Florida's DOMESTIC VIOLENCE BENCHBOOK

September 2008

Office of the State Courts Administrator

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INTRODUCTION

Education enhances the knowledge and skills of the judiciary and therefore contributes to the administration of justice. To further assist in the administration of justice, the Office of the State Courts Administrator (OSCA), Office of Court Improvement (OCI), developed Florida's domestic violence benchbook in 2005 to address the highly litigated legal issues in domestic violence cases. OSCA created and continues to update the benchbook in order to assist both new and experienced judges in Florida who are assigned to hear domestic violence cases.

The benchbook features :

- Chapter 741 Flow Chart
- Checklists for Domestic, Sexual and Repeat Violence
- Domestic Violence Colloquy
- Domestic Violence Legal Outline
- Best Practice Model on Child Support in Domestic Violence Cases
- Summary of 2008 Legislative Session
- Comparison of Chapter 741 and 39 Injunctions
- Domestic Violence Related Articles and Publications

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

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

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

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DOMESTIC VIOLENCE BENCHBOOK

TABLE OF CONTENTS

CHAPTER 741 INJUNCTION FLOW CHART 3

I. FLORIDA'S INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE

Domestic Violence Injunction Case Process and the Issues Associated With Each Stage 5

Possible Warning Signs of Domestic Violence 7

Consequences for Respondent Once a Final Injunction for Protection Against Domestic Violence is Entered 7

Protocol for Domestic Violence Injunction Hearings 8

Domestic Violence Checklist 9

Domestic Violence Colloquy 15

Best Practice Model on Child Support in Domestic Violence Cases 17

Florida Firearms Legal Summary for Domestic Violence Cases 23

Florida Firearms Checklist for Domestic Violence Cases 25

Civil Domestic Violence/Unified Family Court (UFC) Bench Guide 31

Related Unified Family Court Publications 45

II. DOMESTIC VIOLENCE LEGAL OUTLINE

Domestic Violence – Background and Definitions: 47

Domestic Violence – Civil Proceedings: 57

Evidence: 117

Domestic Violence – Criminal Proceedings: 147

III. APPENDICES

Ordering An Evaluation: When is Domestic Violence Expertise Necessary? 179

Florida's Four Orders of Protection Against Violence: Distinguishing the Difference 187

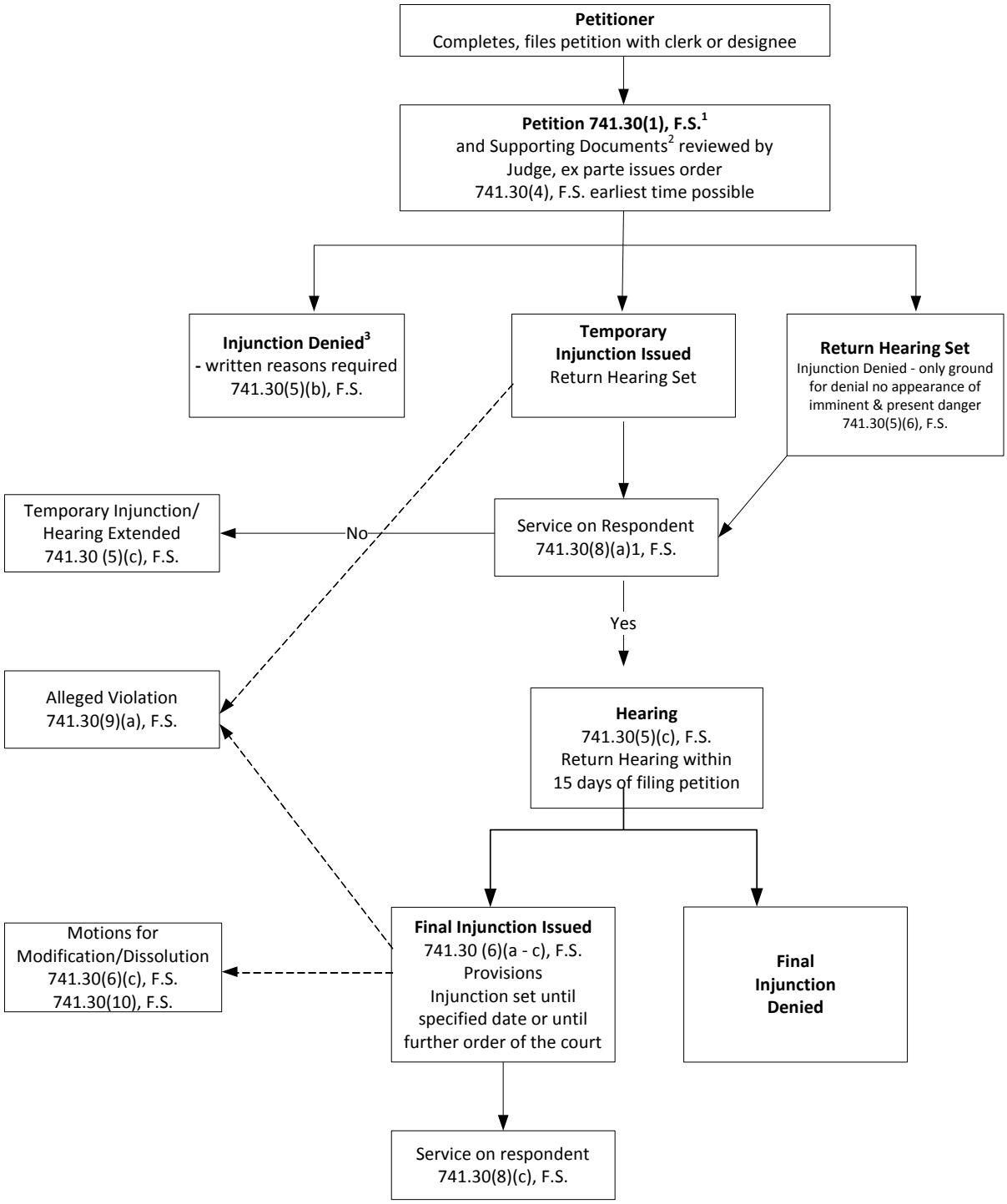
Dating Violence Checklist 197

Sexual Violence Checklist 203

Repeat Violence Checklist 209

Summary of 2008 Legislative Session 215
Comparison of Injunctions Under Chapter 39 and Chapter 741 219
Chapter 39 Injunctions 221
Domestic Violence and Housing Protections in the Violence Against Women Act 223
Security: A Model Family Court Essential Element 227

CHAPTER 741 INJUNCTION FLOW CHART



[1] Statutory citations are from the 2007 statutes
[2] Supporting Documents - UCCJEA, Financial Affidavit, Confidential Address, Child Support Guidelines Worksheet
[3] Petitioner may refile/submit supplemental affidavit

THE PETITIONER MUST BE A VICTIM OF DOMESTIC VIOLENCE OR IN IMMINENT DANGER OF BECOMING A VICTIM OF DOMESTIC VIOLENCE.

§741.30(1)(a), Florida Statutes.

Domestic violence includes:

assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death to one family or household member by another family or household member. §741.28(2), Florida Statutes.

Whether the respondent engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence. §741.30(6)(b), Florida Statutes.

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

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

FLORIDA INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE

TABLE OF CONTENTS

Domestic Violence Injunction Case Process and the Issues Associated With Each Stage 5
Possible Warning Signs of Domestic Violence 7
Consequences Once a Final Injunction for Protection Against Domestic Violence is Entered 7
Protocol for Domestic Violence Injunction Hearings 8
Domestic Violence Checklist 9
Domestic Violence Colloquy 15
Best Practice Model on Child Support in Domestic Violence Cases 17
Florida Firearms Legal Summary for Domestic Violence Cases 23
Florida Firearms Checklist for Domestic Violence Cases 25
Civil Domestic Violence/Unified Family Court (UFC) Bench Guide 31
Related Unified Family Court Publications 45

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

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

Stages	Issues

First:
Petition filed for protection from domestic violence
	• Access to court/courthouse
	• Employment, children, transportation, office hours
	• Completion of forms – usually pro se
	  ○ Lengthy, confusing forms
	  ○ Language/literacy
	  ○ Denial/minimization of abuse as survival strategy
	  ○ Emotional upset/agitation

Second: Court issues ex parte order granting or denying temporary injunction; return hearing set	• Increased danger • Safety of persons and pets • If temporary injunction issued respondent is served with injunction and notice of hearing – often, a very angry reaction • Most dangerous time for petitioners/victims – separating or attempting to separate from partner • Especially dangerous if court has scheduled a hearing without issuing a temporary injunction

Third: Court holds return hearing to determine whether final injunction will be granted	• Access to court/courthouse • Employment, children, transportation • Safety of persons and pets • Threats, violence to coerce petitioner to drop case • Courthouse/courtroom safety issues • Respondent's access to children through shared custody • Unsupervised visitation • Firearms issues • Family support • Custody and visitation provisions • Child support/alimony • Counseling, other services for victim and children (not part of injunction order)
Fourth: Enforcement of compliance with terms of injunction	• Safety • No contact • No violence • Firearms surrender • Treatment/family support • BIP/other treatment for respondent • Custody and visitation provisions • Child support/alimony • Fear – who is responsible for tracking and enforcing compliance? (Often, it turns out to be the petitioner)

POSSIBLE WARNING SIGNS OF DOMESTIC VIOLENCE

Respondent's:

- Prior violence
- Psychological factors – acute depression, psychiatric history, extreme isolation, lack of support systems
- Increase in frequency and escalation in severity of violence
- Preoccupation, obsession, possessive with the victim
- Threats, fantasies, or attempts to kill or harm self or others
- Prior criminal behavior or injunctions
- Weapons owned by respondent, threats to use weapons, or recent purchases of weapons
- Substance abuse
- Choking, strangling
- Child abuse
- Stalking
- Animal abuse

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

- Injunction may require limited visitation with children, supervised visitation, the respondent to leave the residence, and/or pay support for minor children and/or petitioner.
- Under both state and federal law the respondent is prohibited from possessing firearms and ammunition.
- Law enforcement officers or anyone employed in a position that requires the use of weapons may be affected.
- Respondent's current employment status or employment applications may be affected.
- Professional licenses may be affected.
- Entry into the military may be affected.
- Admission to schools, colleges, and universities may be affected.
- Violation of a final injunction may affect a resident alien's application for citizenship, and may result in deportation if respondent is not a citizen.
- Final injunctions are enforceable in all fifty states, under the Full Faith and Credit Clause.
- Violation of a final injunction may result in arrest and charge of a first degree misdemeanor for each violation with a maximum sentence of one year under Florida law.
- If the respondent stalks the petitioner who has an injunction against him/her, the respondent may be charged with a second degree felony.

PROTOCOL FOR DOMESTIC VIOLENCE INJUNCTION HEARINGS

DO:

- ☑ Use a courtroom rather than chambers for domestic violence injunction hearings and do have law enforcement officers present.
- ☑ Physically separate the petitioners and respondents in the waiting area and in the courtroom to ensure that there is no communication between them.
- ☑ Have the petitioners leave the courtroom before the respondents in order to lessen the risk of post-hearing danger.
- ☑ Use the services of a victim advocate in the courtroom.
- ☑ Timely grant temporary child support and award ancillary relief where it is appropriate.
- ☑ Carefully address visitation issues, keeping in mind safety of the parties and the children.
- ☑ Use the services of any available supervised visitation center when ordering that visitation must be supervised.
- ☑ Exercise your powers of civil contempt and indirect criminal contempt to enforce the domestic violence injunction.
- ☑ Let parties know that child support and visitation is temporary because it will terminate when the final injunction ends or when ordered in a related civil case. If they want request permanent child support and/or visitation they may file a different civil case/cause of action.

DO NOT:

- ∅ Issue mutual injunctions.
- ∅ Order the petitioner to attend a batterer intervention program.
- ∅ Substitute an anger control program for a statutorily required certified batterer intervention program.
- ∅ Fail to order a respondent to complete a batterer intervention program merely because the respondent has a job which requires out-of-town work or long hours.
- ∅ Refer any case to mediation if there is a significant history of domestic violence between the parties which would compromise the mediation process.
- ∅ Award child custody, child support, or visitation rights to anyone who is not a legal parent, an adoptive parent, or a guardian by court order of a minor child or children.

DOMESTIC VIOLENCE CHECKLIST

STANDING

☐ **Petitioner and respondent must be family or household members. §741.30(1)(e), Florida Statutes.**

- "Family or household member" means spouses, former spouses, persons related by blood or marriage, persons who are presently living together as if a family or who have lived together in the past as if a family and persons who are parents of a child together regardless of whether or not they have been married or lived together. §741.28(3), Florida Statutes.
- With the exception of persons who have a child in common, the family or household members must be currently residing together or have in the past resided together in the same single dwelling unit. §741.28(3), Florida Statutes.
- A minor child can file by and through a parent as "next best friend."

☐ **There is no minimum residency requirement.** A petition may be filed in the circuit where the petitioner currently or temporarily resides, where the respondent resides, or where the domestic violence occurred. §741.30(1)(j), Florida Statutes.

☐ **Petitioner must be a victim of domestic violence or in imminent danger of becoming a victim.** §741.30(1)(a), Florida Statutes.

- Domestic violence includes: assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death to one family or household member by another family or household member. §741.28(2), Florida Statutes.
- In determining whether petitioner has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence, the court must consider all relevant factors alleged in the petition for injunction for protection against domestic violence, including, but not limited to:
  - The history between the petitioner and the respondent, including threats, harassment, stalking, and physical abuse.
  - Whether the respondent has attempted to harm the petitioner or family members or individuals closely associated with the petitioner.
  - Whether the respondent has threatened to conceal, kidnap, or harm the petitioner's child or children.
  - Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.
  - Whether the respondent has intentionally injured or killed a family pet.
  - Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.

- Whether the respondent has a criminal history involving violence or the threat of violence.
- The existence of a verifiable order of protection issued previously or from another jurisdiction.
- Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communication equipment, clothing, or other items belonging to the petitioner.
- Whether the respondent engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence. §741.30(6)(b), Florida Statutes.

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

EX PARTE (TEMPORARY) INJUNCTIONS

☐ **Determine whether it appears to the court that an <u>immediate and present danger</u> of domestic violence exists. §741.30(5)(a), Florida Statutes.**

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

☐ **If the ex parte (temporary) injunction is <u>denied</u>:**

- If the court finds no basis for the issuance of an injunction, the petition may be denied without a return hearing; however, a denial of a petition for an ex parte (temporary) injunction shall be by written order noting the legal grounds for denial. §741.30(5)(b), Florida Statutes.
- When the only ground for denial is no appearance of an immediate and present danger of domestic violence, the petition for ex parte (temporary) injunction may be denied but the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. §741.30(5)(b), Florida Statutes.

☐ **If the ex parte (temporary) injunction is <u>granted</u>:**

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

POSSIBLE RELIEF WITH EX PARTE (TEMPORARY) INJUNCTIONS

☐ Restrain respondent from committing any acts of domestic violence against petitioner or any member of petitioner's family or household members. §741.30(5)(a)(1), Florida Statutes.

☐ Restrain respondent from contact with petitioner or any member of petitioner's immediate family or household. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

☐ Award petitioner temporary exclusive use and occupancy of the dwelling that the parties share or excluding the respondent from the residence of the petitioner. §741.30(5)(a)2, Florida Statutes.

☐ Exclude respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

☐ Exclude respondent from places frequented regularly by petitioner and/or any named family or household member of petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

☐ Award temporary custody of a minor child or children of the parties on the same basis as provided in §61.13. §741.30(5)(a)(3), Florida Statutes. A UCCJEA form must be filed by petitioner if seeking such relief. §741.30(3)(d), Florida Statutes.

☐ Order respondent to surrender any firearms and ammunition in his or her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(c)(2).

☐ Order such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies as provided in this section. §741.30(6)(a)(7), Florida Statutes.

FINAL INJUNCTIONS

☐ The court shall allow an advocate from a state attorney's office, an advocate from a law enforcement agency, or an advocate from a certified domestic violence center who is registered under §39.905, Florida Statutes, to be present with the petitioner or respondent during any court proceedings or hearings related to the injunction for protection, provided the petitioner or respondent has made such a request and the advocate is able to be present. §741.30(7), Florida Statutes.

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

☐ **Upon notice and hearing, when it appears to the court that the petitioner is a victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim, the court may grant such relief as the court deems proper. §741.30(6)(a), Florida Statutes.**

☐ **The final judgment of injunction for protection against domestic violence may:**

- be effective indefinitely; until modified or dissolved by the judge at either party's request, upon notice and hearing; or
- expire on a date certain at the judge's discretion. §741.30(5)(c), Florida Statutes, Florida Supreme Court Approved Family Law Form 12.980(e).

☐ The final injunction order ***must*** include the statement that the respondent (unless respondent is a law enforcement officer defined in §943.10, Florida Statutes, holding an active certification) may not have in his or her care, custody, possession or control any firearm or ammunition. §741.30(6)(g), §790.233(1), Florida Statutes.

POSSIBLE RELIEF WITH FINAL INJUNCTIONS

☐ **In addition to the types of possible relief listed in the ex parte temporary injunction section, the court may also:**

- Establish temporary support for a minor child or children.
- The temporary support, custody and or visitation provisions that are established in a permanent domestic violence injunction remain in effect until the order expires or an order, which addresses support, custody and or visitation, is entered in a pending or subsequent civil action. §741.30(6)(a)(3-4), Florida Statutes.
- Refer the petitioner to a certified domestic violence center. The court must provide the petitioner with a list of certified domestic violence centers in the circuit. §741.30(6)(a)(6), Florida Statutes.
- Order counseling for any minor children and order any other provisions relating to minor children. Florida Supreme Court Approved Family Law Form 12.980(d)(1), Florida Statutes.
- Order a substance abuse and/or mental health evaluation for the respondent and order the respondent to attend any treatment recommended by the evaluation(s). §741.30(6)(a)(5), Florida Statutes.
- Order the respondent to enroll and complete a certified batterer intervention program. It is mandatory that such programs be certified under §741.32, Florida Statutes. If the court orders the respondent to this type of program the court must provide the respondent with a list of all certified batterer intervention

programs and all programs that have submitted an application to DCF to become certified. §741.30(6)(a)(5), Florida Statutes.

- Unless the court makes written factual findings in its judgment or order which are based on substantial evidence, stating why batterer intervention programs would be inappropriate, the court **shall** order the respondent to attend a batterer intervention program **if**:
  1. It finds that the respondent willfully violated the ex parte injunction;
  2. The respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; or
  3. At any time in the past in this state or another state, an injunction has been entered against the respondent after a hearing with notice. §741.30(6)(e), Florida Statutes.
- Establish type of contact/visitation with minor child(ren) the noncustodial parent may have. Florida Supreme Court Approved Family Law Form 12.980(d)(1).
- Establish temporary alimony. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (2).

REQUIREMENTS FOR WRITTEN ORDERS – TEMPORARY & FINAL

☐ **A judgment should indicate on its face that:**

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

☐ **Special requirement for final injunctions:**

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

ENFORCEMENT

☐ It is the intent of the Legislature that domestic violence be treated as a criminal act rather than a private matter. Consequently, criminal prosecution shall be the favored method of enforcing compliance with injunctions. §741.2901(2), Florida Statutes.

☐ The Florida Department of Law Enforcement has established and maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic violence injunctions issued by the courts throughout the state. **The Department must have the respondent's name, race, sex, and date of birth.**

☐ The court may enforce a violation of an injunction for protection against domestic violence through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under §741.31, Florida Statutes. The court may enforce the respondent's compliance with the injunction through any appropriate civil and criminal remedies, including but not limited to, a monetary assessment or fine. §741.30(9)(a), Florida Statutes.

DOMESTIC VIOLENCE COLLOQUY

Today we are holding final full evidentiary hearings on injunctions for domestic, repeat, sexual, and dating violence. The purpose of these hearings is to determine whether any temporary injunctions should be extended, any final injunctions should be entered, or any cases should be dismissed. If a final injunction is issued, please read it carefully and become familiar with its terms, conditions, and duration.

It is possible that some of you in attendance today have been arrested or charged with a crime arising out of the same incident(s) which is the basis for this injunction. As required by law, this hearing is being recorded. If you are facing criminal charges you have the right to remain silent because anything you say can be used against you in your criminal case.

If you have been arrested or charged with assault or battery on a victim, your release conditions probably include a provision of "NO CONTACT" with the victim, who may also be the petitioner in this injunction. This injunction hearing is a civil matter, separate from the criminal one, and regardless of whether or not a final injunction is issued or dismissed here today, **THE CONDITIONS OF RELEASE INCLUDING ANY STAY AWAY ORDERS IN YOUR CRIMINAL CASE ARE NOT CHANGED, NOR ARE THE CRIMINAL CHARGES DISMISSED OR DROPPED. THAT CAN ONLY BE DONE BY THE JUDGE IN THE CRIMINAL CASE.** Please make certain you understand all of the conditions of your release in the criminal case because a violation of the no contact provision/stay away order could result in your arrest for a first degree misdemeanor without bond, punishable by one year in jail, or one year's probation and/or a $1,000.00 fine.

When your case is called, please come forward to be sworn and seated. I will first determine whether the petitioner has anything to add to the allegations in the petition and if petitioner can establish their case by the preponderance of the evidence. If the petitioner cannot establish the case, or does not wish to proceed with the case, I will dismiss it without the need for further testimony.

Petitioners are reminded that you signed your petition under penalty of perjury, and, therefore, can be charged with a crime if you provided untruthful answers or allegations in your petition. Perjury is a third degree felony punishable by up to 5 years in the state prison. All testimony taken today, including witness testimony will also be taken under oath.

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

If the petitioner does not appear for the scheduled hearing today, the case may be dismissed. If the respondent does not appear because service of the temporary injunction was not obtained, we will reset the hearing for a later date. If the respondent has been served and

fails to appear, the court may go forward with the hearing and a final injunction, and other relief may be granted.

At the conclusion of your hearing, please do not leave so that you may sign for receipt of the orders entered in your case and copies of any necessary paperwork.

Petitioners should understand that if you leave here with a final injunction and later decide an injunction is not what you need or want, you must file a written motion stating that you desire to dismiss or end the injunction. The court may require a hearing on such a request. The law also allows either party to request, in writing, a hearing to modify or dismiss the injunction at any time after it is issued.

If a final injunction is issued, respondents may be ordered to attend a batterer intervention program (BIP), mental health evaluation and treatment, substance abuse evaluation, parenting class, or other court ordered programs. If the court orders you to one of these programs, it is not voluntary and cannot be ignored. Failure to comply with the programs may result in your being held in contempt of court.

If a final injunction is entered against you, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, revolver, or ammunition pursuant to federal and Florida law. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

If a final injunction is entered today, petitioners should not contact respondents. Respondents please understand that the petitioner cannot give you permission to violate the injunction. Do not be misled by thinking it is acceptable for you to talk to or visit with the petitioner if he or she initiates the contact. IT IS NOT. Unless you have in your hand a copy of an order dismissing the injunction which is signed by a judge, you are still required to abide by the injunction. If you violate the terms of the injunction, you are subject to arrest and may be charged with a crime known as “Violation of an Injunction,” which is a first degree misdemeanor punishable by up to one year in jail, and/or a $1,000 fine, in addition to possible civil penalties. Also, if you follow or harass the petitioner, you may be arrested for aggravated stalking, a felony punishable by up to five years in prison.

If you have any questions feel free to ask. Please come forward when your names are called. Thank you.

BEST PRACTICE MODEL ON CHILD SUPPORT IN DOMESTIC VIOLENCE CASES

Introduction

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

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

The Intake Process

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

1. Find out whether paternity has ever been established and if the petitioner is already receiving child support in another case. Also ask whether the mother was legally married to a man who is not the other party in the current case when the child(ren) was conceived or born. If paternity has never been established, inform the petitioner that initiating a paternity case is one way to have child support established on a permanent basis.

2. If the petitioner fears disclosing his or her address in Section I of the Petition for Injunction for Protection against Domestic Violence, make sure that the petitioner is aware that he or she can keep this information confidential. If desired, have the petitioner write “confidential” in the spaces provided in Section I, number 1 and then have the petitioner complete and file the Florida Supreme Court Approved Form 12.980(h), Petitioner’s Request for Confidential Filing of Address.

3. If the petitioner wishes to seek child support, make sure that Section VI is filled out completely and accurately. In addition, make sure that the petitioner also completes:

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

b) Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) Affidavit, Florida Supreme Court Approved Family Law Form 12.902(d);

c) Child Support Guidelines Worksheet, Florida Family Law Rules of Procedure Form 12.902(e);

d) Notice of Social Security Number, Florida Supreme Court Approved Family Law Form 12.902(j); and

e) A Notice of Related Case Form if applicable.

4. In addition to the required forms, it will be helpful for the establishment of temporary child support if the petitioner lists such information as the respondent's place of employment along with the address, phone number, fax number, rate of pay, pay stub information, a W-2 form, or a recent tax return. If the petitioner does not know this information but can obtain it and bring it to the hearing, advise him or her to do so.

5. Prior to the return hearing, make sure to check for related cases to see if child support has already been established.

<u>In Court</u>

1. If the petitioner requests temporary child support in the petition, the judge must address it in the domestic violence hearing pursuant to §741.2902(2)(d), Florida Statutes, regardless of whether other paternity, divorce, or related cases are pending. It is the best practice for the presiding judge to consider and order temporary child support at the injunction hearing to alleviate the need for the petitioner to return to court, prevent additional contacts between the petitioner and the respondent, and to ensure that temporary child support is ordered and hopefully received by the petitioner as soon as possible. Victims of domestic violence are often in need of child support immediately as they may lose their regular means of support when they file a petition for an injunction. Other family court cases may take months to resolve and in the meantime the children of victims of domestic violence still need to be supported. Lastly, an order for temporary child support becomes ineffective upon the entry of an order pertaining to child support in a pending or subsequent civil case pursuant to §741.30(6)(a)(4), Florida Statutes, so no two orders will conflict.

2. If the petitioner does not include a request for temporary child support in the Petition for Injunction for Protection against Domestic Violence the judge should not address child support unless the respondent is present and waives notice.

3. While the judge can always calculate temporary child support during the hearing, the following two options can save court time and promote accuracy:

    a) Financial affidavits are filled out in court or ahead of time by both parties, and child support is calculated on the spot by using FinPlan, Divorce Power Analyzer, or similar software.

    b) Financial affidavits are filled out in court or ahead of time by both parties, and the domestic violence case manager calculates the guidelines amount of child support manually using Form 12.902(e), Child Support Guidelines Worksheet.

4. In Title IV-D cases and in all cases utilizing an income deduction order the judge shall order temporary child support payments to be made through the State Disbursement Unit pursuant to §61.181, Florida Statutes. Income deduction orders should be used whenever possible, however, if payments are not being made by an income deduction order, the judge shall order that temporary child support be paid through the depository unless both parties request and the court finds that direct payments are in the best interest of the child pursuant to §61.13(1)(d), Florida Statutes. Direct payments to the petitioner should be avoided as this may increase the likelihood of contact between the petitioner and the respondent or disputes as to what was or was not actually paid.

5. Each child support order shall provide the full name and date of birth of each minor child who is the subject of the child support order. The respondent should be notified when his or her first payment is due and where the check should be sent. In addition to the court case number, the name of the person obligated to pay, and the name of the person to whom the payment is being made must be included with payments. It would be helpful after each hearing for the respondent to receive a paper reminding him or her of this information. An example of this is:

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

6. Income Deduction Orders are the preferred method for collecting child support payments and should be ordered whenever possible. The deputy clerk or other designee should mail or fax the Income Deduction Order to the obligor's employer within two business days. The amount of time it takes for the obligee to receive payment varies greatly depending on the employer and payroll procedures, therefore, the judge should consider alternative payment methods for the initial payment or payments.

7. When ordering temporary child support the judge should explain the following to both parties:

    a) This is temporary child support. The order for temporary child support will end when the injunction expires, or when a child support order is entered in another case;

    b) The options for securing long-term child support, such as a paternity hearing;

    c) That it is the petitioner's responsibility to notify the court if payments are not made;

    d) The court's options for enforcing the child support order; and

    e) The responsibilities of the petitioner and respondent to notify the court if the award needs to be modified due to a change in circumstance.

8. Before leaving court, both parties should receive documentation showing the judge's decision on temporary child support, and the respondent should receive information on how payments should be made. If income deduction is being used, both the respondent and petitioner should receive information on when payment will begin and how payments will be made until the Income Deduction Order takes effect.

Follow-Up and Compliance

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

1. One such method is the use of a tickler system that initiates compliance checks at key points in time. The tickler system should be used in the following manner:

    a) The system may be set up as either an automated electronic system or a manual case file system.

    b) The tickler system should alert the case manager to the timeframe or deadline contained in the injunction order for temporary child support payments.

    c) After the deadline passes, if the respondent has not produced documentation of payment, the case manager should alert the court and proceed according to circuit procedures.

2. A second method is the use of compliance review hearings. These hearings should be conducted in the following manner:

a) An order setting review hearings for compliance with temporary child support and all other conditions of the injunction - such as batterers intervention participation - should be issued at the final hearing. Compliance hearings should be set for 30 days and 60 days after issuance of the final judgment with the respondent being the only person required to attend.

b) At the compliance hearing the respondent must provide proof and documentation that child support is being paid as ordered by the court and that he or she is complying with all the requirements of the final judgment.

c) If the respondent fails to provide proof of child support payments or other requirements at or before the scheduled review hearings, an Order to Show Cause should be issued and a hearing date should be set before the court for no later than two weeks.

d) The respondent should have the opportunity to provide proof of compliance to either the clerk or designee prior to the scheduled review hearing. If proof is provided early, the respondent should then be excused from attending the hearing and should be provided with a document indicating that he or she was excused.

e) If there is nonpayment of child support after the completion of the compliance review hearings, the petitioner should file a Motion for Enforcement with the clerk or obtain the services of the Department of Revenue Child Support Enforcement Unit to enforce compliance. The petitioner should be made aware of this responsibility in writing by the court at the end of the final hearing.

Modifications and Termination

1. The petitioner or the respondent may request a modification of an injunction or a dismissal of an injunction using the appropriate Florida Supreme Court approved Family Law Form.

2. If requested, domestic violence coordinators should provide information and referrals to both the petitioner and the respondent regarding changes to or termination of the injunction.

3. Upon filing, the motion to modify or terminate the injunction will be sent to the signing judge for review and a hearing will be scheduled if necessary.

When there is a modification or termination of an injunction requiring temporary child support payments made to the State Disbursement Unit, the clerk's office must notify the State Disbursement Unit of the changes. In addition, if an Income Deduction Order is facilitating

payment, an Order to Vacate should be sent by the clerk to the employer and the State Disbursement Unit when a modification or termination is entered.

FLORIDA FIREARMS LEGAL SUMMARY FOR DOMESTIC VIOLENCE CASES

STATE AND FEDERAL FIREARMS LAWS

Federal law:

- *18 U.S.C. §922(g)(8):* It is unlawful for a person who has a Protection Order (Florida's Final Judgment of Injunction for Protection Against Domestic Violence meets federal definition of "Protection Order") in effect against him/her to possess a firearm and/or ammunition, ship or transport same in interstate commerce, receive any which have been so shipped or transported, or have seized firearms returned. The respondent must be an "intimate partner" and must have had due process (proper notice of hearing and opportunity to be heard).

- *18 U.S.C. §921(a)(32):* An "intimate partner" is a spouse, former spouse, co-parent, or individual who lives or has lived together with the victim.

- *18 U.S.C. §925:* An official use exemption exists for law enforcement officers and active military, subject to a protection order, which has been interpreted by the Bureau of Alcohol, Tobacco and Firearm (ATF) to only allow "on-duty" possession of service weapons.

- *18 U.S.C.§922(g)(9) "Lautenberg Amendment":* A person convicted of a "qualifying" (right to counsel, jury trial, and conviction not expunged) misdemeanor crime of domestic violence is permanently disqualified from possessing a firearm or ammunition. Defendant must be spouse, former spouse, co-parent, parent or guardian of victim, person who cohabits or has cohabited as spouse, parent or guardian, or a person similarly situated. No "official use" exemption is applicable.

- *18 U.S.C.§921(B)(ii):* The court may retain firearm prohibition in any order of expungement of conviction.

- 18 *U.S.C. §924(a)(2):* All federal violations are punishable by up to 10 years imprisonment and/or a $250,000 fine.

Florida law:

- *§790.233(1), Florida Statutes,* prohibits a person subject to a current final injunction Against Domestic Violence under *§741.30* from possessing firearms or ammunition.

- *§790.233(3), Florida Statutes,* provides an "official use" exemption for law enforcement officers subject to an injunction, consistent with federal law, subject to the policy of the employing agency.

- *§790.06(2)(l*), *Florida Statutes,* prohibits the issuance of a license to carry a concealed weapon or firearm to a person subject to a current injunction for protection against domestic or repeat violence.

- *§790.06(2)(K), Florida Statutes,* prohibits issuance of a license to carry a concealed weapon or firearm to a person who has had an adjudication withheld or sentence suspended for a felony or misdemeanor crime of domestic violence, and three years has not expired from the completion of probation or other conditions.

- *§790.233(2), Florida Statutes,* violations constitute a first degree misdemeanor.

- *§790.065(2)*, *Florida Statutes,* requires FDLE to perform a records check for federal and state disqualifiers such as injunctions and convictions prior to authorizing the purchase of a firearm.

FLORIDA FIREARMS CHECKLIST FOR DOMESTIC VIOLENCE CASES

State and federal laws prohibit possession of firearms and ammunition by respondents who have in effect or ever had a final injunction for protection against domestic violence entered against them. This mandate constitutes a primary safety provision of domestic violence civil injunctions. The courts, law enforcement agencies, and other concerned stakeholders should collaborate to resolve issues and create protocols for the surrender, storage, and return of weapons and ammunition.

SURRENDER

☐ If a temporary injunction so provides, upon service of the injunction, respondent must surrender all firearms and ammunition to the police, obtain a receipt of surrender, and file the receipt with the court. *§790.233(1), Florida Statutes*, *and 18 U.S.C. §922(g)(8).*

☐ If a respondent fails to appear in court after being served with a temporary injunction and petitioner testifies that respondent currently has a gun in his/her possession, the court may issue a separate order requiring the respondent to surrender the firearm/ammunition.

☐ Firearm surrender is mandated in domestic violence cases; however, the court may order surrender of guns and ammunition in repeat, dating and sexual violence cases when there is a nexus between the firearm and the alleged violence.

☐ Orders should specify respondent has to surrender weapons within 48 hours or provide an affidavit saying he or she does not have any weapons or ammunition.

☐ Orders should note that the weapons and/or ammunition will be destroyed after 60 days from date order is vacated or expires if not claimed by the respondent. The respondent should sign a notice to this effect.

☐ The court should specifically address firearms at the final hearing and notify the respondent of restrictions.

☐ The court should inform respondents about the laws regarding “possession” of a firearm and “access” to a firearm when living with others who own firearms.

☐ All respondents should complete a sworn statement of possession/surrender of firearm prior to commencement of final hearing attesting to whether they have in the past six months owned or possessed any firearms or ammunition.

☐ Respondent should be required to provide proof of surrender if a receipt was not previously filed with the court.

☐ Court may make an "on the record" inquiry to verify whether respondent surrendered the firearms and/or ammunition and review any supporting documentation provided by the respondent.

☐ Respondent may sell or transfer all firearms and ammunition to a third party not residing with the respondent, provided that the third party is pre-approved by the court. A notarized copy of an affidavit evidencing such transfer should be filed with the court.

☐ If respondent is not in possession of firearms and/or ammunition, no further action is required by the court.

☐ If there has not been full compliance, the court may enter a separate order compelling respondent to comply with the surrender within 24 hours and provide proof by fax to the court. If the respondent has still not complied, the court may commence indirect criminal contempt procedures by entering an Order to Show Cause. *See* Florida Rule of Criminal Procedure 3.840.

RETURN OF FIREARMS/AMMUNITION

☐ After entry of a final judgment after hearing, a Motion for Request of Return of Firearms and Other Property should be required and a hearing should be held before the court enters any modification. The petitioner should have an opportunity to give testimony on the issue of weapons return.

☐ When a protection order expires or is dismissed, a respondent can file for a return of property and attest that he/she qualifies under 18 U.S.C. §922(g) and 18 U.S.C. §922(n), and Florida law in that he/she*:*

- Has not been found guilty of a felony or misdemeanor crime of domestic violence, or in Florida, a crime involving violence;
- There is no final protection order in effect in Florida or any other state;
- No forfeiture action is pending in another court;
- Has never been adjudicated mentally defective or been committed to a mental institution;
- Is legally and lawfully in the United States;
- Has never been dishonorably discharged from the Armed Services;
- Has never renounced US citizenship;
- Is not currently under indictment for any felony;
- Has not been convicted of a felony or misdemeanor crime of domestic violence, or in Florida, a crime involving violence;

- Has not been on probation or pretrial diversion, or had adjudication withheld for an act of domestic violence or in Florida, a crime involving violence, within the past 3 years; and
- There is no other legal impediment to his/her owning or possessing a firearm.

☐ The petitioner should be notified that respondent has requested return of firearms and is allowed 15 days to file any objections.

☐ At the expiration of 15 days, the case should be set for hearing on the request for return of property. The court may determine if the firearm/ammunition may be legally returned to the respondent by conducting an FCIC/NCIC check on the respondent and reviewing the sworn motion and all supporting documents prior to signing the order for return.

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

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

II. Domestic violence injunctions must be issued separately but be aware of related pending cases in order to avoid entering orders that are inconsistent or conflict and the legal precedent of conflicting orders.

III. Be mindful of the petitioner's request to keep her or his home address confidential and take steps to ensure safe keeping of confidential information in all related cases.

IV. Determine if the petitioner has standing.

V. Make sure the petition includes allegations which meet the definition of domestic violence and the appropriate burden of proof is met.

VI. Apply the appropriate burden of proof.

VII. Issue the ex parte order the same day the petition is filed.

VIII. Grant relief in the temporary injunction as listed under §741.30(5)(a), Florida Statutes. If a temporary injunction has already been entered or denied, skip to number XII below.

IX. Should you deny an injunction, it shall be by written order noting the legal grounds for denial. If the court finds no basis for the issuance of an injunction, the petition may be denied without a return hearing. But when the only legal ground for denial is no appearance of an immediate and present danger of domestic violence, the petition may be denied but the court shall set a full hearing on the petition for injunction, no more than 15 days from the day the petition was filed, with notice at the earliest possible time.

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

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

XII. Complete all the relevant sections of the Final Judgment Injunction for Protection Against Domestic Violence and sign the order at the conclusion of the hearing.

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

XIV. Provide litigants with a list of batterer intervention programs, which have been certified by Florida's Department of Children and Families, and information about other programs in which the court orders them to participate.

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

XVI. Injunctions are meant to be permanent unless otherwise requested by the petitioner. *See* §741.30(6)(c), Florida Statutes. No new violence is required to extend a final injunction.

XVII. Consider and follow the actions recommended by the Domestic Violence Subcommittee of the Steering Committee on Children and Families in the Court (FCC) and the Domestic Violence Strategic Planning Workgroup for entering orders and conducting hearings in civil domestic violence proceedings.

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

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

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

It is important to be mindful of both pending and closed cases that may contain judgments and orders, which impact pending cases. The court must be aware of and consider any orders or judgments that affect jurisdiction, establish a precedence of orders, or contain potentially inconsistent rulings. *See also* Florida's Family Court Tool Kit: Volume I, pg. 47.

When dealing with related cases, the best way to ensure consistency among orders is to assign all of a family's related cases to one judge. This makes the judge aware of the family's interconnected cases and puts the judge in the best position possible to effectively coordinate proceedings and to create consistent and meaningful orders. *See also* Florida's Family Court Tool Kit: Volume II, pg. 11.

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

To prevent the entry of inconsistent orders, except as provided in chapter 39, Florida Statutes, the court must enter chapter 741, Florida Statutes, civil domestic violence orders separately. The court should not include domestic violence injunctions within orders or final judgments in dissolution of marriage, separate maintenance, child support or paternity cases.

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

Furthermore, judges must be aware of orders entered in related cases and the precedence of the orders to mitigate the impact of inconsistent provisions. In 2005, the legislature amended §39.013, Florida Statutes, which states that chapter 39 orders pertaining to custody, visitation, etc. take precedence over similar orders in other civil cases. Additionally, §741.30, Florida Statutes, mandates that the provisions of injunctions dealing with custody, visitation, and child support remain in effect until the order expires or an order on those matters is entered in a subsequent civil case.

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

A. Domestic Violence Allegations During Dissolution of Marriage:

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

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

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

Inconsistent orders can arise when a party to a dissolution of marriage has been issued an injunction for protection against domestic violence. The typical scenario is of a petitioner with an injunction for protection that prohibits all contact between the parties who then gets a subsequent order in the dissolution case that allows for contact to exchange children for visitation. According to §741.30(1)(c), Florida Statutes, orders entered in a subsequent action filed under chapter 61, Florida Statutes, take precedence over any inconsistent provisions of an injunction that address matters more appropriately governed by chapter 61 of the Florida Statutes.

Therefore the court hearing chapter 61 actions needs to be aware of the domestic violence issues between the parties to make decisions regarding visitation

and to tailor safe and effective means for exchanging children for visitation. If contact for visitation purposes is allowed in a chapter 61 proceeding, the court may need to enter an amended injunction for protection that clarifies or modifies the contact the parties may have pursuant to the injunction for protection.

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

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

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

III. Be mindful of the petitioner's request to keep her or his home address confidential and take steps to ensure safe keeping of confidential information in all related cases. *(See* Florida Family Law Rule of Procedure 12.610(b)(4)(B), and §§741.30(6)(a)(7) and 741.465, Florida Statutes.) For further discussion on the topic of addressing confidentiality in general, read the section titled "Address Confidentiality" in the Domestic Violence Legal Outline that is included in this benchbook and Florida's Family Law Tool Kit: Volume II, pg.17.

A. Once the petitioner requests that her or his address be kept confidential, it shall remain confidential in the pending proceeding and in related case files. This will take some diligence on the part of the petitioner in alerting the court and clerk of the confidential address and not disclosing the address on his or her own in other court documents.
B. Court personnel should work with the clerk of court staff and the sheriff's office to develop a method to ensure that the address is truly confidential.

IV. Determine if the petitioner has standing.

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

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

V. Make sure the petition includes allegations which meet the definition of domestic violence and the appropriate burden of proof is met.

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

VI. Apply the appropriate burden of proof.

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

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

B. Final Domestic Violence Injunctions:
   1. The court may grant relief, including an injunction, when "it appears to the court" that petitioner is "either the victim of domestic violence . . . or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence." §741.30(6)(a), Florida Statutes.
   2. The evidence must be "strong and clear" to balance the harm sought to be prevented against the respondent's right to notice and a hearing. Kopelovich v. Kepelovich, 793 So.2d 31, 33 (Fla. 2d DCA 2001).

C. Violation of Domestic Violence Injunction:

1. The burden of proof in a hearing involving a violation of an injunction is beyond a reasonable doubt. Hunter v. State, 855 So.3d 677, 678 (Fla. 2d DCA 2003).
2. In a case based entirely on circumstantial evidence, the party seeking the contempt finding has the burden of presenting evidence from which the court can exclude every reasonable hypothesis except that of guilt. Fay v. State, 753 So.2d 682, 683 (Fla. 4th DCA 2000).
3. Willful violation of an injunction may be prosecuted criminally as a first degree misdemeanor pursuant to §741.31(4), Florida Statutes.
4. The person accused of the violation does not have the burden of going forward at the outset of the hearing to show why he or she should not be held in contempt. Tide v. State, 804 So.2d 412, 413 (Fla. 4th DCA 2001).
5. "Because criminal contempt is 'a crime in the ordinary sense,' a contemnor must be afforded the same constitutional due process protections afforded to criminal defendants." Id. (quoting Feltner v. Columbia Pictures Television, Inc., 789 So.2d 453, 455 (Fla. 4th DCA 2001)), (citation omitted). Therefore, the person seeking the order of contempt has the initial burden of going forward at the contempt hearing.

D. Civil Contempt:

1. The preponderance of the evidence burden of proof applies to civil contempt proceedings. Kramer v. State, 800 So.2d 319, 320 (Fla. 2d DCA 2001).
2. Civil contempt is a remedy of a court "to coerce obedience to its orders which direct a civil litigant to do or abstain from doing an act or acts . . . ." Dowis v. State, 578 So.2d 860,862 (Fla. 5th DCA 1991).

E. Criminal Contempt:

1. The burden of proof in a criminal contempt proceeding is beyond a reasonable doubt. *See* Kramer v. State, 800 So.2d 319, 320 (Fla. 2d DCA 2001).
2. Criminal contempt proceedings are subject to Florida Rules of Criminal Procedure 3.830 and 3.840 and to the "constitutional limitations applicable to criminal cases including due process requirement of a burden of proof 'beyond a reasonable doubt.'" Dowis v. State, 578 So.2d 860, 862 (Fla. 5th DCA 1991).

VII. Issue the ex parte order the same day the petition is filed.

Initial orders should be issued the same day that the petition is filed and will remain effective for a period of fifteen days. The timeliness of the court's actions in domestic violence cases is critical due to the potential danger to petitioners and their children. Violence will likely escalate in frequency and severity when a victim attempts to separate from the abuser especially after the respondent receives notice that the victim has filed a petition seeking protection against domestic violence.

VIII. Grant relief for the temporary injunction as listed under §741.30(5)(a), Florida Statutes. If a temporary injunction has already been entered or denied, skip to Roman number XII.

A. Restraining the respondent from committing any acts of domestic violence.
B. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.
C. Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in Florida Statutes chapter 61.
D. Do not grant child custody, support, or visitation rights to a party unless the party is the legal parent, adoptive parent, or guardian by court order of the minor child or children. *See* §§741.30(6)(a)(4), 61.13(1)(a), 39.40211)(a), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980 (a), section VI (3). Paternity may be established by a separate paternity action filed in family court; a hospital affidavit executed by both parents pursuant to §§382.013 or §§382.016, Florida Statutes; by affidavit or stipulation of paternity executed by both parents and filed with the clerks of the court, in a worker's compensation or similar hearing that determines the dependent(s) of an injured worker; in an adjudicatory hearing in a probate case (addressing inheritance), or in a dependency proceeding under chapter 39, Florida Statutes.
E. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies.
F. Restraining respondent from contact with petitioner or any member of petitioner's immediate family or household. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
G. Excluding respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (2).
H. Excluding respondent from places frequented regularly by petitioner or any named family or household member of petitioner. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
I. Ordering respondent to surrender any firearms and ammunition in his or her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(d)(2).
J. NOTE: Extending temporary injunctions should not be a substitute for issuing a final order. *See* <u>Sanchez v. Alviar</u>, 906 So.2d 1263 (4th DCA 2005), which states that the statute does not contemplate relief beyond an ex parte temporary injunction without a full evidentiary hearing.

IX. Should you deny an injunction, it shall be by written order noting the legal grounds for denial. If the court finds no basis for the issuance of an injunction, the petition may be denied without a return hearing. But when the only legal ground for denial is no appearance of an immediate and present danger of domestic violence, the petition may be denied but the court shall set a full hearing on the petition for injunction, no

more than 15 days from the day the petition was filed, with notice at the earliest possible time. *See* §741.30(5)(b), Florida Statutes.

