

# **TENNESSEE DOMESTIC ABUSE BENCHBOOK**

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	<i>any criminal offense defined in title 39, chapter 13, in which the alleged victim of the offense is a victim as defined in § 36-3-601(5), (10) or (11), or is in violation of an order of protection as authorized by title 36, chapter 3, part 6, the magistrate shall review the facts of the arrest and make certain findings and impose one or more conditions of release or bail on the defendant to protect the alleged victim of any such offense and to ensure the appearance in court.</i>	6-12
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## Chapter 1 Understanding Domestic Abuse<sup>1</sup>

Domestic abuse is a widespread societal problem with consequences reaching far beyond the realm of the family. It is conduct that has devastating effects on the victims, the children, and the entire community. In addition to its immediate effects, there is increasing evidence that violence within the family becomes the breeding ground for other social problems such as substance abuse, juvenile delinquency, and violent crimes of all types.

The roots of domestic abuse are embedded in our social structures and customs (Pence and Paymar, 1993). To eliminate the abuse and to bring about change, a coordinated community response is required. Each part of the community has a role to play: mental and medical health personnel, educators, clergy, the media, social activists, and the civil and criminal justice system. How we carry out our respective roles in responding to this problem is greatly influenced by our understanding of the realities of domestic abuse: what it is, why it occurs, and who is involved.

Domestic abuse is a pattern of behavior that consists of multiple, often daily, behaviors, including both criminal and non-criminal acts. While the legal process tends to focus on discrete behaviors, it is the entire pattern of abuse that shapes how the perpetrator and the victim function in Court and how each responds to interventions. Not only are the adults affected by the abuse, but so are the children in these families as they witness one parent abusing the other.

Consequently, the presence of domestic abuse is particularly relevant to certain issues before the courts, such as dissolution of marriages, child custody and visitation arrangements, Orders of Protection, tort actions, and findings and dispositions in criminal cases. Understanding the what, why, and who of domestic abuse enables judges to improve the Court's fact-finding and decision-making in domestic abuse cases and to develop appropriate court procedures designed to handle these cases more effectively and efficiently.

### **§1-1 Behavioral Definitions of Domestic Abuse**

Domestic abuse is a pattern of violent and coercive behaviors whereby the perpetrator seeks to control the thoughts, beliefs, and conduct of his or her intimate partner and to punish the intimate partner for resisting the perpetrator's control over her or him. Perpetrators of domestic abuse can be found in all age, racial, socioeconomic, educational, occupational, sexual orientation<sup>2</sup>, and religious groups.

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<sup>1</sup> This chapter draws on materials prepared by Anne L. Ganley, Ph.D., for *Domestic Violence in Civil Court Cases: A National Model for Judicial Education* published by The Family Violence Prevention Fund in 1992.

<sup>2</sup> Participants in lesbian and gay relationships may identify themselves as heterosexual, lesbian, gay, bisexual, or transgendered. The term "lesbian and gay relationship" is used here to indicate someone

**§1-1.01 Domestic abuse is behavior done in the context of an intimate relationship.**

Women are up to six times more likely to suffer violence at the hands of a partner or ex-partner than from a stranger (Bachman and Saltzman, 1995; Koss, Woodruff, and Koss, 1994), and are more likely to suffer injury when their assailant is an intimate (Bachman and Saltzman, 1995). The victim is affected by domestic abuse in many of the same ways as victims of violence perpetrated by strangers, but also is affected in unique ways since the perpetrator is an intimate rather than a stranger. Both intimate violence and stranger violence can result in the victim being traumatized and terrorized. However, the effects of trauma are accentuated, and repeated violence is more likely in domestic abuse cases due to the fact that the perpetrator, unlike most perpetrators of stranger violence, has ongoing access to the victim, knows the victim's daily routine, and can continue to exercise considerable control over the victim's daily life, both physically and emotionally.

The complexity and strength of the intimate relationship creates many barriers to dissolution. Domestic abuse perpetrators may have good qualities in addition to their abusiveness. Furthermore, perpetrators of domestic abuse gain control over victims through their coercive tactics and violence because the intimacy of the relationship gives them social, and sometimes legal, permission to use such abuse.

The behavioral definition of domestic abuse focuses on the pattern of abuse and violence in relationships between adults and does not technically include child abuse or neglect. However, in many domestic abuse cases, children may be physically injured or emotionally and developmentally damaged as a result of witnessing the violence or of being used as pawns by the perpetrator. Sometimes in domestic abuse cases, the perpetrator and/or the victim may be an adolescent rather than an adult (Levy, 1990). In cases involving adolescents, there is the same pattern of abusive behaviors as that which occurs in adult relationships.

**§1-1.02 Domestic abuse is a pattern of assaultive and controlling behaviors, including physical, sexual, and psychological attacks, that one intimate partner does to another.**

Domestic abuse consists of a wide range of behaviors, including some of the same behaviors found in stranger violence. Some acts of domestic abuse are criminal (hitting, choking, kicking, assault with a weapon, shoving, scratching, biting, rape, unwanted sexual touching, forcing sex with third parties, threats of violence, stalking, destruction of property, etc.) while other behaviors may not by themselves constitute criminal conduct (degrading comments, interrogating children or other family members, suicide threats or attempts, controlling access to the family resources as well as controlling the victim's own time and activities, etc.). Domestic abuse perpetrators often

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who is involved in an intimate sexual or romantic relationship with someone of the same sex, regardless of how they would describe their sexual identity. Tennessee's domestic abuse statutes apply equally to people in lesbian and gay relationships.



act excessively jealous and possessive in order to isolate the victim. Whether or not there has been a finding of criminal conduct, evidence of these behaviors indicates a pattern of abusive control which has devastating effects on the family.

Batterers use the tactics best designed to control their particular victims. Violence within lesbian and gay relationships may include homophobic control, e.g., telling or threatening to tell family, friends, employers, police, the church community, etc., that the victim is lesbian or gay, telling the victim she or he deserves abusive treatment because of being lesbian or gay, reminding the victim that the homophobic world will not help (Hart, 1986). A bisexual woman may be assaulted by a male partner for her bisexuality and the same types of homophobic controls used against her as are used by same-sex partners.

Immigrant victims are vulnerable to threats related to their immigrant status. The batterer may threaten to report an undocumented victim to the authorities or to have her children removed from her custody. If the victim's facility with the English language is limited, she may be unable to access services or police assistance. The vulnerability of an immigrant victim is particularly acute if the batterer is a U.S. citizen and speaks English well.

Domestic abuse is not an isolated, individual event. One battering episode builds on past episodes and sets the stage for future episodes. All incidents of the pattern interact with each other and have a profound effect on the victim. There is a wide range of consequences, some physically injurious and some not; all are psychologically damaging.

Domestic abuse is purposeful and instrumental behavior. The pattern of abuse is directed at achieving compliance from or control over the victim. It is directed at circumscribing the life of the victim so that independent thought and action are eliminated and so that the victim will become exclusively devoted to fulfilling the needs and requirements of the perpetrator. The pattern is not impulsive or out of control behavior. The perpetrator selectively chooses tactics that work to control the victim.

Some of the acts may appear to be directed against or involve the children, property, or pets when in fact the perpetrator is doing these behaviors in order to control or punish the intimate partner (e.g., physical attacks against a child, throwing furniture through a picture window, strangling the victim's pet cat, etc.). Although someone or something other than the victim is physically damaged, that particular assault is part of the pattern of abuse directed at the victim.

Not all verbal attacks or insults between intimates are psychological battering. Again, it is the pattern of attempts to establish and maintain power and control through psychological abuse that is important. Prior use or threat of physical force against person or property gives additional power to psychological abuse. In addition, psychological abuse, such as verbal abuse, isolation, threats of violence, etc., often escalates into and paves the way for physical abuse. The verbal abuse includes disparaging, degrading, and discrediting language. These verbal attacks are fabricated with particular sensitivity to the victim's vulnerabilities. Perpetrators are able to control

victims by a combination of physical and psychological tactics since the two are so closely interwoven by the perpetrator.

Some mistakenly believe that both the perpetrator and the victim are abusive, one physically and one verbally. While some victims may resort to verbal insults, the reality is that verbal insults are not the same as a fist in the face. Furthermore, perpetrators use both physical and verbal assaults. Research indicates that perpetrators are more verbally abusive than either their victims or other persons in distressed but nonviolent relationships or in non-distressed intimate relationships (Margolin, *et al.*, 1987). In addition, what perpetrators report as abusive behavior of the victim are often acts of resistance by the victim. Victims are not passive recipients of violence, but often engage in strategic survival during which they sometimes resist demands of perpetrators that they see as immoral or inappropriate. Perpetrators respond to such resistance with escalating tactics of control and violence. The victim seeking separation is often seen by the perpetrator as engaging in the ultimate act of resistance. Consequently, the perpetrator may increase the violence during points of separation.

Sometimes it may seem that there is mutual battering where both individuals are using physical force against each other. Careful fact-finding often reveals that one party is the primary physical aggressor and the other party's violence is in self-defense (e.g., she stabbed him as he was choking her), or one party's violence is more severe (e.g., punching and choking versus scratching) (Saunders and Brown, 1990).

### **§1-1.03      The consequences of domestic abuse are often lethal.**

In Tennessee in 2003 there were seventy domestic violence murders (Tennessee Bureau of Investigation Crime Statistics Unit, 2004). Tennessee ranked 7th in the United States for women murdered by men in 2002 (Violence Policy Center, 2004). For homicides in which the weapon used could be identified, 71 percent of female victims (44 out of 62) were shot and killed with guns. There were 7 women killed with knives or other cutting instruments, 2 women killed by a blunt object, and 7 women killed by bodily force. For homicides in which the victim to offender relationship could be identified, 87 percent of female victims (53 out of 61) were murdered by someone they knew. Eight female victims were killed by strangers. Of the victims who knew their offenders, 66 percent (35 victims) were wives, common-law wives, ex-wives, or girlfriends of the offenders.

In a study of murder-suicides, 73.7 percent of all murder-suicides in the study involved an intimate partner. Of these, 93.5 percent were females killed by their intimate partners (Violence Policy Center, 2002). Battering is the single major cause of injury to women, even more significant than the numbers injured in auto accidents, rapes, and muggings combined (O'Reilly, 1983).

Without intervention, the pattern of abusive behaviors will most likely escalate in both frequency and severity. The pattern may change with more emphasis on psychological abuse or physical assault over time. Regardless of variations in the pattern, damage to the victim often becomes more severe. In 1992 the U.S. Surgeon General ranked abuse by husbands and partners as the leading cause of injury or death to women and

classified domestic abuse as having reached epidemic proportions in the nation (Meier and Zoeller, 1995).

Access to guns, threats to kill, and most of all, unemployment, are the biggest predictors of the murder of women in abusive relationships (Campbell, *et al.*, 2003). The incidence as well as the lethality of domestic abuse often increases when the perpetrator believes that the victim has left or is about to leave the relationship (Campbell, 1992; Harlow, 1991). Many homicides occur when the victim is in the process of separating from the perpetrator (Saunders, 1986; Langan and Innes, 1986; Stark, E., *et al.*, 1980). Thus, victims may be at greater risk at the very time they come before the Court. For this reason it is critical that the Court use all available legal remedies such as Orders of Protection to provide the victim with protection throughout the duration of the court proceedings.

There are significant gender differences when examining perpetrator behavior in the context of lethality. Male perpetrators are more likely to stalk the victim, to kill the victim and/or other family members, and to commit suicide than are female perpetrators (Bernstein, 1993). Women are unlikely to commit homicide except in self-defense (Ganley, 1992). Twenty years ago, about one-half of spousal homicide victims were men. Since the advent of shelters and abuse prevention laws in the 1970's, wives have killed fewer husbands so that husbands now constitute only 34% of spousal homicides (Zorza, 1994). Effective intervention in domestic abuse cases may stop the violence before it becomes a homicide case.

## **§1-2 Causes of Domestic Abuse**

### **§1-2.01 Violent behavior is the result of learning, reinforcement, and choice rather than biology or genetics.**

Male violence against women in intimate relationships is a social problem condoned and supported by the customs and traditions of society. Domestic abuse behaviors, as well as the rules and regulations of when, where, against whom, and by whom domestic abuse is to be used, are learned through observation. It is learned and reinforced by interactions with all of society's major institutions: familial, social, legal, religious, educational, mental health, medical, and media. In all of these social institutions there are various customs that perpetuate the use of violence as a legitimate means of controlling family members at certain times (e.g., religious institutions that teach that a woman should submit to the will of her husband; laws that consider raping spouses a less serious crime). These practices reinforce the use of violence to control intimates by failing to hold the perpetrator accountable and by failing to protect the victim. (For a more complete listing, see Dobash and Dobash, 1983). Until recently, domestic abuse was rarely considered a crime and was often discounted as a private matter not worthy of the legal system's attention.

**§1-2.02 In a very small percentage of domestic abuse cases, the violence is caused by organic or psychotic impairments and is not part of a pattern of coercive control.**

Illness-based domestic abuse cases (e.g., Alzheimer's disease, Huntington's chorea, psychosis, etc.) are rare, but they do happen. It is relatively easy to distinguish illness-based abuse from learning-based violence. With illness-based violence, there is usually no selection of a particular victim (whoever is present when the short circuit occurs will get attacked, so it may be a helper, family member, stranger, etc.). Also, with illness-based violence there is usually a constellation of other clear symptoms of the disease. For example with an organic brain disease there are changes in speech, gait, and physical coordination. With psychosis there are multiple symptoms of the psychotic process (e.g., he attacked her "because she is a CIA agent sent by the Pope to spy on him using the TV monitor"). Poor recall of the event alone is not an indicator of illness-based violence.

Knowing in these rare cases that a disease causes the violence will not alter the fact that violence occurred, but it may influence strategies chosen to increase the safety of the victim, the children, and the public. Furthermore, knowing that it is caused by an illness may influence advocacy considerations, since rehabilitation through specialized domestic abuse intervention is contraindicated for illness-based violence. In these rare cases, the violence can be more effectively managed by appropriate external constraints and by appropriate medical or mental health intervention. Courts may find it more effective to involuntarily commit a perpetrator who suffers from organic brain disease or psychosis rather than issue a civil Order of Protection; alternatively, courts may want to require day treatment and the appropriate dispensation of medication as an additional element in an Order of Protection.

**§1-2.03 Alcohol and most drugs do not cause domestic abuse.**

Alcohol and drugs such as marijuana, depressants, anti-depressants, or anti-anxiety drugs do not cause nonviolent persons to become violent. Many people use or abuse those drugs without ever battering their partners. Alcohol and drugs are often used as an excuse for the battering although research indicates that the pattern of assaultive behaviors which constitutes domestic abuse is not being caused by those particular chemicals (Critchlow, 1986).

The majority (in one study, 76 percent) of physically abusive incidents occur in the absence of alcohol use (Kantor and Straus, 1987), and there is no evidence to suggest that alcohol use or dependence is linked to the other forms of coercive behaviors that are part of the pattern of domestic violence. Economic control, sexual violence, and intimidation, for example, are often part of a batterer's ongoing pattern of abuse, with little or no identifiable connection to his use of or dependence on alcohol (Zubretsky and Digirolama, 1996).

There is contradictory evidence that certain drugs (PCP, speed, cocaine or its derivative crack) may chemically react within the brain to cause violent behavior in individuals who show no abusive behavior except under the influence of those drugs. Further research

is needed to explore the cause and effect relationship between these drugs and violence. One of the most confounding variables is that some people who consume these drugs are violent with or without the chemical in their bodies. An addict's violence may be part of a lifestyle where everything including family life is orchestrated around the acquisition and consumption of the drug.

Unlike the relatively low levels of substance abuse among batterers in general, the incidence of substance abuse by batterers seen in criminal justice, mental health, or social service settings is well above 50 percent (Bennett, 1997). For example, a 1995 study of domestic violence calls in Memphis, Tennessee found that 92 percent of assailants had used drugs or alcohol during the day of the assault, as well as about 42 percent of victims, according to reports from victims and family members (Brookoff, 1997). Regardless of the exact role of alcohol and drugs, it is important to focus on the violent behavior and not allow substance use or addiction to become a justification or excuse for the violence. While the presence of alcohol or drugs does not alter the finding that domestic abuse took place, it is relevant to the assessment of lethality and in determining case dispositions. The use of or addiction to substances may increase the potential for lethality of domestic abuse and needs to be carefully considered when weighing safety issues concerning the victim, the children, and the community (Browne, 1989).

Legal remedies in cases where the perpetrator is addicted to alcohol and/or drugs must be directed at both the violence and the substance abuse. For individuals who are addicted to alcohol and drugs, changing domestic abuse behavior is impossible without also stopping the substance abuse. Intervention must be directed at both problems either through concurrent interventions for domestic abuse and substance abuse; inpatient substance abuse treatment with a mandatory follow-up program for domestic abuse; or an involuntary mental health commitment with rehabilitation directed at both the substance abuse and the domestic abuse.

#### **§1-2.04 Perpetrators of domestic abuse externalize responsibility for their behavior to others or to factors supposedly outside of their control.**

However, the majority of domestic abuse is not out of control behavior, but a pattern of behavior that is used by the perpetrator because it works. Some perpetrators will batter only in particular ways, e.g., hit certain parts of the body, but not others; only use violence towards the victim even though they may be angry at others (their boss, other family members, etc.); break only the victim's possessions, not their own. They are making choices even when they are supposedly out of control. Such decision-making indicates they are actually in control of their behavior.

Domestic abuse is not caused by anger. The perpetrator chooses to use violence to get what he or she wants or that to which he or she feels entitled. Displays of anger by the perpetrator are often merely tactics employed by the perpetrator to intimidate the victim. Perpetrators choose those acts of abuse that work and which subject them to the least risk. They choose acts of abuse or violence which they believe the victim is particularly sensitive or responsive to. They choose times and places that are designed to have the most powerful impact with the least risk.

Domestic abuse is not caused by stress. We all have different sources of stress in our lives (e.g., stress from the job, stress from not having a job, marital and relationship conflicts, discrimination, poverty, etc.). We can respond to stress in a wide variety of ways (e.g., problem solving, substance abuse, eating, laughing, withdrawal, violence, etc.) (Bandura, 1973). People choose ways to reduce stress according to what has worked for them in the past.

It is important to hold people accountable for the choices they make regarding how to reduce their stress, especially when those choices involve violence. Just as we would not excuse a robbery or a mugging of a stranger simply because the perpetrator was under stress, we can no longer excuse the perpetrator of domestic abuse. Moreover, when we remember that domestic abuse is a pattern of behavior consisting of a variety of tactics repeated over time, then citing specific stressors becomes less meaningful in explaining the entire pattern (Pence and Paymar, 1993).

Domestic abuse is not caused by problems inherent in the relationship between the two individuals or by the victim's behavior. People can be in distressed relationships and experience negative feelings about the behavior of the other without responding with violence. Domestic abuse is a pattern of control that perpetrators bring into their intimate relationships. Without intervention, it is likely that they will be violent in each consecutive relationship with an intimate partner (Ganley, 1989).

Victims are often assaulted when they are not engaging in any behavior that could be construed as resisting the perpetrator. Other incidents occur when the victim is resisting the perpetrator's demands that she or he engage in unethical or unlawful behavior. Looking at the relationship or the victim's behavior as a causal explanation for domestic abuse takes the focus off the perpetrator's responsibility for the violence, and supports the perpetrator's minimization, denial, externalization, and rationalization of the violent behavior. Blaming the victim or locating the problem in the relationship provides the perpetrator with excuses and justifications for the conduct. This reinforces the perpetrator's use of abuse to control family members and thus contributes to the escalation of the pattern. As a result, the victim is placed at greater risk.

**§1-2.05 Perpetrators of domestic abuse can be found in all age, racial, socioeconomic, educational, occupational, sexual orientation, and religious groups.**

Perpetrators are a very heterogeneous population whose primary commonality is their use of violence. They do not fit into any specific personality diagnosis group. Because of the racism and classism in our criminal and civil justice systems, courts often deal more often with low-income people (and people of color and recent immigrants are more likely to be poor). This may lead to some inaccurate generalizations about perpetrators or victims. When the court process is accessible to all and domestic abuse issues are identified, then the diversity of perpetrators is apparent.

Certain cultural groups are viewed as being more violent than others in the United States in spite of a lack of evidence on this issue. Most often the question of whether

there are cultural differences in the frequency or severity of domestic abuse is raised regarding cases that involve people of color or recent immigrants. The reality is that most cultures, including the white culture in the United States, have until recently been unwilling to take a stand against domestic abuse. Just as the Court would not find the values of a perpetrator's culture to be a mitigating circumstance in crimes such as robbery, speeding, or violence against a stranger, so it should not treat domestic abuse any less seriously based on assumptions regarding a particular culture's acceptability of domestic abuse.

### **§1-3 Impact of Domestic Abuse on the Victim**

#### **§1-3.01 Victims of domestic abuse experience a wide variety of injuries and traumas.**

Between 1976 and 1997, from 1200 to 1600 women were killed each year by intimates (The Silent Witness National Initiative, 2000). Besides often severe physical injuries, permanent disability, or death, victims of domestic abuse suffer a wide range of other injuries. Victims of intimate partner violence are at greater risk of injury than are victims of stranger violence (Thompson, Simon, Saltzman, and Mercy, 1999). Some victims may be very isolated as a result of the perpetrator's control over the victim's activities, friends, and contacts with family members. Women who experience psychological abuse from an intimate partner face a significantly increased risk of developing chronic neck or back pain, arthritis, migraines, stammering or stuttering, problems seeing even with glasses, sexually transmitted infections, chronic pelvic pain, stomach ulcers, colon problems, and other physical illnesses (Coker, 2000).

A 1990 Ford Foundation study found that 50% of homeless women and children were fleeing abuse (Zorza, 1991). More recently, in a study of 777 homeless parents (the majority of whom were mothers) in ten U.S. cities, 22% said they had left their last place of residence because of domestic violence (Homes for the Homeless, 1998). Women who were victims of intimate partner abuse had higher rates of suicidal behavior than non-victims (Thompson, *et al.*, 1999). The experience of assault plays a significant role in escalating both alcohol and drug use in women, even in women who did not have a prior history of alcohol or drug abuse. However, women were more likely to turn to alcohol abuse than drug abuse after an assault (Kilpatrick, *et al.*, 1997). The March of Dimes found that women battered during pregnancy have high rates of miscarriages (Zorza, 1994).

#### **§1-3.02 Victims of domestic abuse are a heterogeneous group.**

Victims of domestic abuse can be found in all age, racial, socioeconomic, educational, occupational, sexual orientation, and religious groups. Victims may or may not have been abused as children or in previous relationships. As with perpetrators, courts often see more victims from poor, often minority communities, due to the racism and classism of our criminal and civil justice systems. However, the fact remains that domestic violence can happen to anyone.

**§1-3.03      Some victims of domestic abuse may minimize or deny the violence, or rationalize it by blaming themselves for making the perpetrator angry.**

Some victims find it very painful to acknowledge that their intimate partners are battering them. The victim's minimization and denial in certain situations may assist her or him in surviving the abuse. Sometimes victims are not minimizing or denying the violence to themselves but are instead lying because of fear of retaliation by the perpetrator.

**§1-3.04      What may appear at first to be crazy behavior may in fact be a normal reaction to a crazy situation.**

The primary reason given by victims of domestic abuse for staying with the perpetrator is the realistic fear of the escalating violence. Victims may know from past experience that the violence gets worse whenever they attempt to get help.

Research shows that domestic abuse tends to escalate when the victim leaves the relationship. National crime statistics show that in almost 80 percent of reported spousal assaults, the partners were divorced or separated (Harlow, 1991). A perpetrator may repeatedly tell the victim that she will never be free of him. The victim may believe this as a result of past experience. When she did try to leave, the perpetrator may have tracked her down or abducted the children in an attempt to get the victim back. He may have enlisted help from family, friends, and others to pressure the victim to return.

It is not true that victims could easily leave the relationship if they wanted to and that the perpetrators would let victims leave. Perpetrators do not let victims leave their control. It is also not true that victims stay with perpetrators because they like to be abused. Even in cases where the victim was abused as a child, she or he does not seek out violence and does not want to be battered. The reasons for staying in a violent relationship are multiple and vary for each victim. In addition to fear, other reasons why victims stay in the relationship include:

- Lack of real alternatives for employment and financial assistance, especially for victims with children;
- Inability to afford an attorney;
- Lack of affordable, safe housing;
- Being immobilized by psychological and/or physical trauma;
- Cultural, family, or personal values that encourage the maintenance of the family unit at all costs;
- Being told by the perpetrator, counselors, the courts, police, ministers, family members, friends, etc., that the violence is the victim's fault and that she or he could stop the abuse just by complying with the perpetrator's demands;
- Hope that the perpetrator will change and stop using violence;
- Fear of a hostile response from police, courts, shelters, or counselors because of race, immigrant status, sexual orientation, or other factors.



### **§1-3.05 Victims sometimes fail to follow through on court proceedings.**

Some victims may fail to show for hearings because the perpetrator has physically prevented them from doing so, either through threats of further violence, or by actual physical injury to the victim. Sometimes victims stop the court process shortly after a temporary order is issued because the violence has temporarily stopped. They may think that a permanent order is now unnecessary. Victims may be unaware that the perpetrator has merely switched tactics of control. Rather than use violence or the threat of violence, the perpetrator is temporarily using good behavior in order to manipulate his or her way out of the court proceedings.

Some victims fail to show for hearings because the perpetrator or others tell them that the orders will be dropped if they do not show up for the hearing. Thinking that the violence has stopped and that the Order is no longer necessary, the victim may not appear at the next hearing. In other cases, the perpetrator has intercepted the notification of hearings intended for the victim. Some victims may fail to show at later hearings because the police have failed to enforce the temporary order, resulting in the victim's belief that a permanent order will be useless in stopping the violence. Sometimes the victim does not appear because the system fails to provide adequate information or support. The court system can be complicated and full of delays and changes. The victim is too often left alone to navigate an alien and sometimes victim-blaming system.

### **§1-3.06 Many victims follow through with court proceedings.**

Sometimes we over-emphasize the difficult cases where the victim has appeared ambivalent or reluctant. We ignore the many cases where victims are cooperative and persistent. Furthermore, we often ignore the multiple barriers to domestic abuse victims and blame them for their ambivalence rather than eliminating the barriers.

## **§1-4 Impact of Domestic Abuse on the Children**

### **§1-4.01 Perpetrators traumatize children in the process of battering their adult victims.**

Some perpetrators physically or sexually abuse the children as well as the adult victim. Researchers estimate the extent of overlap between domestic abuse and child physical or sexual abuse to be approximately 30 - 40% (Jaffe, *et al.*, 1990; Roy, 1977). Girls are five to six times more likely to be sexually abused by fathers who abuse their partners than by fathers who don't abuse their partners. Child abuse usually occurs *after* mother abuse.

Shelters report that the number one reason battered women give for fleeing the home is that the perpetrator was also attacking the children. Sometimes the victim acts in ways

that do not effectively protect the children because she or he is relatively powerless to protect the children from the perpetrator. Legal protection can realign that power so the victim, once safe, can effectively protect the children.

Some perpetrators intentionally or unintentionally injure the children during their attacks on the adult victim. Sometimes children are used as a weapon by the perpetrator against the victim. For example, the child may be physically thrown at the victim; or abused as a way to coerce the victim to do certain things. Sometimes the children are accidentally injured when the perpetrator is assaulting the victim or when the child is trying to stop the perpetrator's attack against the victim.

Some perpetrators assault the adult victim in front of the children. Children often either directly witness the acts of physical and psychological assaults or indirectly witness it by overhearing the episodes or by seeing the aftermath of the injuries and property damage (Hilton, 1992). Research reveals that children who witness domestic abuse are affected in the same way as children who are physically and sexually abused themselves (Goodman and Rosenberg, 1987).

Some perpetrators use the children to coercively control the intimate partner through, for example, isolating the child along with the victim or engaging the child in the abuse of the other parent. Some perpetrators use the children as pawns to control the victim after the victim and perpetrator are separated. In these cases, the intent is to continue the abuse of the victim with little regard for the damage of this controlling behavior to the children (Walker and Edwall, 1987). Perpetrators may use lengthy custody battles or visitation violations as a way to continue abusing the other parent. Perpetrators may hold children hostage or abduct the children in efforts to punish the victim or to gain the victim's compliance. Some visitation periods become nightmares for the children either because of physical abuse by the perpetrator or because of the psychological abuse that results from such things as the perpetrator interrogating the children about the activities of the victim.

#### **§1-4.02 Domestic abuse results in behavioral, emotional, social, cognitive, and physical damage to children.**

One summary of 29 studies of children who have witnessed partner assaults (Kolbo, *et al.*, 1996) reports harm in several areas of functioning: behavioral, emotional, social, cognitive, and physical. Behavioral problems include aggression, cruelty to animals, tantrums, "acting out," immaturity, truancy, delinquency, and attention deficit disorder/hyperactivity (Ascione, 1997; Graham-Bermann, 1996; Dodge, *et al.*, 1994; Sternberg *et al.*, 1993; Davies, 1991; Hershorn and Rosenbaum, 1985). Common emotional problems are anxiety, anger, depression, withdrawal, and low self-esteem (Graham-Bermann, 1996; Carlson, 1990; Hughes, 1988; Davis and Carlson, 1987; Jaffe, *et al.*, 1986). Social problems are poor social skills, peer rejection, and an inability to empathize with others (Graham-Bermann, 1996; Strassberg and Dodge, 1992). Cognitive difficulties generally include language lag, developmental delays, and poor school performance (Wildin, *et al.*, 1991; Kerouac, *et al.*, 1986). Physical problems include failure to thrive, difficulty sleeping and eating, regressive behaviors, poor motor

skills, and psychosomatic symptoms such as eczema and bed-wetting (Copping, 1996; Jaffe, *et al.*, 1990).

There are also long-term effects as these children become adults. Since important developmental tasks are interrupted, children carry these deficits into adulthood. They may never make up getting behind in certain academic tasks or in interpersonal skills. These deficits impact their abilities to maintain jobs and relationships. Male children in particular are affected and have a high likelihood of battering intimates in their adult relationships (Hotelling and Sugarman, 1986). Sometimes the children do not wait to become adults before using violence themselves (e.g., against the victim, the perpetrator, their peers, and other adults). Sixty-three percent of all males in America between the ages of 11 and 20 who are serving time for homicide are incarcerated because they killed their mother's abuser (Buel, 1992).

Usually, the most effective way to protect the children is to protect and support the non-abusing parent. Holding the perpetrator, not the victim, accountable for the abuse is critical in protecting both the victim and the child.

### **§1-5 Impact of Domestic Abuse on the Community**

Domestic abuse ripples out into the community as the perpetrator's violence also results in the death or injury of bystanders or those attempting to assist the victim. The financial cost of domestic abuse to the community in terms of medical care, days missed from work, and response of the justice system is phenomenal. The National Institute of Justice estimates the annual costs incurred as a result of domestic abuse, including property damage and loss, medical costs, mental health care, police and fire services, victim services, and lost worker productivity to be \$67 billion each year (Miller, *et al.*, 1996).

There were 66,619 domestic violence crimes reported in Tennessee in 2003 (Tennessee Bureau of Investigation Crime Statistics Unit, 2004). There were 70 domestic homicides. Each of these crimes takes a toll in terms of injury to the victim and his or her loved ones, as well as the time and resources of law enforcement, the judicial system, health care providers, and others who must respond to these incidents. The District Attorney General in Hamilton County recently estimated that it costs his office \$500,000 to prosecute each murder case (M. Wynn, personal communication, June 6, 2003). Extrapolating similar costs to the entire state, it would cost approximately \$35 million for prosecution alone for the 70 domestic murder cases reported in 2001. Blue Cross Blue Shield of Tennessee has estimated the total health care costs of domestic violence in Tennessee to be \$32,969,848 (Harr, 2002).<sup>3</sup> Obviously, domestic violence is taking a huge toll on our state.

The cost to the community in lost lives and resources is a constant reminder that domestic abuse is not just a family affair and it is not merely a private affair; it is a community affair demanding a community response. Early intervention and a coordinated community response can help reduce the loss to our communities and our state from domestic violence.

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<sup>3</sup> Calculated from Blue Cross Blue Shield of Tennessee cost estimates based on National Violence Against Women survey data

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## Chapter 2 Judicial Role in Domestic Abuse Cases

### §2-1 Court Objectives

The legislature has clearly stated the policy of the State of Tennessee concerning domestic abuse:

*The purpose of this part is to recognize the seriousness of domestic abuse as a crime and to assure that the law provides a victim of domestic abuse with enhanced protection from domestic abuse. A further purpose of this chapter is to recognize that in the past law enforcement agencies have treated domestic abuse crimes differently than crimes resulting in the same harm but occurring between strangers. Thus, the general assembly intends that the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated.<sup>1</sup>*

When adjudicating a case which involves domestic abuse issues, it is important for the Court to understand and identify the outcomes the Court wishes to effect. When the objectives are identified, a decision can be made which will promote these outcomes. Following is a list of objectives which apply in both the civil and criminal courts when domestic abuse issues arise.

