is abused provides informed consent, and a specialized process is employed that fully accounts for the abuse and its implications for the process.

This section also directs courts, as the entities with the ultimate responsibility in these cases, to refrain from referring parties to an ADR program that does not meet the requirements of this section. Further, if the court determines that the agreement on its face does not appear to serve the best interest of the children or appears manifestly unsafe, it shall not incorporate the agreement into the final judgment unless, after further inquiry regarding any such provisions, the parties demonstrate to the court's satisfaction that the agreement is safe and serves the child's best interest.

Relocation

One of the most fraught types of family law matters involves the conflict that can arise when one parent seeks to relocate with a child. Some such scenarios involve abused parents who find themselves needing to flee from one place or jurisdiction to another in order to escape ongoing abuse, to avoid escalating violence, or to protect children from harm or kidnapping. Many jurisdictions' legal frameworks make such escape and relocation nearly impossible. Accordingly, this section is intended to remove unnecessary obstacles to relocation in cases involving domestic abuse while protecting the rights of noncustodial parents and ensuring that the move would be in children's best interest, taking the abuse and other factors into account.

This is the only section of the new Chapter Four that is not limited in its applicability to cases involving domestic abuse. Because integrating the protections set forth in this section into the statutory schemes of existing relocation laws may be difficult, the language in this section is intended to replace existing relocation requirements and standards in all cases, including those involving domestic abuse.

The section is limited in its application to cases in which the child's custody is governed by the terms of an existing court order. Furthermore, the section addresses only relocations from one state to another. If a jurisdiction's relocation law currently applies to cases *without* court orders or to relocation *within* a state, and the jurisdiction declines to change those provisions to align with this Chapter's approach, the jurisdiction should nonetheless consider adopting the other provisions of the section on relocation, including those addressing temporary relocation for safety, notice, the presumptions in favor of relocation, and the factors to consider in relocation cases.

In recognition that fleeing for safety can be the most appropriate and necessary action for a parent to take with a child, and that a parent may need to relocate in an emergency, the section provides that where it is necessary for a parent to temporarily relocate with a child to be safe from the threat of domestic abuse, the parent is permitted to do so until the court makes a determination under this section. The 30-day advance notice requirement that would otherwise operate is explicitly not applicable in these emergency relocation situations.

When considering these cases under the Chapter provisions of this section, the court operates under three presumptions: (1) a parent having physical primary custody has a right to change the child's residence unless the court finds that removal would, on balance, prejudice the rights or welfare of the child more than it benefits that child; (2) where the court finds that the relocation is needed in order to meet the needs of the parent who is abused to escape or recover from domestic abuse, it is presumed that the court will grant the request; and (3) where the court finds that the objecting parent has not significantly exercised court-ordered parenting time, it is presumed that the court shall approve the relocation plan.

When applying those presumptions to individual cases, the court is to consider several factors directly relevant to the relocation context, including two that are particularly important in cases involving domestic abuse:

> (a) Whether the relocation will increase the physical or psychological well-being of the relocating parent or child; … and
>
> (e) Domestic abuse, regardless of whether the abuse was directed against the child, or the child was exposed to the abuse.

Extensive commentary follows this section's provisions and provides significantly useful information for jurisdictions considering adoption of provisions governing relocation.

Modification and enforcement

When a request to modify a custody or parenting time order includes an allegation of domestic abuse, this section requires the court to make the same analysis and findings regarding whether the requested modification would be in the best interest of the child as required in the initial custody

and parenting time determination, using all of the standards set forth in the best interest of the child provision.

Some of the most challenging decisions involve requests by parents who are abusive to remove restrictions (such as supervised exchange or visitation), which were put in place to protect the child or the parent who is abused. Courts struggle to determine whether, for example, the absence of violent incidents under the current set of restrictions proves that the parent who is abusive has, in fact, changed and that the problem being addressed has been solved. Guidance for courts can be found in this new section. In addition to the usual best interest analysis, the considerations that should govern the court's decision-making include the nature and context of the domestic abuse involving the parents and experienced by the child, relevant parenting behaviors, including the support by the parent who is abusive of the child's relationship with the non-abusive parent and support of the parental role of the non-abusive parent, information about risk of harm to the parent who is abused and the child, and the effects on the child's physical and psychological well-being. Of most significance is this factor: whether a parent who is abusive has genuinely acknowledged past harm, has committed to avoiding it in the future, and has made the necessary changes to address the reasons for ordering the supervised visitation. The provision further notes that a parent's compliance with the requirements for participation in supervised visitation or exchanges does not, by itself, constitute evidence that they have made the requisite changes.

Turning to enforcement, this section provides explicit authority for the court to order a compliance hearing to monitor the progress of the parent who is abusive with ordered interventions or other conditions or provisions. It also addresses certain types of enforcement problems, including where the requested enforcement is (1) a remedy for an alleged violation of the current court order (follow the provisions related to modifications, including the usual best interest analysis); (2) caused by a child's resistance, refusal, or reluctance toward contact with that parent (follow the other provisions related to those cases); or (3) based on an allegation of unjustifiable denial of visitation (reject the allegation if the court finds that the parent who denied visitation did so as a means to protect themselves or their children from the risk of harm posed by the other parent). This section also specifically empowers courts to order parents who are abusive to bear the financial cost of treatment, supervision, or other interventions necessitated by the abuse.

Child-related relief in civil protection orders (CPO)

This section offers language specific to child-related relief, to be added to Chapter Three of the Model Code, which deals with civil protection orders (CPO). This section of the Model Code echoes and is consistent with the approach taken in the best interest of the child section of Chapter Four, where safety of the child is at the top of the list of considerations. But the CPO section differs in that it goes farther: it moves safety to the *center* of the analysis when undertaken in the CPO context, thereby elevating safety considerations above the other factors that govern long-term custody and parenting time decisions by courts.

This section expands on the forms of relief that should be available at the ex parte temporary order stage. First, the provision clarifies that a CPO court can grant temporary legal and/or physical custody regardless of whether an existing custody order is in effect in the same or another court. Further, only if the petitioner requests it, the court can grant visitation or parenting time to the respondent, and the safety and well-being of the child and petitioner should be the primary consideration. Finally, the list of ex parte relief available includes orders related to safety and access to pets.

This section also addresses the standard to be applied when a protected party requests a modification of a custody CPO provision: the court shall apply the safety-focused standard that the code sets out for the initial determination on the issue. A new subsection addresses requests for dismissals of civil protection orders. It provides that when a protected person requests dismissal, the court should seek to understand the reason for the request, ensure that there was access to an advocate, and when deciding on the request, the court should recognize the civil nature of the proceeding and the importance of victim autonomy.

Finally, this section includes a provision in the new Chapter Four (the Families and Children Chapter) that requires the court to consider in any non-CPO custody case the existence of any protection orders, any related evidence of abuse, including even where the order was not granted, and any findings related thereto.

Final note

The definition of domestic abuse utilized in this Chapter is specifically designed to apply to proceedings concerning custody with a child, notably those between parents or between a parent and a third party. Because the definition is quite comprehensive and includes several types of

nonphysically violent behavior, the potential arises for unintended negative consequences if used in child welfare, civil protection order, or criminal court contexts. Any jurisdiction that considers adopting this broader definition of domestic abuse for custody purposes must attend to the potential unintended and negative consequences of use in other types of cases or in other legal contexts.

Section 401. Definitions

Section 401. Definitions.

1. For the purpose of this Chapter, in any proceeding concerning custody, parenting time or visitation with a child, “domestic abuse,” whether or not the conduct constitutes a criminal offense, is defined as the following:

   (a) physical assault or other forms of bodily harm, including those involving a firearm, or implicit or explicit threats thereof, this provision applies to such acts against the other parent or against another member of the family;

   (b) stalking;

   (c) sexual abuse;

   (d) health-related abuse as defined below;

   (e) coercive controlling abuse as defined below;

   (f) technological abuse as defined below;

   (g) financial abuse as defined below; or

   (h) human trafficking.

2. Domestic abuse does not include behaviors used by a parent to protect themselves or their children from the risk of harm posed by the other parent.

3. “Health-related abuse” is defined as when, through physical harm, threat thereof, intimidation, or coercive controlling abuse, a parent engages in the following against the other parent:

   (a) Interferes with or obstructs access to necessary health insurance, medical care, medicine, medical devices, or other health-related services for the other parent;

   (b) Prevents or controls the other parent’s access to mental health services or medications; or

   (c) Controls reproductive autonomy, deliberately interferes with contraception use or access to reproductive health information,

or uses coercive tactics to control, or attempt to control, pregnancy outcomes.

4. Coercive controlling abuse

(a) For purposes of this chapter, coercive controlling abuse is a pattern of conduct that has the purpose or effect of substantially restricting the other parent's safety or autonomy through intimidation, implicit or explicit threats, or by compelling compliance.

(b) Conduct undertaken by a parent to protect themselves or their children from the risk of present or future harm posed by the other parent does not constitute coercive controlling abuse.

(c) The following is an inexhaustive list of examples of behaviors which may constitute coercive control if they are part of a pattern of conduct as defined in (a):

(1) Monitoring and surveilling of daily personal activities;

(2) Intensely managing or dictating the other parent’s personal day-to-day activities;

(3) Intimidating the other parent;

(4) Manipulating the other parent’s mental health status to the detriment of the other parent;

(5) Isolating the other parent from friends, relatives, faith, cultural, or linguistic communities, employment, education, or other support networks;

(6) Repeatedly humiliating or using degrading language towards the other parent;

(7) Threatening to harm or abduct children;

(8) Committing or threatening to commit cruelty or abuse to animals connected to the family;

(9) Using repeated court actions not warranted by existing law or good faith argument to harass, coerce, or control the other party, diminish or exhaust the other party’s

financial resources, or compromise the other party's employment or housing;

(10) Engaging in gaslighting behaviors towards the other parent;

(11) Cleaning, accessing, displaying, using, or wearing a firearm in an intimidating or threatening manner; or

(12) Threatening deportation or to contact local or federal agencies based on actual or perceived immigration status, refusing to file immigration applications, refusing to sponsor, withholding essential documents needed for immigration applications, or threatening to withdraw immigration applications filed on the other parent's or child's behalf or coercing or forcing the other parent to violate the terms of their immigration visa.

5. "Financial abuse" is defined as causing or attempting to cause the other parent to be financially dependent, through physical harm, threat thereof, manipulation, or coercive controlling abuse. The following is an inexhaustive list of examples of behaviors which may constitute financial abuse:

(a) accessing or using credit or property without authorization;

(b) engaging in fraud or misuse related to taxes or state or federal assistance;

(c) withholding or interfering with access to money, debit cards or credit cards, government benefits, or any other resources;

(d) sabotaging efforts to gain financial independence by interfering with employment or education, immigration status, employment authorization, or damaging the reputation of the abused parent;

(e) damaging credit ratings; or

(f) acquiring debt that is imposed on the other parent.

6. “Technological abuse” is an act or pattern of behavior by one parent against the other parent that is intended to harm, threaten, intimidate, stalk, impersonate, exploit, or extort, by use of any form of technology such as cyberstalking or other forms of electronic monitoring or surveillance, nonconsensual intimate image disclosure, or impersonation.

Commentary

Chapter Four of the Model Code contemplates that the burden of proof for a finding of domestic abuse as defined in this section would be satisfied by the preponderance of the evidence standard, which is generally true in civil matters.

Use of the term "domestic abuse"

The definition of "domestic abuse" set forth in this section recognizes that abuse by a parent against another parent can take a myriad of different forms, each of which is likely to affect the safety and well-being of children, parents who are abused, and the parenting by both parents. This Chapter, which addresses decision-making in child custody/parenting time and visitation cases, uses the term "domestic abuse" to describe abusive conduct that courts must take into account in such cases; the definition is therefore not necessarily coterminous with definitions used in the criminal, child welfare, or other legal contexts. The term "domestic abuse" was chosen for several reasons, as a result of careful consideration of the alternatives used in existing statutes, including terms such as "domestic violence" or "domestic or family violence." First, "domestic" was chosen over "family" to emphasize that this definition focuses primarily on abuse of intimate partners. The term "abuse" was chosen over "violence" to help judges and other family court practitioners recognize that physical violence is only one of a multitude of types of abusive behavior and that nonphysical abuse is often just as problematic, if not more so, and, therefore, must be appropriately addressed in custody/parenting time decision-making.

The term "domestic abuse" is also intended to include abuse that occurs after the parents have become separated, reflecting an understanding that parents who abuse their partners frequently continue their behavior - often modified to reflect the new circumstances and sometimes elevated in intensity and severity - even after the parent who has been abused achieves physical separation. The power and control dynamics of the domestic abuse addressed in this Chapter typically do not end simply because of the separation, and can, as research suggests, include "violence, threats, intimidation, stalking, monitoring, emotional abuse, and

manipulation." [15] In fact, the risk of lethal violence often escalates following separation.[16]

Treatment of conduct posing a threat to children

Courts must always identify, assess the impact of, and effectively address domestic abuse as defined in the Model Code and child abuse and maltreatment as defined elsewhere in the jurisdiction's statutes,[17] in custody/parenting time decision-making under this Chapter.

We note that child abuse and maltreatment are the subject of separate statutory provisions in state law, implemented through the child welfare system. Chapter Four of the Model Code is focused on custody/parenting time decision-making and does not address those separate statutory provisions nor child welfare proceedings. Instead, the intent of this Chapter is to ensure that courts recognize that an abusive parent's conduct, whether it constitutes domestic abuse as defined herein or child abuse/child maltreatment as defined in other provisions of a jurisdiction's laws, likely poses a threat to a child's physical or psychological well-being and must be addressed as an essential component of custody, parenting time, and visitation as required in Sections 402, 404, 407, and 408 of this Chapter.

Children experience domestic abuse and child abuse in many ways. These may include prenatal exposure, postnatally as the target of a physical, sexual, or verbal assault, as an intervener who attempts to stop an assault, as an eyewitness (of an assault or its aftermath), or by hearing an assault against a parent, sibling, or family pet. Any of these forms of exposure may result in harm to a child.[18]

---

[15] Emma Katz et al., *When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence* (2020); see also Kathryn J. Spearman et al., *Post-Separation Abuse: A Concept Analysis* (2022).

[16] Spearman et al., *supra* note 15 (citing Jacquelyn Campbell et al. (2003), Evan Stark & Marianne Hester (2019), and April Zeoli et al. (2013) for the risk that lethality often escalates following separation).

[17] References to "child abuse" throughout this Chapter are intended to include state, tribal, and territorial laws that govern both child abuse and child maltreatment (which can include, for example, child neglect).

[18] *See,* Jaffe et al., *supra* note 8.

Even where a parent's abusive conduct does not include direct abuse of a child, but instead is exclusively directed against the other parent, the child is likely to suffer harm, which can be significant and long-lasting. An extensive body of research suggests that exposure to domestic abuse places children at risk of adverse developmental, behavioral, and physical and mental health consequences, including depression, anxiety, poor coping mechanisms, suicidal ideations, self-harm, substance abuse, and chronic pain.[19]

Decision-making regarding custody and parenting time, under the Revised Chapter should incorporate this understanding of the effects on children of exposure to and experience of domestic abuse in the family, as well as the fact that even parents who have not previously directly abused their children often turn their abuse on the children after their adult victim has separated from the parent who is abusive. Providing for the safety of the parent who is abused consequently will enhance the safety and well-being of the children, and bonding with a protective parent helps to mitigate harm to the child or boosts resilience.[20] Accordingly, the provisions of this Chapter that address the best interest of the child, rebuttable presumptions (if included in a statute), and parenting time/visitation direct the court to make findings regarding the effects of the abuse on children and to incorporate those findings in decision-making.

It is important to note that recognition of the effects of abuse on children may lead to responses by the child welfare system that are detrimental to

---

[19] Id.; Artz et al., *supra* note 8; Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study,* 14(4) AMER. J. PREVENTIVE MED. 245-58; U. NATIONS CHILD. FUND (UNICEF), *Behind Closed Doors: The Impact of Domestic Violence on Children* (2006).

[20] RCDV:CPC, NCJFCJ, *Identifying and Reinforcing Resiliency in Children Exposed to Maltreatment and Domestic Violence: Some Initial Considerations* (technical assistance brief) (2019); Child Bureau, Child Welfare Info. Gateway, *Promoting Protective Factors for Children Exposed to Domestic Violence: A Guide for Practitioners* (factsheet) (2015); Futures Without Violence (hereinafter FUTURES), *Promising Futures: Promoting Resiliency Among Children and Youth Experiencing Domestic Violence* (infographic) (2014).

abused parents and children. When that system charges parents who are abused with "failure to protect" or "neglectful supervision of" their children due to continued exposure to abuse in the family, rather than directing attention to the parent who is causing the harm, parents who are abused may be revictimized by the system, and the harm to children may be exacerbated. Nothing in this Chapter should be interpreted to condone the use of "failure to protect" or other legal sanctions against parents who are abused, and communities are encouraged to consult the guidance in the resources referenced herein, which describes a more appropriate, collaborative response to the interplay of domestic abuse and child welfare.[21]

Applicability to people of all sexual orientations and gender identities

The definition of "domestic abuse" and all terms used are intended to apply regardless of the sexual orientation and gender identity of any parent.

Conduct constituting "domestic abuse"

This section enumerates the types of conduct constituting domestic abuse, including conduct and tactics commonly used by abusers. It is important to note, however, that every case may involve unique behavior or threats intended to or having the effect of inflicting harm, causing fear, or jeopardizing safety of the particular parent who is being abused and/or

---

[21] Megan R. Holmes, et al., *Research Foundations of Greenbook Interventions to Address the Co-Occurrence of Child Maltreatment and Adult Domestic Violence*, 70 (4) Juv. Fam. C. J.,11-36 (2019); FUTURES, Quality Improvement Ctr. Domestic Violence Child Welfare (hereinafter QIC), *Adult and Child Survivor-Centered Approach for Addressing Domestic Violence*; Kristen Selleck, Safe & Together Inst. (2013); NCJFCJ, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY & PRACTICE (1999). For more information on the unintended consequence of failure to protect on non-abusive parents, see Amanda Mahoney, *How Failure to Protect Laws Punish the Vulnerable*," 29 HEALTH MATRIX 429 (2019). For information on the Indian Child Welfare Act (ICWA), see NCJFCJ, ICWA Courts resource page.

children in the family. Consequently, the conduct described is meant to be interpreted broadly and with regard to the specific family context.

The definition of domestic abuse incorporates both assaultive and nonviolent conduct that poses harm or threat of harm. Section 401(1)(a) is intended to define acts of physical violence broadly, to include threats of violence or bodily harm, as well as threatened use of a firearm. Because such acts are likely to have profound effects on victim parents and children even if the target is a different family member, that language is incorporated in the definition (as opposed to "against a parent or child").

The definition also enumerates several forms of nonphysical abuse constituting domestic abuse. Thus, it reflects the prominent role nonphysical forms of domestic abuse play in supporting power and control, as captured by the Domestic Abuse Intervention Project's Power and Control Wheel.[22] The enumerated acts are not exclusive and should be viewed by the court in light of the nature and context of the abuse, including the perpetrator's intent and the effect on the victim.

The following definitions, developed by the Centers for Disease Control and Prevention (CDC),[23] may be used as guidance regarding some of the categories of conduct described in this section:

> Physical violence "includes a range of behaviors from slapping, pushing or shoving to severe acts that include hit with a fist or something hard, kicked, hurt by pulling hair, slammed against something, tried to hurt by choking[24] or suffocating, beaten, burned on purpose, used a knife or gun."
>
> Sexual violence "includes rape, being made to penetrate someone else, sexual coercion (non-physically pressured sex), unwanted sexual contact (such as groping), and noncontact

---

[22] *See*, Domestic Abuse Intervention Program (hereinafter DAIP), *Understanding The Power & Control Wheel*.

[23] Ctr. Disease Control & Prevention (hereinafter CDC), Nat'l Intimate Partner & Sexual Violence Surv. (hereinafter NISVS), *Key Terms and FAQs: How does the NISVS Measure Intimate Partner Violence?*.

[24] Note that although not explicitly included in the CDC definition cited, the Revised Chapter Four of the Model Code's definition is intended to include strangulation, as that term provides a more accurate depiction of the act's serious consequences on victims. *See* ELLEN TALIAFERRO ET AL., STRANGULATION IN INTIMATE PARTNER VIOLENCE: A HEALTH-BASED PERSPECTIVE 217 (C. Mitchell & D. Anglin, Eds., Oxford University Press) (2009).

unwanted sexual experiences (such as verbal harassment). Contact sexual violence is a combined measure that includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact."[25]

Stalking is where "victimization involves a pattern of harassing or threatening tactics used by a perpetrator that is both unwanted and causes fear or safety concerns in the victim."[26]

Sexual abuse

This section does not include a definition of sexual abuse, in recognition of the fact that most jurisdictions already have codified such a definition. It is important to recognize, however, that parents who are abusive engage in a wide range of sexually abusive conduct, all of which constitutes abuse intended to be covered by this section. For instance, in making decisions about custody/parenting time, courts should identify and account for abusive conduct that includes, but is not limited to, the conduct included in the CDC definition[27] of "sexual violence" above, as well as the following activities: unwanted kissing or touching, unwanted rough or violent sexual activity, unwanted penetration, refusing to use condoms or restricting someone's access to birth control, keeping someone from protecting themselves from sexually transmitted infections (STIs), and sexual contact with someone who is very drunk, drugged, unconscious, or otherwise unable to give a clear and informed "yes" or "no", or coercing the parent who is abused to engage in sexual activity with another person.

---

[25] CDC, *supra* note 23 (in interpreting this Section, sexual violence should be understood to include the acts of unwanted penetration that may not be considered "rape").

[26] Sharon Smith et al., Atlanta, GA: Nat'l Ctr. Injury Prevention & Control, CDC, *The Nat'l Intimate Partner & Sexual Violence Surv.: 2016/2017 Report on Stalking — Updated Release* (2022); *see also* CDC, *Fast Facts: Preventing Stalking*, and The Stalking Prevention, Awareness, & Resource Center (SPARC).