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

A. Restraining the respondent from committing any acts of domestic violence against petitioner or any member of petitioner's family or household members.
B. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.
C. Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in chapter 61, Florida Statutes.
D. Establishing temporary support for the petitioner (temporary alimony) or minor child or children (temporary child support), on the same basis as provided in chapter 61, Florida Statutes. (*See Infra* Best Practices Model on Child Support in Domestic Violence Cases). Do not grant child custody, support, or visitation rights to a respondent unless the respondent is the legal parent, adoptive parent, or guardian by court order of a minor child or children. *See* §§741.30(6)(a)(4), 61.13(1)(a), 39.40211)(a), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980 (a), section VI (3). Paternity may be established by a separate paternity action filed in family court; a hospital affidavit executed by both parents pursuant to §§382.013 or §§382.016, Florida Statutes; by affidavit or stipulation of paternity executed by both parents and filed with the clerks of the court, in a worker's compensation or similar hearing that determines the dependent(s) of an injured worker; in an adjudicatory hearing in a probate case (addressing inheritance), or in a dependency proceeding under chapter 39, Florida Statutes.
E. Ordering the respondent to participate in a treatment, intervention, or counseling services to be paid for by the respondent. *See infra* batterer intervention programs.
F. Referring a petition to a certified domestic violence center.
G. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies.
H. Restraining respondent from contact with petitioner or any member of petitioner's immediate family or household. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
I. Ordering counseling for any minor children and order any other provisions relating to minor children. Florida Supreme Court Approved Family Law Form 12.980(e)(1).
J. Excluding respondent from petitioner's place of employment or school. Florida Supreme Court Family Law Forms 12.980(d)(1) and (2).
K. Excluding respondent from places frequented regularly by petitioner and/or any named family or household member of petitioner. Florida Supreme Court Family Law Forms 12.980(d)(1) and (d)(2).
L. Ordering respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Family Law Forms 12.980(d)(2).

M. Ordering a substance abuse and/or mental health evaluation for the respondent and order the respondent to attend any treatment recommended by the evaluation(s). §741.30(6)(a)(5), Florida Statutes.
N. Specifying the type of contact or visitation the noncustodial parent may have with the minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(2)(1).

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

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

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

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

A. Mediation in Domestic Violence Cases:

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

1. The court conducts a hearing and makes a finding of whether domestic violence occurred or imminent danger exists. If the court determines that an injunction will be issued, the court shall also rule on such matters as contact between the parties, use of the residence, temporary custody and visitation, temporary spousal and child support. Rule 12.610(c)(1)(C), Florida Family Law Rules of Procedure.
2. With the consent of the parties, the court may refer the parties to mediation by a certified family mediator to attempt to resolve the details as to the use of the residence, temporary custody and visitation, and temporary spousal and child support. **This mediation shall be the only alternative dispute resolution process offered by the court**. Rule 12.610(c)(1)(C), Florida Family Law Rules of Procedure.

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

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

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

XIV. Provide litigants with a list of batterer intervention programs, which have been certified by Florida's Department of Children and Families, and information about any other programs in which the court orders them to participate. (A list of certified programs can be found on the DCF website: http://www.myflorida.com/cf_web/ .

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

XVI. Injunctions are meant to be effective indefinitely unless otherwise requested by the petitioner. *See* 741.30(6)(c). If a petitioner requests that a final injunction be extended, no new violence is required to extend a final injunction.

XVII. Consider and follow the actions recommended by the 2004 Domestic Violence Subcommittee of the court's Steering Committee on Families and Children in the Court (FCC) and the 2008 Domestic Violence Strategic Planning Group for entering orders and conducting hearings in civil domestic violence proceedings.

Below, excerpted from the 2004 Domestic Violence Court Action Plan and the 2008 Domestic Violence Strategic Planning Group, are recommendations to consider when entering domestic violence orders and conducting hearings.[2]

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

A. General Items for Judicial Consideration When Entering Orders:

1. Judges should recognize domestic violence injunction proceedings as emergency matters and review petitions for injunction immediately so that petitioners are not required to remain at or make multiple trips to the point of intake to obtain a temporary injunction.
2. Courts should handle injunction cases in a timely manner by scheduling all original return hearings within the 15-day statutory time limit. If the respondent is not served on the first attempt, courts should consider whether extending the temporary injunction for longer than an additional 15 days would facilitate service on the respondent. Courts should schedule motion hearings on an expedited basis.
3. The court should be discouraged from issuing an order that sets a hearing without providing any ex parte relief.
4. Address temporary child support, if it is requested by petitioner. *See infra* Best Practices Model on Child Support in Domestic Violence Cases.
5. The court must allow witnesses during the final injunction hearing**.** Smith v. Smith, 964 So.2d 217, (Fla. 2d DCA 2007); Tejeda-Soto v. Raimondi, 968 So.2d 635, (Fla. 2d DCA 2007); Ohrn v. Wright, 963 So.2d 298 (Fla. 5th DCA 2007).
6. The court should issue final orders instead of extending temporary injunctions. Extensions put the burden on the petitioner to repeatedly request them, create a burden for the clerks and law enforcement to input the information in the FCIC and increases the court's workload.
7. After a final hearing has occurred, injunctions are meant to be effective, unless otherwise requested by the petitioner, until modified or dissolved. §741.30(6)(c), Florida Statutes. Florida Family Law Rule of Procedure 12.610(c)(4)(B) also states, "Any relief granted by an injunction for protection against domestic, repeat, dating, or sexual violence shall be granted for a fixed period or until further order of court. Such relief may be granted in addition to other civil and criminal remedies. Upon petition of the victim, the court may extend the injunction for successive periods or until further order of court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required."
8. No new violence is required to extend a final injunction.
9. If respondent fails to appear at an order to show cause hearing after being properly noticed, the court should issue a civil contempt/arrest warrant for failure to appear.
10. Respondents should fill out a mailing certification form in court which includes primary and secondary addresses.
11. Courts should refer petitioners to community support services and counseling if necessary. The plain language of §741.30, Florida Statutes, does not authorize a trial court to order a petitioner for an injunction for protection against domestic violence to attend a batterer intervention program. Chacoa v. Mahon, 970 So. 2d 909, (Fla. 1st DCA 2007).

12. The court should make the safety of the parties and the children a primary factor in determining custody and parenting time arrangements.
13. If the judge deems unsupervised vistiation appropriate, the judge should consider requiring that parenting time be exercised at a location physically separate from the primary residential parent or that the transfer of the children between the parents be accomplished using a third party intermediary in a protected setting.
14. Courts should be discouraged from using family and friends to supervise visits in domestic violence cases.
15. Judges and court personnel should monitor and periodically review compliance with supervised visitation orders.
16. Judges and court personnel should proactively monitor compliance with court ordered counseling, including batter intervention programs, and other provisions.
17. Courts should take into consideration disabilities of parties and of children when structuring orders.
18. Judges should ensure that provisions within an injunction do not conflict with each other or with any other court orders regarding this family.
19. Judges should phrase all injunction orders in terms that litigants and law enforcement can understand.
20. Courts should not enter an injunction upon the respondent's consent unless, after a hearing, the court finds that the petitioner is a victim of domestic violence or is in imminent danger of becoming a victim of domestic violence and that the respondent has been fully advised of the ramifications of his or her decision, the possible consequences of a violation, and that he or she will be subject to the terms of the injunction.
21. Imminent danger may include:
    a. Whether or not the history between the petitioner and the respondent, includes threats, harassment, stalking, and physical abuse.
    b. Whether the respondent has attempted to harm the petitioner, family members or individuals closely associated with the petitioner.
    c. Whether the respondent has threatened to conceal, kidnap, or harm the petitioner's child or children.
    d. Whether the respondent has intentionally injured or killed a family pet.
    e. Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.
    f. Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.
    g. Whether the respondent has a criminal history involving violence or the threat of violence.
    h. Whether a verifiable order of protection issued previously or from another jurisdiction exists.

i. Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communications equipment, clothing, or other items belonging to the petitioner.
j. Whether the respondent had engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence. §741.30(6)(b)(1-10), Florida Statutes. The court is not limited to these factors.

B. Treatment Provisions: Courts should order treatment provisions for respondents whenever appropriate and enforce compliance with such orders.
1. Courts should order respondents to successfully complete batterer intervention programs (BIPs) if after a hearing the court determines that such a program is statutorily mandated or otherwise appropriate. Pursuant to §741.30(6)(e), Florida Statutes, the court shall order the respondent to attend a batterer's intervention program if:
   a. It finds that the respondent willfully violated the ex parte injunction;
   b. The respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; or
   c. The respondent, in this state or any other state, has had at any time a prior injunction for protection entered against the respondent after a hearing with notice.
2. Judges may order BIP classes in other situations as appropriate.
3. A petitioner cannot be ordered to attend BIP classes. Chacoa v. Mahon, 970 So. 2d 909, (Fla. 1st DCA 2007).
4. Courts should ensure respondents are ordered to attend only those BIPs that comply with the minimum state standards for those programs.
5. Courts should order respondents for assessment and treatment for substance abuse and mental health issues when appropriate.
6. Courts should establish protocols to monitor compliance with and enforce injunction provisions regarding alcohol, substance abuse, and mental health treatment as well as batterer intervention program enrollment and completion, and should utilize contempt and show cause proceedings as appropriate.
7. Do not order couples to attend counseling for their relationship or for the children; it can set up a dangerous situation.
8. Judges may also consider ordering respondent to BIP if the violence has been physical or if it happened more than once.

C. Firearms Provisions: The court should pay particular attention to the statutory requirements regarding possession of firearms and ammunition in cases where final injunctions are issued.
1. Judges should require respondents in injunction cases to surrender firearms and ammunition in their possession in accordance with state and federal law. 18

U.S.C. §922(g); §741.31(4)(b), Florida Statutes. Judges should fully inform the respondents about the legal prohibitions against gun ownership.

2. Injunction orders should contain instructions regarding surrender of firearms and ammunition, including the requirement that the respondent produce a receipt documenting the sale or surrender of the firearms and ammunition within a specified timeframe and direct law enforcement officers to execute the firearms surrender provision upon service of the order on the respondent.
3. Circuits should track and enforce compliance with firearms surrender.
4. **A trial court has no power to authorize a respondent to possess firearms in violation of federal law.** Weissenburger v. Iowa Dist. Court for Warren County, 740 N.W.2d 431 (Iowa, 2007).
5. The Brady Handgun Control Act, Pub. L. No. 103-159; 107 Stat. 1536 (1993), requires federally licensed firearm dealers to run a background check on any prospective buyer. The Act also created the National Instant Criminal Background Check System (NICS), that allows the FBI and state law enforcement agencies to check the available records in the National Crime Information Center, Interstate Identification Index and the NICS database itself to determine if prospective gun buyers are authorized to own weapons. Sections 741.31(4)(b)(1) and 790.233, Florida Statutes, prohibit a person from possessing a firearm or ammunition when they are subject to a final injunction for committing acts of domestic violence. The Brady Handgun Control Act gives gun dealers the ability to conduct background checks to verify that the purchaser is eligible to own a weapon pursuant to Florida and federal law.

D. Judicial Consideration When Conducting Final Hearings:

1. Judges should afford both parties the opportunity for a full, fair, and impartial hearing on all matters to be decided in injunction cases. This includes hearing witnesses. Tejeda-Soto v. Raimondi, 968 So.2d 635 (Fla. 2d DCA 2007) (to comply with due process requirements at an injunction hearing, the parties must have an opportunity to prove or disprove the allegations made in the complaint.), Ohrn v. Wright, 963 So.2d 298 (Fla. 5th DCA 2007)(the trial court violated the petitioner's due process rights when it did not swear either witness and did not permit the appellant to call a witness who could have offered testimony to support her version of the incidents that had occurred between the parties) Smith v. Smith, 964 So.2d 217 (Fla. 2d DCA 2007)(The husband's right to due process was violated when the trial court did not permit him to call his witnesses or to testify himself prior to the court entering a final injunction.)
2. An advocate from a state attorney's office, law enforcement agency, or certified domestic violence center should be allowed to be present with the petitioner at the podium during any court proceedings or hearings related to an injunction for protection, provided that the petitioner has made such a request and the advocate is able to be present.
3. Courts should ensure the accurate recording of domestic violence hearings.

4. Courts should not dismiss injunction cases at the petitioner's request without first conducting a hearing at which the court determines whether the petitioner initiated the request freely and voluntarily, is aware of community resources, and understands the availability and process for filing a case in the future.
5. Mediation is not an appropriate mechanism for determining whether criminal charges should be filed or whether an injunction for protection should be issued.
6. Mediation is not permitted without court order. §44.102(2)(c), Florida Statutes. Parties cannot stipulate to mediation.
7. Before the parties leave the final hearing, the court should explain its decision, the terms of the injunction, the possible consequences of violations, and how to proceed if the injunction is violated. For safety reasons, the petitioner should leave the courtroom first, and the respondent should not be allowed to leave until 15 minutes after the petitioner has left. *See Infra* Security: A Model Family Court Essential Element, which addresses additional safety considerations.
8. Judges should advise the litigants of the full faith and credit provisions of the injunction which make the terms and conditions enforceable nationally.
9. Judges should emphasize to the parties that decisions regarding the terms of an injunction are the court's and not the petitioner's.

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- 2004-2005 Compendium of Family Court Practices
- 2005 Self Assessment Results
- Unified Family Court Brochure
- 2003 Compendium of Family Court Practices
- Florida's Family Court Toolkit: Vol. 1
- Florida's Family Court Toolkit: Vol. 2
- Unified Family Court Sample Administrative Order
- What, Where, Why and How: Unified Family Courts in Florida
- Getting from "Clobberation" to "Collaboration" - The Importance of Collaboration in Unified Family Court
- Report of the 2000 - 02 Family Court Steering Committee
- A Model Family Court for Florida: Recommendations of the Florida Supreme Court's Steering Committee on Families and Children in the Court

Domestic Violence

- 2008 Domestic Violence Strategic Plan
- Civil Injunction for Protection Brochure for Respondents
- DV Civil Injunction Survey Report
- DV Resources for Court Staff
- DV Case Management Guidelines
- Best Practices Model on Child Support in DV cases
- Dating Violence Checklist
- Repeat Violence Checklist
- Sexual Violence Checklist
- Domestic Violence Checklist
- DV Benchbook
- DV Court Action Plan
- DV Assessment Final Report
    - Assessment Executive Summary
    - Assessment Table

Dependency

- 2007 Dependency Benchbook
- Model for Child Support in Dependency Cases
- Independent Living Services Checklist
- 2007 Chapter 39, Florida Statutes
- Dependency Reassessment
- A Parent's Guide to Juvenile Dependency Court
  - Case Plan insert
- Juvenile Delinquency
- Chapter 985, Florida Statutes 2008
- with flowchart and excerpts from Florida Rules of Juvenile Procedure
- A Family Guide to Delinquency Court
- Delinquency Assessment Final Report
  - Assessment Executive Summary

Drug Court

- Statewide Directory
- Florida's Adult Drug Court Tool Kit
- Drug Court Transfer Guide
- Report on Florida's Drug Courts

Miscellaneous

- Minimum Standards for Supervised Visitation ProgPro Se Litigation Florida Team Report

DOMESTIC VIOLENCE LEGAL OUTLINE

TABLE OF CONTENTS

I. DOMESTIC VIOLENCE – BACKGROUND AND DEFINITIONS: 47
A. FEDERAL LAW: 47
B. FLORIDA STATE LAW: 49
II. DOMESTIC VIOLENCE COURT – CIVIL PROCEEDINGS: 57
A. VALID ESTABLISHMENT OF DOMESTIC VIOLENCE COURTS: 57
B. JURISDICTION OF DOMESTIC VIOLENCE COURTS: 58
C. PARTIES/STANDING/RESIDENCY: 59
D. PROCEDURAL REQUIREMENTS FOR CLAIMS: 62
E. SUBSTANTIVE REQUIREMENTS FOR CLAIMS: 68
F. EX PARTE TEMPORARY INJUNCTIONS: 74
G. RELIEF GRANTED IN TEMPORARY DOMESTIC VIOLENCE INJUNCTIONS: 78
H. FINAL INJUNCTIONS: 79
I. RELIEF GRANTED IN FINAL DOMESTIC VIOLENCE INJUNCTIONS: 81
J. FACTORS THE COURT MUST CONSIDER WHEN ENTERING AN INJUNCTION: 83
K. ADDITIONAL PROVISIONS WHICH MUST BE INCLUDED IN BOTH TEMPORARY AND FINAL INJUNCTIONS: 87
L. SERVICE OF FINAL INJUNCTIONS: 89
M. ADDITIONAL REMEDIES: 89
N. SUBSEQUENT ACTIONS: 91
O. CROSSOVER CASES/RELATED CASES: 94
P. HOUSING - FEDERAL HOUSING PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING: 99
Q. ANCILLARY MATTERS: 101
R. APPELLATE REVIEW: 103
S. ENFORCEMENT: 105
III. EVIDENCE: 117

A. PRIVILEGES APPLICABLE TO DOMESTIC VIOLENCE: 117
B. ALLOCATION OF DECISION MAKING/FINDER OF FACT: 118
C. CONFIDENTIAL RECORDS: 118
D. JUDICIAL NOTICE OF SERVICE: 118
E. BATTERED SPOUSE SYNDROME (BSS) or (BWS): 119
F. STATEMENTS BY WITNESSES: FLORIDA RULE OF CRIMINAL PROCEDURE 3.330(B)(1)(B): 120
G. STATEMENTS BY VICTIMS: 121
H. HEARSAY: 121
I. HEARSAY EXCEPTIONS: §90.803, FLORIDA STATUTES: 123
J. NON-HEARSAY (EXCLUDED FROM DEFINITION OF HEARSAY): 133
K. EXCULPATORY EVIDENCE (BRADY VIOLATION): 138
L. WILLIAMS RULE/SIMILAR FACT EVIDENCE: 142
IV. DOMESTIC VIOLENCE - CRIMINAL PROCEEDINGS: 147
A. BURGLARY: 147
B. URY INSTRUCTIONS AND JURORS: 147
C. WARRANTLESS ARREST POWERS: 148
D. IMMUNITY OF LAW ENFORCEMENT UNDER FLORIDA STATUTES: 150
E. VICTIM'S RIGHTS: 151
F. PARENTAL DISCIPLINE/BATTERY ON A CHILD: 152
G. CHARGING AND PROSECUTING: 153
H. DOUBLE JEOPARDY: 156
I. PREPARATION FOR FIRST APPEARANCE SUBSEQUENT TO ARREST FOR VIOLATION OF AN INJUNCTION: 158
J. DOMESTIC VIOLENCE PRETRIAL RELEASE/DETENTION: 159
K. BAIL: 161
L. PRETRIAL INTERVENTION: 164
M. PROBATION: 166
N. JAIL: 171
O. SENTENCING: 171
P. VIOLATION OF PROBATION OR INJUNCTION: 173
Q. EXPUNCTION OF CRIMINAL HISTORY IN DOMESTIC VIOLENCE CASES: 176
R. PROSECUTOR'S RESPONSIBILITY DEALING WITH A THREAT OF PERJURY OR CONTEMPT: 177

DOMESTIC VIOLENCE LEGAL OUTLINE

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Introduction: This outline was created to assist judges in Florida who are assigned to hear domestic violence cases. It has been made part of the 2008 Florida Domestic Violence Benchbook, which was developed and disseminated by the Office of Court Improvement in the Office of the State Courts Administrator. Although the information focuses primarily on civil domestic violence proceedings, it also includes sections on evidence and on domestic violence in criminal proceedings.

I. DOMESTIC VIOLENCE – BACKGROUND AND DEFINITIONS:

A. FEDERAL LAW:

1. **Violence Against Women Act, 42 U.S.C. § 13981:** Under section 5 of the Fourteenth Amendment and section 8 of Article I of the Constitution, Congress enacted the Violence Against Women Act of 1994 (VAWA), a federal civil rights cause of action for victims of gender motivated violence. 42 U.S.C. § 13981.
   a. <u>However, the Supreme Court held that Congress did not have the authority to enact the civil remedy provision of VAWA:</u> *See* <u>United States v. Morrison</u>, 120 S.Ct. 1740 (2000). The Supreme Court held that the Commerce Clause did not provide Congress with authority to enact the civil remedy provision of VAWA (§ 13981). The provision was not a regulation of activity that substantially affected interstate commerce, gender-motivated crimes of violence were not economic activity, and the provision contained no jurisdictional element

establishing that a federal cause of action was in pursuance of Congress' power to regulate interstate commerce. Although, state-sponsored gender discrimination could violate equal protection under certain circumstances, the Fourteenth Amendment did not prohibit or provide a shield against private conduct, it prohibits only state action, and is directed at conduct of a State or state actor. The conduct at issue in this case is that of a private individual.

b. The Court further rejected the argument that Congress may regulate noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce and stated that they "can think of no better example of police power which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 1754.

2. **Federal Definition of Domestic Violence:** A "crime of domestic violence" is defined as a misdemeanor under Federal or State Law that involves the use, attempted use, or threatened use of physical force against a person by a current or former spouse, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, or by a person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides. 18 U.S.C.A. § 2260, Part 1. § 16; 18 U.S.C.A. § 2266(7)(B).

3. **Interstate Domestic Violence Statute, 18 U.S.C. § 2261(a):**
   a. Offenses:
      (i) Crossing a State Line. -- Under this provision a person who travels across a state line or enters or leaves Indian Country with the intent to injure, harass, or intimidate that person's spouse or immediate partner, and who, in the cause of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner shall be punished as provided in subsection (b).
      (ii) Causing the crossing of a state line. -- A person who causes a spouse or intimate partner to cross a state line or to enter or leave Indian Country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).
   b. Penalties: A person who violates this section or section 2261A shall be fined under this title and imprisoned:
      (i) For life or any term of years, if death of the victim results;
      (ii) For not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(iii) For not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
(iv) As provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
(v) For not more than 5 years, in any other case, or both fined and imprisoned.

c. Enactment of 18 U.S.C. § 2261(a) does not exceed Congress' authority under the Commerce Clause. *See* U.S. v. Bailey, 112 F.3d 758 (4th Cir. 1997)
The portion of the Violence Against Women Act that makes it a federal crime to cause bodily injury to one's spouse after crossing state lines with the intent to do so, 18 U.S.C. 2261(a)(2), does not exceed Congress' authority under the Commerce Clause. The court pointed out that § 2261(a)(2) requires the crossing of a state line, and therefore placed the criminal activity squarely in interstate commerce.

4. Full Faith and Credit, 18 U.S.C. § 2265:
The Violence against Women Act requires all states and Indian nations to give full faith and credit to restraining orders and orders of protection against domestic violence that meet the federal definition if the respondent was given notice and an opportunity to be heard. The mandatory injunction forms used in Florida were created in part to qualify under the federal statute, including the written finding that the petitioner is a victim of domestic violence and/or petitioner has reasonable cause to believe that she or he is in imminent danger of becoming a victim of domestic violence.

B. FLORIDA STATE LAW:

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

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

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

(ii) No Requirement to Allege Irreparable Harm:
Also, although one way to obtain a domestic violence injunction is by showing an imminent threat of domestic violence, this is not required if a petition is filed based on the petitioner already being a victim of domestic violence. Therefore, alleging irreparable harm is not a requirement to seeking an injunction against domestic violence.

2. Florida Statutes Chapter 741

a. Chapter 741, Florida Statutes, Exclusive Method to Obtain an Injunction. The procedure outlined in chapter 741, Florida Statutes, is the *exclusive* method to obtain an injunction in Florida for protection against domestic violence. No other remedies, including an injunction under Florida Rule of Civil Procedure 1.610, may be utilized to obtain an injunction against domestic violence. Campbell v. Campbell, 584 So.2d 125 (Fla. 4th DCA 1991); *see* Florida Family Law Rule of Procedure 12.610(a), and §61.052(6), Florida Statutes.

b. *See* Shaw-Messed v. Messed, 755 So.2d 776 (Fla. 5th DCA 2000).

The Fifth District Court of Appeal held that the trial court erred in not conducting an evidentiary hearing on the issuance of an injunction for protection against domestic violence filed by the wife against the husband, and in entering a mutual injunction in the dissolution action, under chapter 61, Florida Statutes, without any testimony that the husband had committed any conduct deserving such action. In reversing the lower court's ruling and remanding the case for further action, the Fifth District Court of Appeal held that §741.30, Florida Statutes, not chapter 61 of the Florida Statutes, is the appropriate vehicle for a domestic violence injunction.

c. In addition to §741.28, Florida Statutes, a number of Florida statutes address issues associated with domestic violence cases, including injunctions (§741.31), civil actions for damages (§768.35), confidentiality (§§39.908,

741.401, 741.465), evidentiary issues (§90.5036) and mediation (§44.102). These related sections will be discussed further in this outline.

3. Domestic Violence Definitions in Florida Statutes:

a. DOMESTIC VIOLENCE means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death of one family or household member by another family or household member. §741.28(2), Florida Statutes.

b. <u>Assault defined:</u>

An assault is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. §784.011(1), Florida Statutes.

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

d. <u>Battery defined:</u>

A person commits a battery if he or she (1) actually and intentionally touches or strikes another person against the will of the other, OR (2) intentionally causes bodily harm to another person. §784.03, Florida Statutes.

e. A battery is a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, Florida Statutes. §784.03(1)(b), Florida Statutes.
   (i) <u>Punishment for Battery under §775.082(4)(a):</u> For a misdemeanor of the first degree, definite term of imprisonment not to exceed 1 year.
   (ii) <u>Punishment for Battery under §775.083(1)(d):</u> A person who had been convicted of battery may be sentenced to pay a fine in addition to the punishment under §775.082 above or he or she may be sentenced to pay a fine not to exceed $1,000 in lieu of the punishment described above.

f. A person who has one or more prior convictions for battery, aggravated battery, or felony battery and who commits any second or subsequent

battery commits a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084. §784.03(2), Florida Statutes.

(i) Punishment for third degree felony under §775.082(3)(d), Florida Statutes: a term of imprisonment not to exceed 5 years.

(ii) Punishment for third degree felony under §775.083(1)(c), Florida Statutes: A person who had been convicted of a third degree felony may be sentenced to pay a fine in addition to the punishment under §775.082 above or he or she may be sentenced to pay a fine not to exceed $5,000 in lieu of the punishment described above.

(iii) Punishment for a third degree felony under §775.084(4)(b)(3), Florida Statutes: If defendant is found to be a habitual felony offender: term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

(iv) Punishment for third degree felony under §775.084(4)(d)(3), Florida Statutes: If defendant is found to be a violent career criminal: term of years not exceeding 15, with a mandatory minimum term of 10 years imprisonment.

g. <u>Felony Battery defined:</u>

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

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

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

i. <u>Aggravated Battery defined:</u>

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

j. Aggravated battery is a second degree felony, punishable as provided in §§775.082, 775.083, and 775.084, Florida Statutes.
   (i) Punishment for second degree felony under §775.082(3)(c): a term of imprisonment not to exceed 15 years.
   (ii) Punishment for second degree felony under §775.083(1)(b): A person who had been convicted of aggravated battery may be sentenced to pay a fine in addition to the punishment under §775.082 above. The fine shall not exceed $10,000.
   (iii) Punishment for second degree felony under §775.084(4)(b)(2): If defendant is found to be a habitual felony offender: term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
   (iv) Punishment for second degree felony under §775.084(4)(d)(2): If defendant is found to be a violent career criminal: term of years not exceeding 40, with a mandatory minimum term of 30 years' imprisonment.

k. The general view is that consent is not a defense to battery.
   (i) Lyons v. State, 437 So.2d 711, 712 (1st DCA 1983).
   (ii) State v. Conley, 799 So.2d 400 (Fla. 4th DCA 2001), "A view of the law that a victim of domestic violence can consent to the batteries and injuries perpetrated on him or her is incompatible with both the general law of battery and the specific legislative intent expressed in §741.2901(2)...."
   (iii) *See also* State v. Conley, 799 So.2d 400 (Fla. 4th DCA 2001). Judge Warner concurs in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery is a defense. Consent is only a defense in cases of sexual battery, not domestic violence.

l. Stalking defined:

Section 784.048(2), Florida Statutes: Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking.

m. Stalking is a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, Florida Statutes. *See also* section (e) above.

n. Cyber-Stalking defined:

To engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing

substantial emotional distress to that person and serving no legitimate purpose. §784.048, Florida Statutes.

o. <u>Aggravated stalking defined:</u>

(i) Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084, Florida Statutes.

(ii) Any person who, after an injunction for protection against repeat violence, sexual violence, or dating violence pursuant to §784.046, or an injunction for protection against domestic violence pursuant to §741.30, Florida Statutes, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084, Florida Statutes.

(iii) Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a minor under 16 years of age commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§775.082, 775.083, or 775.084. §784.048(3-5), Florida Statutes. *See also* section (f) above.

4. Applicable Rules of Procedure:

a. The Florida Family Law Rules of Procedure apply to domestic, repeat, dating and sexual violence proceedings. Florida Family Law Rule of Procedure 12.010(a)(1).

b. Pre-trial discovery:

Pre-trial discovery is available in injunction cases including: depositions (rule 12.290), interrogatories (rule 12.340), production of documents (rule 12.350), examination of persons (rule 12.360), and requests for admission (rule 12.370). However, the mandatory disclosure required under Florida Family Law Rule of Procedure 12.285 for most family law cases is not available in domestic, repeat, dating and sexual violence injunction proceedings.

c. Procedures for temporary and final injunctions for protection against domestic violence are governed by Florida Family Law Rule of Procedure 12.610. In conjunction with this rule, the Florida Supreme Court has approved a series of standardized domestic violence forms, which include petitions for various types of injunctions and mandatory injunction forms. Judges are required to use the injunction forms when making determinations

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

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

6. **No Filing Fee**:
   The clerk of court cannot assess a filing fee for petitions for injunction against domestic violence. §741.30(2)(a), Florida Statutes.

II. DOMESTIC VIOLENCE COURT – CIVIL PROCEEDINGS:

A. VALID ESTABLISHMENT OF DOMESTIC VIOLENCE COURTS:

1. Case Law Validating Establishment of Domestic Violence Courts:

a. Holsman v. Cohen, 667 So.2d 769 (Fla. 1996). It is appropriate for circuits to establish domestic violence courts to enable family law judges to address all issues involving domestic violence in an expeditious, efficient, and deliberate manner.

b. Rivkind v. Garcia, 650 So.2d 38 (Fla. 1995).

c. In re Report of Comm'n on Family Courts III, 646 So.2d 178 (Fla.1994).

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

a. Holsman v. Cohen, 667 So.2d 769 (Fla. 1996).

(i) District courts lack authority to review administrative orders.

(ii) District courts' obligations do not include the approval of routine matters generally included in administrative orders such as the assignment of judges to divisions.

b. In re Report of Comm'n on Family Courts III, 646 So.2d 178 (Fla. 1994).

c. Rivkind v. Patterson, 672 So.2d 819 (Fla. 1996).

3. Judicial Assignments in Domestic Violence Court:

a. Rivkind v. Patterson, 672 So.2d 819 (Fla. 1996), ("that judicial assignments at issue constitute a logical and lawful means to ensure the expeditious and efficient resolution of domestic violence issues...").

b. Holsman v. Cohen, 667 So.2d 769 (Fla. 1996). County court judges may be assigned to hear circuit court work on a temporary or regular basis, provided that the assignment is directed to a specified or limited class of cases. Likewise, this applies equally to the assignment of circuit judges to handle county court matters.

B. JURISDICTION OF DOMESTIC VIOLENCE COURTS:

1. **The Court Must Have Jurisdiction before Entering a Final Judgment of Injunction for Protection against Violence and Ancillary Relief.**
   a. Velez v. Selmar, 781 So.2d 1197 (Fla. 3d DCA 2001) The trial court, which lacked jurisdiction, incorrectly entered an injunction against repeat violence and supplemental order for a final injunction.
   b. *See also* Rinas v. Rinas, 847 So.2d 555 (Fla. 5th DCA 2003).

   Trial court did not have jurisdiction to award custody, child support and alimony, in a domestic violence action, absent dissolution of marriage proceeding; §741.30, Florida Statutes, does not authorize such awards, under provisions of chapter 61, Florida Statutes, *when petitioner in a domestic violence action is a minor child filing by and through her mother as "next best friend."* Unique to this case, was that the petitioner's mother was filing on her minor child's behalf, and in such cases ancillary relief may be limited. *See* Domestic Violence Legal Outline II. C. 4. c.

2. **Florida's Courts Lack Authority to Issue Protective Injunctions Granting Custody of Children who are Subjects of Foreign Custody Order. Baumgartner v. Baumgartner, 691 So.2d 488 (Fla. 2d DCA 1997).**
   a. Florida courts likewise lack authority to prohibit children, who are subjects of foreign custody orders, from leaving Florida.
   b. Florida courts do have authority to issue protective orders to those persons within the state.
   c. Foreign Orders Which Prohibit Removal of Child from Other Countries:

   See Abuchaibe v. Abuchaibe, 751 So.2d 1257 (Fla. 3d DCA 2000). The Third District Court of Appeal held that the courts in Florida had no jurisdiction over a child for the purpose of making a custody determination under §61.1308(1)(b) Florida Statutes, where the child did not have any significant connection with the state of Florida. The child was born in Florida, and later moved to Colombia. He had lived about half of his thirty-three months in Florida, and about half in Colombia. The father is a dual citizen of the U.S. and Colombia, where he resides. The mother is a Colombian citizen and has resided in the U.S. while attempting to qualify for residency. The child was present in Florida visiting his mother for six days prior to the mother filing an injunction for protection against domestic violence. The Florida court entered a domestic violence injunction, asserted jurisdiction over the child, awarded her temporary custody, and ordered the child returned from Colombia by the father, who had sent him back to Colombia the day after the mother filed for the injunction. The father commenced formal proceedings in Colombia to determine custody of the child some time after the final order of the Florida court in November 1998, which awarded custody to the mother. Service of process on the mother for the Colombia proceedings was attempted, though unsuccessfully, through the

Colombian Consulate in Miami. In December 1998, the mother filed for dissolution of marriage, seeking permanent custody of the child. The mother subsequently dismissed her dissolution petition while the issue of jurisdiction was being considered by the Family Court. The domestic violence trial court later held the father in contempt for his failure to return the child to the mother, despite the father's argument that Colombian law prevented him from removing the child from the country while custody proceedings were pending. The Third District Court of Appeal reversed the trial court's custody order, finding that the court erred in asserting jurisdiction. Further, the Third District Court of Appeal reversed the contempt order, since the father was barred from removing the child from Colombia by Colombian law.

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

C. PARTIES/STANDING/RESIDENCY:

1. **Petitioner Does Not Have to Vacate Residence:**
   A person's right to file a petition for injunction against domestic violence is not affected by whether that person has left the parties' residence or household. §741.30(1)(d), Florida Statutes. Likewise, a litigant may still be awarded exclusive use and possession of the parties' home, even if the litigant has left the home.

2. **Petition can be filed Pro Se:**
   A pro se litigant can file a petition for protection against domestic violence. §741.30(1)(f), Florida Statutes.

3. **Standing:**
   Section 741.30(1)(a), Florida Statutes: "Any person described in paragraph (e), who is either the victim of domestic violence as defined in §741.28 or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence, has standing in the circuit court to file a sworn petition for an injunction for protection against domestic violence."
   a. There is apparently no statutory distinction between the standing to file a petition, conferred above by being a victim of domestic violence or having a

reasonable belief of being in imminent danger of becoming a victim, and prevailing on the merits. Section 741.30(6)(a), Florida Statutes, permits the court to enter the injunction upon making either of the findings in §741.30(1)(a), Florida Statutes. This interpretation of standing is also supported by case law. Cleary v. Cleary, 711 So.2d 1302 (Fla. 2d DCA 1998); Gustafson v. Mauck, 743 So.2d 614 (Fla. 1st DCA 1999).

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

4. **Parties Must Be "Family or Household Members" to Request an Injunction for the Protection against Domestic Violence:** An injunction for protection against domestic violence requires that the domestic violence or threat of domestic violence occur between "one family or household member" and "another family or household member" but the petitioner is not required to be the spouse of the respondent. §§741.28(2), 741.30(1)(e), Florida Statutes. Any "family or household member" as defined under §741.30(1)(e), Florida Statutes, below, can file a petition for protection against domestic violence.

   a. Pursuant to §741.28(3), Florida Statutes: "FAMILY OR HOUSEHOLD MEMBER" means:
      (i) They are family or household members – spouses, ex-spouses, relatives by blood or marriage, anyone who lives or has lived together in the same dwelling as a family unit AND
      (ii) They currently reside or have in the past resided together in the same dwelling as a family unit, OR
      (iii) They have a child in common, regardless of whether they have been married and regardless of whether they currently reside or have in the past resided together in the same dwelling. (If the parties are relatives and no longer reside together or did not reside together in the past they may want to file for an injunction under §784.046, Florida Statutes.)

   b. Unless the parties have a child in common, the parties must have lived in the same single dwelling with the person against whom the injunction is sought. (Therefore, a child who has never lived with his biological parent could not seek a domestic violence injunction against the parent.)

   c. Definition of "family or household member" under Florida law is broader than under federal statutes: Florida includes blood relatives and in-laws but federal law does not. Furthermore, a minor child can file by and through a parent as "next best Friend." However in such case ancillary relief may be limited.

(i) *See* Rinas v. Rinas, 847 So.2d 555 (Fla. 5th DCA 2003). Improper for trial court to award custody, child support, and alimony for petitioner's mother and sister in a domestic violence action where petitioner was a minor child filing by and through her mother as "next best friend."

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

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

6. **Standing Requirement Met:**
   a. Section 741.30, Florida Statutes, was intended to protect intimate (including same sex) partners and was not intended to exclude those who seek protection from someone of the same sex. Peterman v. Meeker, 855 So.2d 690 (Fla. 2d DCA 2003).
   b. Petitioner and respondent who are brother and sister have not lived together for 40 years. They still qualify for domestic violence relief. Rosenthal v. Roth, 816 So.2d 667, (Fla. 2d DCA 2002). The statutes defining "domestic violence" and "family household member" were amended after this case in 2002.
   c. Temporary stay, of one week, with Aunt satisfied statutory requirement that the parties were residing in the "same dwelling." Koris v. Zipnick, 738 So.2d 369 (Fla. 4th DCA 1999).

7. **Standing Requirement NOT Met:**
   a. Petitioner lacked standing to file a domestic violence action although the parties' relationship was romantic in nature with overnight visits because both parties lived in separate residences. Slovenski v. Wright, 849 So.2d 349 (Fla. 2nd DCA 2003).
   b. Petitioner who is maternal grandfather and who had custody of the grandchild requested domestic violence injunction against child's father. The Court found pursuant to §741.28 Florida Statutes, that the grandfather and father did not share child in common and dismissed the petition. Partlowe v. Gomez, 801 So.2d 968 (Fla. 2d DCA 2001).
   c. Court found that statute required that parties lived together at some point; improper to enter injunction to sister-in-law, although related by marriage, where she and brother-in-law never resided together. Sharpe v. Sharpe, 695 So.2d 1302 (Fla. 5th DCA 1997). The statute was modified after Sharpe to

make clear that parties who have a child in common do not have to have lived together.

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

D. PROCEDURAL REQUIREMENTS FOR CLAIMS:

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

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

3. **Service Requirements of Pleadings and Other Documents:**
   Florida Family Law Rule of Procedure 12.610(b)(2)(A) requires petitions for protection against domestic violence, other required documents, and the temporary injunction (if one has been entered) to be served by a law

enforcement agency and requires the clerk to furnish a copy of the petition and applicable forms to law enforcement for service.

a. Temporary and Final Injunctions Must be Served:

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

b. Service Requirements for Subsequent Pleadings and Orders:

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

4. Due Process Problems:

a. Notice Problems:

(i) Trial court's decision to permit psychologist's testimony, which was based on a child custody psychological report, during a hearing on a temporary domestic violence injunction issued against the father, deprived the mother of procedural due process. The report which recommended that the children be removed from the mother's custody due to severe alienation of the children from their father was 35 pages single spaced and was not received by the mother until the day before the hearing. Schmitz v. Schmitz, 890 So.2d 1248 (Fla. 4th DCA 2005).

(ii) Lab report, which was sent directly to the judge, was an ex parte communication and the court must provide a copy to each party and allow each side to be heard before suspending visitation base upon report. Pierce v. Tello, 868 So.2d 1253 (Fla. 4th DCA 2004).

(iii) Former Wife's due process rights were violated when trial court on its on its own motion modified "no contact" provision of the contempt order, domestic violence injunction, husband did not request a modification and agreed at that hearing that the only issues to be decided was the amount of child support. Swanson v. Swanson, 888 So.2d 117 (Fla. 4th DCA 2004). *See also* White v. Cannon, 778 So.2d 467 (Fla. 3d DCA 2001).

(iv) Trial court erred in dismissing an injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not

noticed that the matter would be considered, thus failing to provide due process on the issue. Parties must have notice that dismissal will be considered. Farr v. Farr, 840 So.2d 1166 (Fla. 2d DCA 2003).

(v) Court erred in hearing respondent's motion to modify temporary injunction concerning child custody at the same time as the final hearing. Petitioner claimed no notice and asked for continuance which was denied. Cervieri v. Cervieri, 814 So.2d 528 (Fla. 4th DCA 2002).

(vi) Conversion of ex parte hearing on Motion to Quash Injunction into full evidentiary hearing infringed upon due process and therefore the injunction was vacated and the case remanded for a full hearing. Melton v. Melton, 811 So.2d 862 (Fla. 5th DCA 2002).

(vii) Respondent's right to due process violated where custody and visitation were terminated without a petition requesting such relief. Ryan v. Ryan, 784 So.2d 1215 (Fla. 1st DCA 2001).

(viii) By dismissing injunction without motion, notice or hearing, the court erred. Chanfrau v. Fernandez, 782 So.2d 521 (Fla. 2d DCA 2001).

(ix) Judge cannot sua sponte modify injunction where no motion seeking modification was filed. Mayotte v. Mayotte, 753 So.2d 609 (Fla. 5th DCA 2000).

(x) The trial court amended a domestic violence injunction and granted the paternal grandmother temporary custody of the child without motion, notice, or hearing afforded to the parties. The custody order was reversed and the court stated that the fact that the wife had obtained a hearing on a motion to dissolve the child custody order was not sufficient to satisfy due process requirements. Snyder v. Snyder, 685 So.2d 1320 (Fla. 2d DCA 1996).

b. Opportunity to be Heard:

(i) It was error to deny respondent the opportunity to present evidence. Oravec v. Sharp, 743 So.2d 1174 (Fla. 1st DCA 1999), Madan v. Madan, 729 So.2d 416 (Fla. 3d DCA 1999).

(ii) Full evidentiary hearing required. Cisneros v. Cisneros, 782 So.2d 547 (Fla. 4th DCA 2001), Chanfrau v. Fernandez, 782 So.2d 521 (Fla. 2d DCA 2001).

(iii) Must allow evidence to be presented. Wooten v. Jackson, 812 So.2d 609 (Fla. 1st DCA 2002), Shaw-Messer v. Messer, 755 So.2d 776 (Fla. 5th DCA 2000), Cuiska v. Cuiska, 777 So.2d 419 (Fla. 1st DCA 2000).

(iv) It was error for the court to "cut hearing short" due to number of cases to be heard that day. Semple v. Semple, 763 So.2d 484 (Fla. 4th DCA 2000).

(v) Petitioner requested emergency writ of certiorari for review of two separate orders which denied her ex parte motion for a domestic violence injunction. The first petition was denied without a hearing. The second petition denied relief, holding that the first order issued by a

different judge was controlling. The writ was granted and the judge issuing the first order admitted error because the petitioner's allegations were sufficient. The Fifth DISTRICT COURT OF APPEAL quashed both orders and remanded the case to the first judge with instructions to issue the temporary injunction. Gonzales v. Clark, 799 So.2d 451 (Fla. 5th DCA 2001).

c. Court Forced Defendant to Proceed to Hearing without Representation: Defendant, against whom injunction for protection was sought, was denied due process when trial court granted her twenty days to obtain representation and at the same time required her to proceed pro se at a hearing in which all of the issues that required the assistance of an attorney were to be decided. Sheinheit v. Cuenca, 840 So.2d 1122 (Fla. 3d DCA 2003).

5. **Injunction Must be Issued as a Separate Order under Chapter 741:**
   a. An injunction for protection against domestic violence must be issued as a separate order under chapter 741, Florida Statutes, including service of process, proper pleadings, and sufficient evidence to support an injunction or waiver. Guida v. Guida, 870 So.2d 222 (Fla. 2d DCA 2004).
   b. Section 61.052(6), Florida Statutes, mandates that an injunction must be a separate order from the final judgment of dissolution of marriage. *See also* Campbell v. Campbell, 584 So.2d 125 (Fla. 4th DCA 1991).
   c. Practical Reasons for this Mandate: It facilitates protection by Police

   The Florida Supreme Court Approved Family Law Form final judgments, which pertain to domestic violence, are recognized due to their uniformity by law enforcement personnel, whereas individually created final judgments may not be registered or easily recognized. The form injunctions are registered in a statewide registry and may be verified by law enforcement personnel. A similar order under chapter 61, Florida Statutes, would not be registered.

6. **Entering and Interpreting Multiple or Inconsistent Orders:**
   Provisions regarding support, custody, and exclusive use and possession of the home in Chapter 61 orders take precedence over inconsistent determinations in domestic violence injunctions, whether a chapter 61 case was filed and determined subsequent to the chapter 741, Florida Statutes, action or before. §741.30(1)(c), Florida Statutes.

7. **Domestic Violence Hearings Must be Recorded:**
   a. Section 741.30(6)(h), Florida Statutes.
   b. Schmidt v. Hunter, 788 So.2d 322 (Fla. 2d DCA 2001). Initial hearing must be recorded for contempt to be adjudicated; otherwise, facially sufficient claim of error cannot be refuted by the record.

8. **Mediation in Domestic Violence Cases**:

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

9. **Bond is Not Required for Civil Domestic Violence Injunction:**
No bond is required for issuance of a civil injunction for protection against domestic violence. §741.30(2)(b), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).

10. **Error for Trial Court to Enter Final Injunction When no Petition was Filed:**
Orth v. Orndorff, 835 So.2d 1283 (Fla. 2d DCA 2003): Trial court's sua sponte entry of a final injunction where there was no petition before it was in "direct contravention of §741.30(1)(l), (4), and (6)(a), which requires the filing of a petition and a hearing on such prior to the issuance of an injunction."

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

12. **Required Forms for Filing:**
Depending on the request of the petitioner, the following additional Florida Supreme Court Approved Family Law Forms must be filed in addition to the petition:
a. If temporary child support is requested:

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

b. If temporary custody of a minor child is requested:
Uniform Child Custody Jurisdiction and Enforcement Affidavit, Florida Supreme Court Approved Family Law Form 12.902(d).

c. If temporary alimony is requested:
Family Law Financial Affidavit, Florida Family Law Rules of Procedure Form 12.902(b) or (c).

13. Perjury:

a. If a petitioner makes false statements in a petition for an injunction against domestic violence, the petitioner is subject to perjury prosecution pursuant to the elements of §837.02, Florida Statutes. Adams v. State, 727 So.2d 983 (Fla. 5th DCA 1999). The petitioner is made aware of this potential sanction when the petitioner signs the petition and takes the oath required under §741.30(3)(c), Florida Statutes.