- To stop the violence;
- To protect the victim;
- To protect the children and other family members;
- To protect the general public and community;
- To hold the perpetrator accountable for the violent behavior, and for stopping that behavior;
- To provide restitution for the victim;
- To convey to the public that domestic abuse will not be tolerated;
- To rehabilitate the perpetrator, to the extent possible without compromising the other objectives.

When making decisions, such as whether to dismiss a case because the victim requests it, the Court can examine these objectives to see if the proposed action furthers the objectives of court intervention. Every court is called upon to make decisions that affect the outcome of the case and the continued behaviors of the parties. Reviewing the Court's objectives as part of the decision-making process can provide clarity for the Court.

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<sup>1</sup> Tenn. Code Ann. § 36-3-618 (2009); see Kite v. Kite, 22 S.W.3d 803; 1997 Tenn. LEXIS 284; 1997 WL 259332 (Tenn. 1997).

## **§2-2 Domestic Abuse Coordinating Councils**

*[A]n effective response to family violence cannot be accomplished piecemeal. No one agency or office can expect that internal changes will result in improvement in the entire justice system. There are too many agencies, courts and persons, and too many interactions, as family violence cases are detected, investigated, prosecuted, and monitored. A failure in any part of the system will limit the success of the entire justice system. What is needed is a systems approach, a strategy which includes all parts of the justice system (Edwards, 1992).*

The American Bar Association's Commission on Domestic Violence, after researching successful domestic abuse programs across the country, concluded that:

*...only those programs which draw on the broad resources of the community—the judges, lawyers, doctors, nurses, social workers, psychiatrists, shelter workers, victim services professionals, law enforcement personnel, probation officers, military personnel, members of the business community and the media—have been able to begin the process of change that will end domestic violence in families (Valente, 1995).*

A Domestic Abuse Coordinating Council is a community group consisting of representatives from all the agencies, departments, and groups which are a part of the system dealing with domestic abuse, i.e., law enforcement, prosecution, defense, probation, the courts (civil and criminal), court staff, corrections, social services, medical experts (including, perhaps, the coroner), intervention services for perpetrators and victims, community domestic violence groups, shelters, victim representatives, other relevant governmental agencies such as the Commission on the Status of Women, community leaders, as well as persons with special expertise in such areas as elder abuse, gay and lesbian abuse, immigrant victims, research and data collection, etc.

The general purposes of a Coordinating Council are:

- to effectuate coordination between agencies, departments, and the courts with victims of domestic abuse;
- to promote effective prevention, intervention, and treatment based on research and data collection; and
- to improve the response to domestic abuse so as to reduce the incidence thereof.

The mission of coordinated community response programs is to streamline the process of investigation and conviction, increase conviction rates, and make the courts more consistent and conscientious in domestic violence cases. Tactics include early intervention, prevention, counseling, education, and training of professionals, investigation, and prosecution. When Nashville implemented a coordinated community response program, the domestic violence homicide rates in Nashville fell 46% on average for three successive years (The Silent Witness National Initiative, 2000, 41, 43).

Judges are in an excellent position of leadership to organize and direct a Coordinating Council. Judge Frederic B. Rodgers, a trial judge who developed an accelerated domestic abuse program in Colorado, suggests that:

*...judges should not be reluctant to assume a leadership role in dealing with the bar association, police, court administration, district attorneys, public defender, service providers, probation and jails. They need to coordinate the activities of all the parties and endeavor to make the Court's treatment of this pernicious problem satisfactory to all of the consumers of the justice system (Rodgers, 1992).*

Judges have a unique perspective on and control over court operations. Judges play a major role in determining and controlling domestic abuse. Not only will judicial participation facilitate a better understanding of how the system works and what is needed to improve its operation, but it will increase the judges' understanding about the dynamics of domestic abuse (Edwards, 1992). The Final Report of the Attorney General's Task Force on Family Violence discusses how sending a message to the community that domestic abuse will not be tolerated must start with the judge:

*Judges are the ultimate legal authority in the criminal justice system. If they fail to handle domestic abuse cases with the appropriate judicial concern, the crime is trivialized and the victim receives no real protection or justice. Using the yardstick of the Court to measure conduct, the attacker will perceive the crime as an insignificant offense. Consequently he has no incentive to modify his behavior and continues to abuse with impunity. The investment in law enforcement services, shelter support and other victim assistance is wasted if the judiciary is not firm and supportive (Attorney General's Task Force on Family Violence: Final Report, 1984).*

### **§2-3 Local Domestic Abuse Policies and Education**

All state and local court administrators, court clerks, and judges, with personnel who are likely to encounter situations involving domestic abuse, must adopt a policy regarding domestic abuse and provide initial and continuing education concerning the dynamics of domestic abuse and the handling and response procedures concerning allegations of domestic abuse to all judges and court personnel who are likely to encounter allegations of domestic abuse.<sup>2</sup> Law enforcement agencies face a similar requirement.<sup>3</sup> The Domestic Violence State Coordinating Council has developed a Model Judicial Policy for courts to adopt or adapt as needed. This policy is included in the appendices.

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<sup>2</sup> Tenn. Code Ann. § 38-12-107 (2015).

<sup>3</sup> Tenn. Code Ann. § 38-12-106 (2015). The Peace Officers Standards and Training Commission has adopted a training curriculum, *Domestic Violence/Sexual Assault Interdiction (2003)*, for use by law enforcement agencies in Tennessee. Copies are available from the Tennessee Coalition Against Domestic and Sexual Violence, 2 International Plaza, Suite 425, Nashville, TN 37217, 615 386-9406, 615 383-2967 (fax), tcadsv@tcadsv.org, www.tcadsv.org.

Court personnel should have lists of local shelters, perpetrator intervention programs, legal assistance, and other information for parties to cases involving domestic abuse. The Court should take all necessary steps to give information to the parties which will assist in maintaining the safety of the parties and the children.

#### **§2-4 *Coordination and Communication between Courts within the Same Judicial District.***

Each judicial district in Tennessee has several courts which may be handling cases involving the same family. This is especially true in cases which involve issues of domestic abuse. Chancery or Circuit Court may be hearing a divorce involving custody and visitation decisions. A General Sessions Judge may have heard an Order of Protection and know nothing about the restraining order currently in effect in the divorce. The General Sessions Judge may hear a case alleging contempt of an Order of Protection and not be aware that there are criminal charges pending as a result of the same series of events stemming from the contempt. A Juvenile Judge could be hearing a dependency and neglect case or a termination of parental rights case and not know about criminal charges or divorce cases which involve the parties. The domestic abuse policy developed by each judicial district should provide mechanisms for communication between courts where issues of domestic abuse present themselves to ensure that judges are aware of all court proceedings which involve the parties.

#### **§2-5 *Security Issues.***

Cases where violence is an issue can be dangerous for all participants, including court personnel. Care should be exercised in cases where domestic abuse is an issue to take steps to prevent any weapons from being carried into the courtroom. Bailiffs should be present whenever an order is announced. Their presence will provide security for all participants. The bailiff should escort the parties out separately and ensure that one party has left the courtroom before the other party is escorted out.

#### **§2-6 *Ethical Considerations in Domestic Abuse Cases***

In an article on judicial ethics in domestic abuse cases, Bernard W. Greene, points out that judges that hear domestic abuse cases will encounter a variety of ethical issues, generally related to issues of impartiality. For example,

*[V]ictims may not present themselves to the court as likeable or as totally innocent. They may also present themselves multiple times before the court and not be as cooperative in pursuing remedies against their abuser as a judge may think a victim should. All of this may lend itself to conscious or unconscious biases of the judge against the victim of domestic violence. Similarly, such biases may be expressed against the accused. In addition to the many requirements that judges treat all parties before their court fairly and impartially, the Code includes new provisions in Section 3(B)(5) and (6), which prohibit judges from using words or*

*conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, social economic status or other biases. The obligation to avoid biases applies to the judge, his or her staff, court officials and others subject to his or her direction and it also is to be applied by the judge to lawyers appearing in proceedings before them [sic] (Greene, 1998).*

The full article is included in the appendices.

#### **§2-6.01      Extra-judicial activities.**

Under Section 4C(3) of the Code, a judge may serve as an officer, director, or trustee of or non-legal advisor to an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. State, local, or national domestic violence councils or task forces generally would fit in this category and would be permissible, unless the advocacy activities of the organization would draw the judge into taking positions on issues likely to come before him or her, or would impugn his or her impartiality or the appearance of impartiality.

#### **§2-6.02      Taking positions on controversial issues.**

The U.S. Supreme Court in Republican Party of Minnesota v. White<sup>4</sup> held in 2002 that a canon of judicial conduct that prohibits a "candidate for a judicial office" from "announc[ing] his or her views on disputed legal or political issues" violates the First Amendment of the Constitution. In response to this opinion the Tennessee Supreme Court on October 11, 2005 issued the following amended Comment to Rule 10, Canon 5(A)(3)(d), effective immediately:

*Commentary. – A judge's obligation to avoid prejudgment is well established. Under the First Amendment and in light of the voters' right to have information about an elective candidate's views, judicial ethics rules may not prohibit judicial candidates from announcing their views on disputed legal and political issues. Canon 5(A)(3)(d) does not proscribe a candidate's public expression of personal views on disputed issues. To ensure that voters understand a judge's duty to uphold the Constitution and laws of Tennessee where the law differs from the candidate's personal beliefs, however, candidates are encouraged to emphasize their duty to uphold the law regardless of personal views.*

*Some speech restrictions are indispensable to maintaining the integrity, impartiality, and independence of the judiciary. The state has a compelling interest in enforcing these restrictions. Thus, under Canon 5(A)(3)(d) it remains improper for a judicial candidate to make pledges, promises or commitments regarding pending or*

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<sup>4</sup> 536 U.S. 765, 153 L. Ed. 2d 694, 122 S. Ct. 2528 (2002).

*impending cases, specific classes of cases, specific litigants or classes of litigants, or specific positions of law, that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases that would fall within the scope of the pledge, promise or commitment. To fall within the proscription of this rule the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected. Statements by a candidate that would have this effect are inconsistent with the obligation of all judges to perform impartially the adjudicative duties of office.*

*Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations seeking to learn their views on disputed or controversial legal or political issues. Canon 5(A)(3)(d) does not generally prohibit candidates from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the questions and the format provided for answering, a candidate's responses might constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way. In order to avoid violating Canon (5)(A)((3)(d), therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views.*

*Additionally, judicial candidates must keep in mind that, in stating their position as to an issue, they may later be required to disqualify themselves pursuant to Canon 3(E)(1) should that issue subsequently arise in a proceeding before them and, because of the position taken by the judge while a candidate, the judge's impartiality might reasonably be questioned.*

*Canon 5(A)(3)(d) does not prohibit a candidate for judicial office from making public statements concerning improvements to the legal system or to the administration of justice.*

### **§2-6.03 Referrals to batterers intervention programs.**

Effective July 1, 2005, the Supreme Court has amended Rule 10, Canon 3(C) ("Administrative Responsibilities") by adding the following new paragraph (5):

When a judge refers litigants to community resources as a condition or requirement relating to litigation, such referrals shall be made impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. For purposes of this provision, a "community resource" is any person or organization providing services such as, but not limited to: counseling services; driver education or traffic safety programs; mental health, substance

abuse, or other treatment programs; parenting classes; private probation services; and similar types of services.

The "Commentary" to Canon 3(C) is likewise amended by adding the following new second paragraph:

It is increasingly more common for trial judges, either directly or acting through court employees or court affiliated agencies, to refer litigants to a variety of community resources. For example, litigants may be required by a court to complete treatment programs, parenting classes, driver education or traffic safety programs, etc., or to be monitored by private probation services. Section 3(C)(5) requires that such referrals be made impartially and on the basis of merit, and without nepotism or favoritism. This requirement complements other provisions, e.g., Section 2(A) and (B), Section 3(E), and Section 4(A) and (D), which may apply to such referrals.

This amendment would apply to referrals by judges to batterer intervention programs, substance abuse treatment, and other similar referrals. Making referrals only to batterer intervention programs that have been certified pursuant to the state standards adopted by the Domestic Violence State Coordinating Council would help to insure not only that referrals are made in an impartial manner but that the services provided meet certain essential minimum requirements. The state standards for batterer intervention programs are included in the Appendices.

#### **§2-6.04      Records checks in Order of Protection cases.**

The Judicial Ethics Committee has held that judicial consideration of criminal history records supplied through a local law enforcement agency upon the pre-trial, *sua sponte* request of the Judge would constitute an impermissible communication concerning a pending or impending proceeding.<sup>5</sup>

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<sup>5</sup> Attorney General Opinion No. 97-5 (1997).

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## Chapter 3 Orders of Protection<sup>1</sup>

Orders of Protection are a powerful tool to reduce domestic abuse. They are particularly helpful when seen as part of a comprehensive approach aimed at achieving the goals of civil court intervention. A common misconception regarding domestic abuse is that the violence will stop once the victim leaves the relationship, and therefore issuance of Orders of Protection after separation is unnecessary. Studies show that in fact a perpetrator often increases the violence after separation in an attempt to coerce the victim to return or in retaliation for the separation. Many perpetrators who kill their partners do so at the time the victim is in the process of separating from the perpetrator (Stark *et al.*, 1980; Langan and Innes, 1986). For this reason it is critical that the Court use all available legal remedies to provide the victim with protection throughout the duration of the court proceedings.

### **§3-1 Purpose and Effectiveness of Orders of Protection**

#### **§3-1.01 Purpose of Orders of Protection.**

Orders of Protection have emerged during the past decade as an accessible and effective justice system response to domestic abuse. They can play a critical part in a comprehensive plan designed to protect victims from continuing violence in the home. In one study filing for an Order of Protection resulted in a significant decline (66%) in abuse over a two-year follow-up period (Carlson, Harris, and Holden, 1999). There is a strong correlation between an increase in legal protection and support services for battered women and a decrease in the number of domestic homicides (NCJFCJ, 1990).

*Civil protective orders offer judges a unique additional tool for responding to the special difficulties of domestic violence cases. When properly used and enforced, protective orders can help prevent specific behavior such as harassment or threats which could lead to future violence. They also can help provide a safe location for plaintiff, if necessary, by barring or evicting an offender from the household, and establish safe conditions for any future interactions, for example, supervised child visitation (Finn and Colson, 1990).*

The legislature has clearly stated its legislative intent concerning the purpose of the Domestic Abuse Act:

*The purpose of this part is to recognize the seriousness of domestic abuse as a crime and to assure that the law provides a victim of domestic abuse with*

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<sup>1</sup> This chapter draws on materials prepared by Leslye Orloff for the Family Violence Prevention Fund, San Francisco, CA (1992).

*enhanced protection from domestic abuse. A further purpose of this chapter is to recognize that in the past law enforcement agencies have treated domestic abuse crimes differently than crimes resulting in the same harm but occurring between strangers. Thus, the general assembly intends that the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim, and the official response shall communicate the attitude that violent behavior is not excused or tolerated.<sup>2</sup>*

**§3-1.02 Effectiveness of Orders of Protection.**

The National Institute of Justice found that Orders of Protection, when properly drafted and enforced, are effective in eliminating or reducing domestic abuse. The utility of Orders of Protection may depend on whether they provide the requested relief in specific detail (Finn and Colson, 1990; Grau, Fagan, and Wexler, 1984; Lerman, 1964; Walker, 1980).

*Judges stress that each type of relief provided must be fully explained in the order. Providing precise conditions of relief makes the offender aware of the specific behavior prohibited. A high degree of specificity also makes it easier for police officers and other judges to determine later whether the defendant has violated the order (Finn and Colson, 1990).*

**§3-2 Filing of a Petition for Orders of Protection**

**§3-2.01 The particular court which can issue an Order of Protection varies depending on the population of the county.**

The particular court which can issue an Order of Protection varies depending on the population of the county. The statute sets forth specific requirements for certain counties based on population, as follows:

<b>County</b>	<b>Definition</b>	<b>Court(s) with Jurisdiction</b>
Davidson	Metropolitan form of government with a population of more than 100,000 <sup>3</sup>	Any court of record with jurisdiction over domestic relation matters and the general sessions court
Hamilton, Knox	Population of not less than 200,000 nor more than 800,000 <sup>4</sup>	Any court of record with jurisdiction over domestic relation matters

<sup>2</sup> Tenn. Code Ann. § 36-3-618 (2015); see *Kite v. Kite*, 22 S.W.3d 803, 1997 Tenn. LEXIS 284, 1997 WL 259332 (Tenn. 1997).

<sup>3</sup> Tenn. Code Ann. § 36-3-601(2)(B) (2015).

<sup>4</sup> Tenn. Code Ann. § 36-3-601(2)(A) (2015).

Shelby	Population in excess of 800,000 <sup>5</sup>	Any court of record with jurisdiction over domestic relations matters or the general sessions criminal court
All other counties	All other counties <sup>6</sup>	Any court of record with jurisdiction over domestic relation matters or the general sessions court

Judicial commissioners, magistrates, and other officials with the authority to issue an arrest warrant in the absence of a judge may issue Ex Parte Orders of Protection when a judge of one of the courts listed above is not available.<sup>7</sup> The Attorney General and Reporter for the State of Tennessee has advised that “not available” means that:

the judge cannot carry out the duties of his office due to illness, disability or other cause, when the judge is away from his or her office or when the judge is engaged in the performance of other judicial duties such that he or she would not be able to address the application for an order of protection within a reasonable amount of time.<sup>8</sup>

When hearing an Order of Protection case, a General Sessions Court has full domestic relations jurisdiction over these kinds of cases.<sup>9</sup> However, the grant of jurisdiction over Orders of Protection to the General Sessions Courts in Davidson and Shelby Counties does not confer jurisdiction to these courts for matters relating to child custody, visitation, or support.

**§3-2.02 Juvenile Courts have jurisdiction to enter an order of protection and assistance when hearing a criminal nonsupport case.<sup>10</sup>**

The Order may require the perpetrator to:

- Stay away from the home, dependent child, or spouse;
- Abstain from offensive conduct against the dependent child or spouse or from other acts which tend to make the home an unfit place for the dependent person to live; or

The Court may also include in the Order a provision to permit the defendant visitation with the child or children at reasonable or stated periods. The Court should be specific in its Order about when and where the visitation will occur and how the transfer of the child will take place, keeping in mind the safety of both the victim and the children.

<sup>5</sup> Tenn. Code Ann. § 36-3-601(2)(E) (2015).

<sup>6</sup> Tenn. Code Ann. § 36-3-601(2)(C) (2015).

<sup>7</sup> Tenn. Code Ann. § 36-6-601(2)(D) (2015); see Attorney General Opinion No. 96-139 (1996) [(Attorney General's opinion that this delegation of authority is constitutional under State v. Bush, 626 S.W.2d 470 (Tenn.Cr. App. 1981)].

<sup>8</sup> Attorney General Opinion No. 00-120 (2000).

<sup>9</sup> Attorney General Opinion No. 00-165 (2000); Attorney General Opinion No. 94-4 (1994).

<sup>10</sup> Tenn. Code Ann. § 39-15-102(a)(3) (2015)T.C.A. § 37-1-103 (clarifies that a court of juvenile jurisdiction can enter temporary orders on behalf of a child, including orders of protection).

### §3-2.03 Personal jurisdiction.

A Tennessee court acquires personal jurisdiction over a non-resident if an incident or threat of domestic abuse has occurred in the state.<sup>11</sup> An offense can be considered to have occurred in the state if any part or element of the crime was committed in the state.<sup>12</sup> Lack of personal jurisdiction must be raised by the respondent and is easily waived by express or implied consent.<sup>13</sup>

### §3-2.04 Venue.

Venue for a petition for an order of protection and all other matters relating to orders of protection shall be in the county where the respondent resides or the county in which the domestic abuse, stalking, or sexual assault occurred. If the respondent is not a resident of Tennessee, the petition may be filed in the county where the petitioner resides.<sup>14</sup> An Order of Protection is valid and enforceable in any county in Tennessee.<sup>15</sup> Like personal jurisdiction, improper venue is waived if the respondent fails to enter a special appearance for the purposes of objecting to venue.<sup>16</sup> When a defect in venue is waived by the respondent, the court can hear the case or the case can be transferred to a court in another county that does have venue, at the court's discretion.<sup>17</sup> Clarify jurisdictional and venue issues before issuing the Order of Protection to the victim.

### §3-2.05 Forms

***The administrative office of the courts, in consultation with the Domestic Violence State Coordinating Council, has developed a "Petition for Orders of Protection" form, an "Order of Protection" form, an "Ex Parte Order of Protection" form, a "Dismissal Order," and the Affidavit of Firearms Dispossession" form. These forms shall be used exclusively in all courts exercising jurisdiction over orders of protection.<sup>18</sup> These forms were designed to comply with Tennessee law and to be***

<sup>11</sup> Tenn. Code Ann. § 20-2-214 (2015); see Gentry v. Davis, 512 S.W.2d 4, 1974 Tenn. LEXIS 475 (1974).

<sup>12</sup> See, e.g., Adair v. United States, 391 A. 2d 288 (D.C. 1978); United States v. Baish, 460 A. 2d 38 (D.C. 1983); Anthony T. v. Anthony J., 510 N.Y.S. 2d 810 (N.Y. 1986) (telephone harassment initiated outside but received in the state could serve as basis for Order of Protection); Pierson v. Pierson, 555 N.Y.S. 2d 227 (N.Y. 1990) (appellant's return to New York and his presence and service in New York presented a risk of violence to plaintiff sufficient to establish personal jurisdiction although the acts of violence occurred outside the state).

<sup>13</sup> Landers v. Jones, 872 S.W.2d 674, 1994 Tenn. LEXIS 46 (Tenn. 1994).

<sup>14</sup> Tenn. Code Ann. § 36-3-602(c)(2015).

<sup>15</sup> Tenn. Code Ann. § 36-3-606(f)(2015).

<sup>16</sup> Kane v. Kane, 547 S.W.2d 559, 1977 Tenn. LEXIS 561 (1977).

<sup>17</sup> Taylor v. Taylor, 903 S.W.2d 307, 1995 Tenn. App. LEXIS 169 (Tenn. App. 1995).

<sup>18</sup> T.C.A. § 36-3-604(c)(2015).

***uniform with those of surrounding states so that Tennessee forms may be afforded full faith and credit. The forms have been sent to the courts in Tennessee which handle Order of Protection cases and are available on the website of the Administrative Office of the Courts at <http://www.tsc.state.tn.us/>.***

### **§3-3 Grounds for Issuance of an Order of Protection**

**§3-3.01 The petitioner must have been subjected to, threatened with or placed in fear of domestic abuse, stalking, or sexual assault.<sup>19</sup>**

**Domestic abuse, stalking, and sexual assault fall within the definition of abuse as outlined in Tenn. Code Ann. § 36-3-601(1):**

- Inflicting or attempting to inflict physical injury on an adult or minor by other than accidental means;
- Placing an adult or minor in fear of physical harm;
- Physical restraint; or
- Malicious damage to the personal property of the abused party,
- Inflicting, or attempting to inflict, physical injury on any animal owned, possessed, leased, kept, or held by an adult or minor, or placing an adult or minor in fear of physical harm to any animal owned, possessed, leased, kept, or held by such adult or minor.<sup>20</sup>

**§3-3.02 The domestic abuse petitioner must meet the definition of a victim which requires a specific relationship with the respondent.**

Domestic abuse Victim is defined as a victim who has a domestic relationship who is experiencing abuse. The relationship requirements are as follows:

- Adults or minors who are current or former spouses;
- Adults or minors who live together or who have lived together;
- Adults or minors who are dating or who have dated or who have or had a sexual relationship;
- Adults or minors related by blood or adoption;
- Adults or minors who are related or were formerly related by marriage; or
- Adult or minor children of a person in a relationship described above.<sup>21</sup>

There is no relationship requirement for a sexual assault victim or a stalking victim to file a petition for an order of protection.

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<sup>19</sup> Tenn. Code Ann. § 36-3-601(9)(10)(11) (2015).

<sup>20</sup> Tenn. Code Ann. § 36-3-601(1)(2015).

<sup>21</sup> Tenn. Code Ann. § 36-3-601(11) (2015).

Stalking victim means any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of the offense of stalking.<sup>22</sup>

Sexual assault victim means any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of any form of rape or sexual battery.<sup>23</sup>

**§3-3.03 Any victim who has been subjected to domestic abuse, sexual assault, or stalking may seek relief through an Order of Protection.<sup>24</sup>**

Any victim of domestic abuse, sexual assault, or stalking may file a petition for an Order of Protection. **The requirement that the abuse be by an adult was repealed by the legislature in 2005.**<sup>25</sup>

A petition filed by an unemancipated minor must be signed by at least one parent or by the minor's guardian.<sup>26</sup> A minor can become emancipated in several ways:

- Marriage,<sup>27</sup>
- Military service<sup>28</sup>;
- Consent of the parents, either express or implied<sup>29</sup>; or
- An emancipation decree in circuit or chancery court<sup>30</sup>.

The marriage of a minor child either with or without the consent of the parents fully emancipates such child from parental authority, even though the child may later be divorced while still a minor. Parents may give their consent to the minor's emancipation, and this consent may be either express or implied. For example, if the parents allow the minor to move out into his or her own apartment, do not contribute to his or her support, and do not exercise parental authority over the minor, consent to the minor's emancipation may be implied. Finally, a minor may have been emancipated by a Court. Circuit and chancery courts have concurrent jurisdiction to declare a minor emancipated.<sup>31</sup>

In cases before the juvenile court where the department of children's services is a party or where a guardian ad litem has been appointed for the child by the juvenile court, the

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<sup>22</sup> Tenn. Code Ann. § 36-3-601(10) (2015).

<sup>23</sup> Tenn. Code Ann. § 36-3-601(9) (2015).

<sup>24</sup> Tenn. Code Ann. § 36-3-602(a) (2015).

<sup>25</sup> Id.

<sup>26</sup> Tenn. Code Ann. § 36-3-602(b) (2015).

<sup>27</sup> *Going v. Going*, 8 Tenn. App. 690, 1928 Tenn. App. LEXIS 191 (Tenn. App. 1928).

<sup>28</sup> *Glover v. Glover*, 319 S.W.2d 238, 1958 Tenn. App. LEXIS 107 (Tenn. App. 1958).

<sup>29</sup> *Wallace v. Cox*, 188 S.W. 611, 1916 Tenn. LEXIS 101 (Tenn. 1916).

<sup>30</sup> Tenn. Code Ann. § 29-31-105 (2015).

<sup>31</sup> Tenn. Code Ann. § 29-31-101 (2015).

petition may be filed on behalf of the unemancipated person by the department or the guardian ad litem.<sup>32</sup>

This petition may also be signed by a caseworker at a not-for-profit organization which receives funds pursuant to Title 71, Chapter 6, Part 2 for family violence and child abuse prevention and shelters; provided, however, that petition signed by such a caseworker may not be filed against such unemancipated minor's parent or legal guardian.<sup>33</sup> Additionally, "[i]n such case, unless the court finds that the action would create a threat of serious harm to the minor, a copy of the petition, notice of hearing and any ex parte order of protection shall also be served on the parents of the minor child, or if the parents are not living together and jointly caring for the child, upon the primary residential parent."<sup>34</sup>

### **§ 3-3.04 Relatives may petition on behalf of a vulnerable adult.**

The Tennessee Legislature in 2010, passed a law permitting a relative to file an order of protection on behalf of an "adult" as defined under the Adult Protection Act T.C.A. § 71-6-101, who is the victim of willful abuse, neglect or exploitation (T.C.A. § 71-6-117). The statute does not include a person while in the custody of intermediate care facilities for persons with mental retardation (ICFs/MR) and a person while receiving residential services or other services from a community provider through contracts with the division of intellectual disability services, department of finance and administration.

The relative filing the petition must be a spouse, child, including stepchild, adopted child or foster child; parents (stepparents, adoptive parents or foster parents); siblings of the whole or half-blood; step-siblings, grandparents, grandchildren, of any degree, and aunts, uncles, nieces and nephews.

Jurisdiction, venue and service of this order of protection are the same as other orders of protection in Tennessee. At the time of the hearing, if the judge finds by a preponderance of the evidence that the allegations are true, then the court may issue an order of protection for a definite period of time not to exceed 120 days. The court has the discretion to appoint a guardian ad litem under T.C.A. § 34-1-107.

An order of protection pursuant to this section may: (1) (A) Order the respondent to refrain from committing a violation of this part against the adult, T.C.A. § 71-6-117; (B) Refrain from threatening to misappropriate or further misappropriating any monies, state or federal benefits, retirement funds or any other personal or real property belonging to the adult; (C) Order the return to the adult or the adult's caretaker or conservator or to the fiduciary any monies or benefits misappropriated from the adult. The court may also enter a judgment against the respondent for repayment. If the amount in question

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<sup>32</sup> Tenn. Code Ann. § 36-3-602(b) (2015).

<sup>33</sup> Tenn. Code Ann. § 36-3-602(b) (2015).

<sup>34</sup> Tenn. Code Ann. § 36-3-605(c) (2015).

exceeds ten thousand dollars, the court may require the caretaker or custodian of funds appointed under this subsection to post a bond. (2) Enjoin the respondent from providing care for an adult on a temporary or permanent basis; (3) Prohibit the respondent from telephoning, contacting, or otherwise communicating with the adult, directly or indirectly, and any other necessary relief to protect the adult.

Any violation of the order of protection shall be treated as an order of protection issued under the Order of Protection Act. This would include contempt (T.C.A. § 36-3-610) and the violation of the order of protection (T.C.A. 39-13-113). The Tennessee firearms prohibition may apply depending on the relationship between the respondent and the adult.<sup>35</sup>

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<sup>35</sup> T.C.A. § 71-6-124 (2015).



### §3-4 Ex Parte Orders

#### §3-4.01 **The Court may issue an Ex Parte Order of Protection immediately upon the filing of a petition and before a hearing for good cause shown.**

The good cause requirement is met upon a showing of an immediate and present danger of abuse to the petitioner.<sup>36</sup> In making the determination whether or not to issue an Ex Parte Order, the judge or other official must liberally construe the allegations of the Petition in favor of the petitioner, particularly if it is filed without the assistance of an attorney.<sup>37</sup> Thus if, taking the allegations of the petition as true, it appears that the petitioner is at risk of continued harm, the Ex Parte Order should be issued.

The Court should consider the following when determining whether there is an immediate and present danger of domestic abuse:

- A history of violence;
- Petitioner's injuries;
- Respondent's access to weapons;
- Threats to attack the petitioner;
- Threats to attack or abduct the children;
- Threats or attacks on family or household members;
- Respondent's drug and alcohol abuse;
- Respondent's history of a mental disorder;
- Respondent's threats of suicide;
- Petitioner's fear of retaliation for attempts to leave the relationship.

Due process rights to notice and hearing are not required when irreparable harm may result if an Ex Parte Order is not entered.<sup>38</sup> The petitioner need not testify other than by petition prior to the issuance of an Ex Parte Order. The fact that the petitioner has not recited a recent event of abuse or that the petitioner has waited to file a Petition is not grounds to deny the petition.

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<sup>36</sup> Tenn. Code Ann. § 36-3-605(a)(2015).

<sup>37</sup> Tenn. Code Ann. § 36-3-604(a)(2015).

<sup>38</sup> See also Sanders v. Shepard, 185 Ill.App. 719, 541 N.E. 2d 1150, 1155 (1989) (no violation of procedural due process where affidavit in support of emergency Order contained allegation of harm if Order not entered); Marquette v. Marquette, 686 P. 2d 990 (Okla. App. 1984) (infringement minimized by statutory requirement of full hearing within ten days).

**§3-4.02      Ex Parte Orders of Protection are intended to protect the petitioner until a full hearing on the petition.**

A hearing must be held within fifteen days of service of the Ex Parte Order on the respondent.<sup>39</sup> If the hearing is held within fifteen (15) days of service of such order, the ex parte order shall continue in effect until the entry of any subsequent order of protection issued pursuant to 39-3-609. If no ex parte order of protection has been issued as of the time of the hearing, and the petitioner has proven the allegation of domestic abuse, stalking or sexual assault by a preponderance of the evidence, the court may, at that time, issue an order of protection for a definite period of time, not to exceed one (1) year.<sup>40</sup> The Ex Parte Order must be served upon the respondent at least five days prior to the hearing.<sup>41</sup> The Ex Parte Order must be personally served on the respondent, unless the respondent is not a resident of Tennessee, in which case the Ex Parte Order is served by mail through the Secretary of State.<sup>42</sup>

If the petitioner has visible injuries, the judge should include written findings concerning those injuries in the Order granting temporary relief. Recording this information may become important for use in the subsequent hearing on the extended Order of Protection since the evidence of the injuries may have healed by then.

Ex parte Orders of Protection are not generally appealable, since they are interlocutory in nature and subject to an expeditious hearing on the merits.<sup>43</sup>

**§3-4.03      If no Ex Parte Order is issued or if the Ex Parte order is dismissed, the case should be scheduled for hearing.**

When someone requests an Order of Protection, the office of the clerk must file the Petition for Orders of Protection whether or not an Ex Parte Order is granted. Even if the judge, judicial commissioner, or magistrate denies an Ex Parte Order, the Petition must be filed and the judge must still hold a hearing to determine, after presentation of sworn testimony and any documentary or other physical evidence, whether or not grounds exist for issuance of an Order of Protection.