[27] CDC*, Fast Facts: Preventing Sexual Violence*.

Health-related abuse

This section includes a definition of health-related abuse because it is not explicitly addressed in most existing statutes, especially in the context of child custody/parenting time decision-making. The definition[28] is expansive to encompass the many forms of health-related abuse that parents who are abusive can perpetrate as part of their exercise of power and control, including abusive behavior related to the physical, mental, and sexual health of the other parent. These forms of abuse frequently are part of coercive controlling abuse, when part of a pattern of conduct as described in that definition.

Coercive controlling abuse

A critical element of the definition of "domestic abuse" set forth in this section is the explicit inclusion of "coercive controlling abuse." Despite its significant detrimental effects on victims and children, coercive controlling abuse can be difficult to detect and often remains unaddressed by the legal system. As Evan Stark, a professor at the Rutgers School of Public Affairs and Administration and a leading expert on this issue has noted:

> Some of the tactics used in coercive control are criminal offenses, such as stalking, while others are crimes only if committed against strangers such as economic exploitation or deprivation, enforced isolation or sexual coercion. But most tactics used in coercive control have no legal standing, are rarely identified with abuse and are almost never targeted by intervention. These tactics include forms of constraint and the monitoring and/or regulation of commonplace activities of daily living, particularly those associated with women's default roles as mothers, homemakers and sexual partners and run the gamut from their access to money, food and transport to how they dress, clean, cook or perform sexually.[29]

---

[28] Nat'l Ctr. Domestic Violence, Trauma & Mental Health, *Coercion Related to Mental Health & Substance Use in the Context of Intimate Partner Violence: A Toolkit*.
[29] Evan Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty*, 2012.

Although Stark's description emphasizes the prevalence of coercive controlling abuse committed by men against women, the definition provided in this section is intended to encompass any situation in which such tactics are used against the other parent, regardless of the sexual orientation or gender identity of either parent.

It is critical to note that coercive controlling abuse is capable of causing immense harm to parents who are being abused and children even in the absence of any physical abuse. Because coercive controlling abuse requires consideration of nonphysical interpersonal dynamics that may be less obvious than physical forms of abuse, it is critical that courts and other stakeholders understand what it is and take affirmative steps to identify and assess the nature and context of such conduct, as well as its effects on parents, parenting, and children. The best interest of the child analysis mandated by Section 402 establishes standards and processes to ensure that custody and parenting time decision-making incorporates these elements of coercive controlling abuse.

The definition of coercive controlling abuse set forth in this Revised Chapter is intended to achieve a balance between two objectives that can be in tension: (1) to include an expansive definition that includes all of the myriad tactics and behaviors coercive controlling abusers employ against parents who are abused and (2) to prevent the misapplication of the definition to include behavior by parents who are abused, such as taking protective measures or other acts that could be construed as "controlling." To achieve this balance, the drafters have included the following elements in the definition of coercive controlling abuse:

1) "Pattern of conduct," rather than a single act: This reflects the fact that the tactics used by abusers perpetrating this form of abuse are ongoing and typically build upon and draw their power from previous acts. As an example (among many possible patterns), a coercively controlling abuser may commit or threaten an act of physical harm and subsequently impose a set of rules of behavior on the parent who is abused that the abusive parent monitors and modifies in accordance with the abusive parent's wishes, with compliance compelled by reference to the previous act of violence. If a pattern is not present, it is far less likely that the conduct at issue truly constitutes coercive controlling abuse.

2) "Purpose or effect": Consistent with the definitions of coercive controlling abuse adopted in some states, the definition in this

Chapter provides for flexibility in establishing the existence of the abuse, permitting either proof of the actor's intent ("purpose") to substantially restrict the other parent's safety or autonomy or proof that the effect of the conduct was to create such a restriction. While persuasive evidence of the abuser's intent is valuable, it is often difficult or impossible to produce. Therefore, demonstration that the abuser's conduct in fact imposed a substantial restriction on the other parent's safety or autonomy may be dispositive.

3) "Substantially restricting the other parent's safety or autonomy": The term "substantially" is used here to ensure that the restriction on the other parent's safety (physical and psychological) or autonomy is beyond a mere annoyance or inconvenience and that the purpose or effect is to impose significant limitations on that parent's freedom and ability to make decisions or take (or avoid) actions. It is important to note that the effect may be cumulative; that is, a significant number of independently minor constraints may result in "substantial restriction."

4) "Through implicit or explicit threats, intimidation, or by compelling compliance": These tactics of coercive control are part of the definition for two reasons: first, to incorporate the typical tactics employed by coercive controlling abusers (use of threats, intimidation, and other means to compel the target to comply with the abuser's rules and demands); second, to exclude from the definition individuals who may engage in conduct that may be perceived of as "controlling," but who are not coercive controlling abusers because they do not incorporate threats or intimidation or take steps to compel compliance with rules or demands. A parent who is being abused is may be faced with the option to meet the demands or suffer the abusive consequence for failure to comply. The presence of these features in a case should help courts to distinguish between coercive controlling abuse and situations in which one partner is "controlling," but the power and control dynamics of domestic abuse are not present.

Some members of the Working Group favored including explicit or implicit threats as a required element under the definition, perceiving that the presence or absence of threats of harm is the best means of distinguishing between coercive controlling abuse (threats present) and "controlling" or other inappropriate behavior not motivated by the intent to dominate or

exercise power and control over the target. Others expressed concern about the burden that parents who are abused would face in proving the existence of threats of harm. Ultimately, the Working Group opted to include the existence of implicit or explicit threats as an optional feature of the requisite conduct and to permit as alternatives a showing that the parent who is abusive engaged in intimidating behavior or compelled compliance with their rules or demands.

Subsection 4(b) of the definition is intended to ensure that courts do not misconstrue protective actions taken by a parent as coercive control. The provision prevents the potential misuse of the coercive controlling abuse definition by parents who are abusive, who may argue, for example, that it applies to steps taken by parents who are abused to prevent parents who are abusive from having access to children for protective purposes or preemptive behaviors to plan for escaping abuse or as part of a safety strategy to avoid or minimize potential risk posed by the parent who is abusive.

As further guidance, the definition provides a non-exhaustive list of some of the types of conduct or behavior that constitute coercive controlling abuse, provided that the pattern of conduct satisfies the previously described requirements. Courts and family law practitioners should recognize that parents who are abusive tailor their behavior to exploit the particular vulnerabilities of the target of their coercive controlling abuse, which makes each situation unique and renders it impossible to enumerate all the potential tactics. Instead, the list includes some of the most prominent categories of coercive controlling behavior to assist courts in identifying whether it is present in an individual case.

The definition of coercive controlling abuse includes the example of "[m]anipulating the other parent's mental health status to the detriment of the other parent." Although such behavior is closely related to and may constitute "gaslighting," as described below, it also may include such acts as interfering with access to treatment or using mental health services against the parent who is abused.

Examples of "[m]onitoring and surveilling of daily personal activities" can include such things as monitoring phone calls, texts, and other communications, surveilling the other parent's travel, movements, and contacts through cyber-tracking or other means, going through the other parent's personal effects and interrogating them in a threatening or hostile manner about what they did.

The provision addressing “intensively managing or dictating the other parent’s personal day-to-day activities” should be interpreted to include activities such as choice of clothing, food, toileting, and other routine activities.

“Isolating the other parent from friends, relatives, faith, cultural or linguistic community, employment, education, or other support networks,” can include removing or destroying clothing and cell phones, preventing the use of needed transportation or funds, or not permitting the use of child care, or abandoning the parent who is being abused in a new jurisdiction without financial resources or identification documentation (e.g., driver’s licenses, government-issued identification or passport). It also can involve repeated actions to undermine the other parent’s social connections through intimidation, threats around “outing” (sexual orientation, gender identify, or immigration status), or harassment of individuals in the parent’s social network. The parent who is abusive may also interfere or force violations related to employment or education visas.[30]

The phrase “[r]epeatedly humiliating or using degrading language towards the other parent” is meant to include examples of words or behaviors used both in the presence and in the absence of other people provided that the use of degrading language or humiliation has as its purpose or effect the substantial restriction of the other parent's safety or autonomy through implicit or explicit threats, intimidation, or by compelling compliance. Additional examples include treatment of a competent adult like a child, forcing them to take or undergo humiliating or embarrassing positions or actions, and marking their body against their will (e.g., with tattoos or bite marks).

The provision addressing the repeated use of court actions as a form of coercive controlling abuse is intended to encompass parents’ who are abusive exploitation of litigation to expand and strengthen their exercise of

[30] Victims who are immigrants may have work or student visas tied to a particular employer, educational institution, or university. For these visa holders, abuse, harassment, or intimidation at work or school of the parent, their employers, co-workers, professors, or classmates can lead to the parent losing their job or can interfere with the parent’s ability to maintain the required number of courses, which can lead to loss of legal immigration status and can make them deportable. Many forms of legal visas in the U.S. do not include work authorization and prohibit work, others only allow work for a specific employer, and victims may also violate the terms of their visa by staying longer than authorized. All of these may, depending on the facts of the case, be caused by the perpetrator’s coercive control.

power and control. Studies suggest that this is a pervasive, multifaceted, and effective tactic to further and expand coercive control.[31] Parents who are abusive may misuse the legal system by bringing repeated groundless motions for modification, for enforcement, and even false reports of child abuse. It may be challenging, in some cases, for courts to prevent and deny meritless legal actions while leaving the courthouse door open for colorable claims for relief, and detecting abusive litigation can be difficult.[32]

The example of "gaslighting behaviors"[33] in the definition warrants further discussion. This term refers to statements or behaviors that are intended, for example, to cause the other parent to question their thoughts, perception of reality, or memories, which results in disorientation and uncertainty about one's mental state. A parent who is abusive may use the tactic to cause the other parent to question their own perceptions and memories and consequently to rely on the abusive parent's recollection of past events or description of current events, or to lead the parent who is abused to blame themselves for things that they did not cause. These strategies enable parents who are abusive to gain and maintain power and control by increasing dependency, isolation, and perceived powerlessness.

The provision "cleaning, accessing, displaying, using, or wearing a firearm in an intimidating or threatening manner" is meant to be broadly interpreted to include both explicitly and implicitly threatening behavior that a parent who is abusive engages in regarding firearms. For instance, it would include verbal and non-verbal references made to the location in which firearms are stored that are intended as a reminder and implicit threat to the other parent.

In addition to the foregoing examples, coercive controlling abusers also may force dependence of the other parent by withholding necessities and

---

[31] *See*, Heather Douglas*, Legal Systems Abuse and Coercive Control*, 18(1) CRIMINOLOGY & CRIM. JUST. 84-99 (2018); Ellen R. Gutowski & Lisa A. Goodman, *Coercive Control in the Courtroom: the Legal Abuse Scale (LAS)*, J. FAM. VIOLENCE (2022).

[32] For some guidance, see NCJFCJ, *A Judicial Guide to Child Safety in Custody Cases* 22-24 (2008).

[33] Ctr. Rsch. Educ. Violence Against Women & Child., *Gaslighting in Intimate Relationships: A Form of Coercive Control You Need to Know More About*.

requiring compliance with demands in order to obtain them, including food, medical treatment, sleep, clothing, or money.

Parents who are abusive may characterize protective measures taken by parents who are abused as a form of coercive control. Such protective measures may include withholding contact when it could endanger the children, validating children's distress after a visit, or otherwise supporting a child's well-being. Subsection 4(b) is intended to exclude such protective conduct from the definition.

Although not provided as an example in the definition, animal abuse, including killing or harming an animal or threats to do so, can have a profound impact on a child and must be addressed in child custody/parenting time decision-making under this Chapter. Research suggests a clear link between abuse of pets and domestic abuse and that coercive controlling abusers understand and exploit the bonds between children and pets to threaten, control, and intimidate them and their parents who are abused.[34]

Parents who are abusive and whose partners are immigrants may use various tactics related to their immigration status or lack thereof to exert power and control, including making unsupported allegations that the parent who is abused is a flight risk and should, therefore, have parenting time limited.[35] Parents who are abusive may also create an international custody crisis by confiscating travel documents during family trips to other countries and stranding the other parent alone abroad after the parent who is abusive returns to the United States with the children.

Bias related to immigration status or culture poses a barrier to the court recognizing the ways parents who are abusive exert control over the other parent who is an immigrant. In addition to raising unsubstantiated claims

---

[34] *See* NCJFCJ, *Animal Cruelty & Family & Interpersonal Violence*; Mary Lou Randour, BWJP*, Animal Abuse & Domestic Violence* (2017).

[35] See 4 Janet Chiancone, Linda Girdner & Patricia Hoff, U.S. Dept. of Justice, *Issues in Resolving Cases of International Child Abduction by Parents*, JUV. JUST. BULL.1, 3 (Dec.2001), (stating parents who abduct internationally are those who have connections to the country of abduction including family or employment); See also, Monica Bates & Leslye E. Orloff*, Flight Risk of Foreign-Born Parents with Children* (June 12, 2021). (discussing risk factors for international child abduction).

that the parent who is abused is a flight risk, immigration-related abuse is a potent form of coercive control. Immigration-related abuse may consist of threats to seek the removal of the parent who is abused from the country, refusal to file or delay in filing immigration papers for the parent who is abused or the children, withholding travel or identity documents, refusal to include the abused parent or child as a beneficiary in the abusive parent's immigration application, or threats that the parent who is abusive will raise the parent who is abused or child's immigration status as an issue in a custody or protection order case in an attempt to focus the court on immigration status, rather than on the domestic abuse.

The Violence Against Women Act (VAWA) includes protections and immigration relief specifically designed to help immigrant victims of domestic violence.[36] Courts should also be aware that VAWA's immigration relief incudes confidentiality provisions that prohibit the disclosure of confidential information related to the existence of, actions taken in, and information contained in VAWA, T, or U visa applications. It is important for judicial officers to be informed about these VAWA confidentiality provisions and their impact in the family court context, particularly on discovery and cross-examination.[37]

The battering or extreme cruelty definition of domestic violence in the immigration law context also recognizes the forms and patterns of abuse detailed in this Chapter.[38] A common understanding of these abusive

---

[36] Nat'l Immigrant Women's Advocacy Proj. (hereinafter NIWAP), *Bench Card on Immigration Relief for Battered Spouses, Children, & Immigrant Crime Victims* (December 31, 2021); For a description of how immigration can affect child custody, *see* Candace Evilsizor et al., NIWAP, *Common Immigration Issues that Arise in Custody Cases Involving Immigrant Crime Victims and Their Children* (March 4, 2014).

[37] Leslye E. Orloff et al., NIWAP, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality* (Dec. 3, 2021); Monica Bates et al., NIWAP, *VAWA Confidentiality Protections, Courthouse Enforcement, & Sensitive Locations Policies at a Glan*ce (Dec. 27, 2021).

[38] Leslyle E. Orloff et al., NIWAP, *Battering or Extreme Cruelty Drawing Examples from Civil Protection Order and Family Law Cases* (Sept. 12, 2015); SPARC, NCJFCJ & NIWAP, Judicial Officer Guide: Responding to Stalking (2022).

behaviors among state, tribal, territorial, federal, and immigration systems provides courts with an opportunity to issue orders and provide relief that enhances safety for parents who are abused and their children. State court findings documenting domestic violence, coercive control, child abuse, and the impact of the abuse on the parent and the children, can be useful to that parent's and children's immigration cases.

Litigants are entitled to meaningful access to qualified interpreters and translation of vital documents, and courts are required to meet such language access needs.[39] A lack of access to accurate and timely interpretation and translation interferes with informed decision-making by courts, litigants may be unable to participate in all aspects of the legal proceeding, and litigants' compliance with court orders can be undermined.[40]

In domestic abuse cases, if language access is not provided and the limited English proficient (LEP) parent who is abusive does not receive court orders in their own language, then the court orders may be unenforceable increasing the risk to the parent who is abused and the parties' children. When LEP parents who are abused are not provided language access, including court orders in their own language, parents who are abusive have another control tactic to use against the LEP parent. By contorting the LEP parent's understanding of what the court actually ordered, the parent who is

---

[39] U.S. Dep't Just. (hereinafter DOJ), *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*; *see also* Limited English Proficiency, LEP.gov, *Language Access Resources for Courts*; Negron v. New York, 434 F.2d 386 (2d. Cir, 1970) (in a criminal case, due process was violated when no interpreter was provided); U.S. v. Sanchez, 928 F.2d 1540 (6th Cir. 1991), at 1456 (recognizing a constitutional right to an interpreter, but rejecting defendants' Sixth Amendment claim because there was no abuse of discretion); Amadou v. INS, 226 F.3d 724 (6th Cir. 2000) (due process right to a full and fair hearing violated when an interpreter was incompetent in civil (immigration) case).

[40] Nancy K.D. Lemon*, Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?* 21 BERKELEY J. GENDER, L. & JUST. 38, 55 (2006) (describing a California study finding that a majority of judicial officers thought interpreting would improve the ability of litigants to understand and comply with orders, and would reduce case backlogs); Laura Abel, *Language Access in State Courts*, 5 BRENNAN CTR. JUST. (2009).

abusive can attempt to manipulate the LEP parent's interactions with the family court system preventing court order enforcement.[41]

Overall exemption for protective behaviors

The Revised Chapter Four explicitly excludes from the definition of domestic abuse acts of a parent intended to protect themselves or their children from a risk of harm by the other parent. Actions meant to be self- or child-protective that stem from or are in reaction to abusive conduct should not be addressed as domestic abuse under the provisions of this Chapter. An assessment of the nature and context of the acts will aid a decision-maker in determining whether they should be subject to the exclusionary language.

Parents who are abusive may make a claim that their acts fall within this exemption because they are preventing "harm posed by the other parent" of "parental alienation." In other words, they assert that they are withholding a child or threatening to do so, or are monitoring the other parent's actions and whereabouts, to prevent that parent from causing "harm" by engaging in alienating behaviors. These characterizations are another attempt by the abusive parent to minimize their abusive behaviors and the effects on abused parents and children. In cases involving domestic abuse, equating alienating behaviors with domestic abuse is an attempt by the abusive parent to manipulate the court and is not the type of harm referred to in this provision.

Financial Abuse

The definition of financial abuse in this section is intended to be interpreted expansively, in recognition of the range of tactics parents who are abusive use to create economic insecurity for the other parent and cause them to be impoverished or financially dependent on the parent who is abusive. Additional behaviors falling within the scope of this definition include withdrawing or using funds, credit, or property, or other assets without the express permission of the parent who is abused and withholding or interfering with access to other financial resources.[42]

---

[41] Leslye E. Orloff et al., *supra* note 37.

[42] For more information, in general, on financial abuse, see Adrienne E. Adams & Marisa L. Beeble, *Intimate Partner Violence and Psychological Well-Being: Examining the Effect of Economic Abuse on Women's Quality of Life*, 9(5) PSYCH. VIOLENCE 517-25 (2019).

Technological abuse

Rather than attempt to enumerate the ever-evolving forms of technology implicated by the definition of technological abuse, the drafters intend that the term "technology" be interpreted to include such means as internet-enabled devices, online spaces and platforms, computers, mobile devices, cameras and imaging platforms, apps, messaging services, location tracking devices, communication technologies, or any other emerging technologies.

Technological abuse is intended to include the use of technology to engage in nonconsensual intimate image disclosure (NCIID) (sometimes referred to as "revenge porn"). This term describes the posting or distribution on social media sites or through other electronic means of sexually explicit images or videos involving a person without their consent. A parent who is abusive may engage in revenge porn as part of a course of coercive controlling abuse, and it may also be considered sexual abuse under that provision of this section. The National Domestic Violence Hotline has described the experience of victims of this form of abuse as follows: "Some victims have willingly shared images privately with their partners, only to have their partners break their trust and later threaten to distribute those images publicly. Others have had partners coerce or force them into creating sexually explicit materials in order to shame, control, and manipulate them. Alternatively, some abusive partners take photographs or videos without the victims' knowledge and then use the threat of sharing those materials online to maintain control over the victim."[43] In addition, courts should be attuned to the fact that some parents who are abusive use a child's device to monitor, surveil, harass, or abuse the other parent.

Human Trafficking

This section does not include a definition of trafficking in recognition of the fact that most jurisdictions have already codified such a definition. It is important to recognize the intersection between human trafficking and domestic abuse. A parent who is abusive may compel or force the other parent to engage in labor or commercial sex. The parent who is abusive may threaten to use the behaviors the other parent was forced to engage in against them in a custody/parenting time proceeding. Parents who are victims of trafficking may have been arrested or otherwise reported for

[43] Nat'l Domestic Violence Hotline, *Revenge Porn*.

commercial sex acts and, therefore, may be fearful of how the court system will perceive them. Thus, it is crucial for judicial officers to receive training on the dynamics of human trafficking and its intersection with domestic abuse.[44]

[44] *See* Hum. Trafficking Prevention Project (hereinafter HTPP), Univ. Baltimore Sch. L. & Maryland Volunteer Law. Serv. (hereinafter MVLS), *Human Trafficking, Domestic Violence, & Family Law: Tips for Attorneys & Advocates*; Meijken Westenskow, *Risks And Vulnerabilities For Trafficking Survivors Within Family Court Systems*, FAM. L. (Fall 2021).

Section 402. Best Interest of the Child

Section 402. Best interest of the child; purpose, analysis, factors, required findings.

1. **Legislative purpose.** Understanding the effects of domestic abuse and child abuse on all members of a family is crucial to discerning the best interest of a child in cases with evidence of such abuse. The determination of a child's best interest in these cases requires that existing best interest factors be evaluated in light of the domestic abuse or child abuse and requires consideration of the additional factors in Subsection 2. This section sets forth the analysis and findings a court shall undertake if domestic abuse or child abuse is present, based on the preponderance of the evidence, in a case in which child custody and parenting time between the parents is at issue.