Adams v. State, 727 So.2d 983 (Fla. 5th DCA 1999). The wife was convicted of perjury by contradictory statement after filing a false affidavit in a domestic violence action against her husband. On appeal she contended that the trial court erred in not granting her motion for judgment of acquittal because 1) the evidence established that she did not sign the affidavit under oath, and 2) her defense of recantation was established as a matter of law. The Fifth District Court of Appeal Court of Appeals affirmed the trial court finding that neither argument possessed merit and emphasized the criminal consequences attach to the false swearing of complaints, even where the affiant might have been motivated by the desire to benefit the person against whom the complaint was sworn.

b. Additionally, in a dissolution action, the court can consider false allegations made by a party in an injunction proceeding under §741.30, Florida Statutes, when determining parental responsibility and physical residence of the parties' children. §61.13(3)(k), Florida Statutes.

14. Frivolous Allegations:

a. Chapter 741, Florida Statutes, does not provide a sanction when a party to an injunction proceeding makes frivolous allegations. However, one possible sanction could be the award of attorney's fees under §57.105, Florida Statutes.

b. Although no cases were located authorizing attorney's fees in such a case, §57.105, Florida Statutes, permits an award of attorney's fees in a civil action if the court finds that "the losing party or the losing party's attorney knew or

should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts." Cf. Cisneros v. Cisneros, 831 So.2d 257 (Fla. 3d DCA 2002), (stating request for appellate attorney's fees under §57.105 in domestic violence injunction case should be made by timely motion before appellate court); but cf. Lewis v. Lewis, 689 So.2d 1271 (Fla. 1st DCA 1997) (stating attorney's fees may not be awarded in a domestic violence injunction case under §61.16 (dissolution of marriage) where it did not involve enforcement or facilitation of an action under chapter 61).

c. *See also* section II.P.(1), Attorney's Fees in Domestic Violence Proceedings.

15. Failure to Appear:

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

E. SUBSTANTIVE REQUIREMENTS FOR CLAIMS:

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

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

2. Legal Grounds Required to Enter a Final Injunction:

a. There are two bases for obtaining a final injunction for protection against domestic violence. A petitioner must either show:
   - (i) The petitioner is a victim of domestic violence, as defined under §741.28, Florida Statutes, OR
   - (ii) The petitioner has reasonable cause to believe that he or she is in imminent danger of becoming the victim for a court to issue an ex parte temporary injunction and/or a final injunction for protection against domestic violence. §741.30(1)(a),(6)(a), Florida Statutes; *See also* Farrell v. Marquez, 747 So.2d 413 (Fla. 5th DCA 1999).
   - (iii) Physical Injury or Death Not a Pre-Requisite to Grant an Injunction: Definition does not require that the physical injury or death occur in connection with the offense. R.H. v. State, 709 So.2d 129 (Fla. 4th DCA 1998). *See also* Rey v. Perez-Gurri, 662 So.2d 1328 (Fla. 3d DCA 1995). Chapter 741, Florida Statutes, does not require a petitioner to demonstrate that he or she has already been a victim of domestic

violence. The petitioner's evidence that her former husband recently threatened her was sufficient to establish "reasonable cause to believe that she was about to become a victim of domestic violence" in light of her former husband's prior violent threatening behavior.

(iv) The second basis for petitioning for an injunction requires the petitioner to show that he or she is in "imminent danger" of domestic violence. Taylor v. Taylor, 831 So.2d 240 (Fla. 2d DCA 2002) (stating court failed to find that either of the two statutory bases for issuing a domestic violence injunction existed).

(v) Section 741.30(6)(b), Florida Statutes, sets forth specific factors the court should consider when determining whether there is imminent danger of domestic violence. *See infra* section (b).

b. Court Must Consider; §741.30(6)(b), Florida Statutes:

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

(i) The history between the petitioner and respondent, including threats harassment, stalking, and physical abuse.

(ii) Whether the respondent has attempted to harm the petitioner or family members or individuals closely associated with the petitioner.

(iii) Whether the respondent has threatened to conceal, kidnap, or harm the petitioner's child or children.

(iv) Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.

(v) Whether the respondent has intentionally injured or killed a family pet.

(vi) Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.

(vii) Whether the respondent has a criminal history involving violence or the threat of violence.

(viii) The existence of a verifiable order of protection issued previously or from another jurisdiction.

(ix) Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communications equipment, clothing, or other items belonging to the petitioner.

(x) Whether the respondent engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that she or he is in imminent danger of becoming a victim of domestic violence.

c. Remoteness of Incident(s) Forming Basis For Petition:

There is no requirement that the incidents alleged to support the issuance of an injunction for protection against domestic violence occur within a certain time frame relative to filing of the petition. Section 741.30(6)(b), above, sets forth the factors the court should consider regarding whether a threat of domestic violence is imminent. Some factors indirectly address the proximity of the

alleged acts to the filing of the petition: 1) the history of the parties; and 2) the prior criminal record of violence of the respondent.

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

4. **Fear of Imminent Danger NOT Established:**
   a. Kopelovich v. Kopelovich, 793 So.2d 31 (Fla. 2d DCA 2001). *Respondent threatened to harm dog and petitioner in court by destroying her financially, brainwashing her and embarrassing her in front of her friends.* The Second District Court of Appeal held that it was error for the trial court to grant initial ex parte injunction and amended temporary injunction against respondent where petitioner failed to establish "immediate or present danger" or threat of or actual "domestic violence," in accordance with §741.30(5), Florida Statutes (1999), and Florida Family Law Rule of Procedure 12.610. In order to balance respondent's due process rights against harm sought to be protected, *evidence supporting an ex parte injunction should be "strong and clear."* Additionally, it was error to enter a final injunction where petitioner amended her petition to include allegations sufficient to satisfy the statutory requirements, but where *petitioner's testimony at hearing still failed to satisfy the requirement* that she had "a reasonable cause to believe she was in imminent danger of domestic violence." Note: This case was

decided before injuring or killing a family pet was added to the statute as a relevant factor.

b. McMath v. Biernacki, 776 So.2d 1039 (Fla. 1st DCA 2001).

Receipt of letter and later flowers does not create "well-founded fear that violence is imminent."

c. Giallanza v. Giallanza, 787 So.2d 162 (Fla. 2d DCA 2001).

General harassment of petitioner and/or her children insufficient.

d. Cuiska v. Cuiska, 777 So.2d 419 (Fla. 1st DCA 2000).

The First District Court of Appeal held that the trial court did not abuse its discretion in denying the entry of a temporary injunction for protection against domestic violence where the *allegations in the petition did not demonstrate the existence of an "immediate and present danger of domestic violence"* as required by §741.30(5)(a), Florida Statutes. Although the appellate court did not rule on the issue of whether the trial court erroneously dismissed the petition without a hearing, due to the fact that such an order was not provided as part of the case on appeal, the opinion noted that in accordance with §741.30(5)(b), Florida Statutes, a hearing on the allegations of the petition would clearly be required before the case could be dismissed.

e. Gustafson v. Mauck, 743 So.2d 614 (Fla. 1st DCA 1999).

The First District Court of Appeal held that the trial court erred in granting a final injunction for protection against domestic violence on the basis of *repeated telephone calls made to petitioner, where the calls did not give the petitioner objectively reasonable grounds to fear* that she was in imminent danger of violence from the respondent, and there was *no evidence of previous physical violence, although a final injunction had been previously entered which expired two years prior.* The parties had not lived together for five years and the calls subsided once the step-father asked the respondent to stop calling. The court reviewed the 1 997 amendment to §741.30(1)(a), Florida Statutes, which changed the standard for issuance of an injunction to require reasonable fear of *imminent danger*, as opposed to reasonable fear of violence at some indeterminate time in the future.

f. Farrell v. Marguez, 747 So.2d 413 (Fla. 5th DCA 1999).

Petitioner and respondent are both students at the University. He parked his car in a school lot near her, greeted her, offered her a birthday card and was seen on campus several times. No reasonable cause to believe the petitioner was about to become a victim of domestic violence. *See infra* (5)(c) for further facts of this case.

g. Oettmeier v. Oettmeier, 960 So.2d 902, (Fla. 2nd DCA 2007) Competent, substantial evidence did not support finding that wife had an objectively reasonable fear of imminent domestic violence at the hands of husband, as required for issuance of injunction for protection against domestic violence. The danger feared must be imminent and the rationale for the fear must also be objectively reasonable. In this case, the husband (1) moved out of the home taking most of his personal belongings except a loaded gun in the

closet, which she concluded was a threat; (2) left angry messages on her cell phone and notes at the home; (3) "broke into" the home with the aid of a locksmith after having moved out; (4) spit on her face and pushed her away when she tried to kiss him approximately nine months earlier; (5) is a very heavy drinker who becomes depressed and angry when he drinks; (6) beat on the door and walls of the home and on one occasion smashed a trash can in the kitchen; (7) threatened to make her life miserable if she did not offer to buy him out; and (8) has a mental health problem but does not take his medication. The wife did not allege that the husband ever physically harmed her or that he verbally threatened to physically harm her.

5. **Sufficiency of Allegations and Evidence:**
   a. Whether the conduct meets the statutory requirement is a question of fact for the trier of fact. Biggs v. Elliot, 707 So.2d 1202 (Fla. 4th DCA 1998).
   b. Sufficient Evidence to Grant an Injunction:
      (i) Gonzales v. Clark, 799 So.2d 451 (Fla. 5th DCA 2001).
      Petitioner requested an emergency writ of certiorari for review of two separate orders which denied her ex parte petition for a domestic violence injunction. The first petition was denied without a hearing. A different judge denied the second petition, holding that the first order was controlling. The writ was granted and the judge issuing the first order candidly admitted, by filing a response with the district court, error because the petitioner's allegations were sufficient to issue the injunction. The Fifth District Court of Appeal quashed both orders and remanded the case to the first judge with instructions to issue the temporary injunction.
      (ii) *See supra* section E.(4)(d), Cuiska v. Cuiska, 777 So.2d 419 (Fla. 1st DCA 2000).
      (iii) *See supra* section E.(3)(b), Abravaya v. Gonzalez, 734 So.2d 577 (Fla. 3d DCA 1999).
      (iv) Biggs v. Elliot, 707 So.2d 1202 (Fla. 4th DCA 1998). Following the petitioner, repeatedly telephoning her, and stalking her constitutes grounds for a final injunction.
      (v) Rey v. Perez-Gurri, 662 So.2d 1328 (Fla. 3d DCA 1995).
      Chapter 741, Florida Statutes, does not require a petitioner to demonstrate that he or she has already been a victim of domestic violence. The petitioner's evidence that her former husband recently threatened her was sufficient to establish "reasonable cause to believe that she was about to become a victim of domestic violence" in light of her former husband's prior violent threatening behavior. Note: The 1997 statutory change requires that petitioner must either be a "victim of domestic violence or have reasonable cause to believe he or she is in imminent danger of becoming a victim…" Notwithstanding such change,

the reasoning of this case should apply, provided the imminent standard is met.

c. *See also* in this outline, IV. Domestic Violence – Criminal Proceedings, section F. Parental Discipline/Battery on a Child.

6. Insufficient Evidence to Grant Injunction:

a. Hursh v. Asner, 890 So.2d 494(Fla. 5th DCA 2004). No error in denying petition for domestic violence when petitioner's ultimate burden of proof is not met.

b. Mossbrooks v. Advincula, 748 So.2d 382 (Fla. 3d DCA 2000).

The Third District Court of Appeals reversed the entry of an injunction for protection against domestic violence because the evidence presented to the trial court of the alleged prior acts of violence was *insufficient as a matter of law.*

c. Farrell v. Marquez, 747 So.2d 413 (Fla. 5th DCA 1999).

The Fifth District Court of Appeal held that it was error for the trial court to enter a final injunction for protection against domestic violence where no *evidence was presented that the former husband had physically harmed or threatened the former wife,* and the facts alleged and proved did not support the conclusion that the former wife had reasonable cause to believe that she was in imminent danger of becoming a victim of domestic violence. The testimony revealed four encounters which did not involve any physical harm or threat of harm. During the first such encounter, the former wife discovered the former husband's parked car next to hers in the school parking lot; however, there was no evidence the former husband was present at the time. Second, the former wife saw the former husband three times at a school building where they both take classes. On one occasion he greeted her in passing. On another occasion, he offered her a birthday card, and she continued to exit the building. On the third occasion, following the conclusion of a lecture they had both attended, when she attempted to cut through the crowd to leave and the former husband did not move out of her way, she reacted by pushing him out of the way with her book bag. The testimony revealed, however, that it was impossible for him to move due to the fact that there were people on both sides of him.

7. Aggravated Stalking:

a. Continued Incidents Constitute Aggravated Stalking:

Jordan v. State, 802 So.2d 1180 (Fla. 3d DCA 2001). Defendant appealed convictions for aggravated stalking and trespass after violating a domestic violence injunction on the grounds that the evidence was not sufficient to sustain the charges. The court held that the defendant's conduct in visiting the victim's home after the issuance of the injunction and multiple phone calls from jail subsequent to his arrest constituted aggravated stalking under §741.30, Florida Statutes.

b. Single Incident Not Enough:

Stone v. State, 798 So.2d 861 (Fla. 4th DCA 2001). Defendant appealed a conviction for aggravated stalking after a no contest plea. The only evidence supporting the charge was the probable cause affidavit detailing the events of the night in question. The Fourth District Court of Appeal held that there was not a sufficient factual basis for a nolo contendere plea on a charge pursuant to §784.048(3), Florida Statutes. The affidavit alleged a single incident on one occasion. There was no other evidence presented that the defendant had contact with the victim at any other juncture; therefore, a charge of aggravated stalking was inappropriate because there was only a single act.

c. Disjointed and Discrete Incidents Not Enough:

Butler v. State, 715 So.2d 339 (Fla. 4th DCA 1998). Disjointed and discrete incidents, interspersed with one of more reconciliations between the defendant and the victim, who were in an "on and off" again marital relationship, are not instances of repeated harassing conduct constituting aggravated stalking.

F. EX PARTE TEMPORARY INJUNCTIONS:

1. Required Forms/Information:

If the petition for injunction requests that the court address issues of temporary child custody or visitation of the parties minor child or children, the required allegations under §61. 522 shall be incorporated into the petition for protection against domestic violence or a separate Uniform Child Custody Jurisdiction and Enforcement Act Affidavit Form (UCCJEA), which sets out the required information, shall accompany it. Section 741.30(3)(d), Florida Statutes. *See also* in this outline, sections II.D.(12),(13) for further explanation of the petition requirements and additional forms required for filing when petitioner requests temporary child or spousal support.

2. Amended Petition:

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

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

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

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

5. **Period of Effectiveness:**
An ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days AND a full hearing on a final injunction shall be set for a date no later than the date the temporary injunction ceases to be effective. §741.30(5)(c), Florida Statutes, Florida Family Law Rule of Procedure 12.610(c)(3)(A).

6. **Notice of Full Hearing:**
Once a petition for an injunction is filed, a hearing on the petition must be held at the earliest possible time. §741.30(4), Florida Statutes. The respondent should receive notice of the hearing when the petition, temporary injunction or order denying the petition, and other pleadings are served. §741.30(4), Florida Statutes; Florida Family Law Rules of Procedure 12.610(c)(3)(A).

7. **Required Verified Pleadings:**
The court can only consider the verified pleadings/affidavits in an ex parte hearing, unless the respondent appears at the hearing or has received reasonable notice of the hearing. §741.30(5)(b), Florida Statutes.
   a. **If the respondent appears at the temporary injunction hearing or has had reasonable notice of it, a full evidentiary hearing may be held. Florida Family Law Rule of Procedure 12.610(c)(1)(A).**
   b. Court Can Not Consider Ex parte Motion unless it is Verified:
   Vargas v. Vargas, 816 So.2d 238 (Fla. 2d DCA 2002). Azra Rheman Vargas appeals from a non-final order issued without notice that temporarily enjoined her and her husband, David Vargas, from removing their children from the jurisdiction of the circuit court and required her to relinquish the children's passports to her attorney or to her husband. The Second District Court of Appeal reversed the decision from the trial court because the trial court failed to conform to the requirements of Florida Rule of Civil Procedure 1.610. The Second District Court of Appeal said that *the party seeking a temporary injunction without notice must file a verified pleading or affidavit that alleges specific facts showing immediate and irreparable harm and must detail any efforts made to give notice and the reasons why notice should not be required.* Florida Rule of Civil Procedure 1.610(a). Appellant's motion was not verified because he did not file an affidavit, and he did not detail any efforts made to give notice or state why notice should not be required. Note that this does not preclude a party from reapplying for injunctive relief in accordance with the requirements of rule 1.610.

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

a. If the court finds no basis for the issuance of an injunction the petition may be denied without a return hearing. A denial shall be by written order noting the legal grounds for denial. §741.30(5)(b), Florida Statutes. *See also* Florida Supreme Court Approved Family Law Form 12.980(b)(2).
b. When the only ground for denial is no appearance of an immediate and present danger of domestic violence, the petition for an ex parte temporary injunction may be denied but the court shall set a full hearing on the petition with notice at the earliest possible time. §741.30(5)(b), Florida Statutes, Florida Supreme Court Approved Family Law Form 12.980(b)(1).
   (i) *See also* Cuiska v. Cuiska, 777 So.2d 419 (Fla. 1st DCA 2000), (trial court did not abuse its discretion in denying the entry of a temporary injunction for protection against domestic violence where the allegations in the petition did not demonstrate the existence of an "immediate and present danger of domestic violence" as required by §741.30(5)(a), Florida Statutes.) Furthermore, although the appellate court, in Cuiska, did not rule on the issue of whether the trial court erroneously dismissed the petition without a hearing, due to the fact that such an order was not provided as part of the case on appeal, the opinion noted that in accordance with §741.30(5)(b), Florida Statutes, a hearing on the allegations of the petition would clearly be required before the case could be dismissed.
   (ii) Segui v. Nester, 745 So.2d 591 (Fla. 5th DCA 1999).
c. Likewise, Florida Family Law Rule of Procedure 12.610(b)(3) requires the denial of a petition to be by written order noting the legal grounds for denial and when the only ground for denial is no appearance of immediate and present danger of domestic violence the court must set a full hearing on the petition, with notice, at the earliest possible time.
   (i) Mandatory requirements if petition is denied -
      (a) order must be in writing and specify how the allegations were insufficient OR
      (b) if the petition is dismissed because there is no appearance of an immediate and present danger of domestic violence, a full hearing must be scheduled at the earliest possible time.
   (ii) Sanchez & Smith v. State, 785 So.2d 672 (Fla. 4th DCA 2001). The Fourth District Court of Appeal held in these consolidated opinions that it was error for the trial court to summarily deny a facially sufficient petition for ex parte injunction against domestic violence without a hearing and without explanation for the reason for summarily denying the petition. The trial court provided as its sole reason for denying the petition, only that petitioner "failed to allege facts sufficient to support the entry of an injunction against domestic violence or repeat violence," but did not specify how the allegations were insufficient. Additionally, the denial of petitioner's facially sufficient petition without a hearing was a departure from the essential requirements of the law. The Fourth District Court of

Appeal also held that it was error for the trial judge to summarily dismiss an ex parte injunction for protection against domestic violence issued by a duty judge the previous day and to cancel the hearing which had been set by the duty judge. Before the denial of a petition and prior to dismissal of an injunction, where the trial court's action is based on a finding of insufficient allegations, the trial court must have a specific basis for that finding.

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

d. Continuance of the Hearing/ Extension of Temporary Injunction:

(i) The court may grant a continuance of the hearing and an extension of the temporary injunction when "good cause" is shown by any party, or on the court's own motion for "good cause," including failure to obtain service of process. Florida Family Law Rule of Procedure 12.610(c)(4)(A), §741.30(5)(c). Therefore, the court can sua sponte extend a temporary injunction when it has "good cause" or when it finds it "necessary" due to the fact the hearing is being continued. There does not appear to be a time limit to an extension of a temporary injunction when it is made according to the above procedures. However, due process concerns would still apply. *See* Kopelovich v. Kopelovich, 793 So.2d 31 (Fla. 2d DCA 2001).

(ii) *See also* Miller v. Miller, 691 So.2d 528 (Fla. 4th DCA 1997). The court may not extend a temporary injunction without good cause.

(iii) Section 741.30(5)(c) states that a request for an extension of a hearing on a petition must be made before or during the hearing on the petition for injunction. When a hearing on a petition is continued, the court can extend the temporary injunction if necessary during any period of continuance. §741.30(5)(c), Florida Statutes.

(iv) Motions regarding the extension of a temporary injunction may be served by certified mail. Florida Family Law Rules of Procedure 12.610(c)(3)(A).

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

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

G. RELIEF GRANTED IN TEMPORARY DOMESTIC VIOLENCE INJUNCTIONS:

1. **Final Judgment of Ex Parte Temporary Injunction**
   Section 741.30(5)(a), Florida Statutes, if the court determines that there is an immediate and present danger of domestic violence, the court may grant a temporary injunction ex parte, and may grant such relief as the court deems proper, including an injunction:
   a. Restraining the respondent from committing any acts of domestic violence.
   b. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.
   c. Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in chapter 61.
   d. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies.
   e. Restrain respondent from contact with petitioner or any member of petitioner's immediate family or household. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
   f. Exclude respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
   g. Exclude respondent from places frequented regularly by petitioner and/or any named family or household member of petitioner. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and 12.980(d)(2).
   h. Order respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and 12.980(d)(2).

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

H. FINAL INJUNCTIONS:

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

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

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

4. **Grounds for Relief:**
   When it appears to the court that the petitioner is a victim of domestic violence or has reasonable cause to believe he or she will become a victim, the court may grant such relief as the court deems proper. §741.30(6)(a), Florida Statutes. *See also* section II.J. Factors the Court must Consider when Entering an Injunction.

5. **It is Error to Grant Relief Not Requested, Unless it Falls within the Statutory Language Regarding Domestic Violence:**
   a. Ryan v. Ryan, 784 So.2d 1215 (Fla. 2d DCA 2001).
   b. Don't give exclusive use of marital home if not requested. Montemarano v. Montemarano, 792 So.2d 573 (Fla. 4th DCA 2001).

6. **An injunction for protection against domestic violence should not be used as a substitute for an order regarding issues which should be addressed in dissolution of marriage or paternity proceeding**.
   See O'Neill v. Stone, 721 So.2d 393 (Fla. 2d DCA 1998). "Although custody matters may be decided in domestic violence proceeding, better practice in such case would be for trial court to enter temporary order, such as order adopting general master's report, and direct parties to litigate their subsequent custody and visitation disputes in proper paternity proceeding where orders entered would remain in effect beyond temporary lifespan of most injunctions."

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

8. **Period of Effectiveness:**
   a. Section 741.30 has also been revised to provide that the terms of an injunction are to "remain in effect until modified or dissolved." *See* §741.30(6)(c), Florida Statutes.
   b. Florida Family Law Rule of Procedure 12.610(c)(4)(B) states that a final injunction must be issued for a fixed period or until further order of the court. *See also* Miguez v. Miguez, 824 So.2d 258 (Fla. 3d DCA 2002).
   c. A final judgment of injunction for protection against domestic violence may be effective indefinitely, until modified or dissolve by the judge at either party's request, upon notice and hearing, or expire on a date certain at the judge's discretion. Florida Supreme Court Approved Family Law Form 12.980(e). The court has discretion to determine the length of time for which the injunction will remain in effect. *See* Amendments to the Florida Family Law Rules, no. 89,955 (Fla. 2/26/98). Therefore, the duration of the injunction is not subject to any time limits by statute. *Id.*; Patterson v. Simonik, 709 So.2d 189 (Fla. 3d DCA 1998).
   d. *See also* Goodell v. Goodell, 421 So.2d. 736 (Fla. 4th DCA 1982). The appellate court affirmed the trial court's finding of contempt against the wife for violation of the injunction contained in the final judgment of dissolution of marriage against her claim that the injunction was void because it was perpetual. The court held that the injunction was properly entered, valid and enforceable and not overbroad despite the absence of a time limit. The Fourth District Court of Appeal held that an injunction can be entered as long as the court feels the protection is necessary or until a modification is needed.

9. **Judicial Error Entering and Vacating Final Injunction:**
   a. Oravec v. Sharp, 743 So.2d 1174 (Fla. 1st DCA 1999).
   The First District Court of Appeal held that the trial court erred in entering a final injunction for protection against domestic violence where the entry of the order

was inconsistent with the judge's statement that he intended only to extend the temporary injunction for 90 days, and the court denied the respondent an opportunity to present evidence in opposition to the entry of the injunction.

b. Lee v. Delia, 827 So.2d 368 (Fla. 2d DCA 2002). The trial court erred in denying the respondent's post judgment motions to vacate the final injunction where a stipulation was entered into to enter the final injunction and the final injunction is inconsistent with the terms of the stipulation. The denial of the post judgment motion to vacate is reversed and the case remanded to the trial court to hold a hearing on the merits of the motion.

I. RELIEF GRANTED IN FINAL DOMESTIC VIOLENCE INJUNCTIONS:

1. **Final Judgment of Injunction for Protection Against Domestic Violence:** Section 741.30(6)(a)1.-7., Florida Statutes, after notice and hearing, if the court determines that the petition is either a victim of domestic violence, as defined by §741.28, Florida Statutes, or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence, the court may grant such relief as the court deems proper, including an injunction:
   a. Restraining the respondent from committing any acts of domestic violence against petitioner or any member of petitioner's family or household members.
   b. Awarding the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.
   c. Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in chapter 61, Florida Statutes.
   d. Establishing temporary support for the petitioner (temporary alimony) and/or minor child or children (temporary child support), on the same basis as provided in chapter 61, Florida Statutes.
   e. Ordering the respondent to participate in a treatment, intervention, or counseling services to be paid for by the respondent. *See infra,* Batterer Intervention Programs.
   f. Referring a petition to a certified domestic violence center.
   g. Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies.
   h. Restraining respondent from contact with petitioner or any member of petitioner's immediate family or household. Florida Supreme Court Approved Forms 12.980(d)(1) and 12.980(d)(2).
   i. Ordering counseling for any minor children and order any other provisions relating to minor children. Florida Supreme Court Approved Family Law Form 12.980(e)(1).

j. Excluding respondent from petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and 12.980(2).
k. Excluding respondent from places frequented regularly by petitioner and/or any named family or household member of petitioner. Florida Supreme Court Approved Forms 12.980(d)(1) and 12.980(d)(2).
l. Ordering respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and 12.980(d)(2).
m. Ordering a substance abuse and/or mental health evaluation for the respondent and order the respondent to attend any treatment recommended by the evaluation(s). §741.30(6)(a)(5), Florida Statutes.
n. Specifying the type of contact/visitation the noncustodial parent may have with the minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(2)(1).

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

3. **Participation in a Parenting Class May Be Court Ordered:**
A parenting class can be required as a condition of a domestic violence injunction. Roman v. Lopez, 811 So.2d 840 (Fla. 3d DCA 2002).

4. **Court Must Provide List of Domestic Violence Centers, If Applicable:** If the court refers the petitioner to a certified domestic center, the court must provide the petitioner with a list of certified domestic violence centers in the circuit, which the petitioner may contact. §741.30(6)(a)(6), Florida Statutes.

5. **Batterer Intervention Programs:** Under Certain Circumstances Respondents must be Court Ordered to Attend Batterer Intervention Programs (BIPs), §741.30(6)(e), Florida Statutes:
   a. The court **MAY** order the respondent to attend a batterer intervention program as a condition of the injunction; however,
   b. The court **SHALL** order the respondent to attend a batterer intervention program if the any of the following circumstances exist:
      (i) The court finds that the respondent willfully violated the ex parte injunction;
      (ii) The respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; OR
      (iii) At any time in the past in this state or another state, an injunction has been entered against the respondent after a hearing with notice,

c. Exception: UNLESS the court makes written factual findings in its judgment or order which are based on substantial evidence, stating why batterer intervention programs would be inappropriate, the court SHALL order the respondent to attend a BIP.

6. **Batterer Intervention Programs Must Be Certified Under §741.32, Florida Statutes and a List of BIPs Must Be Provided to the Respondent if Participation is Court Ordered:** When the court orders the respondent to participate in a BIP, the court, or any entity designated by the court, must provide the respondent with a list of all certified BIPs, from which the respondent must choose a program in which to participate. §741.30(6)(a)(5), Florida Statutes.

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

1. **Custody:**
   a. The court must consider evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to §741.30, Florida Statutes, and evidence of domestic violence or child abuse when making a temporary determination in a domestic violence proceeding regarding parental responsibility and designating the primary residential parent. §61.13(3)(k-l), Florida Statutes.
   b. Custody Must be Properly Pled in Domestic Violence Petition:
      (i) Ryan v. Ryan, 784 So.2d 1215 (Fla. 2d DCA 2001).
      The Second District Court of Appeal held that it was error for the trial court to grant an injunction for protection against domestic violence in favor of petitioner where the injunction also awarded temporary custody of the parties' minor children to former husband and denied former wife any contact with children for one year. Former wife's rights of due process were violated when her rights of custody and visitation were terminated based upon pleadings that did not request such relief and did not provide notice that the court could take such action. The former husband did not mark appropriate boxes on the face of the petition to indicate he was seeking temporary exclusive custody or to determine visitation rights, nor did the former husband in the narrative portion of the petition seek temporary exclusive custody of the children or exclusion of visitation by the former wife. Additionally, the husband did not file a Uniform Child Custody Jurisdiction Act Affidavit (UCCJA), despite the petition form clearly stating UCCJA was required if petitioner was requesting the court to determine issues of temporary custody. §741.30(3)(d), Florida Statutes. Finally, the best interests of the children were not addressed at the hearing for the injunction.

(ii) Blackwood v. Anderson, 664 So.2d 37 (Fla. 5th DCA 1995). The petitioner filed for a domestic violence injunction against the respondent but failed to appear at the final hearing. The court granted the respondent (the father) custody of the children and reset the case for final hearing. The order awarding custody to the father was quashed because the father did not properly plead for custody and the mother was not sufficiently notified of the custody issue. Note: *See* Judge Antoon's concurring opinion for an interesting discussion on jurisdiction and the frustration trial judges can experience in dealing with domestic violence injunction cases.

2. Relocation of a Child:

a. O'Neill v. Stone, 721 So.2d 393 (Fla. 2d DCA 1998). A relocation issue arose in the domestic violence proceeding involving unmarried parents, where no paternity or judgment had been obtained. The parties appeared before a general master, who issued a report recommending that custody, visitation and support be awarded as part of the domestic violence injunction. Prior to the trial court entering an order adopting the report, the petitioner left the state with the minor child of the parties, who were unmarried. At a hearing where the petitioner was present, the trial court granted a motion filed by the respondent to transfer custody to him and ordered law enforcement to pick up the minor child. The petitioner then filed a motion to set aside this order. The appellate court held that the trial court abused its discretion by ordering the petitioner to return to Florida with the child, when it failed to conduct a full hearing and take testimony to consider the statutory factors regarding relocation. Note: The dicta in this opinion contains strong language to the effect that it is *contrary to the intent of the legislature for domestic violence injunction proceedings to be the primary forum for custody, visitation, and child support issues to be addressed.*

b. Young v. Young, 698 So.2d 314 (Fla. 3d DCA 1997). The restriction prohibiting either party from removing the children from the county without prior court order or written agreement of the parties is premature, where neither party sought to relocate and the court made no findings to support such a residential restriction.

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

a. Under §61.13(2)(b)(2), Florida Statutes, due to the detriment of the child, the court may base an award of sole parental responsibility on evidence of child or spouse abuse.

(i) *See* Ford v. Ford, 700 So.2d 191 (Fla. 4th DCA 1997).
The trial court abused its discretion in awarding custody to the husband where it made no determination regarding the credibility of either party, failed to apply §61.13, Florida Statutes, and the final judgment was

devoid of all but the most "minimal mention" of the husband's established pattern of domestic violence. The court noted that the record from the six day trial was replete with testimony regarding domestic violence, which was the "central focus" of the case. The final judgment stated, "The court has considered everything that each side has accused the other side of as well as all the good things that each side has presented about themselves". The appellate court found that failure to give the domestic violence evidence the proper consideration and weight mandated a reversal of the custody award to the father and restoration of custody to the mother. Note: The 1997 amendment to §61.13(2)(b)(2), Florida Statutes, mandates the court's consideration of the existence of any child abuse or spousal abuse as evidence of detriment to the child.

b. Felony conviction of domestic violence is not an absolute bar to being a primary residential parent.

A felony conviction of the third degree or higher involving domestic violence creates a presumption of detriment to the child, which can be rebutted by the abuser to persuade the court that shared parental responsibility should be ordered. §61.13(2)(b)(2), Florida Statutes.

(i) *See* Doyle v. Owens, 881 So.2d 717 (Fla. 1st DCA 2004). Father failed to rebut the statutory presumption against unsupervised visitation.

(ii) Monacelli v. Gonzalez, 883 So.2d 361 (Fla. 4th DCA 2004). Although §61.13, Florida Statutes, provides that a felony conviction is a rebuttable presumption of detriment to a child, the court held that the evidence supported the award of primary residential custody of four minor children to ex-husband; although there was a history of domestic violence towards ex-wife, emotional ties were significantly greater towards ex-husband, he had greater capacity and disposition to provide children with necessities, they would maintain a stable environment in the home of their paternal grandmother, the children preferred to be with their father, ex-wife suffered from bipolar disorder, and ex-wife refused to accept treatment or medication for her illness.

c. Visitation between Inmate and Minor Child:

Singletary v. Bullard, 701 So.2d 590 (Fla. 5th DCA 1997).

The trial court exceeded its authority by entering a post-conviction order requiring the Department of Corrections to allow visitation between the inmate and minor child during the inmate's incarceration. The statutory provision permitting the trial court to grant permission for special visitation where visiting was restricted by court order did not apply in the case where the trial court was not eliminating the restriction it had earlier imposed.

4. **Visitation:**
   a. Although shared parental responsibility is the statutory preference under §61.13(2)(b), Florida Statutes, this determination can set up a dangerous situation for abuse victims and their children. Consequently, when making a visitation determination, the court must be cognizant of the situation and prevent giving the perpetrator access to the home for visitation with the children. *See* Burke v. Watterson, 713 So.2d 1094 (Fla. 1st DCA 1998), Fullerton v. Fullerton, 709 So.2d 162 (Fla. 5th DCA 1998); M. Sharon Maxwell and Karen Oehme, Referrals to Supervised Visitation Programs, A Manual for Florida's Judges (2004).
   b. *But see* Andrade v. Dantas, 776 So.2d 1080 (Fla. 3d DCA 2000). The court erred in granting a temporary order denying the father the right to overnight visitation with his twenty-two month old child. There is nothing about overnight visitation which permits its treatment as an exception to the doctrine that both parents of children of any age must be treated equally. There is a lack of substantial competent evidence that would prevent more extensive visitation between the father and minor child. Thus, there is no basis to deny it.

5. **Support:**
   a. Support should be paid by an income deduction order and through the State Disbursement Unit or court depository in order to eliminate control issues and to avoid further contact between the victim and the abuser.
   b. Payments for the victim's future medical expenses may be included in the support order. This requirement can remain effective subsequent to remarriage by the victim. *See* Garces v. Garces, 704 So.2d 1106 (Fla. 3d DCA 1998).

6. **Alimony:**
   a. An individual who petitions for an injunction against domestic violence can request temporary support as a term of the injunction. §741.30(6)(a)(4), Florida Statutes. The same standard for awarding alimony in a family law case under chapter 61, Florida Statutes, must be applied in determining whether to award temporary support in an injunction case. *Id.*

   Chapter 61, §61.071, Florida Statutes, permits the court to award a "reasonable sum" of alimony when a temporary request for support is made. Section 61.08(2), Florida Statutes sets forth the factors for the court to consider when making an alimony award in a dissolution proceeding. Both permanent and rehabilitative alimony can be awarded under §61.08. Rehabilitative alimony, including bridge-the-gap alimony, is temporary in nature, and therefore could likely be awarded as a term of a domestic violence injunction.

b. Rehabilitative Alimony:
Rehabilitative alimony requires the court to make specific findings including: whether the petitioner has a specific rehabilitation plan, the costs of rehabilitation, the stated purpose of the rehabilitation, and the duration of the award. Collinsworth v. Collinsworth, 624 So.2d 287 (Fla. 1st DCA1993). This type of support is awarded to enable a spouse to become self-supporting. Shea v. Shea, 572 So.2d 558 (Fla. 1st DCA 1991).

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

7. Marital Home and Marital Property:

a. Damages to Marital Property:
When distributing marital assets, reimbursements should be figured in for damaged property, such as broken window, doors, furniture, etc. §741.31(6), Florida Statutes; *See also* Hill v. Hill, 415 So.2d 20 (Fla. 1982).

b. Petitioner must request exclusive use and possession of home.
Montemarano v. Montemarano, 792 So.2d 573 (Fla. 4th DCA 2001). Without background, the court held that in domestic violence cases, where the petitioner did not seek exclusive use and possession of the marital home, it is an error to include in that order a requirement that the respondent vacate the premises. Due process requires that a party have proper notice of hearing, and the opportunity to be heard before such an order is entered requiring the party to vacate the marital home.

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

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

1. **The injunction is valid and enforceable in all counties in Florida.**

2. **Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.**

3. **The court had jurisdiction over the parties and matter.**

4. **Reasonable notice and opportunity to be heard was given to respondent sufficient to protect that person's rights to due process.**

5. **The date the respondent was served with the temporary or final order, if obtainable. §741.30(6)(d)(4), Florida Statutes.**

6. **Firearms Violation:** It is a violation of §790.233, Florida Statutes, and a first degree misdemeanor for respondent to have in his or her care, custody, possession or control any firearm or ammunition. §741.30(6)(g), Florida Statutes.
   a. Florida's Firearm Prohibition:
      (i) Section 741.31(4)(b)(1), Florida Statutes, Possession of a firearm or ammunition is prohibited when a person is subject to a final injunction against committing acts of domestic violence.
      (ii) Therefore, according to §741.31(4)(b)(1), Florida Statutes, possession of a firearm or ammunition is prohibited when a person is subject to a final injunction against committing acts of domestic violence. It is a first degree misdemeanor to violate the firearms provision of an injunction and punishable as provided in §775.083, Florida Statutes. However, this provision is consistent with federal law and therefore the active law enforcement exception applies in Florida. This provision does not apply to active law enforcement officers who possess firearms and ammunition for use in performance of their job, unless the law enforcement agency finds that possession of firearms should be denied. §741.31(b)(2), Florida Statutes.
      (iii) State's Evidence in Criminal Contempt Proceedings for Proof of Firearm Violation Must Rebut Reasonable Hypothesis of Innocence:
      Fay v. State, 753 So.2d 682 (Fla. 4th DCA 2000). The Fourth District Court of Appeal held that it was error for the trial court to deny a motion for judgment of acquittal where the defendant was charged with indirect criminal contempt for possession of a firearm in violation of an injunction for protection against domestic violence, and the evidence that the defendant possessed a firearm prior to the issuance of the injunction, coupled with circumstantial evidence relating to current possession of the firearm, was insufficient to rebut a reasonable hypothesis of innocence.
      (iv) FDLE form requiring gun purchasers to disclose prior conviction for domestic violence is unconstitutional.
         (a) State v. Watso, 788 So.2d 1026 (Fla. 2d DCA 2001).
         (b) Randall v. State, 805 So.2d 917 (Fla. 2d DCA 2001).
   b. Federal Firearm Prohibition:
      (i) 18 U.S.C. § 922(g)(8):

(a) Prohibits any person, under a final domestic violence injunction, from possessing a firearm.
(b) Penalty: Up to ten years incarceration.

(ii) U.S. v. Emerson, No 99-10331 (5th Cir. October 16, 2001). Statute is not unconstitutional on its face under Second Amendment.

(iii) 18 U.S.C. § 922(g)(9).
(a) Prohibits any person convicted of domestic violence from possessing a firearm.
(b) Penalty: up to ten years incarceration.

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

L. SERVICE OF FINAL INJUNCTIONS:

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

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

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

M. ADDITIONAL REMEDIES:

1. **Mutual Orders of Protection are Prohibited:**
Section 741.30(1)(i), Florida Statutes, prohibits the court from issuing mutual orders of protection. Likewise, mutual restraining orders or similar restrictive provisions based on domestic violence should not be incorporated into orders which address issues under chapter 61, Florida Statutes. §61.052(6), Florida Statutes. However, the court is not precluded from issuing separate injunctions

for protection for each party where each party has complied with the provisions of §741.30, Florida Statutes.

a. DeMaio v. Starr, 791 So.2d 1116 (Fla. 4th DCA 2000).

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

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

2. Confidentiality of Information:

a. Address Confidentiality can be Requested:

(i) Petitioner can request that his or her address be kept confidential and omitted from the Petition for Protection Against Domestic Violence and other required forms by filing Florida Supreme Court Approved Family Law Form 12.980(h). Florida Family Law Rule of Procedure 12.610(b)(4)(B); §741.30(6)(a)(7), Florida Statutes.

(ii) The ultimate determination of a need for address confidentiality must be made by the court as provided in Florida Rule of Judicial Administration 2.051. Florida Family Law Rule of Procedure 12.610(b)(4)(B).

b. Address Confidentiality Program:

In accordance with §741.408, Florida Statutes, the Attorney General shall designate state and local agencies and nonprofit agencies that provide counseling and shelter services to victims of domestic violence to assist persons applying to be program participants in the Address Confidentiality Program.

(i) The addresses, corresponding telephone numbers, and social security numbers of program participants in the Address Confidentiality Program of Victims of Domestic Violence held by Office of the Attorney General are exempt from §119.07(1), Florida Statutes. §741.465, Florida Statutes.

(ii) Legislative Intent and Program for Victims of Domestic Violence: §§741.401 – 741.409, Florida Statutes enable state and local agencies to respond to requests for public records without disclosing the location of a victim of domestic violence.

c. Practical note:

The confidentiality provisions of chapter 741, Florida Statutes, are not distinctly cross referenced to other statutes that cover related areas of a Unified Family Court. The clear intent and language used to create the confidentiality program indicates that information made confidential under its provisions must remain confidential regardless of the context in which the information is kept. If this was not true, then a respondent to a domestic violence injunction could simply initiate an additional court matter as a means to discover the whereabouts of the petitioner.

Likewise, any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of the crime of sexual battery as defined in chapter 794, Florida Statutes, is exempt from public record disclosure. §119.07(6)(f), Florida Statutes.

d. Victim and Domestic Violence Center Information Exempt from Public Record: Information received by department or Domestic Violence Center about clients and location of domestic violence centers and facilities is exempt from the public records provisions of §119.07(1), Florida Statutes, and unable to be disclosed without the written consent of the client. §39.908, Florida Statutes.

N. SUBSEQUENT ACTIONS:

1. Modification of Injunctions:

a. Either party may file a motion to modify an injunction. §741.30(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6).

b. Motion for modifications must be filed and a hearing held with opposing party properly notified.

(i) Mayotte v. Mayotte, 753 So.2d 609 (Fla. 5th DCA 2000).
The Fifth District Court of Appeal held that it was error for the trial court to modify a final injunction for protection against domestic violence without the filing of a motion for modification, without a hearing, and without notice to the opposing party.

(ii) Betterman v. Kukelhan, 977 So.2d 702 (Fla. 4th DCA 2008) A former boyfriend made a motion to vacate an injunction against domestic violence pursuant to §741.30(6)(c), Florida Statutes. The court issued an order denying the motion without a hearing. The appellate court reversed and held that the trial court erred in denying the motion without giving the boyfriend a hearing and an opportunity to be heard. The summary denial of a motion to vacate without a hearing violates due process requirements.

(iii) *But see* Ribel v. Ribel, 766 So.2d 1185 (Fla. 4th DCA 2000). Extensions of temporary injunctions may be done ex parte.

c. Evidence of a change in circumstances since the time the injunction was entered must be provided.

Simonik v. Patterson, 752 So.2d 692 (Fla. 3d DCA 2000). The Third District Court of Appeal held that it was not error for the trial court, after conducting a hearing, to deny respondent's motion to modify an injunction for protection against repeat violence to allow him to possess firearms, in the absence of evidence that circumstances had changed since the injunction was entered.

d. Courts have broad discretion regarding injunction modifications.

Reed v. Giles, 974 So.2d 624 (Fla. 4th DCA 2008) Appellant sought review of a trial court order denying her motion to dissolve a final injunction against domestic violence. Since courts have broad discretion regarding injunctions, appellant could not prevail without demonstrating that there was an abuse of discretion.

e. Service of an Order Modifying an Injunction:
   (i) *See supra* section D(3)(b).
   (ii) *See also* Florida Family Law Rule of Procedure 12.610(c)(3)(B)(i). Service of an order modifying an injunction must be made in the same manner as an injunction.

2. Extension of Final Injunctions:

a. To extend an injunction, no new violence is necessary but a continuing fear that is reasonable based on the circumstances must exist.
   (i) Sheehan v. Sheehan, 853 So.2d 523 (Fla. 5th DCA 2003). Although §741.30(6)(c), Florida Statutes, does not specifically require any allegation of a new act of violence, the moving party must prove to the trial court that a continuing fear exists and that such fear is reasonable based on the circumstances.
   (ii) *See also* Giallanza v. Giallanza, 787 So.2d 162 (Fla. 2d DCA 2001). The trial court erred in extending the injunction against domestic violence against the respondent because the petitioner has not established sufficient facts. The statutory definition of domestic violence requires some showing of violence or a threat of violence. General harassment does not constitute domestic violence under the statute. Here, the petitioner never alleged any further actual violence or threats of violence, nor showed any fear of domestic violence. Rather, they reflect that she is upset by the respondent's dealings with their children and that she believes that he is using the children to harass her.
   (iii) *See also* i*nfra* Spiegal v. Haas.

b. Court may consider the circumstances leading to the imposition of the original injunction, as well as subsequent events.
   (i) Patterson v. Simonik, 709 So.2d 189 (Fla. 3d DCA 1998).
   (ii) In determining whether to extend a final injunction the court may consider the circumstances leading to the imposition of the original injunction, as well as subsequent events which may cause the petitioner

to have continuing reasonable fear that violence is likely to reoccur in the future.

c. Florida Statutes permit an extension hearing to be set ex parte.

Ribel v. Ribel, 766 So.2d 1185 (Fla. 4th DCA 2000).

The trial court did not err in extending the temporary injunction for two weeks and rescheduling the hearing by entering an order without a motion or notice of hearing, based solely on the ex parte communication of the wife's attorney with the judge's office. The Florida Statute permits an extension hearing to be set ex parte. The petitioner has not demonstrated how an order resetting the noticed hearing on a petition for temporary injunction for protection presents the possibility of any harm, let alone irreparable harm.

d. Court's Discretion to Extend a Final Injunction:

Miguez v. Miguez, 824 So.2d 258 (Fla. 3d DCA 2002).

The appellate court affirmed the trial court's decision granting petitioner a second domestic violence injunction five days before the expiration of petitioner's one year previous injunction. The Third District Court of Appeal held that the seven year duration of the second injunction was not defective and could only be challenged as an abuse of discretion. *See* Goodell v. Goodell, 421 So.2d. 736 (Fla. 4th DCA 1982). As there was no record of the proceeding to determine if there had been an abuse of discretion, the court affirmed the trial court's decision.

3. Dissolving Injunctions:

a. Either party may move to dissolve the injunction at any time. §741.30(6)(c), Florida Statutes, Florida Family Law Rule of Procedure 12.610(c)(6).

(i) *See also* York v. McCarron, 842 So.2d 281(Fla. 1st DCA 2003). The First District Court of Appeal reversed the trial court's decision denying appellant's motion to dissolve the final injunction against repeat violence as either party may motion at any time to modify or dissolve an injunction, as provided for in §784.046(7)(c), Florida Statutes. The court held that the trial court erred in not allowing the presentation of evidence "regarding the initial procurement of the injunction at a hearing."

(ii) Madan v. Madan, 729 So.2d 416 (Fla. 3d DCA 1998).