If the judge or other official finds that there is no immediate and present danger of domestic abuse and no Ex Parte Order is issued, the following steps must be taken:

- The Petition must be filed;
- The case must be set for hearing;

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<sup>39</sup> Tenn. Code Ann. § 36-3-605(b) (2015).

<sup>40</sup> Id.

<sup>41</sup> Tenn. Code Ann. § 36-3-605(c) (2015).

<sup>42</sup> Tenn. Code Ann. § 36-3-602 (c) (2015).

<sup>43</sup> See Tenn. R. App. P. 9 (appeal of interlocutory orders is within the discretion of the trial and appellate courts).

- Process must be served on the respondent; and
- A hearing must be held at which the petitioner and the respondent (if he or she appears) can give sworn testimony, examine other witnesses to the abuse, and introduce documentary and other physical evidence<sup>44</sup> or at which the parties may announce their agreement in the case, subject to the approval of the judge.<sup>45</sup>

If the Court dismisses the Ex Parte order, the order of protection petition remains pending before the Court, and the Court should have a hearing on the petition.

### **§3-5 Relief Available through an Order of Protection**

#### **§3-5.01 Relief granted in an Ex Parte Order is limited.**

Relief granted in an ex parte Order may include only the following:

- Directing the respondent to refrain from committing domestic abuse, stalking or sexual assault or threatening to commit domestic abuse, stalking or sexual assault against the petitioner or the petitioner's minor children.<sup>46</sup>
- Prohibiting the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly..<sup>47</sup>
- Prohibiting the respondent from stalking the petitioner.<sup>48</sup>

The magistrate may order the respondent to leave the shared residence while the order of protection petition is pending a hearing.<sup>49</sup>

#### **§3-5.02 After a hearing the Court has the inherent power to issue any constitutionally defensible relief.**

Relief that may be granted after the petitioner and respondent have been given an opportunity to be heard by the Court includes:

- Granting to the petitioner possession of the residence or household to the exclusion of the respondent by evicting the respondent, by restoring possession to the petitioner, or by both;

<sup>44</sup> Tenn. Code Ann. § 36-3-605(b)(2015).

<sup>45</sup> An Agreed Order signed by counsel for both parties, or by the parties themselves if they are unrepresented, and approved by the judge has the same force and effect as an order entered after a hearing.

<sup>46</sup> T.C.A. § 36-3-606(a)(1)(2015).

<sup>47</sup> T.C.A. § 36-3-606(a)(2)(2015).

<sup>48</sup> T.C.A. § 36-3-606(a)(3)(2015). See T.C.A. § 39-17-315(2015).

<sup>49</sup> T.C.A. § 36-3-606 (a)(10) (2015); Attorney General No. 10-06 (2010).

- Directing the respondent to provide suitable alternate housing for the petitioner when the respondent is the sole owner or lessee of the residence or household;
- Awarding temporary custody of or establishing temporary visitation rights with regard to any minor children born to or adopted by the parties;
- Awarding financial support to the petitioner and such persons as the respondent has a duty to support; except in cases of paternity, the Court shall not have the authority to order financial support unless the petitioner and respondent are legally married;
- Directing the respondent to attend available intervention programs that address violence and control issues or substance abuse problems;
- Direct the respondent to pay the petitioner all costs, expenses and fees pertaining to the petitioner's breach of a lease or rental agreement for residential property if the petitioner is a party to the lease or rental agreement and if the court finds that continuing to reside in the rented or leased premises may jeopardize the life, health and safety of the petitioner or the petitioner's children. This language does not alter the terms, liability for the lease agreement.<sup>50</sup>

The Court must order the respondent to surrender all firearms.<sup>51</sup>

The Court may also direct the care, custody, or control of any animal owned, possessed, leased, kept, or held by either party or a minor residing in the household. In no instance shall such animal be placed in the care, custody, or control of the respondent but shall instead be placed in the care, custody, or control of the petitioner or in an appropriate animal foster situation.<sup>52</sup> The Court is not limited to the relief specifically enumerated in the statute.<sup>53</sup> To be effective, Orders of Protection must include all necessary protection against future abuse, given the needs of the victim. Victims of domestic abuse need a high level of protection if they are to be able to live a life safe and separate from the perpetrator because the perpetrator typically has ready access to the victim (Finn and Colson, 1990).

If the respondent is directed to attend available intervention programs that address violence and control issues or substance abuse problems, the Court should monitor compliance and hold the respondent in contempt for failure to follow through with intervention. Several studies of court-mandated batterer intervention programs found that between 25 and 37 percent of the offenders mandated to intervention either never showed up at all or dropped out fairly early in the intervention with few or no sanctions imposed by the courts (Chalk and King, 1998). The lack of sanctions for non-completers puts victims in jeopardy since victims are more likely to remain with a perpetrator who goes to intervention (Gondolf and Fisher, 1988).

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<sup>50</sup> Tenn. Code Ann. § 36-3-606(9)(a)(4)-(8)(2015).

<sup>51</sup> Tenn. Code Ann. § 36-3-606(g)(2015).

<sup>52</sup> Tenn. Code Ann. § 36-3-606(9)(2015).

<sup>53</sup> Tenn. Code Ann. § 36-3-606; Suttles v. Suttles, 1996 Tenn. App. LEXIS 494, (Tenn. App. 1996) (domestic abuse statute is broad enough to give the trial court sufficiently broad authority to enjoin the respondent from any type of conduct which would be either physically or mentally abusive to the petitioner).

Where the petitioner is in hiding, the Court should order the respondent to stay away from the petitioner's residence without revealing its location.<sup>54</sup> In such instances, the Court should order the respondent not to attempt to discover the location of the petitioner's residence and not to enlist the assistance of others in locating the petitioner. The Court may want to specify a minimum distance that respondent must keep from the petitioner.<sup>55</sup>

When the Court believes that a child may be at risk for abduction, physical or emotional harm, or being used by the respondent to gain access to or advantage over the petitioner, the Court may wish to prohibit contact between the respondent and the children. The Order should contain the names and birth dates of these children (Finn and Colson, 1990).

The relief provided should be explained fully and the terminology of the Order of Protection should be highly specific so that parties, law enforcement officers, and other judges will know exactly what is intended. Otherwise, enforcement will be difficult (Finn and Colson, 1990). Any Order of Protection must include the statement of the maximum penalty that may be imposed.<sup>56</sup>

### **§3-5.03 The Order of Protection may include additional provisions concerning property.**

The Order may award petitioner possession of the residence by eviction or require that the respondent provide suitable alternate housing except for petitioners who are seeking relief based on a dating relationship with the respondent.<sup>57</sup> No Order of Protection shall in any manner affect title to any real property.<sup>58</sup>

Additional relief the Court may want to consider when entering a vacate Order includes ordering the respondent:

- To surrender forthwith any keys to the home to the petitioner;
- Not to damage any of the petitioner's belongings or those of any other occupant;
- Not to shut off or cause to be shut off any utilities or mail delivery to the petitioner.

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<sup>54</sup> See Tenn. Code Ann. § 71-6-208(a)(2015) (no person can be compelled to provide testimony or documentary evidence in a criminal, civil, or administrative proceeding which would identify the address or location of a shelter).

<sup>55</sup> See, e.g., *State v. Sutley*, 1990 Ohio App. LEXIS 5520 (Ohio App. Ct. 1990) (order requiring defendant to stay away from petitioner, her family members, and the quadrant of the city where she resided did not violate the defendant's freedom of association rights where the restrictions related to his offenses and would help insure future compliance with the court order).

<sup>56</sup> Tenn. Code Ann. § 36-3-606(c)(2015).

<sup>57</sup> Tenn. Code Ann. § 36-3-606(e)(2015).

<sup>58</sup> Tenn. Code Ann. § 36-3-606(d)(2015).

The petitioner's right to relief is not affected by petitioner's leaving the residence to avoid domestic abuse, stalking, or sexual assault.<sup>59</sup>

If the respondent is allowed to retrieve personal property from the residence, the Court should specify in the Order those items to be retrieved and a time and date for the retrieval. The Court should also consider requiring that a law enforcement officer be present to insure that no violence occurs. Similar arrangements should be specified if the petitioner is to be allowed to retrieve personal property from the residence. In addition, the Court should order that respondent is not to be present when the petitioner retrieves property or to follow petitioner in the process of removing property.

### **§3-5.04 The Court must make orders regarding weapons, including a requirement that the respondent not possess weapons.<sup>60</sup>**

It is a federal and state offense for any person who is subject to an Order of Protection to ship, transport, possess, or receive any firearm, if such shipping, transport, possession, or receipt is in or affects interstate or foreign commerce.<sup>61</sup> Federal and Tennessee law prohibit the transfer (or return) of firearms to anyone currently subject to a protection order.<sup>62</sup> This firearms prohibition applies to a qualifying order of protection. A qualifying order of protection has meets the following requirements:<sup>63</sup>

Petitioner is an intimate partner of the respondent.

- Respondent received actual notice and had an opportunity to be heard.

- The order restrains the respondent from harassing, stalking, or threatening the intimate partner, child of the respondent, or child of the respondent's intimate partner

or

The order restrains respondent from engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or child.

- Finding of a credible threat to the physical safety of an intimate partner or child.

or

The order, by its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

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<sup>59</sup> Tenn. Code Ann. § 36-3-613(a)(2015).

<sup>60</sup> See, e.g., Hoffman v. Union County Prosecutor, 572 A.2d 1200, 1990 N.J. Super. LEXIS 113 (N.J. Super. Ct. Law Div. 1990) (police properly took possession of husband's rifles, shotguns and a Japanese saber that were removed at the wife's request after a domestic incident; continuation of the husband's firearms-purchaser ID card would not be in the interest of the public health, safety, or welfare).

<sup>61</sup> 18 U.S.C.A. § 922(g)(8)(B),(C)(2015).

<sup>62</sup> 18 U.S.C.A. § 922(d)(8); T.C.A. 36-3-606(g)(2015).

<sup>63</sup> 18 U.S.C.A. § 922(g)(8)(A)(2010); T.C.A. 39-17-1316(a)(1)(2015).

An intimate partner is defined as:

- A spouse or former spouse;
- A parent of the respondent's child;
- A person who is cohabiting or has cohabited with the respondent; or
- Someone similarly situated to a spouse who is covered by state protection laws<sup>64</sup>.

Federal law creates an exception for law enforcement officers and members of the active duty military to carry their duty firearms.<sup>65</sup> This exception applies only to Orders of Protection. If these persons are convicted of any domestic abuse crime, the firearms restriction applies to them as well. This section has been held constitutional.<sup>66</sup>

Tennessee law does not create an exemption for law enforcement or members of the active duty military.<sup>67</sup>

Tennessee law mandates that the respondent dispossess himself or herself of any firearms by any lawful means, such as transferring possession to a third party who is not prohibited from possessing firearms. The respondent may reassume possession of the dispossessed firearm at such time as the order expires or is otherwise no longer in effect.<sup>68</sup>

The Court must provide the following notices to the respondent:

1. To terminate his or her physical possession of the firearms in the respondent's possession by any lawful means, such as transferring possession to a third party who is not prohibited from possession firearms, within forty-eight (48) hours.
2. To complete and return the Affidavit of Firearm Dispossession form, which the court may provide the respondent or direct the respondent to the administrative office of the courts' Web site.
3. That if he or she possesses firearms as business inventory or that are registered under the National Firearms Act, there are additional statutory provisions which apply and shall include these additional provisions in the content of the order.<sup>69</sup>

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<sup>64</sup> 18 U.S.C.A § 921(a)(32)(2015).

<sup>65</sup> 18 U.S.C.A. § 925(a)(2015).

<sup>66</sup> U.S. v. Emerson, No. 99-10331 (5<sup>th</sup> Cir., revised November 2, 2001) [Online.] Available:<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=5th&navby=case&no=9910331cr0>. [June 12, 2002]; U.S. v. Pierson, 139 F.3d 501 (5<sup>th</sup> Cir. 1998); U.S. v. Smith, 964 F.Supp. 286 (N.D. Iowa, 1997).

<sup>67</sup> T.C.A. 36-3-625(2015).

<sup>68</sup> T.C.A. 36-3-625 (a) (2015).

<sup>69</sup> T.C.A. 36-3-625(b)(2015).

Upon issuance of the order of protection, its provisions and date and time of issuance shall be transmitted to the sheriff and all local law enforcement agencies in the county where the respondent resides.

If the respondent possesses a firearm registered under the National Firearms Act or is a firearms dealer other provisions apply:

1. If the possession, including, but not limited to, the transfer of weapons registered under the National Firearms Act that requires the approval of any state or federal agency prior to the transfer of such firearm, the respondent may comply with the dispossession requirement by having the firearms or firearms placed into a safe or similar container which is securely locked and to which the respondent does not have the combination, keys or other means of normal access.
2. If the respondent is licensed as a federal firearms dealer or a responsible party under a federal firearms license, the determination of whether such an individual “possesses” firearms that constitute the business inventory under such federal license shall be determined based upon the applicable federal statutes or the rules, regulations and official letters, rulings and publications of the Bureau of Alcohol, Tobacco, Firearms and Explosives. The order of protection shall not require the surrender or transfer of any such inventory if there are one or more individuals who are responsible parties under the federal license who are not the respondent subject to the order of protection.<sup>70</sup>

A person subject to an order of protection that fully complies with 18 U.S.C. § 922(g)(8) who knowingly fails to surrender or transfer all firearms commits a Class A Misdemeanor.<sup>71</sup> Failure to comply with the weapons surrender, including submission of the Affidavit of Surrender is considered a violation of the protective order.<sup>72</sup> Additionally, if a person possesses a firearm and is, at the time of the possession, subject to an order of protection that fully complies with the provisions of 18 U.S.C. § 922(g)(8) commits a Class A misdemeanor.<sup>73</sup> Tennessee law allows for a respondent to be punished for each of these crimes as separate offenses.<sup>74</sup>

Tennessee law forbids sales of firearms to persons who have been convicted of the offense of stalking or are addicted to alcohol, and sales to persons ineligible to receive them under 18 U.S.C. § 922, which includes people under Orders of Protection and those convicted of a “misdemeanor crime of domestic violence.”<sup>75</sup> Tennessee makes the violation of a protection order a misdemeanor crime of domestic violence.<sup>76</sup>

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<sup>70</sup> T.C.A. §36-3-625(f)(2015).

<sup>71</sup> T.C.A. §36-3-625(h)(2015).

<sup>72</sup> T.C.A. §39-13-113(h)(2015).

<sup>73</sup> T.C.A. § 39-17-1307(e)(2015).

<sup>74</sup> T.C.A. § 36-3-625(h)(3)(2015).

<sup>75</sup> T.C.A. § 39-17-1316 (2015).

<sup>76</sup> T.C.A. §39-17-1316(2015).



**§3-5.05 The Court may include in its order a requirement that the perpetrator seek substance abuse treatment or participate in a batterer intervention program.**

Many judges and some victims favor outpatient or voluntary inpatient chemical dependency treatment programs. However, because these programs do not address the issues of violence or control, they should not be viewed as an effective substitute for batterer intervention. Addiction intervention may be needed first with batterer intervention to follow (Finn and Colson, 1990).

The NIJ study suggests the following concerning couples counseling or counseling for victims:

- Victims should not be required to participate in court-mandated intervention programs intended for perpetrators, nor should they be required to participate in family counseling or individual counseling;
- Requiring the victim to enter counseling may put the victim in increased jeopardy by suggesting to the perpetrator that the perpetrator is not responsible for the violence, thereby giving the perpetrator an excuse to continue the abuse. Couples counseling improperly conducted may have the same effect; furthermore it may create a setting in which the victim is at an inherent disadvantage given the victim's fear of the perpetrator (Finn and Colson, 1990).

**§3-5.06 The Court should address the issue of custody and visitation to protect both the petitioner and the children.**

The Court should consider evidence of physical or emotional abuse to the child, to the other parent, or to any other person in making any custody determination.<sup>77</sup> Where there are allegations that one parent has committed child abuse or child sexual abuse against a family member, the Court must consider all evidence relevant to the physical and emotional safety of the child and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings.<sup>78</sup> There is a presumption that custody shall not be awarded to a parent who has been convicted of a sex crime against a child under the age of 18.<sup>79</sup>

There is an emerging national trend toward presuming that it is in the best interests of the child to be placed in the custody of the non-abusive parent.<sup>80</sup> There is a high correlation between ineffective custody and visitation provisions and contempt of Orders of Protection (DC Courts, 1992). It is not enough to separate the parties; nor is it

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<sup>77</sup> Tenn. Code Ann. § 36-6-106(a)(8) (2015).

<sup>78</sup> *Id.*

<sup>79</sup> Tenn. Code Ann. § 36-6-101(2)(A)(ii) (2015).

<sup>80</sup> H.R. Con. Res. 172, 101st Cong., 136 Cong Rec. H 11777 (1990).

enough to order the perpetrator to stop beating the victim. The latter does not work without effective enforcement. The former - keeping the parties separated - does not work unless other issues, such as custody, visitation, possession of the parties' residence, and financial support, are resolved. Addressing custody as part of an Order of Protection can reduce the incidence of parental kidnapping and clarify for the prosecutor whether prosecution for parental kidnapping is warranted. Additional information on custody and visitation issues in domestic abuse cases is included in Chapter 4.

**§3-5.07 Tennessee law authorizes awarding financial support to the petitioner and "such persons as the respondent has a duty to support."<sup>81</sup>**

Possible monetary relief available in an Order of Protection includes:

- Financial support and maintenance for petitioner and children;
- Payment of rent, mortgage, or alternate housing costs;
- Payment of utilities;
- Cost of replacement of locks;
- Child care costs;
- Medical, dental and/or counseling bills for the victim and/or the children;
- Insurance premiums; or
- Restitution for property damage.

An award of attorney's fees to the petitioner is mandatory if after a hearing the Court issues or extends an Order of Protection.<sup>82</sup>

The failure of the respondent to contest paternity in an Order of Protection proceeding shall not be construed as an admission of paternity by the respondent; the failure to contest paternity is not admissible in evidence in a paternity proceeding.<sup>83</sup> Where paternity is contested in an Order of Protection proceeding, the Court may grant an Order of Protection pending the outcome of paternity tests.<sup>84</sup> Additional information on support issues in domestic abuse cases is included in Chapter 5.

Assessing attorney's fees can encourage the private bar to accept clients who need Orders of Protection, but do not have access to the funds to pay an attorney. Since the award of attorney's fees is primarily meant to be in lieu of a greater spousal support obligation, assessing the attorney's fees as spousal support also protects the award from discharge in bankruptcy.

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<sup>81</sup> Tenn. Code Ann. § 36-3-606(a)(7)(2015); Tenn. Code Ann. § 36-5-101(k)(2)(2015) (The custodial parent of an adult disabled child may receive child support if the child was disabled before attaining the age of 18, and if the child was disabled at the time of entry of final decree of divorce or legal separation.)

<sup>82</sup> Tenn. Code Ann. § 36-3-617(2015).

<sup>83</sup> Tenn. Code Ann. § 36-3-614(a)(2015).

<sup>84</sup> Tenn. Code Ann. § 36-3-614(a)(2015); see also Tenn. Code Ann. § 24-7-112 (2015).

**§3-5.08 Courts should consider special provisions in Orders of Protection to protect immigrant victims and their children.**

Batterers of immigrant victims often use the victim's immigrant status as a way to keep the victim in the relationship and under the batterer's control. Some provisions that may help protect immigrant victims include:

- The respondent shall give petitioner access to, or copies of, any documents supporting petitioner's immigration application.
- The respondent shall not withdraw the application for permanent residency which has been filed on petitioner's behalf.
- The respondent shall not contact USCIS (formerly INS)<sup>85</sup> about petitioner's immigration petition. (Although USCIS is statutorily barred from using any information from the abuser, the abuser should be prevented from informing USCIS of her immigration status and thereby placing her in a defensive position.)
- The respondent shall take any and all action necessary to ensure that the petitioner's application for residency is approved.
- The respondent shall pay any and all fees associated with the petitioner's and/or children's immigration cases.
- The respondent shall immediately relinquish possession and/or use of and transfer to the petitioner the following items:
  - Petitioner's property such as culturally important items and things needed to prove or attain legal status.
  - Copies of information or documents of the respondent that the victim needs for her immigration claim.
  - Evidence of good faith marriage.
  - Other materials needed by the USCIS that establish that the parties have resided together and that the petitioner currently resides in the U.S.
- The respondent shall pay to the petitioner through the court all costs associated with replacing documents destroyed, hidden, or claimed to be missing by the respondent, including the petitioner's or the children's passports, social security cards, alien registration cards, birth certificates, work permits, bank cards, or driver's licenses.
- The respondent shall under oath sign a document in open court stating whether or not he has been previously married and identifying the jurisdiction in which each prior marriage was terminated, including the date each prior divorce was issued.
- The respondent shall not remove the children from the court's jurisdiction and/or the U.S. absent a court order and shall relinquish the children's passports to the petitioner or the court.
- The respondent shall sign a statement that will also be signed by petitioner and the judge informing an embassy or consulate that it should not issue visitor's visas or any other visa to the child of the parties absent an order of the court.

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<sup>85</sup> On March 1, 2003, service and benefit functions of the U.S. Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security (DHS) as the U.S. Citizenship and Immigration Services (USCIS).

**§3-5.09 The Court is required to assess court costs and litigation taxes at the hearing on the Order of Protection.<sup>86</sup>**

If the court, after the hearing, issues or extends an order of protection, petitioner's court costs and attorney fees shall be assessed against the respondent.<sup>87</sup> A petitioner may be charged fees and costs ONLY if a hearing is held and the evidence supports a finding that the petitioner is not a victim of domestic violence, sexual assault or stalking.

**§3-6 Pre-trial Issues in Order of Protection Cases**

**§3-6.01 There is no limitation on the time within which a petitioner must file for an Order of Protection.<sup>88</sup>**

**§3-6.02 The victim shall not be required to pay any filing fees, litigation taxes, or any other costs associated with the filing, issuance, service, or enforcement of an Order of Protection upon the filing of the petition.<sup>89</sup>**

Notwithstanding any other provision of law to the contrary, no victim shall be required to bear the costs, including any court costs, filing fees, litigation taxes or any other costs associated with the filing, issuance, registration, service, dismissal or nonsuit, appeal or enforcement of an ex parte order of protection, order of protection, or a petition for either such order, whether issued inside or outside of the state. If the court, after the hearing, issues or extends an order of protection, all court costs, filing fees, litigation taxes and attorney fees shall be assessed against the respondent.<sup>90</sup> There is no initial fee for a petition to the court for any action on an order of protection.

If the court does not issue or extend an order of protection, the court may assess all court costs against the petitioner if the court finds by clear and convincing evidence: (a) the petitioner is not a victim and that such determination is not based on the petitioner's request to dismiss the order, failure to attend the hearing or incorrectly filled out the petition; AND (b) the petitioner knew that the allegations were false at the time the petition was filed.

The Court shall not require the petitioner to execute a bond to issue an Order of Protection.<sup>91</sup>

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<sup>86</sup> Tenn. Code Ann. § 36-3-617(2015).

<sup>87</sup> *Id.*

<sup>88</sup> Since there is no limitation in the Order of Protection statute itself, the statute of limitations governing actions not expressly provided for would govern, i.e., 10 years, Tenn. Code Ann. § 28-3-110 (2009).

<sup>89</sup> T.C.A. § 36-3-617 (2015)

<sup>90</sup> T.C.A. § 36-3-617 (2015)

<sup>91</sup> Tenn. Code Ann. § 36-3-607 (2015).

**§3-6.03 The Administrative Office of the Courts in consultation with the Domestic Violence State Coordinating Council has developed forms for use in Order of Protection cases.<sup>92</sup>**

The following forms have been developed:

- Petition for Orders of Protection;
- Ex parte Order of Protection;
- Order of Protection;
- Dismissal.

The administrative office of the courts has authority to develop other forms in the future as needed. These forms shall be used exclusively in all courts exercising jurisdiction over Orders of Protection. The petitioner is not limited to the use of these forms and may file any legally sufficient petition.<sup>93</sup> The office of the clerk of court is required to provide these forms to the petitioner.<sup>94</sup>

**§3-6.04 The petitioner has a right to proceed pro se.<sup>95</sup>**

The office of the clerk must assist a petitioner who is not represented by counsel by filling in the name of the Court on the petition, by indicating where the petitioner's name shall be filled in, by reading through the petition form with the petitioner, and by rendering any other assistance as is necessary for the filing of the petition.<sup>96</sup> All such petitions which are filed pro se shall be liberally construed in favor of the petitioner.<sup>97</sup>

The clerk of court may provide Order of Protection petition forms to agencies that provide domestic abuse assistance. Any agency that meets with a victim in person and recommends that an Order of Protection be sought shall assist the victim in the completion of the form petition for filing with the clerk. No agency shall be required to provide this assistance unless it has been provided with the appropriate forms by the clerk.<sup>98</sup>

**§3-6.05 The Tennessee Rules of Civil Procedure apply to Orders of Protection.<sup>99</sup>**

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<sup>92</sup> Tenn. Code Ann. § 36-3-604(b)(2015). These forms are included in the Appendices and are also available at <http://www.tsc.state.tn.us/>.

<sup>93</sup> Tenn. Code Ann. § 36-3-604(a)(2015).

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Tenn. Code Ann. § 36-3-617(2015).

<sup>99</sup> Tenn. R. Civ. P. 1 (amended by TN Orders 2005-5, issued Jan. 6, 2005, effective July 1, 2005) (Rules of Civil Procedure apply in General Sessions Court when the Court is "exercising civil jurisdiction of the circuit or chancery courts"). See Attorney General Opinion No. 00-165 (2000), Attorney General Opinion No. 94-4 (1994).

However, the application of the Rules is subject to the Court's authority to preclude discovery where necessary to prevent unreasonable annoyance, embarrassment, or undue burden or expense.<sup>100</sup> In view of the threat of continued violence in domestic abuse cases, the Court should adopt procedures for discovery that prevent delays in court proceedings. Information that, if obtained by the respondent, may endanger the victim or the children, including the victim's address, telephone number, the name of the children's school or day care provider, and domestic abuse shelter's address, should be protected by the Court. Methods other than depositions, including requests for production of documents or subpoenas for documents are favored. Documents that may be typically subpoenaed or requested include: medical records, documentation of income of the parties for purposes of determining support and other forms of monetary relief, and any other documentary evidence that will not improperly restrict case preparation or expose the victim to greater danger.

**§3-6.06 Tennessee requires a hearing on the Order of Protection within fifteen days of service of the Ex Parte Order.<sup>101</sup>**

The Court shall cause service of the respondent with a copy of the petition, notice of the date set for the hearing, and a copy of the Ex Parte Order of Protection at least five days prior to the hearing.<sup>102</sup> The Ex Parte Order must be served personally on the respondent, unless the respondent is not a resident of Tennessee, in which case it must be served by mail through the Secretary of State.<sup>103</sup> Since the Ex Parte Order must give notice of the hearing date, the Court must guess at the approximate date of service in order to comply with the statute. Where service is not made prior to the date set for the hearing, a new Order, giving a new hearing date, may need to be issued. When the hearing date falls within the five day limit, the Court may be required to continue the petition.

Setting the case within the statutory period meets the requirement of the statute and satisfies the intent of the legislature, even though the case is postponed due to petitioner's not having been notified of the hearing date.<sup>104</sup> If the respondent requests and receives a continuance, the Order of Protection should be continued until the new hearing date.

The notice of the date set for hearing must notify the respondent that the respondent may be represented by counsel.<sup>105</sup> If the respondent appears without counsel and requests time to obtain counsel, the Court may grant a continuance for that purpose.

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<sup>100</sup> Tenn. R. Civ. P. 26.03.

<sup>101</sup> Tenn. Code Ann. § 36-3-605(b) (2015).

<sup>102</sup> Tenn. Code Ann. § 36-3-605(c) (2015).

<sup>103</sup> Id.

<sup>104</sup> Cable v. Clemmons, 1999 Tenn. App. LEXIS 703 (Tenn. App. 1999).

<sup>105</sup> Tenn. Code Ann. § 36-3-605(c) (2015).

### **§3-7 Trial Issues In Order of Protection Cases**

#### **§3-7.01 Non-English-speaking parties and those who have recently arrived in this country present special concerns regarding representation, as they may not understand court procedures due to language or cultural barriers.**

This may result in their inability to articulate their needs, the relief they seek, or relevant facts. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin (including discrimination on the basis of Limited English Proficiency) in programs and activities receiving federal financial assistance.<sup>106</sup> Title VI applies to Courts as well as to law enforcement agencies and most non-profit organizations. Courts need to implement special procedures to insure that non-English-speaking parties and recent immigrants fully understand their rights and court proceedings. Such procedures include:

- Preparation of court forms in the major languages spoken in the local community;
- Providing court translators;
- Hiring of bilingual, bicultural court clerks who can explain court proceedings.

#### **§3-7.02 When the petitioner fails to appear at the hearing, the Court should take steps to ascertain the reason behind the petitioner's failure to appear.**

The National Institute of Justice concluded that there are a variety of reasons why a petitioner may not appear at a hearing for the Order of Protection (Finn and Colson, 1990). For example,

- The victim may be intimidated by threats of greater violence from the respondent as a result of pursuing court action;
- The victim may be physically unable to appear for the hearing due to injuries; or
- The victim may not understand that a second hearing is required.

Prior continuances or procedural delays may also discourage the victim from appearing at the hearing. The more expeditiously a case is handled, the more likely the petitioner is to pursue remedies.

Where the respondent requests dismissal and the reason for the petitioner's failure to appear is uncertain, the Court should continue the case, notify the petitioner of the continuation date, and inform the respondent that the case will not be dismissed unless the petitioner comes to court to request it in person.

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<sup>106</sup> 42 U.S.C.S. § 2000d (2015).

**§3-7.03      When the respondent fails to appear after having been served with notice of the hearing, the Court should issue an Order of Protection.**

When the respondent fails to appear after having had an opportunity to be heard, the weapons prohibition still applies. The respondent is responsible for returning the Affidavit of Dispossession according to the requirements set forth in T.C.A. 36-3-625(d). Furthermore, the court should set a date certain for the return of the Affidavit of Dispossession to ensure that the respondent turned in the form.

**§3-7.04      Parties should be required to disclose the existence of any pending cases.**

Every party in a custody proceeding must disclose other custody litigation concerning the same child in this or in any other state and any other person who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

The petitioner may request an Order of Protection in a divorce action.<sup>107</sup> In cases where an Order of Protection is entered and a subsequent divorce action is filed, the Order of Protection shall remain in effect until the Court in which the divorce action lies modifies or dissolves the Order.<sup>108</sup> Tennessee law now provides for the automatic issuance of mutual injunctions when a divorce petition is filed.<sup>109</sup> Provisions of the restraining order that prohibit either party from harassing, threatening, assaulting, or abusing the other do not obviate the need for an Order of Protection in domestic abuse cases. The Order of Protection gives the victim much more protection than a restraining order. A violator of an Order of Protection can be arrested with or without a warrant.<sup>110</sup> Courts should be aware that these mutual injunctions could give victims a false illusion of safety and actually increase her danger. Provisions of the injunctions that prohibit relocation of the parties with the children are subject to an exception in the case of a well-founded fear of physical abuse against either the fleeing parent or the child.<sup>111</sup> In such cases, upon request of the non-relocating parent, the court will conduct an expedited hearing, by phone conference if appropriate, to determine the reasonableness of the relocation and to make such other orders as appropriate.

Some courts consolidate all Order of Protection and family law cases involving the same parties. Where child support, custody, or divorce actions precede the Order of Protection action, knowledge of those proceedings may be important to a judge seeking to craft an Order that will prevent further violence. Relevant information could include:

- Whether the respondent is in arrears in child support;

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<sup>107</sup> Tenn. Code Ann. § 36-3-603(b) (2015).

<sup>108</sup> Tenn. Code Ann. § 36-3-603(a) (2015).

<sup>109</sup> Tenn. Code Ann. § 36-4-106(d) (2015).

<sup>110</sup> Tenn. Code Ann. § 36-3-611(a) (2015).

<sup>111</sup> Tenn. Code Ann. § 36-4-106(d)(5) (2015).



- Whether there is a pre-existing divorce decree awarding custody to the victim; if there is a pre-existing custody award, the respondent would not be able to seek custody under the standard of comparative fitness but would be required to show a change in circumstances;
- Whether the divorce action contains an already existing visitation provision; this provision can be changed by the judge issuing the Order of Protection if it does not work in the context of the domestic abuse case;
- Whether there are criminal cases with release conditions or probation terms; these may limit the ability of the judge issuing the Order of Protection to order certain remedies, for example, where a criminal order directs no contact with the party's child, the judge in the Order of Protection case should not award custody to the defendant in that criminal case.