2. **Domestic abuse factors.**

   (a) Before considering the other best interest of the child factors as set forth in, [insert the relevant section of this jurisdiction], the court shall first consider the following factors and make specific findings regarding each factor:

      (1) the nature and context of the domestic abuse by one parent against the other and any abuse experienced by the child from the parent who is abusive;

      (2) the historical and present parenting behaviors of each parent, including the abusive parent's support of the child's relationship with the non-abusive parent and the abusive parent's support of the parental role of the non-abusive parent;

      (3) any information about current or future risk of harm to the child or the parent who is abused posed by the abusive parent, including a child's expressions of distress about contact with the parent who is abusive; and

      (4) the effects of domestic abuse or child abuse on the child's physical and psychological well-being.

3. **Effects of domestic abuse on best interest factors.**

(a) In addition to the factors in Subsection 2, the court shall consider and make findings regarding how domestic abuse affects all other best interest of the child factors as set forth in [insert the relevant section of this jurisdiction's code].

(b) In addition to the best interest factors set forth in [insert the relevant section of this jurisdiction's code], the court shall consider and make findings regarding how the domestic abuse affects each of the following best interest factors:

(1) the child's historical and present relationship with each parent and the child's siblings;

(2) any protective behaviors engaged in by a parent who is abused to support the safety and psychological well-being of each child;

(3) each child's adjustment to changes in daily life; and

(4) whether and how each child's physical, social, and psychological needs are or have been met by each parent.

4. **Provisions to address domestic abuse.**

(a) After having assessed the nature, context, and effects of the domestic abuse, the court shall address the identified effects of the domestic abuse or child abuse on the child, including the child's present and future safety, and its effects on the parenting of the parent who is abused. Provisions to promote the child's and the parent who is abused safety, recovery, and resilience could include, but are not limited to:

(1) Ensuring that the parenting plan accommodates the child's interests, activities, cultural traditions, and support systems;

(2) Providing sufficient parenting time flexibility to adapt to the child's age, developmental stage, and social needs;

(3) Connecting the child and the parent who is abused to available community-based resources;

(4) Requiring the parent who is abusive to pay for any associated costs of services needed to respond to the domestic abuse, unless the costs pose an undue hardship. The court shall not assess costs against the parent who is abused;

(5) If available, requiring the abusive parent to attend a program aimed at raising awareness of the harm domestic abuse caused to the child and the family and addressing safe and healthy parenting; and

(6) Any other provision that promotes safety, resiliency, and well-being of the child and the safety of the parent who is abused, as detailed above and in Subsection 7 of this section.

5. **Matters not to be considered as evidence against an abused parent.** In determining a child's best interest in a case under this section:

(a) Efforts by a parent who is abused to protect their own or their child's physical safety or psychological well-being from the other parent shall not be considered as evidence of unwillingness to facilitate contact or a positive relationship between the parent who is abusive and the child or to cooperate with the abusive parent. A parent who is abused is exempt from any best interest factor or presumption requiring such willingness.

(b) Evidence that the parent who is abused suffers from the effects of the abuse by the other parent shall not be the sole basis for denying a parent who is abused custody or parenting time.

6. **Mutual allegations of domestic abuse.**

(a) If both parents present evidence that the other parent has engaged in acts of domestic abuse, the court shall hold an evidentiary hearing regarding the allegations. If the court makes

a finding that both parents have engaged in acts of domestic abuse, the court shall assess and make findings regarding the following factors to assist in determining the parent that poses the lesser risk to the child and is less likely to commit acts of domestic abuse in the future:

(1) the nature and effects of the abuse on either parent, including whether either party has engaged in coercive control;

(2) whether any physical act was in response to domestic abuse, as defined by this Chapter, by the other parent;

(3) the impact of the domestic abuse on parenting behaviors and attributes;

(4) the effect on the child of the domestic abuse perpetrated by each parent; and

(5) the likelihood of future acts of domestic abuse being perpetrated by either parent.

7. **Allowing access.** If the court grants any type of custody or parenting time to a parent who perpetrated domestic abuse or child abuse, whether after a hearing or by agreement between the parents, the court shall make detailed findings regarding how the custody or parenting time ordered by the court adequately protects the child and the parent who is abused from the risk of future physical or psychological harm and addresses the effects of the domestic abuse or child abuse.

8. **Allegations that a child resists, refuses, or shows reluctance toward contact with a parent; permissible interventions.**

(a) Allegations of a child's resistance, refusal, or reluctance toward contact with a parent shall not be presumed to be caused by the other parent.

(b) In a case involving allegations of domestic abuse or child abuse and where a child is allegedly resisting, refusing, or exhibiting reluctance toward a parent who is allegedly abusive, the court shall utilize the following analysis:

(1) The court shall first determine whether a preponderance of the evidence supports a finding that the child is actually resisting, refusing, or exhibiting reluctance towards a parent;

(2) Second, if the court finds that the child is resisting, refusing, or exhibiting reluctance toward a parent, then the court shall assess and make findings regarding any domestic abuse and child abuse allegations, as set forth in Subsections 2 and 3 of this section, and determine whether the child's behavior is a response, in whole or in part, to the domestic abuse or child abuse.

(3) Next, the court shall address the domestic abuse or child abuse in the order as set forth in Subsections 4 and 7 of this section.

(4) If the court finds domestic abuse or child abuse and that the child has exhibited resistance, refusal, or reluctance, the court, when determining whether to order a program for the child to address the resistance, refusal, or reluctance behaviors, shall consider and make findings regarding the following factors:

(A) That program components are generally accepted in research and meet the standards of practice for relevant professional organizations or are based upon such research and standards;

(B) Include approaches designed to address the effects of the abuse on the child;

(C) Incorporate processes that protect the safety of the parent who is abused and child; and

(D) Use of risk management for the parent who is abusive, in consideration of current and potential risks of future harm.

Commentary

This section was constructed to remedy the failure of custody statutes that do not give courts direction related to appropriate consideration of domestic abuse and child abuse in contested custody cases. Domestic abuse does not operate in a vacuum and cannot be siloed as a discrete factor; it affects every part of family life and parenting, and how it does so is specific to each family. As one of many possible examples, parents who are abusive may threaten or attempt to raise a myriad of issues such as immigration status or related allegations (e.g., lack of access to legal work authorization, public benefits, drivers' license, identification), the abused parent's or child's gender or sexual identity, culture, or disability, or parenting status of nonbiological/non-birth parents, in an attempt to bias the court or shift the focus away from the domestic abuse.

Failure to accurately identify domestic abuse and adequately account for its effects on parents who are abused and children undermines the core legal foundation of family court proceedings: promoting outcomes that are in the best interest of the child. Barriers to identifying domestic abuse may result from a lack of education on domestic abuse, personal, cultural, and institutional bias, or ineffective system responses. To properly evaluate a child's best interest, therefore, merely identifying domestic abuse as a factor and then immediately drawing conclusions about the appropriate custody/parenting time arrangement does not adequately address the needs of the family. Each case must be carefully considered on its facts. The first subsection recognizes and codifies this principle.

The second subsection elevates the safety and well-being of the child and parent who is abused above all other best interest factors in deliberations about custodial options in those disputed custody cases where there has been a finding of domestic abuse by one parent of the other. It contemplates that no custody or parenting time order may properly be issued that jeopardizes the safety and well-being of adult and child victims. It lists specific factors for the court to consider, with findings required for each factor, including the parenting behavior of the parent who is abusive. In determining whether domestic abuse has occurred and its nature and context, the court has a duty to consider, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, whether a related proceeding involving a civil protection order, child protection matter, or criminal case is pending or has occurred. Courts are encouraged to make inquiries of the parties or review information that is

readily available, with notice to the parties and any other appropriate due process protections. In particular, a court's review of available information is especially important since self-represented litigants (which comprise many of the family case parties) may assume that the court is aware of other related court proceedings. Judicial officers may accomplish this by using their leadership role to encourage the establishment of community-wide protocols that ensure that information is shared appropriately within legal and ethical parameters.

Research[45] suggest that parents who engage in violence against the other parent tend to be authoritarian, manipulative, coercive, and unable or unwilling to put the children before themselves. Whether a parent exhibits this style of parenting is part of the analysis that must be performed to determine the child's best interest and craft a parenting plan that accounts for the parent's actual behaviors.

The third subsection compels courts to consider and make findings regarding how domestic abuse has affected each of the jurisdiction's usual best interest factors. As noted above, domestic abuse and child abuse have an impact on every aspect of family life and the risk posed to each child and the parent who is abused, and in order to craft a safe, workable parenting plan, that impact must be understood.

This subsection contemplates that certain common best interest factors may not be present in a state's law. If the factors listed in Subsection 3(b) are included in a state's best interest factors, the first Subsection of this provision should be enacted as the entirety of the subsection (and not designated as Subsection (3)(a)), and Subsection (b) should be omitted.

---

[45] *See, e.g.*, Jay G. Silverman, Daniel Ritchie & Lundy Bancroft, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS, (SAGE Publications, Inc. 2012) (2002); Asa Cater & Anna M. Forssell, *Descriptions of Father's Care by Children Exposed to Intimate Partner Violence (IPV) – Relative Neglect and Children's Needs*, 19(2) CHILD & FAM. SOC. WORK 185-93 (2014); Nehami Baum, *Coping with Absence-Presence: Noncustodial Fathers' Parenting Behaviors*, 74(3) AM. J. ORTHOPSYCHIATRY 316–24 (2004); Ann L. Jonhed & Åsa Källström, *Patterns in Child–Father Contact after Parental Separation in a Sample of Child Witnesses to Intimate Partner Violence*, 30(3) J. FAM. VIOLENCE 339- 49 (2015); Maria Eriksson & Marianne Hester*, Violent Men as Good-enough Fathers?: A Look at England and Sweden*, 7(7) VIOLENCE AGAINST WOMEN 779- 98 (2001).

Some states, however, may not include certain factors that are essential for understanding a family with a history of domestic abuse and determining a custody/parenting time order that will best meet their needs. In this case, the subsection should be adopted as written, with the Subsection designating 3(a), and (b) to include any missing factors. In considering parenting behaviors, the parents' history and present relationship with the child, any behaviors by parents to support the safety and well-being of the child, and the likelihood that parental duties can be shared in a safe and non-abusive manner should be part of the analysis. The factor related to "adjustment to changes in daily life" is included to recognize how domestic abuse may impact the day-to-day experiences of children and any effects on each child related to the daily life before, during, or after the court-ordered parenting plan. This assessment of the "adjustment to changes in daily life" should be informed by the unique needs of each child, including those related to developmental or learning disabilities or mental health needs. The reference to the child's needs in Subsection 3(b)(4) is intended to be comprehensive, including economic, cultural, physical, educational, social, support for the child's gender expression and identity, cognitive, health, psychological, and emotional support. Changes in daily life resulting from the abuse are properly considered as consequences of the behaviors of the parent who is abusive and should not be viewed negatively towards the parent who is abused.

The fourth subsection provides a mechanism to address the impact domestic abuse has had on a child by listing examples of relief that may be included in the custody/parenting time order to assist the child in overcoming the effects of the abuse. The list is not exhaustive, and the judicial officer is free to select from the list or include other supportive measures to promote the child's recovery and resilience.[46] Such measures may include parenting support for parents who are abused if parenting behaviors are adversely affected by the abuse and promoting access to trauma-informed services found to be beneficial for children who have experienced domestic abuse. The subsection clarifies that any costs incurred in providing appropriate services or resources should be borne by the parent who is abusive, as the one who caused the need for them. The court-ordered programs could include traditional abusive partners'

[46] Debra P. Stark, Jessica M. Choplin & Sarah E. Wellard, *Properly Accounting for Domestic Violence Child Custody Cases: An Evidence-based Analysis and Reform Proposal*, 26 MICH. J. OF GENDER & L. 1 (2019).

intervention programs, but are intended to encompass specialized programs focused on the effects of abusive behaviors on parenting, such as “caring dads” and “parenting after violence” programs.[47] Programs based on an “anger management” approach should not be considered as a potential measure to address the effects of the abuse, because, among other shortcomings, such programs are not based upon an accurate understanding of the power and control dynamics that characterize domestic abuse.[48]

The final listed item stresses the importance of tailoring the court order to address specific needs whether or not an example is enumerated in the provided list. For example, parents who are abusive may continue to undermine the ability of the parent who is abused to care for and nurture the child or escalate coercive controlling abuse post separation. The court should address such behavior to minimize its effect and promote the resources and protections needed by the parent who is abused. (See Section 408 on Modification and Enforcement.)

The fifth subsection is intended to properly contextualize and account for protective or defensive behavior by the parent who is abused. In protecting themselves and/or their children from the parent who is abusive, many parents who are abused must engage in behavior that limits the abusive parent’s contact with the children. The parent who is abused may also have to speak about the abuse with the child and/or third parties, such as a therapist, or they may need to comfort a child who is distressed after a visit. Holding such conduct against the parent who is abused as violative of a friendly parent provision frequently results in arrangements that are unsafe for parents who are abused and children and do not support the children’s well-being.[49] Therefore, a parent who is abused must be exempt from any

---

[47] Caring Dads, https://caringdads.org/; FUTURES, Fatherhood Intervention Programs; DAIP, the Duluth Model; Katreen Scott, *Fathering in the Context of Domestic Violence and Abuse*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF DOMESTIC VIOLENCE AND ABUSE (John Devaney et al., eds., 2021).

[48] *See, e.g.*, Domestic Violence Offender Mgmt. Bd. Div. Crim. Just., Colo. Dep’t Pub. Safety*, Anger Management vs. Domestic Violence Offender Treatment: An Overview* (2009, updated 2014).

[49] Daniel G. Saunders, Nat’l Crim. Just. Reference Serv. (hereinafter NCJRS), Off. Just. Programs, *State Laws Related to Family Judges’ and Custody Evaluators’ Recommendations in Cases of Intimate Partner Violence: Final Summary Overview*

statutory “friendly parent” or other similar factor requiring them to facilitate the relationship with the children and the parent who is abusive. Such factors are frequently stated in terms of the parent’s willingness to cooperate with the other parent or to facilitate a relationship between the other parent and the child, the language used in this section. If a jurisdiction has a friendly parent factor that uses other language, this subsection should be modified to mirror the language used in that jurisdiction.

Because the effects of abuse may adversely impact the parenting by the parent who is abused, Subsection (5)(b) prohibits the court from refusing to grant custody/parenting time based solely on the effects of the abuse on the parent. In addressing this issue, the court should consider all available community supports for that parent, including support or treatment for addictions and mental health disorders, such as anxiety, depression, or post-traumatic stress disorder (PTSD).

The sixth subsection addresses one of the more challenging aspects of domestic abuse: when each parent alleges the other has engaged in acts of abuse. The prevalence of abusive parents seeking protection orders and/or raising allegations of abuse as a tactic is all too common.[50] The court is then faced with the task of determining the credibility of allegations based on the evidence provided and rejecting unfounded allegations. If the court finds that each parent has engaged in acts that constitute domestic abuse, as defined in this Chapter, the court must determine the nature and context of each parent’s alleged behaviors and their impact on the child and implications for parenting. Assessing the nature and context of behaviors is of particular importance in cases involving LGBTQI+ parents because such cases may be more likely to include inaccurate allegations of mutual abuse. Because the nature of coercive controlling abuse is to diminish the autonomy and sense of self of the target of the abuse, it is unlikely that both parties will have engaged in such abuse as defined in this Chapter.

Subsection 6(a) lists several factors that must be considered to determine which parent will provide the safest environment for the children, with

---

(2017); Allison C. Morrill et al., *Child Custody and Visitation Decisions when the Father has Perpetrated Violence Against the Mother*, 11(8) VIOLENCE AGAINST WOMEN 1076–1107 (2005).

[50] Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46(3) FAM. CT. REV. 500-22 (2008).

findings regarding each factor. These findings are required to support the decision and may suggest protective measures to include in the final order to account for the abuse. In making these findings, the court should discuss past and current parenting behaviors, with the burden on the parent who is abusive to show that they are not or will not be abusive to the other parent or the child. Further, the burden is on the parent who is abusive to show their ability to parent safely based on the best interest of the child.

The seventh subsection requires specific findings to support any order regarding custody or parenting time to a parent who is abusive. The findings must link the award and its terms regarding custody/parenting time to the nature, context, and effects of the domestic abuse or child abuse and demonstrate how they protect the child and the parent who is abused from the risk of future harm and address the effects of the abuse.

The final subsection addresses an argument that is made to counter an allegation of domestic abuse, the argument that the parent who is alleging domestic or child abuse is "alienating" the child from the other parent, especially if the child is resisting contact with the alleged abusive parent.[51] Research suggests that this tactic can be effective in directing attention away from the conduct of the parent who is abusive and in producing an outcome in favor of the parent who is abusive: "The proceedings and outcomes of cases involved in these studies reflect the overall lack of understanding of the nature of IPV and its impacts on both adults and children in the court system. In determining custody and access, judges are more likely to bring attention to alienating behaviors than IPV." [52] As an initial matter, this section directs the court to not presume that a child's

---

[51] Ctr. Rsch. & Educ. Violence Against Women and Child., *The Misuse of Parental Alienation in Family Court Proceedings with Allegations of Intimate Partner Violence, Part 1: Understanding the Issue*, 33 Learning Network: Mobilizing Knowledge to End Gender-Based Violence (Feb. 2021).

[52] Jassamine Tabibi et al., Ctr. Resh. & Educ. Violence Against Women & Child*, Misuse of Parental Alienation in Family Court Proceedings Involving Allegations of Intimate Partner Violence – Part 1: Understanding the Issue 7* (2021); *see also* Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L.J. 835-98 (2022); Simon Lapierre & Isabelle Côté, *Abused Women and the Threat of Parental Alienation: Shelter Workers' Perspective*s, 65(C) CHILD. & YOUTH SERVS. REV. 120-26 (2016).

resistance, refusal, or reluctance toward contact with a parent is caused by the other parent's behavior. It is important not to assume that resistance to leaving a parent, separation anxiety, or other issues the child may be experiencing are evidence of the other parent's alienating behaviors.

This subsection is intended to slow down the decision-making process by requiring the court to follow a step-by-step rubric. First, the court must determine whether the child's alleged conduct in fact demonstrates a resistance to a parent. Next, the court must resolve any allegations of domestic or child abuse, according to the analysis set forth in the preceding portions of this section, and determine whether the child's behavior is triggered at least in part by the abuse. If so, any other causes for the child's behavior should be assessed in the light of the domestic or child abuse. If a court determines that a child is exhibiting resistance, refusal, or reluctance towards a parent and the behavior is not, in whole or in part, caused by domestic abuse or child abuse by that parent, the court may consider other reasons for the child's behavior, including a wide range of possibilities related to the development, new living arrangements and/or new household members, harsh parenting, or other interpersonal experiences that do not rise to the level of legally cognizable abuse and must not jump to the conclusion that a child's resistance is the product parental interference.[53]

Subsection (8)(b)(4) requires that in cases involving domestic abuse or child abuse, before directing the parents to provide treatment, programs, or intervention to a child regarding the behavior found by the court to be resistant, reluctance, or refusing contact, the court must critically evaluate the treatment, program, or other intervention.[54] This evaluation must include a review of the research supporting the intervention and its effectiveness in addressing the harm caused to children by domestic abuse. It must also include consideration of safety for the abused parent and the child and use of risk management for the parent who is abusive, in consideration of current and potential risk of future harm.

---

[53] *See* Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 FAM. CT. REV. 270-92 (2020).
[54] For examples and more information, *see* Linda Chamberlain, FUTURES, *Comprehensive Review of Interventions for Children Exposed to Viol*ence (2014).

Section 403. Rebuttable Presumption (in Applicable Jurisdictions)

The following provisions apply only when a jurisdiction's code includes a rebuttable presumption against awarding sole or joint custody to a parent who has committed domestic abuse. The first provision reflects the recommended approach for jurisdictions that adopt the definition of domestic abuse found in Section 401. Those definitions are slightly revised here when applying a rebuttable presumption statute. Jurisdictions are encouraged to review the commentary notes for this section, detailing why the below definition text is proposed for use in determining when a domestic abuse rebuttable presumption provision is applicable.

Section 403. Rebuttable presumption against ordering custody/parenting time to an abusive parent.

1. For purposes of this section, the following forms of abuse, as defined in this Chapter, if involving a pattern or serious act, will prompt a rebuttable presumption against the parent perpetrating domestic abuse:

   (a) physical assault or other forms of bodily harm (including strangulation or involving a firearm);

   (b) stalking;

   (c) sexual abuse;

   (d) health-related abuse;

   (e) financial abuse;

   (f) technological abuse;

   (g) coercive controlling abuse; or

   (h) human trafficking.

2. When the court is making a determination of domestic abuse for purposes of applying a rebuttable presumption, the court shall consider relevant and admissible evidence of current or past acts of domestic abuse, whether or not there is a conviction for any offense of domestic abuse, a current or expired order for protection involving

the child or parent, or previous court or administrative agency findings on domestic abuse.

3. **Determining whether the presumption is rebutted.** In determining whether the parent who has engaged in domestic abuse has rebutted a statutory presumption, the court shall consider all of the following factors:

   (a) the nature and context of the domestic abuse involving the parents, parenting behaviors and attributes, and the abuse's effects on the child's physical and psychological well-being;

   (b) any current or future risk posed by the parent who is abusive to the physical or psychological well-being of the child or the other parent;

   (c) evidence that the parent who engaged in domestic abuse:

      (1) can and will prioritize the child's physical and psychological well-being;

      (2) is able to make shared decisions about the child in a manner and place that does not pose a risk to the child or to the other parent; and

      (3) has adhered and is likely to adhere to court orders.

   (d) whether the parent who is abusive has genuinely acknowledged past harm and committed to avoiding it in the future and made the necessary changes. A parent's compliance with the requirements for participation in an abusive partner intervention program does not, by itself, constitute evidence that they have made the requisite changes.

4. Regardless of whether the domestic abuse presumption is rebutted, the court shall consider the best interest of the child factors as outlined in Section 402 before making decisions related to custody and parenting time.