The Third District Court of Appeal reversed the lower court's denial of the husband's motion to dissolve the final injunction, holding that a trial judge must allow a respondent to present evidence of false allegations by the petitioner at the initial injunction hearing. Pursuant to §741.30(6)(b), Florida Statutes (now §741.30(6)(c)), either party may move at any time to dissolve an injunction. In this case, the appellate court interpreted this statute to permit what would appear to amount to a de novo rehearing *at any time*, to reopen the case with proof of falsehoods in the petitioner's "initial procurement of the injunction".

b. Service of the motion to dissolve must be made on the other party to provide notice and an opportunity to be heard. Florida Family Law Rule of Procedure 12.610(b)(2)(C).

Chanfrau v. Fernandez, 782 So.2d 521 (Fla. 2d DCA 2001). The Second District Court of Appeal held that it was error to dismiss final injunction against domestic violence where there was no motion, notice or evidentiary hearing. "By dismissing the injunction without motion, notice, or evidentiary hearing, the court failed to accord appellant due process in this matter." Snyder v. Snyder, 685 So.2d 1320 (Fla. 2d DCA 1996).

c. Court's Authority Subsequent to Dismissal: Incorrect to Order Compliance with Counseling Subsequent to Dismissal of Petition or Domestic Violence Injunction. Tobkin v. State, 777 So.2d 1160 (Fla. 4th DCA 2001).

O. CROSSOVER CASES/RELATED CASES:

1. **Chapter 39 Orders Pertaining to Custody, Visitation, Etc. Take Precedence Over Similar Orders in Other Civil Cases. A Court of Competent Jurisdiction In Any Other Civil Action May Modify Such an Order If The Dependency Court Has Terminated Jurisdiction. §39.013(4), Florida Statutes.**

2. **Final Orders and Evidence From a Dependency Case are Admissible In a Subsequent Civil Case that Deals with Custody and Visitation Issues. §39.0132(6)(D-E), Florida Statutes.**

3. **The Provisions of Injunctions Dealing with Custody, Visitation, and Child Support Remain In Effect Until the Order Expires or an Order on Those Matters Is Entered In a Subsequent Civil Case. §741.30(6)(A)(3-4), Florida Statutes.**

a. An injunction should not be used as a substitute order for issues which should be addressed in dissolution of marriage or paternity proceedings.

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

b. Types of Crossover Cases:

Issues in Dissolution of Marriage/Domestic Violence Crossover Cases:

(i) Domestic Violence Injunctions in Dissolution Cases:
In a dissolution action under chapter 61, Florida Statutes, injunctions for protection against domestic violence must be issued under §741.30, Florida Statutes. An injunction under §741.30 is the exclusive remedy at law for a domestic violence injunction.

(a) Shaw-Messed v. Messed, 755 So.2d 776 (Fla. 5th DCA 2000). The Fifth District Court of Appeal held that the trial court erred in not conducting an evidentiary hearing on the issuance of an injunction for protection against domestic violence filed by the wife against the husband, and in entering a mutual injunction in the dissolution action, under chapter 61, Florida Statutes, without any testimony that the husband had committed any conduct deserving such action. In reversing the lower court's ruling and remanding the case for further action, the Fifth District Court of Appeal clearly maintains that §741.30, Florida Statutes, is the appropriate vehicle for a domestic violence injunction, as opposed to Chapter 61 proceedings.

(b) Campbell v. Campbell, 584 So.2d 125 (Fla. 4th DCA 1991). Injunctions against domestic violence may not be issued as part of a final judgment of dissolution; they must be made in a separate order. §61.052(6), Florida Statutes.

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

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

(iii) Trial Court must Make Findings Regarding Domestic Violence or Child abuse in Dissolution Action when Ruling on the Issue of Primary Residential Custody:
Collins v. Collins, 873 So.2d 1261 (Fla. 1st DCA 2004). In making a ruling on the issue of primary residential custody in the divorce action, the trial court was required to make a finding regarding alleged domestic violence or child abuse by husband; evidence indicated that alleged domestic abuse appeared to be serious incident involving wife making distraught 911 call to local police, and appellate review could not be meaningfully conducted without trial court explicitly addressing allegation.

(iv) Ancillary Relief is Limited when Child Files Domestic Violence Petition by and through her Mother:
Rinas v. Rinas, 847 So.2d 555 (Fla. 5th DCA 2003).The Fifth District Court of Appeal found it improper for trial court to award custody, child support and alimony for petitioner's mother and sister in a domestic violence action where petitioner was a minor child filing by and through

her mother as "next best friend". Mother was only a party to the case as representative of the child, and the statute did not authorize awards of custody, child support, or alimony in the absence of an action for dissolution of marriage. Consequently, the Fifth District Court of Appeal held that the trial court did not have jurisdiction to award custody, child support and alimony absent dissolution of marriage proceeding as §741.30, Florida Statutes (1997) does not authorize such awards.

(v) Trial Court Can not Dismiss Domestic Violence Injunction in Dissolution where Parties did not Move to Vacate and were not Notified the Matter would be Considered:
Farr v. Farr, 840 So.2d 1166 (Fla. 2d DCA 2003). Trial court erred in dismissing an injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered, thus failing to provide due process on the issue. Additionally, the court struck the trial court's order setting a motion for a rehearing as the court had lost jurisdiction on the matter when the wife filed an appeal.

(vi) Trial Court Can Dismiss Temporary Injunction at a Related Hearing but the Requirements of Due Process must be Observed:
White v. Cannon, 778 So.2d 467 (Fla. 3d DCA 2001). The trial court erred in dismissing a temporary injunction for protection against domestic violence at a hearing on husband's emergency motion for visitation by claiming that whether or not a restraining order should or should not be granted must be determined by the court in the parties' dissolution of marriage. The matter may be handled by one circuit judge, §741.30, Florida Statutes, however the requirements of due process must be observed.

(vii) Pending Dissolution Action does not Prevent Court from Issuing Domestic Violence Injunction (DVI):
Kniph v. Kniph, 777 So.2d 437 (Fla. 1st DCA 2001). Dismissal of a request for an injunction against domestic violence solely on the basis that there was a pending divorce action between the parties is contrary to §741.30(1)(b), Florida Statutes (1999), and constitutes error.

(viii) Judge Hearing Dissolution Erred in Requiring Husband to Pay Attorney's Fees in a Separately Filed DVI Case:
Belmont v. Belmont, 761 So.2d 406 (Fla. 2d DCA 2000). The Second District Court of Appeal held that the trial court hearing the dissolution case erred in requiring the husband to pay attorney's fees incurred by the wife in a separately filed domestic violence injunction case. *See also* in this outline, section II.,P.(1), Attorney's Fees in Domestic Violence Proceedings.

(ix) Provisions in Chapter 61 Orders Trump Conflicting Temporary Provisions Set out in Chapter 741, Florida Statutes, DVI Orders:

Cleary v. Cleary, 711 So.2d 1302 (Fla. 2d DCA 1998). When parties are involved in both an injunction and a dissolution case, matters governed by chapter 61 are controlled by the judge hearing the dissolution case, without regard to whether the family court action was filed before or after the injunction case.

c. Issues in Dependency/ Domestic Violence Crossover Cases:

Opinion from New York's Highest Court:

A charge of child neglect may be made only where there is a link or causal connection between the mother's alleged actions or inactions and proven harm to the child. Nicholson v. Scoppetta, 3 N.Y.3d 357, (N.Y. Oct 26, 2004). In Nicholson, the court specifically ruled that it violates the U.S. Constitution to remove children from battered mothers solely or primarily on the grounds that there is domestic violence in the home, to charge those battered mothers with child neglect, and to mark cases against them as "indicated" at the State Central Register of Child Abuse and Maltreatment.

d. Florida Case Law:

(i) Sufficient Evidence to Adjudicate Child As Dependent:

(a) D.R. v. Department of Children and Families, 898 So.2d 254 (Fla. 3d DCA 2005). The Third District Court of Appeal Court of Appeal upheld the trial court's adjudication of the child as dependent as to the mother based on finding that domestic violence in the house adversely affected the child even though there was insufficient evidence to conclude the child witnessed the physical altercations between both parents.

(b) T.R. v. Dept. of Children and Families, 864 So.2d 1278 (Fla. 5th DCA 2004). The 5th District Court of Appeal affirmed the trial court's ruling that evidence supported adjudication of father's two children as dependents based upon the children being aware of an act of domestic violence. The children had been aroused from sleep by the screams of their father and his girlfriend who was yelling for the father to keep the knife away from her and the baby.

(c) W.V. v. Department of Children and Families, 840 So.2d 430 (Fla. 5th DCA 2003). Competent substantial evidence supported conclusion that there was a pattern of domestic violence in presence of child, warranting finding of abuse.

(d) D.W.G. v. Department of Children and Families, 833 So.2d 238 (Fla. 4th DCA 2002). Dependency adjudication affirmed based on a holding that it is not necessary for a child to witness violence in order to be harmed by it as children may be affected and aware that the violence is occurring without actually having to see it occur. This rule of law is to be considered in determining whether visitation or custody is appropriate where domestic violence is committed against a parent.

(e) Y.G. v. Department of Children and Families, 830 So.2d 212 (Fla. 5th DCA 2002). Dependency case in which the court affirmed the adjudication of dependency, but remanded for entry of written findings consistent with the trial court's oral announcement. The Fifth District Court of Appeal provided specifically, "[t]he children's health was in danger of being significantly impaired by the acts of domestic violence that took place in the children's presence and by the mother's refusal to end her troubled relationship with the paramour."

(f) D.D. v. Department of Children and Families, 773 So.2d 615 (Fla. 5th DCA 2000). Father (appellant) appealed trial court order finding his five-year-old child dependent. The court found that evidence that the child witnessed father's abuse of the mother, together with evidence indicating that parents will more likely than not resume their relationship in the future and resume the cycle of domestic violence in the presence of the child, established prospective neglect sufficient to support finding of dependency, even in absence of medical or other expert testimony. Pursuant to §39.01(46), Florida Statutes, (now §39.01(45)) defining neglect, the court can make a finding that the child is neglected and adjudicated a dependent when the state has presented sufficient evidence that the child is living in an environment which causes mental, physical, or emotional impairment. It continued by finding that it is not necessary for finding of dependency that the court make finding that there is no reasonable prospect that parents can improve their behavior. The court affirmed the decision.

e. Florida Case Law:

Insufficient Evidence to Adjudicate Child As Dependent:

(i) B.C. v. Department of Children and Families, 846 So.2d 1273 (Fla. 4th DCA 2003). Dependency adjudicated based on domestic violence between father and former wife and father's alleged substance abuse was not supported by competent substantial evidence. The two instances of domestic violence in the presence of the child more than a year and a half prior to the dependency petition were too remote in time to support dependency adjudication.

(ii) J.B.P.F. v. Department of Children and Families, 837 So.2d 1108 (Fla. 4th DCA 2003). Error to adjudicate child dependent based on finding that she was at substantial risk of imminent abuse and neglect where that finding was base upon a single instance of abuse inflicted on a sibling, and evidence failed to establish a nexus between the abuse of the sibling and a risk of prospective abuse to the child.

(iii) E.B. v. Department of Children and Families, 834 So.2d 415 (Fla. 2d DCA 2003). Evidence insufficient to support finding that child suffered from abuse as a result of domestic violence between mother and her boyfriend

where there was no evidence that the child was present at the time of the act of domestic violence.

f. Dismissal of Injunctions in Crossover Cases:

(i) Sumner v. Sumner, 862 So.2d 93 (Fla. 2d DCA 2003).
Appellate court decided, inter alia, that the trial court committed reversible error by entering an order dismissing the wife's petition for a final injunction for protection against domestic violence at the end of its hearing on the petition for dissolution of marriage. Due process required that a hearing for the issuance of the final injunction occur and that the court erred when it dismissed the petition based solely upon its observations at the final hearing of the dissolution of marriage.

(a) *See also* White v. Cannon, 778 So.2d 467 (Fla. 3d DCA 2001). Trial court erred in dismissing an injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered, thus failing to provide due process on the issue.

(b) Parties must have notice that dismissal will be considered. Farr v. Farr, 840 So.2d 1166 (Fla. 2d DCA 2003).

(ii) Tobkin v. State, 777 So.2d 1160 (Fla. 4th DCA 2001).
Petitioner's voluntary dismissal of an action for injunction for protection against domestic violence and an action for dissolution of marriage divested the trial judge of authority to continue with further proceedings on the wife's attorney's motion to withdraw, the husband's motion to disqualify the wife's counsel, and enforcement of the previously ordered requirement of counseling and attendance at the spouse batterers' program. No final injunction requiring counseling or attendance at the Glass House was ever entered. A voluntary dismissal does not divest the court of jurisdiction to conclude ancillary matters involved in the case such as outstanding and unresolved motions for attorney's fees and costs, and similar issues. The decision of the trial court is reversed.

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

1. **The Violence Against Women Act of 2005** (Pub.L. 109-162; 119 Stat. 2960) protects tenants and family members of tenants who are victims of domestic violence, dating violence, or stalking from being evicted or terminated from housing assistance based on such acts of violence against them. These provisions apply to public housing and Section 8 programs. VAWA became effective on January 5, 2006.

2. **Who is Covered:** The new protections cover victims of domestic violence, dating violence, and stalking who are tenants in the federal Public Housing and Section 8 voucher and project-based programs. The protections also cover immediate members of the victim's family. "Immediate family member" includes: any person living with the victim and related to him or her by blood or marriage; or the victim's spouse, parent, brother, sister, child, or any person to whom the victim stands in loco parentis. 42 U.S.C. §1437d(u)(3)(D)(2006); 42 U.S.C. § 1437f(f)(11)(2006).

3. **Key Provisions:**
   a. Provides that an individual's status as a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of admission or denial of housing assistance. 42 U.S.C. §1437d(c)(3)(2006); 42 U.S.C. §1437f(c)(9)(A)(2006); 42 U.S.C. §1437f(d)(1)(A)(2006); 42 U.S.C.§1437f(o)(B)(2006).
   b. Establishes an exception to the federal "one-strike" criminal activity eviction rule for tenants who are victims. Provides that an incident of actual or threatened domestic violence, dating violence, or stalking does not qualify as a "serious or repeated violation of the lease" or "good cause for terminating the assistance, tenancy, or occupancy rights of the victim." 42 U.S.C.§1437d(l)(5)(2006); 42 U.S.C. §1437f(c)(9)(B) (2006); 42 U.S.C. §1437f(d)(1)(B) (2006); 42 U.S.C. § 1437f(o)(7)(C)(2006); 42 U.S.C. §1437f(o)(20)(A)(2006).
   c. Provides that criminal activity directly relating to domestic violence, dating violence, or stalking does not constitute grounds for termination of a tenancy. 42 U.S.C. §1437d(l)(6)(2006); 42 U.S.C. §1437f(c)(9)(C)(2006); 42 U.S.C. §1437f(d)(1)(C)(2006); 42 U.S.C. §1437f(o)(7)(D)(2006); 42 U.S.C. §1437f(o)(20)(B) (2006).
   d. Provides that a Public Housing Authority (PHA) or Section 8 landlord may bifurcate a lease in order to evict, remove, or terminate the assistance of the offender while allowing the victim, who is a tenant or lawful occupant, to remain. 42 U.S.C. §1437d(l)(6)(B) (2006); 42 U.S.C. §§ 1437f(o)(7)(D)(ii)(2006); 42 U.S.C. §§1437f(c)(9)(C)(ii) and (d)(1)(B)(iii)(II)(2006).
   e. States that PHAs and Section 8 landlords have the authority to honor civil protection orders and other court orders from domestic violence and family court judges that address rights of access to or control of the property. 42 U.S.C. §1437d(l)(6)(C)(2006; 42 U.S.C. §§1437f(o)(7)(D)(iii) and (o)(20)(D)(ii)(2006); 42 U.S.C. §§ 1437f(c)(9)(C)(iii) and (d)(1)(B)(iii)(III)(2006).
   f. Allows the PHA or Section 8 landlord to evict a victim if the PHA or Section 8 landlord demonstrates an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant's tenancy is not terminated. 42 U.S.C. § 1437d(l)(6)(E)(2006); 42 U.S.C. §§ 1437f(o)(7)(D)(v) and (o)(20)(D)(iv)(2006); 42 U.S.C.§§ 1437f(c)(9)(C)(v) and (d)(1)(B)(iii)(V)(2006).

g. Allows but does not require a PHA or Section 8 landlord to request documentation that the individual or family members has been a victim of domestic violence, dating violence or stalking. A victim may satisfy a PHA's or Section landlord's request for documentation by producing a federal, state, tribal, territorial, or local police or court record that documents the incident or incidents of violence. Alternatively, a victim may provide a statement in which "an employee, agent, or volunteer of a victim service provider, an attorney, or a medical professional, from whom the victim has sought assistance in addressing domestic violence, dating violence, or stalking, or the effects of the abuse" attests under penalty of perjury that the professional believes that "the incident or incidents in question are bona fide incidents of abuse." The victim also must sign or attest to the documentation. In addition, the documentation must name the offender. Finally, the statute also allows PHAs and Section 8 landlords to request documentation through a certification form approved by HUD. 42 U.S.C. §§1437d(u)(1)(A) and (C)(2006); 42 U.S.C. §§ 1437f(ee)(1)(A) and (C)(2006).

h. After a PHA or Section 8 landlord has requested the documentation in writing, an individual has 14 business days to respond to the request. If an individual does not provide the documentation within 14 business days, the PHA or landlord may bring eviction proceedings against the tenant. However, the PHA or Section 8 landlord also may extend this timeframe at its discretion. 42 U.S.C. §§1437d(u)(1)(A) and (B)(2006); 42 U.S.C. §§1437f(ee)(1)(A) and (B)(2006).

Q. ANCILLARY MATTERS:

1. Attorney's Fees in Domestic Violence Proceedings:

a. Neither Appellate Rule 9.400 nor Chapter 741, Florida Statutes, Provides Authority to Grant Attorney's Fees:

(i) Lewis v. Lewis, 689 So.2d 1271 (Fla. 1st DCA 1997).
Wife's request for appellate attorney's fees was denied. Neither the domestic violence statute nor Florida Rule of Appellate Procedure 9.400 provides authority for granting attorney's fees in domestic violence proceedings. Section 61.16(1), Florida Statutes, providing for attorney's fees for maintaining or defending proceedings under chapter 61, Florida Statutes, does not apply to chapter 741, Florida Statutes, proceedings, as domestic violence proceedings are independent of dissolution of marriage proceedings. Note: The court stated, "we are not unaware that the public policy reasons for granting attorney's fees in a chapter 61 proceeding exist in a domestic violence proceeding. This is a matter, however, that should be dealt with by the Legislature rather than the courts."

(ii) Attorney's fees cannot be awarded in a domestic violence injunction case. Dudley v. Schmidt, 963 So.2d 297 (Fla. 5th DCA 2007).

(iii) *But see* Harrison v. Francisco, 884 So.2d 239 (Fla. 2d DCA 2004). Husband was entitled to a hearing on his motion for costs, after wife voluntarily dismissed her domestic violence injunction. "Although an award of costs is a matter largely left to the discretion of the trial court,' the holding in Coastal Petroleum requires 'the trial court, in an appropriate hearing, after argument and presentation of appropriate evidence by both sides to determine exactly which expenses would have been reasonably necessary for an actual trial." Quoting, Coastal Petroleum Co. v. Mobil Oil Corp., 583 So.2d 1022, 1025 (Fla. 1991).

b. Attorney's fees under §57.105, Florida Statutes, could not be awarded in the absence of a timely motion for such fees in a domestic violence case:

Cisneros v. Cisneros, 831 So.2d 257 (Fla. 3d DCA 2002). Regardless of the fact that respondent's injunction was reversed by the Third District Court of Appeal on respondent's appeal, no attorney's fees could be awarded based on §57.105, Florida Statutes, (frivolous-bad faith lawsuit), for either the trial level or the appellate level proceedings, in the absence of a timely motion for such fees.

c. Compensatory and Punitive Damages:

A victim of domestic violence who has suffered repeated physical or psychological injuries over an extended period of time, as a result of continuing domestic violence, has a cause of action for compensatory and punitive damages against the perpetrator responsible for the violence. §768.35, Florida Statutes.

2. Disqualification and Recusal of Judge:

a. Tindle v. Tindle, 761 So.2d 424 (Fla. 5th DCA 2000).

The Fifth District Court of Appeal held that the trial court erred in not granting the husband's motion for recusal where the trial judge showed strong disapproval of calling the children as witnesses of domestic violence occurring in their presence for purposes of determining custody issues.

b. Wehbe v. Uejbe, 744 So.2d 572 (Fla. 3d DCA 1999).

Where appellant and appellee were half brothers who each filed for an injunction for protection against domestic violence against one another, the Third District Court of Appeal held that the issue of whether the trial court should not have taken judicial notice of testimony presented in appellee's case without making such testimony a part of the record was not preserved for appellate review based on the fact that the issue was never raised as an objection before the trial court. There was also no abuse of discretion by the trial court in denying an oral motion for disqualification and request for new trial where it was *raised at the conclusion of the hearing.* The Third District Court of Appeal noted that a motion for disqualification is not properly used to express disagreement with the trial court's rulings.

c. Yates v. State, 704 So.2d 1159 (Fla. 5th DCA 1998), concurring opinion. Motion to disqualify judge based on judge's membership on domestic violence task force was legally insufficient.

R. APPELLATE REVIEW:

1. **Appellate Record:**
   a. Trial Court Must Make Findings for the Record Regarding Alleged Domestic Violence:

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

   b. Issue Must be Raised by Objection for the Record:

   Wehbe v. Uejbe, 744 So.2d 572 (Fla. 3d DCA 1999).
   Where appellant and appellee were half brothers who each filed for an injunction for protection against domestic violence against one another, the Third District Court of Appeal held that the issue of whether the trial court should not have taken judicial notice of testimony presented in appellee's case without making such testimony a part of the record was not preserved for appellate review based on the fact that the issue was never raised as an objection before the trial court.

2. **Standard of Review:**
   a. S.E.R. v. J.R., 803 So.2d 861 (Fla. 4th DCA 2002).
   The petitioners requested review of the circuit court's order denying their motion to dismiss a domestic violence injunction. The petitioners based their motion on the grounds that there was a pending dependency action in Palm Beach, in which a custody award was granted that was contrary to the custody award given during the domestic violence injunction hearing. The Fourth District Court of Appeal found that no certiorari review is necessary where a party has failed to show that a denial of a motion to dismiss a domestic violence injunction caused irreparable harm. The Fourth District Court of Appeal found that the petitioner's argument claiming that the Palm Beach award had precedence over the domestic award was not sufficient harm to mandate certiorari review. *(The test for irreparable harm is set forth in Bared & Co., Inc. v. McGuire, 670 So2d. 153. (Fla. 4th DCA 1996).)*

3. **Transcripts:**
   a. Squires v. Darling, 834 So.2d 278 (Fla. 5th DCA 2002).
   Appellate court affirmed the entry of injunction as moving party failed to provide the court with a transcript of the proceedings and failed to provide the court a record of the proceedings pursuant to Florida Rule of Appellate Procedure 9.200(b)(4). Respondent's failure to provide either a transcript or record

preserved the presumption of correctness attached to the final judgment. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

b. Stevens v. Bryan, 805 So.2d 881 (Fla. 2d DCA 2001).

Respondent appeals a repeat violence injunction, as next best friend of her son. Because no record or transcript was provided, the Second District Court of Appeal cannot find error in the trial court's decision, as evidence had to be provided to the lower court for the injunction to be issued. The case was remanded only to correct scrivener's errors regarding the correct parties, and to remedy an error on the pre-printed form.

c. Ricketts v. Ricketts, 790 So.2d 1265 (Fla. 5th DCA 2001).

No transcripts were made available to determine whether or not error was committed, therefore injunction preventing appellant from contacting ex-husband is affirmed.

d. Lawrence v. Walker, 751 So.2d 68 (Fla. 4th DCA 1999).

The Fourth District Court of Appeal affirmed the trial court's issuance of an injunction for protection against domestic violence where the contentions raised by the appellant could not be evaluated due to the fact that no transcript was ever made of the hearing in which the evidence was presented. In a special concurrence, the court observed that an injunction action is a civil proceeding, and there is no requirement as yet that such proceedings be transcribed at public expense, making it necessary for the party to arrange in advance for reporting and transcription. It was noted that with so much litigation being conducted pro se, the parties should be alerted in the notice for final hearing on the injunction that if they want the hearing reported, it is up to them to create a record by arranging for the services of a court reporter to transcribe the proceedings.

e. Pollock v. Couffer, 750 So.2d 659 (Fla. 5th DCA 1999).

The Fifth District Court of Appeal affirmed the ruling of the trial court where the appellant/respondent contended that the evidence of record did not support the trial court's entry of a final injunction for protection against repeat violence, but failed to provide the appellate court with either a transcript of trial court proceedings or stipulated statement of facts. Accordingly, the appellate court was prevented from reviewing the validity of the claim and held that no error of law was apparent.

S. ENFORCEMENT:

1. Enforcement of Injunctions in Florida:

a. Florida Injunctions:

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

b. Foreign Protection Orders:

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

(i) Violation of Foreign Protection Order is a First Degree Misdemeanor. §741.31(4)(a), Florida Statutes.

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

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

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

(b) The District of Columbia;

(c) An Indian tribe; or

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

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

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

(b) Venue is proper throughout the state.

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

(v) Registration of a Foreign Order:

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

(b) "The protected person must swear by affidavit, that to the best of the person's knowledge and belief, the attached certified copy of the foreign order . . . is currently in effect as written and has not been

superseded by any other and that the respondent has been given a copy of it." §741.315(3)(a), Florida Statutes.

(c) "If not apparent from the face of the certified copy of the foreign order, the sheriff shall use best efforts to ascertain whether the order was served on the respondent" [and] "shall assign a case number and give the protected person a receipt showing registration of the foreign order in this state." §741.315(3)(b), Florida Statutes.

(d) FDLE "shall develop a special notation for foreign orders of protection." §741.315(3)(b), Florida Statutes.

(e) It is a first degree misdemeanor to intentionally provide police with a false or invalid foreign protection order. §741.315(5), Florida Statutes.

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

a. The court may enforce a violation of an injunction for protection against domestic violence through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under §741.31, Florida Statutes. §741.30(9)(a), Florida Statutes. The court may enforce the respondent's compliance with the injunction through any appropriate civil and criminal remedies, including but not limited to, a monetary assessment or fine.

b. Violations of provisions such as child support or visitation may be enforced through civil contempt sanctions, since the purpose of a civil contempt proceeding is to mandate compliance with the injunction, not to impose punishment. §741.30(9)(a), Florida Statutes.

c. Legislative Intent:

According to §741.2901(2), Florida Statutes, it is the intent of the legislature that domestic violence be treated as a crime; and for that reason, "criminal prosecution shall be the favored method of enforcing compliance with injunctions for protection against domestic violence." However, that provision does not preclude the court from using indirect contempt to enforce the order. But if the violation is punishable by criminal contempt and incarceration, the court must comply with the provisions of Florida Rule of Criminal Procedure 3.840. *See also* Lapushinsky v. Campbell, 738 So.2d 514 (Fla. 1st DCA 1999).

3. Inherent Power of Contempt:

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

a. Steiner v. Bentley, 679 So.2d 770 (Fla. 1996).

The statutory directive that domestic violence injunctions "shall" be enforced by civil contempt is directory rather than mandatory. The legislature cannot eliminate the court's inherent indirect criminal contempt power. The portion of the statute expressing legislative intent that indirect criminal contempt may not

be used to enforce compliance with injunctions for protection against domestic violence is unconstitutional.

b. Ramirez v. Bentley, 678 So.2d 335 (Fla. 1996).

The statutory directive that domestic violence injunctions "shall" be enforced by civil contempt is permissive rather than mandatory.

c. *See also* Walker v. Bentley, 660 So.2d 313 (Fla. 2d DCA 1995). To the extent that statute would limit the circuit court's jurisdiction to use civil contempt to enforce compliance with a domestic violence injunction, it is unconstitutional as violative of the doctrine of separation of powers. The court's power to enforce an injunction through a civil contempt proceeding is discretionary rather than mandatory, and thus does not prohibit use of indirect criminal contempt by the circuit court.

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

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

a. It is a first degree misdemeanor to willfully violate an injunction for protection against domestic violence or a foreign protection order that is given full faith and credit pursuant to §741.315, Florida Statutes. Violation of the injunctions above is punishable as provided in §775.082 or §775.083, Florida Statutes. §741.31(4)(a), Florida Statutes.

b. The essential inquiry in a contempt proceeding is whether the defendant intentionally failed to comply with the subpoena or other court order.

(i) Robinson v. State, 840 So.2d 1138 (Fla. 1st DCA 2003). Error to deny motion for judgment of acquittal on charge of violation of domestic violence injunction where state failed to establish that defendant knew final injunction had been entered against him, either through proof that the defendant had been served with the injunction or proof that defendant had some other notice.

(ii) Hunter v. State, 855 So.2d 677 (Fla. 2d DCA 2003).
Respondent was ordered to successfully complete a batterer intervention program as part of an injunction. Respondent enrolled and attended eight classes before being terminated by the program for failure to pay the provider fee and provide proof of community service hours. Respondent was sentenced to ninety days in jail for indirect criminal contempt for violating the injunction. Respondent testified that because he was sentenced to prison on an unrelated offense, he did not have any income and wanted to complete the community service but could not because of his asthma. Furthermore, the batterers' program issued a trespass warning against him because he had failed to pay the provider fees. The Second District Court of Appeal held that the respondent demonstrated a willingness to attend the class but, because of his

indigency and disability status, he could not. Furthermore, the State failed to prove an intentional violation of the injunction.

(iii) Villate v. State, 663 So.2d 672 (4th DCA 1995).

(a) Fear of retaliation is not a valid defense for failing to comply with a lawful order to appear at a court proceeding.

(b) "While we sympathize with Villate's plight, the courts simply cannot conduct orderly business where individual witnesses take it upon themselves to decide when, and if, they should respond to a court order."

(iv) Scimshaw v. State, 592 So.2d 753 (Fla. 3d DCA 1992). Where a law enforcement officer reasonably believed that he had been excused from the subpoena by an assistant state attorney, there was no intent to disobey the order.

(v) *See also* Gaspard v. State, 848 So.2d 1161 (Fla. 1st DCA 2003). Trial court fundamentally erred in failing to instruct the jury that defendant's knowledge that the injunction is in effect at the time of the alleged violation is an essential element of the offense of violation.

c. Actions which Constitute a Willful Violation:

A person is guilty of a first degree misdemeanor who intentionally violates an injunction for protection against domestic violence by (§741.31(4)(a), Florida Statutes):

(i) Refusing to vacate the dwelling that the parties share;

(ii) Going to, or being with 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;

(iii) Committing an act of domestic violence against the petitioner:

(iv) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;

(v) Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party;

(vi) Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;

(vii) Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or

(viii) Refusing to surrender firearms or ammunition if ordered to do so by the court.

d. Respondent may be charged with burglary or trespassing for entering the residential property in violation of an injunction:

(i) State v. Surez-Mesa, 662 So.2d 735 (Fla. 2d DCA 1995), *review denied*, 669 So.2d 252 (Fla. 1996). Husband who shared a house with wife, but was restrained by an injunction from entering the property, was charged with burglary for entering the premises with the intent to commit a crime.

(ii) Jordan v. State, 802 So.2d 1180 (Fla. 3d DCA 2002).The domestic violence injunction had the effect of giving notice to defendant against entering the victim's property.

e. Violation of Injunction by Indirect Contact Includes:
   (i) Mailing letters to victim; circuit court could revoke probation based upon defendant's indirect contact with victim through a third party, as order of probation mandated that defendant was to have no association in any way with victim. Arias v. State, 751 So.2d 184 (Fla. 3d DCA 2000).
   (ii) *But see* Seitz v. State, 867 So.2d 421 (Fla. 3d DCA 2004). Even though defendant's actions did not involve direct or indirect contact with the victim, he still could be convicted of stalking. (Defendant disseminated pharmaceutical records of the victim to various persons in the county. The State alleged that this action served no legitimate purpose and that it caused the victim to suffer emotional distress.)

5. Contempt Remedies:

Civil Contempt:

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

6. Civil Contempt Orders Must Contain a Purge Provision.

a. Jones v. Ryan, 967 So.2d 342, (Fla. 3rd DCA 2007) In these consolidated cases, two men sought habeas corpus relief based upon their confinement as a result of being found in civil contempt of court for failure to comply with

the trial court's order in final judgments for injunctions in domestic violence cases. The 3rd District Court of Appeal noted that the last orders issued by the trial court found each respondent to be in civil contempt of court and sentenced each to incarceration without containing a purge provision. Without this provision, the contempt orders were criminal rather than civil, and required that the contemnors be afforded the same constitutional due process protections afforded criminal defendants.

b. Sando v. State, 972 So.2d 271, (Fla. 4th DCA 2008) A petition for habeas corpus was granted when Ms. Sando was sentenced for civil contempt after violating a domestic violence injunction. The trial court ordered Ms. Sando jailed for six months with a purge that stated she would be released upon completion of a 60 day domestic violence class which was unavailable where she was incarcerated. The appellate court found that the sentence represented a criminal contempt sanction, not a civil contempt sanction, and that Ms. Sando was not properly noticed or provided with the due process requirements necessary in criminal contempt proceedings.

c. Indirect Criminal Contempt: Florida Rule of Criminal Procedure 3.840:
   (i) Indirect criminal contempt concerns conduct that has occurred outside the presence of the judge. Gidden v. State, 613 So.2d 457 (Fla. 1993).
   (ii) Indirect criminal contempt is a criminal matter with the object of punishment. Featherstone v. Montana, 684 So.2d 233 (Fla. 3d DCA 1996).
   (iii) Rule of Criminal Procedure 3.840:
      (a) The prosecutorial procedure for criminal contempt is governed by Florida's Rule of Criminal Procedure 3.840.
         (1) Hagan v. State, 853 So.2d 595 (Fla. 5th DCA 2003). The Fifth District Court of Appeal reversed the defendant's conviction for indirect criminal contempt for violating an injunction against repeat violence. The court held, inter alia, that: (1) the affidavit of violation was insufficient as it was not based on personal knowledge (2) the trial court committed reversible error by not having the proceeding transcribed, preventing the appellate court from reviewing the defendant's additional due process claims. The District Court of Appeal reversed without prejudice to new proceedings being initiated in conformity with Florida Rule of Criminal Procedure 3.840.
         (2) Lapushinsky v. Campbell, 738 So.2d 514 (Fla. 1st DCA 1999). The First District Court of Appeal granted a writ of *habeas corpus* where the trial judge hearing the petition for final injunction learned of a violation of the temporary injunction and, in addition to entering the final injunction, held the respondent in indirect criminal contempt and sentenced him to thirty days in the county jail. The First District Court of Appeal held that the trial court failed to comply with the procedural safeguards set forth in

Florida Rule of Criminal Procedure 3.840 when instituting the contempt action.

(b) Indirect criminal contempt begins with the judge issuing an order to show cause. Tschapek v. Frailing, 699 So.2d 851 (Fla. 4th DCA 1997).

(c) Motion for order to show cause on which contempt order is based must be sworn or supported by affidavit.

(1) Judkins v. Ross, 658 So.2d 658 (Fla. 1st DCA 1996).

(2) Lindman v. Ellis, 658 So.2d 632 (Fla. 2d DCA 1995).

(3) B.L.J. v. State, 678 So.2d 530 (Fla. 1st DCA 1996).

(iv) All the procedural aspects of the criminal justice process must be ol a defendant in an indirect criminal contempt proceeding.

(a) Appropriate charging document;

(b) An answer;

(c) An order of arrest;

(d) The right to bail;

(e) An arraignment;

(f) A hearing;

(g) Representation by counsel;

(h) Process to compel the attendance of witnesses; and

(i) Right to testify in his own defense.

(1) Gidden v. State, 613 So.2d 457 (Fla. 1993).

(2) Tschapek v. Frailing, 699 So.2d 851 (Fla. 4th DCA 1997).

(v) State must Produce Non-Hearsay Testimony:
In order to justify a holding that defendant violated an injunction for protection, the State must produce non-hearsay testimony. Torres v. State, 870 So.2d 149 (Fla. 2d DCA 2004).

(vi) Featherstone v. Montana, 684 So.2d 233 (Fla. 3d DCA 1996). The fact that the husband had previously been found in civil contempt and incarcerated for noncompliance with court orders does not bar indirect criminal contempt proceedings based on the same noncompliance.

(vii) Subject to Speedy Trial:

(a) Washington v. Burk, 704 So.2d 540 (Fla. 5th DCA 1997). Indirect criminal contempt is subject to the speedy trial rule, whether the proceeding is initiated by arrest or service of an order to show cause. Where the defendant had been arrested for violation of an injunction, the state filed a nolle prosse in county court after the defendant filed a motion for discharge, and the state subsequently filed a motion for an order to show cause in circuit court, the speedy trial period for the circuit court action commenced with the defendant's initial arrest rather than with service of the show cause order.

(b) *But see* Burk v. Washington, 713 So.2d 988 (Fla. 1998). Indirect criminal contempt initiated by the court is not subject to the speedy trial rule.

(viii) Right to jury trial:

A defendant charged with indirect criminal contempt for violation of injunction was not entitled to a jury trial; denial of jury trial merely limited the maximum term of jail to six months. Wells v. State, 654 So.2d 146 (Fla. 3d DCA 1995).

(ix) Standard to support conviction for criminal contempt is beyond a reasonable doubt:

(a) Lindman v. Ellis, 658 So.2d 632 (Fla. 2d DCA 1995).

(b) Tide v. State, 804 So.2d 412 (Fla. 4th DCA Oct. 3, 2001).

(1) In criminal contempt proceeding, the court must require proof of defendant's guilt beyond a reasonable doubt before shifting the burden to defendant to go forward.

(2) "Thus, to prove indirect criminal contempt, 'there must be proof beyond a reasonable doubt that the individual intended to disobey the court.'"

(c) Hoffman v. State, 842 So.2d 895 (Fla. 2d DCA 2003). The trial court erred in finding that the defendant had violated the 500 foot provision of the injunction as the state failed to prove the exact distance the defendant was from petitioner. The court held that the state's burden of proof in an indirect criminal contempt case is to prove every element beyond a reasonable doubt.

(x) Notice of Prohibited Conduct Must Be Provided in an Injunction:

(a) Hoffman v. State, 842 So.2d 895 (Fla. 2d DCA 2003). Defendant, a respondent in a civil case, was convicted of violation of the injunction for sending cards to the petitioner's residence and for allegedly violating the 500 foot provision of the injunction. The trial court erred in finding that the defendant had violated the injunction as the cards were addressed to other residents of the petitioner's household and as the injunction did not specifically prohibit this.

(b) Zelman v. State, 666 So.2d 188 (Fla. 2d DCA 1995). The order holding the husband in indirect criminal contempt for violating a temporary restraining order against harassing the wife by failing to pay her health insurance premiums in a timely fashion was reversed. Neither the final judgment of dissolution nor the temporary restraining order adequately apprised the husband of conduct that was prohibited in regard to the timeliness of payments of the wife's health insurance premiums. The husband's payment of premiums after the due date had passed, but within the grace period, did not constitute indirect criminal contempt.

d. Direct Criminal Contempt, Florida Rule of Criminal Procedure 3.830:

(i) Criminal contempt proceedings are subject to Florida's Rules of Criminal Procedure 3.830 and 3.840 and to the "constitutional limitations applicable to criminal cases including due process requirement of a burden of proof 'beyond a reasonable doubt.'" Dowis v. State, 578 So.2d 860, 862 (Fla. 5th DCA 1991).

(a) Defendant must be allowed to show cause why he should not be found guilty.
(1) Rule 3.830, Florida's Rules of Criminal Procedure.
(2) Tchapek v. Frailing, 699 So.2d 851 (Fla. 4th DCA 1997).

(ii) Direct criminal contempt occurs when the court sees or hears the conduct, which constitutes the contempt.
(a) Tchapek v. Frailing, 699 So.2d 851 (Fla. 4th DCA 1997).
(b) Jackson v. State, 779 So.2d 379 (Fla. 2d DCA 2000). Defendant's "contemptuous behavior occurred in the presence of the trial court, frustrated an ongoing proceeding, and is apparent on the face of the record."

(iii) The burden of proof to support conviction for criminal contempt is beyond a reasonable doubt:
(a) Kramer v. State, 800 So.2d 319, 320 (Fla. 2d DCA 2001).
(b) Dowis v. State, 578 So.2d 860, 862 (Fla. 5th DCA 1991).
(c) Lindman v. Ellis, 658 So.2d 632 (Fla. 2d DCA 1995).
(d) Tide v. State, 804 So.2d 412 (Fla. 4th DCA Oct. 3, 2001).
(1) In criminal contempt proceeding, the court must require proof of defendant's guilt beyond a reasonable doubt before shifting the burden to defendant to go forward.

(iv) Purpose of criminal contempt is to punish.
(a) Tchapek v. Frailing, 699 So.2d 851 (Fla. 4th DCA 1997).
(1) Kress v. State, 790 So.2d 1207 (Fla. 2d DCA 2001). Judge cannot hold a person in direct criminal contempt of court for a profanity-laced tirade that takes place away from the courtroom and has nothing to do with the judge's official duties.

(v) Woods v. State, 600 So.2d 27, 29 (Fla. 4th DCA 1992). Failure to appear is direct contemptuous behavior.

7. FDLE Statewide Verification System:

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

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

a. Law enforcement officers must assist the victim of domestic violence to obtain medical attention and advise the victim that there is a domestic violence center from which the victim may receive services. Additionally, law

enforcement must immediately notify the victim of his or her legal rights by providing the victim with the Legal Rights and Remedies Notice, which is developed by the Department of Children and Families and shall include the statutory language in §741.29(1)(a-b), Florida Statutes.

b. Law enforcement officers are required to prepare reports of each act of alleged domestic violence and give the report to the officer's supervisor and file it with the law enforcement agency "in a manner that will permit data on domestic violence cases to be compiled." §741.29(2), Florida Statutes.
c. The court may order a law enforcement officer "to accompany the petitioner and assist in placing the petitioner in possession of the dwelling or residence, or otherwise assist in the execution or service of the injunction." §741.30(8)(a(2), Florida Statutes.
d. Law enforcement officers may arrest the alleged abuser regardless of the consent of the alleged victim. §741.29(3), Florida Statutes.
e. Law enforcement officers may not be held liable in a civil action because of arrests, enforcement, or service of process under chapter 741, Florida Statutes. §741.29(5), Florida Statutes.
f. Law Enforcement Must have Defendant Sign Notice to Appear (NTA) for the Court to have Jurisdiction over the Defendant:
   (i) Mallard v. State, 699 So.2d 797, 798 (Fla. 4th DCA 1997). Conviction reversed on jurisdictional grounds where the defendant was issued a NTA and was booked into the county jail. The court held that where a defendant is booked into jail, the defendant does not sign the NTA and the officer does not fill in the court information, the NTA was no longer a NTA, thus there was no charging document before the court. The court therefore lacked any jurisdiction over the defendant. Jurisdiction can never be waived; an information must be filed whenever someone is actually booked into jail.
   (ii) However, *see* Florida Rule of Criminal Procedure 3.170(a): "If the sworn complaint charges the commission of a misdemeanor, the defendant may plead guilty to the charges at first appearance . . . and the judge may thereupon enter judgment and sentence without the necessity of any formal charges being filed."

9. Procedures Subsequent to a Violation of the Injunction:

a. Three Ways Enforcement of a Violation Can Be Initiated:
   (i) Victim may contact local law enforcement.
   (ii) If the court has knowledge on its own that the petitioner, the petitioner's children, or another person is in immediate danger if the court fails to act before the decision of the state attorney to prosecute, the court may take one of two actions:
      (a) Court may issue an order of appointment of the state attorney to file a motion for an order to show cause why the respondent should not be held in contempt, OR

(b) If the court does not issue an order of appointment of the state attorney, it shall immediately notify the state attorney that the court is proceeding to enforce the violation through criminal contempt. §741.31(3), Florida Statutes.

(iii) Victim may contact the clerk of the court's office and receive assistance from the clerk's office in filing an "affidavit in support of the violation." §§741.31(1), 741.30(2)(c) Florida Statutes.

(a) Once an Affidavit in Support of the Violation is Completed: The affidavit must be immediately forwarded to the state attorney's office, the designated judge, and, if the affidavit contains allegations that a crime has been committed, it shall be forwarded to the appropriate law enforcement agency to complete an investigation within 20 days and forward an investigative report to the state attorney.

(b) The state attorney must determine within 30 working days whether it will file criminal charges or prepare a motion for an order to show cause why the respondent should not be held in criminal contempt, or both, or file notice that the case is under investigation or still pending. §741.31(2), Florida Statutes.

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

a. Each state attorney shall develop special units or assign prosecutors, who are trained in domestic violence, to specialize in the prosecution of domestic violence cases. §741.2901(1), Florida Statutes.

b. State attorneys are required to adopt a "pro-prosecution policy" for acts of domestic violence. The consent of the victim is not required to prosecute; the state attorney possesses prosecutorial discretion. §741.2901(2), Florida Statutes. A respondent can be prosecuted for specific acts such as assault, battery, or stalking which constituted violation of the injunction. *See* State v. Surez-Mesa, 662 So.2d 735 (Fla. 2d DCA 1995), Jordan v. State, 802 So.2d 1180 (Fla. 3d DCA 2002).

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

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

a. If the respondent is arrested by law enforcement for violation of an injunction under chapter 741, Florida Statutes, law enforcement must hold the respondent in custody until first appearance when court will decide bail in accordance with chapter 903. §741.30(9)(b), Florida Statutes.

See Simpson v. City of Miami, 700 So.2d 87 (Fla. 3d DCA 1997). Sovereign immunity did not bar wrongful death action against city arising from death of woman killed by violator of domestic violence injunction after he was released from police cruiser; if officer's action of securing violator in cruiser, after having responded to call about injunction violation, constituted "arrest" of violator,

then statute left officer no discretion under sovereign immunity principles to release violator, but required him to take violator before judge.

b. Prior to first appearance the State Attorney's Office shall perform a thorough background investigation on the respondent and present the information to the judge at first appearance, so he/she will have all pertinent information when determining bail. §741.2901(3), Florida Statutes.

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

a. Economic Damages:

The court may award economic damages to any person who suffers an injury and/or loss due to a violation of an injunction for protection against domestic violence. §741.31(6), Florida Statutes.

b. Compensatory and Punitive Damages:

A victim of domestic violence who has suffered repeated physical or psychological injuries over an extended period of time as a result of continuing domestic violence has a cause of action for compensatory and punitive damages against the perpetrator responsible for the violence. §768.35, Florida Statutes.

c. Attorneys' Fees: *See supra* section II.P.

III. EVIDENCE:

A. PRIVILEGES APPLICABLE TO DOMESTIC VIOLENCE:

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

2. **Attorney-Client Privilege; §90.502, Florida Statutes.**
   Attorney-client privilege is relatively limited in scope, and thus does not require exclusion of evidence voluntarily submitted by an attorney in violation of that privilege. State v. Sandini, 395 So.2d 1178 (Fla. 4th DCA 1981).

3. **Spouse Privilege; §90.504, Florida Statutes.**
   a. No privilege "prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited" Trammel v. U.S., 445 U.S. 40 (1980); State v. Grady, 811 So.2d 829 (2d DCA 2002).
   b. Statements of spouse that would be privileged at trial can be used to establish cause to obtain a search warrant or to investigate a suspect based on those statements. State v. Grady, 811 So.2d 829 (2d DCA 2002).
   c. Husband-wife evidentiary privilege does not apply to criminal acts by one spouse.