Tennessee law does not address the modification of existing custody orders but does provide that the Order of Protection may award temporary custody of or establish temporary visitation rights with regard to any minor children born to or adopted by the parties.<sup>112</sup>

**§3-7.05      When conflicting orders are issued involving the same parties, serious enforcement problems are created for police.**

Nothing in the Tennessee statutes prohibits a petitioner from seeking an Order of Protection because the petitioner is protected under an order entered in a criminal proceeding. However, which order controls will depend on a number of variables, including which case is being heard first, what laws are applied to each specific case, and the statutory purpose of the competing orders in light of the domestic abuse statutes.

**§3-7.06      The Court should make explicit written findings of fact.**

In Tennessee, there is no requirement that hearings be recorded or that oral or written findings be made.<sup>113</sup> However, it is advisable for the Court to make explicit findings as to which incidents of violence the Court is relying on to issue its Order of Protection and findings concerning the credibility of witnesses, where appropriate. Written findings will be helpful to courts hearing the case in the future as well as to judges who may hear other cases involving the same parties.

When the Court denies an Order of Protection or denies specific remedies requested, the National Council of Juvenile and Family Court Judges urges judges to provide reasons for the denial (NCJFCJ, 1990).

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<sup>112</sup> Tenn. Code Ann. § 36-3-606(a)(6)(2015).

<sup>113</sup> Davis v. Davis, 1998 Tenn. App. LEXIS 289 (Ct. App. 1998), appeal denied, 1999 Tenn. LEXIS 18 (Tenn. 1999).

**§3-7.07 The Court should make certain that its Order of Protection meets the requirements for Full Faith and Credit in other jurisdictions.**

Any order entered should show the relationship between the petitioner and the respondent. The Violence Against Women Act requires courts in other jurisdictions to give full faith and credit to an Order of Protection entered in Tennessee to protect a spouse or intimate partner.<sup>114</sup> Under the federal definition, a spouse or intimate partner includes:

- (A) a spouse, or former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and
- (B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.<sup>115</sup>

The Order should show personal service on the respondent, whether the respondent appeared, and the relationship of the petitioner and respondent.

However, full faith and credit does not extend to mutual Orders of Protection where no cross- or counter-petition was filed against the petitioner and where the judge did not make a finding that the petitioner had committed domestic abuse. Tennessee courts should refrain from issuing any mutual Orders of Protection, as they deny due process to the petitioner, create enforcement problems for local law enforcement, and will not be enforced at all outside of Tennessee under the Violence Against Women Act.

**§3-7.08 Mediation is inappropriate in Order of Protection proceedings.**

Mediation is prohibited in divorce, child custody, and visitation cases in which there is a prior court finding of domestic abuse, except under certain conditions.<sup>116</sup>

*Because assault of any kind is a serious crime and needs to be treated as such by the courts, mediation of family violence is simply not an appropriate response. Mediation is a process by which the parties voluntarily reach consensual agreement about the issue at hand. Violence, however, is not a subject for compromise. Thus, when the issue before the court is a request for an Order of Protection or a criminal family violence charge, mediation should not be mandated. The victim receives no protection from the court with mediated agreement not to batter. And a process which involves both parties mediating the issue of violence implies, and allows the batterer to believe, that the victim is somehow at fault (NCJFCJ, 1990).*

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<sup>114</sup> 18 U.S.C.S. §§ 2265 (2015).

<sup>115</sup> 18 U.S.C.S. §§ 2266(7) (2015).

<sup>116</sup> Tenn. Code Ann. §§ 36-4-131, 36-6-107, 36-6-305, 36-6-409 (2015).

Agreed Orders of Protection are not a result of mediation. They are generally presented to judges after negotiation between counsel and after the parties have been able to come to an agreement about the provisions to be included in the Order of Protection.

**§3-7.09 Judges should not issue mutual Orders of Protection (NCJFCJ, 1990).**

The National Council of Juvenile and Family Court Judges recommends that judges not issue mutual no contact orders (NCJFCJ, 1990). The Court lacks jurisdiction over the victim who is not a party to the criminal action. In some states, orders prohibiting both parties from contacting each other have been held unconstitutional in civil cases.<sup>117</sup> In addition, mutual no contact orders are often difficult for law enforcement to enforce.

Mutual Orders of Protection are not appropriate unless both parties file pleadings, receive prior notice, and prove violence or abuse. Mutual Orders of Protection create the following problems:

- They create due process problems when a mutual Order of Protection is issued without prior notice, written application, and a finding of good cause;
- They create significant problems of enforcement that render them ineffective in preventing further abuse; police have no way of determining whose conduct is enjoined, which may result in both parties being arrested or in no arrests being made;
- They signal to the perpetrator that such behavior is excusable, was perhaps provoked, and that the perpetrator will not be held accountable for the violence.

Tennessee law provides that mutual orders shall not be enforceable against the petitioner in a foreign jurisdiction unless:

- (1) The respondent filed a cross- or counter-petition, or a complaint or other written pleading was filed seeking such a protection order; and
- (2) The issuing court made specific findings of domestic or family violence against the petitioner.<sup>118</sup>

**§3-7.10 Either party may request to modify an Order of Protection.**

The party requesting a modification must file a motion together with an affidavit showing a change in circumstances sufficient to warrant the modification.<sup>119</sup> If there has been new abuse, the petitioner may request expanded remedies that may have been denied at the initial hearing. Judges hearing modifications of Orders of Protection should be well-acquainted with the history of the relationship between the parties before entering a

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<sup>117</sup> *Fitzgerald v. Fitzgerald*, 406 N.W.2d 52, 1987 Minn. App. LEXIS 4380 (Minn. Ct. App. 1987).

<sup>118</sup> Tenn. Code Ann. § 36-3-622 (d) (2015).

<sup>119</sup> Tenn. Code Ann. § 36-3-608(b) (2015).

modification. Orders should not be modified without notice and a hearing absent exigent circumstances.

Parties should return to court for modification of their Orders if they desire to reunite with one another, removing stay-away provisions but leaving the no-abuse provision in full effect. Leaving the no-abuse provision in effect will assure that police continue enforcing the no-abuse provisions of the Order of Protection.

**§3-7.11 All Orders of Protection shall be effective for a fixed period of time, not to exceed one year.<sup>120</sup>**

Extensions of the Order of Protection, each extension not to exceed a further definite period of one year, may be granted after a hearing on the continuation of the Order, after which time a further hearing must be held for any subsequent one-year period.<sup>121</sup> At an extension hearing, courts should not exclude evidence of Order violations not previously reported. Victims may not report violations immediately for several reasons, including:

- The victim may be reluctant to come to court due to intimidation by the respondent;
- The victim received some level of protection from the Order despite the violations and therefore wishes the Order to continue;
- The perpetrator succeeded in preventing the victim from filing for contempt;
- The victim does not believe that the Court will act to enforce the Order of Protection.

A victim can file a motion to extend order of protection or a judge may extend it *sua sponte* upon conviction on the violation of the order of protection. Tennessee law provides that if the respondent is found to be in violation of the order, the court may extend the order of protection up to five (5) years. If the respondent is found to be in a second or subsequent violation of the order, the court may extend the order of protection up to ten (10) years. No new petition is required to be filed in order for a court to modify or extend an order pursuant to this subsection.<sup>122</sup>

**§3-7.12 Dismissals should be carefully considered.**

Upon a request from the petitioner to dismiss or withdraw the Order, the Court may wish to question the petitioner outside the presence of the respondent to ascertain whether the respondent is coercing the petitioner into this request. If the Court is not convinced that the petitioner is requesting dismissal voluntarily, the Court can continue the matter for a period of time. Advantages of a continuance include:

- Deterrent effect on some perpetrators;
- Petitioner need not wait for a new incident of violence in order to return to court to obtain an Order of Protection;

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<sup>120</sup> Tenn. Code Ann. § 36-3-608(a) (2015).

<sup>121</sup> Tenn. Code Ann. § 36-3-605(b) (2015).

<sup>122</sup> Tenn. Code Ann. § 36-3-605(d) (2015).

- If a new incident of violence occurs, the victim needs only to file a supplemental petition to be served along with the original petition to have a new hearing set.

The petitioner may ask to dismiss the case for a number of reasons:

- fear of facing the respondent in court to make what may be the first public accusation of the abuse;
- confusion about how to represent himself or herself in court;
- fear of hostile questioning by respondent's counsel;
- economic dependence on respondent;
- lack of support or direct opposition from family, community, clergy;
- hostile or indifferent treatment by police, prosecutors, court personnel or judges;
- intimidation through threats and retaliatory assaults by respondent at home or in court waiting rooms or parking lots;
- violence has stopped (at least temporarily).

### **§3-8 Enforcement of Orders of Protection**

The effectiveness of Orders of Protection depends largely on how well they are enforced by both the judiciary and law enforcement. Judges who hold perpetrators accountable for their actions send a clear message to the community that domestic abuse will not be tolerated (Dakis and Karan, 1996).

*[I]t appears that when protective orders only offer weak protection, the explanation may lie in the functioning of the justice system rather than the nature of protective orders as a remedy . . . [C]hanges in the justice system's handling of protective orders can significantly increase their utility . . . [W]here judges have established a formal policy that offenders who violate an order will be apprehended and punished, often with jail terms, both judges and victim advocates report the highest level of satisfaction with the system (Finn and Colson, 1990).*

*Comprehensive provisions of restraining orders are only as good as their enforcement. To improve enforcement, courts should develop, publicize, and monitor a clear, formal policy regarding violations. This might include follow up hearings, promoting the arrest of violators, incremental sanctions for violations, treating violations as criminal contempt, and establishment of procedures for modification of orders. In addition, courts can establish procedures for monitoring offenders for compliance (NCJFCJ, 1990).*

Enforcement is the Achilles heel of the Order of Protection process, because an Order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security. Perpetrators may routinely violate Orders if they believe there is no real risk of being arrested. This situation, while deplorable, is not without remedy; courts can develop, publicize, and monitor a clear, formal policy

regarding contempt in order to encourage respect for the Court's Order and to increase compliance.

*. . . [C]ourts can develop guidelines specifying (1) what procedures law enforcement officers are statutorily required and authorized to follow and (2) what procedures judges themselves will follow in holding violation hearings. By developing and publicizing these guidelines in advance, judges would be able to achieve more uniformity of judicial response, would encourage compliance and respect for the judiciary among defendants (and their attorneys), and might avoid unnecessary and protracted appeals . . . Although some provisions of a court enforcement policy must be tailored to the specific enforcement tools provided by the statute, other policies are adaptable to virtually any jurisdiction (Finn and Colson, 1990).*

Aggressive enforcement and prompt case handling by the Court itself is also crucial. While police officers can assist the Court by arresting and detaining perpetrators who violate Orders of Protection, the Court will ultimately be responsible for long-range enforcement (Finn and Colson, 1990).

### **§3-8.01 The Court should monitor compliance with Orders of Protection.**

The following mechanisms to monitor compliance with Orders of Protection have been developed by other jurisdictions:

- Order or encourage police to arrest on violations of court orders, and to report violations directly to the Court;
- Coordinate administrative mechanisms for registry of Orders of Protection with all local law enforcement agencies;
- Inform victims of their right to file a motion for contempt of the Order of Protection;
- Initiate enforcement hearing for violations of Orders without waiting for the victim to ask the judge to enforce the Order.
- Set a date certain for the return of the Affidavit of Dispossession.

Procedures recommended by the National Council of Juvenile and Family Court Judges for courts issuing Orders of Protection after trial or after a finding of contempt are to:

- Retain the case to monitor compliance;
- Arrange for formal supervision of all contempt cases through probation and court social services;
- Monitor compliance by requesting that court social services and/or probation agencies actively monitor the case and swiftly issue sua sponte orders to show cause on any contempt violations brought to the Court's attention by police, probation, social services, counselors, or the petitioner;
- Conduct hearings promptly on contempt motions; and

- Sentence persons found in criminal contempt to increasingly severe penalties with each subsequent contempt (NCJFCJ,1990).

**§3-8.02 The respondent can be arrested for violation of an Order of Protection.**

A copy of any Order of Protection and any subsequent modifications or dismissal shall be issued to the petitioner, the respondent, and the local law enforcement agencies having jurisdiction in the area where the petitioner resides.<sup>123</sup> Service of the Order upon a party or counsel shall be made by delivering to such party or counsel a copy of the Order of Protection, or by the clerk mailing it to the party's last known address. In the event the party's last known address is unknown and cannot be ascertained upon diligent inquiry, the certificate of service shall so state. Service by mail is complete upon mailing.<sup>124</sup>

An Order of Protection is valid and enforceable in any county in Tennessee<sup>125</sup> and in any court having jurisdiction over Orders of Protection<sup>126</sup>. An arrest can be made on an Ex Parte Order of Protection once the respondent has been served with the Order or otherwise has actual knowledge of the Order.<sup>127</sup> An officer may arrest for violation of an Order of Protection with or without a warrant.<sup>128</sup> The arrest shall be made without a warrant if:

- the officer has jurisdiction over the area in which the violation occurred;
- the officer has reasonable cause to believe the respondent has violated or is in violation of an Order of Protection;
- the officer has verified the existence of an Order of Protection. Verification may be made by telephone or radio communication.

**§3-8.03 The Court must consider certain statutory factors when making a decision concerning the amount of bail required for the release of a defendant when it is alleged that the defendant is in violation of an Order of Protection.**<sup>129</sup>

The magistrate or judge shall review the facts of the arrest and detention and determine whether the defendant:

- Is a threat to the alleged victim or other family or household member;
- Is a threat to public safety;

<sup>123</sup> Tenn. Code Ann. § 36-3-609(e) (2015).

<sup>124</sup> Tenn. Code Ann. § 36-3-609(b) (2015).

<sup>125</sup> Tenn. Code Ann. § 36-6-606(f)(2015).

<sup>126</sup> State v. Gray, 46 S.W.3d 749, 2000 Tenn. App. Lexis 677 (Tenn. App. 2000).

<sup>127</sup> Tenn. Code Ann. § 36-3-611(b) (2015); Attorney General Opinion No. 06-094.

<sup>128</sup> Tenn. Code Ann. § 36-3-611(a) (2015).

<sup>129</sup> Tenn. Code Ann. § 40-11-150(a) (2015).

- Is reasonably likely to appear in court.

In determining whether the defendant is a threat to the victim or to public safety, the magistrate or judge may wish to consider the following:

- Degree of injury to the victim;
- History of domestic abuse as documented by police reports and/or convictions;
- Whether the frequency or severity of violence appears to be escalating;
- Threats of retaliation towards the victim or the children;
- Use or threatened use of a weapon;
- Prior criminal history of the defendant;
- Danger posed to the public, including threats to family or co-workers;
- The use of drugs or alcohol;
- The defendant's access to the victim and family;
- The defendant's mental and physical health;
- Any threats of suicide by the defendant.

Before releasing the defendant, the judge or magistrate shall make findings on the record, if possible, concerning the Court's determination as to the factors used in setting the amount of bail. The three statutory factors should be specifically addressed.

**§3-8.04 The judge or magistrate shall impose one or more conditions of release which are designed to protect the victim from further violence.<sup>130</sup>**

Conditions of bail may be:

- An order enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim;
- An order prohibiting the defendant from harassing, annoying, telephoning, contacting or otherwise communicating with the alleged victim, either directly or indirectly;
- An order directing the defendant to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be;
- An order prohibiting the defendant from using or possessing a firearm or other weapon specified by the magistrate;<sup>131</sup>
- An order prohibiting the defendant from possession or consumption of alcohol or controlled substances; and

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<sup>130</sup> Tenn. Code Ann. § 40-11-150(b)(2015).

<sup>131</sup> The Court should inquire as to the defendant's possession of a weapon, since possession of a firearm or ammunition by a person subject to a valid Order of Protection is a federal offense, punishable by incarceration up to 10 years and a fine up to \$250,000.00. See *infra* § 3-5.04 and *supra* § 6-7.08 for more details.



- Any other order required to protect the safety of the alleged victim and to ensure the appearance of the defendant in court (this would include protecting other household family members).
- An order requiring the defendant to carry or wear a global positioning monitoring system device and, if able, pay the costs associated with operating that device and electronic receptor device provided to the victim, pursuant to T.C.A. § 40-11-152.

If conditions of release are imposed, the judge or magistrate must issue a written order for conditional release.<sup>132</sup> A copy of the order must be sent to the law enforcement agency which has custody of the defendant. At the same time, the judge or magistrate must provide the law enforcement agency with any available information on the location of the victim in a manner which protects the victim.

Before a judge or magistrate imposes the condition of the global positioning monitoring system device, the magistrate or judge must consider the likelihood that the defendant's participating will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threatened the victim before trial. The magistrate or judge must also provide the victim with the following notifications:

1. The victim's right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the magistrate terminate the victim's participation.
2. The manner in which the global positioning monitoring system technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements.
3. Any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations.
4. Any sanctions that the magistrate may impose on the defendant for violating a condition of bond imposed related to the global positioning monitoring system.
5. The procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails.
6. Community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of domestic violence.
7. The fact that the victim's communications with the magistrate concerning the global positioning monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.

In addition to the information described above, the magistrate or judge shall provide the victim who participates in a global positioning monitoring system with the name and phone number of an appropriate person employed by a local law enforcement agency who the victim may call to request immediate assistance if the defendant violates a condition of bond related to the global positioning monitoring system.

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<sup>132</sup> Tenn. Code Ann. § 40-11-150(c)(2015).

The law enforcement agency is then required to give a copy of the order to the defendant.<sup>133</sup> The defendant may request a hearing before the trial judge over the conditions, and a hearing shall be held promptly.<sup>134</sup>

When a defendant who is arrested for a domestic abuse offense or a violation of an Order of Protection is released from custody, the law enforcement agency having custody of the defendant shall:

- Use all reasonable means to immediately notify the victim of the alleged offense of the release; and
- Furnish the victim of the alleged offense at no cost a certified copy of any conditions of release.<sup>135</sup>

Release of a domestic abuse defendant shall not be delayed because of the victim notification requirements.<sup>136</sup>

Enforcement of the conditions of release must be swift and certain. The Court must send the message to the defendant, the victim, and the community at large that domestic abuse and violation of court orders will not be tolerated. A person who violates a condition of release imposed pursuant to this section shall be subject to immediate arrest with or without a warrant. Such a violation shall be punished as contempt of the Court imposing the conditions and the bail of such violator may be revoked.<sup>137</sup> Additionally, it can be punished as a misdemeanor Violation of a Protective Order if it meets the statutory elements.<sup>138</sup>

### **§3-8.05 The Court may punish a violation of the Order of Protection as either civil or criminal contempt or both.**<sup>139</sup>

A judge of the General Sessions Court has the same power as a court of record to punish a respondent for civil or criminal contempt. If the General Sessions Judge is not a licensed attorney, the judge must appoint an attorney referee to hear charges of criminal contempt.

Classification of contempt as civil or criminal depends on the purpose for which the power is exercised.<sup>140</sup> When the primary purposes of the finding of contempt are to provide a remedy for an injured party and to coerce compliance with an order, the contempt is civil. Civil contempt is imposed to compel compliance with an order and

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<sup>133</sup> Tenn. Code Ann. § 40-11-150(d) (2015).

<sup>134</sup> Tenn. Code Ann. § 40-11-150(e) (2015).

<sup>135</sup> Tenn. Code Ann. § 40-11-150(f) (2015); See Tenn. Code Ann. § 36-3-615 (2015).

<sup>136</sup> Tenn. Code Ann. § 40-11-150(g) (2015).

<sup>137</sup> Tenn. Code Ann. § 40-11-150(i)(2) (2015).

<sup>138</sup> Tenn. Code Ann. § 40-11-150(i)(1) (2015).

<sup>139</sup> Attorney General Opinion No. 06-085; Tenn. Code Ann. § 36-3-610 (2015).

<sup>140</sup> Garrett v. Forest Lawn Memorial Gardens, 588 S.W. 2d 309 (Tenn. Civ. App. 1979).

parties in contempt may purge themselves by compliance.<sup>141</sup> When the primary purpose of the finding of contempt is to preserve the Court's authority, the contempt is criminal. Criminal contempt is punishment for failing to comply with an order, and the contemptuous party cannot be freed by eventual compliance with the order.<sup>142</sup>

Under Tennessee law, if the contempt is criminal contempt, as determined by the nature of the remedy, the contemnor is entitled to due process rights similar to those of the criminal defendant.<sup>143</sup> In a criminal contempt proceeding, the contemnor has the right of confrontation<sup>144</sup> and the right to remain silent<sup>145</sup>. The notice must fairly and completely apprise the respondent of the events and conduct constituting the alleged contempt.<sup>146</sup> The respondent probably has a right to a trial by jury in criminal contempt proceedings.<sup>147</sup>

A respondent may be entitled to assistance of counsel even during a civil contempt proceeding where the respondent faces incarceration.<sup>148</sup> Tennessee law does not provide for appointment of counsel for petitioner, even though the respondent may be entitled to court-appointed counsel. There is some support that the Court may have inherent authority to enforce its orders by means of appointment of state's counsel to prosecute contempt.<sup>149</sup>

The standard of proof for criminal contempt is the same as for criminal charges, i.e., beyond a reasonable doubt.<sup>150</sup> The standard of proof for civil contempt is clear and convincing evidence.<sup>151</sup> The Supreme Court in *Overnite Transportation Co. v. Teamsters Local Union No. 480*<sup>152</sup>, held that:

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<sup>141</sup> Crabtree v. Crabtree, 716 S.W. 2d 923 (Tenn. Civ. App. 1986); Shiflet v. State, 217 Tenn. 690, 400 S.W. 2d 542, 543 (1966).

<sup>142</sup> Crabtree v. Crabtree, *supra*; Shiflet v. State, *supra*.

<sup>143</sup> See Tenn. R. Crim. P. 42.

<sup>144</sup> See Guthrie v. Oldham, 1985 Tenn. Crim. App. LEXIS 2682 (Tenn. Crim. App., 1985).

<sup>145</sup> See Gompers v. Bucks Stove, 221 U.S. 418 (1911) and Kornick v. Kornick, 3 Tenn. Civ. App. 41 (1931).

<sup>146</sup> See United States v. United Mine Workers of America, 330 U.S. 258 (1947) and Storey v. Storey, 835 S.W. 2d 593 (Tenn. Civ. App. 1992).

<sup>147</sup> Brown v. Latham, 914 S.W.2d 887 (Tenn. 1996).

<sup>148</sup> See Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984); Mastin v. Fellerhoff, 526 F.Supp. 969 (S.D. Ohio 1981) (practice of domestic relations court of incarcerating indigent persons for contempt without appointing counsel violated due process).

<sup>149</sup> See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987); Marcisz v. Marcisz, 357 N.E. 2d 477 (Ill. 1976) (contempt action based on divorce Order of Protection was an action "in which the people of the state may be concerned" under Ill. Rev. Stat. 1990 34 3-9005 (1)). See also In re Marshall, 549 A. 2d 311 (D.C.App. 1988) (judge not strictly prohibited from prosecuting contempt); State v. Rudolph, 240 Iowa 726, 37 N.W. 2d 483 (1949) (generally, contempt proceedings may be brought either by a party or in the name of the state).

<sup>150</sup> See O'Brien v. State ex rel. Bibb, 26 Tenn. App. 270, 170 S.W. 2d 931 (1943); State ex rel. Anderson v. Daugherty, 137 Tenn. 125, 191 S.W. 974 (1917).

<sup>151</sup> See Oriel v. Russell, 278 U.S. 358 (1929). See also Wright, Federal Practice and Procedure (Criminal) § 701-13 (2nd ed. 1982).

<sup>152</sup> 2005 Tenn. LEXIS 550 (Tenn. 2005).

- a trial court's order declining to hold an alleged contemnor in civil contempt may be appealed;
- compensatory damages for civil contempt are available pursuant to Tennessee Code Annotated section 29-9-105 (1980 & 2000) from a contemnor who commits an act forbidden by a trial court's order; and,

those damages may be recovered if the violation is not ongoing at the time of the hearing.

Punishment of contempt may be by fine, imprisonment, or both. The perpetrator may be punished by a fine of up to \$50.00 and imprisonment of up to 10 day.<sup>153</sup> Separate punishments may be given for separate violations so long as they are sufficiently distinct to support separate violations.<sup>154</sup> A judge of the General Sessions Court shall have the same power as a court of record to punish the defendant for contempt when exercising jurisdiction pursuant to this part or when exercising concurrent jurisdiction with a court of record.<sup>155</sup> A judge of the General Sessions Court who is not a licensed attorney shall appoint an attorney referee to hear charges of criminal contempt. If the contempt consists of an omission to perform an act that is yet in the power of the person to perform, the person may be imprisoned until the act is performed.

In addition to the authorized punishments for contempt of court, the judge may assess a civil penalty of \$50.00 against a person who violates an Order of Protection or a court-approved consent agreement.<sup>156</sup> The Court may not punish a perpetrator for contempt of an Order of Protection by ordering the perpetrator into counseling but the Order of Protection may be modified to include counseling if warranted.<sup>157</sup> In order for the Court to order the contemnor into intervention, there would have to be a motion to amend the Order of Protection made by the petitioner, the respondent, or by the Court, sua sponte.

When an Order of Protection is violated as to child support, the respondent may be punished by imprisonment in the county workhouse or county jail for a period not to exceed six months.<sup>158</sup> In addition the Court shall have the discretion to require an individual who fails to comply with the order or decree of support and maintenance to remove litter from the state highway system, public playgrounds, public parks, or other appropriate locations for any prescribed period or to work in a recycling center or other appropriate location for any prescribed period of time in lieu of or in addition to any of the penalties otherwise provided; provided, however, that any person sentenced to remove litter from the state highway system, public playgrounds, public parks, or other appropriate locations or to work in a recycling center shall be allowed to do so at a time other than such person's regular hours of employment.<sup>159</sup> When an Order of Protection

<sup>153</sup> Tenn. Code Ann. § 29-9-103(b)(2015).

<sup>154</sup> State v. Wood, 91 S.W.3d 769; 2002 Tenn. App. LEXIS 330 (Tenn. App. 2002).

<sup>155</sup> Tenn. Code Ann. § 36-3-610(a)(2015).

<sup>156</sup> Tenn. Code Ann. § 36-3-610(b)(2015).

<sup>157</sup> Cable v. Clemmons, 36 S.W.3d 39, 2001 Tenn. Lexis 1 (Tenn. 2001); see also, State v. Wood, 91 S.W.3d 769; 2002 Tenn. App. LEXIS 330 (Tenn. App. 2002).

<sup>158</sup> Tenn. Code Ann. § 36-5-104(a)(2015).

<sup>159</sup> Tenn. Code Ann. § 36-5-104(c)(2015).

is violated as to child or spousal support, the Court should order payment to be made under an income assignment to the clerk of court.<sup>160</sup>

### **§3-8.06 Violation of an Order of Protection is a criminal misdemeanor.**

A person who knowingly violates an order of protection issued pursuant to this part or a restraining order issued to a party who is a victim as defined in Section 36-3-601(8) (the relationship categories defined in the statute) commits the offense of violation of a protective order.<sup>161</sup>

In order to be found guilty under this section:

- The person must have received notice of the request for an order of protection or restraining order;
- The person must have had an opportunity to appear and be heard in connection with the order of protection or restraining order; and
- The court made specific findings of fact in the order of protection or restraining order that the person had committed domestic abuse, sexual assault, and stalking as defined in this part.<sup>162</sup>

Any act that constitutes the offense of violation of a protective order shall be subject to arrest with or without a warrant, as outlined above.<sup>163</sup>

A person who is arrested for violation of a protective order shall be considered within the provisions of Section 40-11-150(a) (requiring that bond conditions be set) and subject to the twelve-hour hold period authorized by Section 40-11-150(h).<sup>164</sup> At the time the issue of bond is being determined, the magistrate shall notify or cause to be notified the victim of violation of a protective order that the defendant has been arrested.<sup>165</sup> Neither an arrest nor the issuance of a warrant or capias for the offense of violation of a protective order shall in any way affect the validity or enforceability of any order of protection or restraining order.<sup>166</sup>

Violation of a protective order is a Class A misdemeanor and any sentence imposed shall be consecutive to any other offense that is based in whole or in part on the same factual allegations (for example, a finding of contempt or conviction of aggravated assault) unless the sentencing judge or magistrate specifically makes the sentences for any such offenses arising out of the same facts to be concurrent with one another.<sup>167</sup>

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<sup>160</sup> Tenn. Code Ann. § 36-3-610(b) (2015).

<sup>161</sup> Tenn. Code Ann. § 39-13-113(a)(2015).

<sup>162</sup> Tenn. Code Ann. § 39-3-113(b)(2015).

<sup>163</sup> Tenn. Code Ann. § 39-13-113(b)(2015).

<sup>164</sup> Tenn. Code Ann. § 39-13-113(c)(2015).

<sup>165</sup> Tenn. Code Ann. § 39-13-113(d)(2015).

<sup>166</sup> Tenn. Code Ann. § 39-13-113(e)(2015).

<sup>167</sup> Tenn. Code Ann. § 39-13-113(g)(2015).

Furthermore, a defendant who is convicted of a violation of the order of protection cannot possess a weapon.<sup>168</sup>

### **§ 3-8.07 Defenses to the violation of the Order.**

The respondent may attempt to raise the victim's alleged permission and participation in the prohibited contact as a defense to the violation of the Order. While no Tennessee case has addressed this issue, the U.S. Attorney General's Task Force recommends that the Court admonish the perpetrator that any contact with the protected party, even if initiated by the protected party, may constitute a violation of the Order of Protection (*Attorney General's Task Force on Family Violence: Final Report*, 1984). Many states hold that reunification of the parties is not a defense to prosecution for a violation.<sup>169</sup>

### **§3-8.08 Double jeopardy.**

Often the violence that prompts a contempt hearing is criminal conduct as well. For example, any assault done in contempt of an Order of Protection is an aggravated assault. Similarly, breaking into a petitioner's home to commit an assault is burglary. The Tennessee Supreme Court has held that "neither the Double Jeopardy Clause of the United States Constitution nor that of the Tennessee Constitution bars separate proceedings and punishments for contempt and the substantive offense underlying the contempt."<sup>170</sup> Recently, the General Assembly expanded the consequences for violating some Orders of Protection to constitute a criminal misdemeanor while leaving intact the provisions of the Act which make violation of an Order of Protection civil or criminal contempt.<sup>171</sup> Although no Court has yet considered whether simultaneous prosecution for contempt and the misdemeanor crime of violation of an Order of Protection violates the double jeopardy prohibition, the Attorney General has opined that charging a defendant with both criminal contempt a misdemeanor Violation of a Protective Order does not violate federal or state constitutional double jeopardy principles.<sup>172</sup> The Court is empowered to punish the respondent for both contempt and the Violation of a Protective Order. In addition, violations not covered by the misdemeanor definition must continue to be prosecuted by punishment for contempt.

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<sup>168</sup> Tenn. Code Ann. § § 39-17-1316;39-17-1352(2015).

<sup>169</sup> See, e.g., *Cole v. Cole*, 147 Misc. 2d 297, 556 N.Y.S.2d 217 (Fam. Ct. DE Cty. 1990) (wife who reunited for two months with husband against whom she had an Order of Protection did not waive right to enforce the order); *State v. Kilponen*, 47 Wash. App. 912, 737 P. 2d 1024 (Wash. 1987) (plaintiff who had divorced, reconciled, and separated again could not change court's order that defendant not approach or communicate directly or indirectly with the plaintiff and that he not go to the family residence).

<sup>170</sup> *State v. Winningham*, 958 S.W.2d 740; 1997 Tenn. LEXIS 632 (Tenn. 1997) [citing *State v. Denton*, 938 S.W.2d 373, 378 (Tenn. 1996)].

<sup>171</sup> Tenn. Code Ann. § 39-13-113(2015).

<sup>172</sup> Attorney General Opinion No. 06-085.

### **§3-8. 09 Tennessee courts must enforce Orders of Protection from other states.**

The full faith and credit section of the Violence Against Women Act<sup>173</sup> requires that when a victim goes to a new state, any valid Order of Protection issued in the old state must be enforced by the new state as if it were issued by the new state. In other words, whatever the implications of violating an Order of Protection in the new state, these apply to enforcement of the Order from the old state. In addition, if the victim is ineligible for an Order of Protection in the new state but she or he was eligible for the Order of Protection in the old state, the new state must still enforce the out-of-state Order.

Full faith and credit extends to both temporary and final Orders of Protection. It also applies to both civil and criminal Orders of Protection. However, full faith and credit does not extend to mutual Orders of Protection where no cross- or counter-petition was filed against the petitioner and where the judge did not make a finding that the petitioner had committed domestic abuse. The full faith and credit section does not require that the Order of Protection from the old state be registered in the new state to be enforceable. However, the section does require that (1) the Court that issued it had personal and subject matter jurisdiction and (2) the opposing party had reasonable notice and opportunity to be heard.