5. **Requirement for specific findings on the record.** If a court grants custody or parenting time to a parent who engaged in domestic

abuse, as defined in this Chapter, the court shall make specific findings on the record that:

(a) detail the factors above that rebut the domestic abuse presumption and therefore allow for the custody or parenting time;

(b) how the order will promote the child's physical safety and psychological well-being; and

(c) how the order will protect the other parent from harm posed by the parent who is abusive.

Commentary

Rebuttable presumption language was included in Chapter Four of the original Model Code on Domestic and Family Violence released in 1994. Since its release, 28 states and the District of Columbia have implemented laws requiring a rebuttable presumption against sole or joint custody for parents that have perpetrated domestic violence.[55] Experience has highlighted examples of inconsistent implementation of the statutory language and has revealed weaknesses such as the lack of correct identification and comprehensive assessment of domestic abuse increasing the possibility of the misapplication of the rebuttable presumption.[56]

This section recognizes the continued inclusion of the rebuttable presumption in many state codes and provides guidance for application within the context of the Revised Chapter Four of the Model Code language. Many states with a rebuttable presumption use a narrow definition of domestic violence, typically including criminal acts, repeated acts, serious physical assaults, or threats of bodily harm indicative of the trend toward using a criminal definition of domestic violence in civil codes related to protection orders and custody/parenting matters. More recently, research suggests the negative impact of exposure to various forms of

[55] RCDV: CPC, NCJFCJ, *supra* note 1.

[56] Lisa Bolotin, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Viol*ence, 25 ALASKA L. REV. 263, 270 (2008); Rebecca S. Lamprecht, *Advancing the Best Interests of the Child: Why South Dakota Should Strengthen its Rebuttable Presumption Against Awarding Custody to Abusive Paren*ts, 56(2), S. DAKOTA L. REV. 351 (2011); Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50(1) FAM. L. REV. 173-92 (2016); Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They*?, 28 WM. MITCHELL L. REV. 601 (2001); Lisa A. Tucker, *Domestic Violence as a Factor in Child Custody Determinations: Considering Coercive Control*, 90(6) FORDHAM L. REV. 2673 (2022).

abuse, including coercive controlling abuse, on child development and well-being.[57]

Therefore, the definition of domestic abuse in this Revised Chapter Four reflects the broad understanding of the forms of abuse used to exert and maintain control over their partners. The specific list of acts of domestic abuse enumerated above as indicators for the rebuttable presumption recognizes the need to identify serious acts or a pattern of abuse when applying the presumption. Jurisdictions are encouraged to review their statutory definition of domestic abuse and determine if the forms of abuse reflected in the definition are too narrow to provide adequate protection to children experiencing domestic abuse. The definition of domestic abuse used in this section applies only to those jurisdictions that currently have domestic violence rebuttable presumption language in their code.

The statutory framework of a rebuttable presumption initially places the burden on the parent who is abused to provide evidence of domestic abuse. Domestic abuse may be invisible to third parties and is often not reported. Parents who are abused face an increased risk of serious and lethal violence when separating from the parent who is abusive.[58] Therefore, the section referencing evidence requires courts to consider relevant, admissible evidence beyond the limited scope of previous court orders, findings, or convictions and can include findings from administrative agencies.[59] However, the lack of past orders, findings, or convictions

---

[57] Emma Katz, *Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed by and Resist Regimes of Coercive Control*, 25(1) CHILD ABUSE REV. 46-59 (2016).

[58] Jacquelyn C. Campbell et al*., The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24(4) J. INTERPERSONAL VIOLENCE 653-74.

[59] Administrative agencies are included in the evidence section to highlight the importance of information voluntarily provided by the parent who is abused regarding findings and relief provided in administrative processes such as VAWA immigration relief, battered spouse waivers, U visas, federal family violence option assistance programs, Department of Housing and Urban Development programs, and innocent spouse relief from the IRS. Federal administrative agency protections for abuse victims often include confidentiality protections. For example, immigration law VAWA confidentiality protections prohibit release of information about the existence of, actions taken in, or information contained in a VAWA confidentiality protected immigration case file, including through family court discovery or cross examination. Further, even when an abused immigrant parent voluntarily reveals the existence of a VAWA confidentiality protected immigration case, information contained in a federal immigration case file remains confidential and is not discoverable in a family court case. Leslye E. Orloff et

should not be interpreted as indicating the absence of domestic abuse. Being able to recognize coercive controlling abuse will assist judicial officers in assessing evidence and determining a parenting plan that accurately reflects the best interest of the child.

Many states with rebuttable presumption statutes do not address what factors should be considered by the court to determine when the parent who is abusive has adequately rebutted the presumption. The approach outlined in this section promotes the best interest of the child analysis based on evidence related to the effects of domestic abuse, the current and future risk to the abused parent and the child, and the ability and willingness of the parent who is abusive to focus on the needs of the child without continued use of abusive tactics.

A fundamental underpinning of this Revised Chapter's approach to custody/parenting time decision-making in cases involving domestic abuse is that any parenting arrangement must be based on the best interest of the child, as carefully assessed in light of the nature and context of the abuse, and its effects on the child and parenting by both parents. To that end, this section includes Subsection 4, which mandates that the court must conduct that best interest analysis as specified in Section 402, whether or not an allegedly abusive parent has rebutted the domestic abuse presumption, before making decisions related to custody or parenting time.

This section requires specific findings on the record because such findings play an essential role in courts' clear articulation of the factual basis and legal reasoning underlying the court's ruling. Court findings can also assist parents who are abused in needed relief and protection in other legal matters. As stated in the NCJFCJ's A Judicial Guide to Child Safety in Custody Cases, "Both parents will benefit from clear, precise orders complete with detailed findings of fact and conclusions of law. Well-crafted findings and conclusions will not only support you [judges] in the event of an appeal, they could prevent an appeal."[60]

---

al., NIWAP, *Family Court Bench Card on Violence Against Women Act (VAWA) Confidentiality (Dec. 3, 2021)*; Rafaela Rodrigues et al., NIWAP*, Quick Reference Guide for Judges: VAWA Confidentiality and Discovery Related Case Law* (October 25, 2022).

[60] NCJFCJ, *supra* note 32.

Section 404. Parenting Time/Visitation

Section 404. Parenting time/visitation, conditions, programs for abusive parents, supervised visitation or exchange.

1. **Conditions of Parenting Time/Visitation.**

   (a) After the court has considered the specific factors related to domestic abuse as outlined in Section 402 addressing the best interest of the child, and determined that it is in the child's best interest for the abusive parent to have parenting time or visitation, a court shall order appropriate parenting time or visitation provisions to promote safety and physical and psychological well-being of the child and the parent who is abused, as set forth in the remainder of this section.

   (b) Courts shall set out in the initial order not only the protective provisions and duration, but also the necessary behavioral changes that would support a modification.

   (c) Whether or not parenting time or visitation is allowed, the court may, at the request of a party or on its own, order that specific information be kept confidential.

   (d) Courts shall determine and order specific protective measures needed for contact, exchange, and parenting time or visitation.

   (e) The court should impose, to the extent possible, measures that will provide the safest conditions that promote safety and physical and psychological well-being of the child and abused parent for the parent who is abusive to have the parenting time or visitation ordered by the court.

   (f) Where appropriate, the court may order that exchanges of children between the parents be supervised, without supervision of the parenting time or visitation. Any supervised exchanges shall occur in a secure setting with a qualified, trained professional present.

   (g) Where necessary to protect the safety and physical and psychological well-being of the child and the parent who is

abused, the court may order supervised parenting time or visitation.

(1) Supervision should be provided by a supervised visitation center using qualified, trained professionals in domestic abuse and operated in conformity with the current version of the Guiding Principles for Supervised Visitation and Safe Exchange (Guiding Principles) developed by the U.S. Department of Justice, Office on Violence Against Women (OVW) and the requirements in Subsection 3 below.

(2) When professional supervision services or personnel are unavailable or their use not feasible, the court should require parenting time or visitation to be supervised by another person who has been determined by the court to possess the ability to provide the necessary safety measures ordered by the court for the parenting time or visitation.

(3) The court orders for supervised visitation or exchange should include specific protective measure for arrival and departure at the visitation or exchange location.

(h) Whether or not the court has imposed a required level of supervision for parenting time or visitation or exchange, the court shall order conditions necessary to promote and enhance the safety and psychological well-being of the child and the parent who is abused. The court should ensure such conditions are met and continue to be met for the duration of the court order. Prohibitions and requirements that may be imposed upon the parent who is abusive as a condition of parenting time or visitation include, but are not limited to:

(1) Prohibiting possession or consumption of alcohol or controlled substances during the parenting time or visitation and for 24 hours preceding the parenting time or visitation;

(2) Requiring surrender of all firearms and ammunition for a period of time determined by the court for the safety of the child and the parent who is abused;

(3) Assessing any fees associated with the use of the court ordered supervised visitation against the parent who is abusive, unless the fees pose a barrier to accessing the services or is an undue hardship. The court shall not assess fees related to supervision against the parent who is abused;

(4) Prohibiting overnight parenting time or visitation;

(5) Limiting communication with the child or the parent who is abused by specifying the frequency and methods of communication and the permissible reasons for such communication;

(6) Requiring location settings or devices be used during the parenting time or visitation with the parent who is abusive; or

(7) Any other condition that is deemed necessary to provide for the physical and psychological safety and well-being of the child, the parent who is abused, or other family or household member.

2. **Court-Ordered Programs.**

(a) Where appropriate, the court may condition parenting time or visitation on successful completion of a program of intervention for parents who abuse their partners or children, including programs focused on the impact of domestic abuse on children and ways to promote safe positive parenting, or other appropriate counseling programs designed to address domestic abuse that meet the prevailing guidance for abusive partner intervention programs or treatment.

(b) The court determines whether a parent has successfully completed a program described above, with information

provided by the program director regarding the participation of the abusive parent in the program.

(c) The court may refer, but shall not order, a parent who is abused to receive services relating to the impact of current or past domestic abuse on the parent who is abused and the child.

3. **Specialized Visitation Centers.**

(a) Courts should refer cases only to supervised visitation or safe exchange centers that adhere to the prevailing Guiding Principles.

(b) In addition, to help ensure that court-ordered visitation protects the safety of all family members, courts should refer cases only to supervised visitation or safe exchange centers that meet the requirements of this section for parents who are abused and their children.

(c) The court making referrals to a visitation center must:

(1) Become familiar with the center's purpose, specific services offered, and how the center addresses the safety of parents and children, and the other requirements set forth in this subsection;

(2) Implement a referral process developed in conjunction with the center to provide relevant information regarding the impressions, allegations, or evidence of risk that are relevant to the safety of a child or protected parent in the supervised visitation or exchange program. The referral information from the court to the center should include detailed information related to the supervision;

(3) Be aware of the center's policies on rejecting, suspending, or terminating visits or exchanges;

(4) Ensure that courts receive reports, which include only the following information from the center, in order to enforce court orders or modify orders in the event of abusive behavior during the visitation or exchange:

(A) Information about any critical incidents;

(B) Any abusive behavior observed during the visitation or exchange; and

(C) Information about a parent's noncompliance with the court order provisions related to the supervised visitation or exchange.

(5) Include in any order that requires supervised visitation or exchange the factors the court will consider if a parent requests a modification of the conditions regarding the supervised visitation or exchange, as outlined in Subsection 1.

(d) A center must:

(1) Have policies and procedures that are centered around the safety of the child and the parent who is abused and adhere to the prevailing Guiding Principles;

(2) Provide a secure setting by establishing security protocols and specialized procedures for supervised visitation or exchange, including methods to assist in eliminating the opportunities for parents to come in contact with one another including physical, auditory, and visual contact while on-site;

(3) Ensure meaningful access to the center's services, including services and paperwork in the primary language of clients, using trained qualified interpreters, and offering culturally responsive services that meet the needs of diverse families;

(4) Provide staff specifically trained in domestic abuse dynamics in post-separation situations;

(5) Implement confidentiality and communication policies to protect the safety and privacy of children and adults who are abused;

(6) Collaborate with the court to establish clear reporting guidelines to promote the safety of the child and the parent who is abused and provide clear communication with the court, including identification of abusive behaviors and critical incidents that occur during visitation or exchange;

(7) Provide initial and ongoing, comprehensive training to staff regarding recognizing and understanding the dynamics of domestic abuse and any risk posed to the child and the parent who is abused, including how abuse may manifest in the supervised visitation or exchange setting;

(8) Design services that account for the nature, context, and effects of abuse in each family.

(9) Implement documentation practices that avoid endangering children and adult victims while documenting critical incidents and identifying abusive behavior during visitation or exchange; and

(10) Collaborate with community organizations to support families and provide referrals responsive to family needs.

Commentary

After consideration of the best interest of the child, a court may find that it would be safe and in the child's best interest for a parent who is abusive to have visitation or parenting time with the child. Courts can impose a range of potential requirements and conditions on parenting time and exchange of the child to promote the safety and well-being of the child and parent who is abused. This section sets forth standards for the use of such protective provisions in custody, parenting time, and visitation orders.

Safety is, of course, paramount in the crafting of parenting time and visitation provisions. Courts should also strive to craft provisions that are feasible and set parents up for successful compliance. This may include such considerations as the transportation challenges faced by the parents, financial resource limitations, and other factors that may impede a parent's ability to satisfy parenting time and visitation schedules and other requirements. Only by carefully tailoring parenting time and visitation orders can courts help address these challenges. Similarly, when courts are called upon to enforce or modify orders, they should avoid unduly penalizing parents for non-compliance caused by transportation problems or other practical barriers.

Subsection (1)(a) is intended to ensure that the court anticipates subsequent requests to modify the initial terms and conditions regarding parenting time and visitation, especially those submitted by the parent who is abusive seeking less restrictive conditions, by including in the initial order information regarding the behavioral changes that would be necessary to support a modification. The court's analysis of such modification requests is addressed in Section 408 of the Revised Chapter Four of the Model Code.

Subsection (1)(c) is included as a safety provision to authorize the court to order that such information as a victim parent's new residence or workplace, or a child's childcare facility, is kept confidential and not shared with the abusive, noncustodial parent. Maintaining confidentiality of such private information is consistent with the confidentiality provisions of the Violence Against Women Act for "personally identifying information."[61]

[61] The U.S. Congress has legally codified the importance of victim confidentiality in two sections of VAWA. VAWA Universal Grant Conditions: Nondisclosure of Confidential or Private Information. 34 USC §12291 (a)(20) & (b)(2) (VAWA 2013 Section 3). VAWA amended the McKinney-Vento Homeless Assistance Act. 42 U.S.C. 11363 (VAWA 2005, Section 605). Additionally, the Department of Justice has implemented supporting

Many states' domestic abuse laws also address confidentiality and other protective provisions.

Subsection (1)(e) requires that the court focus primarily on safety considerations in making parenting time decisions. It is critical for the court to base its decision on as much relevant information as possible about the potential threat to safety and well-being posed by ordering visitation to the parent who is abusive, and the visitation restrictions that could prevent those harms. Consequently, courts should implement measures to assist litigants, especially parents who have been abused and who are self-represented, to provide this evidence to the court.[62] For instance, courts should consider the provision that sets forth a range of possible protective measures that may be imposed.

Subsection (1)(f) describes the option of supervised exchange of children, which may be appropriate when the court determines that unsupervised parenting time and visitation would be safe and appropriate, but there are concerns about the transfer of the child between the parents. Subsection (1)(g) sets forth standards for court-ordered supervised parenting time and visitation, a more restrictive form of supervision appropriate in many cases involving domestic abuse.[63]

When the court finds that supervised visitation or exchange is necessary to provide for the safety of the parent who is abused or child, this Section strongly encourages the use of professional supervised visitation centers or programs, with supervision by professionals who have the experience and training on domestic abuse and related issues to enable them to provide safe, trauma-informed, and effective supervision of parenting time and visitation. The Section references the Guiding Principles, with which court-ordered programs should comply, as well as the specific requirements governing such programs. Considerations regarding safe remote supervised visitation are also available.[64]

---

regulations on victim confidentiality for VAWA grantees, 28 CFR 90.4, and for VOCA grantees, 28 CFR 94.115.

[62] FCEP, NCJFCJ, *Access to Justice/Self-represented Litigants* (hereinafter SRLs).

[63] Jaffe et al., *supra* note 50 (for a discussion of the appropriate use of supervised visitation and other parenting time arrangements).

[64] Inspire Action Soc. Change, *Considerations for Conducting Remote Supervised Visitation for Families Experiencing Intimate Partner Violence*.

Under Subsection (1)(g)(2), the court should consider the use of nonprofessionals for supervised parenting time and visitation only if professional services are not an option, and only where the court is satisfied that the person is able to provide for the safety of the child and parent who is abused as ordered by the court. The Toolkit provides guidance regarding the use of nonprofessional supervisors.[65]

Access to professional supervised visitation and exchange programs is not available in all communities across the country. In addition to reliance on nonprofessional supervisors (including family members), courts may be tempted to rely upon less-than-ideal alternatives, including exchanges in locations that they hope will be safe settings because of their public nature or proximity to potential emergency assistance. Examples include pickup at daycare centers and schools, or in law enforcement agency parking lots. There also may be a use of community "safe exchange zones" that were established for the use of exchanged goods and services (e.g., buying and selling of items on internet sites). While such settings may provide the illusion of safety, in reality, only supervision by a professional who understands the dynamics of domestic abuse and is aware of the specific abusive behavior that compelled the court to order supervision in a case can provide real protection against physical or other forms of abuse, including coercive controlling abuse. If the court is forced to consider other alternatives, care must be taken to ensure the alternative arrangement is safe for the parent who is abused and children.[66]

In some situations, a court may wish to consider “therapeutic” supervised visitation, which differs significantly from the safety-focused model of supervision explicitly addressed in this section. Therapeutic supervised visitation instead is designed with therapeutic goals in mind, creating a setting in which mental health professionals work with families to repair the harm caused by abuse, as well as to promote healing and change in

[65] For more information on nonprofessional supervised visitation see NCJFCJ, *Justice for Families Technical Assistance Brief: What To Do When Supervised Visitation Centers Aren’t Available: Tips and Considerations for Judges*.
[66] The Toolkit contains some guidance on selection, monitoring, and other matters regarding nonprofessional supervisors and alternative arrangements.

behavior. A description of processes and guidelines and their appropriate use in cases involving domestic abuse is referenced in the footnote.[67]

Subsection (1)(h) requires that the court include in the parenting time order any prohibitions and requirements necessary to protect the child's and the abused parent's safety and psychological well-being. Such conditions should be imposed even where parenting time/visitation or exchange is unsupervised and should directly address the nature, context, and effects of any domestic abuse identified in the case. For instance, where the communication by the parent who is abusive with the parent who is abused has included threats, harassment, or other forms of abuse, it is particularly important that the court include limitations on communication between the parents to avoid providing the parent who is abusive with further opportunities for abuse.

Under Subsection (1)(h)(1), courts can consider ordering that the parent who is abusive undergo breath-alcohol tests at that parent's expense to ensure compliance with an order to refrain from the consumption of alcohol.

In implementing Subsection 2 and conditioning visitation on successful completion of an intervention program, courts should recognize that the programs contemplated by this provision are those that comply with prevailing expert guidance regarding abusive partner intervention programs. This includes an expectation that a program's work incorporates, to the extent possible, the guiding principles described in the Center for Court Innovation's and Future Without Violence's Guiding Principles for Engagement and Intervention with People Who Cause Harm through Intimate Partner Violence.[68] In general, traditional parenting classes and, especially, anger management classes are inappropriate for these purposes, in part because they do not incorporate an understanding of domestic abuse as rooted in power and control dynamics.

Subsection 3 sets forth requirements for professional supervised visitation and safe exchange programs, which can play a critical role in cases

---

[67] *See* Inspire Action Soc. Change*, Change is Possible: An Enhanced Model of Supervised Visitation for Families Impacted by Domestic Violence*.
[68] Ctr. Ct. Innovation & FUTURES, *Guiding Principles for Engagement & Intervention with People who Cause Harm Through Intimate Partner Violence*.

involving domestic abuse and within the context of post-separation abuse. When such programs make safety of children and parents who are abused paramount and tailor their services to the specific needs of individual families, they offer an opportunity for parents who are abusive to have contact with their children in a manner that protects the safety and well-being of vulnerable parents and children. This Revised Chapter of the Model Code is intended to establish statutory requirements for professional supervised visitation and safe exchange programs designed to help ensure safe and effective services. These requirements are consistent with and incorporate key elements of the supervised visitation and safe exchange Guiding Principles. The current version of the Guiding Principles, therefore, should be consulted for additional guidance on how to ensure compliance with these provisions and effective implementation of programs. Programs offering supervised visitation and safe exchange would benefit from assessing their current practices and procedures in light of the Guiding Principles.

Unfortunately, not all communities offer professional programs to families in need of their services, and some programs are cost prohibitive for noncustodial parents. In addition, safe and convenient physical access to centers can be challenging for many parents, especially parents who are abused. The development of safe, free or low-cost, and easily accessible centers should be a priority for family court stakeholders. A collaborative approach is suggested to achieve this goal: there are many examples of excellent centers created and sustained by local coordinated community responses or similar collaborative teams.[69]

It is critical to note the role of professional supervised visitation and safe exchange programs is not to promote or facilitate change in the behavior of the parent who is abusive or to provide information to support an eventual reassessment of whether less restrictive parenting arrangements are appropriate. Centers are not change agents. Thus, courts and family court stakeholders should not call upon centers and center staff to assume an inappropriate role in parenting time and visitation cases. As explained in reference to Subsection (3)(c)(4) below, centers may be required to provide the court with limited, specific information about critical incidents, abusive behavior, and violations of court order terms, but there should be no expectation that the center would provide reports on general parenting skills or assessments of the parent child relationship.

---

[69] *See* Inspire Action Soc. Change.

Subsection (3)(a) encourages courts to refer appropriate cases to supervised visitation and safe exchange centers where available. For a case to be appropriate, the court should find that (a) parenting time and visitation for the parent who is abusive is appropriate under the circumstances, as determined under Section 402 of the Revised Chapter Four of the Model Code and (b) that supervised visitation or exchange will protect the safety and well-being of the child and the parent who is abused in light of any identified risks and dangers.