(i) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.
(ii) Section 90.504(3)(b), Florida Statutes. There is no privilege under this section in a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse or the person or property of a child of either.
(iii) Valentine v. State, 688 So.2d 313 (Fla. 1997).

B. ALLOCATION OF DECISION MAKING/FINDER OF FACT:

Question of Fact for the Trier:

1. **Emotional Distress:**
   D.L.D., Jr. v. State, 815 So.2d 746 (Fla. 5th DCA 2002). The court looked to the 1st District Court Of Appeal in McMath v. Biernacki agreeing with that courts finding that in deciding whether an incident or series of incidents creates substantial emotional distress that distress should be judged on an objective, not subjective standard and even if a subjective standard is used, a person does not need to be reduced to "tears or hysteria in order to be considered substantially emotionally distressed."

2. **Stalking:**
   Biggs v. Elliot, 707 So.2d 1202 (Fla. 4th DCA 1998). The court's finding that whether following and repeatedly telephoning the victim fell within the statutory definition of stalking under the domestic violence statute so as to permit the issuance of an injunction was a question of fact for the trier of fact and was not clearly erroneous. The stalking statute was found not to be unconstitutionally vague or overbroad.

C. CONFIDENTIAL RECORDS:

1. **A Petitioner's Place of Residence May Be Kept Confidential for Safety Reasons. §741.30(6)(a)(7), Florida Statutes.**

2. ***See Also* in This Outline section II.,M.(2), Confidentiality of Information.**

D. JUDICIAL NOTICE OF SERVICE:

1. **Improper for Court to Take Judicial Notice of an Essential Element That the State is Required to Prove.**

a. Cordova v. State, 675 So.2d 632 (Fla. 3d DCA 1996).
   (i) Notice of injunction is an essential element of charge of violating its provisions.
   (ii) Return of service, while hearsay, was admissible in evidence under public records exception.
   (iii) Trial court may not take judicial notice of fact that defendant was served with an injunction.
      (a) Fact that the defendant was served is not generally known within territorial jurisdiction of the court.
      (b) And it was not type of fact that was not subject to dispute because of being capable of accuracy could not be questioned.
   (iv) However: Trial court may allow State to use "permissive inference" to establish that the defendant was served with an injunction.
      (a) Permissive inference allows, but does not require, the trier of fact to infer elemental fact upon proof of a basic fact and places no burden on the defendant.
      (b) Such inference passes the rational connection test, as fact of service more likely than not flowed from the return of service.
b. Hernandez v. State, 713 So.2d 1120 (Fla. 3d DCA 1998). The District Court of Appeal held that the defendant was entitled to judgment of acquittal on charge of violating a domestic violence injunction, as trial court could not properly take judicial notice of an essential element that the state was required but failed to prove for conviction.

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

1. Admissible Against Batterers to Bolster Credibility of Victim:

a. Commonwealth v. Goetzendanner, 42 Mass.App.Ct. 637, *cert. denied*, 425 Mass. 1105 (1997). "Where relevant, evidence of BSS may be admitted through a qualified expert to enlighten jurors about behavioral or emotional characteristics common to most victims of battering and to show that an individual or victim witness has exhibited similar characteristics."
b. State v. Griffin, 564 N.W.2d 370 (Iowa 1997).
   (i) Iowa Supreme Court allowed the use of expert testimony on BWS with respect to the victim's recantation.
   (ii) Expert did not offer opinion on the specific victim's credibility, but instead testified concerning the medical and psychological syndrome present in battered woman generally.
c. People v. Morgan, 58 Cal.App.4th 1210 (Cal.Ct.App.1997). BWS is admissible to bolster the credibility of a victim who recants her story.
d. Gonzalez-Valdes v. State, 834 So.2d 933 (Fla. 3d DCA 2003). Defendant was convicted in a jury trial in the circuit court, Miami-Dade County, of second-degree murder of her live-in boyfriend. Defendant appealed. On motion for

rehearing, the District Court of Appeal held that the testimony of victim's ex-wife, that victim never abused her in 29 years of marriage, was relevant to battered woman's syndrome defense.

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

F. STATEMENTS BY WITNESSES: FLORIDA RULE OF CRIMINAL PROCEDURE 3.330(B)(1)(B):

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

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

3. **The Reference to "Statements" Is Limited to Written Statements or Contemporaneously Oral Statements.**
   Watson v. State, 651 So.2d 1159 (Fla. 1994). Expert's oral statement was not discoverable.

4. **State Is Not Charged With Knowledge Of Defendant's Statement To State Witness.**
   a. Sinclair v. State, 657 So.2d 1138 (Fla. 1995). "We agree with the trial court that none of the rules of criminal procedure relating to discovery require the State to disclose information which is not within the State's actual or constructive possession."
   b. *Reversing by implication*:
   McCray v. State, 640 So.2d 1215 (Fla. 5th DCA 1994). Held that the State was so charged with constructive knowledge of a defendant's statements to a State witness.

5. **Prosecutor's Trial Preparation Notes, Work Product, Not Subject to Disclosure:**
   Where the prosecutor's trial preparation notes did not reflect verbatim statements of any witness interviewed, had not been adopted or approved by the person to whom they were attributed, and the notes included interpretation

of remarks made by witnesses, they were not subject to disclosure. Williamson v. Dugger, 651 So.2d 84 (Fla. 1994).

G. STATEMENTS BY VICTIMS:

1. Reluctant v. Recanting Victim:

a. Fairness of Opposing Party and Counsel:

A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act. Rule 4-3.4, Florida Rules of Professional Conduct.

b. State v. Conley, 799 So.2d 400 (Fla. 4th DCA 2001). The state appealed an order dismissing a felony battery. An adversarial hearing occurred but the state had neglected to subpoena the witnesses to the events. The victim was present and claimed that she instigated the argument and the injuries she sustained were a result of her own actions, directly contradicting the eyewitness account. The victim claimed she never wanted charges brought against the defendant. The judge dismissed the charges despite the state's objection. In relying on both Florida Rule of Criminal Procedure 3.133(b), and on State v. Hollie, 736 So.2d 96 (Fla. 4th DCA 1999), the Fourth District Court of Appeal held that because the hearing was an adversarial hearing, where the defendant never motioned the court for a dismissal, and because probable cause was clearly established, a dismissal was clearly in error. Judge Warner concurs in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery is a defense. Consent is only a defense in cases of sexual battery, NOT domestic violence.

2. Cross Examination of Victim; Fundamental Right:

Zuchel v. State, 824 So.2d 1044 (Fla. 4th DCA 2002).

Defendant, charged with aggravated stalking and violation of the restraining order, filed a writ of prohibition after the trial court denied his motion for disqualification. The Fourth District Court of Appeal granted defendant's request and remanded the case back to the trial court for assignment of a new judge. The appellate court held that the trial court's denial of the basic fundamental right of cross examination of the victim would give a "reasonably prudent person a well-founded fear of judicial bias." The Fourth District Court of Appeal noted the fact that the state was allowed to use the victim's testimony in its opposition to the motion to reduce bond.

H. HEARSAY:

1. **Definition: A statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. §90.801(1)(c), Florida Statutes.**

2. **Conviction May Stand Solely on Hearsay:**
   a. "We decline to enunciate a blanket rule that no conviction can stand based solely on hearsay." Anderson v. State, 655 So.2d 1118 (Fla.1995).
   b. *But see* Colwell v. State, 838 So.2d 670 (Fla. 2d DCA 2003). (Improper to base revocation of probation on inadmissible hearsay). The Second District Court of Appeal reversed trial court's revocation of defendant's probation for violation of probation for committing domestic battery. The court held that it was an error to base the revocation, in part, on inadmissible hearsay and other insufficient evidence. The only testimony offered at the revocation hearing was that of a deputy who testified that the victim told him that the defendant had grabbed her and she was afraid to go back to the house. Further, the deputy testified that the victim was hysterical and had a faint mark on her neck. This evidence was insufficient to find that defendant violated probation. Note: Trial court found that the victim's statement did not meet excited utterance exception as too much time passed between the time of the alleged incident and her statement to the deputy.

3. **When the Declarant Testifies During the Hearing and Is Subject to Cross-**Examination the Confrontation Clause is Satisfied.
   a. U.S. v. Owens, 484 U.S. 554 (1988).
   b. U.S. v. Spotted War Bonnett, 933 F.2d 1471 (8th Cir.1991), *cert. denied*, 112 S.Ct. 1187 (1992).

4. **Satisfaction of the confrontation clause where the declarant does not testify.** *See also infra* section I.
   a. If a hearsay statement is admissible under any of the hearsay exceptions included in the Evidence Code, with the exception of §90.803(23) – hearsay exception; statement of child victim, no additional analysis is necessary and the admission of the statement will not infringe upon the defendant's confrontation rights.
      (i) *Ehrhardt, 1 Fla. Prac., Evidence* §802.2 (2004 ed.).
      (ii) Where witness is unavailable to testify at subsequent hearing, prior testimony is admissible, despite confrontation clause, if opponent can show that testimony was given under circumstances that indicate its content is probably true. State v. Kleinfeld, 587 So.2d 592 (Fla. 4th DCA 1991).
   b. *But see* Mathieu v. State, 552 So.2d 1157 (Fla. 3d DCA 1989). Defendant's right to confrontation was violated when there was testimony from which an inescapable inference was drawn that two eye-witnesses who did not testify had identified the defendant as the person who committed the robbery.

c. *See also* Crawford v. Washington, 124 S.Ct. 1354 (2004), which, regarding "testimonial" hearsay, overruled the Roberts decision, which held that reliability could be inferred if the hearsay statement falls within a firmly-rooted exception or if there are particular guarantees of trustworthiness. Ohio v. Roberts, 448 U.S. 56 (1980).
   (i) Note: The Crawford opinion applies to "testimonial" hearsay and Roberts analysis applies to "non-testimonial." Further discussion of Crawford's impact on domestic violence proceedings, *see* Judge Amy Karen and Judge David M. Gersten's article, "Domestic Violence Hearsay Exceptions In the Wake of Crawford v. Washington."
   (ii) In Crawford, the U.S. Supreme Court held that when hearsay statements of an unavailable witness are "testimonial" in nature, the 6th amendment requires that the accused be afforded a prior opportunity to cross-examine the witness. Crawford v. Washington, 124 S.Ct. 1354 (2004). However, the Supreme Court did not set out a definition of "testimonial." *Id.*

I. HEARSAY EXCEPTIONS: §90.803, FLORIDA STATUTES:

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

1. **Spontaneous Statement –** §90.803(1), Florida Statutes. A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.
   The spontaneity of the statement negates the likelihood of conscious misrepresentation by the declarant and provides the necessary circumstantial guarantee of trustworthiness to justify the introduction of the evidence.
   a. *Ehrhardt, 1 Fla. Prac., Evidence* § 803.1 (2004 Ed.).
   b. White v. Illinois, 502 U.S. 346 (1992).
   c. Fratcher v. State, 621 So.2d 525 (Fla. 4th DCA 1993). Defendant's companions' statement to store manager should not have been admitted under spontaneous statement exception to hearsay rule.
   d. McDonald v. State, 578 So.2d 371 (Fla. 1st DCA 1991), *review denied*, 587 So.2d 1328 (Fla. 1991). Victim's statement to friend immediately after sexual battery incident was admissible.
      (i) Sunn v. Colonial Penn Ins. Co., 556 So.2d 1156 (Fla. 3d DCA 1990). Testimony inadmissible where record did not reflect that statements were spontaneous and made without engaging in reflective thought.

(ii) Cadavid v. State, 416 So.2d 1156 (Fla. 3d DCA 1982). "There was no error in permitting the investigating police officer to testify as to victim's spontaneous statements at the time of the incident."

(iii) The spontaneity is lacking if more than a "slight lapse of time" has occurred between the event and the statement.

(iv) State v. Jano, 524 So.2d 660 (Fla. 1988). Spontaneous statement by two-and-one-half year old to baby sitter that child's father had sexually molested her was no showing that statement was made contemporaneously with the alleged act by the father.

(v) Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988). Testimony by police officer concerning victim's version of aggravated assault, when the statement was made after the victim drove home and called the police, was not admissible.

(vi) U.S. v. Cruz, 765 F.2d 1020 (11th Cir. 1985). Undercover agent's statement as to whom agent identified as source of cocaine was not admissible under present sense impression exception to hearsay rule.

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

a. Excited utterance is an exception to the hearsay rule.

(i) Viglione v. State, 861 So.2d 511 (Fla. 5th DCA 2003). Victim of a kidnapping had called witnesses while the offense was taking place. These were considered excited utterances, and the people who were called were allowed to testify about the content of the conversations.

(ii) J.L.W. v. State, 642 So.2d 1198 (Fla. 2d DCA 1994) 714 So.2d 462 (Fla. 3d DCA 1997).

(iii) Power v. State, 605 So.2d 856 (Fla. 1992), *cert. denied*, 507 U.S. 1037 (1993).

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

b. Elements:

(i) There must be an event startling enough to cause nervous excitement;

(ii) The statement must have been made before there was time to contrive or misrepresent; and

(iii) The statement must have been made while the person is under the stress of excitement cause by the event.
(a) State v. Jano, 524 So.2d 660 (Fla. 1988).
(b) Rogers v. State, 660 So.2d 237 (Fla. 1995).
(c) Henyard v. State, 689 So.2d 239 (Fla. 1997).

c. Time:
(i) State v. Jano, 524 So.2d 660 (Fla. 1988).
(a) "Some out-of-court statements may be admitted as excited utterances even though they were not made contemporaneously or immediately after the event."
(b) "The length of time between the event and the statement is pertinent in considering whether the statement may be admitted as an excited utterance."
(c) "It would be an exceptional case in which a statement made more than several hours after the event could qualify as an excited utterance because it would be unlikely that the declarant would still be under the stress of excitement caused by the event."
(ii) The lapse of time between the startling event and the statement is relevant but not dispositive. Henyard v. State, 698 So.2d 239 (Fla. 1997). ". . . The immediacy of the statement is not a statutory requirement."
(iii) There is no bright-line rule of hours or minutes to determine whether the time interval between the event and the statement is long enough to permit reflective thought.
(a) Werley v. State, 814 So.2d 1159 (Fla. 1st DCA 2002).
(b) Rogers v. State, 660 So.2d 237, 240 (Fla. 1995). The fact that reflective thought may be possible does not automatically exclude a statement from being classified as an excited utterance. If the evidence establishes a lack of reflective thought, the predicate is satisfied.
(iv) "As long as the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements of §90.803(2)." *Ehrhardt, 1 Fla. Prac., Evidence §* 803.2 (2004 Ed.). Cited by:
(a) State v. Jano, *supra.*
(b) Edwards v. State, 763 So.2d 549 (Fla. 3d DCA 2000). No error in admission, as excited utterance, statement made by bystander at accident scene that she had been at party with defendant, that defendant was drunk, and that defendant had been told not to drive.

d. Excited utterance does not violate the confrontation clause.
(i) J.L.W. v. State, 642 So.2d 1198 (Fla. 2d DCA 1994).
(ii) White v. Illinois, 502 U.S. 346 (1992).

e. 911Recordings:
(i) Generally, 911 tapes are admissible as excited utterance or spontaneous statement exceptions to the hearsay rule.
(a) State v. Frazier, 753 So.2d 644 (Fla. 5th DCA 2000).

(b) Werley v. State, 814 So.2d 1159 (Fla. 1st DCA 2002). The First District Court of Appeal affirmed trial court's conviction of aggravated battery with a deadly weapon and held that the trial court did not abuse its discretion in admitting 911 tapes regardless of the fact that the victim did not call the police until an hour after the alleged battery occurred as she was shaken and visibly frightened when the police arrived.

(c) Coley v. State, 816 So.2d 817 (Fla. 2d DCA 2002) Jamie Coley appealed from his judgment and sentence for aggravated battery, arguing that the trial court erred in failing to redact portions of a 911 tape admitted into evidence, which referred to a nonexistent restraining order. The state argued that even if the reference to the restraining order should have been redacted from the tape, its admission into evidence was harmless. The test for harmless error requires the state to prove that there is no reasonable possibility that the error complained of contributed to the verdict. State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). Here the state did not meet its burden and as a result the court reversed and remanded the judgment.

(d) Sliney v. State, 699 So.2d 662 (Fla. 1997). Prosecutor allowed to read transcript of 911 call to the jury.

(e) Davis v. State, 698 So.2d 1182 (Fla. 1997).

(f) Allison v. State, 661 So.2d 889 (Fla. 2d DCA 1995). 911 audio recording of victim's ten-year-old son's telephone call was admissible under excited utterance exception to hearsay rule. (*reversed on other grounds*), *affirmed* by Sliney, *supra.*

(g) Ware v. State, 596 So.2d 1200 (Fla. 3d DCA 1992), *approved*, Davis v. State, 698 So.2d 1182 (Fla. 1997), *affirmed* by Sliney, *supra*.

(h) *See also* Garcia v. State, 492 So.2d 360, 365 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986), *approved*, Davis v. State, *supra*.

(i) Quinn v. State, 692 So.2d 988 (Fla. 5th DCA 1997).

(j) Evans v. State, 854 A.2d 1158 (Del.Supr. 2004); Williamson v. State, 707 A.2d 350 (Del.Supr. 1998) Defendant's argument that the statements could not be admitted as evidence identifying the defendant as the killer was rejected by the court.

(ii) However: The fact that a call is placed on a 911 line does not, standing alone, qualify it for admission, as a hearsay exception, under §90.803, Florida Statutes.

(a) Quinn v. State, *supra*.
Tape of 911 call from anonymous caller was not admissible.

(b) Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995). 911 call not admissible absent firsthand knowledge of the events described under present sense impression or excited utterance exceptions.

(c) People v. Adkins, 628 N.Y.S. 2d 711 (N.Y. 2d Dept. 1995). Transcript of a 911 call was not admissible as present sense exception because

caller was not an eyewitness. Affirmed as modified by, People v. Vasquez, 670 N.E. 2d. 1328 (N.Y. 1996).

(d) Franzen v. State, 746 So.2d 473 (Fla. 2d DCA 1998). The concurring opinion pointed out that 911 tapes do not come in under business records exception.

f. Call to Third Party:

(i) Viglione v. State, 861 So.2d 511 (Fla. 5th DCA 2003).
The court, citing State v. Skolar, 692 So.2d 309 (Fla. 5th DCA 1997), recognized the rule that a victim's telephone "calls for help" to third parties made while the victim was being held against his will and threatened during a kidnapping incident are admissible under the same excited utterance or spontaneous statement exception to the hearsay rule that would permit the admission of a victim's 911 calls.

(ii) J.L.W. v. State, *supra*. Officer's testimony that victim stated "the guys in the car pointed a gun at me" was admissible.

(iii) Wilcox v. State, 770 So.2d 733 (Fla. 4th DCA 2000). Testimony that the victim yelled to her daughter to "call the police because Ernest picked up a knife[,]" was admissible as an excited utterance.

g. Excited utterance on their own are sufficient to deny a Judgment of Acquittal (JOA) motion and send case to the jury.

(i) Williams v. State, 714 So.2d 462 (Fla. 3d DCA 1998).

(a) Trial testimony which conflicts with excited utterance goes to the weight of the testimony; jury has the choice of which statement to believe.

(b) These excited utterances were, on their own, sufficient to deny the defendant's motion's for JOA and to send the case to the jury.

(c) Rivera v. State, 718 So.2d 856 (Fla. 4th DCA 1998).

(d) Lopez v. State, 716 So.2d 301 (Fla. 3d DCA 1998).

(e) Willis v. State, 727 So.2d 952 (Fla. 4th DCA 1998). Applies to violation of probation hearings.

(ii) *But see* R.T.L. v. State, 764 So.2d 871 (Fla. 4th DCA 2000). Error to deny JOA where only evidence of intent was prior inconsistent statement from victim.

(a) Note: This holding is no new revelation. The case law has always held that prior inconsistent statements cannot be used as substantive evidence. However, an excited utterance is not a prior inconsistent statement; it is an exception to hearsay and can supply the basis for a conviction. Controlling precedent has held that exited utterances on their own are sufficient to deny JOA motion and send cases to the jury.

h. Other Case Law Regarding Excited Utterance:

(i) Garcia v. State, 492 So.2d 360 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986). Statement made to police by wounded victim admissible because "her response was spontaneous, sprang from the stress, pain and

excitement of the shootings and robberies, and was not the result of any premeditated design."

(ii) Power v. State, 605 So.2d 856 (Fla. 1992). Bystander's hearsay statement to officer, which described assailant, was admissible because bystander flagged down officer and appeared visibly shaken.

(iii) Henyard v. State, 689 So.2d 239 (Fla. 1997).

(iv) Rodriguez v. State, 696 So.2d 533 (Fla. 3d DCA 1997). The fact that the declarant also testifies does not affect the admissibility of the excited utterance. Evidence that victim identified defendant to an investigating officer, which was properly admitted as an excited utterance, was sufficient to support a conviction.

(v) Willis v. State, 727 So.2d 952 (Fla. 4th DCA 1998). Although evidence was conflicting, trial court was in best position to weight the credibility of the witnesses.

(vi) Pope v. State, 679 So.2d 710, 713 (Fla. 1996). Being stabbed and beaten was a sufficiently startling event.

(vii) Pedrosa v. State, 781 So.2d 470 (Fla. 3d DCA 2001). Statement made to police while victim was still bleeding and in a distressed state.

i. Practical Points When Dealing with Excited Utterances:

(i) Establish the victim's emotional condition and demeanor at the time of the statement.

(ii) Establish whether the statement was made pursuant to detailed questioning (reflective thought), the product of a general "what happened question" or was it spontaneous.

3. Medical Statement – §90.803(4), Florida Statutes, Statements made for the purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar, as reasonably pertinent to diagnosis or treatment.

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

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

c. Elements:

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

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

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

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

treatment." *See also* State v. Frazier, 753 So.2d 644 (Fla. 5th DCA 2000).

d. Statements which are Not Necessary for Medical Diagnosis are Inadmissible:
   (i) Conley v. State, 620 So.2d 180 (Fla. 1993). In prosecution for armed burglary and sexual battery with a deadly weapon, doctor could testify that victim stated that she was orally, vaginally, and anally penetrated because it was reasonably pertinent to the diagnosis or treatment of the victim's wounds. However, the "assault at gunpoint" portion of the statement was inadmissible because it was not reasonably pertinent to medical diagnosis or treatment.
   (ii) Begley v. State, 483 So.2d 70 (Fla. 4th DCA 1986). Statements about victim's medical state provided by sexual abuse counselor were unsupported by any showing purpose for medical diagnosis and therefore inadmissible hearsay.
   (iii) Allison v. State, 661 So.2d 889 (Fla. 2d DCA 1995).
      (a) Where the record does not show that the statement was elicited for the purpose of treatment as opposed to investigation, the statement is not within the medical diagnosis exception.
      (b) Where a four year old witnessed her father kill her mother, the child's statement to a psychologist, who was treating her for Post Traumatic Stress (PTS), describing the killing is not admissible under the medical diagnosis exception.
   (iv) Randolph v. State, 624 So.2d 328 (Fla. 1st DCA 1993). In sexual battery prosecution, error to admit doctor's testimony concerning statements made by the victim which related the "details of the crime", particularly those relating to a shotgun because the statements were not "reasonably pertinent to medical diagnosis or treatment."
   (v) Bradley v. State, 546 So.2d 445 (Fla. 1st DCA 1989). Hearsay exception for statements made for purposes of medical diagnosis does not permit the admission of victim's statement to doctor that she was raped when she went to the doctor to determine if she was pregnant, not for treatment of injuries from the assault.

e. Statement Regarding Circumstances which Caused Injury May be Admissible:
   (i) Pridgeon v. State, 809 So.2d 102 (Fla. 1st DCA 2002).
   (ii) Allison v. State, 661 So.2d 889 (Fla. 2d DCA 1995).
   Statements describing the cause or inception of an illness are admissible, but statements of fault are not.
   (iii) Brown v. State, 611 So.2d 540 (Fla. 3d DCA 1992). Testimony of doctor who conducted rape treatment examination that the victim stated that she was beaten with a show was admissible because the "information was pertinent to the treatment of her wounds."
   (iv) State v. Ochoa, 576 So.2d 854 (Fla. 3d DCA 1991). Victim's statement to physician that "they had been touched in the genitalia by an adult male and had experienced some pain when that happened" was admissible.

(v) *See also* Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988).

f. Statement Need Not be Made to Medical Doctor:

(i) Begley v. State, *supra*.

(ii) Otis Elevator Co. v. Youngerman, 636 So.2d 166 (Fla. 4th DCA 1994). Plaintiff's statement to emergency room nurse that she fainted or passed out and fell was admissible under exception to hearsay for statements made for medical treatment or diagnosis.

g. Identity of Perpetrator Not Pertinent to Diagnosis and Therefore Seldom Admissible: The details of a violent crime may be reasonably pertinent to diagnosis or treatment, but the identity of the perpetrator would seldom, if ever, be admissible as not being pertinent to either diagnosis or treatment.

(i) State v. Jones, 625 So.2d 821 (Fla. 1993). Statements made to child protection team doctor by victims of child sexual abuse identifying their abuser are not admissible.

(ii) Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988).

(a) In murder prosecution, statement to doctor that he was shot was admissible because it was reasonably pertinent to the diagnosis or treatment of his wounds.

(b) But the statement that black people had tried to steal his medallion was not admissible, because it was a statement of fact "not reasonably pertinent in the medical treatment."

(iii) State v. Frazier, 753 So.2d 644 (Fla. 5th DCA 2000). The Fifth District Court of Appeal upheld the ruling of the trial court where the victim's statements to her treating physician identifying the defendant as her assailant were not given for purposes of medical diagnosis or treatment, and were therefore inadmissible and not excepted from the hearsay rule. The Fifth District Court of Appeal held however those statements on the 911 tape identifying the defendant as her assailant may be admissible if the trial court determines on remand that the statements are hearsay, but qualify as excited utterances. The statements on the 911 tape may be excluded as hearsay if the trial court determines that the statements are not excited utterances or admissible on some other grounds. The Fifth District Court of Appeal also held that statements on the 911 tape were also not inadmissible as violative of the defendant's right to confrontation, as such hearsay evidence is firmly rooted in the common law and its reliability can be inferred.

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

(a) Statements by a child abuse victim describing the cause of an injury are admissible if reasonably pertinent to the diagnosis.

(b) A description about how the victim was assaulted is admissible.

(c) Identity of the defendant by the doctor as related by the victim was error.

4. **Former Testimony - §90.803(22) –** Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to §90.402 or §90.403, Florida Statute.
   a. State v. Mosley, 760 So.2d 1129 (Fla. 5th DCA 2000). Defendant's testimony in first trial was admissible on retrial under former testimony hearsay exception, where defendant was only surviving eyewitness of homicide, defendant voluntarily took the stand in his own defense at trial, and testimony would not be cumulative, would not mislead the jury, and would not confuse the issues.
   b. *But see* Price v. City of Boynton Beach, 847 So.2d 1051 (Fla. 4th DCA 2003). Psychiatrist's deposition testimony that defendant had made threats, talked about guns, and was a danger was not admissible in hearing on city's motion for temporary injunction for protection against defendant under former testimony exception to rule against admission of hearsay, where deposition was not taken in case, but in defendant's workers' compensation case involving different issues; rule required that the party against whom the testimony was offered had the opportunity and motive to cross-examine the witness in the prior proceeding.
   c. *See also* Friedman v. Friedman, 764 So.2d 754 (Fla. 2d DCA 2000).
      (i) Court held that the admissibility of a discovery deposition of a nonparty witness as substantive evidence continues to be governed by rule 1.330(a)(3), Florida Rule of Civil Procedure.
      (ii) "An attorney taking a discovery deposition does not approach the examination of a witness with the same motive as one taking a deposition for the same purpose of presenting testimony at trial."
   d. Former Testimony Statute, as Applied in Criminal Cases is Unconstitutional.
      (i) Abreu v. State, 804 So.2d 442 (Fla. 4th DCA 2001).
      "It is, therefore, clear that live testimony may not be constitutionally supplanted with former testimony in criminal cases absent a showing of unavailability."
      (ii) In re: Amendments to the Florida Evidence Code, 782 So.2d 339 (Fla. 2000). The court specifically declined to adopt and approve an amendment made by the legislature, which would allow the admission of former testimony when the defendant is available as a witness.
      (iii) Brown v. State, 721 So.2d 814 (Fla. 4th DCA 1998). Although the court did not address the former testimony statute, it held that it was error to admit the pretrial deposition of the victim as evidence in place of live

testimony where the defendant was not personally present when the deposition was taken.

5. **Statement of Child Victim, §90.803(23)(a), Florida Statutes, –** "Unless the method or circumstances under which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against the child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act . . . in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible into evidence in any civil or criminal proceeding if:"
   a. The court conducts a separate hearing, outside of the jury, and determines that the circumstances of the statement provide adequate safeguards of reliability, *see* §90.803(22)(a)1, Florida Statutes, AND
   b. the child either testifies; OR is unavailable as a witness and other corroborative evidence regarding the abuse or offense exists.

   For further discussion on the determination of "unavailability" *see* §90.803(22)(a)2b, Florida Statutes.

6. **Statements of Family History and Relationships are Admissible as an Exception to the Hearsay Rule. Brown v. State, 473 So.2d 1260 (Fla. 1985). *See Also* Cruz v. State, 557 So.2d 668 (Fla. 5th DCA 1990).**
   a. Providing the identity of the victim is a material element of the proof at trial.
   b. The identity of the victim could not be established through "inadmissible hearsay".
   c. Cruz does not identify what is inadmissible hearsay.

7. **Statements Admissible as Substantive Evidence are Exceptions to Hearsay:**
   a. Exceptions to hearsay are substantive evidence.

   J.L.W. v. State, 642 So.2d 1198 (Fla. 2d DCA 1994). Officer's testimony that victim stated "the guys in the car pointed a gun at me" was admissible as substantive evidence.
   b. Impeachment testimony cannot be used as substantive evidence.
      (i) Izquierdo v. State, 890 So.2d 1263 (Fla. 5th DCA 2005). Allowing deputy, on direct examination by prosecutor, to read specific question from the Domestic Violence Threat Level Assessment checklist and the victim's affirmative answers in order to impeach victim's testimony at hearing, was permissible to show victim's motivation to testify untruthfully about her husband's crime and was not an abuse of the court's discretion.
      (ii) Jackson v. State, 498 So.2d 906, 909 (Fla. 1986).
      (iii) Kingery v. State, 523 So.2d 1199, 1204 (Fla. 1st DCA 1988), *affirmed* by: State v. Smith, 573 So.2d 306 (Fla. 1990).

(iv) Santiago v. State, 652 So.2d 485 (Fla. 5th DCA 1995). Victim's recanted original statement could be used as impeachment but not as substantive evidence.

c. In a criminal prosecution, a prior inconsistent statement standing alone is insufficient as a matter of law to prove guilt beyond a reasonable doubt.
   (i) State v. Green, 667 So.2d 756 (Fla. 1995). Criminal depositions pursuant to Florida's Rule of Criminal Procedure 3.220 are inadmissible as substantive evidence.
   (ii) State v. Moore, 485 So.2d 1279 (Fla. 1986).
   (iii) Joyce v. State, 664 So.2d 45 (Fla. 3d DCA 1995).

d. HOWEVER: Prior inconsistent statement introduced pursuant to 90.801(2)(a) is admissible as substantive evidence.
   (i) Moore v. State, 452 So.2d 559 (Fla. 1984). "Under §90.801(2)(a), Florida Statutes (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a grand jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact."
   (ii) State v. Green, 667 So.2d 756 (Fla. 1995). Depositions to perpetuate testimony taken pursuant to Florida Rule of Criminal Procedure 3.190(j) are admissible as substantive evidence.
   (iii) §90.801(2), Florida Statutes, A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement isInconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. (Note: Depositions referred to are those taken pursuant to Rule 3.190(j). Green, *supra*.

e. Discovery depositions may not be used as substantive evidence in a criminal trial.
   (i) State v. Green, 667 So.2d 756 (Fla. 1995).
   (ii) State v. James, 402 So.2d 1169, 1171 (Fla. 1981).

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

1. §90.801(2), Florida Statutes – A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:

a. Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at trial, hearing or other proceeding or in a deposition;

b. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; OR

c. One of identification of a person made after perceiving the person.

2. Statements of Identification: Non-hearsay:

a. Statements of identification made by a witness made after the witness has perceived the individual, which identify an individual before a trial, are excluded from the definition of hearsay.
   (i) *Ehrhardt, 1 Fla. Prac., Evidence* § 801.9 (2004 ed.).
   (ii) State v. Freber, 366 So.2d 426 (Fla. 1978).
      (a) "An identification made shortly after the crime is inherently more reliable than a later identification in court."
      (b) "The fact that the witness could identify the respondent when the incident was still fresh in her mind is of obvious probative value."

b. Statements of identification May be Admissible as Substantive Evidence:
   (i) State v. Freber, 366 So.2d 426 (Fla. 1978). "Testimony of prior extrajudicial identification is admissible as substantive evidence of identity if identifying witness testifies to fact that prior identification was made."
   (ii) *But see* Rockerman v. State, 773 So.2d 602 (Fla. 1st DCA 2000). Affirmative defense cannot rest on evidence of prior inconsistent identifying statement adduced for impeachment purposes only.

c. Failure of the witness to repeat the identification in court does not affect the admissibility of evidence of the prior identification:
   (i) Brown v. State, 413 So.2d 414 (Fla. 5th DCA 1982). Evidence of prior identification admissible even though witness denied making the prior identification and testified at trial that defendant did not commit the crime.
   (ii) A prior identification is also admissible as a prior inconsistent statement to impeach the victim's recantation of the identification at trial.
      (a) U.S. v. Jarrad, 754 F.2d 1451 (9th Cir. 1985), *cert. denied*, 474 U.S. 830 (1985). Where witness identified defendant in photo-spread after the crime was committed and at trial denied making the identification, an FBI agent could testify at trial that witness had made the pretrial identification.
      (b) Evans v. State, 366 So.2d 540 (Fla. 3d DCA 1979).

d. Must be a Statement of Identification to be Admissible:
Robbery victim's description of suspect to police was not statement of identification, and thus police officer's testimony as to victim's description was not admissible under statute providing that statement of identification of person after perceiving him is non-hearsay when declarant testifies and is subject to cross examination. Puryear v. State, 810 So.2d 901 (Fla. 2002).

e. Witness Must Testify for Identifying Statement to be Admissible:
Individual who made out-of-court identifying statement must testify during trial for statement to be admissible.
   (i) Valley v. State, 860 So.2d 464 (4th DCA 2003).

(ii) Hayes v. State, 581 So.2d 121 (Fla. 1991), *cert. denied*, 502 U.S. 972 (1991).
(iii) Hall v. State, 622 So.2d 1132 (Fla. 2d DCA 1993).
(iv) D'Agostino v. State, 582 So.2d 153 (Fla. 4th DCA 1991).
(v) Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981), *review denied*, 411 So.2d 384 (Fla. 1981).
(vi) Graham v. State, 479 So.2d 824 (Fla. 2d DCA 1985).

f. The statement of identification need not be made to a police officer; it may be made to a family member or other non-law enforcement person.

See Henry v. State, 383 So.2d 320 (Fla. 5th DCA 1980). Testimony of father who was present when his daughter identified the victim at a chance encounter.

3. Caller-ID Readout: Non-hearsay:

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

4. Statements of Defendant: Non-hearsay:

a. Police questioning of the defendant at a domestic violence crime scene does not normally require the reading of *Miranda* warnings in that the questioning does not involve custodial interrogations.
   (i) Morris v. State, 557 So.2d 27 (Fla. 1990). *Miranda* warnings are not required of defendant questioned in defendant's home.
   (ii) Melero v. State, 306 So.2d 603 (Fla. 3d DCA 1975). Admission to killing wife to the police in response to what happened type question at the crime scene found not to violate *Miranda*.
   (iii) U.S. v. Axsom, 289 F.2d 496 (8th Cir. May 06, 2002). Where defendant was not "in custody" during an interview in his home, based on the presence of mitigating factors and absence of aggravating factors, *Miranda* warnings were not required, and granting of motion to suppress inculpated statements made by appellant is reversed.
b. False statements of the defendant are admissible in State's case in chief as substantive evidence to prove guilt.
   (i) Simpson v. State, 562 So.2d 742 (Fla. 1st DCA 1990). Jury instruction as to this issue should not be given.
   (ii) Brown v. State, 391 So.2d 729 (Fla. 3d DCA 1980). Used as both impeachment and substantive evidence to prove guilt.
   (iii) Mackiewicz v. State, 114 So.2d 684 (Fla. 1959). False exculpatory statements admissible as consciousness of guilt evidence.

5. **Admissions: Non-hearsay:**
   a. Statements which are made against a party and are his own statements are admissions and therefore an exception to the prohibition against hearsay. §90.803(18)(a), Florida Statutes.
   b. *Ehrhardt, 1 Fla. Prac., Evidence* § 803.18(a), (2004 ed.).
   c. The statement need not be against the interest of the party-opponent either at the time the statement was made or at the time it is offered.
   d. Husband-wife evidentiary privilege does not apply to criminal acts by one spouse on the other.
   e. Searcy v. Simmons, 299 F.3d 1220 (10th Cir. August 19, 2002). A corrections department's Sexual Abuse Treatment Program (SATP) does not violate an inmate's Fifth Amendment right against self-incrimination, and the SATP's admission of responsibility requirement does not violate the right to free exercise of religion.

6. **Impeachment Testimony: §90.608(1), Florida Statutes, Allows a Party to Impeach His Own Witness.**
   a. Limitations:
      (i) Party (State) cannot call a witness solely to impeach. London v. State, 541 So.2d 119 (Fla. 4th DCA 1989).
      (ii) Impeachment testimony cannot be used as substantive evidence.
      (iii) State v. Smith, 573 So.2d 306 (Fla. 1990).
         (a) Jackson v. State, 498 So.2d 906, 909 (Fla. 1986).
         (b) Kingery v. State, 523 So.2d 1199, 1204 (Fla. 1st DCA 1988), *affirmed* by: State v. Smith, 573 So.2d 306 (Fla. 1990).
         (c) Santiago v. State, 652 So.2d 485 (Fla. 5th DCA 1995). Victim's recanted original statement could be used as impeachment but not as substantive evidence.
      (iv) Joyce v. State, 664 So.2d 45 (Fla. 3d DCA 1995).
   b. The impeaching party must be prepared to prove up the disputed evidence prior to asking the question. This concept is based on the idea that for the party to ask the question in good faith he must be prepared to prove up the answer.
      (i) Marrero v. State, 478 So.2d 1155 (Fla. 3d DCA 1985).
      (ii) Tobey v. State, 486 So.2d 54 (Fla. 2d DCA 1986), *review denied*, 494 So.2d 1153 (Fla. 1986).
      (iii) Criticized by: *Ehrhardt, 1 Fla. Prac., Evidence* § 608.4 (2004 Edition).
         (a) "The logical result of the *Marrerro* decision is to limit any cross-examination regarding credibility to situations in which counsel has a witness-room full of witnesses prepared to give backup testimony."
         (b) *See also* Greenfield v. State, 336 So.2d 1205 (Fla. 4th DCA 1976). Requiring counsel to demonstrate to the court by a "professional statement to the court" or through other evidence that counsel's belief is well-founded.

c. There is no requirement that a prior inconsistent statement be reduced to writing in order to be used for impeachment.
   (i) Kimble v. State, 537 So.2d 1094 (Fla. 2d DCA 1989).
   (ii) Williams v. State, 472 So.2d 1350 (Fla. 2d DCA 1985).
   "The prior inconsistent statement may be oral and unsworn and may be drawn out on cross-examination of the witness himself and, if on cross-examination the witness denies, or fails to remember making such a statement, the fact that the statement was made may be proven by another witness."
d. The court did not error in granting State's motion in limine excluding evidence that defendant had filed two petitions for domestic violence injunctions against the victim after the criminal incident. Nelson v. State, 704 So.2d 752 (Fla. 5th DCA 1998).
e. Simmons v. State, 790 So.2d 1177 (Fla. 3d DCA 2001). By testifying that he had never been violent with the victim or anyone else, defendant opened the door to admission of impeachment evidence that defendant had engaged in acts of domestic violence against another girlfriend.
f. Butler v. State, 842 So. 817 (Fla. 2003). Defendant alleged, inter alia, that the trial court erred by allowing the state to elicit testimony regarding alleged prior acts of violence committed by defendant. The court held that the trial court did not err in allowing the cross examination of defense witnesses on other crimes evidence as "the evidence was admissible to explain and modify direct testimony, was relevant and probative, and its probative value was not outweighed by the prejudicial effect.
g. Mills v. State, 816 So.2d 170 (Fla. 3d DCA 2002).
Respondent appealed from a judgment of conviction for aggravated battery. The Third District Court of Appeal affirmed the lower court's decision concluding that the domestic violence final injunction and the arrest warrant issued, based upon alleged violations of the injunction, were admissible under §90.402, Florida Statutes, and not Williams' rule of evidence. The court held that evidence of uncharged crimes, which are inseparable from the crime charged, is not Williams' rule of evidence and is admissible if it is a relevant and inseparable part of the act, which is in issue. "It is necessary to admit the evidence to adequately describe the deed." Coolen v. State, 696 So.2d 738, 742-43 (Fla. 1997), (quoting Griffin v. State, 639 So.2d 966, 968 (Fla. 1994)).
h. Werley v. State, 814 So.2d 1159 (Fla. 1st DCA 2002). The First District Court of Appeal affirmed trial court's conviction of aggravated battery with a deadly weapon and held evidence of prior convictions was admissible pursuant to §90.806(1), Florida Statutes, for the purpose of impeaching statements (made by defendant) but offered by wife but through her testimony and the court found that the statement made by the wife was "exculpatory hearsay" offered for the truth of the matter.

7. Statements from Radio dispatch: Non-hearsay:

a. Police may testify that they arrived on the scene because of a statement made to them. Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989)(*en banc*), affirmed in: Conley v. State, 620 So.2d 180 (Fla. 1993).
b. HOWEVER: The contents of the statement are inadmissible especially where they are accusatory.
   (i) The inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information only to establish the logical sequence of events outweighs the probative value of such evidence.
      (a) Conley v. State, 620 So.2d 180 (Fla. 1993). Police dispatch is hearsay.
      (b) State v. Baird, 572 So.2d 904 (Fla. 1990).
      (c) Harris v. State, *supra*, expressly receding from: Freemen v. State, 494 So.2d 270 (Fla. 4th DCA 1986).

K. EXCULPATORY EVIDENCE (BRADY VIOLATION):

1. The State Cannot Suppress Material Evidence.

a. Brady v. Maryland, 373 U.S. 83, 87 (1963). "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment . . . ." *See also* White v. State, 664 So.2d 242 (Fla. 1995).
b. *Material* Evidence Means: - "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."
   (i) U.S. v. Bragley, 473 U.S. 667, 682 (1995).
   (ii) White v. State, *supra*.
   (iii) Kyles v. Whitley 514 U.S. 419 (1995).
c. In order to establish a Brady violation, the defendant must prove that the State possessed evidence favorable to the defense, that the defendant did not have the evidence, nor could have obtained it through the exercise of reasonable diligence, that the State suppressed the evidence, and that a reasonable probability exists that had the evidence been disclosed, the outcome would have been different. Cherry v. State, 659 So.2d 1069 (Fla. 1995), Hegwood v. State, 575 So.2d 170,172 (Fla. 1991). *See also* Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995), (Here, the defendant failed to establish such a violation where the State made its entire file available to the defense).
d. TEST:

The test "is whether there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990), quoting, U.S. v. Bagley, 473 U.S. 667, 682 (1985), Cherry v. State, 659 So.2d 1069 (Fla. 1995).

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

3. **Photographs:**
   a. To Be Admissible Photographs Must Be a Fair and Accurate Depiction of That Which It Purports to Be:
      (i) Pierce v. State, 718 So.2d 806 (Fla. 4th DCA 1997). Computer generated animation.
      (ii) Paramore v. State, 229 So.2d 855 (Fla. 1969), *vacated as to sentence only,* 408 U.S. 935 (1972); Bryant v. State, 810 So.2d 532 (Fla. 1st DCA 2002). Videotape admission.
      (iii) Grant v. State, 171 So.2d 361 (Fla. 1965), *cert. denied*, 384 U.S. 1014 (1966). Motion picture.
   b. Two methods of authenticating photographic evidence:

   Dolan v. State, 743 So.2d 544 (Fla. 4th DCA 1999), (computer enhanced process).
      (i) First, the "pictorial testimony" method requires the testimony of a witness to establish that, based upon personal knowledge; the photographs fairly and accurately reflect the event or scene.
      (ii) Second, the "silent witness" method provides that the evidence may be admitted upon proof of the reliability of the process which produced the tape or photo.
   c. The trial court's admission of autopsy photographs was held to be in the sound discretion of the trial judge in all of the following cases:
      (i) Gudinas v. State, 693 So.2d 953 (Fla. 1997).

(ii) Olivera v. State, 719 So.2d 341 (Fla. 3d DCA 1998).
(iii) Maret v. State, 605 So.2d 949 (Fla. 3d DCA 1992). The fact that photographs were taken at medical examiner's office rather than at the scene of the crime did not affect their admissibility.
(iv) Russell v. State, 454 So.2d 778 (Fla. 4th DCA 1984), photograph of post evisceration view of empty chest cavity.
(v) Mordenti v. State, 630 So.2d 1080 (Fla. 1994). Morgue photographs admissible even though manner of death was not in dispute; however, repetitious photographs should be excluded.

d. The following cases held that photographs which corroborated testimony were properly admitted.
   (i) Jackson v. State, 545 So.2d 260 (Fla. 1989). Photographs of victim's charred remains.
   (ii) Russell v. State, *supra*.
   (iii) Brumbley v. State, 453 So.2d 381 (Fla. 1984). Color photographs of homicide victim's skeletal remains.
   (iv) Stratight v. State, 397 So.2d 903, 906 (Fla. 1984).
   (v) Edwards v. State, 414 So.3d 1174 (Fla. 5th DCA 1982). Entry and exit gunshot wounds.
   (vi) Carvajal v. State, 470 So.2d 73 (Fla. 3d DCA 1985). Color photograph of deceased victim's fact in early state of decomposition.
   (vii) Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). Notwithstanding defendant's offer to stipulate to murder, position of body, etc., photographs were relevant in that they corroborated testimony of certain witnesses.

e. Photographs which assisted the medical examiner in explaining wounds found on murder victim are admissible.

f. Pressley v. State, 261 So.2d 522 (Fla. 3d DCA 1972). Held that the trial court did not err in admitting 12" x 15" black-and-white glossy photographs of murder victim lying dead on the floor of the murder scene, taken within one hour of the commission of the crime, though bloodstain appeared, where the photograph accurately portrayed the setting and served to illustrate or explain the testimony of the witnesses.

g. The test for admissibility of photographs is relevancy rather than necessity. (The fact that other witnesses can or will testify to that which is depicted in the various photographs does not make those photographs inadmissible.)
   (i) Pope v. State, 679 So.2d 710, 713 (Fla. 1996).
   (ii) King v. State, 623 So.2d 486 (Fla. 1993).
   (iii) Nixon v. State, 572 So.2d 1336 (Fla. 1990).
      (a) Rejecting the defense's argument that since the cause and nature of death had been clearly established there was no circumstances which necessitated the introduction of the seven photographs of the victim's charred remains.