### **§3-8.10 An Order of Protection may be extended upon violation.**

Tennessee law provides that “within the time the order of protection is in effect, any court of competent jurisdiction may modify the order of protection, either upon the court’s own motion or upon motion of the petitioner. If a respondent is properly served and afforded the opportunity for a hearing pursuant to § 36-3-612, and is found to be in violation of the order, the court may extend the order of protection up to 5 years. If the respondent is properly served and afforded the opportunity for a hearing, and is found to be in a second or subsequent violation of the order, the court may extend the order of protection up to 10 years. No new petition is required to be filed in order for a court to modify an order or extend an order pursuant to this subsection.”<sup>174</sup>

### **§3-8.11 Performance Bond Required for Order of Protection Violations**

Respondents, who have been convicted of violating an order of protection, are required to post a bond in an amount of no less than \$2500.<sup>175</sup> This bond is in addition to any other penalties provided by law. The bond must be at least \$2500, but the court can set

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<sup>173</sup> 18 U.S.C.A. § 2265 (2015). Tenn. Code Ann. § 36-3-622 (2015) provides guidance and procedures to assist in implementation of the full faith and credit provisions of the Violence Against Women Act.

<sup>174</sup> T.C.A. §36-3-605 (2015).

<sup>175</sup> T.C.A. § 36-3-610 (2015)

a reasonable amount greater than \$2500 to assure the safety of the petitioner. If the respondent does not post the bond, the respondent may be held in contempt of court.

If the respondent fails to comply with the bond requirements, the court must enter an order declaring the bond forfeited. The clerk must mail notice of the order indicating that the bond has been forfeited to the respondent at the respondent's last known address. The respondent has 30 days to show compliance with the conditions of bond. If the respondent cannot satisfy to the court compliance with the bond conditions, then the court shall enter a judgment in favor of the state against the respondent in the amount of the bond and costs of the court proceedings. The clerk may enforce the judgment as in other civil actions.

The proceeds of a judgment for the amount of the bond would be paid quarterly to the Administrative Office of the Courts and would be allocated equally on an annual basis in the following manner:

- (1) To provide legal representation to low-income Tennesseans in civil matters in such manner as determined by the Supreme Court. One fourth of such funds would be allocated to an appropriate statewide nonprofit organization capable of providing continuing legal education, technology support, planning assistance, resource development and other support to organizations delivering civil legal representation to indigents. The remainder would be distributed to organizations delivering direct assistance to clients with Legal Services Corporation funding;
- (2) To the Domestic Violence State Coordinating Council;
- (3) To the Tennessee Court Appointed Special Advocates Association (CASA); and
- (4) To Childhelp.

### ***§3-9 Interaction of the Domestic Abuse Act with the federal Violence Against Women Act (VAWA) and other federal laws.***

#### **§3-9.01 Tennessee Courts should craft their Orders of Protection so that they will be valid and enforceable in other states.**

The Order of Protection should show on its face that the Court has personal and subject matter jurisdiction and that the opposing party had reasonable notice and opportunity to be heard. In the case of an Ex Parte Order, the Order should indicate that a hearing will be held within 15 days as required by the statute. Tennessee Courts should not issue mutual Orders of Protection unless a cross- or counter-petition was filed against the petitioner and the judge has made a finding that the petitioner has committed domestic abuse. The sample Order of Protection in the Appendices complies with the requirements of this federal statute.



### **§3-9.02 Orders of Protection should be crafted so that federal laws that prohibit respondents under valid Orders of Protection from possessing firearms can be enforced.**

A gun in a home with previous domestic violence assaults increases the risk of murder to the survivor by twenty times (Kellerman, *et al.*, 1993). In Tennessee in 2003 there were seventy domestic violence murders (Tennessee Bureau of Investigation Crime Statistics Unit, 2004). Tennessee ranks fourth in the nation in the number of females murdered by males in single victim/single offender incidents (Violence Policy Center, 2002).

It is a federal offense for a person to possess a firearm who is subject to a court order that:

- was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
- restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
- includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
- by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

Courts should be careful that their Orders contain the required language. The sample Order of Protection in the Appendices complies with the requirements of this federal statute.

Federal law prohibits the transfer (or return) of firearms to anyone currently subject to a protection order.<sup>176</sup> This would include the return of weapons confiscated in a domestic abuse arrest or in an Order of Protection. Such an Order would violate federal law and would be a criminal offense.

### **§3-9.03 Constitutionality of the Violence Against Women Act and other federal domestic violence laws.**

On May 15, 2000, the Supreme Court of the United States declared the Civil Rights Remedy of the Violence Against Women Act unconstitutional.<sup>177</sup> The decision did not to apply to the other provisions of the Act. Courts have uniformly upheld the interstate felonies against constitutional challenge.<sup>178</sup> Likewise, the Court's decision will have no

<sup>176</sup> 18 U.S.C.A. § 922(d)(8)(2015).

<sup>177</sup> *Brzonkala v. Morrison* (No. 99-5, Argued January 11, 2000, Decided May 15, 2000).

<sup>178</sup> *See, e.g., United States v. Gluzman*, 154 F.3d 49 (2d Cir. 1998), *cert.denied*, 119 S.Ct. 1257 (1999).

impact on the full faith and credit provisions of the Violence Against Women Act. The firearms prohibitions for domestic abuse defendants have been held constitutional.<sup>179</sup>

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<sup>179</sup> United States v. Baker, 1999 FED App. 0392P (6th Cir. 1999), cert. denied, 528 U.S. 1197; 120 S. Ct. 1262; 146 L. Ed. 2d 117; 2000 U.S. LEXIS 1727 (Feb. 28, 2000) (upholding constitutionality of prohibition based on Order of Protection); see also, U.S. v. Beavers, 2000 FED App. 0058P (6th Cir. 2000) (cert. denied, 529 U.S. 1121; 120 S. Ct. 1989; 146 L. Ed. 2d 815; 2000 U.S. LEXIS 3372 (May 15, 2000) (upholding constitutionality of prohibition based on conviction of misdemeanor crime of domestic violence).

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## Chapter 4 Parenting Issues in Domestic Abuse Cases

Cases known or suspected to involve domestic violence pose particular challenges, because:

- abusive parents commonly blame their partners for turning their children against them, and rarely take responsibility for the impact of their own behavior on the children (Bancroft and Silverman, 2002);
- it is often legitimate for the partner of an abusive parent to try to protect the children from exposure to abuse, or to try to secure his or her own safety from the abusive partner by limiting that partner's contact with the children. It may be hard to distinguish between appropriately protective behavior and behavior which is well-intentioned but excessive and ultimately counter-productive (Drozd and Olesen, 2004);
- the undermining strategies employed by abusive partners commonly include invalidating their partners' parental authority and sabotaging their relationships with the children (Bancroft and Silverman, 2002); and
- children in an abusive household may feel safer identifying and allying with the abusive partner than with the one who suffers abuse (Dalton et al., 2003).

Domestic abuse cases which involve children are some of the most difficult cases a trial judge will face. During a custody battle, the children can be the means for a perpetrator to continue to maintain power and control over the victim. Custody litigation frequently becomes a vehicle whereby perpetrators attempt to extend or maintain their control and authority over the abused parent after separation (Hart and Hofford, 1997). The trial court must be cognizant of this misuse of the court system and work to protect the children from being used in this fashion.

Children provide perpetrators a means of maintaining control and domination over victims who seek to escape. Some abusers use the courts to continue their control over their ex-partners and children by taking advantage of the current trend of courts favoring joint custody and mediation or granting sole custody to fathers. Women usually are the primary caretakers of children before and after divorce, and they have profound fears of losing custody, whereas the perpetrator has little to lose by using custody as a bargaining and power tactic (Liss and Stahly, 1998; Marks, 1988; Pagelow, 1992).

Perhaps at no point in a domestic abuse case is the potential for further violence and harassment greater than when the domestic abuse perpetrator has continuing access to the victim and the children through a parenting plan or custody or visitation order. In crafting parenting plans and custody and visitation orders, the Court faces the difficult task of determining how these orders can best protect the children from witnessing violence and/or from being abused themselves, weighed against promoting an ongoing relationship with both parents. In order to protect the children from further violence, the Court must make orders which will minimize the opportunity for violent and controlling behavior. This can be done through restricting contact between the parties, as well as

rigorously regulating the terms of parenting responsibilities, residential schedules, custody, and visitation to take away the ability of the perpetrator to use the children to control the victim.

The National Council of Juvenile and Family Court Judges found that:

*Continued aggression and violence between divorced spouses with joint custody has the most adverse consequences for children of any custody option. The long-term effect is intergenerational transmission of abuse, with such children becoming either victims of abuse or abusers as adults. In the shorter term, emotional and physical problems will frequently lead to poor school performance, running away and juvenile delinquency.*

*Court orders which force victims to share custody with their abusers place both victims and children in danger (NCJFCJ, 1990).*

The National Council of Juvenile and Family Court Judges makes the following recommendations to improve court practices in domestic abuse cases which involve custody issues:

- Weigh and consider the violent conduct in making orders concerning parenting;
- Recognize that there may be an unequal balance of power or bargaining capability between the parties which requires a more careful review of the parenting and financial agreements before approval by the Court;
- Do not presume that joint custody is in the best interests of the children; in fact, with serious battery or control issues, joint custody is not advised.

If there is a recent history of violence, perpetrators should be ordered to successfully complete intervention specifically for the violence, and for substance abuse if necessary, before unsupervised contact with the children is allowed (NCJFCJ, 1990). A program between 24 to 52 weeks is recommended.

The U.S. House of Representatives and the Senate went further and unanimously passed a resolution in 1990 stating:

*It is the sense of the Congress that, for purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse. . .*

*[T]here is an alarming bias against battered spouses in contemporary child custody trends such as joint custody. . . . [J]oint custody guarantees the batterer continued access and control over the battered spouse's life through their children. . . . [J]oint custody, forced upon hostile parents can create a dangerous psychological environment for a child.<sup>1</sup>*

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<sup>1</sup> H. Con. Res. 172, October 25, 1990.

## **§4-1 Initial Orders Concerning Children**

### **§4-1.01 The Court must have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.<sup>2</sup>**

The UCCJEA imposes specific requirements on parties in any proceeding which requests custody and visitation. Any pleading which requests a custody or visitation award must include in the first pleading an affidavit stating:

- The child's present address. May use County or State if address is secreted;
- The places where the child has lived for the last five years;
- The names and present addresses of the persons who have lived with the child;
- Whether the party has participated in any capacity in any other litigation concerning this child;
- Whether the party knows of any pending custody proceedings; and
- Whether the party knows of any person who is not a party who has physical custody or who claims to have custody or visitation rights with respect to this child.<sup>3</sup>

However, if a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public. If a party objects to the non-disclosure, the Court must hold a hearing in which the Court takes into consideration the health, safety, or liberty of the party or child and may order the disclosure to be made if it determines that the disclosure is in the interest of justice.<sup>4</sup>

In all custody and visitation proceedings, the Court must make a determination whether it has subject matter jurisdiction to make a ruling on custody and visitation under the UCCJEA. As with any subject matter jurisdiction issue, the parties cannot agree on a state as the proper forum and confer subject matter jurisdiction on the Court. Mere filing of the custody proceeding or physical presence of the child does not confer subject matter jurisdiction.

A victim of domestic violence may flee the marital home and come to Tennessee and file for a divorce or Order of Protection. If the child is present in this state and the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse a court of this state has temporary emergency jurisdiction.<sup>5</sup>

If there is no previous or pending child custody determination in a state having jurisdiction under the UCCJEA, an emergency child-custody determination remains in effect until an order is obtained from a court of a state having jurisdiction under the

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<sup>2</sup> Tenn. Code Ann. § 36-6-201 to 243 (2015).

<sup>3</sup> Tenn. Code Ann. § 36-6-224 (2015).

<sup>4</sup> Tenn. Code Ann. § 36-6-224(e) (2015).

<sup>5</sup> Tenn. Code Ann. § 36-6-219(a) (2015).

UCCJEA. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under the UCCJEA, a child custody determination made under this section becomes a final determination, if it so provides, and this state becomes the home state of the child.<sup>6</sup>

If there is a previous or pending child custody determination in a state having jurisdiction under the UCCJEA, any order issued by a court of this state must specify a period that the Court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under the UCCJEA. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.<sup>7</sup>

A court of this state which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under the UCCJEA, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to the UCCJEA, upon being informed that a child custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the Court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.<sup>8</sup>

If the emergency provisions of the UCCJEA do not apply, the Court must look to the other provisions of the UCCJEA to make a determination as to whether it has jurisdiction. In general these provisions require either that:

- The child has lived in Tennessee for at least six consecutive months prior to the commencement of the action, i.e. is the home state of the child;<sup>9</sup> or
- If no state is the home state, or if the home state has declined to exercise jurisdiction on the grounds that Tennessee is the more appropriate forum to determine custody, a Tennessee court must determine whether:
  - The child and at least one contestant have a significant connection with Tennessee; and
  - Substantial evidence concerning the child's present or future care, protection, training and personal relationship is available in Tennessee; and
  - It is in the best interest of the child that Tennessee assume jurisdiction.<sup>10</sup>

#### **§4-1.02 Parenting Plans.**

In actions for absolute divorce, legal separation, annulment, or separate maintenance involving a minor child, the Court must incorporate a temporary parenting plan in any

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<sup>6</sup> Tenn. Code Ann. § 26-6-219(b) (2015).

<sup>7</sup> Tenn. Code Ann. § 26-6-219(c) (2015).

<sup>8</sup> Tenn. Code Ann. § 26-6-219(d) (2015).

<sup>9</sup> Tenn. Code Ann. § 36-6-216(a)(1) (2015).

<sup>10</sup> Tenn. Code Ann. § 36-6-216(a)(2) (2015).



temporary order and a permanent parenting plan in any final decree or decree of modification of a post-1997 decree.<sup>11</sup> However, there are certain restrictions that apply in these cases where domestic abuse is present. Those restrictions are outlined in the chart below.

<b>If:</b>	<b>Then:</b>	<b>Proof Required</b>
Physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child.	The mechanism for approval of the permanent parenting plan shall not utilize dispute resolution.	Prior order or other reliable evidence. <sup>12</sup>
Physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child.	Permanent parenting plan may not utilize dispute resolution.	Prior order or other reliable evidence. <sup>13</sup>
Physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child.	A parent's residential time as provided in the permanent parenting plan or temporary parenting plan shall be limited.	Prior order or other reliable evidence. <sup>14</sup>
The parent resides with a person who has engaged in physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child.	The parent's residential time with the child shall be limited.	Prior order or other reliable evidence. <sup>15</sup>
A parent has been convicted as an adult of certain sexual offenses or has been found to be a sexual offender.	The Court shall restrain the parent from contact with a child that would otherwise be allowed under this part.	Prior conviction. <sup>16</sup>

<sup>11</sup> Tenn. Code Ann. § 36-6-403 and 36-6-404 (2015).

<sup>12</sup> Tenn. Code Ann. § 36-6-406(a)(2) (2015).

<sup>13</sup> Tenn. Code Ann. § 36-6-406(a)(2) (2015).

<sup>14</sup> Tenn. Code Ann. § 36-6-406(a)(2) (2015).

<sup>15</sup> Tenn. Code Ann. § 36-6-406(b) (2015).

<sup>16</sup> Tenn. Code Ann. § 36-6-406(c) (2015).

<b>If:</b>	<b>Then:</b>	<b>Proof Required</b>
A parent resides with an adult who has been convicted, or with a juvenile who has been adjudicated guilty of certain sexual offenses, or who has been found to be a sexual offender.	The Court shall restrain that parent from contact with the child unless the contact occurs outside the adult's or juvenile's presence and sufficient provisions are established to protect the child.	Prior conviction or juvenile adjudication. <sup>17</sup>
An Order of Protection issued in or recognized by this state is in effect.	The Court's ability to order mediation is limited (see below).	Order of Protection in effect. <sup>18</sup>
There is a court finding of domestic abuse.	The Court's ability to order mediation is limited (see below).	Court finding. <sup>19</sup>
There is a criminal conviction involving domestic abuse within the marriage.	The Court's ability to order mediation is limited (see below).	Prior conviction. <sup>20</sup>

In cases where the Court's ability to order mediation is limited, the Court may not order mediation unless:

- Mediation is agreed to by the victim of the alleged domestic or family violence;
- Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
- The victim is permitted to have in attendance at mediation a supporting person of the victim's choice, including, but not limited to, an attorney or advocate. No victim may provide monetary compensation to a non-attorney advocate for attendance at mediation. The other party may also have in attendance at mediation a supporting person of such party's choice, including, but not limited to, an attorney or advocate.<sup>21</sup>

Furthermore, if the parties enter into and file a properly executed marital dissolution agreement and, if there are minor children of the marriage, a properly executed parenting plan, then there is no requirement for mediation.<sup>22</sup> If dispute resolution is not available either party may request and the Court may order an expedited hearing to

<sup>17</sup> Tenn. Code Ann. § 36-6-406(c)(2015).

<sup>18</sup> Tenn. Code Ann. § 36-6-409(5)(2015).

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Tenn. Code Ann. § 36-4-131(2015).

establish a temporary parenting plan.<sup>23</sup> Parenting plans and procedures for alternative dispute resolution are only applicable to actions for absolute divorce, legal separation, annulment, or separate maintenance. In Orders of Protection or other suits involving children, the Court must apply the relevant laws concerning custody and visitation determinations.

**§4-1.03 The Court should insure that attendance at parent education seminars does not put victims at additional risk of violence.**

In an action where a permanent parenting plan is or will be entered, parents are required to attend a parent educational seminar as soon as possible after the filing of the complaint.<sup>24</sup> The Court may waive the requirement of attendance at such a seminar upon a showing of good cause for such relief. The fact that there is only one such seminar available in the jurisdiction, which would require attendance of both parties at the same time, should be sufficient cause for waiver in domestic abuse cases. No court shall deny the granting of a divorce from the bonds of matrimony for failure of a party or both parties to attend the educational session.<sup>25</sup>

**§4-1.04 In domestic abuse cases, joint custody is inappropriate.**

In the absence of an agreement between the parties, there is neither a statutory preference nor a presumption in favor of joint custody or against sole custody.<sup>26</sup> Generally, the appellate courts have held that joint custody is disfavored where the parties have not agreed to it.<sup>27</sup> There is a rebuttable presumption that it is detrimental to the child and not in the best interests of the child to award sole custody or joint legal or joint physical custody to a perpetrator of child abuse or child sexual abuse.<sup>28</sup>

Even where the parents have agreed to joint custody, or agree in open court at the custody hearing, the Court should look at the agreement closely. The balance of power between the parties is unequal where domestic abuse exists and the victim may be agreeing to joint custody under the threat of further violence. Where the parties have agreed to joint custody, there is a statutory presumption that joint custody is in the best interests of the minor child, but this presumption can be overcome by clear and convincing evidence that such an arrangement is not in the child's best interests.<sup>29</sup> When there is a history of domestic abuse between the parties, the Court must make its own determination that joint custody is not in the best interests of the children.

Problems incurred by joint custody in conflicted relationships are substantial (Steinman, 1986; Steinman, Zimmelman, and Knoblauch, 1985). Research shows that some

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<sup>23</sup> Tenn. Code Ann. § 36-6-403(2)(2015).

<sup>24</sup> Tenn. Code Ann. § 36-6-408(a)(2015).

<sup>25</sup> Tenn. Code Ann. § 36-6-408(c)(2015).

<sup>26</sup> Tenn. Code Ann. § 36-6-101(a)(2)(2015).

<sup>27</sup> *Shepherd v. Metcalf*, 794 S.W.2d 348 (Tenn. 1990); *Malone v. Malone*, 842 S.W.2d 621 (Tenn.App. 1992).

<sup>28</sup> Tenn. Code Ann. § 36-6-101(a)(4) (2015).

<sup>29</sup> Tenn. Code Ann. § 36-6-101(a)(2) (2015).

children in these families fare better when sole custody is awarded to the mother and there is little or no paternal contact (Furstenberg, Morgan, and Allison, 1987; Johnston, Kline, Tschann, and Campbell, 1988). According to the Family Violence Project report (1990), "Judges should not presume that joint custody is in the best interests of the children. . . . Court orders which force victims to share custody with their abusers place both victims and children in danger." The power and control of the perpetrator will be continued and victims and their children will tend to be revictimized (Pagelow, 1997; American Psychological Association, 1996; Geffner and Pagelow, 1990).

**§4-1.05 Trial courts must consider evidence of physical or emotional abuse to the child, to the other parent, or to any other person when determining custody.<sup>30</sup>**

Evidence of domestic abuse mitigates against custody being awarded to the abusive party. Eighty-five percent of all children who live in homes where there is domestic abuse will witness the abuse. Simply witnessing the abuse is emotionally traumatizing to a child. Children who live with domestic abuse experience a myriad of problems. Several states have legislated a rebuttable presumption against awarding custody<sup>31</sup> or joint custody<sup>32</sup> to domestic abuse perpetrators.

Where there are allegations that one parent has committed child abuse or child sexual abuse against a family member, the Court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The Court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the Court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings.<sup>33</sup>

One report on the impact of domestic abuse on children offers three reasons to deny custody to a perpetrator:

- The perpetrator ignored the child's interests by harming the other parent;
- Perpetrators often continue their controlling and threatening behavior even after the parents are separated;
- Perpetrators who have custody of their children often use them to control the other parent (Lehrman, 1996).

If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be

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<sup>30</sup> Tenn. Code Ann. § 36-6-106(8) (2015).

<sup>31</sup> N.J. Laws § 2C:25-29(13)(b)(11); N.D. Cent. Code § 14-09-06.2(1)(j); Ok. Stat. 10-21.1D, 43-112.2; R.I. Gen. Law § 15-5-16(g); Wa. Rev. Code Ann. § 26.09.191; Wyo. § 20-2-112(b).

<sup>32</sup> Ariz. Rev. Stat. Ann. § 25-403(E); Fla. Stat. Ann. § 61.13(2)(b)2;

<sup>33</sup> Tenn. Code Ann. § 36-6-106(8) (2015).

deprived of custody, visitation, or contact with the child, or restricted in custody, visitation, or contact, based solely on that belief or the reasonable actions taken based on that belief.<sup>34</sup> If an allegation that a child is abused is supported by a preponderance of the evidence, the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child.<sup>35</sup>

Courts are also required to consider the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.<sup>36</sup> In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order.<sup>37</sup> In cases of domestic abuse, the victim may take steps to prevent the perpetrator from coming about the victim or knowing where the victim lives or works, and use other methods to reduce contact and the potential for further injury at the hands of the perpetrator. If an abused parent strenuously objects to shared parenting, she or he may appear recalcitrant and unforgiving in court (Lehrman, 1996). In cases where one parent has abused the other parent or the child, it would not be consistent with the child's best interests to award custody to the perpetrator, despite the perpetrator's expressed willingness to allow contact between the victim and the child. Courts in some states have allowed proof of the victim's fear of continued assaults to outweigh the friendly parent preference.<sup>38</sup> Tennessee law allows certain restrictions on temporary and permanent parenting plans regarding parenting time:

(1) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting responsibilities; or

(2) Physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child as defined in § 36-3-601.

(b) The parent's residential time with the child shall be limited if it is determined by the court, based upon a prior order or other reliable evidence, that the parent resides with a person who has engaged in physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child as defined in § 36-3-601.

(c) If a parent has been convicted as an adult of a sexual offense under § 39-15-302, title 39, chapter 17, part 10, or §§ 39-13-501 -- 39-13-511, or has been found to be a sexual offender under title 39, chapter 13, part 7, the court shall restrain the parent from contact with a child that would otherwise be allowed under this part. If a parent resides with an adult who has been convicted, or with a juvenile who has been adjudicated

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<sup>34</sup> Tenn. Code Ann. § 36-6-112(c)(2015).

<sup>35</sup> Tenn. Code Ann. § 36-6-112(d)(2015).

<sup>36</sup> Tenn. Code Ann. § 36-6-106(10)(2015).

<sup>37</sup> *Id.*

<sup>38</sup> *In re Jon N.*, 179 Cal.App.3d 156 (Ca. 1986).

guilty of a sexual offense under § 39-15-302, title 39, chapter 17, part 10, or §§ 39-13-501 -- 39-13-511, or who has been found to be a sexual offender under title 39, chapter 13, part 7, the court shall restrain that parent from contact with the child unless the contact occurs outside the adult's or juvenile's presence and sufficient provisions are established to protect the child.

(d) A parent's involvement or conduct may have an adverse effect on the child's best interest, and the court may preclude or limit any provisions of a parenting plan, if any of the following limiting factors are found to exist after a hearing:

- (1) A parent's neglect or substantial nonperformance of parenting responsibilities;
- (2) An emotional or physical impairment that interferes with the parent's performance of parenting responsibilities as defined in § 36-6-402;
- (3) An impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting responsibilities;
- (4) The absence or substantial impairment of emotional ties between the parent and the child;
- (5) The abusive use of conflict by the parent that creates the danger of damage to the child's psychological development;
- (6) A parent has withheld from the other parent access to the child for a protracted period without good cause;
- (7) A parent's criminal convictions as they relate to such parent's ability to parent or to the welfare of the child; or
- (8) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.<sup>39</sup>

In addition, the statute recognizes that often a parent must leave the home to avoid violence. Because of this, where there is a finding of child abuse or child sexual abuse by one parent and a non-perpetrating parent has relocated in order to flee the perpetrating parent, such relocation shall not weigh against an award of custody.<sup>40</sup> When a parent is forced by the other parent's violence to leave the home, this fact should not be used to deprive the victim of custody. The Court must consider all of the evidence concerning continuity for the children, and examine whether the children are better off in their new environment. This reasoning should also be applied in orders of protection cases when visitation is an issue.

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<sup>39</sup> See Tenn. Code Ann. § 36-6-406(d)(6)(2015).

<sup>40</sup> Tenn. Code Ann. § 36-6-106(3)(2015).

**§4-1.06 BATTERERS OFTEN USE AN IMMIGRANT VICTIM'S STATUS AGAINST HER IN A CUSTODY BATTLE.**

Batterers who are United States citizens often refuse to file petitions to normalize status for their victims whom they may have encouraged or supported to enter the country. U.S. citizen spouses have a certain period of time after marriage to file a petition on behalf of their immigrant spouses. Lawful Permanent Residents can also sponsor immigrant spouses. Abusive spouses often refuse to do this because it increases their control over the victim. This is particularly true if the parties have children together. If the victim is deported, she loses not only whatever ties she may have had to this country but will probably lose her children as well. Abusers may also use the family visa process to control the undocumented spouse by threatening to have her deported or by threatening to withdraw a filed petition.

In 1994, Congress enacted the Violence Against Women Act (VAWA) to address this problem. The provisions of VAWA allow abused spouses and children of U.S. Citizens and Legal Permanent Residents to file their own visa petition, rather than having to rely on the abuser to file a petition on their behalf.<sup>41</sup> If the self-petition is granted, the self-petitioner will be put in deferred action, which means that although the U.S. Citizenship and Immigration Service (USCIS) knows that the petitioner is present in the U.S. without lawful immigration status, it will not deport her before she can adjust to Lawful Permanent Status. The self-petitioner may apply for permanent legal status upon approval of the petition. While waiting for legal permanent status, the self-petitioner may apply for employment authorization and public benefits. The termination of a marriage will not preclude the self-petitioner from a favorable decision. In fact, an abused spouse may file within two years of a divorce, if there is a connection between the divorce and the domestic violence.<sup>42</sup>

Abusers in custody actions may argue that since the victim's immigration status is irregular (often due to actions of the abuser), the abuser should be given custody of the children, and the victim's access to the children limited. The relief available to victims under VAWA makes such arguments spurious.

**§ 4-1.07 THE COURT SHOULD CAREFULLY CONSIDER THE HISTORY OF DOMESTIC ABUSE IN CRAFTING VISITATION ORDERS AND IN REVIEWING PROVISIONS OF PARENTING PLANS CONCERNING ACCESS TO CHILDREN BY NON-RESIDENTIAL PARENTS.**

The potential for renewed violence is the greatest during visitation. Often courts order visitation where the perpetrator will be coming to the home of the victim to pick up or drop off the children. When the parties are in the privacy of the victim's home, chances for renewed violence increase. The Court must balance the needs of the children to maintain a relationship with both parents against the need to be insulated from further violence. Unfortunately, there are some severe cases where the harm done to the

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<sup>41</sup> INA § 204(a)(1)(A)(iii).

<sup>42</sup> INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc).

children by continued exposure to domestic abuse outweighs the benefits of continued contact with the abusing parent.<sup>43</sup>

The Court must craft visitation orders which accomplish the following goals:

- Protect the safety and well-being of the children;
- Protect the safety and well-being of the victim;
- Discourage continued contact between the parties, particularly in a private setting.

If the court finds that the non-custodial parent has physically or emotionally abused the child, the court may require that visitation be supervised or prohibited until such abuse has ceased or until there is no reasonable likelihood that such abuse will recur.<sup>44</sup> Children are harmed both emotionally and often physically by continued exposure to domestic abuse. The Court can see the effects of the violence when talking with the children in chambers and looking at their school records, social contact and involvement, and other indicators of damage to the children.

If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child.<sup>45</sup> Where the Court makes findings of child abuse or child sexual abuse, the Court may only award visitation under circumstances that guarantee the safety of the child.<sup>46</sup> In order to guarantee the safety of the child, the Court may order:

- That all visits be supervised by a responsible adult or agency, the costs to be primarily borne by the perpetrating parent;
- That the perpetrating parent attend and complete a perpetrator's intervention program, and when appropriate a drug or alcohol program as a precondition to visitation;
- That overnight visitation be prohibited until such time that the perpetrating parent has successfully completed court ordered intervention, or otherwise demonstrated a change in circumstances that guarantees the safety of the child;
- That the address of the child and the non-perpetrating parent be kept confidential; and
- Any other conditions the Court deems necessary and proper to guarantee the safety of the child.

Make specific and detailed orders regarding visitation; ordering reasonable rights of visitation or ordering that visitation will be arranged later may place the victim in

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<sup>43</sup> Examples of such severe violence where the court suspended visitation can be found in Goldring v. Goldring, 424 N.Y.S.2d 270 (N.Y. 1980); In re Marriage of Kim, 208 Cal.App.3d 346 (Cal. 1989); Stuckey v. Stuckey, 768 P.2d 694 (Co. 1989); and Marquette v. Marquette, 686 P.2d 990 (Okla. 1984).

<sup>44</sup> Tenn. Code Ann. § 36-6-301 (2009); Ramsey v. Henson, 2002 Tenn. App. LEXIS 629 (2002).

<sup>45</sup> Tenn. Code Ann. § 36-6-112(d)(2015).

<sup>46</sup> Tenn. Code Ann. § 36-6-107(b)(2015).



constant contact with the perpetrator and subject the victim to the perpetrator's control, harassment, and violence (Finn and Colson, 1990).

Following are suggestions on how to make visitation orders specific and detailed to reduce the potential for renewed violence:

- Eliminate the need for any contact between the parties;
- The time, method, and manner of any ordered contact must be clearly structured, leaving no ambiguities to be resolved by the parties;
- Spell out when visitation begins and when it ends; who will facilitate the exchange for each party; where the pick-up and drop-off place will be; and how long the parties must wait for each other at the pick-up and drop-off place. The best point of exchange may be a public place or the home of a third party, such as a relative or mutual friend, where the parties have no contact with each other;
- Order that visitation be supervised; the propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation (NCJFCJ, 1990);
- Order the perpetrator to successfully complete a domestic abuse intervention program prior to any unsupervised visitation;
- Order the perpetrator to undergo a psychiatric evaluation before visitation is authorized;<sup>47</sup> Further, prior to visitation, the report from the professional evaluator should be filed with the Court under seal and reviewed on a date certain by the Court to ensure the safety of those parties and children involved.
- Where the perpetrator has a history of alcohol or other drug abuse, order that an intervention program for both alcohol and/or drugs and violence be completed prior to any unsupervised visitation;
- Where substance abuse treatment is ordered and completed, order that the perpetrator not consume alcohol or other drugs before or during the visit, and that the victim may refuse visitation if the perpetrator appears to have violated this condition. Further, the Court should order that there will be no alcohol or drugs in the home when the children come to visit. This reduces the temptation to drink and the likelihood that there will be friends drinking around the children during visitation.

**§4-1.08      The National Council of Juvenile and Family Court Judges found that supervised visitation may be necessary when there is a history of violence (NCJFCJ, 1990).**

Obviously, if the violence has been directed at the children, courts should be concerned about the safety of the children in an unsupervised setting. When the violence has been directed towards a parent, courts should also be concerned about the safety and emotional stability of the children when considering the likelihood of continued violence. The NCJFCJ recommends that supervised visitation programs that ensure the safety of the children and the victim should be available to all persons regardless of their income.

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<sup>47</sup> See, e.g., Goldring v. Goldring, 424 N.Y.S.2d 270 (1980).

Many states are developing supervised visitation programs which are community sponsored and supported to take the place of an hour in a small room at the Department of Children's Services building. Tennessee courts may not order the department of children's services to provide supervision of visitation except in cases where the department is the petitioner or intervening petitioner in a case in which the custody or guardianship of a child is at issue.<sup>48</sup> Visitation must be meaningful and foster a relationship between parent and child. The Court can play a leadership role in establishing a community program to provide supervised visitation which will protect the child while allowing the parent/child relationship to grow. Examples of programs used in other areas are the use of trained church groups and church facilities to supervise the visitation, trained senior citizens at a local senior citizen center, other community service groups or community agencies which might be willing to supervise visitation, or the use of foster parents.