Subsection (3)(c) sets forth requirements for any court that refers a case for supervised visitation or exchange. To comply with these requirements, courts must learn about centers' policies and processes and work collaboratively with centers to inform them of the courts' expectations regarding the centers' provision of services and communication with the court. In addition, courts and centers must work together to create effective referral processes. The Guiding Principles provide specific guidance on these aspects of the court's responsibilities and their relationship with centers.

Subsection (3)(c)(2) specifically requires that the court provide the center with case-specific information related to the services being ordered and why. Among other such information, the court should include:

1. Type of service being ordered (e.g., supervised visitation/parenting time, supervised exchange);
2. Recommended or maximum frequency of visitation (e.g., weekly, biweekly, monthly);
3. The maximum duration of each visit (note, however, that the duration of visits should be subject to the service provider's discretion and availability of the provider, and parenting time may be shorter in duration at the discretion of the provider);
4. Whether third parties are allowed to attend visitations and, if so, who may attend;
5. Date of the next court appearance regarding parenting time and visitation;
6. Existence or history of relevant civil protection orders; and
7. Other services that have been ordered related to the parties.

Subsection (3)(c)(4) calls upon the court to direct the center to provide it with reports regarding the services provided on only a limited number of important topics, not on parents' and children's behavior in general. Specifically, the center is to provide information needed by the court to enforce court orders or to modify orders in the event of abusive behavior during the visitation or exchange, including information about any critical incidents, abusive behavior observed during the visitation or exchange, and information about a parent's noncompliance with the court order. Consistent with the Guiding Principles' description, a critical incident should be interpreted to mean such behavior as violations of center rules, attempts to continue abuse, in particular when staff must end a visit or call in law enforcement, as well as "problematic behavior that necessitates a change in the level of monitoring."[70] It is important to note that, consistent with the appropriate role of supervised visitation and safe exchange centers, reports should not include information about noncritical incidents, which could inappropriately be used to advocate for a reduction in parenting time and visitation restrictions. In addition, the absence of critical incident reports alone is not probative of whether the parent who is abusive has undergone sufficient change and presents reduced risk so that parenting time and visitation restrictions should be modified.

Subsection (3)(d) focuses on the requirements with which the supervised visitation and safe exchange centers must comply. The provisions are intended to ensure that centers prioritize safety in all of their policies and practices, and that services are trauma-informed, culturally responsive, linguistically-accessible, and tailored to the unique needs of each family. The specific requirements set forth draw upon the Guiding Principles, which should serve as a reference for programs as they assess their ongoing compliance with the Subsection.

Subsection (3)(d)(1) and (2) incorporate the Guiding Principle that requires that centers prioritize the safety of both children and adults in their facility design, policies, and protocols. Security is a core element of safe parenting time, and security protocols should be designed to ensure the child and abused parent's safety in a tailored way, accounting for the level of danger and specific risks presented by the parent who is abusive. The Guiding Principles provide examples of standards and practices to satisfy this requirement, including the use of methods to ensure separation of parents, the implementation of security protocols and collaboration with law

[70] Ctr. Ct. Innovation & FUTURES, *supra* note 68, at 27.

enforcement, the rejection of cases and termination of services where appropriate, staggered arrival and departure times for parents, design facilities that minimize contact between parents, and arrivals that are centered around the safety of the child and the parent who is abused, are trauma-informed, and value multiculturalism and diversity of families receiving services from the center.

Subsection (3)(d)(5) requires centers to implement policies designed to protect the safety and privacy of the families they serve, guidance for which is available in the Guiding Principles.[71]

Subsection (3)(d)(6) requires collaboration between the court and center to implement reporting guidelines to which the center must adhere, including when a parent has engaged in abusive behavior during participation in the center's program. Guidance for the development of such guidelines is provided in the Guiding Principles.[72] Similarly, Subsection (3)(d)(9) requires that the center's documentation practices avoid further endangering children and adult victims.

[71] *Id.* at 16-17.
[72] *Id*. at 28.

Section 405. Use of Experts to Assist Decision-Making

Section 405. Use of experts to assist with decision-making in cases involving domestic abuse and child abuse.

1. **Definition and purpose of custody evaluation.**

(a) For purposes of determining the best interest of the child as set forth in Section 402 of this Chapter, a court may use an expert to collect, analyze, and synthesize information regarding the family and to make recommendations to the court. This process shall be termed a “custody evaluation.”

(b) A custody evaluation comprises the following processes:

(1) gathering, organizing, and summarizing relevant information regarding the family to assist with judicial determination of the best interest of the child, including the nature and context of domestic abuse, when present, and its effects on the child and parenting;

(2) analyzing the information to assess its sufficiency for determining the best interest of the child, including the implications of the domestic abuse for children and parenting; and

(3) synthesis of the information collected to make a recommendation to the court regarding the custody and parenting time arrangement that would serve the best interest of the child.

(c) In cases involving domestic abuse, the expert exercises professional judgment to synthesize the information collected regarding the abuse and its effects, to assess the best interest of the child in light of that information, and to make appropriate recommendations to the court, in recognition that the child’s physical and psychological welfare is paramount. The evaluation focuses on parenting behaviors and attributes, the risks of harm to the children and the parent who is abused, and the child’s needs. The court may draw upon the expert’s

assessment of these factors to reach its own conclusions and render a decision.

2. **Role of mental health professional as expert conducting a full custody evaluation.**

   (a) An expert conducting a full custody evaluation, as defined in Subsection 1(b), is a qualified, licensed mental health professional with the requisite expertise, designated by the court to collect, analyze, and synthesize information to make recommendations to the court regarding the custody or parenting of a child in a written report.

   (b) The process must be conducted in accordance with state law and the court's order appointing the expert. When ordered, the expert will make written recommendations to the court. The expert will prepare the report detailing the information collected and, when sought by the court, any recommendations regarding child custody, parenting time, and related matters specified by the court. Although an expert's role is to provide the court with recommendations and the underlying information that supports the recommendations, the court makes the final decision as to the ultimate legal issue, including both the final determination of the credibility of either party's allegations and the discretionary decision as to how to order custody and parenting time.

3. **Qualifications of mental health professionals as experts for custody evaluation in cases involving domestic abuse.** To qualify as a non-judicial expert for a full custody evaluation in a case with domestic abuse allegations, an individual must, in addition to any other qualifications required by law:

   (a) Be a licensed mental health professional and possess, through training and experience, extensive knowledge and understanding of:

      (1) all forms of domestic abuse and child abuse (in cases in which child abuse is an issue), trauma, and the behaviors

of parents who are abusive and the effects on parents who are abused;

(2) the effects on children of exposure to abuse of one parent by the other and the effects on a child of physical or sexual abuse, and potential for later development of post-traumatic symptoms or effects;

(3) how domestic abuse may affect the parent who is abused and both parents' parenting;

(4) the factors related to risk of lethality for both the parent who is abused and the child;

(5) applicable laws and the legal rights of those who are part of the process;

(6) forensic interview methods; and

(7) how to recognize the expert's own gender, cultural, and other biases related to domestic abuse and child custody and how to take active steps to reduce the influence of personal biases on all parts of the full custody evaluation process.

(b) Be competent in gathering and synthesizing information relevant to risk of future abuse to children and parents;

(c) Be competent in screening for domestic abuse and child abuse, including proper use of screening and assessment methods recognized as best practices in the domestic abuse field and child abuse field. Any screening and assessment tools used must be identified to the court;

(d) Be competent at identifying and evaluating complex forms of domestic abuse, including coercive controlling abuse;

(e) Be able to recognize the effects of trauma, in order to properly contextualize parties' and child's demeanor and behaviors and any psychological test results;

(f) Be competent in the safe communication of the report to the parties, including anticipating strong reactions and preparing all involved to plan for their safety and the safety of the child;

(g) Obtain consultation from a professional with the requisite expertise if the expert lacks the expertise to evaluate particular relevant areas; and

(h) Disclose any:

(1) Past or concurrent referrals by attorneys, judges, attorneys for children, or other professionals involved in the case for other evaluations, or other professional appointments;

(2) Professional and personal interactions outside of court, business dealings, and interactions; and

(3) Donations to campaigns. If such disclosures result in a litigant or attorney objecting to the candidate working on the case, the judge should not select that evaluator for the case.

4. **Order appointing mental health professional as expert to assist with custody/parenting time decision-making.** When appointing an expert for a full custody evaluation, the court shall enter an order specifying the following:

(a) Qualifications of the expert, ensuring expertise on domestic abuse, child abuse (where it is an issue in the case), cultural considerations, and abuse-related trauma, in compliance with the standards set forth in Subsection 3, above, and that the expert certify such compliance prior to commencing the process;

(b) The requirement that the expert implement measures to ensure the safety of the process;

(c) Scope of the information to be collected and issues to be investigated, including domestic abuse, the safety and well-being of children and parents, parent-child relationships, and demonstrated parenting ability;

(d) Scope of the issues to be analyzed and synthesized, including domestic abuse, the past and future safety and well-being of children and parents, parent-child relationships, and demonstrated parenting ability;

(e) The requirement that the parties cooperate with the expert's reasonable requests to meet the requirements of the court order;

(f) Disclosures by the expert as specified in Subsection 5 below;

(g) Screening requirements, including domestic abuse and child abuse screening;

(h) Expectations for the analysis, synthesis, and recommendations process, the expected content of the report, issues within and beyond the scope of the evaluation, and the use of psychological testing; and

(i) Expectations for the communication and release of the report, including that all parties, and self-represented litigants, must be provided a copy, in accordance with the requirements set forth in Subsection 8 below.

5. **Disclosures, screening, and safety of process by mental health professionals as experts.**

(a) The expert must screen for the presence of domestic abuse and child abuse, initially and throughout the process, regardless of whether the court has indicated that it is an issue in the case or included it in the designated scope of the evaluation.

(b) To minimize risks to the disclosing parent and allow safety precautions to be taken, the expert must inform parents and collateral sources about the way the report and any domestic abuse and child abuse information will be shared, and with whom (including, where applicable, the court or a parent), and limits on confidentiality, including mandatory reporting requirements, where applicable.

(c) The expert must take steps to ensure that the process does not inadvertently increase the risk of threats, harassment, intimidation, or violence to a parent, child, or other person.

6. **Process and recommendations for full custody evaluation conducted by mental health professional.**

(a) An expert conducting a full custody evaluation must investigate and assess the nature, context, and effects of any domestic abuse, including coercive control and the risk of domestic abuse and lethality, for the children, the parent who is abused, and the implications of past abuse for the parenting of each parent.

(b) An expert shall assess how previous domestic abuse affects all applicable best interest of the child factors, as specified in Section 402.

(c) In making any recommendations to the court concerning physical custody and parenting time and decision-making, an expert must account for the nature, context, and effects of the domestic abuse and the risk posed, by specifying:

(1) The explicit links between any abuse history in the report and the expert's parenting recommendations concerning decision-making and custody and parenting time;

(2) Measures that address the child's safety and psychological well-being;

(3) Measures that promote the safety and autonomy of the parent who is abused, while minimizing future risk from the parent who is abusive;

(4) Interventions that address the present and potential future risk of abuse posed by the parent who is abusive (including, among other things, requiring supervision of custody and parenting time, limiting decision-making by the parent who is abusive, and mandating completion of an abusive partner intervention program for the parent

who is abusive prior to contact with children, as appropriate);

(5) If available, requiring the parent who is abusive to attend a program aimed at raising awareness of the harm domestic abused caused to the child and the family and addressing safe and healthy parenting; and

(6) The means of assessing whether a parent who is abusive has genuinely acknowledged past harm and committed to avoiding it in the future, and made the necessary changes, before a court considers any modification in the parenting arrangement.

(d) If domestic abuse is identified as an issue in a case, an expert must:

(1) Ensure that any recommendations regarding a parenting arrangement or other interventions account for the specific nature, context, and effects of the domestic abuse as set forth in Section 402, regardless of any conclusions drawn about other hypotheses explored by the expert; and

(2) Evaluate all hypotheses developed or assessed during the evaluation process in light of the domestic abuse, including its nature, context, and effects, as set forth in Section 402.

7. **Admissibility and judicial use of report from a mental health professional.**

(a) A court should only admit findings, evidence, labels, or any diagnoses offered by an expert if the expert meets the qualifications under Subsection 3, and the findings, labels, or diagnoses and evidence supporting them meet evidentiary admissibility standards for scientific evidence.

(b) The court should consider an expert's findings and recommendations when sought, but shall make its own findings

and shall not delegate decision-making to the expert, instead retaining full authority and discretion over the final decision.

(c) The court should consider whether to adopt the recommendations made in an expert's report in light of whether the report and the process used in its development satisfy the requirements set forth in Subsection 6.

8. **Release and distribution of report.**

(a) The court, with input from the expert, shall set forth requirements for the release and distribution of the expert's report.

(b) The expert, or counsel, should consult with the court regarding how to address potential risks associated with release of the report, including such steps as advance notice of release of the report or the creation of safety plans.

(c) The court shall set forth the conditions under which the expert, attorneys, and the parties may review, take notes on, duplicate, or disseminate reports, including an order that the reports shall not be disseminated beyond the expert, parties, and attorneys without express permission of the court.

9. **Mandatory training for mental health professionals as experts.** To be appointed by the court for custody evaluations, experts must have received training on all relevant topics, including forensic interviewing, coercive controlling abuse, dynamics of domestic abuse in custody litigation, stalking, and the risks and impact of domestic abuse for children, including post-separation abuse, and of child abuse.

10. **Use of non-mental health professional as expert for information-gathering only.**

(a) If a court chooses to use a non-mental health professional as an expert to conduct the first part of the process defined in Subsection 1(b) (gathering, organizing, and summarizing relevant information regarding the family), or to conduct both that part and the second part of the process defined in

Subsection (1)(b) (analyzing the information to assess its sufficiency for determining the best interest of the child, including the implications of the domestic abuse for children and parenting), the court shall ensure the non-mental health professional conducts the evaluation in accordance with the requirements set in Section 6(a) and (b) and meets the qualifications set out in Section 3.

(b) Under this approach, the court may draw upon the non-mental health professional's work to conduct its own synthesis of the information and make its own findings, reach its own conclusions, and render a decision regarding the best interest of the child in accordance with the analysis set forth in Section 402.

(c) To qualify as an expert to conduct only the information-gathering process (or the information-gathering and analysis process) in a case with domestic abuse allegations, an individual must meet all of the expert qualifications set forth in Subsection 3, except that the expert role is not limited to mental health professionals. However, a non-mental health professional should work collaboratively with a multidisciplinary team, including mental health professionals and other with relevant expertise, to ensure the requirements set forth in Subsection 6 are met.

Commentary

Revised Chapter Four, Section 402, of the Model Code requires courts to assess the nature, context, and effects of any domestic abuse that has been identified, and craft parenting arrangements that address these features of the abuse. This section is intended to set forth standards for courts' use of experts in cases involving domestic abuse to assist with that assessment and determination of appropriate custody and parenting time in light of the best interest of a child. Consistent with common practice in family courts across the country, this section refers to such a process as "custody evaluation."

The inclusion of this section addressing custody evaluation is not intended to imply that appointment of a custody evaluator is appropriate in all or most cases. In fact, the use of a third-party professional may be beneficial or harmful, depending in large part on the training, expertise, and skills of the professional, especially as related to domestic abuse, child abuse, and the effects of abuse on children. Courts should weigh the benefits of using a third-party professional against the possible limitations and disadvantages, which this section is intended to mitigate by attempting to ensure objective evaluations that focus on the best interest of the child and that appropriately account for any identified domestic abuse.

Local practices may include the use of non-mental health professionals to conduct all or a portion of custody evaluations as defined in this section. In some jurisdictions, experts may be used to conduct full custody evaluations or, in some cases, evaluations focused on one or a subset of issues. If an expert is called upon to conduct only a portion of a full custody evaluation, the expert should be required to meet the qualifications as set forth in this section. This section is intended to govern all such processes and to ensure that briefer evaluations, including those made available to parties who cannot afford more in-depth evaluations, meet the standards necessary to assure a safe process that effectively addresses the nature, context, and effects of domestic abuse on the child and on parenting by both parents.

In some situations, courts may benefit from an expert assessment of a single or very small set of issues in a case, rather than a full custody evaluation. In a case involving domestic abuse, such an assessment (sometimes termed a "brief, focused assessment") should be carried out in compliance with the requirements set forth in this section, to the extent that

the expert is called upon to engage in information collection, analysis, and synthesis to provide recommendations to the court.

Note that the assessment may focus on the domestic abuse itself. Any brief focused assessment must comply with the screening requirements in Subsection 5, regardless of its scope.[73] When weighing the benefits, limitations, and risks of custody evaluation, courts should consider that:

If done correctly by a well-qualified evaluator with expertise in the types of abuse at issue and in accordance with the standards in this section, a custody evaluation can be very helpful to judges, lawyers, and parents in developing parenting plans that promote safety and accountability in the context of children's best interest. It also may provide an opportunity for initial and ongoing screening and assessment for domestic abuse and for lethality factors (by contrast, the court may only be able to do so at the outset of the case).

However, custody evaluations conducted by unqualified evaluators (e.g., those lacking expertise in domestic abuse) can cause more harm than good, especially if accepted uncritically by the court: some evaluators fail to identify the existence and/or nature, context, and effects of abuse, and recommendations can be more closely tied to preconceptions and biases than the facts of the case.[74]

Where custody evaluation is used, courts play a critical role in overseeing the process and ensuring the involvement of qualified evaluators. This section sets forth requirements for the training and qualifications of custody evaluators, as well as for the evaluation itself, especially about how domestic abuse and child abuse are addressed in the evaluation process and in any recommendations made to the court. The National Council of

---

[73] For guidance on such assessments, *see* Ass'n Fam. Conciliatio Cts. (hereinafter AFCC), *Guidelines for Brief Focused Assessments*.

[74] *See, e.g.*, Daniel G. Saunders et al*., Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations* (2012); Michael S. Davis et al., *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators* (2011).

Juvenile and Family Court Judges has developed guidance for courts regarding these issues.[75]

Custody evaluators may be employed by the county or court in which they practice, or they may be private professionals whose fees, typically, are paid by the parties. To help ensure quality, consistency, and access for parties with limited financial resources, courts should consider the creation of a cadre of qualified evaluators employed by the court or county. An additional benefit to such a program is that by eliminating situations in which one of the parties pays all or most of the evaluator's fees (due to differing financial abilities), potential biases in favor of the person paying the fees would be reduced or eliminated.

This section does not address fees for evaluations. Jurisdictions are encouraged to create a rule specifying that, if a fee is required for the evaluation, the court shall be responsible for paying the fee and ordering reimbursement by the parties under an equitable apportionment that is not disclosed to the evaluator. Any approach to the payment of a custody evaluator's fees should be designed to minimize any real or perceived bias that could be introduced (e.g., bias in favor of the person paying all or a greater share of the evaluator's fees). Ideally, the evaluation would be paid by the court or another entity other than the parties. The suggestion above provides an alternative, in which the evaluator does not learn about how the fee has been allocated between the parties. Jurisdictions should also consider requiring publication of fees for evaluations, as well as a cap on permissible fees.

This section sets forth requirements intended to ensure the proper handling of cases involving domestic abuse. However, an enacting jurisdiction might wish to expand the applicability of this section by specifying additional requirements applicable in all cases, including those that do not involve domestic abuse.

The role of an expert conducting a custody evaluation, as set forth in this section, is distinct from and broader than that of a subject matter expert who may be called upon to offer expertise on a topic related to domestic abuse, such as coercive controlling abuse. Experts conducting custody evaluations must have expertise in several subject areas, and it is not

[75] NCJFCJ, *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* (2004, revised 2006).

intended that the requirements enumerated herein apply to subject matter experts.

Commentary on specific provisions of this section

Subsection 1(b) adopts the description of the child custody evaluation process used in the Association of Family and Conciliation Courts' (AFCC) *Guidelines for Examining Intimate Partner Violence* (AFCC Guidelines*)*.[76]

Subsection 1(c) reflects the foundational fact that appointment of an expert does not constitute a delegation of the court's authority and responsibility to reach its own conclusions and make a decision, and that it exercises discretion regarding whether or not to adopt the expert's assessment and recommendations.

This fact is expanded upon in Subsection 2(b), which provides that the court ultimately makes the final determinations. Nonetheless, the drafters recognize that evaluators may appropriately be called upon to provide clinical opinions on the information gathered and clinical findings about how comprehensive and consistent the parties' accounts appear to be, in part by obtaining confirmation from trustworthy third parties and the use of other tools (e.g., validity scales in psychological tests). In such a manner, the evaluators' opinions and findings can lead the judge to "connect the dots" if they deem it appropriate, making the corresponding judicial findings and decisions. Where an evaluator does need to make a credibility determination (e.g., regarding the interview or test data from the parties), the evaluator must provide the court with the facts underlying the determination. Evaluators should include in their reports the information that they have gathered (all of it, including contradictory allegations and information), an explanation to the judge about what the implications are for parenting time arrangements and other interventions if the judge does find that the abuse has occurred with the effects described by the evaluator, as well as the implications if the court does not make those findings.

Subsection 3 addresses the requisite qualifications for experts conducting full custody evaluations, specifically in cases involving domestic abuse allegations. These requirements should be adopted to govern practice in

[76] AFCC*, Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation* (2016).

such cases even if the enacting jurisdiction already has statutory provisions or court rules addressing custody evaluations in general.

Subsection 3(a) requires that to conduct a full custody evaluation the evaluator must be a licensed mental health professional with the described training, skills, and expertise. The detailed qualifications required for experts in cases involving domestic abuse are described in the remaining provisions of Subsection 3. The requirement for a licensed mental health professional reflects the opinion of the majority of the Working Group members. However, not all Working Group members agreed that attorneys should be excluded, provided that they satisfy all of the other qualifications set forth in this paragraph. These Working Group members view legal training and expertise in the applicable law as advantageous.