(b) *Affirmed* on this point in Jones v. State, 648 So.2d 669, 679 (Fla. 1994).

(c) Photographs, although "extremely gruesome", were not "so shocking in nature" as to outweigh their relevancy. Pope v. State, *Supra*.; Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997). Six slides of victim's body in the alley, two slides which showed the stick protruding from the victim's vagina and several slides of the body in the morgue were relevant.

(iv) Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985), *cert. denied*, 475 U.S. 1031 (1986).

(v) Straight v. State, 397 So.2d 903, 906 (Fla. 1981).

(vi) Waggoner v. State, 800 So.2d 684 (Fla. 5th DCA 2001).

(vii) Bush v. State, 461 So.2d 936, 941(Fla. 1984). Reaffirming its position that gruesome and inflammatory photographs are admissible if relevant to any issues required to be proven in a case, and relevancy is to be determine in the normal manner without regard to any special characterization of the proffered evidence.

(viii) State v. Wright, 265 So.2d 361, 362 (Fla. 1972).

h. Admission of photographs appears to be reversible error only when the photographs have little or no relevance or the photographs are so shocking in nature as to outweigh their relevance.

(i) Ruiz v. State, 743 So.2d 1 (Fla. 1999). Admission during penalty phase of murder trial of 2 x 3 foot blowup showing in detail the bloody and disfigured head and upper torso of the victim was reversible error.

(ii) Czuback v. State, 570 So.2d 925 (Fla. 1990). Photographs of victim's body, which had been ravaged by dogs and was in a severely decomposed condition, should not have been admitted.

(iii) Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982). Admission of photograph of the victim's blood-splattered body, which depicted the results of emergency procedures performed after the stabbing was error.

(iv) Polygraph exam results were incorrectly admitted at contempt hearing for violation of domestic violence injunction. Schmidt v. Hunter, 788 So.2d 322 (Fla. 2d DCA 2001).

(a) Evidence of respondent's character and previous criminal convictions was admitted,

(b) respondent's arrest for violating an earlier injunction not involving petitioner, and

(c) a letter that respondent wrote to an old girlfriend apologizing for an incident that lead to charges being filed.

L. WILLIAMS RULE/SIMILAR FACT EVIDENCE:

1. **Prior Bad Acts, Wrongs, or Crimes Committed By the Accused are Admissible Into Evidence if They are Relevant to Prove Some Material Fact In Issue.**
   a. *See* Williams v. State, 110 So.2d 654 (Fla. 1959).
   b. §90.404(2), Florida Statutes.
   c. To Prove Lack of Consent:
   Boroughs v. State, 684 So.2d 274 (Fla. 5th DCA 1996).
   Testimony concerning the abusive nature of the defendant's relationship with the victim, including the defendant's prior "bad acts," was relevant to prove the sexual battery victim's lack of consent and to explain why the victim did not immediately contact the police.
   d. To Prove Premeditation/Motive:
      (i) Goldstein v. State , 447 So.2d 903 (Fla. 4th DCA 1984).
         (a) Evidence was that defendant threatened ex-wife (victim) on a prior occasion.
         (b) "[W]e hold that the prior act of aggressive conduct and the accompanying verbal statements were admissible because they were relevant to the issue of intent which is an essential element of premeditated murder."
      (ii) Hyer v. State, 462 So.2d 488 (Fla. 2d DCA 1984).
         (a) "Defendant also argues that the trial court erred in allowing the admission of testimony establishing that defendant's wife prior to the shooting had obtained an order restraining defendant from bothering, threatening or harming her."
         (b) "Before any testimony was given regarding the restraining order, the wife testified without objection concerning an occasion when her husband hit her."
         (c) "The evidence was relevant to the issue of premeditation. One of defendant's defenses at trial was lack of premeditation.
         (d) See also
            (1) King v. State, 436 So.2d 50 (Fla. 1983). Evidence that defendant severely beat victim twenty-three days before killing her was relevant to premeditation.
            (2) Wooten v. State, 398 So.2d 963 (Fla. 1st DCA 1981). Evidence that defendant previously beat or physically mistreated one-year-old murder victim or victim's two-year-old sister was properly admissible.
      (iii) Burgal v. State, 740 So.2d 82 (Fla. 3d DCA 1999). Although no facts were given, the court held that evidence of prior incidents of domestic violence by defendant against victim were properly admitted to prove motive, intent and premeditation, in an attempted first degree murder/armed burglary trial.

(iv) *But see* Robertson v. State, 829 So.2d 901 (Fla. 2002). Landmark collateral crimes domestic violence case; reversible error "as a matter of law" to allow as Williams rule evidence "a prior threat six years earlier against a different victim and involving a different weapon" to prove absence of mistake or accident. The Supreme Court noted it was "unable to find...any cases in Florida where a prior threat against a different victim was admitted under the Williams rule to prove the absence of mistake or accident of the present offense." The court did cite with apparent approval cases allowing "prior crimes against the same victim as the charged offense."

e. Prior Bad Acts Admitted Once Defense "Opened the Door":
Fiddemon v. State, 858 So.2d 1100 (Fla. 4th DCA 2003). The Fourth District Court of Appeal reversed the trail court's judgment convicting the defendant of the second-degree murder of his girlfriend. Prior to the trial, the court granted the defendant's motion in limine to preclude evidence regarding defendant's prior assault on his girlfriend. At trial, the court allowed the state to introduce evidence of the assault on the theory that the defense had "opened the door" by presenting evidence of a 10 year-old domestic violence incident involving the girlfriend's former husband. The District Court of Appeal reversed and held that in order for prior bad acts to be admitted under the "opening the door" argument, the defense must first present misleading testimony or a factual assertion which the state would have a right to correct. (Note: The court did go on to discuss in a footnote that evidence of prior violence or assaults may be relevant to establish motive, intent.)

f. Proper and Improper use of Prior Bad Acts in Trial for Resisting Arrest:

(i) Burgos v. State, 865 So.2d 622 (Fla. 3d DCA 2004). While responding to a domestic violence call, defendant struggled with the officers as they intended to arrest him. The domestic battery charge was not filed. During his trial for resisting arrest with violence, the officers testified in detail about the domestic violence offense. This was error, and defendant was entitled to a new trial.

(ii) Logan v. State, 705 So.2d 140 (Fla. 3d DCA 1998).
Proper to enter injunction for protection against domestic violence into evidence on resisting with violence charge where defendant/respondent battered law enforcement officer when trying to serve injunction.

2. Pre-requisites to Introduce Similar Fact Evidence:
There must be sufficient similarity between the crime charged and the evidence introduced. The evidence introduced must be relevant to a fact in issue; and the evidence must not be relevant solely to prove bad character.
Crowell v. State, 528 So.2d 535 (Fla. 5th DCA 1988).

3. Evidence is Inadmissible if Solely Relevant to Prove Bad Character or Propensity to Commit the Crime.

a. Peek v. State, 488 So.2d 52 (Fla. 1986).
b. Coler v. State, 418 So.2d 238 (Fla. 1982).
c. Florida v. State, 522 So.2d 1039 (Fla.4th DCA 1988).
d. Paquette v. State, 528 So.2d 995 (Fla. 5th DCA 1988). Improper to admit prior bad act evidence where purpose is to show that because of propensities, defendant very likely did the acts for which he is charged.
e. Jackson v. State, 522 So.2d 802 (Fla. 1988).
f. LaMarr v. Lang, 796 So.2d 1208 (Fla. 5th DCA 2001).

The Fifth District Court of Appeal reversed a lower court's decision to enter a final injunction for repeat violence against the respondent on the grounds that the court erred in admitting certain evidence regarding the respondent's character and previous criminal convictions. At the original hearing, the court allowed the petitioner's attorney to "1) show that LaMarr had been arrested for violating an earlier injunction not involving Lang; 2) introduce a letter that LaMarr wrote to an old girlfriend apologizing for an incident that apparently lead to charges being filed against him; 3) question LaMarr regarding prior injunctions filed against him by other people." The Fifth District Court of Appeal held that this was improper for the lower court to admit this evidence pursuant to the Williams Rule regarding collateral evidence. Relying on Pastor v. State, 792 So.2d 627 (Fla. 4th DCA 2001), the court comments that collateral crimes evidence is not admissible when its relevance goes only to prove a respondent's propensity.

g. *See also* Rodriguez v. State, 842 So.2d 1053 (Fla. 3d DCA 2003).

Trial court improperly permitted victim's testimony regarding a restraining order she obtained subsequent to an argument she and the defendant had which resulted in defendant's charge of aggravated assault with a deadly weapon against the victim. The Third District Court of Appeal held that the testimony should not have been admitted as it bolstered the victim's credibility.

4. Collateral Crime Evidence:

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

a. Jackson v. State, 522 So.2d 802 (Fla. 1988).
b. Smith v. State, 365 So.2d 704 (Fla. 1978).
c. The collateral offenses must not only be strikingly similar, but they must also share some unique characteristics or combination of characteristics which sets them apart from other offenses.

See Crowell v. State, 528 So.2d 535 (Fla. 5th DCA 1988).

d. The evidence must be relevant to a material fact in issue.

See Crowell v. State, *supra*.

e. *Reverse Williams Rule*:

When the State seeks to introduce Williams rule evidence, the defendant should have the same right to question the alleged collateral victim about the circumstances surrounding the collateral crime as he would have in questioning

the alleged victim in a crime for which he stands accused. Gutierrez v. State, 705 So.2d 660 (Fla. 2d DCA 1998).

5. **Inseparable Crime Evidence:**
   a. Inseparable crime evidence or inextricably intertwined evidence is admissible because it is relevant and necessary to adequately describe the events leading up to the crime and/or the entire context out of which the criminal conduct arose or occurred.
      (i) Smith v. State, 365 So.2d 704, 707 (Fla. 1978).
      (ii) Hall v. State, 403 So.2d 1321 (Fla. 1981).
      (iii) Osborne v. State, 743 So.2d 602 (Fla. 4th DCA 1999).
      (iv) State v. Cohens, 701 So.2d 362, 364 (Fla. 2d DCA1997).
      (v) Austin v. State, 500 So.2d 262 (Fla. 1st DCA 1986).
   b. Evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is admissible under 90.402, Florida Statutes, because "it is relevant and inseparable part of the act which is in issue."
      (i) Osborne v. State, 743 So.2d 602 (Fla. 4th DCA 1999).
      (ii) Coolen v. State, 696 So.2d 738 (Fla. 1997).
      (iii) It is inseparable crime evidence that explains or throws light upon the crime being prosecuted.
      Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986).
         (a) "Under this view, inseparable crime evidence is admissible under §90.402 because it is relevant rather than being admitted under 90.402(2)(a)."
         (b) affirmed in: Padilla v. State, 618 So.2d 165 (Fla. 1993).
      (iv) There is no need to comply with the ten (10) day notice provision.
      Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986).

IV. DOMESTIC VIOLENCE - CRIMINAL PROCEEDINGS:

A. BURGLARY:

1. **State v. Byars, 804 So.2d 336 (Fla. 4th DCA 2001).**
   The defendant was charged with first degree murder and armed burglary of an occupied structure with assault and battery. The defendant had an injunction against him, preventing him from entering the structure where the victim was killed. The defendant successfully moved that the second count of armed burglary be dismissed based on Miller v. State, 733 So.2d 955 (Fla. 1998), in which the court held that a complete defense to burglary is established when the defendant can prove that the premises were open to the public. *The state challenged the dismissal because of the domestic violence injunction, which encompassed the victim's workplace.* The Fourth District Court of Appeal ruled that the intent of Miller must be upheld because of the statutory wording of §810.02(1), Florida Statutes. Because the defendant entered into a store which was open to the public, a charge of burglary cannot stand. The court suggested the legislature consider this issue at the next session.

2. ***But see* State v. Suarez-Mesa, 662 So.2d 735 (Fla. 2d DCA 1995).**
   The husband, who had shared the house with his wife but was restrained by court order (an injunction) from entering the property, was subject to a burglary charge when he entered the premises with the intent to commit a crime.

B. JURY INSTRUCTIONS AND JURORS:

1. **Tindle v. State, 832 So.2d 966 (Fla. 5th DCA 2002).**
   Reversible error for trial court to deny defendant's motion to dismiss the amended information, and fundamental error to instruct jury in a way permitting

the jury to find that one alleged victim was threatened while the other had a well-founded fear that violence was imminent as the crime of aggravated assault requires that the victim must both have been threatened and have a well founded fear that the violence is imminent.

2. **<u>Rodriguez v. State</u>, 816 So.2d 805 (Fla. 3d DCA 2002).**
   Appellant Carlos Rodriguez appealed his conviction by the circuit court for felony battery in a domestic violence case following a jury trial challenging that the trial court erred in denying his challenge for cause to a potential juror. It was found that during voir dire, the trial court did not allow defendant Rodriguez to strike a potential juror who had revealed that she had been exposed to domestic violence in her past. The Third District Court of Appeal held that a juror is not impartial when one side must overcome a set opinion in order to prevail. If a prospective juror's statements raise reasonable doubts as to that juror's ability to make an impartial verdict, the juror should be excused. Note that when it is not completely clear whether or not the juror should be dismissed, then those cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality. This error made by the trial court was irreversible and as a result the conviction was reversed and remanded.

3. **<u>Henry v. State</u>, 756 So.2d 170 (Fla. 4th DCA 2000).**
   The Fourth District Court of Appeal held that where the defendant was convicted for violating an injunction for protection against domestic violence, a new trial was required based on the fact that the trial court erroneously failed to excuse a juror for cause. The juror, who in his capacity as a paramedic and firefighter regularly worked with the police department and had responded to a number of domestic violence cases, gave answers which demonstrated reasonable doubt as to his ability to lay aside a bias in favor of law enforcement.

C. WARRANTLESS ARREST POWERS:

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

policy of this state to strongly discourage arrest and charges of both parties for domestic violence on each other and to encourage training of law enforcement and prosecutors in this area.

c. §901.15(8) , Florida Statutes – There is probable cause to believe that the person has committed child abuse, as defined in §827.03. The decision to arrest shall not require consent of the victim or consideration of the relationship of the parties. It is public policy of this state to protect abused children by strongly encouraging the arrest and prosecution of persons who commit child abuse. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection is immune from civil liability that otherwise might result by reason of his or her action.

d. §901.15(13), Florida Statutes, was created giving police warrantless arrest powers where there is probable cause to believe that a person has violated a condition of pretrial release when the original arrest was for an act of domestic violence.

e. *But see* Espiet v. State, 797 So.2d 598 (Fla. 5th DCA 2001). The courts generally agree that a law enforcement officer may not make a warrantless entry into a person's home to arrest the person for a misdemeanor offense. The provisions of §901.15(7), Florida Statutes, which allow a law enforcement officer to arrest a person for an act of domestic violence without a warrant, do not permit the forcible entry into the person's home to effectuate the arrest based on a misdemeanor offense. The decision of the trial court is reversed and remanded. *See also infra* section (3).

2. Arrest Powers Under §741.29(3), Florida Statutes:

Whenever a law enforcement officer determines upon probable cause that an act of domestic violence has been committed within the jurisdiction the officer may arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime. The decision to arrest and charge shall not require consent of the victim or consideration of the relationship of the parties.

3. Warrantless Misdemeanor Arrest in Private Residence:

a. Invalid:

(i) State v. Eastman, 553 So.2d 349 (Fla. 4th DCA 1989). Arrest held invalid where trooper chased defendant three miles with lights flashing and siren on, followed defendant into his home and arrested him for fleeing. Subsequent DUI arrest based upon facts obtained after entering home also invalid.

(ii) Drumm v. State, 530 So.2d 394 (Fla. 4th DCA 1988).

(iii) Welsh v. Wisconsin, 466 U.S.740 (1984).

(iv) Guerrie v. State, 691 So.2d 1132 (Fla. 4th DCA 1997). LEO may not enter a private residence to effect a warrantless misdemeanor arrest even when the crime was committed in the LEO's presence.

(v) Espiet v. State, 797 So.2d 598 (Fla. 5th DCA 2001), *supra* (Domestic violence).
(vi) M.J.R. v. State, 715 So.2d 1103 (Fla. 5th DCA 1998).
(vii) Conner v. State, 641 So.2d 143 (Fla. 4th DCA), rev. denied. 649 So.2d 234 (Fla. 1994).
(viii) Ortiz v. State, 600 So.2d 530 (Fla. 3d DCA 1992).
(ix) Johnson v. State, 395 So.2d 594 (Fla. 2d DCA 1981).

b. Valid:
Gasset v. State, 490 So.2d 97 (Fla. 3d DCA), rev. denied, 500 So.2d 544 (Fla. 1986).

4. **Dual Arrest Policy –**§741.29(4)(b), Florida Statutes, created a dual arrest policy for police. If a law enforcement officer has probable cause to believe that two or more persons have committed a misdemeanor or felony, or if two or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response with respect to a person who acts in a reasonable manner to protect or defend oneself or another family or household member from domestic violence.

D. IMMUNITY OF LAW ENFORCEMENT UNDER FLORIDA STATUTES:

1. **§901.15(7), Florida Statutes –** A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection, under §741.31(4) or §784.047, or pursuant to a foreign order of protection accorded full faith and credit pursuant to §741.315, is immune from civil liability that otherwise might result by reason of his or her actions.

2. **§741.29(5), Florida Statutes** – No law enforcement officer shall be held liable, in any civil action, for an arrest based on probable cause, enforcement in good faith of a court order, or service of process in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

3. **§741.315(4)(f), Florida Statutes –** A law enforcement officer acting in good faith under this section and the officer's employing agency shall be immune from all liability, civil, or criminal, that might otherwise be incurred or imposed by reason of the officer's or agency's actions in carrying out the visions of this section.

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

E. VICTIM'S RIGHTS:

1. **Article I, Section 16(b), Florida Constitution.**
   "Victims of crime or their legal representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."

2. ***See Generally,* §960.001, Florida Statutes.**

3. **Victim's Right to be Present in Court During Trial:**
   a. Here, the trial court heard argument of counsel before deciding whether the sequestration rule would be applied to the victim's next of kin. Key to the decision was the fact that the witnessses' testimony had been memorialized in prior depositions. Under these circumstances, the trial court did not err in denying defense counsel's request to apply the rule of sequestration to the victim's next of kin. Beasley v. State, 774 So.2d 649 (Fla. 2000).
   b. Mother of child victim had a statutory and constitutional right to remain in the courtroom in the penalty phase of a capital murder prosecution in the absence of a showing of prejudice. Rose v. State, 787 So.2d 786 (Fla. 2001).
   c. Excluding a murder victim's great-niece from the courtroom during the defendant's case before she testified as a defense witness violated her constitutional right to be present as the next of kin of a homicide victim; since the constitutional right to be present did not conflict with the right to a fair trial, the constitutional right prevailed over the rule of sequestration in the penalty phase of a capital murder prosecution. Booker v. State, 773 So.2d 1079 (Fla. 2000).
   d. Where victim's right to be present at defendant's trial might conflict with defendant's right to received fair trial, doubts should be resolved in favor of defendant receiving a fair trial. Martinez v. State, 664 So.2d 1034 (Fla. 4th DCA 1995), Cain v. State, 758 So.2d 1257 (Fla. 4th DCA 2000).
   e. The victim is entitled to be present at all proceedings, including the trial, as long as it does not prejudice the defendant. Gore v. State, 599 So.2d 978 (Fla. 1992), section 616.1 (pg. 555) in *Florida Evidence by Ehrhardt*.

4. **Victim's Right to be Properly Notified of Court Hearing Defendant's Pleas:**
   Ford v. State, et al, 829 So.2d 946 (Fla. 4th DCA 2002). Pleas quashed after constitutional rights of victim violated because victim received insufficient notice of hearing in which court accepted guilty pleas of defendants.

5. **Prosecutor Disciplinary Action for Violating Victim's Rights:**
   a. In re: Disciplinary proceedings Against Lindberg, 494 N.W.2d 421 (Wis. 1993).Failure by prosecutor to contact victim in timely manner reference preliminary proceeding was grounds for disciplinary action.
   b. The Florida Bar v. Buckle, 771 So.2d 1131 (Fla. 2000). Lawyer misconduct: "An attorney was publicly reprimanded for sending a letter to the alleged victim of a battery that insinuated that the attorney would take her away from her job and her children and expose her to ridicule, contempt and hatred." The letter was sent after the attorney had spoken with the alleged victim by phone and told not to contact her. The Supreme Court of Florida found that the letter was a clear attempt to have the alleged victim drop the charges against the attorney's client and the contents of the letter violated Rule of Professional Conduct 4-4.4 and 4-8.4(d).

6. **Withholding Victim's Address and Current Place of Employment From Defendant Was Within the Trial Court's Discretion. Deluge v. State, 710 So.2d 83 (Fla. 5th DCA 1998).**

7. **Court Does Not Error By Imposing Sentence Greater Than That Recommended By the Victim. Pandolph v. State, 710 So.2d 577 (Fla. 4th DCA 1998).**

8. **Yesnes v. State, 440 So.2d 628 (Fla. 1st DCA 1983) (concurring opinion)** "We should be grateful that this great country of ours has perfected the greatest justice system known to mankind. We should continually strive to better it. But, while doing this, should we ignore the rights of the lawful, should we ignore the rights of victims, should we ignore the rights of taxpayers? No! Should we consider only the rights of criminals who have shown no respect for their victims, for the law of the land, for the constitution of our country and state? No."

F. PARENTAL DISCIPLINE/BATTERY ON A CHILD:

1. **Child Abuse Defined** §**827.03, Florida Statutes,** the intentional infliction of physical or mental injury upon a child; an intentional act that could reasonably be expected to result in physical or mental injury to a child; or active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child. A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree, punishable as provided in §§ 775.082, 775.083, or 775.084, Florida Statutes.

2. **Over a century ago the Florida Supreme Court Reaffirmed the Right of a Parent to Moderately Chastise or Correct a Child Under Their Authority. Marshall v. Reams, 32 Fla. 499, 14 So. 95 (1893). However, that power is not absolute.**
   a. Raford v. State, 828 So.2d 1012, (Fla. 2002) the court held that a parent or one standing in loco parentis has no absolute immunity and may be convicted of the lesser offense of felony child abuse under §827.03(1), Florida Statutes.
   b. Brown v. State, 802 So.2d 434 (Fla. 4th DCA 2001). "Even if the evidence in the present case had established a 'typical spanking', the parental privilege to administer corporal punishment is an affirmative defense which is waived if not asserted."
   c. Nixon v. State, 773 So.2d 1213 (Fla. 1st DCA 2000). The defendant waived his right to assert privilege for battery on child by a parent by requesting instruction on lesser-included offense of simple child abuse.
   d. State v. McDonald, 785 So.2d 640 (Fla. 2d DCA 2001) "a father's 'privilege' to reasonably discipline a child does not bar prosecution for simple child abuse when the beating results in bruising severe enough to require the child's treatment at a hospital." Common law recognizes a parent's right to discipline a child, "in a reasonable manner", and prevents prosecution for simple battery; however, no such privilege exists as to the separate statutory crime of child abuse." "Our current child abuse statutes attempt to define the boundary between permissible parental discipline and prohibited child abuse."

G. CHARGING AND PROSECUTING:

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

2. **Discretionary Executive Function:**
   a. The state attorney has complete discretion in the decision whether to charge and prosecute.

(i) Valdes v. State, 728 So.2d 736 (Fla. 1999).
(ii) Cleveland v. State, 417 So.2d 653, 654 (Fla. 1982).

b. The decision to prosecute does not lie with the victim of a crime.
(i) State v. Wheeler, 745 So.2d 1094 (Fla. 4th DCA 1999).
(ii) McArthur v. State, 597 So.2d 406 (Fla. 1st DCA 1992). "The thrust of appellant's argument is that he should not have been charged in a domestic dispute where the victim advised the state attorney's office that she did not wish to prosecute. Since the decision to charge was the prerogative of the prosecutor, the argument is unavailing.
(iii) State v. Brown, 416 So.2d 1258 (Fla. 4th DCA 1982).

c. The judiciary cannot interfere with this discretionary executive function.
(i) Valdes v. State, *supra*.
(ii) State v. Bloom, 497 So.2d 2, 3 (Fla. 1986).

d. State, not trial court, makes decisions whether to prosecute.
(i) State v. Bryant, 549 So.2d 1155 (Fla. 3d DCA 1989).
(ii) State v. Jogan, 388 So.2d 322 (Fla. 3d DCA 1980). State Attorney has sole discretion to either prosecute or nolle prosse a defendant.
(iii) In the Interest of S.R.P., 397 So.2d 1052 (Fla. 4th DCA 1981). Decision to file nolle prosse vested solely in discretion of State.
(iv) Cleveland v. State, 417 So.2d 653, 654 (Fla. 1982). "State attorney has complete discretion in making the decision to charge and prosecute."
(v) State v. Wheeler, 745 So.2d 1094 (Fla. 4th DCA 1999). "Notwithstanding the court's belief that the best interest of the public and the parties would be served by dismissal, it is the state attorney who 'who make the final determination as to whether prosecution will continue.'"

e. Court Improperly Dismissed Information Where State Attorney Determined to Prosecute:
(i) State v. Greaux, 977 So.2d 614 (Fla. 4th DCA 2008) A victim in a criminal domestic violence case stated that she wanted to drop the charges against the defendant, and the court dismissed the case sua sponte. The appellate court held that only the prosecutor has the authority to decide whether or not to go forward with the prosecution and that the trial court erred in dismissing the case.
(ii) State v. Rubel, 647 So.2d 995 (Fla. 2d DCA 1994). The State shall make the final determination as to whether the prosecution shall continue.
(iii) State v. Conley, 799 So.2d 400 (Fla. 4th DCA 2001). The state appealed an order dismissing a felony battery. An adversarial hearing occurred but the state had neglected to subpoena the witnesses to the events. The victim was present and claimed that she instigated the argument and the injuries she sustained were a result of her own actions, directly contradicting the eyewitness account. The victim claimed she never wanted charges brought against the defendant. The judge dismissed the charges despite the state's objection. In relying on both Florida Rule of Criminal Procedure 3.133(b), and on State v. Hollie, 736 So.2d 96 (Fla.

4th DCA 1999), the Fourth District Court of Appeal held that because the hearing was an adversarial hearing, where the defendant never motioned the court for a dismissal, and because probable cause was clearly established, a dismissal was clearly in error. Judge Warner concurs in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery is a defense. Consent is only a defense in cases of sexual battery, NOT domestic violence. Judge Warner continues by noting that consent as a defense to domestic violence is in complete contravention to §741.2901(2), Florida Statutes, in that the intent behind creating the statute is to make domestic violence a criminal act, as opposed to a " private matter."

f. Severance/Joiner of Offenses:
   (i) Joiner of Offenses: Florida Rule of Criminal Procedure 3.150(a) -- Two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both are based on the same act or transaction or on two or more connected acts or transactions.
   (ii) Trying defendant for both battery LEO and DUI together was not error when battery charge occurred while defendant was in-route to breathe testing facility. Hamilton v. State, 458 So.2d 863 (Fla. 4th DCA 1984).
g. Prosecution and Conviction of Stalking:
   (i) State v. Gagne, 680 So.2d 1041 (Fla. 4th DCA 1996). Double jeopardy does not bar a subsequent prosecution for aggravated stalking where the defendant had previously been convicted for violating an injunction based on the same conduct.
   (ii) State v. Johnson, 676 So.2d 408 (Fla. 1996).
   (iii) The defendant was properly convicted or aggravated stalking where he had previously been convicted of contempt for violating an injunction based on the same conduct. Each of the offenses contained an element not contained in the other offense.
   (iv) *See also infra* section H. Double Jeopardy.
h. *See also supra* section II.R.(8), Preparation for First Appearance Subsequent to Arrest for Violation of an Injunction.

3. The Victim's Lack of Consent to a Battery Can Be Proven With Circumstantial Evidence. State v. Clyatt, 976 So.2d 1182 (Fla. 5th DCA 2008).

The defendant was charged with felony battery pursuant to §784.03(2), Florida Statutes (2007) for repeatedly striking the victim. The victim refused to testify, but the state attorney's office pursued the case. To prove the case pursuant to §784.03 (1)(a)(1), Florida Statutes, the State was required to prove that the defendant touched or struck the victim against her will. Because the State could not produce a Florida case stating that a purported battery victim's lack of consent could be proved circumstantially without the victim's testimony, the trial

court did not allow the State's witnesses to testify regarding their observations. Although no Florida court has directly held that lack of consent can be established by circumstantial evidence in a simple battery case, Florida courts have recognized circumstantial evidence as sufficient to support a lack of consent finding in other types of criminal prosecutions. Additionally, Florida courts have routinely found circumstantial evidence sufficient to prove a victim's or defendant's state of mind on issues other than consent. Generally, the test for admissibility of evidence is its relevance. Because the State's evidence was clearly relevant to the issue of the victim's lack of consent, and because there is no rule of law barring the State from using circumstantial evidence to prove lack of consent, the appellate court held that the trial court should have allowed the witnesses to testify.

H. DOUBLE JEOPARDY:

1. **Double Jeopardy Clause Applies to All "Crimes":**
   a. Ex Parte Lange, 85 U.S. 163 (1873). "(N)o man shall be twice punished by judicial judgments for the same offence." This applies to both criminal and civil cases.
   b. Criminal contempt is a crime in every fundamental respect.
      (i) Codispoti v. Pennsylvania, 418 U.S. 506 (1974).
      (ii) Attwood v. State, 687 So.2d 271 (Fla. 4th DCA 1997).
      (iii) Civil and criminal sentences served distinct purposes, one coercive, the other punitive and deterrent; the fact that the same act may give rise to both of these distinct sanctions presents no double jeopardy problem. Yates v. U.S., 355 U.S. 66 (1957), Featherstone v. Montana, 684 So.2d 233 (Fla. 3d DCA 1996).
   c. It may be generally said that the Double Jeopardy Clause has no application in non-criminal cases.
      (i) An award of punitive damages in a civil lawsuit does not bar subsequent criminal prosecution for the offense. Smith v. Bagwell, 19 Fla. 117 (1882).
      (ii) Helvering v. Mitchell, 303 U.S. 391 (1938). "[C]ongress may impose both a criminal and civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."
      (iii) Defendant may be convicted of indirect criminal contempt even though there has previously been a civil contempt adjudication based on the same noncompliance with court orders.
      (iv) A prior arbitration reward under a collective bargaining agreement where a postal employee was suspended for thirty (30) days did not bar a subsequent prosecution for misappropriating postal funds involving the same conduct. U.S. v. Reed, 937 F.2d 575 (11th Cir. 1991).

2. **The Guarantee Against Double Jeopardy Consists of Three Protections:**
Lippman v. State, 633 So.2d 1061 (Fla. 1994).
   a. Against a second prosecution for the same offense after acquittal,
   b. Against a second prosecution for same offense after conviction, and
   c. Against multiple punishments for the same offense.

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

4. **Where Defendant Pointed a Gun at the Victim and Stabbed the Victim After the Gun Had Been Taken Away, Both Acts Occurring in Uninterrupted Sequence are Properly Viewed as Being but a Single Act; Thus Attempted Second Degree Murder By the Gun and Aggravated Battery By the Knife are Barred By Double Jeopardy. Gresham V. State, 725 So.2d 419 (Fla. 4th DCA 1999).**

5. **Sentencing of Defendant on Both Battery and Violation of Domestic Violence Injunction Counts Violated Double Jeopardy Clause. Doty v. State, 884 So.2d 547 (4th DCA 2004).**
   See also Young v. State, 827 So.2d 1075 (Fla. 5th DCA 2002). Double Jeopardy bars conviction for both battery AND violation of injunction (here, for repeat violence) where the violation consists of the battery itself: "Young was convicted of violating the injunction by committing a battery. Because of the crime of battery did not contain any elements distinct from the elements of a violation of

§784.047 [prohibiting willfully violating an injunction for protection against repeat violence], the crimes are not separate under the Blockburger test."

6. **Multiple Charging:**
   a. Double jeopardy prohibits multiple homicide convictions for a single death. Barnes v. State, 528 So.2d 69 (Fla. 4th DCA 1988).
   b. HOWEVER: Although a defendant cannot be convicted of multiple homicide offenses based on a single death, he can be charged with multiple crimes.
      (i) State v. Lewek, 656 So.2d 268 (Fla. 4th DCA 1995).
      (ii) *See also* State v. Miller, 700 So.2d 1253 (Fla. 1st DCA 1997). Double jeopardy principles did not preclude multiple charges, even though charges arose from single DUI violation.
      (iii) THUS: State can charge defendant with domestic battery and violation of injunction in the same information regardless of double jeopardy considerations, although double jeopardy bars conviction for both.

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

1. **If the respondent is arrested by law enforcement for violation of an injunction under chapter 741, Florida Statutes, law enforcement must hold the respondent in custody until first appearance when court will decide bail in accordance with chapter 903. §§ 741.30(9)(b), 741.2901(3), Florida Statutes.** Murder was committed by a person who was the subject of a domestic violence injunction, who was placed in a police cruiser by a law enforcement officer dispatched to the victim's home after the victim called the police department, and who was subsequently released after he promised the officer he would leave the victim alone. It was error to dismiss the complaint with prejudice. On remand, the plaintiff was given leave to amend her complaint to allege an arrest since the officer had no discretion under sovereign immunity principles to release a violator who had been arrested. Simpson v. City of Miami, 700 So.2d 87 (Fla. 3d DCA 1997).

2. **Prior to first appearance the State Attorney's Office shall perform a thorough background investigation on the respondent and present the information to the judge at first appearance, so he/she will have all pertinent information when determining bail. §741.2901(3), Florida Statutes.**

3. ***See also* II. Domestic Violence – Civil Proceedings, section R.(6) and (7), for information about Indirect and Direct Criminal Contempt.**

J. DOMESTIC VIOLENCE PRETRIAL RELEASE/DETENTION:

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

2. **Pretrial Detention**:
   a. Section 907.041(4)(a)(18), Florida Statutes, classifies domestic violence as a "dangerous crime".
   b. Section 907.041(4)(b), Florida Statutes: "No person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing; however the court shall retain the discretion to release an accused on electronic monitoring or on recognizance bond if the findings on the record and circumstances warrant such release."
   c. Section 907.041(3)(a), Florida Statutes. It is the intent of the legislature to create a presumption in favor of release on non-monetary conditions for any person who is granted pretrial release unless such person is charged with a dangerous crime as defined in subsection (4).
   d. Section 907.041(4)(c)(1-2,6), Florida Statutes authorizes a court to order pretrial detention if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria in §903.046, Florida

Statutes, and any other relevant facts, that any of the following circumstances exist:

(i) The defendant has previously violated conditions of release and that no further conditions of release are reasonably likely to assure his appearance at subsequent proceedings;

(ii) The defendant, with the intent to obstruct the judicial process, has threatened, intimidated, or injured any victim, potential witness, . . . or has attempted or conspired to do so, and that no further conditions of release are reasonably likely to assure his appearance at subsequent proceedings;

(iii) The defendant is on probation, parole, or other release pending completion of sentence or on pretrial release for a *dangerous crime* at the time of the current arrest.

e. Where defendant is held without bond on an offense which is not designated a "dangerous crime" the State must prove that there are no reasonable conditions of release that would secure the defendant's appearance at trial.

(i) Martinez v. State, 715 So.2d 1024 (Fla. 4th DCA 1998).

(ii) Dupree v. Cochran, 698 So.2d 945 (Fla. 4th DCA 1997)

f. Arguments for Detention or High Bond -

(i) Prior criminal record:

(a) NCIC/FCIC

(b) Local records check

(c) Input from victim or police.

(ii) Flight risk:

Failure To Appear (FTA)– Defendant's driver record and NCIC. Generally, if there is a willful FTA after reasonable notice, a court may commit a defendant to custody without determining whether conditions of release are appropriate.

(a) Wilson v. State, 669 So.2d 312 (Fla. 5th DCA 1996).

(b) Florida Rule of Criminal Procedure 3.131(g).

(iii) Ties to the jurisdiction:

(a) Family

(b) Property

(c) Employment

(d) Passport

(e) Pilot license

(iv) Victim safety:

(a) Statements by the defendant, reference future harm to the victim or witnesses.

(b) Seriousness of the instant offense.

(c) Prior violence offenses or harm to the victim.

g. Recommended conditions for pretrial release:

(i) No contact (or violent contact) with the victim;

(a) Consider having victim obtain caller ID and call block,

(b) Have the victim consider changing the phone number to unlisted and change the locks on the house,
(c) Issue and explain safety plan to the victim,
(d) Consider initiating a program to issue a 911 cellular phone to the victim.
Example Program Overview:
A cooperative venture between local criminal justice agencies and the local cellular telephones may be available at no cost to victims. Specified victims are provided cellular telephones which have been pre-programmed for 911 access only, which victims can have with them at all times, but especially when they are most vulnerable. The cellular telephone provides a tool for security in that 911 assistance is just a phone call away.

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

(viii) Note: These same pretrial conditions would be valid special conditions of probation.

K. BAIL:

1. Purpose of Bail:

a. Ensure that appearance of the criminal defendant at subsequent proceedings; and,
b. To protect the community against unreasonable danger from the criminal defendant.
c. Assure the integrity of the judicial process.
(i) Nicholas v. Cochran, 673 So.2d 882 (Fla. 4th DCA 1996).
(ii) Section 903.046(1), Florida Statutes.
(a) Section 903.047(1), Florida Statutes.
(b) Florida Rule of Criminal Procedure 3.131(b)(3).
(c) Florida Constitution Article I, section 14.
(iii) Generally limited to securing the defendant's presence in court.

Stack v. Boyle, 342 U.S. 1 (1951).

(a) "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

(b) "The right to release before trial is conditioned upon the accused giving adequate assurances that he will stand trial and submit to sentence if found guilty."

2. Initial Determination and Bail Modification:

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

b. Once bail is set, the State may move to modify it "by showing good cause," with notice to the defendant.
   (i) Florida Rule of Criminal Procedure 3.131(d)(2).
   (ii) Keane v. Cochran, 614 So.2d 1186 (Fla. 4th DCA 1993).
   (iii) However: In contrast there is no requirement of showing good cause when a defendant moves to reduce bond.
      (a) Florida Rule of Criminal Procedure 3.131(d)(2).
      (b) Keane v. Cockran, 614 So.2d 1186 (Fla. 4th DCA 1993). "This suggests that the state has a greater burden to carry to increase a bond than a defendant had to reduce it."
      (c) Defendant has the burden of proof when seeking a bail reduction to adduce evidence sufficient to overcome the presumption of correctness of the trail court's order. Mesidor v. Neumann, 721 So.2d 810 (Fla. 4th DCA 1999).

c. In order to have good cause to modify a bond, the State must present evidence of a change in circumstances or information not make known to the first appearance judge.
   (i) Keane v. Cochran, 614 So.2d 1186 (Fla. 4th DCA 1993).
   (ii) Kelsey v. McMillan, 560 So.2d 1343 (Fla. 1st DCA 1990).
   (iii) Sikes v. McMillan, 564 So.2d 1206 (Fla. 1st DCA 1990).
   Where there was conflicting evidence as to whether the first appearance judge had the same information as the trial judge who increased a bond, and the conflict was not resolved, the State failed to carry its burden of demonstrating adequate grounds to increase bail.

d. Bond can be denied or revoked to assure the integrity of the judicial process.
   (i) Section 903.0471, Florida Statutes.
   (ii) Ex Parte McDaniel, 86 Fla. 145, 97 So. 317, 318 (1923).
   (iii) Witness tampering would violate the conditions of pretrial release and disrupt the integrity of the court. Arcia v. Manning, 680 So.2d 1146 (Fla. 3d DCA 1996).

(iv) Section 903.0471, Florida Statutes violations of conditions of pretrial release.
  (a) Notwithstanding §907.041, a court may, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that the defendant committed a new crime while on pretrial release. Parker v. State, 780 So.2d 210 (Fla. 4th DCA 2001).
    (1) Statute is constitutional. State v. Paul, 783 So.2d 1042 (Fla. 2001).
    (2) Trail court properly revoked pretrial release and placed defendant in pretrial detention upon finding probable cause that defendant committed new crime while on pretrial release.
  (b) Williams v. Spears, 814 So.2d 1167 (Fla. 3d DCA 2002).
    (1) Statute authorizing courts to revoke pretrial release where there is probable cause to believe a defendant has committed a new crime while free on bail is constitutional.
    (2) "The reason for revoking the defendant's pretrial release in this case – and refusing to further release – is because the defendant committed a new crime while on pretrial release. No showing that the defendant poses a risk of physical harm is required."
    (3) "The integrity of the judicial process is undercut if the courts do not have effective tools to use where a defendant free on bail commits a further crime."

e. Trial court may not increase bond on its own motion.
  (i) Flemming v. Cochran, 694 So.2d 131 (Fla. 4th DCA 1997).
  (ii) Bowers v. Jenne, 710 So.2d 681 (Fla. 4th DCA 1998).
  (iii) Cousino v. Jenne, 717 So.2d 599 (Fla. 4th DCA 1998).
  (iv) Mongomery v. Jenne, 744 So.2d 1148 (Fla. 4th DCA 1999).
  (v) Welch v. Jenne, 770 So.2d 731 (Fla. 4th DCA 2000).

3. Denial of Bail:

a. To deny an accused the right to bail in a capital case under our constitution, the State must present proof that guilt is evident or the presumption of guilt is great.
  (i) Van Eeghen v. Williams, 87 So.2d 45 (Fla. 1956). Specifically, the court held that the state is actually held to an even greater degree of proof than that required to establish guilt beyond a reasonable doubt.
  (ii) Russell v. State, 71 Fla. 236, 71 So. 27 (1916).
  (iii) State v. Arthur, 390 So.2d 717 (Fla. 1980).
  (iv) Mininni v. Gillum, 477 So.2d 1013 (Fla. 2d DCA 1985).

b. Proof Required:
  (i) The State must rely on something more than the Indictment and the probable cause affidavit to have bailed denied.
    (a) State v. Arthur, 390 So.2d 717 (Fla. 1980).
    (b) Young v. Neumann, 770 So.2d 205 (Fla. 4th DCA 2000).

(ii) Admissible Hearsay:
(a) State v. Arthur, 390 So.2d 717 (Fla. 1980).
(1) "The state can probably carry this burden by presenting the evidence relied upon by the grant jury or the state attorney in charging the crime."
(2) "This evidence may be presented in the form of transcripts or affidavits."
(01) Mininni v. Gillum, 477 So.2d 1013 (Fla. 2d DCA 1985).
(02) Kinson v. Carson, 409 So.2d 1212 (Fla. 1st DCA 1982).
(iii) Proof Beyond a Reasonable Doubt:
Burden of proof on State even when defense moves for bail. Gomez v. McCampbell, 701 So.2d 412 (Fla. 4th DCA 1997).

c. Circumstances valid for denial of bail:
(i) Martin v. State, 700 So.2d 809 (Fla. 4th DCA 1997).
(a) Lack of ties to the community;
(b) Lack of regard for the orders of the courts;
(c) Expressed intent of leaving jurisdiction.
(ii) Failure to appear:
(a) Bradshaw v. Jenne, 754 So.2d 109 (Fla. 4th DCA 2000). A defendant who "willfully" violates a condition of bail by failing to appear may be subject to revocation of bail and commitment to custody.

d. Appellate remedy:
(i) Through writ of mandamus.
(a) Martin v. Circuit Court of the Fifteenth Judicial Circuit, 690 So.2d 674 (Fla. 4th DCA 1997). Mandamus will lie to compel the timely performance of a purely ministerial duty, such as entering a ruling on a bond motion.
(b) Kramp v. Fagan, 568 So.2d 479 (Fla. 1st DCA 1990).
(c) Florida Rule of Appellate Procedure 9.140(h)(4).
(ii) Writ of Hebeas Corpus.
(a) Flemming v. Cochran, 694 So.2d 131 (Fla. 4th DCA 1997).

L. PRETRIAL INTERVENTION:

1. **Batter Intervention Programs:** §741.281, Florida Statutes – "If a person is found guilty of, has had adjudication withheld on, or has pled nolo contendere to a crime of domestic violence, as defined in §741.28, the COURT MUST ORDER -
   a. a minimum term of 1 year's probation, and
   b. attendance at a batterer intervention program as a condition of probation; UNLESS the court determines not to impose attendance and states on the record why a batterer intervention program might be inappropriate. §741.32, Florida Statutes.

2. **Plea and Pass Diversion Program:** The following are guidelines for a State Attorney "plea & pass" program:
   a. "Plea & pass" is a form of diversion to be utilized for cases where the State is unable to proceed with the prosecution. (Alternatively, in cases where there is a cooperating victim or the case is otherwise provable, probation with counseling or incarceration will be the standard disposition.)
   b. "Plea & pass" should be considered in the following type cases:
      (i) Where the victim will not cooperate and the case cannot otherwise be proven. (Proceed with caution.)
      (ii) For first offenders, where victim agrees and is concerned with the effect of a criminal record on the family.
      (iii) For mutual combatants where the primary aggressor cannot be determined.
   c. The victim must be in agreement with a "plea & pass" disposition.
   d. A standardized office "Plea & Pass" form may be utilized.
   e. All defendants will be required to participate in and complete a Batterer Intervention Program (BIP) as a standard condition; otherwise, there will be a written explanation by the court.
   f. An administrative order should set out program specifics. For example, when a status check should be scheduled (45 days after the plea and 90 days after the plea).

3. **It is an Error to Dismiss Case After Defendant Successfully Completed Pretrial Intervention (PTI) Program Where State Objected to the Original Placement of The Defendant In PTI.** State v. Turner, 636 So.2d 815 (Fla. 3d DCA 1994). Section 948.08(5), Florida Statutes, specifically requires consent of State to placement in PTI program.

4. **PTI Diversion Decision of State Attorney is Prosecutorial in Nature and Thus Not Subject to Judicial Review.**
   a. Cleveland v. State, 417 So.2d 653 (Fla. 1982).
   b. State v. Turner, 636 So.2d 815 (Fla. 3d DCA 1994).
   c. Virgo v. State, 675 So.2d 994 (Fla. 3d DCA 1996).
   d. State v. Winton, 522 So.2d 463 (Fla. 3d DCA 1988). Trial court cannot second-guess State's decision to withhold consent to defendant's entry into PTI program.

5. **State, Not Trial Court, Makes Decision Whether to Prosecute.**
   a. State v. Bryant, 549 So.2d 1155 (Fla. 3d DCA 1989).
   b. State v. Jogan, 388 So.2d 322 (Fla. 3d DCA 1980). State attorney has sole discretion to either prosecute or nolle prosse a defendant.
   c. In the interest of S.R.P., 397 So.2d 1052 (Fla. 4th DCA 1981). Decision to file nolle prosse vested solely in discretion of state.

d. Court improperly dismissed information where State attorney determined to prosecute.
   (i) State v. Brown, 416 So.2d 1258 (Fla. 4th DCA 1982).
   (ii) State v. Rubel, 647 So.2d 995 (Fla. 2d DCA 1994). The state attorney shall make the final determination as to whether the prosecution shall continue.
   (iii) Section 948.08(5), Florida Statutes.
e. HOWEVER: Trial court has discretion to dismiss charges against substance abuse-impaired offender, over objection by the State, where the offender has successfully completed a court referred drug treatment program.
   (i) State v. Dugan, 685 So.2d 1210 (Fla. 1996).
      (a) A trial court is empowered "to dismiss the charges against a substance-abuse impaired offender who successfully completes a drug treatment program when the offender is referred to the program by the court."
      (b) A trial court is authorized to close a case by dismissing the charges against the offender once the offender successfully completes the drug treatment program.
      (c) *See also* State v. Upshaw, 648 So.2d 851 (Fla. 3d DCA 1995). Court properly dismissed case over State's objection where defendant successfully completed PTI type program offered with the consent of the State under the theory of specific performance of a settlement agreement.
   (ii) *See also supra* section IV.G. Charging and Prosecuting.