**§4-1.09 When the Court finds it to be in the best interests of the child, the rights of the perpetrating parent may be restricted.<sup>49</sup>**

The following rights may need to be restricted in order to protect the child:

- The right to unimpeded telephone conversations;
- The right to send mail to the child;
- The right to receive notice and relevant information of any event of hospitalization, major illness or death for the child;
- The right to receive from the child's school copies of the child's report cards, attendance records, names of teachers, class schedules, standardized test scores, and other records customarily made available to parents;
- The right to receive copies of the child's medical records;<sup>50</sup> and
- The right to be free of unwarranted derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child;
- The right to be given notice of extra-curricular activities and the opportunity to participate or observe:
- The right to receive from the other parent, in the event the other parent leaves the state with the minor child or children, an itinerary including telephone numbers for use in the event of an emergency; and
- The right of access and participation in education, including the right of access to the minor child or children for lunch and other activities, on the same basis that is provided to all parents.

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<sup>48</sup> Tenn. Code Ann. § 36-6-301 (2015).

<sup>49</sup> Tenn. Code Ann. § 36-6-101(a)(3) (2015).

<sup>50</sup> In Maine, domestic abuse is a factor which can restrict a perpetrator's access to children's records where there is a finding that such access would be detrimental to the other parent. Me.Stat.Ann. title 19 § 214.

A finding of domestic abuse may require the Court to restrict or abrogate any or all of these rights in order to protect the child or the victim from the perpetrator's abuse. Such restrictions would be in the best interests of the child.

**§4-1.10      Mediation is inappropriate in custody and visitation cases where there is a history of domestic abuse.**

A recent study found that women who informed custody mediators that they were victims of domestic violence often received less favorable custody awards (Johnson, Saccuzzo, and Koen 2005). The study empirically evaluated outcomes and found that mediators often failed to recognize and report domestic abuse even when there were clear indicators of abuse. In addition, legal and physical custody arrangements stemming from mediation resulted in poor outcomes for victims of domestic abuse. The study's authors concluded that the ability of mediators to focus on the best interest of the children is called into question in cases of domestic abuse.

In relationships where domestic abuse is present, efforts at coercion and duress are typically made outside of mediation to force the victim to agree to the terms desired by the perpetrator. As stated by the National Institute of Justice:

*While mediation presumably requires that both parties be placed on "equal footing" in order to negotiate a mutually acceptable agreement the abused woman may make concessions to protect herself from further abuse. [The] balance of power in victim/abuser relationships is so weighted that the possibility of victim coercion during mediation is virtually unavoidable. Mediation, by nature, relies to some extent on the mutual goodwill and fairness of both parties. In some kinds of cases, trained mediators may be effective in equalizing the bargaining power of the parties, but they cannot compensate for a long-term pattern in which one party has consistently controlled and manipulated the other. Indeed, the victim may even be afraid to speak up or register disagreement during a mediation session for fear of retaliation. This imbalance of power would continue after the mediation session as well, since the parties' relationship would not be altered (NIJ, 1986).*

Mediation cannot be required when there is any finding of domestic abuse.<sup>51</sup> When the Court is presented with a mediated agreement, and the Court is aware of a history of domestic abuse, the Court should look at the agreement very carefully to ensure that the best interests of the parties and the minor children are being served by the agreement. All agreements should contain language that the agreement is voluntary, knowing, and without duress. If a party is unrepresented and the Court has concerns about the fairness of the agreement or concerns about specific provisions, the Court should continue the hearing to give the unrepresented party an opportunity to seek review of the agreement by counsel. At a minimum, the Court should ensure that certain facts are on the record: that the agreement was achieved through mediation,

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<sup>51</sup> Tenn. Code Ann. §§ 36-4-131, 36-6-107, 36-6-305, 36-6-409 (2015).

that one or both parties have not had the benefit of counsel, and that parties were given the opportunity to seek advice of counsel and declined.

#### **§4-2 Enforcement of Custody Orders**

Tennessee courts are required to recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with the UCCJEA, or the determination was made under factual circumstances meeting the jurisdictional standards of the UCCJEA and the determination has not been modified in accordance with the UCCJEA.<sup>52</sup> A court of this state may utilize any remedy available under other law of this state to enforce a child-custody determination made by a court of another state. Courts may also enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child-custody determination.<sup>53</sup>

Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.<sup>54</sup> If the Court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the Court shall hold the hearing on the first judicial day possible. The application for the warrant must state:

- Whether the Court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;
- Whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this part and, if so, identify the Court, the case number, and the nature of the proceeding;
- Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the Court, the case number, and the nature of the proceeding;
- The present physical address of the child and the respondent, if known;
- Whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and
- If the child custody determination has been registered and confirmed, the date and place of registration.<sup>55</sup>

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<sup>52</sup> Tenn. Code Ann. § 36-6-227(2015).

<sup>53</sup> Tenn. Code Ann. § 36-6-226(2015).

<sup>54</sup> Tenn. Code Ann. § 36-6-235(2015).

<sup>55</sup> Tenn. Code Ann. § 36-6-232(b)(2015).

A warrant to take physical custody of a child must:

- Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;
- Direct law enforcement officers to take physical custody of the child immediately; and
- Provide for the placement of the child pending final relief.

The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody. A warrant to take physical custody of a child is enforceable throughout this state. If the Court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the Court may authorize law enforcement officers to make a forcible entry at any hour. The Court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

The UCCJEA sets out procedures for registering and enforcing child-custody determinations in non-emergency situations.<sup>56</sup> In general, courts must recognize and enforce, but may not modify, except in accordance with this part, a registered child-custody determination of a court of another state.<sup>57</sup>

Additionally, the Tennessee legislature passed the Child Abduction Act. This legislation allows a court on its own motion to order abduction prevention measures in a child-custody proceeding if the court finds that there is evidence to establish a credible risk of abduction of the child. A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child may file a petition seeking abduction prevention measures to protect the child.

The Child Abduction Act allows a prosecutor or DCS to seek a warrant to take physical custody of a child or other appropriate prevention measures. The petition must set forth personal identifying information of the child, a statement of whether a prior action to prevent abduction or domestic violence has been filed by a party or other individual or entity having custody of the child, and the date, location, and disposition of the action. A statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, or child abuse or neglect.

In making a determination of whether there is a risk of abduction, the court must consider: prior abductions or attempts to abduct, threats to abduct, activities indicating a planned abduction (abandoning employment, selling primary residence, and terminating lease, closing bank account, applying for a passport, seeking to obtain the child's birth certificate or school or medical records), has engaged in domestic violence, stalking,

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<sup>56</sup> Tenn. Code Ann. § 36-6-229 (2015).

<sup>57</sup> Tenn. Code Ann. § 36-6-230 (2015).

child abuse or neglect, refused to follow a child-custody determination, lacks ties to the United States, has strong ties with another state or country, or demonstrates other indicators that the respondent would take the child to another state or country. They can consider evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child. The court can make findings and orders preventing the abduction, including an ex parte order taking custody of the child.<sup>58</sup>

### **§4-3 Considerations when Modifying Custody Orders**

#### **§4-3.01 The Court must have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.**

A Tennessee Court may exercise temporary emergency jurisdiction even if there is a previous child custody determination from another state if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.<sup>59</sup> If there is a previous child custody determination that is entitled to be enforced under this part, or a child-custody proceeding has been commenced in a court of a state having jurisdiction under the UCCJEA, any order issued by a court of this state under this section must specify in the order a period that the Court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under the UCCJEA. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

A court of this state which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under the UCCJEA, shall immediately communicate with the other court. A court of this state which is exercising non-emergency jurisdiction pursuant to the UCCJEA, upon being informed that a child custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the Court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

In non-emergency situations (as defined above), a court of this state may not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under the UCCJEA, and:

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<sup>58</sup> Tenn. Code Ann. § 36-6-601, et al. (2015).

<sup>59</sup> Tenn. Code Ann. § 36-6-219 (2015).

- The Court of the other state determines it no longer has exclusive, continuing jurisdiction under the UCCJEA or that a court of this state would be a more convenient forum; or
- A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.<sup>60</sup>

Except for emergency situations as defined in the statute, a court of this state which has made a child-custody determination consistent with this part has exclusive, continuing jurisdiction over the determination until:

- A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
- A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

A court of this state which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under the UCCJEA (see *infra* §4-1.01).

A court of this state which does not have jurisdiction to modify a child-custody determination may issue a temporary order enforcing:

- A visitation schedule made by a court of another state; or
- The visitation provisions of a child-custody determination of another state that does not provide for a specific visitation schedule.<sup>61</sup>

If a court of this state makes an order which does not provide for a specific visitation schedule, it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in this part. The order remains in effect until an order is obtained from the other court or the period expires.

**§4-3.02      There must have been a significant change of circumstances since the initial order.**

The initial custody decision is binding on all parties until a party can prove that there has been a substantial change in circumstances which requires a change in the Court order. Proof is generally limited to things which have occurred since the initial hearing. The

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<sup>60</sup> Tenn. Code Ann. § 36-6-218 (2015).

<sup>61</sup> Tenn. Code Ann. § 36-6-228 (2015).

standard for changing custody after the initial hearing is a different standard than the comparative fitness analysis used at the time of the initial custody determination. The determination on custody has already been made, and the child has been primarily living with one parent since the initial hearing.<sup>62</sup> The appellate courts have held that there must be some good reason to uproot the child, and thus the courts require proof of a change of circumstances that would justify the significant change in the child's life.

The court is prohibited from permanently modifying a decree for child custody or visitation solely on the basis that one of the parents is a member of the armed forces and is called to active duty or receives orders for duty that is outside the state or country. After the consideration of certain factors, the court may institute temporary orders of child custody or visitation. The law does not prevent the court from issuing a permanent order of visitation and child custody if the parent is on permanent military duty as a career choice.<sup>63</sup>

**§4-3.03 In some recent cases, courts have upheld a change of custody to a non-abusive parent when the custodial parent has subsequently become a victim of domestic violence.<sup>64</sup>**

Exposure to domestic violence can be "sufficient to trigger an inquiry into the best interest of the children."<sup>65</sup> However,

*the Court cannot risk putting a child 'from the frying pan into the fire' and placing the child into a situation as bad or worse than the situation that gave rise to the petition for a change of custody. Consequently, once it is determined that a material change of circumstances has occurred, even if it involves domestic violence, the Court must compare the fitness of the two parents to determine if a change of custody is in the child's best interest.<sup>66</sup>*

**§4-3.04 The Court must consider evidence of physical or emotional abuse to the child, to the other parent, or to any other person in determining whether to allow a custodial parent to relocate.<sup>67</sup>**

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<sup>62</sup> If there has been a joint custody arrangement, where the child has been living with both parents, the standard is somewhat different. Dalton v. Dalton, 858 S.W.2d 324 (Tenn. App. 1993).

<sup>63</sup> Tenn. Code Ann. § 36-6-113(e)(2011).

<sup>64</sup> Peters vs. Peters, 1999 Tenn. App. LEXIS 294 (Tenn. App., 1999); Newport vs. Newport, 1998 Tenn. App. LEXIS 794 (Tenn. App. 1998); Britton vs. Britton, 1998 Tenn. App. LEXIS 587 (Tenn. App. 1998).

<sup>65</sup> Peters v. Peters, 1999 Tenn. App. LEXIS 294 (Tenn. App. 1999) quoting Bjork v. Bjork, 1997 Tenn. App. LEXIS 712, (Tenn. App. 1997).

<sup>66</sup> Peters v. Peters, 1999 Tenn. App. LEXIS 294 (Tenn. App. 1999) citing Adelsperger v. Adelsperger, 970 S.W.2d 482, 485 (Tenn. App. 1997); Williams v. Williams, 1997 Tenn. App. LEXIS 357 (Tenn. App. 1997).

<sup>67</sup> Tenn. Code Ann. § 36-6-108(c)(10)(2015).



Many victims choose to relocate to avoid continued abuse, stalking, harassment, or other forms of manipulation and control by the perpetrator. If the non-custodial parent has been abusive to the child, to the other parent, or to any other person, that fact would mitigate against a change of custody to the abusive parent even if the proposed relocation would diminish the abusive parent's visitation rights.

Normally, the relocating parent must notify the other parent of the intent to move and of the proposed location of the new residence. However, the Court may excuse the relocating parent from providing this notice for exigent circumstances. Fear of continued abuse and harassment should qualify as exigent circumstances and may require the crafting of alternative forms of notice that protect the perpetrator's rights as a parent as well as guard against further abuse.

#### **§4-4 Evidentiary Issues**

##### **§4-4.01 The Court must consider the credibility of both parties and the surrounding circumstances.**

Perpetrators tend to minimize or deny physically abusing their victims. Since most incidents occur in the privacy of the home, generally there are no witnesses to the incident, other than the parties' children. Thus, evaluating the testimony to decide the truth of the matter becomes a necessity for the trial court. Victims are often reluctant to call the police, so there may not be incident reports for the Court to rely on. Many victims will not seek medical help or when they do, they will not tell the medical provider about the abuse. Victims are often isolated from friends and family and may not have witnesses to their injuries. Simply because the victim does not have any corroborating evidence, the Court cannot discount the testimony.

Courts should consider this before bringing contempt charges against victims in divorce cases who raise valid allegations of sexual abuse of the children against the other party.<sup>68</sup>

##### **§4-4.02 An expert witness can be helpful to the Court.**

An expert witness can testify regarding the physical and emotional impact of being physically abused. The expert may also be qualified to testify about the impact on the children, based upon testing and other methods of evaluation, or based upon experience with similar cases. The expert witness can make practical suggestions to assist the Court in crafting custody and visitation orders, such as:

- Protective measures essential to safeguard the children and the victim;

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<sup>68</sup> Tenn. Code Ann. § 36-6-605 (b)(2015) allows the judge to bring contempt charges and assess litigation expenses, including attorney fees and discretionary fees for defending the allegation against a party who has knowingly brought false allegations of sexual abuse in furtherance of the divorce case.

- Effective remedies to mitigate against the potential long-term consequences of past violence to assure the post-separation adjustment of the children and the victim;
- Reasons that the victim may not have reported the violence, or explanations for what seems like abnormal behavior by the victim;
- Assessment of the potential for the victim to be able to properly parent once protected from ongoing violence.

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## Chapter 5 Financial Issues in Domestic Abuse Cases

*Economic dependence is one of the main reasons that women remain with or return to an abusive partner. Abused women are often subject to financial control and isolation by their abusers. In one study, more than half of domestic violence victims surveyed stayed with their abusive partner because they did not feel they could support themselves and their children. Another study of the exit plans of women leaving battered women's shelters found that access to an independent income, along with child care and transportation were primary considerations in deciding whether to return to their abusive partners (Turetsky and Notar, 1999).*

The decisions that the Court makes with respect to financial matters are crucial to whether or not the victim will be able to free herself from the perpetrator's abuse and control. Because in most cases the perpetrator will have controlled the victim's ability to work, pursue an education and job training, and accumulate independent financial resources, the Court will need to be creative in ensuring that the victim does not continue to suffer the effects of economic abuse for years to come even after ending the relationship with the perpetrator. Financial support from the perpetrator is especially important for immigrant victims since immigrant victims may not be able to work legally in the United States until they receive authorization from the United States Citizenship and Immigration Service (USCIS).

### **§5-1 Financial Support for the Victim**

#### **§5-1.01 It is the intent of the General Assembly that a spouse who is economically disadvantaged relative to the other spouse, be rehabilitated whenever possible by the granting of an order for payment of rehabilitative, temporary support and maintenance.<sup>1</sup>**

To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties. Where there is relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors, including those set out in this subsection, the Court may grant an order for payment of support and maintenance on a long-term basis or until the death or remarriage of the recipient or under some circumstances if the recipient is living with a third party.<sup>2</sup> An award of periodic alimony may be made either in addition to a rehabilitation award, where a spouse may be partially rehabilitated as defined above, or instead of a rehabilitation award, where rehabilitation is not feasible.<sup>3</sup>

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<sup>1</sup> Tenn. Code Ann. § 36-5-121(d)(2) (2015).

<sup>2</sup> Tenn. Code Ann. § 36-5-121(d)(3) (2015).

<sup>3</sup> Tenn. Code Ann. § 36-5-121(d)(4) (2015).

Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an Order of Protection.<sup>4</sup>

**§5-1.02 In a divorce case, the Court must consider several factors in awarding alimony.<sup>5</sup>**

Due to the physical, psychological, and economic effects of domestic abuse, the victim may require a period of support in order to become fully self-sufficient. Often the victim needs assistance in the transition from dependency to financial independence. The victim may have been isolated and not allowed to work or the victim may have gone through a series of jobs due to the perpetrator's harassment at the workplace.

The victim may also have diminished earning capacity due to permanent or temporary physical or psychological injury caused by the violence. If the abuse has caused psychological damage to the victim which requires continued counseling, or which might affect that party's ability to secure employment, this can be a major factor in the award of spousal support. If the abuse has caused permanent or temporary injury to the victim, the Court should consider this factor in the award of spousal support. If there is injury which will require ongoing medical costs, and the victim will lose health insurance by virtue of the divorce, the ongoing medical costs should be considered when awarding support.

When there is domestic abuse, the Court may consider the fault of the perpetrator in awarding alimony. Fault may not be considered in the division of property,<sup>6</sup> but if the Court sees fit to compensate the victim for various assaults, injuries, or severe economic disadvantage, the Court can award alimony *in solido* to be paid from the perpetrator's share of the marital property.

**§5-1.03 The Court in an Order of Protection should award support for the petitioner in appropriate cases.**

Transitional alimony is the type of alimony awarded in Order of Protection cases. Due to the control of the perpetrator, the victim may have suffered an economic loss, either by lack of training or lack of steady employment. If the victim has access to education or retraining and financial assistance for the transition period, the victim may be able to become self-supporting. However, if the marriage has been a long-term marriage or if the victim has suffered severe injuries, rehabilitation may not be possible, and long term support may be more appropriate.

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<sup>4</sup> Id.

<sup>5</sup> Tenn. Code Ann. § 36-5-121(i) (2015).

<sup>6</sup> Tenn. Code Ann. § 36-4-121(a)(1) (2015).

**§5-1.04 When the marriage is a long term marriage and/or when the economic conditions of the victim will not be remedied by rehabilitative alimony, the Court should then consider long-term support.**

*In futuro* alimony is a periodic support payment designed to balance the economic interests of the parties. With victims of domestic abuse, the need of the victim for additional income to meet the average monthly expenses will be balanced against the ability of the perpetrator to pay support and still meet that party's average monthly expenses. When the victim demonstrates a need and the perpetrator has an ability to pay, and when the statutory factors are examined, long term support may be necessary. Such support is taxable to the recipient and deductible by the payor.

Sometimes, the Court may wish to set alimony at a specific amount. If fault is great, and the Court does not wish the innocent spouse to be economically disadvantaged by the wrongdoer the Court can provide for the innocent spouse by ordering alimony *in solido*, or lump sum alimony. A lump sum may allow the economically disadvantaged spouse to purchase a car or a house and relieve the need for additional monthly income to make car payments or rent or mortgage payments. It also reduces the continued contact between the parties in the form of a monthly support check, eliminates concerns for enforcement of a monthly amount, and can place the victim in a better financial position to relocate or obtain permanent housing.

**§5-2 Child Support**

**§5-2.01 The amount of child support is governed by guidelines promulgated by the Department of Human Services (DHS).**

In 2004, father's rights groups were successful in getting new child support guidelines adopted based on an income-shares model. In general, these rules benefit non-residential fathers and their new families at the expense of mothers and their children. They also make the child support calculations more complicated for Courts dealing with unrepresented parties. The calculators decrease the time it takes to determine child support orders under the new guidelines (from approximately 25 minutes to two minutes to calculate an order once the fields are filled in). The current version of the calculator and more information is available at the Tennessee Department of Human Services' website.<sup>7</sup>

- Tennessee has adopted the guidelines as a rebuttable presumption on the amount of child support.<sup>8</sup> If the Court deviates from the guidelines, the Court is required to make a written finding that "the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest

<sup>7</sup> <http://www.tennessee.gov/humanserv/is/incomeshares.htm>.

<sup>8</sup> Tenn. Code Ann. § 35-5-101(e)(1)(A) (2015).

of the child or children, or the equity between the parties."<sup>9</sup> When making these findings, the Court is required by statute to state the amount of support that would have been ordered under the guidelines, and also to state the justification for the deviation. Deviations shall not be granted in circumstances where, based upon clear and convincing evidence:

- The remaining spouse has a demonstrated history of violence or domestic violence toward the abandoning spouse, the child's caretaker, or the child;
- The child is the product of rape or incest of the mother by the father of the child;
- The abandoning spouse has a reasonable apprehension of harm from the remaining spouse, or those acting on the remaining spouse's behalf, toward the abandoning spouse or the child; or
- The remaining spouse, or those acting on the remaining spouse's behalf, has abused or neglected the child.<sup>10</sup>

**§5-2.02 Where domestic abuse is present, income assignments are necessary.**

Having the child support paid through income assignment minimizes the contact between the parties and reduces the opportunity for violence. Tennessee law now requires income assignments for all child support obligations unless the Court finds that there is good cause not to require immediate income assignment, that the payor has made timely payment of previously ordered support, and that not ordering income assignment is in the best interest of the child.<sup>11</sup>

**§5-2.03 In a child support case, upon motion of either party, upon a showing of domestic violence or the threat of such violence, the Court may enter an order to withhold from public access the address, telephone number, and location of the alleged victims or victims or threatened victims of such circumstances.<sup>12</sup>**

**§5-3 Attorney's Fees**

**§5-3.01 The plaintiff may recover from the defendant reasonable attorney's fees incurred in regard to any enforcement action for alimony or child support or any action for custody or for modification of custody.<sup>13</sup>**

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<sup>9</sup> Id.

<sup>10</sup> Tenn. Code Ann. § 36-5-101(e)(1)(E) (2015).

<sup>11</sup> Tenn. Code Ann. § 36-5-501 (2015).

<sup>12</sup> Tenn. Code Ann. § 36-5-101(c)(2)(B)(iv) (2015).

<sup>13</sup> Tenn. Code Ann. § 36-6-103(c) (2015).



The Court has complete discretion under this statute to fix the amount of fees awarded. The ability to pay for legal expenses is not the controlling consideration with regard to awarding attorney's fees, but it is a factor to be considered.<sup>14</sup> There need not be proof developed at the trial that the prevailing party is unable to pay his or her attorney's fees.<sup>15</sup> The ultimate question for the trial court is whether it is just and equitable to award attorney's fees.<sup>16</sup> For example, in Sherrod v. Wix, the trial court found that the husband had precipitated the proceedings, that he obsessively pursued his former wife which prolonged the proceedings and added to the legal expenses, and that many of his allegations were found to be unwarranted. Fees were assessed without regard to whether the wife had the ability to pay them.

**§5-3.02 The Court may order the perpetrator to pay attorney's fees during the pendency of an action for child support.<sup>17</sup>**

Victims of domestic abuse may not have the funds to hire counsel or to litigate a protracted proceeding. The Court must be aware of the financial control often exercised by perpetrators. Victims of domestic abuse should not be denied access to the court system because the family finances are in the control of only one party to the marriage. The same statute that authorizes temporary support, authorizes the payment of "any sums necessary . . . to enable such spouse to prosecute or defend the suit." In making this type of order, the Court must consider the financial ability of each spouse to meet those needs and to prosecute or defend the suit.

**§5-3.03 The Court also has the ability to partially divide marital property pending a final hearing, which can allow a victim of domestic abuse to pay for her or his legal expenses.<sup>18</sup>**

The division of property may be prior to any determination of support. For example, if one spouse is receiving a pension payment, and the pension is marital property, the other spouse will be losing benefits the longer the divorce is litigated. If the Court divides the pension benefits prior to the final hearing, it may take away the reason to delay the final hearing, while at the same time providing some income to the other spouse to allow payment of legal expenses. Property may also be sold pending a final hearing with the permission of the Court and the proceeds divided.

**§5-4 Tort Cases**

**§5-4.01 A victim may sue the perpetrator for damages even if the parties were married at the time the cause of action arose.<sup>19</sup>**

<sup>14</sup> Sherrod v. Wix, 849 S.W.2d 780 (Tenn.App. 1992).

<sup>15</sup> Gaddy v. Gaddy, 861 S.W.2d 236 (Tenn.App. 1993).

<sup>16</sup> Sherrod v. Wix, 849 S.W.2d 780 (Tenn.App. 1992).

<sup>17</sup> Tenn. Code Ann. § 36-5-101(l)(1) (2015).

<sup>18</sup> Tenn. Code Ann. § 36-4-121(a)(1) (2015).

<sup>19</sup> Davis v. Davis, 657 S.W.2d 753 (Tenn. 1983); Luna v. Clayton, 655 S.W.2d 893 (Tenn. 1983).

A tort action may be filed in conjunction with or in response to a divorce.<sup>20</sup> A subsequent tort claim may be barred by res judicata if it could have been raised in the divorce but was not.<sup>21</sup> Children may also sue their parents for damages, unless the parent's conduct involved the exercise of parental authority, the performance of parental supervision, or the provision of parental care and custody.<sup>22</sup> The statute of limitations for actions for injuries to the person is one year.<sup>23</sup> If the victim is under a disability, such as minority or being of unsound mind, at the time of the injury, the statute of limitations is one year after the disability ends.<sup>24</sup>

#### **§5-4.02 Domestic abuse tort cases may involve several causes of action.**

Some of the causes of action which may arise in domestic abuse cases are:

- Assault;
- Battery;
- Intentional infliction of emotional distress;
- False imprisonment;
- Wrongful death;
- Second Degree Murder.<sup>25</sup>
- Destruction of Personal Property.

#### **§5-4.03 Punitive damages.**

A domestic abuse victim may successfully sue a perpetrator for punitive damages. The Tennessee Supreme Court in Hodges v. S. C. Toof & Co.,<sup>26</sup> set forth the requirements for an award of punitive damages. In Tennessee, a court may award punitive damages if it finds, based on clear and convincing evidence, that a defendant has acted intentionally, fraudulently, maliciously, or recklessly.

In a trial where punitive damages are sought, the Court, upon motion of defendant, shall bifurcate the trial. During the first phase, the factfinder shall determine liability for, and the amount of, compensatory damages and liability for punitive damages. During this phase, evidence of a defendant's financial affairs, financial condition, or net worth is not admissible. If the factfinder finds a defendant liable for punitive damages, the amount of such damages shall then be determined in an immediate, separate proceeding. During

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<sup>20</sup> Gravunder v. Gravunder, 1994 Tenn. App. LEXIS 447 (Tenn.App. 1994).

<sup>21</sup> Kemp v. Kemp, 723 S.W.2d 138 (Tenn.App. 1986).

<sup>22</sup> Broadwell by Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994),

<sup>23</sup> Tenn. Code Ann. § 28-3-104(a)(1) (2015).

<sup>24</sup> Tenn. Code Ann. § 28-1-106 (2015).

<sup>25</sup> Tenn. Code Ann. § 39-13-210 (b) (2015).

<sup>26</sup> 833 S.W.2d 896, 1992 Tenn. LEXIS 312 (1992).

this second phase, the fact-finder shall consider, to the extent relevant, at least the following:

- The defendant's financial affairs, financial condition, and net worth;
- The nature and reprehensibility of defendant's wrongdoing, for example
  - The impact of defendant's conduct on the plaintiff, or
  - The relationship of defendant to plaintiff;
- The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;
- The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;
- The expense plaintiff has borne in the attempt to recover the losses;
- Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
- Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;
- Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and
- Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

The primary purpose of a punitive award is to deter misconduct, while the purpose of compensatory damages is to make plaintiff whole. After a jury has made an award of punitive damages, the trial judge shall review the award, giving consideration to all matters on which the jury is required to be instructed. The judge shall clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed.

## References

Turetsky V. and S. Notar (1999). Models for Safe Child Support Enforcement. Washington, D.C.: Center for Law and Social Policy.

## Chapter 6 Criminal Domestic Abuse Cases

### **§6-1 General Provisions**

#### **§6-1.01 The legislature has identified specific objectives for the criminal code.<sup>1</sup>**

Those objectives are to:

- Proscribe and prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual, property, or public interest for which protection through the criminal law is appropriate;
- Give fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and the culpable mental state which together constitute an offense;
- Give fair warning of the consequences of violation, and guide the exercise of official discretion in punishment, by grading of offenses; and
- Prescribe penalties that are proportionate to the seriousness of the offense.

When confronting issues of domestic abuse in the criminal courts, these objectives mesh with the court objectives to stop further violence and send fair warning to the community that domestic abuse is prohibited by law and there are clear consequences for violation of the law.

#### **§6-1.02 Generally, any party to an offense may be charged with commission of the offense.**

Perpetrators often enlist the help of friends or family members in their campaigns against the victim. Any party to the offense is charged in the same manner as the principle actor.<sup>2</sup> If the criminal offense is committed by the conduct of another for which the person is criminally responsible, that person may be charged with the crime as well. A person may not be criminally responsible for the conduct of another, but still have criminal liability for facilitation of a felony. A person is guilty of the facilitation of a felony if, knowing that another intends to commit a specific felony, the person knowingly furnishes substantial assistance in the commission of the felony.<sup>3</sup>

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<sup>1</sup> Tenn. Code Ann. § 39-11-101 (2015).

<sup>2</sup> Tenn. Code Ann. § 39-11-401 (2015).

<sup>3</sup> Tenn. Code Ann. § 39-11-403 (2015).

## **§6-2 Criminal Offenses in Domestic Abuse Cases**

### **§6-2.01 Domestic Assault should be charged in a domestic abuse case.**

The misdemeanor assault charges are:

- Assault (a person commits assault who: (1) intentionally, knowingly or recklessly causes bodily injury to another; (2) intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive and provocative.);<sup>4</sup>
- Domestic Assault (the relationship for domestic assault is now consistent with the domestic abuse definition in T.C.A. § 36-3-601: (1) adults or minors who are current or former spouses; (2) adults or minors who live together or who have lived together; (3) adults or minors who are dating or who have dated or who have or had a sexual relationship but does not include fraternization between two individuals in a business or social context; (4) adults or minors related by blood or adoption; (5) adults or minors who are related or were formerly related by marriage; or (6) adults or minor children of a person in a relationship that is described in (1)-(5). This means domestic assault also applies to dating relationships and roommate situations.)<sup>5</sup>

The penalties for a first offense of domestic assault and assault under subsections T.C.A. § 39-13-101(a)(1) or (a)(2) are the same. However, after a second conviction of domestic assault, the judge must order a mandatory sentence and fine:

(1) A first conviction for domestic assault and a second or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101 (a)(2) and (a)(3) is punishable the same as assault under § 39-13-101, and additionally, as provided in subdivisions (c)(2) and (c)(3) and subsection (d) of this section.

(2) A second conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than three hundred fifty dollars (\$350) nor more than three thousand five hundred dollars (\$3,500), and by confinement in the county jail or workhouse for not less than thirty (30) days, nor more than eleven (11) months and twenty-nine (29) days.

(3) A third or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than one thousand one hundred dollars (\$1,100) nor more than five thousand dollars (\$5,000), and by confinement in the county jail or workhouse for not less than ninety (90) days, nor more than eleven (11) months and twenty-nine (29) days.

(4) For purposes of this section, a person who is convicted of a violation of § 39-

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<sup>4</sup> Tenn. Code Ann. § 39-13-101(2015).

<sup>5</sup> Tenn. Code Ann. § 39-13-111(2015).

13-111, committed in a manner prohibited by § 39-13-101(a)(1), shall not be subject to the enhanced penalties prescribed in this subsection (c), if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of 39-13-111, committed in a manner prohibited by § 39-13-101 (a)(1 ), that resulted in a conviction for such offense.

However, the domestic assault law provides that the sentencing judge has discretion to order the defendant to complete available counseling programs that address violence and control issues, including batterer's intervention programs certified by the domestic violence state coordinating council or any court-ordered drug or alcohol treatment program. Failure of the defendant to complete the program is considered a violation of the defendant's alternative sentencing program and the judge may revoke the defendant's participation in such program and order execution of the sentence.<sup>6</sup> The law specifically states that:

As part of a defendant's alternative sentencing for a violation of this section, The sentencing judge may direct the defendant to complete a drug or alcohol treatment program or available counseling programs that address violence and control issues including, but not limited to, a batterer's intervention program that has been certified by the domestic violence state coordinating council. Completion of a non-certified batterer's intervention program shall only be ordered if no certified program is available in the sentencing county. No batterer's intervention program, certified or non-certified, shall be deemed complete until the full term of the program is complete, and a judge may not require a defendant to attend less than the full term of a program as part of a plea agreement or otherwise. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's alternative sentence program and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence.