Courts in some jurisdictions use non-mental health professionals (such as guardians ad litem who are attorneys) to conduct custody evaluations and provide recommendations regarding custody/parenting time. Also, in many jurisdictions throughout the country, there may be a dearth of qualified professionals available to conduct child custody evaluations. More specifically, certain trends, such as seasoned child custody evaluators retiring or "aging out" of the family court system and new child custody evaluators coming into the field at a pace much slower than the experienced evaluators are leaving, necessitate ensuring any professional involved in custody evaluations should have the necessary qualifications and expertise to provide comprehensive information to courts.[77]

The Revised Chapter Four of the Model Code does not endorse the use of non-mental health professionals for full custody evaluations, including synthesis of the information gathered to make recommendations to the court about the best interest of the child and the appropriate custody and parenting time order. To the extent that a jurisdiction enacting this revised section nonetheless intends to maintain the practice, it should codify the requirements in this section to the greatest degree possible and make them applicable to non-mental health professionals (such as some guardians ad litem) conducting full evaluations.

---

[77] James N. Bow & Michael C. Gottlieb*, On Developing a Child Custody Practice*, 6(4) PRAC. INNOVATIONS 263–74 (2021); Marc J. Ackerman, James N. Bow & Nicole Mathy, *Child Custody Evaluation Practices: Where we were, Where we are, and Where we are Going*, 52(4) PROF. PSYCH. RSCH. & PRAC. 406-17 (2021).

Pursuant to Subsection 10, however, if a court uses a non-mental health professional as an expert, their role should be limited to the first two processes, and they may conduct one or both of the first two processes of a custody evaluation, information-gathering and analysis within their professional and ethical guidelines, and not include the synthesis and recommendations processes, which require mental health expertise. Courts may also require that the non-mental health professionals adhere to the current versions of the AFCC Guidelines for Examining Intimate Partner Violence and Guidelines for Parenting Plan Evaluations in Family Law Cases. Non-mental health professionals are strongly encouraged to work collaboratively with a team of multidisciplinary professionals. See the commentary for that paragraph below for more details.

Subsection 3(a)(7) requires that the expert be able to both recognize the expert's own biases and to take active steps to reduce the biases' influence on the evaluation process. Self-assessment tools, such as the Harvard Implicit Association Test (IAT)[78] can be used to measure implicit bias. Another indicator of possible bias is when an expert significantly overstates the rate of false allegations of domestic abuse or child abuse from the base

[78] Project Implicit, Implicit Association Test (IAT); see Ruth L. Perrin, *Overcoming Biased Views of Gender and Victimhood in Custody Evaluations when Domestic Violence is Alleged*, 25 AM. U. J. GENDER SOC. POL'Y & L. 155, 176 (2017) (" . . . upon completion of the required training, evaluators should be required to be certified by passing an exam that tests their understanding of domestic violence and bias, as well as screens their bias…The IAT is a computer-based test that requires the subject to quickly sort words and ideas. It tests reaction times when viewing pairings of words to determine whether or not a person implicitly associates the words paired with each other. As part of a certification exam, evaluators should be required to have a certain score on the IAT. Additionally, tests can be developed to screen for bias against victims. By including questions about, for example, the causes of domestic violence, the exam should exclude candidates who believe that victims cause violence."); *see also* Leslie M. Drozd et al., *Parenting Plan & Child Custody Evaluations: Using Decision Trees to Increase Evaluator Competence & Avoid Preventable Errors* (2013) (containing sections on bias and bias reduction).

rates supported by research.[79] And of course, other forms of bias, for example racial inequity, must be accounted for.[80]

Subsection 3(c) requires competency in screening for domestic abuse and child abuse. Any screening process employed by the expert must include screening for all elements of domestic abuse described in the definition of the term in Section 401, including coercive controlling abuse. Custody evaluators can consider adapting existing screening tools for their own purposes. Several screening tools are cited in the footnote.[81] Custody evaluators should ensure that competent interpretation and translation is provided as needed for the parties.

Subsection 3(e) and (f) are adapted from the AFCC Guidelines for Examining Intimate Partner Violence.[82]

---

[79] Daniel G. Saunders et al., *supra* note 74 (involving questions about the importance of assessing domestic violence in custody cases, the percentage of false allegations they believe are made by parents, etc; for example, if evaluators estimate that more than 10% of child maltreatment reports are false, they are overpredicting its prevalence and will be more prone to look for and find false allegations); see also Roy Lubit, *Recognizing & Avoiding Bias to Improve Child Custody Evaluations: Convergent Data are not Sufficient for Scientific Assessment*, 18(3) J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 224-40 (2021) (stating "In assessing an evaluator's abilities, it is important to see if the evaluator's assessments of situations yield results consistent with base rates. If the evaluator finds that most children being interviewed are fabricating abuse, when the base rate is under 10%, the evaluator's method of assessing for fabrication is flawed and likely biased.").

[80] Solangel Maldonado, *Bias in the Family: Race and Culture in Custody Disputes*, 55(2) FAM. CT. REV. 213-42 (2017).

[81] *See, e.g.*, Gabrielle Davis et al., BWJP, *Practice Guides for Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters* (Forms & Instructions (2018); Mattie P. Thompson et al., Nat'l Ctr. Injury Prev. & Control, CDC*, Measuring Intimate Partner Violence Victimization and Perpetration: A Compendium of Assessment Tools* (2006). To assess danger and coercive control, other tools are available, such as Mediator's Assessment of Safety Issues and Concerns (MASIC), *see* Amy Holtzworth-Monroe, et al., *The Mediator's Assessment of Safety Issues & Concerns (MOSAIC): A Screening Interview for Intimate Partner Violence & Abuse Available in the Public Domain*, 48(4) FAM. CT. REV. 646-62 (2010); Jacquelyn C. Campbell, John Hopkins School of Nursing, Danger Assessment (2003, updated 2019).

[82] AFCC, *supra* note 76.

Subsection 3(g) recognizes that domestic abuse frequently co-presents with other issues, including mental health and substance use, and ideally, custody evaluators would have the requisite expertise to assess the co-presenting issues. However, this is not always the case, and this paragraph mandates that experts recognize the limits of their expertise and, when necessary to conduct an effective and comprehensive evaluation, that they consult with a professional possessing any requisite expertise. Even in cases in which an expert qualified to evaluate domestic abuse must obtain a consultation to address other co-presenting issues, the expert must assess those other issues in light of the nature, context, and effects of any domestic abuse that is present. See Section 402. Experts should consider joining or establishing consulting groups as a means to augment their expertise.

An additional situation calling for consultation with another professional with appropriate expertise arises when the custody evaluation involves a family from a different culture than that of the expert. This may be the case when the family is from a racially or ethnically diverse population, an indigenous community, or has limited English proficiency, when parents are LGBTQI+, when a family member has a disability, or in other situations in which cultural differences exist between the expert and the family. Consultation with a professional with expertise in the relevant culture's parenting practices, social norms and expectations, and other beliefs and values can prevent the expert conducting the evaluation from misinterpreting information and from falling prey to biases and misconceptions. The AFCC's Guidelines for Parenting Plan Evaluations in Family Law Cases include, throughout the document, guidance regarding effective inclusion of cultural considerations in custody evaluations.[83]

The language in Subsection 3(h) was taken from the 2021 Report of the New York Governor's Blue-Ribbon Commission on Forensic Custody Evaluations.[84]

---

[83] *See* AFCC Task Force for the Revisions of the Model Standards for the Practice of Child Custody Evaluation, AFCC, *Guidelines for Parenting Plan Evaluations in Family Law Cases* (2022) (revising AFCC's earlier Model Standards of Practice for Child Custody Evaluation (2006)).

[84] Governor's Blue Ribbon Commission on Forensic Custody Evaluations, New York, *Report of the Blue-Ribbon Commission on Forensic Custody Evaluations* (Dec. 2021).

The requirements and standards enumerated in this revised section of Chapter Four of the Model Code, including screening for domestic abuse, are intended to apply to any evaluation conducted by a custody evaluator regardless of what the process is called. This includes limited-scope evaluations, often called "brief, focused assessments," that courts may order in custody cases. Although brief, focused assessments may have the beneficial effect of limiting the costs of an evaluation, courts should ensure that they are conducted in accordance with this section, as they can cause more harm than good if they are done poorly or superficially.

Subsection 4(b) requires that the court include in its order appointing the expert that the expert implement safety measures to protect the parties and children during the evaluation process. This requirement and appropriate measures to safeguard parents who are abused and children are described below in connection with Subsection 5.

Subsection 4(c) and (d) are intended to ensure that the court specifies in its appointing order the scope of the information-gathering, analysis, and synthesis components of the evaluation. Such specification enables the court to clarify for the expert the issues expected to be addressed in the evaluation process, as a means of maximizing the likelihood that it will aid in the court's decision-making process. Such framing by the court is an essential element of successful custody evaluations.[85]

Subsection 4(h), like Subsections 4(c) and (d), require the court to clarify for the expert its expectations regarding the evaluation, with this provision focused on the process and report to be submitted. For example, if the court is concerned about coercive controlling abuse evident in the case and seeks an assessment of its nature, context, and effects on parenting and the child, the court can express its expectation that the expert will address that issue during the process and in any ensuing recommendations. Psychological testing is mentioned here with an understanding that, as the AFCC notes in its Guidelines, "Standard psychological testing is not useful for the purpose of identifying whether intimate partner violence has occurred and/or whether a given parent has committed or been subjected to intimate partner violence."

[85] NCJFCJ, *supra* note 75.

Courts should consider including in their orders appointing an expert for custody evaluation the requirement that their process and report comply with all provisions of the AFCC Guidelines for Examining Intimate Partner Violence.[86]

Subsection 5(a) specifies that screening for the presence of domestic abuse and child abuse should be universal and conducted at the commencement and throughout the evaluation process. Appropriate tools for screening were described previously, in the commentary on Subsection 3(c).

Subsection 5(b) and (c) reflect the principle that, as the AFCC's Guidelines state, "[a] child custody evaluator should make the safety of the child, the parties, and other involved individuals the highest priority in the evaluation process." In addition to sharing the information set forth in Subsection 5(b), the expert should take steps to interview the parents separately and to discuss the need for safety planning as part of the process. For example, the Australian Standards of Practice for Family Assessment and Reporting provide evaluators with the following guidance: "Family assessors should use the information to offer arrangements so that parties can attend without the risk of threats, harassment, intimidation, or physical violence. Where necessary, they should negotiate a safety plan with parties who have concerns about family violence. Safety plans for parties' participation should be made without prejudging the parties' expressed concerns about violence. Making arrangements based on parties' expressed concerns is not in itself a presumption about the validity of those concerns. Formulation of any opinions as to the actual risks to parties should only be made after all the necessary information has been gathered."[87]

Similarly, the California Rules of the Court Protocol on Domestic Violence requires the development of a safety plan:

> When domestic violence is identified or alleged in a case, Family Court Services staff must consult with the party alleging domestic violence away from the presence of the party against whom such allegations are made and discuss the existence of or need for a safety plan. Safety planning may include but is not

[86] AFCC, *supra* note 76.
[87] Fam. Ct. Austl. et al., *Australian Standards Of Practice for Family Assessments & Reporting (*Feb. 2015).

limited to discussion of safe housing, workplace safety, safety for other family members and children, access to financial resources, and information about local domestic violence agencies.[88]

Subsection 6 sets forth the orders for a full custody evaluation and how recommendations should be made. Although a reference to existing professional guidelines is not included in this section (in part because such guidelines are subject to revision or repeal), jurisdictions are encouraged when codifying this section of the Revised Chapter Four of the Model Code to consider requiring that custody evaluators conduct their evaluations in accordance with the most recent professional guidelines, including the AFCC's Guidelines for Examining Intimate Partner Violence,[89] as well as additional guidance in the AFCC's Guidelines for Parenting Plan Evaluations in Family Law Cases.[90] Other helpful guidance is available from the American Professional Society on the Abuse of Children,[91] the American Psychological Association,[92] and the American Academy of Matrimonial Lawyers.[93] In particular, the AFCC's Guidelines for Examining Intimate Partner Violence contains useful information about the types of relevant information to gather regarding domestic abuse and its effects on parenting and the child, as well as potential sources for the information.[94]

The requirements in Subsection 6(c) for the expert's recommendations are fully consistent with the goals for recommendations set forth in the AFCC Guidelines, namely that they "prioritize the physical and emotional safety and the economic security of children and parents subjected to intimate

---

[88] Jud. Council Cal., 2022 Cal. Rules Ct.
[89] AFCC*, supra* note 76.
[90] AFCC, *Guidelines for Parenting Plan Evaluations in Family Law Cases* (2022).
[91] Am. Prof. Soc'y Abuse Children (hereinafter APSAC), *APSAC Guidelines of Practice*.
[92] Am. Psychol. Ass'n (hereinafter APA), *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65(9) AM. PSYCH. 863-67 (2010).
[93] Am. Acad. Matrim. L., Child Custody Evaluation Standards, 25 J. AM. ACAD. MATRIM. L. 251-94 (2013).
[94] AFCC, *supra* note 76, at 9-14.

partner violence"; "minimize opportunities for and risk of ongoing, intrusive post-separation abuse tactics"; "support the autonomy of parents subjected to intimate partner violence"; and "acknowledge and address the cause and consequential harm of intimate partner violence."[95]

Among other things, Subsection 6(c) is intended to encourage custody evaluators to recommend steps to address the risk posed by abusive parents through evidence-informed interventions directed at that parent, including abusive parent intervention programs (APIP).[96] By no means is the language meant to suggest that mere completion of such a program indicates that the abusive parent is no longer, or even less of, a threat to the other parent or children. Each case must be assessed on an individual basis, and recommending that the abusive parent successfully complete an APIP program before permitting child contact may be an inadequate safeguard in many cases, without further indicia of change, reduced risk, and acceptance of responsibility.

Likewise, completion of other court-ordered interventions alone would not be adequate evidence of the requisite change supporting a modification. In the context of participation in APIP and other interventions, the focus should be on a change that obviates the need for the intervention or restriction on parenting time. In addition, in appropriate cases, the expert should consider providing information to the parent who is abused about domestic abuse service providers to maximize that parent's support and safety.

Subsection 6(d) recognizes that cases involving domestic abuse often co-present with other issues that may affect parenting and the best interest of the child and that may lead the expert to develop and assess other hypotheses. In many cases, the additional presenting issues are a result of, or are exacerbated by the domestic abuse present in the case; in some, they are independent. Subsection 6(d)(1) directs the expert to conduct all elements of a comprehensive evaluation regarding any domestic abuse present, whether or not the expert evaluates any other hypotheses. Subsection 6(d)(2) directs the expert to include in the evaluation an

---

[95] *Id*. at 16.

[96] *See, e.g*., Ctr. Ct. Innovation's Abusive Partner Accountability & Engagement Project and FUTURES' Engaging Men to End Gender-Based Violence Strategy Center.

assessment of whether and how the domestic abuse in a case affects or contributes to all hypotheses evaluated in the case.

For instance, if the expert develops and assesses a hypothesis that a parent who is abused has a substance use problem that is adversely affecting the parenting of a child, any domestic abuse allegations must also be fully assessed in accordance with the requirements set forth in the Revised Chapter Four of the Model Code. In addition, once the nature, context, and effects of the abuse have been assessed, the expert must evaluate the substance use issue in light of the domestic abuse. This means that the expert should investigate whether the substance use is a reaction to or consequence of the abuse, and if so, the likelihood that stopping the abuse would lead to cessation of the substance use.

It is critical to note in this context that treatment of the substance use issues of the parent who is abusive generally will not end the abusive behaviors, which reflect power and control dynamics and a belief system that is not caused by substance use.

Subsection 7 is intended to ensure that the court rely on the expert's report and recommendations only if all of the requirements set forth in this section are satisfied. It also reiterates that the court may not delegate its discretion to the expert.

A court assessing the adequacy of an expert's report and recommendations may find it useful to consult two resources developed by the National Council of Juvenile and Family Court Judges.[97] In addition, the court should accord the report and recommendations only the confidence and weight commensurate with the qualifications of the expert conducting the evaluation.

Subsection eight's limitation on the distribution of the evaluation report reflects a concern about the damage that can be done to abused parties and children through sharing of the report with third parties. There may be significant due process concerns if a party does not have unfettered access to a report, and there is value in sharing it with, for example, a parent, friend, or therapist. In addition, redacted copies of evaluation reports can be very useful in training and for policy-making purposes. For these reasons, the provision authorizes the court to grant permission for dissemination of a report beyond the expert, parties, and attorneys in the case. In states in which self-represented litigants are prevented from

[97] NCJFCJ, *supra* note 32 and 75.

obtaining copies of evaluation reports, they should be permitted, at a minimum, to have meaningful access to the document, including the ability to take notes.

Subsection 9 sets forth mandatory training for experts conducting custody evaluations and lists some of the relevant training topics that must be included. It is suggested that agencies responsible for conducting training for custody evaluators involve state domestic violence coalitions in the development of training programs, as well as others with specific expertise in both domestic abuse and the family courts.

Enacting jurisdictions should consider requiring a certain number of hours of education focused on domestic abuse, such as the requirement in California that appointed experts have 16 hours of training on domestic violence and a 4-hour annual update.[98]

Subsection 10 recognizes a practice used in some courts to appoint an expert to conduct only the information-gathering process or both that process and the analysis process, rather than a full custody evaluation that also includes synthesis of the information and the making of recommendations. It can be very difficult for the court to obtain this information as part of the court proceedings without the assistance of an expert. Where the court specifies the type of information sought, this can be an effective strategy, provided the expert has the requisite expertise and knowledge, and the judge recognizes the need to conduct its own assessment and synthesis of the information presented.

Although this role does not require the expert to be a licensed mental health professional, the provision specifies that the expert must meet all of the other qualifications in this section, which are extensive and higher than those in place for most non-mental health professionals, such as guardians ad litem and other third parties upon which many courts currently rely. Nonetheless, the section does not authorize experts without the mental health qualifications to synthesize the information gathered and make recommendations to the court.

Any information-gathering conducted in a case involving domestic abuse should comply with the requirements set forth in Subsection 6(a) and include obtaining any information regarding coercive controlling abuse. The types of relevant information regarding the abuse and its effects on

---

[98] *See* Jud. Council Cal., *supra* note 88.

parenting and the child, as well as potential sources for the information, are described in detail in the AFCC Guidelines.[99]

Subsection 10(c) includes encouragement to non-mental health professionals to recognize the limits of their expertise and consult with relevant experts (including mental health professionals) where necessary. Experts should inform the court at the outset of both the limitations of their expertise and how their training and experience does support their ability to fulfill their responsibilities of the court appointment.

To ensure that non-mental health professionals (such as guardians ad litem) maintain necessary qualifications and meet all requirements and standards described in this section, the court should play an active role in maintaining and managing a list of eligible individuals. Active involvement should include sponsoring regular training, ensuring that complaints are promptly and thoroughly investigated, ensuring minimum standards, and having transparent recruiting and evaluation processes.

[99] AFCC, *supra* note 76.

Section 406. Alternative Dispute Resolution

Section 406. Alternative dispute resolution programs and requirements; duties of professionals facilitating any alternative dispute resolution process (including mediators); duties of judge.

1. All alternative dispute resolution programs, professionals, and courts must recognize that the alternative dispute resolution process is not an appropriate process for all cases and that agreement is not necessarily the appropriate outcome of all alternative dispute resolution processes.

2. Courts shall not refer parties to an alternative dispute resolution program that does not meet the requirements of this section.

3. All alternative dispute resolution professionals, in addition to any appropriate training and qualifications related to the type of alternative dispute resolution to be used, shall receive a minimum of 10 hours of training on domestic abuse annually, as defined in this Chapter, dynamics of domestic abuse, effects of domestic abuse on children and parenting, signs of domestic abuse, future risk of domestic abuse and child abuse, and implications of domestic abuse for the alternative dispute resolution process, before conducting an alternative dispute resolution process.

4. All alternative dispute resolution programs and professionals must develop and implement:

    (a) A screening and ongoing assessment of domestic abuse process for all cases that meet the requirements of this section;

    (b) A policy requiring that alternative dispute resolution services be provided only after each party consents to participate after being informed of the features of the process and what is required for the process to be effective and result in a safe, workable outcome (e.g., good faith and fair dealing by both parties, recognition of each party's autonomy, judgment, complete information, and safety). Consent may be withdrawn at any time and the process ended; and

(c) A set of safety procedures intended to minimize the likelihood of harm, harassment, or intimidation throughout the alternative dispute resolution process, including during the orientation session, during the negotiation process, on the way in or out of the building in which the orientation or process occurs, or safely terminating the process if a litigant withdraws consent.

5. A professional facilitating any alternative dispute resolution process shall not engage in that process when the professional determines or when either party asserts that domestic abuse, including coercive controlling abuse, has occurred unless: (1) the victim party consents after being fully informed as required in Subsection (4)(b) and (2) the process is conducted in a specialized manner that fully accounts for the abuse. If such adjustments are insufficient to ensure safety from harm, harassment, or intimidation, the alternative dispute resolution process shall not be used in that case.

6. A professional facilitating any alternative dispute resolution process shall, in every case, with each party separately, conduct (1) initial screening to determine whether domestic abuse, including coercive controlling abuse, has occurred and (2) if domestic abuse is identified, an assessment of the nature and context of the abuse and its effect on the alternative dispute resolution process, including as a threshold matter, a decision by the party and the professional as to whether to proceed with the process. During this initial screening, the professional shall provide an orientation that describes the process to be used, the prerequisites for successfully conducting the process, the implications of domestic abuse for the process, and the advantages and disadvantages of the process. Following the initial screening, the professional shall continue to screen and assess on an ongoing basis for domestic abuse that may not have been disclosed during the initial screening.