M. PROBATION:

1. **Batterer Intervention Shall be Ordered in Conjunction with Probation:**
   "If a person is found guilty of, has had adjudication withheld on, or has pled nolo contendere to a crime of domestic violence, as defined in §741.28, Florida Statutes, that person shall be ordered by the court to a minimum term of 1 year's probation and the court shall order that the defendant attend a batterer intervention program as a condition of probation. The court must impose the condition of the batterer intervention program for a defendant under this section, but the court, in its discretion, may determine not to impose the condition if it states on the record why a batterer intervention program might be inappropriate. The court must impose the condition of the batterer intervention program for a defendant placed on probation unless the court determines that the person does not qualify for the batterer intervention program pursuant to §741.32, Florida Statutes." §741.281, Florida Statutes.

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

3. **General Conditions of Probation:**
   a. General Conditions are Contained within the Statutes and may be Imposed in Written Order without Oral Pronouncement:
      (i) Hart v. State, 668 So.2d 589 (Fla. 1996).
      (ii) Fernandez v. State, 677 So.2d 332 (Fla. 4th DCA 1996),
   b. A condition of probation which is statutorily authorized or mandated may be imposed and included in a written order of probation even if not orally pronounced at sentencing.
      (i) Hart v. State, *supra*.
      (ii) Nank v. State, 646 So.2d 762, 763 (Fla. 2d DCA 1994), cited by, Hart v. State, *supra*.

   "'The legal underpinning of this rational is that the statute provides 'constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process.'" Quoting, Tillman v. State, 592 So.2d 767 (Fla. 2d DCA 1992). General conditions set forth in statute need not be orally pronounced.
   c. "All persons are presumed to know the contents of criminal statutes and the penalties provided within them." State v. Ginn, 660 So.2d 1118 (Fla. 4th DCA 1995), *review denied*, 669 So.2d 251 (Fla. 1996).
   d. Defendant's have notice of all probation conditions contained in the statutes.

(i) Tillman v. State, *supra*.
(ii) State v. Green, 667 So.2d 959 (Fla. 2d DCA 1996). All persons have constructive notice of Florida's criminal statutes.
(iii) State v. Beasley, 580 So.2d 139 (Fla. 1991).

e. Random testing is a General Condition of Probation:
   (i) Urinalysis, breathalyzer and blood testing are statutorily authorized as "random testing". Fernandez v. State, 677 So.2d 332 (Fla. 4th DCA 1996).
   (ii) Section 948.03(1)(k), authorizes the imposition of this condition.

f. Conditions contained in the approved Probation Order under Rule of Criminal Procedure 3.986 are general conditions, which do not require oral pronouncement. State v. Hall, 668 So.2d 600 (Fla. 4th DCA 1996).

g. A Defendant may object to imposition of statutory conditions on ground of relevancy. Fernandez v. State, 677 So.2d 332 (Fla. 4th DCA 1996).

4. Special Conditions of Probation:

a. Special Conditions must be related to the offense or rehabilitation of the defendant.
   (i) Brewer v. State, 531 So.2d 393 (Fla. 2d DCA 1988).
   (ii) Grubbs v. State, 373 So.2d 905 (Fla. 1979).
   (iii) Hussey v. State, 504 So.2d 796 (Fla. 2d DCA 1987), *review denied*, 518 So.2d 1275 (Fla. 1987).
   (iv) Goldschmitt v. State, 490 So.2d 123 (Fla. 2d DCA 1986). DUI bumper sticker valid special condition.
   (v) Pratt v. State, 516 So.2d 328 (Fla. 2d DCA 1987).
   (vi) A court may impose a condition of probation that is reasonably related to the offense or future criminality.
      (a) Biller v. State, 618 So.2d 734 (Fla. 1993).
         (1) Condition of probation in CCF that defendant not use alcohol was improper as there was nothing connecting any use of alcohol with the offense and nothing in the record to suggest that the defendant had a propensity toward alcohol abuse.
         (2) Condition of probation is invalid if it:
            i. has no relationship to the crime of which the offender was convicted,
            ii. relates to conduct which is not itself criminal; and
            iii. requires or forbids conduct which is not reasonably related to future criminality.
      (b) *See also* Rogriquez v. State, 378 So.2d 7 (Fla. 2d DCA 1979), Grate v. State, 623 So.2d 591 (Fla. 5th DCA 1993).

b. Special Condition of Probation Must be Ordered by the Court and Orally Pronounced:
   (i) Carson v. State, 531 So.2d 1069 (Fla. 4th DCA 1988).
   (ii) Requirement that defendant pay for urinalysis, breathalyzer or blood test, a condition not mentioned at sentencing, to be deleted.

(a) Catholic v. State, 632 So.2d 272 (Fla. 4th DCA 1994).
(b) Cumbie v. State, 597 So.2d 946 (Fla. 4th DCA 1992).
(c) Nank v. State, 646 So.2d 762 (Fla. 2d DCA 1994).
(d) Luby v. State, 648 So.2d 308 (Fla. 2d DCA 1995).
HOWEVER:
(1) Requirement to submit to random testing is not a special condition.
(2) Section 948.03(1)(k), Florida Statutes, authorizes the imposition of this condition, thus it need not be orally announced.
(3) Condition that probationer pay for this testing is a special condition which must be orally announced.
(e) Bartley v. State, 675 So.2d 246 (Fla. 4th DCA 1996).

(iii) Special condition must be orally pronounced at sentencing before it can be included in the written probation order.
(a) State v. Williams, 712 So.2d 762 (Fla. 1998),
The requirement that the defendant pay for drug testing is a special condition of probation which the trial court must pronounce orally at sentencing.
(b) Nank v. State, *supra*.
(c) Cumbie v. State, 597 So.2d 946 (Fla. 1st DCA 1992).
(d) Shacraha v. State, 635 So.2d 1051 (Fla. 4th DCA 1994).

(iv) Because a defendant must make a contemporaneous objection to the probation conditions at the time of sentencing, the defendant must be informed of the conditions being imposed.
(a) Hart v. State, 668 So.2d 589 (Fla. 1996).
(b) Olvey v. State, 609 So.2d 640 (Fla. 2d DCA 1992), (*en banc*).

(v) Special condition of probation prohibiting use of intoxicants stricken because it was not orally pronounced.
(a) Hann v. State, 653 So.2d 404 (Fla. 2d DCA 1995). Random alcohol testing is special condition which should have been orally pronounced.
(b) Nank v. State, 646 So.2d 762 (Fla. 2d DCA1994).
(c) Friend v. State, 666 So.2d 599 (Fla. 4th DCA 1995).
(d) Fitts v. State, 649 So.2d 300 (Fla. 2d DCA 1995).

(vi) Where sentence is reversed because trial court failed to orally pronounce special conditions of probation which later appeared in the written sentence, trial court may not reimpose the conditions at re-sentencing.
(a) Justice v. State, 674 So.2d 123 (Fla. 1996).
(b) Burdo v. State, 682 So.2d 557 (Fla. 1996).
(c) Young v. State, 699 So.2d 624 (Fla. 1997).

5. **Probation Order Must Specify the Period Within Which the Probationer Must Complete Special Conditions.** Young v. State, 566 So.2d 69 (Fla. 2d DCA 1990).

6. **Illegal Conditions of Probation: Condition which are too vague to advise the probationer of the limits of his restrictions and could be easily violated unintentionally, are illegal.**
   a. Hughes v. State, 667 So.2d 910 (Fla. 4th DCA 1996). Condition prohibiting probationer from coming within 250 miles of the victim was too vague and thus illegal.
   b. Huff v. State, 554 So.2d 616 (Fla. 2d DCA 1989). Condition prohibiting probationer from being within three blocks of a high drug area was stricken as being illegal.
   c. Almond v. State, 350 So.2d 810 (Fla. 4th DCA 1997). Condition that probationer reside elsewhere other than Central Florida was illegal.
   d. HOWEVER: Condition prohibiting probationer from traveling to Tallahassee, Florida was not illegal. Larson v. State, 572 So.2d 1368 (Fla. 1991).

7. **No Contemporaneous Objection Required to Contest an Illegal Condition of Probation:**
   a. Hughes v. State, *supra*.
   b. Larson v. State, *supra*.

8. **Problems with Representation: Uncounseled Plea and Inadequate Waiver of Right to Counsel:**
   a. Tur v. State, 797 So.2d 4 (Fla. 3d DCA 2001). The defendant in this case was sentenced to a term of probation after an uncounseled plea pursuant to Florida Rule of Criminal Procedure 3.111(b)(1). Defendant later violated his probation for driving under the influence of alcohol. The Third District Court of Appeal looked at whether or not a defendant, sentenced to a term of probation pursuant to Florida Rules of Criminal Procedure, may be sentenced to incarceration after violating that probation. The Third District Court of Appeal held that as the trial court could not impose a jail sentence on this defendant for his uncounseled plea to the charges, it cannot later impose a jail term for a violation of the terms of probation. The case was reversed and remanded for resentencing without incarceration.
   b. Harris v. State, 773 So.2d 627 (Fla. 4th DCA 2000).

   The defendant was charged with a crime allowing imprisonment for up to one year. The state represented that they would not seek jail time. Knowing this, the defendant was tried without a jury and without counsel, but never formally waived those rights on the record. The defendant subsequently violated the probation and was sentenced to 60 days in jail. The defendant appealed, alleging that there was a denial of his right to a jury trial and appointed counsel at the original sentencing. In its appellate capacity, the circuit court found that because jail time was a possibility at sentencing, jail time for a violation was permissible. On appeal, the Fourth District Court of Appeal found that the defendant was entitled to a jury trial, as well as counsel. The court also held that the trial court could not impose jail time for either the original charge or the

probation violation. Reversed and remanded with instructions that the defendant is to be resentenced without any jail time.

N. JAIL:

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

O. SENTENCING:

1. **Minimum Term of Imprisonment for Domestic Violence:**
   If a person is adjudicated guilty of a crime of domestic violence and the person has intentionally caused bodily harm to another person, the court SHALL order the person to service a minimum of 5 days in the county jail as part of the sentence imposed, unless the court sentences the person to serve a non-suspended period of time in a state correctional facility. The court may also sentence the person to probation, community control, or additional period of incarceration. §741.283, Florida Statutes.

2. **Upon revocation of probation, the court shall adjudicate the probationer.**
   a. Section 948.06(2)(b), Florida Statutes. "If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control."
   b. State v. Gloster, 703 So.2d 1174 (Fla. 1st DCA 1998).

(i) A judge may withhold adjudication of guilt only if the defendant is placed on probation.
   (a) Florida Rule of Criminal Procedure, 3.670.
   (b) Section 948.06(1), Florida Statutes.
   (c) State v. Gloster, 703 So.2d 1174 (Fla. 1st DCA 1998).
(ii) Amendment to Fla.R.Crim.P 3.704(d)(23), 763 So.2d 997 (Fla. 1999). Sentencing guideline scoresheet (Rule 3.704(d)(23)) amended to reflect that use of sentencing multiplier for crime involving domestic violence in the presence of a child is no longer in the trial court's discretion.

3. Lawful Suspended Sentences:

a. Ex parte Williams, 26 Fla. 310, 8 So. 425 (1890). "That sentence may be suspended on conviction of an offender, because of mitigating circumstances, or the pendency of another indictment, or other sufficient cause, is not denied, and in practice is frequently done in this state, and in other states is held to be permissible."
b. Statutory Authority:
   (i) Sections 948.01(3) and (4), Florida Statutes.
   (ii) McGuirk v. State, 382 So.2d 1235 (Fla. 2d DCA 1980). Court may suspend some or a defendant's entire sentence in order to place him on probation.
   (iii) Section 958.06, Florida Statutes. The court upon motion of the defendant, or upon its own motion, may within 60 days after imposition of sentence suspend the further execution of the sentence and place the defendant on probation in a community control program upon such terms as the court may require.
c. Split Sentences:
   (i) A trial court may impose a true split sentence in which the period of community control and probation is shorter than the suspended portion of incarceration.
   (ii) Suspending sentence and placing defendant on probation constitutes a split sentence. Lawton v. State, 711 So.2d 142 (Fla. 2d DCA 1998).
d. Hearings on Revocation of Suspension of Sentences are Informal:
   (i) Hearings on the question of revocation of suspension of sentence for violating the conditions of suspension are informal and do not take the course of a regular trial.
      (a) Brill v. State, 159 Fla. 682, 32 So.2d 607 (1947).
         (1) evidence adduced at such hearings does not have the same objective as that taken at a criminal trial;
         (2) that its first purpose is to satisfy the conscience of the court as to whether the conditions of suspension have been violated;
         (3) second purpose is to give the accused an opportunity to explain away the accusation as to violation of the conditions of suspension.

(b) State v. Shelby, 97 So.2d 631 (Fla. 1st DCA 1957). The latitude of inquiry is such that even though evidence upon which the revocation is based would be inadmissible upon trial of the accused for a crime, it is competent for the trial court to consider it on the issue of compliance with the conditions under which suspension of the sentence was granted.
(c) Caston v. State, 58 So.2d 694 (Fla. 1952).

4. Unlawful Suspended Sentences:

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

5. Sentencing Multiplier for Domestic Violence Cases:

a. Florida Rule of Criminal Procedure 3.704(d)(23) provides for a domestic violence multiplier of one-and-a-half times when a domestic battery is committed in the presence of a child under the age of 16.
b. Lane v. State, 973 So.2d 654, (Fla. 1st DCA 2008) the trial court imposed a domestic violence multiplier of one-and-a-half times on appellant's sentence for aggravated battery, based upon the state's argument that the child of the appellant and the victim resided in the home. The appellate court reversed because Florida Rule of Criminal Procedure 3.704(d)(23) requires that the domestic battery be committed in the presence of a child under the age of 16, however, no evidence was presented by the state on this issue or on the issue of whether the child was present during the domestic violence. In fact, the victim's affidavit, which was accepted into evidence without objection, stated that the child was not in the home at the time of the battery.

P. VIOLATION OF PROBATION OR INJUNCTION:

1. Gaspard v. State, 845 So.2d 986 (Fla. 1st DCA 2003).

When a conviction for aggravated stalking has been reversed, any sentence imposed after revocation of probation based solely on the conviction must also be vacated. This, however, does not preclude the state from seeking revocation of probation on other grounds.

2. **Hoffman v. State, 842 So.2d 895 (Fla. 2d DCA 2003).**
   Defendant, a respondent in a civil case was convicted of violation of the injunction for sending cards to the petitioner's residence and for allegedly violating the 500 foot provision of the injunction. The trial court erred in finding that the defendant had violated the injunction as the cards were addressed to other residents of the petitioner's household and as the injunction did not specifically prohibit this. Additionally, the trial court erred in finding that the defendant had violated the 500 foot provision of the injunction as the state failed to prove the exact distance the defendant was from petitioner. The court held that the state's burden of proof in an indirect criminal contempt case is to prove every element beyond a reasonable doubt.

3. **Robinson v. State, 840 So.2d 1138 (Fla. 1st DCA 2003).**
   The court reversed the trial court's conviction for violation of a domestic violence injunction for failing to grant appellate's motion for judgment of acquittal. The court held that the state failed to establish that the appellant knew the final injunction had been entered against him. Appellant's conviction for aggravated battery was upheld, however.

4. **Colwell v. State, 838 So.2d 670 (Fla. 2d DCA 2003).**
   The Second District Court of Appeal reversed trial court's revocation of defendant's probation for violation of probation for committing domestic battery. The court held that it was an error to base the revocation, in part, on inadmissible hearsay and other insufficient evidence. The only testimony offered at the revocation hearing was that of a deputy who testified that the victim told him that the defendant had grabbed her and she was afraid to go back to the house. Further, the deputy testified that the victim was hysterical and had a faint mark on her neck. This evidence was insufficient to find that defendant violated probation. Note: Trial court found that the victim's statement did not meet excited utterance exception as too much time passed between the time of the alleged incident and her statement to the deputy.

5. **Dunkin v. State, 780 So.2d 223 (Fla. 2d DCA 2001).**
   Defendant was placed on probation for a period of three years, and ordered to complete an outpatient sex offenders' treatment program until he was officially discharged by the program administrator. Probation officer violated the defendant, finding that he was absent from the sex offenders program without permission by missing three separate meetings without notification to the therapist as to why he missed the sessions. The defendant contended that the

missed appointments were due to illness. The terms of his probation did not specify that the defendant successfully complete the program on the first try, just that the program be completed within the three years of probation. The circuit court revoked the defendant's probation, but the Second District reversed and remanded on the grounds that the defendant's termination from the sex offenders program was insufficient to establish a "willful and substantial" violation of probation, and did not therefore warrant a revocation.

6. **Murtha v. State, 777 So.2d 1067 (Fla. 3d DCA 2001).**
   The court held that the trial court abused its discretion when it found that the defendant had violated the terms of and revoked probation for failing to pay restitution and perform community service hours. The court reversed the probation revocation on the grounds that the original order never specified a schedule for this sentence to be completed by, and there was still sufficient time in the probationary period for the terms to be completed. The court also held that a violation can't be deemed willful where a defendant, as this one, was incarcerated on unrelated charges for the first three months of the probationary period.

7. **Suggs v. State, 795 So.2d 1028 (Fla. 2d DCA 2001).**
   Defendant appeals a denial of her motion to dismiss an aggravated stalking charge. The court reversed, and remanded on the grounds that a defendant cannot be charged with a violation of a final injunction unless the defendant was served with the injunction. In this case, there was no service on the defendant; therefore the court found that she cannot be charged with a violation.

8. **Brown v. State, 776 So.2d 329 (Fla. 5th DCA 2001).**
   The defendant failed to complete an intake interview with the probation officer, as court ordered, and was asked to call back and provide the information requested by the officer. The defendant failed to do so, and the court held that the defendant's failure to complete intake procedure was a substantial enough violation to justify the revocation of the probation.

9. **Meadows v. State, 747 So.2d 1043 (Fla. 4th DCA 2000).**
   Where the state agreed at the beginning of a probation violation hearing not to proceed on a count alleging aggravated battery and domestic violence, but did proceed on a second count alleging accessing 911 for a non-emergency purpose, the case was reversed and remanded by the Fourth District Court of Appeal. Because the revocation of probation was based upon two violations, it was not apparent whether the trial court would have revoked the defendant's.

10. **Young v. State, 739 So.2d 1179 (Fla. 4th DCA 1999).**
    The Fourth District Court of Appeal held that the trial court was without jurisdiction to revoke probation where the warrant charging the defendant with

probation violation was delivered to the sheriff's office after expiration of the probationary period. It was error to find that the defendant had absconded from supervision by failing to file monthly reports with her probation officer where the defendant was not hiding, nor had departed the jurisdiction of the state, and that the probationary period was thereby tolled.

11. **Mitchell v. State, 717 So.2d 609 (Fla. 4th DCA 1998).**
The claim that the trial court erred in finding the defendant in violation of probation because the order of probation did not specify the time frame for completion of a domestic batterer intervention program was not preserved for appellate review. The appellate court found that there was no merit to the claim due to the fact that the time period for completion of the program was implicit in other dictates imposed by the court order and supported the trial court's revocation of probation.

12. **Rawlins v. State, 711 So.2d 137 (Fla. 5th DCA 1998).**
Two unexcused absences from a substance abuse treatment program amounts to a material probation violation. The probation officer lacked the authority to substitute a program different from that ordered by the court.

13. **Appearance via satellite at probation revocation hearing of otherwise unavailable victim is not a denial of the Sixth Amendment's Confrontation Clause.**

14. **Lima v. State, 732 So.2d 1173 (Fla. 3d DCA 1999).**
The Third District Court of Appeal held that in a probation revocation hearing for the commission of a domestic violence-related battery, it is not a denial of the Sixth Amendment's Confrontation Clause to present the victim's testimony via satellite transmission, so long as there is a showing that the victim "was unable to attend." This holding will also apply to the trial itself, as opposed to a probation violation hearing.

Q. EXPUNCTION OF CRIMINAL HISTORY IN DOMESTIC VIOLENCE CASES:

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

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

1. **Prosecutor must be cautious when attempting to get reluctant witnesses to testify (e.g., by threatening perjury of false affidavit).**
   a. Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976). *See also* Davis v. State, 334 So.2d 823 (Fla. 1st DCA 1976).
   b. Merely advising witness of what consequences would be if she failed to testify or if she failed to tell the truth is appropriate.
      (i) Coleman v. State, 491 So.2d 1206 (Fla. 1st DCA 1986).
   c. Prosecution correctly informed victim that if she attempted to change testimony or affidavit statements in order to achieve her desire to have the battery charges against her husband dropped she would be held in contempt for perjury. Coleman v. State, 491 So.2d 1206 (Fla. 1st DCA 1986).
      (i) An admonition to a witness to "tell the truth," if such admonition does not suggest to the witness exactly what testimony to give, is appropriate, and will not be cause for discipline.
      (ii) The Coleman court upheld this action distinguishing both: Lee and Davis *supra*.
   d. Prosecutor may be disciplined by The Florida Bar for telling a witness not to speak with defense counsel at all unless the prosecutor was present.
   e. Appellate Review Due to Prosecutorial Error:

   "Prosecution error alone does not warrant automatic reversal of conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless."

   State v. Murray, 443 So.2d 955, 956 (Fla. 1984). "The correct standard of appellate review is whether the error committed was so prejudicial as to vitiate the entire trial."

   f. Conclusive Summary:
      (i) Prosecutor suggesting which version of testimony = misconduct, and Misconduct = discipline action
      (ii) However, misconduct is not equal to per se reversal.

APPENDICES

TABLE OF CONTENTS

Ordering An Evaluation: When is Domestic Violence Expertise Necessary?..... 179
Please note, the above document is not available in Rich Text Format (RTF)
Florida's Four Orders of Protection Against Violence: Distinguishing the Difference 187
Dating Violence Checklist 197
Sexual Violence Checklist 203
Repeat Violence Checklist 209
Summary of 2008 Legislative Session 215
Comparison of Injunctions Under Chapter 39 and Chapter 741 219
Chapter 39 Injunctions 221
Domestic Violence and Housing Protections in The Violence Against Women Act 224
Security: A Model Family Court Essential Element 227

I

Ordering an Evaluation: When Is Domestic Violence Expertise Necessary?

REMEMBER: Not every case will require or need an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

The Fundamental Question:

Is this a case where I need assistance in determining:

- the presence and extent of physical or sexual violence or other assaultive or coercive behaviors used by one parent against the other;
- the impact of domestic violence on the children;
- the effect of domestic violence on the parenting of each party; and
- the impact of domestic violence on decisions about how to structure custody and visitation?

(See also supplemental material, INTRODUCTION, p. 7-11.)

What If There Are No Resources for an Evaluation?

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

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

Is There a Need for an Emergency/ Interim Assessment?

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

YES, if an existing restraining/protection order has been violated or is not adequate (e.g., fails to provide needed relief), or if there is no restraining/protection order in place, and you have reason to be concerned about the safety of one or both of the parties and/or their children. You may want an interim safety assessment performed by a qualified expert before issuing temporary orders to stabilize the situation pending a final resolution of the contested issues. *

FACTORS that might prompt an emergency/interim safety assessment include:

- credible allegations of child abuse, which often co-occurs with domestic violence;
- one or more convictions of domestic violence-related or other violent offenses;
- a record of one or more 911 calls;
- possession of, access to, or threats to use firearms in conjunction with evidence of assaultive or coercive behavior perpetrated by one parent against the other;
- evidence of stalking;
- evidence of harm or threats of harm to partner or children, or threats of harm to pets or property;
- evidence of suicide threats or threats of self-harm;
- evidence of threats of abduction of children;
- a history of drug or alcohol abuse;
- a prior record of restraining/protection orders involving this partner or a former partner (see also supplemental material, History of Physical Violence, p.13, examining cases in which there may be a record against both parents);
- evidence of assaultive and coercive behaviors, even if there is no history of physical or sexual violence; and/or
- evidence of violations of prior or existing restraining/protection orders.

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

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Is There a Need for an Emergency/ Interim Assessment? (cont.)

An emergency/interim safety assessment should:

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

Once Safety Is Assessed and If Resources Are Available, Should I Order an Evaluation?

The answer may be ***YES*** when:

- the facts trigger a statutory obligation to obtain an evaluation;
- there is a documented history of physical or sexual violence, stalking, or a pattern of assaultive or coercive behaviors perpetrated by one parent against the other, but you are nonetheless inclined to permit contact with the abusive parent; and/or
- there are allegations that a parent has harmed or threatened to harm him- or herself or the other parent or the children, threatened injury to property or pets, or otherwise abused the other parent or the children.

The answer may *also* be ***YES*** when:

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

***RED FLAGS* include:**

- a documented history or allegations of mental illness, substance abuse, or child abuse by either party; ✱
- a pattern of coercion and control even if there is no established history of physical or sexual violence;
- indications that the children are exhibiting symptoms consistent with, although not necessarily the result of, child abuse or their exposure to domestic violence. Such symptoms may include sleep disturbances, bedwetting, age-inappropriate separation anxiety, hyperactivity, aggression or other behavioral problems, depression, or anxiety; ✱
- the presence of one or more prior court orders restricting a parent's access to a former partner or any of his or her children in this or another relationship;
- a history of court or social services involvement with the family;
- a stipulated or mediated agreement heavily favoring one party, thereby raising concerns of intimidation or coercion, especially if one or both of the parties are unrepresented; ✱
- allegations that a parent is turning the children against the other parent; ✱ and
- indications that one or both parents are inattentive to the children's needs. ✱

(See also Card 1, Side 1, FACTORS, and Card II, Side 2, INFORMATION.)

And the answer may also be YES when:

- one or both parties have already retained one or more experts;
- one or both parties, or the children's lawyer or guardian *ad litem*, has requested an evaluation that raises concerns about domestic violence or raises "red flags" warranting an investigation of domestic violence; or
- a party seeking custody is also making a contested request to relocate, particularly if there is a hint that the case may involve domestic violence and safety concerns may be an underlying reason for the request. ✱

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

SJI State justice institute

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II

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

REMEMBER: Not every case will require an evaluation. However, you can still use this tool to guide you in requiring the production of evidence by attorneys, providing unrepresented litigants with a checklist of needed information, and assessing your own ability to make safe and responsible decisions in light of both the information you have and the information you do not.

Safety First

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

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

Frame the Inquiry

Investigation, Evaluation, Recommendation

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

- **Investigation: ✱**

You need an investigation when the questions are factual.
For example:

- "What has happened in this family?"
- "What do the relevant records show?"
- "What does the child say about visiting with his mother or father?"
- "What is the history of each parent's relationship with each child?" (e.g., who fed, clothed, etc., the children?)

- **Evaluation: ✱**

You need an evaluation from a mental health professional to answer the following types of questions if they are relevant to the inquiry:

- "What is the psychological impact of parental behavior on a child?"
- "What are the personality, characteristics, functioning, or symptoms of a party or child?"
- "Are there clinical-level concerns about the mental health of one of the parents or the children?"

- **Recommendations to the Court: ✱**

Court practice is sharply divided on the question of asking evaluators or investigators to make recommendations. However, opinion is unanimous that the judges, not evaluators, make the ultimate best-interests determination. If you or your court permits or requires custody evaluators to make recommendations, in order to make sure that you can make your own independent assessment, you must be able to determine:

- whether the recommendation is sufficiently supported by relevant facts;
- the level of support for the theory and methodology relied upon by the evaluator in his or her professional community; ✱ and
- whether the evaluator impermissibly tried to negotiate a resolution of the matter, either through counsel or directly with the parties.

(See Card III, Side 2, ASSESSING THE RECOMMENDATIONS)

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

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

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Choose the Expert

It is important to choose an evaluator who has training and experience in: ✱

- the issues related to domestic violence and/or sexual assault, including the dangers associated with separation; ✱
- the link between partner abuse and child abuse;
- the impact of exposure to domestic violence on children;
- the impact of abuse on parenting; and
- the psychological, emotional, physical, and economic risks that continued exposure to the abusive parent's behavior can have on the abused parent and the children.

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

- A case with extensive documentation may require the investigatory skills of an attorney.
- Obtaining sensitive information from relatively young children may require a mental health clinician with a background in child development and child psychology and up-to-date training on appropriate interviewing techniques.
- A mental health evaluation will require specialized expertise. The same is true for clinical diagnosis, in the rare case in which such diagnosis is a relevant and necessary aspect of the evaluation.
- Inquiries dependent upon a particular cultural competence, or specialized expertise in another area, such as substance abuse, will require someone with that competence or expertise.

Be Specific about the Information You Need

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

- any facts that would trigger a statutory presumption or specific statutory obligations;
- incidents of physical violence, sexual abuse, threats, stalking, or intimidation;
- destruction of property or abuse of pets or threats to do so;
- threats of homicide, suicide, serious bodily injury, or child abduction;
- unprovoked behaviors designed to make a parent fearful for the children's safety or fearful that the children will be abducted;
- patterns of coercive or controlling behavior, including emotionally abusive behavior; inappropriately limiting access to finances, education, or employment; and isolation from friends or family;
- behaviors that appear designed to, or likely to, undermine a parent's relationship with the children or capacity to parent effectively;
- the exposure of children to incidents of physical violence, sexual abuse, threats, stalking, or intimidation; ✱
- the impact of all these behaviors on each parent, each child, and the relationship between each parent and each child; ✱
- any specific cultural context that is relevant to the inquiry;
- a parent's immigration status used as a means to maintain coercive control over that parent;
- each parent's history of meeting each child's needs;
- the current situation and needs of each child;
- the nature of the communication between the parents;
- the record of any criminal or civil legal proceeding or police involvement; and
- short- and long-term safety concerns raised by the behavior of a parent. ✱

(See also Card I, Side 1, FACTORS, and Card I, Side 2, RED FLAGS.)

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

Continued on Card IIA

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IIA

Articulate Expected Sources of Information

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

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

(See Card III, Side I, READ THE REPORT CRITICALLY)

Communicate Expectations about Any Information-Gathering Procedures and Safety Practices

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

Evaluators should:

- make initial contact with each party separately;
- reflect the safety needs of each family member in any guidelines for further contacts with both the adult parties and the children;
- respect the terms of existing restraining/protection orders;
- help unrepresented litigants understand the evaluation process, the risks of disclosing information that may be shared with the other party, and the risks of not disclosing information;
- advise the parties of an evaluator's duty to report suspected child abuse;
- whenever possible avoid identifying one party as the source of negative information about the other;
- warn the party at risk about disclosure of information in advance, if it becomes essential to share information with one party that may put the other at risk; ✱
- avoid attributing direct quotes to children; and
- use specialized techniques and understanding to obtain and interpret information from children. ✱

Frame the Process

We propose that your order for a custody evaluation specifically include:

- the timeline with which you expect the evaluator and the parties or their attorneys to comply;
- the respective obligations of the parties, their attorneys, and the evaluator with respect to the completion of the evaluation;
- upon notice and opportunity to be heard, an order to produce records available to the courts but not directly available to the parties or their attorneys, including;
  - child protective services reports; and
  - criminal or court activity records;
- the assignment of costs of the evaluation and the costs of the parties' participation in the evaluation;
- the scope and purpose of the evaluation or investigation (you may want to invite input into the scope and purpose of the evaluation or investigation from the parties and their attorneys); and
- the specific questions you want answered in order to expedite the inquiry, to enhance the parties' safety and court efficiency, and to inform your decisions.

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

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Define the Obligations of the Parties

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

A. The parties shall:

- provide information as requested and appropriate;
- sign requested consents or waivers after full consideration, and upon advice of counsel if represented, of the implications and advisability of waiving any privilege involved (make sure the parties have access to information in their language or to qualified translators, or that proper attenion is given to a party's literacy); ✱
- make themselves available to the evaluator; and
- provide the evaluator with access to their children.

B. The attorneys shall:

- participate in defining the proposed scope and purpose of the evaluation or investigation;
- assist their clients in fulfilling their responsibilities, ensuring that they understand what information is being sought and from which sources;
- provide information and documentary material to the evaluator in an organized and timely fashion as authorized by their client or as directed by the court; and
- advise their clients about what information may be disclosed to the other party and what information may otherwise be placed in the public record of the case.

C. The evaluator shall:

- make the safety of the parties and their children a priority at every stage of the process;
- accept the appointment only if qualified;
- accept the appointment only if unaffected by any conflict of interest;
- refrain from engaging in any conflicting professional relationship with anyone involved in the case after accepting the appointment; ✱
- follow the terms of his or her licensure and any appropriate professional guidelines and standards;
- conduct the inquiry giving full consideration to the claims and concerns of each party;
- conduct the inquiry in a timely fashion;
- avoid creating situations that may violate the provisions of a restraining/protection order;
- with the permission of the court, draw on any necessary specialized resources; and
- refrain from negotiating a resolution of the matter, unless specifically instructed to do so by the court and with the knowledge of the parties and their attorneys.

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

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

Card IIA Side 2

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III

Safety First

Determine Whether to Admit the Report into Evidence

Read the Report Critically

(Note: The factors listed in this section could be used to determine the admissibility requirements under your state's rules of evidence.)

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

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

Reading the Report

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

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

- to schedule a hearing pursuant to your state's laws and issue a restraining/protection order, or make a referral for safety planning or other needed services; or
- to involve child protective services in accordance with your state's reporting laws if you conclude from the report that a child is at imminent specific risk of physical or emotional harm.

It is important to remember that custody evaluation reports are a form of evidence, either written or oral, which requires an admissibility determination. Check your state's rules of evidence. See also the Federal Rules of Evidence (FRE): **FRE 401 and 402 (relevance), FRE 403 (probative value), and FRE 702 (experts)**.
(See supplemental material, PARENT ALIENATION AND THE *DAUBERT* STANDARD, p. 24.)

From the report, you should be able to determine whether the evaluator:

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

To assesss the weight to give to the report, you will need to determine whether the report contains sufficient information for you:

- **to rule on potential evidentiary concerns raised by the report:**
  - Was the information obtained directly from individuals interviewed, documents examined, or observations made by the evaluator? Is the source of each piece of information identified?
  - Is any information vulnerable to challenge because it was obtained "second-hand"? If so, is that indicated in the report?
  - Is the information in the report relevant to the legal issues raised by the case?

- **to assess the thoroughness of the factual investigation:** ✶
  - Have relevant collateral sources been interviewed?
  - Have relevant written records been reviewed?
  - Have important facts been corroborated?

- **to assess the accuracy of information from the parties and their children:**
  - Have the safety needs of each member of the family been recognized?
  - Has the evaluator avoided creating opportunities for intimidation and coercion?

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Read the Report Critically (cont.)

- **to determine whether the factual investigation has been even-handed:**
  - Can you determine if fair consideration was given to the claims and concerns of each of the parties, including giving each the opportunity to respond to allegations made by the other?
  - Does the report assess the strengths and deficiencies or vulnerabilities of each parent and each parent/child relationship?
  - Does the report consider the particular cultural context of the parties' parenting and the relationship between the parties and their children?
  - Has the evaluator explored all possible interpretations of the information?

- **to identify what information was not available, and why:**
  - Does the report allow you to determine the extent to which missing information limits the value of the evaluator's conclusions or recommendations?

- **to determine, in cases where the evaluator has conducted an investigation and analyzed, interpreted, or drawn conclusions from the data:**
  - that the evaluator has fully reported the underlying data, with each source identified and relevant documents or records attached?
  - that the evaluator has clearly distinguished between the facts and the analysis, interpretation, or conclusions he or she is deriving from them?
  - that the underlying data support the analyses, interpretations, or conclusions from which they are drawn?

- **to determine, in cases where an evaluator employs specialized mental health expertise:**
  - that the evaluator has the appropriate training, qualifications, and experience to employ any specialized data-gathering procedures used?
  - that any psychological tests administered offer relevant information and that the evaluator satisfactorily explained their relevance?
  - that the tests employed have received appropriate professional endorsement for use in this context (understanding that psychological testing is generally not appropriate in domestic violence situations)?
  - that the evaluator has the requisite mental health expertise to analyze, interpret and draw conclusions from the available data?

(For more information on reading the report critically, see the supplemental information regarding confirmatory bias, page 25; see also Card IIA, Side 1, SOURCES OF INFORMATION, and corresponding supplemental material, page 19-21.)

Assess the Recommendations

If domestic violence is identified as an issue, you will need to determine whether a qualified evaluator: ✶

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

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

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FLORIDA'S FOUR ORDERS OF PROTECTION AGAINST VIOLENCE: DISTINGUISHING THE DIFFERENCE

by Judge Amy Karan and Lauren Lazarus

As of July 1, 2003, Florida law provides for four distinct types of orders of protection against violence, also commonly known, locally and nationally, as *restraining orders*, and in Florida, legally called *injunctions.* These orders protect a person from domestic, repeat, dating, and sexual violence. This article surveys the differences between these four types of injunctive relief, and serves as a guide for practitioners to navigate their way through the four distinct causes of action. It is intended to be a primer on the law in this area rather than an in depth analysis.

All four types of injunctions are civil proceedings, and the Florida Family Law Rules of Procedure and the Florida Rules of Evidence apply.[1] The Florida Supreme Court has promulgated forms, some of which are mandatory. In order to ensure statewide uniformity and recognition by law enforcement, all courts are required to use the Supreme Court's temporary injunction and final judgment of injunction forms.[2] The forms, including petitions, various motions and orders are available online for viewing, printing, and/or downloading at www.flcourts.org.

When filing a case, it is advisable to use the Florida Family Law Rules version of the petition, track the statutory language, or contact your clerk's office to obtain a copy of the version in use in your county. All filing and service fees have been eliminated as of July 1, 2003.[3]

When determining which cause of action is appropriate the practitioner must first consider standing to file which is based solely upon the relationship between the parties.

Once a petition has been filed, it is presented to a judge to consider whether an ex parte temporary injunction, valid for up to 15 days, should be granted.[4] Florida law only requires the court to review the four corners of the petition to determine whether there appears to be "an immediate and present danger of violence," the standard for issuance of temporary injunctions.[5] No police reports, photographs of injuries, or other supporting evidence need be presented.

If a temporary injunction is issued, a full evidentiary hearing must be scheduled within the 15-day period. The court may grant a continuance of the hearing for an additional 15 days, for good cause shown by either party, which includes an extension to obtain service of process.[6]

If the ex parte temporary injunction is denied because the court finds no appearance of an immediate and present danger, a final hearing must be granted. If the temporary injunction is denied because the petition is filed under the incorrect statute, a motion to amend to the correct statute should be filed. At the final hearing, the petitioner must prove the case by a preponderance of the evidence. As with the temporary injunction, no supporting

documentation is required by law, although all admissible evidence should be presented.

"Final judgments" for protection against violence, commonly known as "permanent injunctions," remain in effect until modified or dissolved by the court. Therefore, at the court's discretion, the injunction may be indefinite or expire on a date certain. Petitioners should request the duration of the injunction they are seeking at the time of final hearing.

Injunctions may be extended beyond their expiration date, provided the request to extend is filed prior to actual expiration. In determining whether the injunction should be extended, the occurrence of new violence is not required. The court may consider the circumstances leading to the imposition of the original injunction, as well as subsequent events that may cause the petitioner to have continuing reasonable fear that violence is likely to recur in the future.[7]

When determining which cause of action is appropriate, the practitioner must first consider standing to file which is based solely upon the relationship between the parties. The four types of injunctions, the required standing, the elements of each cause of action, and the available relief will be discussed separately.

DOMESTIC VIOLENCE

Sections 741.28 through 741.31, Florida Statutes, define domestic violence, create a cause of action for an injunction for protection against domestic violence, outline the relief available and set forth the violations that constitute crimes. Ch. 741 is the exclusive civil method to obtain protection against domestic violence.[8]

"Domestic violence" is defined by §741.28, Florida Statutes, as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family household member by another.

Standing to file is conferred upon family or household members, which are defined as: spouses; former spouses; persons related by blood or marriage (including minors);[9] any person who is or was residing within a single dwelling with petitioner as if a family;[10] or a person with whom the petitioner has a child in common (regardless of marriage or cohabitation).

The petition may be filed in the circuit where the petitioner is currently or temporarily residing, where the respondent resides, or where the domestic violence occurred.[11] This allows a victim of violence, who has fled their home county, to obtain protection in their county of temporary residence without having to return to the site of the potential danger.

The court may issue an ex parte temporary injunction if the required relationship exists and the court finds that there is an immediate and present danger of domestic violence. The petitioner must plead and prove he or she has been a victim of domestic violence or that there is reasonable cause to believe he or she is in imminent danger of becoming a victim. Note that the

statute is phrased in the disjunctive and only one of the two criteria need be satisfied: petitioner *has been* a victim, or has *reasonable fear* of imminent violence.[12]

When determining whether an immediate and present danger exists, the court considers the totality of the circumstances. In 2002, the legislature detailed 10 specific factors for the court to take into account. These are indicators of elevated danger and include acts or threats of violence; attempts to harm petitioner, family members or close associates; restraining petitioner from leaving the home or contacting police; prior orders of protection; injuring or killing a family pet; threats to use a gun or knife; previous criminal history; threats to kidnap or harm petitioner's children; and destruction of personal property.[13]

If the court enters an ex parte temporary injunction, the court may award the following requested relief in addition to the standard injunctions against acts of violence and "the no contact within 500 feet" provisions: exclusive use of a shared dwelling (regardless of title); exclusion of the respondent from petitioner's residence, place of employment, school, or other designated places frequented by petitioner, family, or household members; temporary custody of minor children; and temporary surrender of firearms and ammunition.[14]

If the court awards exclusive use of a shared home, provisions will be made for the respondent to retrieve items of personal health and hygiene, tools of the trade, along with other property that the parties may agree on. The respondent will be allowed to return to the premises to retrieve these items at a designated time, in the presence of law enforcement, who will normally stand by for a short period of time (usually 30 minutes or less). In a Ch. 741 proceeding, the court has no authority to make any equitable distribution of property. All disputed matters regarding the division or distribution of property must be brought before the court in a Ch. 61 or other appropriate proceeding.

The domestic violence injunction statute specifically prohibits the entry of any form of "mutual" injunctions. Separate injunctions may be issued under individual and distinct case numbers, in circumstances where each party files for an order of protection, and pleads and proves sufficient facts to warrant the entry of an order.[15]

Violations of the injunction by the respondent, such as refusing to vacate a shared dwelling; returning to the shared dwelling; coming within 500 feet of petitioner's home, place of employment, or other designated place; telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly; committing any act of domestic violence against the petitioner; and/or having any firearms in respondent's possession are first degree criminal misdemeanors.[16] Other violations, such as failure to pay ordered support; failing to attend the court ordered counseling; or violation of visitation orders may result in contempt of court charges. Certain violations of the injunction, such as intentionally crossing a state line to violate an injunction; causing an intimate partner to cross state lines by force or fraud and causing bodily injury to that person in violation of an injunction; and interstate stalking are also crimes under the Federal Violence Against Women Act (VAWA).[17] Even if the petitioner, or a third party, invites the respondent to come to the residence, or otherwise into contact with the

petitioner, it is a violation of the injunction. However, petitioners who initiate contact with the respondent cannot be charged with violating the injunction. If petitioner makes contact, the respondent should file a motion to dissolve the injunction or dismiss the case, although it is not always grounds for dismissal.

As of July 1, 2003, final hearings for injunctions against domestic violence must be recorded at the court's expense. This eliminates the necessity for bringing a court reporter to the final hearing. The notice of hearing will set forth what type of recording the court provides.[18]

The injunctive relief which may be awarded in the permanent injunction against domestic violence include the same provisions for protection against violence and include injunctions against contact and acts of violence, award of temporary visitation;[19] child support;[20] and spousal support; ordering the respondent to attend a certified batterers' intervention program,[21] parenting classes, substance abuse or other counseling; and a mandatory prohibition against possession of firearms and ammunition. Both federal and Florida law make it a crime for a respondent to possess any firearms or ammunition while subject to a qualifying order of protection against domestic violence.[22] Surrender of all personal firearms is mandatory, although law enforcement officers, as defined by §943.10(14), Florida Statutes, may keep their service weapons while on official duty unless otherwise prohibited by the employing law enforcement agency.[23]

There is no statutory authority for an award of attorneys' fees in a Ch. 741 injunction proceeding. Neither trial nor appellate fees may be awarded under any theory, including §57.105, Florida Statutes.[24]

While orders entered in a Ch. 61 proceeding take priority over those entered in an injunction action,[25] the circuits have varying procedures regarding where the injunction case is handled when there is a concurrent domestic relations case. Each circuit should have an administrative order on the issue, or it should be explained in the circuit's unified family court plan. The entry of a final judgment of dissolution of marriage does not automatically result in the dismissal of an injunction.[26] Similarly, if there is a pending temporary injunction against domestic violence, it is error for the court to dismiss the action simply because there is a pending dissolution of marriage action.[27]

Florida injunctions are enforceable in all counties of the state as well as nationwide. Similarly, a qualifying final order of protection against domestic violence issued by a court of a foreign state, must be accorded full faith and credit by the courts of Florida and enforced by law enforcement as if they were Florida court orders.[28]

REPEAT VIOLENCE

A petitioner who does not have a "domestic relationship" as defined in Ch. 741 may be eligible to obtain an injunction for protection under the repeat violence statute.[29] Since the enactment of laws providing for protection against dating and sexual violence, repeat violence cases have become mostly love triangle cases (new girlfriend vs. old girlfriend, former husband vs. new husband, etc.), employer-employee and co-worker relationships, schoolmates, neighborhood disputes, and roommates who do not have a dating or intimate relationship.

Any person who is the victim of repeat violence, or the parent or legal guardian of a minor child living at home who is the victim of repeat violence, has standing to file for an injunction against repeat violence.[30]

In repeat violence cases, the petitioner must plead and prove he or she has been the victim of two incidents of violence, or stalking. Violence is defined as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment or any criminal offense resulting in physical injury or death. One of the incidents of violence or stalking must have occurred within six months of the filing of the petition and be directed against the petitioner or petitioner's immediate family member.[31]

The standard for relief here is much different than that in domestic violence cases. In domestic violence cases, no acts of violence need have occurred prior to the filing if petitioner has a reasonable fear that domestic violence is imminent. In repeat violence cases, not only must the violence have already occurred, there must be two acts of violence or a stalking in order for relief to be warranted. No matter how egregious the violence may be, if it is simply one act the petition will fail.[32]

The following circumstances were found insufficient for issuance of repeat violence injunctions: telephone threats alone;[33] receiving unwanted letters and flowers;[34] nonthreatening e-mails, phone messages, chance encounters at restaurants, and leaving notes, cards, and a rose on petitioner's doorstep, even after petitioner had clearly indicated she wanted no further contact. [35]

On the other hand, repeated videotaping of a neighbor constituted stalking for purposes of the issuance of a repeat violence injunction,[36] and barking dogs coupled with threats were found sufficient where the petitioner was substantially and unreasonably disturbed.[37]

The court may award the following relief in a repeat violence injunction: injunctions from committing acts of violence ordering the respondent to appropriate counseling, and such other relief necessary for the protection of the petitioner.[38]

There is no requirement that the court record the final hearing in any of the Ch. 784 injunction proceedings (repeat, dating or sexual violence), so counsel should bring a court reporter if a transcript is desired.

The firearms prohibitions do not apply in repeat violence injunctions. However, the respondent may be required to surrender firearms if the court finds it necessary to protect the petitioner.[39]

DATING VIOLENCE

In domestic violence cases, no acts of violence need have occurred prior to the filing if petitioner has a reasonable fear that domestic violence is imminent.