Additionally, a person convicted of domestic assault shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by T.C.A. § 36-3-625.<sup>7</sup> There is no crime called aggravated domestic assault. A person who commits aggravated assault against a person in a relationship described above would be charged with aggravated assault.<sup>8</sup>

The criminal offense of aggravated assault has the following elements:

- (a) A person commits aggravated assault who: (1) Intentionally or knowingly commits an assault as defined in T.C.A. § 39-13-101, and (A) causes serious

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<sup>6</sup> T.C.A. § 39-13-111(2015).

<sup>7</sup> T.C.A. § 39-13-111(c)(3)(2015).

<sup>8</sup> T.C.A. § 39-13-102(2015).

- bodily injury to another; (B) uses or displays a deadly weapon; or (C) attempts or intends to cause bodily injury to another by strangulation; or (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) causes serious bodily injury to another; or (B) uses or displays a deadly weapon. "Strangulation" means intentionally or knowingly impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person, regardless of whether that conduct results in any visible injury or whether the person has any intent to kill or protractedly injure the victim.
- (b) A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect the child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-402.
  - (c) A person commits aggravated assault who, after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against the individual or individuals.
  - (d) A person commits aggravated assault who, with intent to cause physical injury to any public employee or an employee of a transportation system, public or private, whose operation is authorized by title 7, chapter 56, causes physical injury to the employee while the public employee is performing a duty within the scope of the public employee's employment or while the transportation system employee is performing an assigned duty on, or directly related to, the operation of a transit vehicle.<sup>9</sup>

**§6-2.02 Perpetrators often commit sexual offenses against their victims.**

**§6-2.03 Perpetrators often stalk or harass their victims.**

As part of perpetrators' desire for power and control, victims may suffer from continual harassment (Bernstein, 1993). The harassment can be over the telephone or it can be in writing. Harassment is also a criminal offense and the victim does not need to wait until the perpetrator actually causes physical harm before seeking help.

Harassment occurs when a person intentionally:

- Threatens, by telephone or in writing, to take action known to be unlawful against any person, and by this action knowingly annoys or alarms the recipient;
- This includes text messaging, emails, and facsimile transmissions.

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<sup>9</sup> Tenn. Code Ann. § 39-13-102 (2015).



- Places one or more telephone calls anonymously, or at an inconvenient hour, or in an offensively repetitious manner, or without a legitimate purpose of communication, and by this action knowingly annoys or alarms the recipient; or
- Communicates by telephone to another that a relative or other person has been injured, killed or is ill when such communication is known to be false.
- Communicates by telephone, in writing, or by electronic communication, including, but not limited to, text messaging, facsimile transmissions, electronic mail or Internet services, without legitimate purpose with the malicious intent to frighten, intimidate or cause emotional distress; or in a manner the defendant knows, or reasonably should know, would frighten, intimidate or cause emotional distress to a similarly situated person of reasonable sensibilities; and as the result of the communication, the person is frightened, intimidated or emotionally distressed.<sup>10</sup>

This offense is a Class A misdemeanor.<sup>11</sup>

It is also harassment if a person convicted of a criminal offense, while incarcerated, on pre-trial diversion, probation, community correction or parole, intentionally communicates in person with the victim of such person's crime if the communication is:

If the victim of such person's offense died as the result of the offense, the offense shall apply to the deceased victim's next-of-kin. This type of harassment is a Class E felony.<sup>12</sup>

Stalking is another offense which arises when a victim has been placed in fear by the actions of another. The charge can occur prior to any physical harm (Note, 1993). Perpetrators who are unwilling to let go of their victims may become stalkers (Salame, 1993). At least 90% of battered women who are killed by their past or present lovers were known to have been stalked by them before being murdered (Zorza, 1995). Obsessiveness with the victim, a component of stalking behavior, is a major risk factor in domestic homicides (Campbell, 1995).

The General Assembly completely re-wrote the stalking statute in 2005 and added the crimes of aggravated stalking and especially aggravated stalking.<sup>13</sup> A person commits the offense of stalking who intentionally engages in a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.<sup>14</sup>

"Course of conduct" means a pattern of conduct composed of a series of two or more separate non-continuous acts evidencing a continuity of purpose. "Emotional distress"

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<sup>10</sup> Tenn. Code Ann. § 39-17-308 (a)(2015).

<sup>11</sup> Tenn. Code Ann. § 39-17-308(c)(2015).

<sup>12</sup> Tenn. Code Ann. § 39-17-308(c)(2015).

<sup>13</sup> Tenn. Code Ann. § 39-17-315 (2015).

<sup>14</sup> Tenn. Code Ann. § 39-17-315(b) (2015).

means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling. "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. "Unconsented contact" means any contact with another person that is initiated or continued without that person's consent, or in disregard of that person's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

- Following or appearing within the sight of that person;
- Approaching or confronting that person in a public place or on private property;
- Appearing at that person's workplace or residence;
- Entering onto or remaining on property owned, leased, or occupied by that person;
- Contacting that person by telephone;
- Sending mail or electronic communications to that person; or
- Placing an object on, or delivering an object to, property owned, leased, or occupied by that person.<sup>15</sup>

Stalking is a class A misdemeanor. Stalking becomes a Class E felony if the defendant, at the time of the offense, was required to or was registered with the Tennessee bureau of Investigaiton as a sexual offender, violent sexual offender or violent juvenile sexual offender, as defined in § 40-39-202 (2015).<sup>16</sup>

A person commits Aggravated Stalking who commits the offense of stalking and:

- In the course and furtherance of stalking, displays a deadly weapon;
- The victim of the offense was less than eighteen years of age at any time during the person's course of conduct, and the person is five or more years older than the victim;
- Has previously been convicted of stalking within seven years of the instant offense;
- Makes a credible threat to the victim, the victim's child, sibling, spouse, parent, or dependents, with the intent to place any such person in reasonable fear of death or bodily injury; or
- At the time of the offense, was prohibited from making contact with the victim under a restraining order or injunction for protection, an order of protection, or any other court-imposed prohibition of conduct toward the victim or the victim's

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<sup>15</sup> Tenn. Code Ann. § 39-17-315(a) (2015).

<sup>16</sup> Tenn. Code Ann. § 39-17-315(b) (2015).

property, and the person knowingly violates such injunction, order or court-imposed prohibition.<sup>17</sup>

Aggravated stalking is a Class E felony.

A person commits especially aggravated stalking who:

- Commits the offense of stalking or aggravated stalking, and has previously been convicted of stalking or aggravated stalking involving the same victim of the instant offense; or
- Commits the offense of aggravated stalking, and intentionally or recklessly causes serious bodily injury to the victim of such offense or to the victim's child, sibling, spouse, parent, or dependent.<sup>18</sup>

Especially aggravated stalking is a Class C felony.

In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated nonconsensual contact with the victim after having been requested by the victim to discontinue such conduct or a different form of nonconsensual contact, and to refrain from any further nonconsensual contact with the victim, is prima facie evidence that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.<sup>19</sup>

If a person is convicted of aggravated or especially aggravated stalking, or another felony offense arising out of a charge based on this section, the court may order an independent professional mental health assessment of such defendant's need for mental health treatment.<sup>20</sup> The court may waive the assessment, if an adequate assessment was conducted prior to the conviction.

If the assessment indicates that the defendant is in need of and amenable to mental health treatment, the court may include in the sentence a requirement that the offender undergo treatment, and that the drug intake of such defendant be monitored in the manner best suited to the particular situation. Such monitoring may include periodic determinations as to whether the defendant is ingesting any illegal controlled substances, as well as determinations as to whether the defendant is complying with any required or recommended course of treatment that includes the taking of medications. The court shall order the offender to pay the costs of assessment, unless the offender is indigent.

Any person who reasonably believes they are a victim of an offense under this section, regardless of whether the alleged perpetrator has been arrested, charged or convicted

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<sup>17</sup> Tenn. Code Ann. § 39-17-315(c) (2015).

<sup>18</sup> Tenn. Code Ann. § 39-17-315(d) (2015).

<sup>19</sup> Tenn. Code Ann. § 39-17-315(f) (2015).

<sup>20</sup> Tenn. Code Ann. § 39-17-315(g) (2015).

of a stalking-related offense, shall be entitled to seek and obtain an order of protection in the same manner, and under the same circumstances, as is provided for victims of domestic abuse.<sup>21</sup>

For purposes of determining if a course of conduct amounting to stalking is a single offense or multiple offenses, the occurrence of any of the following events breaks the continuous course of conduct, with respect to the same victim, that constitutes the offense:

- The defendant is arrested and charged with stalking, aggravated stalking or especially aggravated stalking;
- The defendant is found by a court of competent jurisdiction to have violated an order of protection issued to prohibit the defendant from engaging in the conduct of stalking; or
- The defendant is convicted of the offense of stalking, aggravated stalking or especially aggravated stalking.<sup>22</sup>

If a continuing course of conduct amounting to stalking engaged in by a defendant against the same victim is broken by any of the events set out in subdivision (k)(1), any such conduct that occurs after that event commences a new and separate offense.

#### **§6-2.04 Domestic abuse perpetrators may commit weapons violations.**

It is a Class A misdemeanor to intentionally, knowingly, recklessly or with criminal negligence sell firearms to persons who have been convicted of the offense of stalking or who are ineligible to receive them under 18 U.S.C. § 922 (the federal laws prohibiting sales of firearms to persons who are under Orders of Protection or who have been convicted of a misdemeanor crime of domestic violence).<sup>23</sup> Applicants for concealed carry permits must state under penalty of perjury that he or she:

- is not currently subject to any order of protection and, if so, the applicant shall provide a copy of such order;
- has not been convicted of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(33); and
- has not been convicted of the offense of stalking.<sup>24</sup>

A person convicted of domestic assault shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by T.C.A. § 36-3-625.<sup>25</sup> If a person convicted of this crime does not comply with the firearms surrender,

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<sup>21</sup> Tenn. Code Ann. § 39-17-315(h) (2015).

<sup>22</sup> Tenn. Code Ann. § 39-17-315(k) (2015).

<sup>23</sup> Tenn. Code Ann. §§ 39-17-1303(a)(3), (d); 39-17-1316(d)(2015).

<sup>24</sup> Tenn. Code Ann. § 39-17-1351(c)(2015).

<sup>25</sup> Tenn. Code Ann. § 39-13-111(c)(3)(2015).

the person commits a Class A misdemeanor under T.C.A. 36-3-625(h)(2) and T.C.A. § 39-17-1307.<sup>26</sup>

### **§6-3 Arrest for Domestic Abuse**

#### **§6-3.01 Arrest for violation of an Order of Protection.<sup>27</sup>**

An arrest for a violation of an Order of Protection may be with or without a warrant. Any law enforcement officer shall arrest the respondent without a warrant if:

- the officer has proper jurisdiction over the area in which the violation occurred;<sup>28</sup>
- the officer has reasonable cause to believe the respondent has violated or is in violation of an order of protection;
- the officer has verified whether an order of protection is in effect against the respondent. If necessary, the officer may verify the existence of an order by telephone or radio communication.

An Ex Parte Order of Protection can be enforced by warrantless arrest if the respondent has been served with the Order of Protection or otherwise has acquired knowledge thereof.<sup>29</sup>

#### **§6-3.02 Arrest for violation of out-of-state Order of Protection.<sup>30</sup>**

Any valid protection order issued by a court of another state, tribe, or territory shall be afforded full faith and credit by the courts of this state and enforced as if it were issued in this state. A petitioner may present a certified copy of a foreign order of protection to a court in the county in which the petitioner believes enforcement may be necessary. The clerk shall keep a copy of the order on file and forward a copy of such to the local law enforcement agency which shall enter the foreign order into the Tennessee Criminal Information System (TCIC).<sup>31</sup> Filing or entry of the foreign order in the TCIC system shall not be prerequisites for enforcement of the foreign protection order. Regardless of whether a foreign order of protection has been filed in this state, a law enforcement officer may rely upon a copy of any such protection order which has been provided to the officer by any source and may also rely upon the statement of any person protected by a foreign order that the order remains in effect. A law enforcement officer acting in good faith shall be immune from civil and criminal liability in any action in connection with a court's finding that the foreign order was for any reason not enforceable.

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<sup>26</sup> Tenn. Code Ann. § 39-17-1307(2015).

<sup>27</sup> Tenn. Code Ann. § 36-3-611 (2015).

<sup>28</sup> Officers can enforce orders issued by other counties if violated in their jurisdiction, Tenn. Code Ann. § 36-3-606(f) (2015).

<sup>29</sup> Tenn. Code Ann. § 36-3-611(b); Attorney General Opinion No. 06-085.

<sup>30</sup> Tenn. Code Ann. § 36-3-622 (2015).

<sup>31</sup> Tenn. Code Ann. § 36-3-622(e); See also, Tenn. Code Ann. § 36-3-609(e) (2015).

### **§6-3.03 Arrest for a crime involving domestic abuse.<sup>32</sup>**

If a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or a felony or was committed within or without the presence of the officer, the preferred response of the officer is arrest. The arrest may be without a warrant.<sup>33</sup> Preferred response is defined as requiring that law enforcement officers shall arrest a person committing domestic abuse unless there is a clear and compelling reason not to arrest.<sup>34</sup> A domestic abuse crime means any crime committed where the relationship between the victim and the perpetrator is:

- Adults or minors who are current or former spouses;
- Adults or minors who live together or who have lived together;
- Adults or minors who are dating or who have dated or who have or had a sexual relationship;
- Adults or minors related by blood or adoption;
- Adults or minors who are related or were formerly related by marriage; or
- Adult or minor children of a person in a relationship described above.<sup>35</sup>

Offenders should be charged with appropriate violations of the law, such as assault, domestic assault, or aggravated assault.

If an officer has probable cause to believe that two or more persons committed a misdemeanor or a felony, or if two or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response only with respect to the primary aggressor. Arrest is not the appropriate response for persons who were not the primary aggressor. If the officer believes that all parties are equally responsible, arrest is not the preferred response for any party, and the officer shall exercise his or her best judgment in determining whether to arrest all, any, or none of the parties.

In determining the primary aggressor, the officer shall consider:

- History of domestic abuse between the parties;
- Relative severity of injuries inflicted on each person;
- Evidence from the persons involved in the domestic abuse;
- The likelihood of future injury to each person;
- Whether one of the persons acted in self- defense; and
- Evidence from witnesses.

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<sup>32</sup> Tenn. Code Ann. § 36-3-619 (2015).

<sup>33</sup> Tenn. Code Ann. § 40-1-103 (a)(7) (2015).

<sup>34</sup> Tenn. Code Ann. § 36-3-601(7) (2015).

<sup>35</sup> Tenn. Code Ann. § 36-3-601(11) (2015).

An officer shall not threaten, suggest, or otherwise indicate the possible arrest of all parties to discourage future requests for intervention by police or base the decision of whether to arrest on:

- The consent or request of the victim; or
- The officer's perception of the willingness of the victim or a witness to testify or participate in a judicial proceeding.

When investigating an alleged domestic abuse incident, the officer shall make a complete report and file the report with his or her supervisor. If the officer decides not to make an arrest, or decides to arrest two or more parties, the officer must include the grounds for the decision in the report. If the officer seizes any weapons, an inventory shall be attached to the report. Every month, the officer's supervisor shall forward the compiled data on domestic abuse cases to the administrative director of the courts.

An officer who has probable cause to believe that a crime has been committed involving domestic abuse shall seize all weapons that are alleged to have been used or threatened to be used by the abuser in the commission of a crime.<sup>36</sup> An officer may seize a weapon that is in plain view or discovered pursuant to a consensual search, if necessary for the protection of the officer or other persons. An officer is not required to remove a weapon that the officer believes is needed by the victim for self defense.

When arrest is for assault, domestic assault, or aggravated assault, the arresting officer shall inform the victim that the person arrested may be eligible to post bond for the offense and be released until the date set for trial for the offense.<sup>37</sup>

A law enforcement officer may arrest without a warrant when the officer has probable cause to believe a person has committed the offense of stalking.<sup>38</sup> When a person is charged and arrested for the offense of stalking, aggravated stalking or especially aggravated stalking, the arresting law enforcement officer shall inform the victim that the person arrested may be eligible to post bail for the offense and to be released until the date of trial for the offense.<sup>39</sup>

#### **§6-3.04 Issuance of a criminal summons in lieu of arrest.**

If a law enforcement officer does not make an arrest or if law enforcement is not called, a victim may request a warrant from a magistrate.<sup>40</sup> The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county executives in such officers' respective counties, are magistrates for this purpose.<sup>41</sup> In addition, clerks of courts of general

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<sup>36</sup> Tenn. Code Ann. § 36-3-620(2015).

<sup>37</sup> Tenn. Code Ann. § 36-3-615(2015).

<sup>38</sup> Tenn. Code Ann. § 40-7-103(a)(9)(2015).

<sup>39</sup> Tenn. Code Ann. § 39-17-315(j)(2015).

<sup>40</sup> Tenn. Code Ann. § 40-6-203 (2015).

<sup>41</sup> Tenn. Code Ann. § 40-1-106 (2015).

sessions and their duly sworn deputies have jurisdiction and authority, concurrent with that of the judges thereof, to issue warrants for the arrest of persons.<sup>42</sup>

If a law enforcement officer does not make an arrest or if law enforcement is not called, a victim may request a warrant from a magistrate.<sup>43</sup> The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county executives in such officers' respective counties, are magistrates for this purpose.<sup>44</sup> In addition, clerks of courts of general sessions and their duly sworn deputies have jurisdiction and authority, concurrent with that of the judges thereof, to issue warrants for the arrest of persons.<sup>45</sup>

In determining whether to issue an arrest warrant pursuant or a criminal summons pursuant to § 40-6-215, the following shall apply: If a single or multiple affiants are seeking a warrant of arrest for a felony or misdemeanor offense, and at least one (1) or more of the affiants is a law enforcement officer, as defined by § 39-11-106, the magistrate shall issue an arrest warrant unless the law enforcement officer requests a summons be issued instead. If a single or multiple affiants are seeking a warrant of arrest for a misdemeanor offense, as defined in § 39-11-110, and none of the affiants is a law enforcement officer, as defined by § 39-11-106, there is a presumption that the magistrate shall issue a criminal summons. The presumption is overcome if: (A) The affiant or affiants request a warrant, submit sufficient information demonstrating the need for a warrant, and the magistrate agrees that an arrest warrant should be issued instead of a summons; or (B) The magistrate finds an arrest warrant is necessary to prevent immediate danger to a victim of domestic abuse, sexual assault or stalking as defined in § 36-3-601.<sup>46</sup>

In most instances of domestic abuse, the issuance of an arrest warrant rather than a criminal summons will be necessary, and magistrates should inquire into the circumstances and make findings accordingly. Judges and magistrates should also work with their local Domestic Abuse Coordinating Council to insure that law enforcement officials in their jurisdictions are making arrests or requesting warrants when appropriate in domestic abuse cases and that officials responsible for issuing arrest warrants or criminal summonses are properly educated on the law and on domestic violence (see *infra* § 2-2).

## **6-4 Pre-Trial Release**

**§6-4.01 In making a decision concerning the amount of bail required for the release of a defendant who is arrested for the offense of child abuse, child neglect, or child endangerment, as defined in § 39-15-401, the offense of aggravated child abuse, aggravated child neglect, or**

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<sup>42</sup> Tenn. Code Ann. § 40-6-214 (2015).

<sup>43</sup> Tenn. Code Ann. § 40-6-203 (2015).

<sup>44</sup> Tenn. Code Ann. § 40-1-106 (2015).

<sup>45</sup> Tenn. Code Ann. § 40-6-214 (2015).

<sup>46</sup> T.C.A. § 40-6-205(b)(3) (2015).



**aggravated child endangerment, as defined in § 39-15-402, the offense of stalking, aggravated stalking or especially aggravated stalking, as defined in § 39-17-315, any criminal offense defined in title 39, chapter 13, in which the alleged victim of the offense is a victim as defined in § 36-3-601(5), (10) or (11), or is in violation of an order of protection as authorized by title 36, chapter 3, part 6, the magistrate shall review the facts of the arrest and make certain findings.**

The Court must determine whether the defendant:

- Is a threat to the alleged victim or other family or household member;
- Is a threat to public safety; and
- Is reasonably likely to appear in court.<sup>47</sup>

Before releasing the defendant, the Court shall make findings on the record if possible concerning its determination with respect to the three factors listed above.

**§6-4.02 The Court must impose conditions on the pre-trial release of a defendant who is arrested for the offense of child abuse, child neglect, or child endangerment, as defined in § 39-15-401, the offense of aggravated child abuse, aggravated child neglect, or aggravated child endangerment, as defined in § 39-15-402, the offense of stalking, aggravated stalking or especially aggravated stalking, as defined in § 39-17-315, any criminal offense defined in title 39, chapter 13, in which the alleged victim of the offense is a victim as defined in § 36-3-601(5), (10) or (11), or is in violation of an order of protection as authorized by title 36, chapter 3, part 6, the magistrate shall review the facts of the arrest and make certain findings and impose one or more conditions of release or bail on the defendant to protect the alleged victim of any such offense and to ensure the appearance in court.<sup>48</sup>**

The Court must impose one or more of the following conditions on pre-trial release:

- An order enjoining the defendant from threatening to commit or committing specified offenses against the alleged victim;
- An order prohibiting the defendant from harassing, annoying, telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly;
- An order directing the defendant to vacate or stay away from the home of the alleged victim and to stay away from any other location where the victim is likely to be;
- An order prohibiting the defendant from using or possessing a firearm or other weapon specified by the magistrate;

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<sup>47</sup> Tenn. Code Ann. § 40-11-150(a) (2015). See also Tenn. Code Ann. § 40-11-118 (2015).

<sup>48</sup> Tenn. Code Ann. § 40-11-150(b) (2015).

- An order prohibiting the defendant from possession or consumption of alcohol or controlled substances; a
- An order requiring the defendant to carry or wear a global positioning monitoring system device and, if able, pay the costs associated with operating that device and electronic receptor device provided to the victim, pursuant to T.C.A. § 40-11-152.
- Any other order required to protect the safety of the alleged victim and to ensure the appearance of the defendant in court.<sup>49</sup>

Before a judge or magistrate imposes the condition of the global positioning monitoring system device, the magistrate or judge must consider the likelihood that the defendant's participating will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threatened the victim before trial. The magistrate or judge must also provide the victim with the following notifications:

1. The victim's right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the magistrate terminate the victim's participation.
2. The manner in which the global positioning monitoring system technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements.
3. Any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations.
4. Any sanctions that the magistrate may impose on the defendant for violating a condition of bond imposed related to the global positioning monitoring system.
5. The procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails.
6. Community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of domestic violence.
7. The fact that the victim's communications with the magistrate concerning the global positioning monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.

In addition to the information described above, the magistrate or judge shall provide the victim who participates in a global positioning monitoring system with the name and phone number of an appropriate person employed by a local law enforcement agency who the victim may call to request immediate assistance if the defendant violates a condition of bond related to the global positioning monitoring system.

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<sup>49</sup> T.C.A. § 40-11-150(b)(2015).

When conditions of release are imposed, the Court must:

- Issue a written order for conditional release;
- Immediately distribute a copy of the order of release to the law enforcement agency having custody of the defendant; and
- Provide such law enforcement agency with any available information concerning the location of the victim in a manner that protects the safety of the victim.<sup>50</sup>

The conditions of release shall be indicated on a form prepared by the administrative office of the courts, in consultation with the Tennessee task force against domestic violence and distributed to judges and magistrates by the administrative office of the courts. The law enforcement agency having custody of the defendant shall provide a copy of the conditions to the defendant upon his or her release. Failure to provide the defendant with a copy of the conditions of release does not invalidate the conditions if the defendant has notice of such conditions.<sup>51</sup>

If conditions of release are imposed without a hearing, the defendant may request a prompt hearing before the Court having jurisdiction of the offense for which the defendant was arrested or is charged to review the conditions. Upon such a request, the Court shall hold a prompt hearing to review the conditions.<sup>52</sup>

A person who violates a condition of release imposed pursuant to this section shall be subject to immediate arrest with or without a warrant. Such a violation shall be punished as contempt of the Court imposing the conditions and the bail of such violator may be revoked.<sup>53</sup> A violation can also amount to a misdemeanor charge as a Violation of a Protective Order if the statutory requirements are met.<sup>54</sup>

If a defendant upon whom conditions of release have been imposed is for any reason discharged or released from such conditions, the discharging or releasing Court shall notify all law enforcement agencies within its jurisdiction that such defendant is no longer subject to the conditions originally imposed.<sup>55</sup> The Administrative Office of the Courts, in consultation with the Domestic Violence State Coordinating Council, shall prepare a Discharge from Conditions of Release notification form and distribute such form to all courts with the authority to discharge or release a defendant from conditions of release.<sup>56</sup>

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<sup>50</sup> Tenn. Code Ann. § 40-11-150(c)(2015).

<sup>51</sup> Tenn. Code Ann. § 40-11-150(d) (2015).

<sup>52</sup> Tenn. Code Ann. § 40-11-150(e) (2015).

<sup>53</sup> Tenn. Code Ann. § 40-11-150(i) (2015).

<sup>54</sup> Tenn. Code Ann. § 40-11-150(i)(I); Tenn. Code Ann. §40-11-150 (k)(3)(A)(2015).

<sup>55</sup> Tenn. Code Ann. § 40-11-150(j)(1)(2015).

<sup>56</sup> Tenn. Code Ann. § 40-11-150(j)(2)(2015).

**§6-4.03** Any offender arrested for any crimes against the person, in which the alleged victim is a victim as defined in the Order of Protection statute, or for the offense of stalking, aggravated stalking or especially aggravated stalking shall not be released within twelve hours of such arrest if the magistrate or other official duly authorized to release such offender finds that such offender is a threat to the alleged victim.<sup>57</sup>

Any offender arrested for the offense of stalking, aggravated stalking, or especially aggravated stalking, as defined in § 39-17-315, or any criminal offense defined in title 39, chapter 13, in which the alleged victim is a victim as defined in § 36-3-601, shall not be released within twelve (12) hours of the time of arrest. The magistrate or other official duly authorized to release the offender may, however, release the offender in less than twelve (12) hours if the official finds that the offender is not a threat to the alleged victim.

The findings shall be reduced to writing. The written findings must be attached to the warrant and shall be preserved as a permanent part of the record. The arresting officer shall make official note of the time of the arrest in order to establish the beginning of the twelve-hour period required by this subsection.

If the offender is released prior to the conclusion of the twelve-hour period, the official shall make all reasonable efforts to directly contact the victim and inform the victim that the person charged with the offense will be released prior to the conclusion of the twelve-hour period mandated in subdivision.<sup>58</sup>

**§6-4.04 The victim is entitled to notification of the defendant's release.**

When a defendant who is arrested for a domestic abuse offense or a violation of an Order of Protection is released from custody, the law enforcement agency having custody of the defendant shall:

- Use all reasonable means to immediately notify the victim of the alleged offense of the release; and
- Furnish the victim of the alleged offense at no cost a certified copy of any conditions of release.<sup>59</sup>

Release of a domestic abuse defendant shall not be delayed because of the victim notification requirements.<sup>60</sup>

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<sup>57</sup> Tenn. Code Ann. § 40-11-150(h) (2015).

<sup>58</sup> T.C.A. § 40-11-150(h)(1)(2015); see Attorney General Opinion No. 97-069 (1997) (holding mandatory hold provision constitutional).

<sup>59</sup> Tenn. Code Ann. § 40-11-150(f)(2015).

<sup>60</sup> Tenn. Code Ann. § 40-11-150(g)(2015). See Tenn. Code Ann. § 36-3-615(2015).

#### **§6-4.05 Use of citations in lieu of continued custody of an arrested person.**

No citation shall be issued under the provisions of this section if there is a reasonable likelihood that the offense would continue or resume, or that persons or property would be endangered by the arrested person.<sup>61</sup> For this reason citations should not be used in domestic abuse cases.

#### **§6-5 Trial Considerations in Criminal Domestic Abuse Cases**

##### **§6-5.01 Expedited processing of evidence in stalking cases.<sup>62</sup>**

If a law enforcement officer or district attorney general believes that the life of a possible victim of stalking is in immediate danger, unless and until sufficient evidence can be processed linking a particular person to the offense, the district attorney general may petition the judge of a court of record having criminal jurisdiction in that district to enter an order expediting the processing of any evidence in a particular stalking case. If, after hearing the petition, the court is of the opinion that the life of the victim may be in immediate danger if the alleged perpetrator is not apprehended, the court may enter such an order, directed to the Tennessee bureau of investigation, or any other agency or laboratory that may be in the process of analyzing evidence for that particular investigation.

##### **§6-5.02 Defenses when a victim of domestic abuse is charged with a crime.**

A victim of domestic abuse may commit a criminal act under duress.<sup>63</sup> Duress is a defense to prosecution where the person or a third person is threatened with harm which is present, imminent, impending, and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. The threatened harm must be continuous throughout the time the act is being committed, and must be one from which the person cannot withdraw in safety. Further, the desirability and urgency of avoiding the harm must clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct.

This defense is unavailable to a person who intentionally, knowingly, or recklessly becomes involved in a situation in which it was probable that the person would be subjected to compulsion. Duress is not an affirmative defense. If admissible evidence fairly raises the defense of duress, the trial court must submit the defense to the jury and the prosecution must prove beyond a reasonable doubt that the defense does not apply.<sup>64</sup>

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<sup>61</sup> Tenn. Code Ann. § 40-7-118(c)(2)(2015).

<sup>62</sup> Tenn. Code Ann. § 39-17-315(j)(2015).

<sup>63</sup> Tenn. Code Ann. § 39-11-504 (2015).

<sup>64</sup> State v. Culp, 900 S.W.2d 707, 1994 Tenn. Crim. App. LEXIS 858 (Tenn. Crim. App. 1994).

A victim of domestic abuse may use force in self-defense.<sup>65</sup> Most women (67% in one study) who are arrested for using violence against their partners do not appear to be domestic abuse perpetrators. Rather, in many instances, they are victims who are fighting to defend themselves from an assault by their partners (Hamberger, 1997).

When trying criminal cases involving domestic abuse, self-defense can be asserted by a defendant to show that the purported victim was using force and that the defendant reacted in self-defense. A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

Any person using force intended or likely to cause death or serious bodily injury within the person's own residence is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to self, family or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

Often, when domestic abuse victims act to protect themselves and are charged with the commission of a crime, the defendant/victim will attempt to raise the defense of self-defense through expert testimony that the domestic abuse victim acted under a belief that the use of force was *immediately* necessary to protect against an *imminent* danger of death or serious bodily injury and that this belief was reasonable under the circumstances. This defense is often referred to as the battered woman syndrome defense, although in fact it is not a separate defense at all, nor is the defense, when properly argued and applied, based on diminished capacity. Rather, it is an attempt to give the jury sufficient information to determine whether a reasonable person in the same circumstances would have believed that the use of force was necessary.

A victim of domestic abuse may act in defense of a third person.<sup>66</sup> Sometimes a defendant may assert this defense in cases involving domestic abuse, particularly when a victim of domestic abuse acts to protect a child from the perpetrator. Often this defense is used by a child or other family member of the victim of domestic abuse who takes action to protect the victim.

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<sup>65</sup> Tenn. Code Ann. § 39-11-611 (2015).

<sup>66</sup> Tenn. Code Ann. § 39-11-612 (2015).

### **§6-5.03 Double jeopardy.**

Violence that results in criminal charges may have been the subject of a prior contempt hearing as a violation of an Order of Protection. For example, any assault done in contempt of an Order of Protection is an aggravated assault. Similarly, breaking into a petitioner's home to commit an assault is burglary. If the contempt hearing addresses the elements of these crimes as elements of the contempt, jeopardy attaches and the criminal prosecution may be barred. Further, violation of some Orders of Protection may now be punishable as contempt and as a misdemeanor violation of an Order of Protection.<sup>67</sup>

The Tennessee Supreme Court has held that "neither the Double Jeopardy Clause of the United States Constitution nor that of the Tennessee Constitution bar separate proceedings and punishments for contempt of an Order of Protection and the substantive offense underlying the contempt."<sup>68</sup> Courts must look at the evidence required to prove the charges. If the same evidence is not required to prove each offense, "then the fact that both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes."<sup>69</sup>

### **§6-5.04 Jury selection issues.**

The purposes of voir dire (the questioning of prospective jurors) are to determine any possible basis for challenging jurors for cause and to develop background information to be considered in the intelligent exercise of peremptory challenges. The extent of a lawyer's inquiry is within the discretion of the trial judge.<sup>70</sup>

Voir dire questioning should include questions to identify jurors who have themselves been victims or perpetrators of domestic abuse or who have views about domestic abuse which may cause them to be biased. Potential jurors may hold traditional attitudes regarding domestic abuse that render them unable to hear cases fairly and impartially. They may see criminal justice intervention as an invasion of the family's privacy, interference in the spousal relationship, and/or as violating the male's historical sense of entitlement to control the household and its members. Voir dire examination in domestic abuse cases should identify these individuals whose beliefs may cause them to have difficulty weighing evidence and determining witness credibility impartially in these cases.