7. Before finalizing any agreement in a case involving domestic abuse, the alternative dispute resolution professional must specifically notify the parties that resolving the case by agreement ends the case, that there will be no trial or other opportunity to present their case to the judge, and that future changes may be made only if circumstances

substantially change and the judge approves the change, unless both parties agree to the change.

8. If the agreement on its face does not appear to serve the best interest of the children or appears manifestly unsafe, the judge shall not incorporate the agreement into the final judgment unless, after further inquiry regarding any such provisions, the parties demonstrate to the court's satisfaction that the agreement is safe and serves the child's best interest.

Commentary

This section recognizes that alternative dispute resolution processes are not typically designed to account for the power imbalance and often hidden behaviors that are typical of domestic abuse. For this reason, a case in which domestic abuse has occurred is often not suitable for alternative dispute resolution due to the potential for intimidation, harassment, retaliation, and sometimes violence. Some jurisdictions attempted to address this issue by allowing exceptions or opt-out provisions, but such provisions are inconsistent, and more importantly, inconsistently applied, often forcing parents who are abused into at best disadvantageous and at worst dangerous situations. Another example of an attempt to evade the potential risks is to prohibit the parties from negotiating about whether domestic abuse is present, but requiring mediation of all other issues. However, as described in Section 402, Best Interest of the Child, domestic abuse is not simply a single factor that can be isolated. It permeates family life and impacts all best interest factors and any other considerations in child custody cases. On the other hand, many parents who are abused may prefer alternative dispute resolution to a trial, especially if they are self-represented and are faced with gathering and presenting evidence on complex issues like domestic abuse. Their autonomy should be respected unless safety concerns cannot be adequately addressed. Therefore, this section sets forth necessary features of an alternative dispute resolution process that recognizes the potential harm of such a process in cases with a history of domestic abuse, while also respecting the autonomy of the parent who is abused and providing necessary safeguards.[100]

The first subsection requires alternative dispute resolution programs and professionals to recognize the potential drawbacks and dangers of alternative dispute resolution in cases with a history of domestic abuse by acknowledging that alternative dispute resolution is not appropriate for every case, and that an agreement may not be the best outcome if alternative dispute resolution is used. If the process cannot be conducted safely and in a manner that ensures both parties can participate on equal ground and voice their opinions, concerns, desires, and requests honestly, without fear of retaliation, then alternative dispute resolution is not suitable for that case. If a party is intimidated into signing an agreement that they do

[100] *See, e.g.,* Gabrielle Davis et al., *Intimate Partner Violence and Mediation: A Framework for When and How Mediation Should be Used*, 25 DISP. RESOL. MAG. 24 (2019).

not truly agree with, whether by the other party or the alternative dispute resolution professional, that agreement is not a valid outcome for the case.

The second subsection makes clear that judges and courts must not order or refer parties to any alternative dispute resolution process[101] that is not voluntary, safe, and domestic abuse-informed and otherwise meets the requirements of this section.

The third subsection requires a minimum of 10 hours of mandatory training on domestic abuse for alternative dispute professionals; a greater number of hours is encouraged. Topics to be addressed by this training include; (1) dynamics of domestic abuse, as defined in this Chapter; (2) dangerous or lethal risk factors as defined in research on intimate partner violence and children; (3) trauma associated with experiencing domestic abuse and trauma-informed responses; (4) sexual violence; (5) child abuse and maltreatment; (6) implicit and explicit bias; (7) systemic barriers to access to justice; (8) cultural responsiveness in intimate partner violence cases; (9) impact of domestic violence on diverse communities; and (10) evidence-based and peer-reviewed research on responses that focus on enhancing the safety of children in custody and parenting time decision-making.

The fourth subsection sets forth requirements for a domestic abuse-informed alternative dispute resolution process. It requires (1) initial and ongoing screening for domestic abuse (which may not be disclosed at an initial screening and may be disclosed after the process has already begun), (2) that the process be fully voluntary, after the parties have been provided with complete information[102] about the alternative dispute resolution process and its advantages and disadvantages, as well as available safety measures, and they have consented to engage in the process, and (3) a set of safety measures to ensure the parent who is abused will not be harmed, harassed, or intimidated during the process.

It is recognized that most courts handling family law cases mandate alternative dispute processes, with many allowing parties to opt out in cases with a history of domestic abuse. Realistically, parents who are abused are often unaware of the option to opt out or are unable to avail themselves of it, especially those without counsel. Despite this practice, the

---

[101] *See*, NCJFCJ, *supra* note 32 at 26-27 (for cautions regarding collaborative law, cooperative law and settlements, and the uncontested case).

[102] Courts should ensure needs of litigants with LEP are provided with the necessary resources to ensure interpretation and translation services are available for alternative dispute resolution processes.

National Working Group's conclusion was that the very nature of most, if not all alternative dispute processes requires that they be entered into voluntarily, and thus this section requires the process to be voluntary. Further, in cases with a history of domestic abuse, the parent who is abused is in the best position to know, after being fully informed about the process, whether the process will be safe, whether the potential for harassment and intimidation can be sufficiently mitigated, and whether the likelihood for a safe, workable outcome is improved through the alternative dispute resolution process.

Therefore, Subsection (4)(b) requires that the parties' consent to participate in the process be fully informed, and further, that the consent may be withdrawn at any time. Full information includes the process itself, available safety measures, advantages and disadvantages of alternative dispute resolution, and the requirements for an effective process and safe, workable outcome. If after consideration of the complete information, a parent who is abused concludes that the process would not be safe or would not result in a safe outcome, the parent who is abused may decline to participate. If the parent who is abused elects to attempt the process, but later determines that it is not safe or will not result in a safe outcome, consent may be withdrawn. The mechanism for withdrawing consent must be safe for the parent who is abused.

If a jurisdiction is unable to implement a fully voluntary alternative dispute resolution process, the following language may be substituted for Subsection (4)(b):

> (b). A provision for opting out of alternative dispute resolution that allows a party who has alleged that they have been the victim of domestic abuse to decline to participate after being informed of the features of the process and what is required for the process to be effective and result in a safe, workable outcome (e.g., good faith and fair dealing by both parties, recognition of each party's autonomy, judgment, complete information, and safety) or at any time during the process;

This alternative opt-out exception should be permitted based on allegations, as stated in the above text. Doing so obviates the need for findings that would require an evidentiary hearing, which contradicts the judicial economy purpose of alternative dispute resolution processes.

A strictly mandatory program, with no exceptions at all, should not be implemented. For cases in which alternative dispute resolution is inappropriate or even dangerous, an opt-out provision is absolutely necessary for the safety of not only the parent who is abused but others involved in the case. Also, the agreements reached in such cases would rarely be in the children's best interest, nor are they likely to be safe for the parent who is abused and the children.

Further, even for those jurisdictions that have a mandatory provision with no exceptions at all and that cannot amend that provision to align with the model section or the alternative section set forth in this commentary, above, the remaining provisions will still improve the safety of the process for survivors. Subsection (4)(b) can be deleted, along with other references to a voluntary process or opt-out provision, leaving the rest of the section intact. In particular, the following requirements will help improve the process's safety and increase the likelihood that any agreements are safe, workable, and reached without intimidation to the parent who is abused:

- screening to identify domestic abuse,
- assessment of its nature and context, as well as the impact of the abuse on the process,
- orientation with a full explanation of the process,
- additional safety measures and adjustments as warranted,
- training on domestic abuse for alternative dispute resolution professionals, and
- inquiry by the judge if an agreement on its face appears unsafe or not in the children's best interest.

Subsection (4)(c) requires the availability of safety measures. These can include, among many other options, shuttle mediation, a support person, the presence of a security person, separate waiting areas, staggered arrival and departure times, seating arrangements so that the abused parent is not within the abusive parent's reach, and ensuring that the abused parent has a safe, easy escape method if it becomes necessary.

The fifth subsection imposes a duty on the alternative dispute resolution professional to determine whether safety measures would be sufficient to protect the abused parent in a particular case. If not, the professional must decline to engage in the process in that case.

To make that determination, the sixth subsection requires the professional to conduct screening to identify possible domestic abuse, and if detected, to assess the nature and context of the abuse and its impact on the alternative dispute resolution process. The screening must be done separately with each party to promote candor and prevent possible danger or intimidation. The professional must also provide an orientation that fully describes the process, including the prerequisites for a successful process, advantages and disadvantages of the process, available safety measures, the existence of an opt-out provision, and the consequences on case resolution of reaching an agreement. This process allows each party to make an informed decision regarding whether to engage in the alternative dispute resolution process, and if so, what safety measures may be appropriate.

The seventh subsection requires the professional to ensure that the parties understand fully the consequences of an agreement, in particular that it finally resolves the case and that it cannot be easily changed. The language regarding the standard for modification may be altered to reflect the law in a particular jurisdiction on that issue.

The eighth subsection focuses on responding to an agreement that on its face does not appear to serve the best interest of the child or appears manifestly unsafe by not incorporating the agreement without addressing these concerns. The intent is not to ask the judge to second-guess the parties, but if an agreement appears to pose clear safety risks to the parent who is abused or children, or if the agreement on its face does not appear to be in the children's best interest, this subsection imposes a duty on the judge to make further inquiry, which would typically occur at a hearing with notice to the parties. If, after such inquiry, the judge's concerns have not been adequately addressed, the judge should refuse to approve the agreement and should order such additional proceedings as appear warranted in the particular case.

The structure of statutes and court rules in a particular jurisdiction may indicate that this section, or portions of it, may be more suitable for court rules than a statute. Also, a jurisdiction may wish to set forth further detail in a court rule implementing this section to reflect local practice.

Section 407. Relocation

Section 407. Relocation to a new state of child whose custody is governed by court order.

1. **Applicability.** The requirements provided in this section apply only when a parent having custody pursuant to a court order relocates or intends to relocate to another state with the child. Nothing in this section shall prevent a parent from relocating with a child in the absence of a court order governing custody, including during the pendency of a court proceeding addressing custody.

2. **Temporary relocation for safety.** If this section applies to a relocation and it is necessary for a parent to relocate with a child to be safe from the threat of domestic abuse, the parent may do so until the court makes a determination under this section.

3. **Notice.**

   (a) Subject to the exemption for cases involving domestic abuse set forth in Subsection 3(b) below, a parent intending to relocate must provide written notice to the other parent no fewer than 30 days prior to the intended relocation date.

   (b) A parent is exempt from the requirement for written notice in Subsection 3(a) where the parent has been a victim of domestic abuse or for other good cause.

4. **Presumptions in favor of relocation.**

   (a) A parent with a final child custody order has a right to change the residence of the child, subject to the power of the court to restrain a removal that would, on balance, prejudice the rights or well-being of the child more than it benefits them.

   (b) There is a presumption that the court shall approve the relocation plan if the court determines that the parent's relocation is related to safety or flight from abuse.

   (c) There is a presumption that the court shall approve the relocation plan if the objecting parent has not significantly exercised court-ordered custody or parenting time.

5. **Factors to be considered.** Subject to the presumption(s) set forth in Subsection 4, in determining whether to permit the relocation, the court shall consider the following factors:

   (a) Whether the relocation will increase the physical or psychological well-being of the relocating parent or child;

   (b) Relationships with both parents, siblings, and other significant persons;

   (c) The age, developmental stage, and needs of the child and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any safety or other special needs of the child;

   (d) Whether the relocation will enhance the general quality of life for the parent seeking the relocation (e.g., financial or emotional benefit or employment or educational opportunity);

   (e) Whether the relocation will enhance the general quality of life for the child, (e.g., financial or emotional benefit or educational opportunity); and

   (f) Domestic abuse, regardless of whether the abuse was directed against the child or the child was exposed to or experienced the domestic abuse.

Commentary

Parents who are abused seek to relocate to new geographic locations for many reasons related to their own and their children's safety. Increased risk associated with leaving a relationship ("separation violence"), abusive parents' familiarity with abused parents' daily routines in the community, inability to find safe housing and employment, as well as financial and emotional support available from friends and family in a refuge location all contribute to the need for relocation. Unfortunately, relocation laws in many states impose requirements upon custodial parents that can make it extremely difficult or impossible for abused parents to protect themselves and their children by relocating to new communities. This section is intended to remove unnecessary obstacles to relocation in cases involving domestic abuse, while protecting the rights of noncustodial parents and ensuring that the move would be in children's best interest, taking the abuse into account.

Unlike other sections of the Revised Chapter Four of the Model Code, this section is intended to cover all cases, whether or not domestic abuse is an issue in the case. A courts' relocation decisions should appropriately account for domestic abuse by permitting parents who are abused to relocate for purposes of escaping the abuse and achieving safety and autonomy in a new location. Integrating the protections set forth in this section into the statutory schemes of existing relocation laws may be difficult, so the language in this section is intended to replace existing relocation laws and include the requirements and standards applicable to any relocation, even if domestic abuse has not been alleged.

If replacement of existing relocation laws is deemed not to be feasible or desirable, it is suggested that revisions be made to incorporate the following critical elements: (1) Language clarifying that the relocation law applies only after a custody determination has been made (Subsection 1); (2) A provision providing for temporary relocation for safety reasons (Subsection 2) (3) An exemption from notice requirements when domestic abuse is the reason for the relocation (Subsection 3(b)); (4) The presumptions in favor of relocation (Subsection 4); and (5) The inclusion of a factor related to domestic abuse in the factors to be considered (Subsection 5(f)).

Existing relocation laws vary in the degree to which domestic abuse must be accounted for in courts' relocation decision-making. This section

incorporates protections for parents who are abused found in existing state laws that best address domestic abuse and is intended to elevate the safety, economic, and other special needs of parents who are abused and their children, while also including the other factors courts use to ensure that a relocation is in the best interest of children.

In some states, the relocation law applies even in the absence of an existing custody order; this section limits its applicability to cases in which an order has been entered granting custody to the relocating parent. Where a court order provides for a shared custody arrangement, or divides legal (decision-making) and residential custody in different ways, the provisions in this section would apply to a parent to whom any rights of custody have been granted; thus, it may be applicable to a relocation by either parent under some circumstances.

This section is limited to relocation with children across state lines. Some states' relocation requirements apply to intrastate relocations beyond certain distances; if so, the provisions of this section should be adopted to govern such relocations as well.

In recognition of the fact that parents who are abused may need to relocate quickly in an emergency, this section permits temporary relocation with children in advance of a court determination regarding permanent relocation, even if a court case addressing custody is pending. Absent a court order, the requirements of this section do not apply, so a parent may seek refuge in a new state with a child without seeking permission of a court. If this section does apply (i.e., a court order has been entered addressing custody), Subsection 2 clarifies that a parent who is abused may relocate for safety on a temporary basis before the court makes its final determination regarding relocation.

As is true of many protections provided by the Revised Chapter Four of the Model Code, parents who are abused generally are not aware of their existence, pointing to the critical need for legal services for parents who are abused.

A standard practice in some states is the issuance of an interim order in custody cases prohibiting relocation with children during the pendency of the case. This section does not include such a provision to avoid the unintentional consequence of further endangering victims of domestic abuse and their children by preventing them from seeking safety in another state while the case proceeds.

This section imposes a notice requirement on the parent seeking to relocate, but includes an exemption for victims of domestic abuse, as is found in several states' relocation laws. If the noncustodial parent asserts that a parent who is abused violated the notice requirement by relocating without providing the notice required under Subsection 3(a), the court should waive the requirement if it finds that the relocating parent is a victim of domestic abuse. The noncustodial parent would otherwise be able to oppose the relocation when they learn about it, and the court would determine whether to permit the continued relocation in light of the factors set forth in Subsection 5.

In cases in which a court has entered a temporary custody order during the pendency of a case, the exemption is applicable if the relocating parent has been a victim of domestic abuse, and notice of relocation, therefore, is not required.

This section does not dictate the form of notice, how it must be delivered or served upon the other parent, or the specific information to be included in the notice of relocation. States are free to impose their own requirements regarding these elements.

The court's decision regarding relocation under this section is subject to three presumptions in favor of relocation (which have been adopted by existing statutes in some states): a general presumption that the custodial parent may relocate with the children, subject to a contrary finding by the court that a child's rights or well-being would be jeopardized; a presumption that relocation should be permitted if it is found to be related to abuse of the custodial parent; and a presumption in favor of relocation in cases where the noncustodial parent has failed to exercise court-ordered custody or parenting time with a child. These presumptions may be rebutted based upon an argument that the relocation would not be in the best interest of the child in light of the relocation factors listed in Subsection 5. Subsection 4(a) provides that the court may deny a relocation, despite the presumption, if it would "prejudice the rights or well-being of the child." Courts should not assume that any limitation on contact between the child and non-relocating parent that results from relocation would per se prejudice the well-being of the child. In cases involving domestic abuse, an assessment of the nature, context, and effects of the abuse and the likelihood of its continuation is likely to indicate that the relocation would enhance the child's well-being. Even in cases in which the court determines that there may be a detrimental effect on the child of more limited contact

or resulting from the logistics of arranging interstate exchanges (e.g., transportation and travel), these may be outweighed by the benefits for the child of the relocation and should not overcome the presumption in favor of relocation.

The relocation factors set forth in Subsection 5 are intended to be the exclusive factors to be applied in relocation cases, not the more general best interest factors addressing custody and parenting time. Some state statutes do require a full best-interest assessment in relocation cases. This section does not incorporate that approach because the enumerated relocation factors include the most relevant considerations specific to relocation of children, and the other best interest factors already have been applied in the original custody case and should not be relitigated.

Some existing statutes include as a factor whether the relocation will permit a relationship with the non-relocating parent; courts must recognize that in cases involving domestic abuse this factor must be assessed in light of the abuse and that efforts to maintain a relationship may reasonably be limited or not possible based on the nature, context, and effects of the abuse. In addition, courts must consider whether economic abuse makes it impossible for the relocating parent to facilitate parenting time.

It should be noted that statutory protections for parents who are abused designed to facilitate relocation for safety, akin to those included in this section of the Revised Chapter Four of the Model Code, have been codified by almost every state as part of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[103] Specifically, the UCCJEA includes:

- A provision authorizing a court in a refuge state to exercise temporary emergency jurisdiction over a custody matter to protect a child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.[104]
- A provision mandating that when a court considers whether to decline its jurisdiction over a custody matter in favor of another court (often in a refuge state), the court must determine whether domestic abuse

[103] Nat'l Conf. Comm'r Unif. St. L., *Uniform Child Custody Jurisdiction & Enforcement Act* (UCCJEA) (1997).

[104] *Id.*

has occurred and is likely to continue in the future, as well as which state could best protect the parties and the child.[105]

- Commentary noting that "[d]omestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal."[106]
- A provision requiring sealing of identifying information regarding a parent or child if disclosure would jeopardize their health, safety, or liberty.[107]
- A provision authorizing a court that orders a parent or child to appear for a court hearing to enter any orders necessary to ensure the safety of the child or parent. Commentary to that provision notes that "[i]f safety is a major concern, the court, as an alternative to ordering a party to appear with the child, could order and arrange for the party's testimony to be take in another State… This alternative might be important when there are safety concerns regarding requiring victims of domestic violence or child abuse to travel to the jurisdiction where the abuser resides."[108]

[105] *Id*. at § 207.
[106] *Id.* at § 208 (commentary).
[107] *Id.* at 109(e).
[108] *Id.* at 210(c) and commentary.

Section 408. Modification and Enforcement

Section 408. Modification and enforcement of custody/parenting time orders.

1. **General Provisions**.

   (a) Upon issuance of any order addressing custody and parenting time, the court shall provide the parties with written information regarding the processes available to obtain enforcement and modification of the order.

   (b) Any alternative dispute resolution required or offered for modification or enforcement of custody and parenting orders must satisfy the requirements set forth in Section 406.

2. **Modification**.

   (a) When a request to modify a custody and parenting time order includes an allegation of domestic abuse, the court shall make the requisite findings regarding whether the requested modification would be in the best interest of the child using all of the standards set forth in Section 402(1), (2), and (3).

   (b) When a request to modify a custody and parenting time order includes an allegation that a child resists, refuses, or shows reluctance toward contact with a parent, the court shall assess the allegations as set forth in Section 402(8).

   (c) In any modification to a custody and parenting time order in which domestic abuse is an issue, the court shall consider including provisions that promote the child's safety, recovery, and resilience, as set forth in Section 402(4).

   (d) Subject to the jurisdiction's legal standard around modification, when ruling upon a request to modify or eliminate conditions in a custody and parenting time order related to supervised visitation or exchange for the parent who is abusive, in conducting the best interest of the child analysis required in Subsection 2(a), the court should consider the following factors:

(1) Information related to any behaviors by the parent who is abusive during parenting time or exchange that cause concerns for the safety and physical or psychological well-being of the child or the parent who is abused;

(2) Information about critical incidents associated with the supervised visitation or exchange;

(3) Record of past and current compliance with court orders;

(4) How any proposed modification of the terms of the court order or removal of required supervision for visitation or exchange will promote the physical and psychological well-being of the child and the safety of the victim parent;

(5) Other pending legal filings or cases involving the same parties or the children; and

(6) Whether a parent who is abusive has genuinely acknowledged past harm and committed to avoiding it in the future and made the necessary changes that address the reasons for ordering the supervised visitation or exchange. A parent's compliance with the requirements for participation in supervised visitation or exchange does not by itself constitute evidence that they have made the requisite changes.

(e) The court shall make specific findings on the record regarding its decision on the request to modify a court order.

3. **Enforcement.**

(a) The court should conduct compliance review hearings after issuance of a custody and parenting time order in appropriate cases.

(b) The court may compel the parent subject to the order to appear at a compliance review hearing; the court shall not compel the other parent to appear, but that parent has a right to be heard at the hearing if they so request.

(c) Remedies for violations of custody and parenting time orders may include the following:

(1) If a court is considering a modification of custody and parenting time as a remedy for a violation, it shall make the requisite findings regarding whether the modification would be in the best interest of the child using all of the standards set forth in Section 402(1), (2), and (3);

(2) If a parent alleges a violation based upon a child's resistance, refusal, or reluctance toward contact with that parent, the court shall assess the allegations as set forth in Section 402(8);

(3) In addressing an allegation of unjustifiable denial of parenting time, the court shall reject the allegation if it determines that the parent who denied parenting time did so as a means to protect themselves or their children from the risk of harm posed by the other parent; and

(4) As a remedy for violation of a custody and parenting time order, the court shall consider modifying the order to include provisions that promote the child's safety, recovery, and resilience, as set forth in Section 402(4), and ordering the parent who violated the order to pay for any interventions or services resulting from or exacerbated by any domestic abuse, including counseling for the child or parent related to the abuse.