The legislature created a cause of action for protection against dating violence in 2002. Any person who is the victim of dating violence, or the parent or legal guardian of a minor child living at home who is the victim of dating violence, has standing to file for an injunction under this section.[40]

"Dating violence" means violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature.[41] Despite the fact that the cause of action for an injunction against dating violence is contained in Ch. 784, the law provides that persons in dating relationships must meet the same statutory criteria as is required for issuance of an injunction against domestic violence. That is, the petitioner is a victim of dating violence or has a reasonable belief that violence is imminent. No acts of violence need have occurred prior to filing.[42] Because the dynamics of a dating relationship are the same as those in traditional Ch. 741 "domestic" relationships, the standard for protection is the same.

There are three factors for the court to consider in determining whether a "dating relationship" exists: the relationship existed within the past six months; the relationship was characterized by the expectation of affection or sexual involvement between the parties; and the frequency and type of interaction was that the persons were involved over time and on a continuous basis during the course of the relationship.[43] A dating relationship does not exist in circumstances where contact between the parties has been that of a casual acquaintance or ordinary fraternization in a business or social context.[44]

While the standard for issuance of the injunction is the same as the domestic violence statute, the available injunctive relief mirrors that in repeat violence cases. The court may award injunctions against acts of violence, referrals to appropriate counseling, and such other orders necessary to protect the petitioner.

As of the date of this writing, there are no reported cases construing the dating violence statute.

SEXUAL VIOLENCE

Effective July 1, 2003, "The Victim's Freedom Act" became law, and created a cause of action under Ch. 784 for an injunction against sexual violence. [45]

"Sexual violence" is defined as one incident of sexual battery; a lewd or lascivious act committed upon, or in the presence of, a person younger than 16; luring or enticing a child's sexual performance; or any other forcible felony where a sexual act is committed or attempted.[46]

A person who is the victim of an act of sexual violence, or the parent or legal guardian of a minor child living at home who is the victim of an act of sexual violence, has standing to file. The petitioner must have reported the incident to law enforcement and be cooperating in any criminal proceeding against the respondent; or, if the respondent was sentenced to a term of imprisonment for the act of sexual violence, the sentence must have expired, or be due to expire within 90 days.[47]

If the respondent is incarcerated, the temporary injunction is effective for 15 days following release from incarceration rather than 15 days from the date of issuance as with the other protective injunctions. The final hearing must be set prior to expiration of the temporary injunction.[48]

Authority to serve an injunction for protection against sexual violence upon an incarcerated respondent is shifted from a law enforcement officer to a state prison correctional officer. If the respondent is not served before release, the copies will be forwarded to the sheriff of the county where the offender was released.[49]

This category of protection order was created to provide protection for persons, including minors, who are victims of one act of sexual violence but have no domestic or dating relationship with the perpetrator. Previously, the only remedy available was the repeat violence statute, where two acts are required. This new enactment closes a gap in protection for sex crime victims. The relief available is the same as in repeat violence cases. This law is too new for any case law analysis.

CONCLUSION

The authors hope this article has distinguished the differences between Florida's four orders of protection against violence. The practitioner will best serve the client by becoming familiar with the four types of injunctions and the nuances of standing and proof necessary to warrant relief in each cause of action. The practitioner can then appropriately apply for, defend against, and have a reasonable expectation of prevailing in these important and often dangerous matters.

[1] Fla. Fam. L. R. P. 12.010; Fla. Stat. §90.103.
[2] Fla. Fam. L. R. P. 12.610 (C)(2)(A); Florida Family Law Forms 12.980(d)(1), 12.980(e)(1), 12.980(e)(2), 12.980 (l), 12.980(m), 12.980(p) and 12.980(q).
[3] Fla. Stat. §§741.30(2)(a); §784.046(3).
[4] Fla. Stat. §§741.30(5)(b), 784.046(6)(c).
[5] Fla. Stat. §§741.30(5)(b), 784.046(6)(b).

[6] Fla. Stat. §§741.30(5)(c), 784.046 (6)(c).
[7] *Spiegel v. Haas*, 697 So. 2d 222 (Fla. 3d D.C.A. 1997); *Patterson v. Simonek*, 709 So. 2d 189 (Fla.3d D.C.A. 1998).
[8] *Orth v. Orndorff,* 835 So. 2d 1283 (Fla. 2d D.C.A. 2003); *Campbell v. Campbell*, 584 So. 2d 125 (Fla. 4th D.C.A. 1991).
[9] Children may file against their parents, however no custody, visitation, or support issues may be addressed. *Rinas v. Rinas* , 847 So. 2d 555 (Fla. 5th D.C.A. 2003); *Rosenthal v. Roth*, 816 So. 2d 667 (Fla. 3d D.C.A. 2002) (brother and sister who had not lived together for over 40 years qualified under the plain meaning of this section).
[10] *Slovenski v. Wright*, 849 So. 2d 349 (Fla. 2d D.C.A. 2003) (overnight visits are insufficient to establish "residing within a single dwelling").
[11] Fla. Stat. §741.30(1)(j) (notwithstanding any provision of Fla. Stat. ch. 47).
[12] Fla. Stat. §741.30(5)(a).
[13] Fla. Stat. §741.30(6)(b).
[14] Fla. Stat. §741.30 (5)(a). At this juncture, the surrender of firearms is discretionary with the court; however, surrender of firearms pending final hearing is usually ordered to ensure safety.
[15] Fla. Stat. §741.30(i); *Martin v. Hickey*, 733 So. 2d 600 (Fla. 3d D.C.A. 1999); *Hixson v. Hixson*, 698 So. 2d 639 (Fla. 4th D.C.A. 1997); *Brooks v. Barrett*, 694 So. 2d 38 (Fla. 1st D.C.A. 1997).
[16] Fla. Stat. §741.31(4).
[17] 18 U.S.C. §2261-2262.
[18] Fla. Stat. §741.30(6)(h). In most courts only audiotape recordings are made by the court. If parties desire transcripts, they must arrange for the transcription of the audiotape at their own expense.
[19] Fla. Stat. §741.30(6)(a)(3). Awards of temporary custody and temporary visitation rights are made on the same basis as provided in Fla. Stat. ch. 61. Pursuant to Fla. Stat. §61.13(2)(b)2, evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence as defined in §741.28 and ch. 775, creates a rebuttable presumption of detriment to the child.
[20] Fla. Stat. §741.30(6)(a)(4). Temporary child support is to be awarded on the same basis as provided in Fla. Stat. ch. 61.
[21] Fla. Stat. §741.30(6)(e). The court must order the respondent to attend a certified batterer's intervention program in three instances: (1) the respondent has willfully violated the temporary injunction; (2) the respondent has been convicted of, had adjudication withheld, or plead no contest to a crime involving violence or a threat of violence; (3) the respondent has had at any time a prior injunction for protection entered after a hearing with notice; all other referrals are at the court's discretion.
[22] The Gun Control Act, 18 U.S.C. §922(g)(8); Fla. Stat. §741.30(6)(g).
[23] Fla. Stat. §741.31(4)(b)(2). It is the intent of the legislature that the disabilities regarding possession of firearms and ammunition are consistent with federal law. 18 U.S.C. §925 provides for the "official use" exemption for law enforcement officers and military personnel.
[24] *Cisneros v. Cisneros*, 831 So. 2d (Fla. 3d D.C.A. 2002); *Lewis v. Lewis*, 689 So. 2d (Fla. 1st D.C.A. 1997); *Baumgartner v. Baumgartner*, 693 So. 2d 84 (Fla. 2d D.C.A. 1997); *Belmont v. Belmont*, 761 So. 2d 406 (Fla. 2d D.C.A. 2000).
[25] Fla. Stat. §741.30(1)(c).
[26] *Farr v. Farr*, 840 So. 2d 1166 (Fla. 2d D.C.A. 2003).
[27] *Kniph v. Kniph,* 777 So. 2d 437 (Fla. 1st D.C.A. 2001); *White v. Cannon*, 778 So. 2d 467 (Fla. 3d D.C.A. 2001).
[28] Fla. Stat. §741.30(6)(d)(1); 18 U.S.C. §2265.
[29] Fla. Stat. §784.046.
[30] Fla. Stat. §784.046 (2)(a).
[31] Fla. Stat. §784.046(1)(b).
[32] *Buerster v. Fermin,* 844 So. 2d 804 (Fla. 4th D.C.A. 2003) (although respondent threatened, yelled, and screamed at the petitioner for two years, petitioner's testimony established only one act of violence); *Long v. Edmundson*, 827 So. 2d 365 (Fla. 2d D.C.A. 2002) (only qualifying incident was one in which respondent waved a gun and pushed petitioner; threat on petitioner's answering machine did not qualify as second incident); *Darrow v. Moschella,* 805 So.2d 1068 (Fla. 4th D.C.A. 2002) (several physical altercations on same day with brief pause in between found insufficient).
[33] *Gianni v. Kerrigan*, 836 So. 2d 1106 (Fla. 2d D.C.A. 2003); *Johnson v. Brooks,* 567 So. 2d 34 (Fla. 1st D.C.A. 1990).
[34] *McMath v. Biernacki,* 776 So. 2d 1039 (Fla. 1st D.C.A. 2001).

[35] *Ravitch v. Whelan,* 28 Fla. L. Weekly D1818a (Fla. 1st D.C.A. August 1, 2003).
[36] *Goosen v. Walker*, 714 So. 2d 1149 (Fla. 4th D.C.A. 1998).
[37] *Rae v. Flynn,* 690 So. 2d 1341(Fla. 3d D.C.A. 1997).
[38] Fla. Stat. §784.046(7). Note that all referrals to counseling under ch. 784 are discretionary.
[39] *Langner v. Cox,* 826 So. 2d 475(Fla. 1st D.C.A. 2002).
[40] Fla. Stat. §784.046(2)(b).
[41] Fla. Stat. §784.046(1)(d).
[42] Fla. Stat. §784.046(2)(b).
[43] Fla. Stat. §784.046(1)(d)(1)-(3).
[44] Fla. Stat. §784.046(1)(d)(3).
[45] House Bill 561, Fla. 2003.
[46] Fla. Stat. §784.046(1)(c).
[47] Fla. Stat. §784.046(2)(c).
[48] Fla. Stat. §784.046(6)(c).
[49] Fla. Stat. §784.046(8)(a)2.

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This column is submitted on behalf of the Family Law Section, Richard D. West, chair, and Michele K. Cummings and Jeffrey Weissman, editors.

DATING VIOLENCE CHECKLIST

This project was sponsored by Grant No. 2007-WF-AX-0062 awarded by the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice or the Florida Department of Children and Families.

DEFINITION

☐ Violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on the consideration of the following factors:

1. A dating relationship must have existed in the past 6 months;
2. The nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and
3. The frequency and type of interaction between the persons involved in the relationship must have included that the persons have been involved over time and on a continuous basis during the course of the relationship.

☐ The term does not include violence in a casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context. §784.046(1)(d), Florida Statutes.

STANDING

☐ Any person who is the victim of dating violence <u>and</u> has reasonable cause to believe he or she is in imminent danger of becoming the victim of another act of dating violence, <u>or</u> any person who has reasonable cause to believe he or she is in imminent danger of becoming the victim of an act of dating violence, <u>or</u> the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against dating violence on behalf of that minor child, has standing in the circuit court to file a sworn petition for an injunction for protection against dating violence. §784.046(2)(b), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf <u>against a respondent who is **not** the minor child's parent, stepparent, or legal guardian</u> the following must be met:

(a) ___The minor child must also be living at home with the parent or legal guardian, who is filing as the petitioner on their behalf, and

(b) ___The parent or legal guardian must have reasonable cause to believe that the minor child is a victim of dating violence. §784.046(4)(a)(2), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a child's behalf the following requirements must also be met:

(a) ___The minor child must be living at home with the parent or legal guardian, who is filing as the petitioner on the child's behalf, <u>and</u>

(b) ___The parent or legal guardian must have been an eyewitness to, or have direct physical evidence or affidavits from eyewitnesses of, the specific facts and circumstances of the violence. §784.046(4)(a)(1), Florida Statutes.

☐ Petitioner must allege the incidents of dating violence and shall include the specific facts and circumstances that form the basis upon which relief is sought.
§784.046(4)(a), Florida Statutes.

☐ No bond shall be required for entry of an injunction. §784.046(3)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).

☐ Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3).

☐ The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(2)(B).

TEMPORARY INJUNCTIONS

☐ Determine whether it appears to the court that an immediate and present danger of dating violence exists. §784.046(6)(a), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(1)(A).

☐ The court shall only consider the verified pleadings/affidavits, unless the respondent appears at the hearing or has received reasonable notice of the hearing.
§784.046(6)(b), Florida Statutes.

☐ Amended petitions and affidavits must be considered by the court as if originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).

☐ A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(2).

☐ When the only ground for denial is that there does not exist "an appearance of an immediate and present danger of dating violence," the ex parte temporary injunction may be denied but the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(1).

☐ If the ex parte (temporary) injunction is granted:

- Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

- A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §784.046(6)(c), Florida Statutes; Fla. Fam. L. R. P. 12.610(c)(4).
- The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good cause shown by any party, or upon its own motion for good cause, including failure to obtain service. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

POSSIBLE RELIEF GRANTED WITH TEMPORARY INJUNCTIONS

☐ Restrain the respondent from committing any act of violence. §784.046(7)(a), Florida Statutes.

☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(o).

☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(o).

☐ Restrain respondent from knowingly coming within 100 feet of the petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(o).

☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(o).

☐ Restrain respondent from going to, in, or within 500 feet of:
- the petitioner's current or future residence
- the petitioner's current or any subsequent place of employment or school
- the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(k).

FINAL INJUNCTIONS

☐ No electronic or audio tape recording or court reporting services are provided by the court in dating violence cases. Florida Supreme Court Approved Family Law Forms 12.980(b)(1), 12.980(p).

☐ Upon notice and hearing, when it appears to the court that an immediate and present danger of violence exists, the court may grant such relief as the court deems proper, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7), Florida Statutes.

☐ If a final injunction is granted:
- Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rule of Procedure 12.610(c)(4)(B), Florida Supreme Court Approved Family Law Form 12.980(p).

- The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil and criminal remedies. §784.046(7)(c), Florida Statutes.
- Upon petition of the victim, the court may extend the injunction for successive periods or until further order of the court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

POSSIBLE RELIEF GRANTED with FINAL INJUNCTIONS

☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.

☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(p).

☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b) Florida Statutes, Florida Supreme Court Approved Family Law Form 12.980(p).

☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(p).

☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(p).

☐ Restrain respondent from going to, in, or within 500 feet of:
- the petitioner's current or future residence
- the petitioner's current or any subsequent place of employment or school
- the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(k).

REQUIREMENTS FOR TEMPORARY AND FINAL ORDERS

☐ The temporary and final judgment should indicate on its face that:
- The injunction is valid and enforceable in all counties of the State of Florida.
- Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
- The court had jurisdiction over the parties and matter.
- Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect that person's right to due process.
- The date respondent was served with the temporary or final order, if obtainable. §784.046(7)(d)(1-4), Florida Statutes.

MODIFICATIONS AND TERMINATION

- The petitioner or respondent may move the court to modify or vacate an injunction at any time. §784.046(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6).

ENFORCEMENT

☐ The Florida Department of Law Enforcement has established and maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic, dating, sexual, and repeat violence injunctions issued by the courts throughout the state. **The Department must have the respondent's name, race, sex and date of birth.** §784.046(8)(b), Florida Statutes.

☐ The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. §784.046(9)(a), Florida Statutes.

☐ If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).

☐ If the respondent is arrested under §901.15(6), Florida Statutes, for committing an act of repeat, dating or sexual violence in violation of an injunction for protection, the respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing. §784.046(9)(b), Florida Statutes.

FIRST DEGREE MISDEMEANOR

☐ A person who willfully violates a condition of pretrial release when the original arrest was for dating violence is guilty of a first degree misdemeanor. The offender must be held in custody until his or her first appearance. §784.046(15), Florida Statutes.

☐ A person who willfully violates an injunction for protection against dating violence issued pursuant to §784.046, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes, commits a misdemeanor of the first degree punishable as provided in §§775.082 or 775.083, Florida Statutes. §784.047, Florida Statutes.

SEXUAL VIOLENCE CHECKLIST

This project was sponsored by Grant No. 2007-WF-AX-0062 awarded by the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice or the Florida Department of Children and Families.

DEFINITION

☐ Any one incident of:

1. Sexual battery, as defined in chapter 794;
2. A lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age;
3. Luring or enticing a child, as described in chapter 787;
4. Sexual performance by a child, as described in chapter 827; or
5. Any other forcible felony wherein a sexual act is committed or attempted,

Any one of the incidents listed above meet the definition, *regardless of whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney*. §784.046(1)(c), Florida Statutes.

STANDING

☐ Any person who is the victim of sexual violence, OR

☐ The parent or legal guardian of a minor child who is the victim of sexual violence has standing in the circuit court to file a sworn petition for an injunction for protection against sexual violence on his or her own behalf or on behalf of the minor child if:

1. The petitioner (person who is the victim, or parent or guardian of the minor child victim) reported the sexual violence to law enforcement and is cooperating in any criminal proceeding against the respondent, regardless of whether criminal charges based on the sexual violence have been filed, reduced, or dismissed by the state attorney; or
2. The respondent who committed the sexual violence against the victim or minor child was sentenced to a term of imprisonment in state prison for the sexual violence and the respondent's term of imprisonment has expired or is due to expire within 90 days following the date the petition is filed. §784.046(2)(c), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf against a respondent who is **not** the minor child's parent, stepparent, or legal guardian the following must be met:

(a) ___The minor child must also be living at home with the parent or legal guardian, who is filing as the petitioner on their behalf, and

(b) ___The parent or legal guardian must have reasonable cause to believe that the minor child is a victim of sexual violence. § 784.046(4)(a)(2), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a child's behalf against a parent, stepparent, or legal guardian of the minor child the following requirements must also be met:

(a) ___The minor child must be living at home with the parent or legal guardian who is filing as the petitioner on the child's behalf and

(b) ___The parent or legal guardian must have been an eyewitness to, or have direct physical evidence or affidavits from eyewitnesses of, the specific facts and circumstances of the violence. §784.046(4)(a)(1), Florida Statutes.

☐ Petitioner must allege the incidents of sexual violence and shall include the specific facts and circumstances that form the basis upon which relief is sought. §784.046(4)(a), Florida Statutes.

☐ No bond shall be required for entry of an injunction. §784.046(3)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).

☐ Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3).

☐ The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(2)(B).

TEMPORARY INJUNCTIONS

☐ Determine whether it appears to the court that an immediate and present danger of sexual violence exists. §784.046(6)(a), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(1)(A).

☐ The court can only consider the verified pleadings/affidavits unless the respondent appears at the hearing or has received reasonable notice of the hearing. §784.046(6)(b), Florida Statutes.

☐ Amended petitions and affidavits must be considered by the court as if originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).

☐ A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(2).

☐ When the only ground for denial is that there does not exist "an appearance of an immediate and present danger of sexual violence," the ex parte temporary injunction may be denied but the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(1).

☐ If the ex parte (temporary) injunction is granted:

- Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. § 784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).
- If the respondent who committed the sexual violence against the victim or minor child was sentenced to a term of imprisonment in state prison for the sexual violence, then the ex parte temporary injunction shall be effective for 15 days following the date the respondent is released from incarceration. §784.046(6)(c), Florida Statutes.
- A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).
- The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good cause shown by any party, or upon its own motion for good cause, including failure to obtain service. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

POSSIBLE RELIEF GRANTED with TEMPORARY INJUNCTIONS

☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.

☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(r).

☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(r).

☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(r).

☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(r).

☐ Restrain respondent from going to, in, or within 500 feet of:
- the petitioner's current or future residence
- the petitioner's current or any subsequent place of employment or school
- the places frequented regularly by the petitioner and/or petitioner's minor child(ren).

Florida Supreme Court Approved Family Law Form 12.980(k).

FINAL INJUNCTIONS

☐ No electronic or audio tape recording or court reporting services are provided by the court in sexual violence cases. Florida Supreme Court Approved Family Law Forms 12.980(b)(1), 12.980(s).

☐ Upon notice and hearing, when it appears to the court that an immediate and present danger of violence exists, the court may grant such relief as the court deems proper, including

injunctions or directives to law enforcement agencies as provided in this section. §784.046(7), Florida Statutes.

☐ If a final injunction is granted:
- Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rule of Procedure 12.610(c)(4)(B), 12.980(s).
- The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil and criminal remedies. §784.046(7)(c).
- Upon petition of the victim, the court may extend the injunction for successive periods or until further order of the court. Broad discretion resides with the court to grant an extension after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

POSSIBLE RELIEF GRANTED with FINAL INJUNCTIONS

☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.

☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law From 12.980(s).

☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law From 12.980(s).

☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(s).

☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(s).

☐ Restrain respondent from going to, in, or within 500 feet of:
- the petitioner's current or future residence
- the petitioner's current or any subsequent place of employment or school
- the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(k).

REQUIREMENTS FOR TEMPORARY AND FINAL ORDERS

☐ The temporary and final judgment should indicate on its face that:
- The injunction is valid and enforceable in all counties of the State of Florida.
- Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
- The court had jurisdiction over the parties and matter.
- Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect the person's right to due process.

- The date respondent was served with the temporary or final order, if obtainable. §784.046(7)(d)(1-4), Florida Statutes.

MODIFICATIONS AND TERMINATION

☐ The petitioner or respondent may move the court to modify or vacate an injunction at any time. §784.046(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6).

ENFORCEMENT

☐ The Florida Department of Law Enforcement has established and maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic, dating, sexual, and repeat violence injunctions issued by the courts throughout the state. **The Department must have the respondent's name, race, sex and date of birth.** §784.046(8)(b), Florida Statutes.

☐ The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment or incarceration. §784.046(9)(a), Florida Statutes.

☐ If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).

☐ If the respondent is arrested upon §901.15(6), Florida Statutes, for committing an act of repeat, dating or sexual violence in violation of an injunction for protection, the respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing. §784.046(9)(b), Florida Statutes.

FIRST DEGREE MISDEMEANOR

A person who willfully violates an injunction for protection against sexual violence issued pursuant to §784.046, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes, commits a misdemeanor of the first degree punishable as provided in §775.082 or §775.083, Florida Statutes. §784.047, Florida Statutes.

REPEAT VIOLENCE CHECKLIST

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DEFINITION

☐ Two incidents of violence or stalking committed by the respondent, which are directed against the petitioner or the petitioner's immediate family member. §784.046(1)(b), Florida Statutes.

☐ One of the two incidents of violence or stalking must have been within 6 months of the filing of the petition. §784.046(1)(b), Florida Statutes.

STANDING

☐ Any person who is the victim of repeat violence <u>or</u> the parent or legal guardian of any minor child who is living at home and who seeks an injunction for protection against repeat violence on behalf of the minor child has standing in the circuit court to file a sworn petition for an injunction for protection against repeat violence. §784.046(2)(a), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf <u>against a respondent who is **not** the minor child's parent, stepparent, or legal guardian</u> the following must be met:

(a) ___The minor child must also be living at home with the parent or legal guardian, who is filing as the petitioner on their behalf, <u>and</u>

(b) ___The parent or legal guardian must have reasonable cause to believe that the minor child is a victim of repeat violence. §784.046(4)(a)(2), Florida Statutes.

Notice: In order for the parent or legal guardian to file on a minor child's behalf <u>against a parent, stepparent, or legal guardian of the minor child</u> the following requirements must also be met:

(a) ___The minor child must be living at home with the parent or legal guardian who is filing as the petitioner on the child's behalf <u>and</u>

(b) ___The parent or legal guardian must have been an eyewitness to, or have direct physical evidence or affidavits from eyewitnesses of, the specific facts and circumstances of the violence. §784.046(4)(a)(2), Florida Statutes.

☐ Petitioner must allege the incidents of repeat violence and shall include the specific facts and circumstances that form the basis upon which relief is sought. §784.046(4)(a), Florida Statutes.

☐ No bond shall be required for entry of an injunction. §784.046(3)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(2)(B).

☐ Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(3).

☐ The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. §784.046(5), Florida Statutes; Florida Family Law Rule of Procedure 12.610(b)(2)(B).

TEMPORARY INJUNCTIONS

☐ Determine whether it appears to the court that an immediate and present danger of repeat violence exists. §784.046(6)(a), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(1)(A).

☐ The court can only consider the verified pleadings/affidavits unless the respondent appears at the hearing or has received reasonable notice of the hearing.
§784.046(6)(b), Florida Statutes.

☐ Amended petitions and affidavits must be considered by the court as if originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).

☐ A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(2).

☐ When the only ground for denial is that there does not exist "an appearance of an immediate and present danger of repeat violence," the ex parte temporary injunction may be denied but the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. Florida Family Law Rule of Procedure 12.610(b)(3), Florida Supreme Court Approved Family Law Form 12.980(b)(1).

☐ If the ex parte (temporary) injunction is granted:

- Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

- A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

- The court may grant a continuance of the ex parte temporary injunction and the full hearing before or during a hearing, for good caused shown by any party, or upon its own motion for good cause, including failure to obtain service. §784.046(6)(c), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(4).

POSSIBLE RELIEF GRANTED with TEMPORARY INJUNCTIONS

☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.

☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(k).

☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes; Florida Supreme Court Approved Family Law Form 12.980(k).

☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(k).

☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(k).

☐ Restrain respondent from going to, in, or within 500 feet of:
- the petitioner's current or future residence
- the petitioner's current or any subsequent place of employment or school
- the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(k).

FINAL INJUNCTIONS

☐ No electronic or audio tape recording or court reporting services are provided by the court in repeat violence cases. Florida Supreme Court Approved Family Law Forms 12.980(b)(1), and 12.980(l).

☐ Upon notice and hearing, when it appears to the court that an immediate and present danger exists, the court may grant such relief as the court deems proper, including injunctions or directives to law enforcement agencies as provided in this section. § 784.046(7).

☐ If a final injunction is granted:
- Any relief granted shall be effective for a fixed period or until further order of the court. Florida Family Law Rule of Procedure 12.610(c)(4)(B), Florida Supreme Court Approved Family Law Form 12.980(l).
- The terms of the injunction shall remain in force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil and criminal remedies. §784.046(7)(c), Florida Statutes.
- Upon petition of the victim, the court may extend the injunction for successive periods or until further order of the court. Broad discretion resides with the court to grant an

extension after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

POSSIBLE RELIEF GRANTED with FINAL INJUNCTIONS

☐ Restrain the respondent from committing any acts of violence. §784.046(7)(a), Florida Statutes.

☐ Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Form 12.980(l).

☐ Order other relief as the court deems necessary for the protection of the petitioner, including injunctions or directives to law enforcement agencies as provided in this section. §784.046(7)(b), Florida Statutes, Florida Supreme Court Approved Family Law Form 12.980(l).

☐ Restrain respondent from knowingly coming within 100 feet of petitioner's automobile at any time. Florida Supreme Court Approved Family Law Form 12.980(l).

☐ Order respondent to not use or possess a firearm or ammunition and surrender any firearms and ammunition in respondent's possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Form 12.980(l).

☐ Restrain respondent from going to, in, or within 500 feet of:
- the petitioner's current or future residence
- the petitioner's current or any subsequent place of employment or school
- the places frequented regularly by the petitioner and/or petitioner's minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(k).

REQUIREMENTS FOR TEMPORARY AND FINAL ORDERS

☐ The temporary and final judgment should indicate on its face that:
- The injunction is valid and enforceable in all counties of the State of Florida.
- Law enforcement officers may use their arrest powers pursuant to §901.15(6), Florida Statutes, to enforce the terms of the injunction.
- The court had jurisdiction over the parties and matter.
- Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect that person's right to due process.
- The date respondent was served with the temporary or final order, if obtainable. §784.046(7)(d)(1-4), Florida Statutes.

MODIFICATIONS AND TERMINATION

☐ The petitioner or respondent may move the court to modify or vacate an injunction at any time. §784.046(10), Florida Statutes; Florida Family Law Rule of Procedure 12.610(c)(6).

ENFORCEMENT

☐ The Florida Department of Law Enforcement has established and maintains a Domestic, Dating, Sexual and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic, dating, sexual, and repeat violence injunctions issued by the courts throughout the state. **The Department must have the respondent's name, race, sex and date of birth.** §784.046(8)(b), Florida Statutes.

☐ The court shall enforce, through a civil or criminal contempt proceeding, a violation of injunction for protection. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment.
§784.046(9)(a), Florida Statutes.

☐ If the violation meets the statutory criteria, it may be prosecuted as a crime. Florida Family Law Rule of Procedure 12.610(c)(5).

☐ If the respondent is arrested under §901.15(6), Florida Statutes, for committing an act of repeat, dating or sexual violence in violation of an injunction for protection, the respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing. §784.046(9)(b), Florida Statutes.

FIRST DEGREE MISDEMEANOR

A person who willfully violates an injunction for protection against repeat violence issued pursuant to §784.046, Florida Statutes, or a foreign protection order accorded full faith and credit pursuant to §741.315, Florida Statutes, commits a misdemeanor of the first degree punishable as provided in §775.082, Florida Statutes, or §775.083, Florida Statutes. §784.047, Florida Statutes.

SUMMARY OF 2008 LEGISLATIVE SESSION

NOTE: Due to the changes described below, many of the forms utilized by the courts are in the process of being updated. Please visit www.flcourts.org for the most recent forms.

TOPIC	DESCRIPTION OF CHANGE
HB 313 Dating Violence	This bill is entitled the "Barwick-Ruschak Act", and added the requirements found in §741.29, F.S. regarding domestic violence to the dating violence statute. As a result, law enforcement officers who are investigating dating violence cases must now: a. provide victims notice of their legal rights and remedies b. provide the victim information about local domestic violence centers c. and include certain information in police reports. "Dating violence" is defined in §784.046 Florida Statutes as "violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature." The existence of a dating relationship is determined based on the consideration of the following factors: a. the relationship must have existed within the past 6 months; b. the nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and c. The frequency and type of interaction between the persons involved in the relationship must have included that the persons have been involved over time and on a continuous basis during the course of the relationship. The bill also creates a first degree misdemeanor for the willful violation of a condition of pretrial release when the original arrest was for dating violence and the offender must be held in custody until his or her first appearance. HB 313 also made conforming changes to §901.15(7), F.S., which permits a law enforcement officer to make a warrantless arrest when there is probable cause to believe that the person has committed an act of dating violence.
HB 489 Sexual Violence	Current law requires employers to grant victims of domestic violence leave for certain purposes, such as obtaining medical care and protective injunctions. This bill extends existing employment protection to victims of sexual violence. It requires employers with 50 or more employees to permit employees who have been employed for at least 3 months to request or take up to 3 working days of leave with or without pay within a 12-month period, if the employee is a victim of sexual violence and the leave is sought to: - Seek an injunction for protection against sexual violence; - Obtain medical care or mental health counseling; - Obtain services from a victim-services organization; - Make the employee's home secure or to seek new housing; or - Seek legal assistance to address issues arising from the act of sexual violence and to attend and prepare for court-related proceedings arising from the act of sexual violence.

TOPIC	DESCRIPTION OF CHANGE
	The bill includes the following limitations on an employee seeking leave: - Unless waived by the employer, employees must use all other available leave before using this leave; - Employees must notify their employer of their planned absence (except in cases of imminent danger); - Employers may require documentation of the sexual violence; - The bill includes the following limitations on the employer: - Employers must keep information relating to the employee's leave confidential; - Employers may not interfere with or retaliate against the employee's use of this leave; - Employers may discipline or terminate employees for any other reason. To enforce the bill, employees are provided with a right to civil suit for damages or equitable relief.
HB 1141 Sexual Violence Victims	This bill is linked to HB 489, which requires the submission of documentation in order for an employee to be guaranteed leave related to incidents of sexual violence. This bill extended to victims of sexual violence seeking to obtain leave the same existing public records exemptions as those allowed for victims of domestic violence. The public records exemptions being extended to victims of sexual violence include: (1) written requests for leave submitted by an agency employee who is a victim of sexual violence and any agency time sheet reflecting such requests and (2) personal identifying information contained in records documenting an act of sexual violence submitted to an agency by an agency employee in order to obtain leave. This bill provides for future review and repeal of the exemption and provides a statement of public necessity.
HB 7077- Child Welfare and Domestic Violence Injunctions	This bill amended §39.504, Florida Statutes, to allow an injunction for protection to be filed at any time after a protective investigation has been initiated by the department, a law enforcement officer, the state attorney, or other responsible person, or upon the court's own motion in cases of child abuse or domestic violence. The terms of the injunction remain in effect until the injunction is modified or dissolved by the court. The petitioner, respondent, or caregiver may move at any time to modify or dissolve the injunction. The bill provides that the injunction is valid in all counties and that a law enforcement officer may exercise arrest powers in the enforcement of the injunction. An injunction issued pursuant to this section may order an alleged or actual offender to: - Refrain from further abuse; - Limit contact with the child victim or other children; and - Vacate the home in which the child resides. - The bill provides that if the intent of an injunction is to protect a child from domestic violence, the court may also: - Remove the offender from the home of the child and the caregiver; - Award temporary custody of the child to the caregiver; and - Establish support for the child.

TOPIC	DESCRIPTION OF CHANGE
	Some jurisdictional issues may arise, however, when issuing a Chapter 39 injunction. The new law allows an injunction to be filed at any time after a protective investigation has been initiated by the department, but §39.013(2) Florida Statutes, states that jurisdiction attaches when the initial shelter petition, dependency petition or termination of parental rights petition is filed or when a child is taken into the custody of the department. Rule 8.201 also states that proceedings are commenced when an initial shelter petition, dependency petition, or TPR petition is filed.
HB 2532 – Child Custody and Support	This bill made substantial changes to Chapter 61, Florida Statutes, relating to the dissolution of marriage and the custody and support of minor children. The bill deleted the definitions of "custodial parent," "primary residential parent," "noncustodial parent," "person entitled to be the primary residential parent of a child," and "principal residence of a child," and also replaced references to "custody," "visitation," and "primary residence" with the concepts of a "parenting plan" and "time-sharing schedule." A parent will no longer be labeled as a primary or secondary parent under the new statutory scheme. The bill also revised the factors a court should consider (formerly as part of a custody determination) to determine the amount of time a child will spend with a parent and to allocate parental authority among the parents.

COMPARISON OF INJUNCTIONS UNDER CHAPTER 39 AND CHAPTER 741

CHAPTER 39	CHAPTER 741
Purpose is to protect and promote the best interests of the child in child abuse or domestic violence situations.	Purpose is to protect adults in domestic violence situations, but children may be included in terms of injunction.
DCF often files the motion, but law enforcement, state attorney, the court itself, or a responsible adult may file for the injunction on behalf of the child.	Victim is the petitioner and must file petition with the court. A parent can file a petition on behalf of a minor child.
The petitioner, respondent or caregiver may move at any time to modify or dissolve the injunction. Best interest of the child is still the court's benchmark.	Either party may move to modify or dissolve the injunction at any time. Risk to children is not a factor.
May order treatment for offender. May also order offender to pay for medical, psychiatric, or psychological treatment of the child or other family members. If issued to protect the child from domestic violence, the court may also award exclusive use and possession of the dwelling to the caregiver, award temporary custody to the caregiver and establish temporary support for the child.	May order treatment for respondent only, such as: Batterer Intervention Program, substance abuse, mental health, etc.
Supervised visitation may be ordered with access to DCF visitation centers and supervision.	Supervised visitation may be ordered but will depend upon the availability of local programs.
Law enforcement has a duty and responsibility to enforce with specific authority to arrest.	Law enforcement has a duty and responsibility to enforce with specific authority to arrest.
Violation is a first degree misdemeanor.	Violation may be handled as civil or criminal contempt, or as a first degree misdemeanor
Injunction ends when modified or dissolved by the court.	Injunction ends on a specific date or upon further order of the court.

CHAPTER 39 INJUNCTIONS

Chapter 39, Florida Statutes, provides a method for obtaining an injunction to protect a child from abuse or domestic violence. In 2008, §39.504, Florida Statutes, was amended to allow an injunction for protection to be filed at any time after a protective investigation has been initiated by the department. It is unclear, however, whether or not the courts actually have jurisdiction to issue an injunction before an initial shelter petition, dependency petition or termination of parental rights petition is filed. Due process concerns also arise when the court issues an injunction without the respondent being properly notified. These injunctions can help protect the child in some situations, however, and may be used as a method for removing a paramour or relative offender from the home. The standard forms are currently being amended to reflect the statutory changes.

The Statute:

39.504 Injunction pending disposition of petition; penalty.--

(1) At any time after a protective investigation has been initiated pursuant to part III of this chapter, the court, upon the request of the department, a law enforcement officer, the state attorney, or other responsible person, or upon its own motion, may, if there is reasonable cause, issue an injunction to prevent any act of child abuse. Reasonable cause for the issuance of an injunction exists if there is evidence of child abuse or if there is a reasonable likelihood of such abuse occurring based upon a recent overt act or failure to act.

(2) Notice shall be provided to the parties as set forth in the Florida Rules of Juvenile Procedure, unless the child is reported to be in imminent danger, in which case the court may issue an injunction immediately. A judge may issue an emergency injunction pursuant to this section without notice if the court is closed for the transaction of judicial business. If an immediate injunction is issued, the court must hold a hearing on the next day of judicial business to dissolve the injunction or to continue or modify it in accordance with this section.

(3) If an injunction is issued under this section, the primary purpose of the injunction must be to protect and promote the best interests of the child, taking the preservation of the child's immediate family into consideration.

(a) The injunction shall apply to the alleged or actual offender in a case of child abuse or acts of domestic violence. The conditions of the injunction shall be determined by the court, which conditions may include ordering the alleged or actual offender to:

1. Refrain from further abuse or acts of domestic violence.

2. Participate in a specialized treatment program.

3. Limit contact or communication with the child victim, other children in the home, or any other child.

4. Refrain from contacting the child at home, school, work, or wherever the child may be found.

5. Have limited or supervised visitation with the child.

6. Pay temporary support for the child or other family members; the costs of medical, psychiatric, and psychological treatment for the child incurred as a result of the offenses; and similar costs for other family members.

7. Vacate the home in which the child resides.

(b) If the intent of the injunction is to protect the child from domestic violence, the conditions may also include:

1. Awarding the exclusive use and possession of the dwelling to the caregiver or excluding the alleged or actual offender from the residence of the caregiver.

2. Awarding temporary custody of the child to the caregiver.

3. Establishing temporary support for the child.

This paragraph does not preclude the adult victim of domestic violence from seeking protection under §741.30, Florida Statutes.

(c) The terms of the injunction shall remain in effect until modified or dissolved by the court. The petitioner, respondent, or caregiver may move at any time to modify or dissolve the injunction. The injunction is valid and enforceable in all counties in the state.

(4) Service of process on the respondent shall be carried out pursuant to §741.30, Florida Statutes. The department shall deliver a copy of any injunction issued pursuant to this section to the protected party or to a parent, caregiver, or individual acting in the place of a parent who is not the respondent. Law enforcement officers may exercise their arrest powers as provided in §901.15(6), Florida Statutes, to enforce the terms of the injunction.

(5) Any person who fails to comply with an injunction issued pursuant to this section commits a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083, Florida Statutes.

DOMESTIC VIOLENCE AND HOUSING PROTECTIONS IN THE VIOLENCE AGAINST WOMEN ACT

By Lynn Rosenthal

Introduction

Domestic violence is one of many complex social problems that public housing agencies confront every day in meeting the housing needs of families. At the same time, subsidized housing plays an important role in helping victims escape violence and find safety for themselves and their children.

In the Violence Against Women Act of 2005, Congress expanding protections for victims of domestic violence, dating violence and stalking in public and voucher-assisted housing and created new requirements for public housing agencies in addressing these issues. These include prohibiting the denial, eviction or termination of housing assistance based solely on an individual's status as a victim of domestic violence, dating violence or stalking, as well as providing public housing agencies with greater authority to evict perpetrators of these crimes.

Domestic Violence and Housing

Research has found that as many as 92% of homeless women have been victims of domestic violence or sexual assault at some time in their adult lives.[3] Battered women's advocates frequently report that women return to abusive partners because they have no safe and affordable housing options.

Florida's domestic violence centers provide emergency shelter to nearly 14,000 women and children fleeing domestic violence each year, but these shelters can only provide short-term housing. Most lengths of stay in emergency shelter are limited to 30 days to allow for those in the most danger access to immediate bed space. Some of these providers also have transitional housing programs, which help survivors stay housed as they work to rebuild their lives and plan for the future. These transitional housing programs are meeting a critical need for interim housing and supportive services, but are generally time-limited to 24 months of stay, and are not available in many parts of the state.

Public and voucher-assisted housing can play an important role helping battered women and their children find and keep homes, yet federal "One-strike" policies governing this housing have also put some victims at risk. A national sampling of legal services and domestic violence providers conducted in 2005 found approximately 600 evictions of domestic violence survivors

[3] A. Browne, "Responding to the Needs of Low Income and Homeless Women Who Are Survivors of Family Violence," *Journal of American Medical Association,* 53 (2), 57-64, Spring 1998.

due to the domestic violence they experienced.[4] Survivors were evicted for taking steps to avoid abuse, such as calling the police and obtaining protective orders. The same national survey found that 346 cases were victims were denied housing because of domestic violence.[5] While the numbers of reported cases are not high, these actions can increase the danger for victims of domestic violence, and point to the need for clarification about policies addressing domestic violence in public and voucher assisted housing

Changes in Federal Law

Congress made changes to statutes governing public and voucher-assisted housing in the Violence Against Women Act (VAWA 2005) signed into law January 5, 2006.[6] VAWA 2005 amended the Public Housing program, the Housing Choice Voucher Program and the Project-Based Section 8 statute. The VAWA provisions apply to all public housing agencies administering federal Public Housing and Housing Choice Voucher programs. The law also applies to all landlords, owners and managers participating in the tenant and project-based voucher programs.

These provisions became effective when the bill was signed into law. On June 23, 2006, The Department of Housing and Urban Development issued a notice to public housing agencies about these provisions, but as of April 2007 they have yet to publish final regulations providing guidance on implementation of the law.

The legislation:

- **Amends the federal public housing and housing choice voucher statutes so that an individual's status as a victim of domestic violence, dating violence or stalking is not an appropriate basis for denial of admission or denial of housing assistance;**

- **Establishes an exception to one-strike eviction rules by stating that an incident of actual or threatened domestic violence, dating violence or stalking does not qualify as a serious or repeated violation of the lease or good cause for terminating the assistance, tenancy or occupancy rights of the victim;**

- **Gives public housing agencies, owners and landlords the authority to bifurcate leases in order to evict, remove or terminate assistance to perpetrators of violence without evicting, removing or terminating victims;**

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[4] National Law Center on Homeless and Poverty and the National Network to End Domestic Violence. "Domestic Violence Victims Denied and Evicted from Federal and Subsidized Housing," (draft of Executive Summary), March 2006.
[5] Ibid.
[6] VAWA 2005 became Public Law 109-162 and was also further amended by a technical corrections bill (PL 109-271) signed into law August 12, 2006.

- **Allows for evictions or termination of housing assistance if there is an actual or imminent threat to other tenants or those employed at or providing services to the property;**

- **Allows for eviction or termination of housing assistance for victims of domestic violence, dating violence or stalking for other reasons not related to the abuse, as long as the victim is not held to a different standard than non victims;**

- **Clarifies that an individual with a Section 8 voucher may move to another jurisdiction if the individual is moving to protect the health or safety of an individual who is or has been a victim of domestic violence, dating violence or stalking as long as the individual has complied with all other obligations of the program;**

- **Requires public housing agencies to provide notice to tenants about their new rights and that information about the new provisions be included in leases, housing assistance contracts and project-based Section 8 contracts;**

- **Amends the federal housing planning process so that public housing agencies must address domestic violence, dating violence, sexual assault and stalking in their five-year and annual plans; and**

- **Creates new federal grant programs for public housing agencies to address domestic violence through policy changes, training, best practices and security measures.**

The protections in VAWA apply cover the victim of domestic violence, dating violence and stalking, as well as the immediate family members of the victim, excluding perpetrators. An important provision of the new law allows- but does not require- public housing agencies and Section 8 landlords to use a certification process documenting that domestic violence, dating violence or stalking has occurred.

An individual may satisfy the certification requirements by providing documentation from a victim services provider, and attorney or medical profession from whom the victim has sought assistance in addressing domestic violence, dating violence or stalking, or by providing a police or court record. When requested, the victim must fulfill the certification requirements within 14 days. At their discretion, public housing agencies and landlords may decide that an individual is protected based on that individual's statement or other corroborating evidence. Public housing agencies, owners and landlords are required to keep information related to these provisions confidential unless mandated by a court order or for use in an eviction proceeding.

SECURITY: A MODEL FAMILY COURT ESSENTIAL ELEMENT

By: Nathan Moon, Esquire, Office of Court Improvement

Family Court Security Resource Guide

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

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

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

SCOPE

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

RECOMMENDATIONS

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

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

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

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

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

Security Issues Addressed in the Written Security Plan.

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

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

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

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

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

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

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

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

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

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

Proceedings Involving Domestic Violence. The plan should provide specialized instructions for issues that can present during proceedings involving parties with a history of domestic violence. Family court personnel are aware that individuals who enter family courts may be seeking protection from highly abusive and dangerous situations. It is extremely important that these individuals be able to seek relief without having to confront the person from whom they are seeking protection. Confrontations between the domestic violence victim and perpetrator can occur in the parking lot of the courthouse, the hallways and stairways of the courthouse, as well as in courtroom. During family proceedings where domestic violence is a factor, court security officers should always be present in the courtroom, and constantly monitoring the waiting areas, hallways and stairways. Security guards that provide perimeter security for the courthouse should also be alert for threatening incidents that could occur in the parking lot and surrounding grounds.

" given limited resources, intelligence and forewarning are of immense value in security programs"

Security Director, Massachusetts Trial Court

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

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

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

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

- in a dissolution of marriage involving domestic violence, the court could order (and copy the provider) that the parents not attend the parenting class at the same time;
- develop a screening protocol to identify families with a history of domestic violence prior to referring them to mediation;
- in cases where there is a high level of hostility between the parties, courts could provide a room in the courthouse for private mediators to use; and
- in order to provide for the safety of the parents and children, supervised visitation program staff need specific information regarding the reason supervised visitation was ordered and what activities should not be permitted during the visit. Supervised visitation programs are often confronted with threats from irate program participants and there have been instances where children have been re-victimized due to the fact that the

visitation supervisor was not aware of the specific allegations and in turn did not recognize certain behaviors as harmful. The Clearinghouse on Supervised Visitation, FSU School of Social Work, can provide specific information on the need for security precautions in supervised visitation settings and what courts can do to help. For more information, visit http://familyvio.ssw.fsu.edu/.

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

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

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

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

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

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

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

III.Implement Model Family Court Design Specifications - Accessing justice begins with getting

in and out of the courthouse safely.

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

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

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

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

Separate and Secure Waiting Rooms. Separate and secure waiting rooms for petitioners and respondents will provide domestic victims with a sense of security by minimizing the frequency of contact with the other party. Waiting rooms should be located near a main security checkpoint of the family court where security officers are stationed and readily available. Waiting rooms should also be equipped with panic buttons and remain locked when not in use.

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

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

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

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

- suspicions that explosives may be used against the courthouse
- concerns that weapons are being brought into the courthouse
- violent outbreaks in family courtrooms, halls, and waiting areas

- strangers loitering where they don't belong

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

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

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