Commentary

Modifications

Under most, but not all, state statutes addressing modification of custody and parenting time orders, the parent requesting modification must meet a threshold requirement that a "substantial change in circumstances" (or similar standard) has necessitated the proposed change. This revised section of Chapter Four of the Model Code does not include such a provision under the assumption that the existing standard will remain in effect even if the provisions of this section are enacted. However, states may wish to consider adopting a provision stating that a new domestic violence offense constitutes the requisite change in circumstances under the statute.[109]

Subsection 2(a) clarifies that a court considering a modification request based upon an allegation of domestic abuse must conduct the same best interest of the child analysis specified in Section 402(1), (2), and (3). This includes consideration of and fact-finding regarding the nature and context of the domestic abuse involving the parents and experienced by the child, relevant parenting behaviors, including the support by the parent who is abusive of the child's relationship with the non-abusive parent and support by the parent who is abusive of the parental role of the non-abusive parent, information about risk of harm to the parent who is abused and the child, and the effects on the child's physical and psychological well-being. It also requires a consideration of the effects of the domestic abuse on all of the best interest factors.

Similarly, Subsection 2(b) specifies that in the modification context courts must engage in the same required analysis regarding allegations that a child resists, refuses, or shows reluctance toward contact with a parent. Subsection 2(c) incorporates into the modification context the requirement that the court consider provisions intended to promote the child's safety, recovery, and resilience, including the examples provided in Section 402(4).

Subsection 2(d) addresses modification requests seeking reduced restrictions on parenting time by the parent who is abusive, specifically in the context of supervised visitation or exchange. As with any modification request under this section, the court must conduct the best interest analysis

[109] *See, e.g.,* ALASKA STAT. § 25.20.110(c).

set forth in Subsection 2(a) and Section 402. The provisions in this subsection require that the analysis include specific elements that are relevant in the context of supervised parenting time, based on the history of the abusive parent's participation and conduct in the supervised setting, their compliance with court orders, and any relevant information from other criminal cases. Importantly, the best interest analysis must take into account whether there has been any change in the abusive parent that supports a lessening of restrictions, including acknowledgement of the harm they have caused and evidence of a commitment to avoiding future harm. Mere compliance with the court's order and with the requirements of the supervision does not itself meet this standard. Rather, the court should use multiple sources of information to assess change.[110] Questions to examine, as described by Bancroft and Silverman, include whether or not the abusive parent has: "made full disclosure of [their] history of physical and psychological abuse"; "recognized that abusive behavior is unacceptable"; "recognized that abusive behavior is a choice"; "show[n] empathy for the effects of [their] actions on [their] partner and children"; "identif[ied] what [their] pattern of controlling behaviors and entitled attitudes has been"; and "replaced abuse with respectful behaviors and attitudes," showing that they are "willing to make amends in a meaningful way."

Courts should be willing to consider evidence of domestic abuse that occurred before issuance of the original order in determining whether a modification would be in the best interest of a child.[111] Courts should consider developing an instruction packet for petitions to modify custody and parenting time orders to facilitate self-represented litigants' access to the modification process.[112]

Enforcement

Compliance review hearings: Examples of cases for which compliance review hearings would be appropriate include those in which there is a history of noncompliance with court orders and where the court has ordered specific interventions (for instance child support or firearms surrender) or services related to domestic abuse or parenting (for instance,

---

[110] Lundy Bancroft & Jay G. Silverman, *Assessing Risk to Children from Batterers*.
[111] Nance v. Ferraro, 418 P.3d 679 (Ct. App. Nev. 2018).
[112] *See, e.g.*, Minn. Cts.*, Instructions: Request to Change Child Custody* (2020).

abusive partner intervention programs, mental health or substance use counseling, and supervised visitation or exchange) for which service providers can provide information and testimony to the court. In addition, cases in which both parents are unrepresented may be appropriate for compliance review because a parent seeking enforcement or modification of orders may not understand how to do so or may encounter other significant challenges in bringing an enforcement or modification action. Optional participation enables the parent who is abused who so desires to raise or provide evidence of other enforcement issues. Courts should consider requests by the parent who is abused that compliance hearings be held, but should not require that the abused parent participate in the hearing.[113]

In the enforcement context, courts should take into account the practical barriers that may have contributed to the failure to comply with orders. For instance, where transportation barriers or financial resources prevent compliance with a parenting time arrangement or schedule, rather than unduly punishing a parent for the violation, the court should consider modifications of the terms and conditions of the order that can mitigate or eliminate the barriers. In addition, as explained in the Parenting Time and Visitation Section (Section 404), careful tailoring of parenting time provisions to account for these challenges and ensure the feasibility of the arrangement can help to set parents up for successful compliance and prevent enforcement actions.

Subsection (3)(c)(1) clarifies that, as in other modification contexts, a court considering whether to modify a custody and parenting time order in response to a violation must conduct the same best interest of the child analysis specified in Section 402(1), (2), and (3) of this Chapter. As previously explained in the commentary to this section, this is a

---

[113] For information regarding the implementation of compliance review hearings by civil courts in domestic violence cases, *see* NCJFCJ, *Spotlight on Promising Practices Around Protection Orders: DeKalb County Compliance Review Docket* (2020); Ctr. Ct. Innovation, *Promoting Compliance in Domestic Violence Cases: A Morning with Judge Jerry Bowles* (2015); Ctr. Ct. Innovation, *Compliance Monitoring in Domestic Violence Cases: A Guide for Courts* (2019).

multifaceted analysis that includes assessing the nature and context of the domestic abuse involving the parents and experienced by the child, relevant parenting behaviors, information about risk of harm to the parent who is abused and the child, and the effects on the child's physical and psychological well-being. It also requires a consideration of the effects of the domestic abuse on all of the best interest factors.

Subsection (3)(c)(2) incorporates in the enforcement context the analysis required by Section 402(8) whenever an allegation is made that a child resists, refuses, or shows reluctance toward contact with a parent.

Not all states statutorily define unjustifiable denial of parenting time as a violation of a custody and parenting time order; for those that do, or for states in which judges use their implicit authority to deem unjustifiable denial of visitation to violate an order, Subsection (3)(c)(3) should be adopted to specify that courts must assess whether or not the denial of parenting time was for safety purposes to protect against harm to the parent who is abused or children.

Subsection (3)(c)(3) is intended to ensure that courts determine whether the conduct giving rise to an enforcement action is a result of a parent's effort to protect themselves or their children from the risk of harm posed by the other parent. Such an enforcement effort should be rejected, as should any criminal or civil charges of interference with custody or contempt, if it is determined that the parent who denied visitation did so as a means to protect themselves of their children.

Subsection (3)(c)(4) ensures that where a modification to the custody and parenting time order is used as a remedy for a violation, the court will consider provisions set forth in Section 402(4) intended to promote child safety, recovery, and resilience, and will order the parent who violated the order to pay for any required interventions or services. This is consistent with the Revised Chapter Four of the Model Code's requirements for all modifications set forth in this section.

Section 409. Child-Related Relief in Civil Protection Orders

This new section is added to the Revised Chapter Four of the Model Code to make the child-related relief provisions consistent throughout the Model Code. Amendments to Section 306 in the original Chapter Three of the Model Code follow.

Section 409. Effect of orders of protection concerning the same parties.

1. The court shall take into account the existence of the order for protection and any relevant findings from such a case in determining whether domestic abuse has occurred and the nature and context of that abuse. If the court finds that either or both parents petitioned for but were denied an order for protection on the merits, it nonetheless shall consider any admissible evidence of domestic abuse in determining custody and parenting time.
2. The court should make all findings regarding any history of domestic abuse and how such findings factor into the protection order, custody, or parenting time decision as part of the case record and included in any written opinion.

Section 306. Order for protection; modification of orders; relief available ex parte; relief available after hearing; duties of the court; duration of order.

…

2. A court may grant the following relief without notice and hearing in an order for protection or a modification issued ex parte:

…

(g) Temporary legal or physical custody of any minor children to the petitioner, regardless of whether or not an existing custody and parenting time order is in effect or a case addressing custody and parenting time is pending in the same or another court in this jurisdiction.

(1) In determining whether to grant temporary custody, the court shall consider as primary the safety and well-being of the minor children or the petitioner.

(2) Only upon request of the petitioner, the court may grant parenting time for the respondent; in determining whether to do so, the court shall consider as primary the safety and well-being of the minor children or the petitioner.

(3) If a custody and parenting time order is in effect or a case addressing custody and parenting time is pending, the court shall inform the other court and provide it with a copy of the ex parte order.

(h) Order the respondent to continue to pay the existing expenses of any minor children, including medical, child care, and recreational expenses;

(i) Refrain from removing, hiding, damaging, harming, or mistreating, or disposing of a household pet; and ….

3. A court may grant the following relief in an order for protection or a modification of an order after notice and hearing, whether or not the respondent appears:

…

(b) Specify arrangements for parenting time with any minor child by the respondent, regardless of whether or not an existing custody and parenting time order is in effect or a case addressing custody and parenting time is pending in the same or another court, provided:

(1) The court identifies any risks and dangers of parenting time and visitation to both children and the parent who is abused;

(2) The court addresses those risks and dangers in its order, which may allow unrestricted access, deny visitation altogether, or include specific terms and provisions for visitation that account for any identified safety concerns, including requiring supervision of any visitation by a

qualified third party (for example, a supervised visitation and safe exchange center);

(3) If an existing custody or visitation order issued by a court in this jurisdiction is in effect at the time of issuance of the order for protection, the court issuing the order for protection:

(A) inform the other court and provide it with a copy of the order;

(B) indicate on the face of the order for protection that the custody and parenting time provisions of the order shall take precedence over the existing order until the order for protection expires (or is superseded); and

(C) refrain from including a deadline or expiration date in the order by which time the parties must seek a long-term custody and parenting time order from the appropriate court.

(4) If a case addressing custody or visitation is pending in a court in this jurisdiction at the time of issuance of the order for protection, the court issuing the order for protection must inform the other court and provide it with a copy of the order. The custody or visitation provisions of the order for protection shall remain in effect until the order for protection expires or until the court with jurisdiction over the long-term custody case issues a final custody or visitation order and explicitly states that the order supersedes the provisions of the order for protection.

(5) If a protected person requests a modification of a provision of an order for protection addressing custody and parenting time, the court shall make its decision using the standards set forth in Section 306 3(b) above

regarding the initial safety-focused determination of whether to include a custody/parenting time provision.[114]

4. Requests for dismissals of protection orders.

   (a) When the protected person requests that the court dismiss a civil protection order issued under this Chapter, whether the order has been issued ex parte or after a hearing, the court should take steps to understand the reason for the request, determine whether the request was made in response to threats or coercion, and ensure that the protected person has had an opportunity to discuss the request with a domestic violence advocate.

   (b) The court should recognize the civil nature of protection orders and the importance of victim autonomy in ruling on the request.

   (c) The court should explain to the protected person that they may seek a modification that addresses their needs as an alternative to dismissal of the order, and that if the order is dismissed, the protected person may return to the court to seek relief.

[114] **Codification note:** If existing law requires a best interest of the child analysis for modification of the provision, Section 306 3(b)(5) should read: “If a protected person requests a modification of a provision of an order for protection addressing custody/parenting time, the court shall make its decision using the standards set forth in Section 306 3(b) above regarding the initial safety-focused determination of whether to include a custody/parenting time provision and the best interest of the child analysis set forth in Section 402 for its decision-making.

Commentary

Granting custody and parenting time relief as part of orders for protection provides for the safety and well-being of victims and their children at a critical stage. This section reflects a safety-first focus for child-related relief in civil protection orders, elevating safety considerations above the other factors that govern long-term custody and parenting time decision-making by courts. Research suggests that when victims take steps to separate from their abusive partners, the risk of violence is elevated significantly. Among other benefits, granting custody to the petitioner protects children from the short and long-term effects of exposure to domestic violence.[115] In addition, such relief facilitates recovery from trauma, protects parents who are abused from parents who are abusive and who use children to maintain contact with and exert power and control over them, and confirms the abused parent's parental authority and provides support for their parental role.

Carefully crafted parenting time provisions provide additional benefits, in appropriate cases. These include setting clear parameters for safe contact between parents who are abusive and children, limiting any communication between the parents to those communications that are likely to be safe, and imposing tailored protective measures, including supervised visitation or safe exchange, to protect parents who are abused and children.

In recognition of the critical role of establishing parameters around custody and parenting time in orders for protection, this section explicitly contemplates that courts will provide such relief where requested and appropriate—even during the pendency of a case addressing long-term custody. This section defines the relationship between custody and parenting time relief in orders for protection and existing orders or pending actions addressing custody and parenting time in courts responsible for issuing long-term orders. The provisions in this section emphasize communication between the courts and clarify which court order supersedes the other existing orders.

Where custody litigation is pending, parents seeking protection should also have the alternative of seeking an emergency court order from the court hearing the long-term custody case. Courts should provide ready access to

---

[115] *See* Peter G. Jaffe, et al., *Risk Factor for Children in Situations of Family Violence in the Context of Separation and Divorce*, pp. 12-13 (2014).

such orders, including by ensuring that petitions for emergency custody orders are available. Per the governing statute, standards for issuance of such orders may be different from those that apply in the context of civil protection orders. Courts should provide litigants with information about the process for obtaining emergency custody and parenting time orders, as well as how such orders may be enforced. However, because parents needing protection may face significant obstacles (such as lack of legal assistance or intimidation by the parent who is abusive) in obtaining emergency relief from the court hearing the long-term custody case, the protection order process must be considered the primary vehicle for doing so. Consequently, in jurisdictions in which child-related relief is available in protection orders, courts should not refuse to include such relief in protection orders in favor of referring litigants to the long-term custody court.

Note that the unique and important role played by child custody/parenting time provisions in orders for protection demands that courts make this relief readily available to petitioners and that the findings and determinations made in such actions should be respected by courts in subsequent proceedings addressing custody, as set forth in Section 402. In no way should petitioners who have sought custody/parenting time as part of an order for protection be penalized for this action. It is altogether inappropriate for courts to presume that the petitioner had an ulterior motive of obtaining an unjustifiable advantage in subsequent custody litigation.

This section does not explicitly address the issues of collateral estoppel potentially applicable when a litigant seeks to relitigate in a subsequent custody and parenting time case issues related to domestic abuse considered by the court in a civil protection order case. Rather than include a blanket rule that such issues are subject to preclusion on collateral estoppel grounds, it is noted that the court should carefully consider whether to deny a litigant's attempt in a custody/parenting time case to challenge the civil protection order court's findings.[116] For collateral estoppel to apply, the same issue must actually have been litigated by the same parties in the protection order case and it must have been essential to the judgment on the merits (which typically would be true).

Orders for protection to be considered by the court include sexual assault protection orders, stalking protection orders, and extreme risk prevention

[116] Doyle v. Doyle, 176 N.C. App. 547 (N.C. Ct. App. 2006).

orders (sometimes called gun violence protection orders), to the extent findings of abuse were made in issuing such orders.[117]

Section 306 2(g) recognizes that granting both temporary physical and legal custody can be crucial to protect parents who are abused and children. If only physical custody and parenting time is granted, the parents likely will be required to jointly make decisions concerning the child despite the presence of abuse that led to the issuance of the protection order.

The provisions regarding existing orders are intended to ensure that parents and children needing emergency protection are able to obtain it even if the court involved or another court has issued an existing order or if a case is pending. The cross-filing of a petition for a protection order is a tactic that abusers use against victim parents, so communication between courts, as specified in this subsection and in Subsection 3, is necessary to ensure that abusers are unable to successfully employ this tactic.

Subsection 2(g)(1) provides that child safety and well-being are the primary considerations for granting temporary custody and parenting time. At this emergency, ex parte stage, the provision does not require an assessment of the child's best interest more generally. Some state statutes do require a best interest analysis for the final protection order issued after a hearing. Many courts do not have the time or resources to conduct an in-depth best interest analysis as part of a protection order proceeding, but where such an analysis is undertaken, the court should be sure to assess each best interest factor in light of the abuse, considering safety and risk as paramount. The court should use the standards governing the best interest analysis in long-term child custody/parenting time cases set forth in Section 402.

Subsection 2(i) adds as available relief under an ex parte protection order a prohibition against threats and harm related to family pets. Such acts cause harm to children and should be considered where relevant in all civil protection order cases. The language used herein is adapted from Wisconsin law.[118]

---

[117] For additional guidance regarding child-related relief in civil protection order cases, *see* NCJFCJ*, Custody and Visitation in Civil Protection Orders: Guiding Principles and Suggested Practices for Courts and Communities* (Aug. 2, 2017).
[118] WIS. STAT. ANN. § 813.12(3) and (4).

Subsection 3(b)(3) provides that the court should have access to all existing court orders addressing custody/parenting time when it makes its decision. Upon expiration of the protection order, the protected person would need to seek a modification of the long-term order if necessary due to safety or other concerns.

The term “case addressing custody or visitation” in Subsection 3(b)(4) is meant to include any proceeding that includes a court determination of custody/parenting time of minor children. In some jurisdictions, this may include child protection or support cases, if the subsequent order includes provisions addressing custody/parenting time. This subsection would apply to those proceedings, including the communication requirement and the provision that the protection order remains in effect until expiration or until it is explicitly superseded by the child protection or child support order.

One concern identified involves cases in which the true victim is the respondent in the protection order. The language in Subsection 3(b)(4) would present a problem in such a case because it would bar the true victim from obtaining an emergency order from the court determining long-term custody/parenting time that would supersede the civil protection order which was issued against the victim. An alternative to consider is to address this problem is to provide that an emergency order of the court with long-term custody jurisdiction can supersede the civil protection order. However, this approach may create a similar problem by enabling the abusive parent to obtain an interim order superseding a civil protection order giving the abused parent custody. Clearly, regardless of the approach used to establish a hierarchy of protection orders and long-term custody/parenting time orders, the processes are susceptible to misuse by abusive parents. Consequently, communication and information sharing between the courts are critical to avoiding misuse of the process.

Although these revisions to Chapter 3 of the original Model Code on Domestic and Family Violence specifically address custody/parenting time provisions in orders for protection, other available forms of relief have a direct impact on children and parenting. For instance, courts should recognize the importance of ordering economic relief where authorized (including temporary child support, restitution, etc.), which can provide for economic security and increased safety and well-being for parents who are abused and children.

Subsection 4 addresses requests that the protected party may make for dismissal of orders for protection after issuance. Such requests can come

while either the ex parte or the final protection order is in effect, and they may raise concerns for the issuing court, including whether the parent and child will remain safe if the order is dismissed and whether the dismissal requested stemmed from coercion or threats made by the respondent. Although no one-size-fits-all approach works in these situations, the provision includes important safety measures that should be implemented when a dismissal request is made. In addition, the Battered Women's Justice Project has developed a worksheet, as part of its SAFeR resources, to help guide decisions to dismiss or modify orders.[119]

[119] BWJP, SAFeR.

Section 410. Education for Family Court Judges, Staff, and Practitioners

Section 410. Education and training for family court judges, staff, and practitioners.

1. Training on domestic abuse and child abuse should be included in the jurisdiction's required professional development, orientation, continuing education, and annual educational programs for judges and judicial officers, court staff, and practitioners working in the family court system. This is in addition to the training for experts required by Section 405 and the training for alternative dispute resolution professionals required by Section 406.

2. Training curricula should include at a minimum the following topics and should be offered at least annually:

   (a) Dynamics of domestic abuse, as defined in this Chapter;

   (b) Dangerous or lethal risk factors as defined in research on intimate partner violence and children;

   (c) Trauma associated with experiencing domestic abuse and trauma-informed responses;

   (d) Sexual violence;

   (e) Child abuse;

   (f) Implicit and explicit bias;

   (g) Systemic barriers to access to justice;

   (h) Cultural responsiveness in intimate partner violence cases;

   (i) Impact of domestic violence on diverse communities; and

   (j) Evidence-based and peer-reviewed research on responses that focus on enhancing the safety of children in custody and parenting time decision-making.

Commentary

Education plays a crucial role in developing effective approaches to domestic violence and should be provided as a core professional development requirement and as part of professional continuing education standards. Research suggests that education can have a positive impact on overcoming implicit bias and enhancing practices.[120] Training requirements for judicial officers, court staff, and family court practitioners vary by jurisdiction. The realities of domestic abuse and its effects on victims are often difficult for those working in the justice system to understand, especially when such behaviors seem counterintuitive.

Education provided by the National Council of Juvenile and Family Court Judges, subject matter experts, and those with lived experience can help address such gaps in knowledge and understanding.[121]

---

[120] Jerry Kang et al., *Implicit Bias in Courtroom,* 59 UCLA L. REV. 1124, 1172 (2012); Daniel G. Saunders et al., *Factors Associated with Child Custody Evaluators' Recommendations in Cases of Intimate Partner Violence*, 27(3) J. FAM. PSYCH. 473-83 (2013); L. Song Richardson & Phillip Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2645-46 (2013).

[121] For judicial resources and training opportunities, see NCJFCJ, National Judicial Institute on Domestic Violence; for subject matter resources and training opportunities, see Am. Bar Ass'n, Commission on Domestic & Sexual Violence; UJIMA, National Center on Violence Against Women in the Black Community, and LGBTQ Center Long Beach.

The NCJFCJ offers training and technical assistance on the Revised Chapter Four: Families and Children of the Model Code. The NCJFCJ provides educational opportunities (virtual and in-person) on topics related to parenting time/custody and domestic abuse. For more information and to request training and technical assistance on the Revised Chapter Four of the Model Code, please contact info@ncjfcj.org.