A battered woman defendant is entitled to question jurors regarding their exposure, both through personal experience and the media, to domestic abuse and to question them about the impact of this exposure on their ability to impartially determine the defendant's

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<sup>67</sup> Tenn. Code Ann. § 39-13-113(2015).

<sup>68</sup> State v. Winningham, 958 S.W.2d 740; 1997 Tenn. LEXIS 632 (Tenn. 1997) [citing State v. Denton, 938 S.W.2d 373, 1996 Tenn. LEXIS 783 (Tenn. 1996)].

<sup>69</sup> Denton, *supra* note 64.

<sup>70</sup> Wallis v. State, 546 S.W.2d 244, 1976 Tenn. Crim. App. LEXIS 309 (Tenn. Crim. App. 1976).

guilt or innocence.<sup>71</sup> A prospective juror who is a complainant against any other person indicted for a similar offense may be removed for cause.<sup>72</sup> In one case the Court of Criminal Appeals held that the continued use of the phrase "domestic violence" during voir dire may have been improper, but did not prejudice the jury against the defendant.<sup>73</sup>

**§6-5.05 If the victim is reluctant to testify, the reasons underlying the reluctance should be assessed in order to determine the best course of action.**

Victim advocates can give accurate information regarding the court process and can assist the victim in setting up a safety plan. This assistance will often remedy reluctance which stems from fear of the defendant, belief that there is no alternative but to return home, or inaccurate information regarding possible outcomes of the criminal court process. The surest way to reduce victims' reluctance and requests for charges to be dropped is a coordinated community response that insures that domestic abuse is taken seriously and there are consequences to the perpetrator and safety for victims.

If the victim is still unwilling to testify, previous statements or testimony may be admissible if qualified as exceptions to the hearsay rule. The prosecution may be able to prove its case without the testimony of the victim. In domestic abuse cases, requiring law enforcement to bring a victim/witness before the Court or incarceration of a domestic abuse victim to compel testimony serves only to re-victimize the victim.

**§6-5.06 The decision whether to allow children's testimony in domestic abuse cases raises several issues.**

On the one hand, children are often present during the violence so their testimony may have great probative value. On the other, children may suffer serious emotional trauma from testifying. They may be under great pressure from one or both parents to testify or not to testify. They may fear physical retribution by the violent parent if they testify, as well as fear abandonment from the parent who is the victim if they do not testify. They may feel a sense of loyalty to both parents and not want to be forced to take sides.

The decision to allow children's testimony in these cases should be made with great care and only after the Court has conducted an assessment of the danger to the child if he or she testifies. The Court should insure that appropriate protections are provided for children who testify and that services are available to help them cope with the potential emotional trauma.

In general, all persons are presumed to be competent to testify.<sup>74</sup> When examining a child's competency to testify, a judge should determine whether the child understands

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<sup>71</sup> State v. Furlough, 797 S.W.2d 631, 1990 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 1990).

<sup>72</sup> Tenn. Code Ann. § 22-3-103 (2015).

<sup>73</sup> State v. Bell, 1999 Tenn. Crim. App. LEXIS 626 (Tenn. Crim. App. 1999).

<sup>74</sup> Tenn. R. Evid. 601(2015).



the nature and meaning of an oath, has the intelligence to understand the subject matter, and is capable of relating the facts accurately.<sup>75</sup>

Eyewitness studies indicate that child witnesses as young as five years are as reliable as adults (Fote, 1985). Generally, while children tend to recall less than adults do, what they do recall is usually quite accurate. Children's errors tend to be those of omission rather than commission (Goodman and Rosenberg, 1986).

#### **§6-5.07 Expert testimony on the experience of battered women offered by the prosecution.**

Prosecutors may sometimes offer testimony concerning the experience of battered women for the purpose of establishing one of the following:

- the specific effects of abuse on battered women;
- whether or not a particular victim suffers from the collection of specific effects of abuse on battered women collectively known as the battered woman syndrome.

It is important for the Court to understand the context in which the violence has occurred. The Court should examine the perpetrator's patterns of violence and control of the victim, the perpetrator's belief systems that support the violence, the impact of the violence and abuse on the victim, how the victim has attempted to protect herself and the children in the past, the reasons the victim stayed in the relationship or returned to it, and the reasonableness of the victim's belief or apprehension that the perpetrator was going to inflict serious bodily injury or death. It is important that the Court (and the jury if applicable) view the victim's behavior within the context of the impact of the violence on the victim. The U.S. Attorney General's Task Force on Family Violence recommends that the courts permit expert testimony on battered woman syndrome in order to provide the judge and jury with a clear understanding of the dynamics and complexities of domestic abuse (*Attorney General's Task Force on Family Violence: Final Report*, 1984).<sup>76</sup>

A victim may in fact have been battered but not have the collection of characteristics known as battered woman syndrome. Similarly, the fact that a victim may not evidence all of the characteristics of the battered woman syndrome does not either diminish the victim's experience of being battered or prove that the victim was not battered.

Opinion testimony is admissible from a qualified expert "on a subject on which the trial court and the jury need the help of expert opinion; and on which the expert is particularly qualified to speak because it is peculiarly a matter of superior knowledge on

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<sup>75</sup> *State v. Ballard*, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

<sup>76</sup> For further discussion, see Douglas, 1987. See also 58 A.L.R.5th 749, Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense.

his part."<sup>77</sup> A person does not have to have advanced certification in a field to be an expert.<sup>78</sup> What is required is specialized knowledge,<sup>79</sup> skill,<sup>80</sup> or experience.<sup>81</sup>

The Washington Supreme Court held that expert testimony regarding the battered woman syndrome was admissible to explain to a jury the behavior and mental state of a victim of repeated beatings and sexual assaults.<sup>82</sup> This case was the first time a court admitted such evidence when the battered woman was the victim/witness rather than the defendant. The Court held that the evidence was admissible to explain why the victim did not leave the relationship or call the police immediately and at times engaged in consensual sex with the defendant. The expert was not allowed to testify that the complaining witness was a rape victim. While the expert did testify that the victim suffered from post traumatic stress disorder, no testimony was allowed as to the cause of the stress. It was left to the jury to decide whether the cause of the stress was the alleged rape, other aspects of the relationship, or another event in the victim's life. More recently, the Appellate Division of the Superior Court of New Jersey upheld the use of expert testimony on battered woman syndrome.<sup>83</sup> There are no Tennessee cases which directly address this issue.<sup>84</sup>

#### **§6-5.08 Expert testimony on the experience of battered women offered by the defense on behalf of a battered woman defendant.**

Women are unlikely to commit homicide except in self-defense (Ganley, 1992). Research on battered women who kill has found no distinguishing characteristics between battered women who kill and those who do not. The only differences found in comparing these two groups of battered women were found in the perpetrators (the men who were killed had been more violent against the victim as well as the children, etc. than those who were not killed) (Browne, 1989). Effective intervention in domestic abuse cases may stop the violence before it becomes a homicide case. (For a more

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<sup>77</sup> Murray v. State, 214 Tenn. 51, 377 S.W.2d 918, 1964 Tenn. LEXIS 447, 1964 Tenn. LEXIS 448 (1964).

<sup>78</sup> See Sotka v. State, 503 S.W.2d 212, 1972 Tenn. Crim. App. LEXIS 277 (Tenn. Crim. App. 1972) (doctor not board-certified).

<sup>79</sup> State v. Fears, 659 S.W.2d 370, 1983 Tenn. Crim. App. LEXIS 413, 1983 Tenn. Crim. App. LEXIS 414 (Tenn. Crim. App. 1983), cert. denied, Fears v. Tennessee, 465 U.S. 1082, 79 L. Ed. 2d 768, 104 S. Ct. 1450, 1984 U.S. LEXIS 1371, 52 U.S.L.W. 3651 (1984) (fourth year medical student); State v. Taylor, 645 S.W.2d 759, 1982 Tenn. Crim. App. LEXIS 408 (Tenn. Crim. App. 1982).

<sup>80</sup> See Fed. R. Evid. 702, Advisory Comments, ("skilled" witnesses include bankers or landowners testifying as to land value).

<sup>81</sup> Hall v. State, 65 Tenn. 522, 6 Baxt. 522, 1873 Tenn. LEXIS 399 (1873) (professional gambler); State v. Anderson, 644 S.W.2d 423, 1982 Tenn. Crim. App. LEXIS 400 (Tenn. Crim. App. 1982) (the "testimony of the chief of police shows he was sufficiently competent to testify the material was marijuana"); State v. Wiseman, 643 S.W.2d 354, 1982 Tenn. Crim. App. LEXIS 468 (Tenn. Crim. App. 1982) (sixteen years in dealing with explosives).

<sup>82</sup> State v. Ciskie 110 Wn.2d 263; 751 P.2d 1165; 1988 Wash. LEXIS 26 (1988).

<sup>83</sup> State v. Frost, 242 N.J. Super. 601, 577 A.2d 1282, 1990 N.J. Super. LEXIS 308 (N.J. Super. Ct. 1990).

<sup>84</sup> But see State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993); State v. Schimpf, 782 S.W. 2d 186 (Tenn. Crim. App. 1989).

complete discussion on the legal issues involved in cases where an alleged battered woman kills her alleged batterer, see Gillespie, 1989.)

A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.<sup>85</sup> The presumption that a person using force intended or likely to cause serious bodily injury within their own residence has a reasonable fear of imminent peril of death or serious bodily injury does not apply when the force is directed toward a member of the household.<sup>86</sup>

Testimony of an expert in domestic abuse on whether the defendant had a reasonable fear of imminent danger and thus acted in self-defense should be admitted, even though the testimony embraces the ultimate issue of fact.<sup>87</sup> In capital cases involving indigent defendants, the Court may determine that investigative or expert services or other similar services are necessary to insure that the constitutional rights of the defendant are properly protected.<sup>88</sup>

The defendant may testify to her knowledge of recent acts of violence by the victim against others.<sup>89</sup> This testimony relates to any apprehension on the part of the defendant immediately prior to and during any assault. The evidence cannot be adduced from witnesses other than the defendant, as proof in chief, but may be introduced in rebuttal if the "state presents evidence to disprove defendant had received such information."<sup>90</sup>

With respect to evidence that the deceased was the primary aggressor, the Tennessee Supreme Court held as follows:

*But in all cases where the acts of the deceased in reference to the fatal meeting are of a doubtful character, then evidence which may tend to show that he sought the meeting or began or provoked the combat is admissible. And in this view, previous threats made by the deceased, though not communicated . . . may yet tend to show the animus of the deceased, and to illustrate his conduct*

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<sup>85</sup> Tenn. Code Ann. § 39-11-611(a) (2015).

<sup>86</sup> Tenn. Code Ann. § 39-11-611(b) (2015).

<sup>87</sup> State v. Furlough, 797 S.W.2d 631, 1990 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 1990). But see State v. Leaphorn, 673 S.W.2d 870, 1983 Tenn. Crim. App. LEXIS 378 (Tenn. Crim. App. 1983) (unless evidence that defendant was in imminent danger of death or bodily harm is introduced, court is not required to charge the jury on self-defense).

<sup>88</sup> Tenn. Code Ann. § 40-14-207(b) (2015).

<sup>89</sup> Williams v. State, 565 S.W.2d 503; 1978 Tenn. LEXIS 548 (Tenn. 1978).

<sup>90</sup> Id. at S.W.2d 505. See also State v. Aucoin, 756 S.W.2d 705, 1988 Tenn. Crim. App. LEXIS 330 (Tenn. Crim. App. 1988).

*and motives, and in some cases might be important, in the absence of more direct evidence, to show which party began or provoked the fight.*<sup>91</sup>

#### **§6-5.09 Expert testimony on domestic abuse perpetrators.**

A New Hampshire court upheld the admission of expert testimony on a domestic abuse perpetrator.<sup>92</sup> In that case, the defendant was convicted of the attempted first degree murder of his wife. He had pled not guilty by reason of insanity, waiving his right to a separate trial on the insanity issue. The defense called two psychiatrists to testify that the defendant was, in their opinion, legally insane at the time of the trial. The victim and the couple's daughter testified to many incidents of beatings by the defendant. The prosecution called an expert in domestic abuse who testified that current research does not indicate that mental illness is an important cause of domestic abuse and, in his opinion, a marriage such as the defendant's would probably fall within the contours of the battered wife syndrome. On cross-examination, one of the defense psychiatrists agreed. The appellate court upheld the use of expert testimony to rebut the defendant's evidence on the issue of insanity by providing an alternative explanation for the assault. There are no Tennessee cases which address this issue.

#### **§6-5.10 In a criminal case, the State may not introduce, as part of its case in chief evidence of the defendant's bad character.**<sup>93</sup>

Character evidence is generally inadmissible to show conformity with a certain trait on a particular occasion. An accused, however, may affirmatively choose to place his or her character in issue. Only after the defendant has done so may the state present its own character evidence in rebuttal.<sup>94</sup> The defendant may present evidence of his good character as tending to show that he would not commit a crime. In addition, if testifying as a witness, he may show good character and reputation in support of the proposition that his testimony is entitled to be credited by the jury.<sup>95</sup>

When character evidence is introduced by the defense, the prosecution may rebut this proof by calling witnesses who will testify that the reputation of the defendant for the particular trait at issue is bad.<sup>96</sup> The prosecutor may also cross-examine the defense character witnesses so as to test their knowledge of the defendant by asking whether the witness has heard or knows of various unsavory things about the defendant that are

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<sup>91</sup> Little v. State, 65 Tenn. 491; 1873 Tenn. LEXIS 390; 6 Baxt. 491, at Tenn. 493 (1873). See State v. Barnes, 675 S.W.2d 195; 1984 Tenn. Crim. App. LEXIS 2741 (Tenn. Crim. App. 1984) (whether defendant knew of reputation is irrelevant); State v. Butler, 626 S.W.2d 6, 1981 Tenn. LEXIS 519 (Tenn. 1981) (defendant is "entitled to show the state of mind of the deceased so the jury could determine who was the true aggressor.").

<sup>92</sup> State v. Baker, 120 N.H. 773; 424 A.2d 171; 1980 N.H. LEXIS 401 (1980).

<sup>93</sup> Tenn. R. Evid. 404(2015).

<sup>94</sup> State v. West, 844 S.W.2d 144, 1992 Tenn. LEXIS 657 (Tenn. 1992)

<sup>95</sup> McKinney v. State, 552 S.W.2d 787, 1977 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 1977).

<sup>96</sup> Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213, 1948 U.S. LEXIS 2792 (1948).

relevant to the trait of his or her character that is in question.<sup>97</sup> This rule is subject to the restriction that the question may be asked only if there is a good faith basis to support the question.<sup>98</sup>

**§6-5.11. Evidence of the defendant's prior violent actions or threats against the victim is admissible to show intent or state of mind of the accused.<sup>99</sup>**

The trial judge must weigh the probative value of the evidence against possible unfair prejudice to the defendant.<sup>100</sup> If the defendant testifies, he, as any other witness, may be cross-examined about prior bad acts if the trial court finds that the evidence would be probative of truthfulness and that the probative value outweighs any possible unfair prejudice to the defendant.<sup>101</sup>

**§6-5.12. The State cannot support the character trait of its witnesses or the victim until it is at issue through some action of the defendant.<sup>102</sup>**

The defendant may introduce proof through witnesses to establish that the victim or other state's witness has a bad reputation for truth and veracity.<sup>103</sup> When this occurs, the State may then call witnesses to support the character of the victim.<sup>104</sup> The State is clearly permitted to present evidence of the victim's good character to rebut defendant's suggestion that he or she acted in self-defense.<sup>105</sup>

**§6-5.13 Admissibility of hearsay in domestic abuse cases.**

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>106</sup> A statement is "(1) an oral or written assertion or (2) nonverbal conduct of

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<sup>97</sup> Crawford v. State, 197 Tenn. 411; 273 S.W.2d 689; 1954 Tenn. LEXIS 502 (1954); State v. Ray, 880 S.W.2d 700, 1993 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. 1993).

<sup>98</sup> State v. Sims, 746 S.W.2d 191, 1988 Tenn. LEXIS 61 (Tenn. 1988).

<sup>99</sup> Hull v. State, 553 S.W.2d 90; 1977 Tenn. Crim. App. LEXIS 278 (Tenn. Crim. App. 1977); Ingram v. State, 1 Tenn. Crim. App. 383, 443 S.W.2d 528, 1969 Tenn. Crim. App. LEXIS 328 (Tenn. Crim. App. 1969).

<sup>100</sup> State v. Smith, 868 S.W.2d 561, 1993 Tenn. LEXIS 410 (Tenn. 1993), (cert. denied, Smith v. Tennessee, 513 U.S. 960, 130 L. Ed. 2d 333, 115 S. Ct. 417, 1994 U.S. LEXIS 7536, 63 U.S.L.W. 3346 (1994) (violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim). See Tenn. R. Evid. 608(b).

<sup>101</sup> Morgan v. State, 541 S.W.2d 385, 1976 Tenn. LEXIS 544 (Tenn. 1976).

<sup>102</sup> State v. Lee, 631 S.W.2d 453, 1982 Tenn. Crim. App. LEXIS 415 (Tenn. Crim. App. 1982) (reputation of victim admissible when defendant raised issue of self-defense even where defendant did not first raise claims of prior bad acts).

<sup>103</sup> Tenn. R. Evid. 404(a)(2)(2015).

<sup>104</sup> Id.; Howard v. State, 506 S.W.2d 951; 1973 Tenn. Crim. App. LEXIS 243 (Tenn. Crim. App. 1973).

<sup>105</sup> Tenn. R. Evid. 404(a)(2).; State v. West, 844 S.W.2d 144, 1992 Tenn. LEXIS 657 (Tenn. 1992).

<sup>106</sup> Tenn. R. of Evid. 801(c) (2015).

a person if it is intended as an assertion.<sup>107</sup> The State must establish that the statement bears sufficient "indicia of reliability" in order not to violate the defendant's Sixth Amendment right of confrontation. In many cases, laying the proper foundation for a hearsay exception will satisfy confrontation requirements.<sup>108</sup> However, the United States Supreme Court's recent decision in Crawford v. Washington<sup>109</sup> held that admission of hearsay statements that were "testimonial" in nature would violate the Confrontation clause. According to the Court's reasoning, testimonial hearsay statements would violate the Confrontation clause while non-testimonial statements would not, if they contained sufficient indicia of reliability.<sup>110</sup> Testimonial hearsay statements would be admissible if the declarant was unavailable for trial and the defendant had had a previous opportunity to cross examine.

A statement relating to a startling event or condition made while the defendant was under the stress of excitement caused by the event or condition is admissible as an exception to the hearsay rule.<sup>111</sup> As a prerequisite to admission it must be established that the declarant was present at the event and that the declaration arose from personal observation.<sup>112</sup> The event itself must have been sufficiently startling to create the excitement necessary to insure the trustworthiness of the related declaration.<sup>113</sup> The statement must also be spontaneous although not necessarily contemporaneous with the event.<sup>114</sup> Normally, statements made during the crime itself or soon thereafter are sufficiently spontaneous to be considered admissible. However, absent other factors, a lapse of time may remove the required excitement, and the exception would not apply.

Under certain circumstances a hearsay statement may be introduced to establish a state of mind.<sup>115</sup> For example, statements regarding a plan to kill the victim were admissible to establish a co-defendant's state of mind and to establish knowledge on her part.<sup>116</sup> Only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception.<sup>117</sup> Hearsay statements made for the purpose of medical diagnosis and treatment,<sup>118</sup> except statements made to psychologists,<sup>119</sup> may be introduced.

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<sup>107</sup> Tenn. R. of Evid. 801(a) (2015).

<sup>108</sup> See White v. Illinois, 502 U.S. 346 (1992) (no requirement to call declarant as witness or to find declarant is unavailable before admitting hearsay statements under spontaneous declarations or statements for medical purposes exception in child sexual abuse case).

<sup>109</sup> 541 U.S. 36; 124 S. Ct. 1354; 158 L. Ed. 2d 177; 2004 U.S. LEXIS 1838 (2004).

<sup>110</sup> See State v. Quintero, 2005 Tenn. Crim. App. LEXIS 383 (Tenn. Crim. App. Apr. 22, 2005).

<sup>111</sup> Tenn. R. Evid. 803(2)(2015).

<sup>112</sup> Underwood v. State, 604 S.W.2d 875, 1979 Tenn. Crim. App. LEXIS 319 (Tenn. Crim. App. 1979).

<sup>113</sup> State v. Taylor, 771 S.W.2d 387, 1989 Tenn. LEXIS 135 (Tenn. 1989); State v. Meadows, 635 S.W.2d 400, 1982 Tenn. Crim. App. LEXIS 443 (Tenn. Crim. App. 1982).

<sup>114</sup> State v. Milton, 673 S.W.2d 555; 1984 Tenn. Crim. App. LEXIS 2858 (Tenn. Crim. App. 1984); (accusations made to officer in "midst of argument" with defendant); State v. Meadows, *supra* (victim made statements after regaining consciousness).

<sup>115</sup> Tenn. R. Evid. 803(3)(2015).

<sup>116</sup> State v. Ward, 663 S.W.2d 805, 1983 Tenn. Crim. App. LEXIS 424 (Tenn. Crim. App. 1983) (Tenn. Crim. App. 1983).

<sup>117</sup> Tenn. R. of Evid. 803(3)(2015), Advisory Commission Comments.

<sup>118</sup> Tenn. R. Evid. 803(4); White v. Illinois, 502 U.S. 346 (1992); State v. Rucker, 847 S.W. 2d 512 (Tenn. Crim. App. 1992).

Under certain circumstances, the prior testimony of a witness may be introduced in a later proceeding.<sup>120</sup> For this exception to apply, the testimony must be given under oath, the witness must be subject to cross-examination, and the issues must be substantially the same as in the prior proceedings.<sup>121</sup> Further, the witness must be unavailable to testify in the present trial. A party must use due diligence to procure the witness.<sup>122</sup> If these criteria are not met, the defendant's constitutional right of confrontation may be violated.<sup>123</sup>

Tennessee courts have allowed the introduction of 911 emergency audio tapes, but their admissibility hinges on the purpose for which admission is moved and the foundation laid prior to introduction. The tape may be admissible under the excited utterance exception to the hearsay rule.<sup>124</sup>

### **§6-6 Dispositions in Criminal Domestic Abuse Cases**

Effective interventions with domestic abuse perpetrators must:

- Confront their minimization, denial, and rationalization of the violence;
- Confront their unwillingness to take responsibility for changing their behavior;
- Provide an external motivator for change;
- Provide a consistent external motivator over time;
- Confront their belief that it is acceptable to have control over another person and that violence is an acceptable means of maintaining such control;
- Provide multiple experiences that accomplish the above.

Traditionally the community has looked to the victim to provide these interventions. Too often, victims are told just to leave the situation or to stand up for themselves, to protect the children from the perpetrator, or to go to marriage counseling. This advice is given in the hope that somehow these actions will provide the consistent motivator the perpetrator needs to make changes. Expecting the victim to take this role not only puts her or him in further danger, but also ignores the reality that domestic abuse victims are in severe crisis and may be unable to be consistent. Instead of expecting the victim to be the consistent motivator for the perpetrator, the community, through the criminal justice system, must play that role.

The criminal justice system can provide effective intervention with domestic abuse perpetrators by:

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<sup>119</sup> State v. Barone, 852 S.W.2d 216, 1993 Tenn. LEXIS 69, 38 A.L.R.5th 897 (Tenn. 1993).

<sup>120</sup> Tenn. R. Evid. 804 (b)(1)(2015).

<sup>121</sup> Dykes v. State, 589 S.W.2d 384; 1979 Tenn. Crim. App. LEXIS 283 (Tenn. Crim. App. 1976).

<sup>122</sup> Hicks v. State, 490 S.W.2d 174, 1972 Tenn. Crim. App. LEXIS 286 (Tenn. Crim. App. 1972).

<sup>123</sup> State v. Armes, 607 S.W.2d 234, 1980 Tenn. LEXIS 507 (Tenn. 1980) (Tenn. 1980).

<sup>124</sup> State v. Smith, 868 S.W.2d 561; 1993 Tenn. LEXIS 410 (Tenn. 1993); cert. denied, Smith v. Tennessee, 513 U.S. 960, 130 L. Ed. 2d 333, 115 S. Ct. 417, 1994 U.S. LEXIS 7536, 63 U.S.L.W. 3346 (1994).

- Holding the perpetrator, not the victim, accountable for the violence;
- Holding the perpetrator accountable for changing his behavior;
- Providing clear and consistent consequences for failure to follow through with court mandates or for continuing the abusive behavior;
- Providing multiple experiences that hold the perpetrator accountable (e.g., jail time, restitution, community service, fines, restricted access to the victim, a perpetrator's intervention program, etc.);
- Providing the above on a consistent basis.

The objectives of a disposition in a domestic abuse case should be to:

- Stop the violence;
- Protect the victim;
- Protect the children, and other family members;
- Protect the public;
- Uphold the legislative intent that domestic abuse be treated as a serious crime, and to communicate that intent to the perpetrator and to the victim;
- Hold the perpetrator accountable for the violent behavior and for stopping that behavior;
- Rehabilitate the perpetrator;
- Provide restitution for the victim.

### **§6-6.01      Incarceration.**

The U.S. Attorney General's Task Force on Family Violence concluded in its final report that in all cases when the victim has suffered serious injury, the convicted perpetrator should be sentenced to a term of incarceration. In cases involving a history of repeated abusive behavior or when there is a significant threat of continued harm, incarceration is also the preferred disposition. In serious incidents of violence, incarceration is the punishment necessary to hold the perpetrator accountable for his crime. It also clearly signals the seriousness with which the offense is viewed by the community and provides secure protection to the victim (*Attorney General's Task Force on Family Violence: Final Report, 1984*).

Violence against wives or female intimates has long been tolerated and even condoned by our social norms and institutions. This violence has been viewed as a private family matter which, if left alone, will be resolved without intervention. Perpetrators who victimize their spouses routinely receive lighter sentences than persons committing similar offenses against strangers. For example, in 1987, felons convicted of spousal rape and spousal battery in California received significantly shorter sentences than persons convicted of rape and felonious assault against strangers.



Tennessee's sentencing statute specifies a range of sentence for each offense, but if appropriate for the offense and if not already an essential element of the offense, the Court shall consider, but is not bound by, certain advisory factors in determining whether to enhance a defendant's sentence.<sup>125</sup> Some of these advisory factors that might lead to an enhancement of the defendant's sentence in a domestic abuse case include:

- The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
- The offense involved more than one victim;
- A victim of the offense was particularly vulnerable because of age or physical or mental disability;
- The defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense;
- The personal injuries inflicted upon, or the amount of damage to property sustained by or taken from, the victim was particularly great;
- The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;
- The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community;
- The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense;
- The defendant had no hesitation about committing a crime when the risk to human life was high;
- The felony resulted in death or serious bodily injury, or involved the threat of death or serious bodily injury, to another person, and the defendant has previously been convicted of a felony that resulted in death or serious bodily injury;
- During the commission of the felony, the defendant intentionally inflicted serious bodily injury upon another person, or the actions of the defendant resulted in the death of, or serious bodily injury to, a victim or a person other than the intended victim;
- At the time the felony was committed, the defendant was on some form of pretrial or post-conviction release, on escape status, or incarcerated for a prior offense.
- The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;
- If the defendant is convicted of the offenses of rape, sexual battery, or rape of a child, the defendant caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance;
- If the defendant is convicted of the offenses of aggravated rape, rape, rape of a child, or statutory rape, the defendant knew or should have known that, at the time of the offense, such defendant was HIV positive.

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<sup>125</sup> Tenn.Code Ann. § 40-35-114(2015).

When the trial court departs from the minimum sentence, it is limited to these enhancement factors.<sup>126</sup>

The United States Supreme Court in Blakely v. Washington<sup>127</sup> and United States v. Booker<sup>128</sup>, held in 2004 and 2005, respectively, that criminal defendants are entitled to a jury trial on enhancement factors. The Tennessee Supreme Court upheld the Tennessee Criminal Sentencing Act and its use of enhancement factors in April 2005.<sup>129</sup> The Court said that Tennessee's criminal sentencing laws do not violate the Sixth Amendment guarantee of a jury trial. The majority explained that, unlike the statutes in Booker and Blakely, Tennessee's sentencing statute does not mandate an increased sentence when a judge finds an enhancement factor. Even after a judge finds an enhancement factor, the judge retains discretion to select any sentence within the statutory range, including the presumptive minimum sentence. The Tennessee statute, Drowota wrote, "does not provide a system which requires or even allows judicial power to infringe upon the province of the jury."

Further, with the re-writing of the enhancement factor statute in 2005 to refer to "advisory factors," Tennessee's statute comes within an explicit exception in Booker:

*If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.*<sup>130</sup>

If appropriate for the offense, the Court should weigh the enhancement factors against any mitigating factors.<sup>131</sup>

## **§6-6.02 Fines**

For any defendant convicted of assault, aggravated assault, or domestic assault against a domestic abuse victim, if the Court determines that the defendant possesses the ability to pay a fine in an amount not in excess of \$ 200, then the Court shall impose a fine at the level of the defendant's ability to pay, but not in excess of \$ 225f.<sup>132</sup> A domestic abuse victim is any victim where the relationship between the victim and the perpetrator is:

- Adults or minors who are current or former spouses;

<sup>126</sup> State v. Anderson, 985 S.W.2d 9, 1997 Tenn. Crim. App. LEXIS 1296 (Tenn. Crim. App. 1997).

<sup>127</sup> 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531, 2004 U.S. LEXIS 4573 (2004).

<sup>128</sup> \_\_\_ U.S. \_\_\_, 160 L. Ed. 2d 621, 125 S. Ct. 738, 2005 U.S. LEXIS 628, (2005);

<sup>129</sup> State v. Gomez, 163 S.W.3d 632; 2005 Tenn. LEXIS 350 (2005).

<sup>130</sup> Booker, *supra*, n. 124.

<sup>131</sup> Tenn. Code Ann. § 40-35-113 (2015).

<sup>132</sup> Tenn. Code Ann. §§ 39-13-101; 39-13-102; 39-13-111(2011).

- Adults or minors who live together or who have lived together;
- Adults or minors who are dating or who have dated or who have or had a sexual relationship;
- Adults or minors related by blood or adoption;
- Adults or minors who are related or were formerly related by marriage; or
- Adult or minor children of a person in a relationship described above.<sup>133</sup>

When any person is convicted of a sexual offense on or after July 1, 2003, in addition to any other punishment that may be imposed for such sexual offense, the Court shall impose a \$200 fine.<sup>134</sup> Sexual offense includes:

- Sexual battery;
- Statutory rape;<sup>135</sup>
- Aggravated Statutory Rape<sup>136</sup>
- Aggravated prostitution;
- Sexual exploitation of a minor;
- Incest;
- False imprisonment where the victim is a minor, except when committed by a parent of such minor;
- Exploitation of a minor by electronic means if the victim is under 13 years of age<sup>137</sup>
- Indecent exposure, upon a third or subsequent conviction;
- Attempt, solicitation, or conspiracy to commit any of these offenses;
- Criminal responsibility for any of these offenses;
- Facilitating the commission of or being an accessory after the fact to any of these offenses.

### **§6-6.03 Work release, weekend incarceration.**

In some cases, work release, or weekend incarceration programs may be more feasible than extended incarceration and may offer an experience that serves as a deterrent against future violence. These programs may meet the need for adverse consequences while incorporating concern for the family's continued economic support. However, a perpetrator should never be placed in such a program without a thorough assessment of the threat posed to the victim and children by the perpetrator.<sup>138</sup> The Court cannot order work release for a person convicted of a sexual offense or who is a violent sex

<sup>133</sup> Tenn. Code Ann. § 36-3-601(11) (2015).

<sup>134</sup> Tenn. Code Ann. § 40-24-108 (2015).

<sup>135</sup> Tenn. Code Ann. § 39-13-506 (2015).

<sup>136</sup> Tenn. Code Ann. § 40-39-202 (2015).

<sup>137</sup> Tenn. Code Ann. § 40-39-202 (2015).

<sup>138</sup> See also State v. Shield, 368 N.W.2d 721; 1985 Iowa Sup. LEXIS 1047 (Iowa 1985) (reasonable for trial court to lengthen sentence when work release was granted).

offender.<sup>139</sup> Furthermore, any person who is convicted of a sexual offense or violent sexual offense is ineligible for a work release program.<sup>140</sup>

#### **§6-6.04 Probation.**

The Judge may sentence a defendant convicted of:

- Domestic assault;
- Assault, vandalism, or false imprisonment, where the victim of any such offense is a person identified in the Order of Protection Statute;
- Violation of a protective order, as prohibited by § 39-13-313; and
- Stalking;

to a period of probation not to exceed two years, if the judge finds that such period of probation is necessary:

- For the defendant to complete any appropriate treatment program or programs, including, but not limited to, a sanctioned batterer's intervention program, an anger management program or any court-ordered drug or alcohol treatment program;
- To make restitution to the victim of the offense;
- To otherwise effect a change in the behavior of the defendant, including, but not limited to, imposing any of the conditions set forth in § 40-35-303(d); or
- To protect and better ensure the safety of the victim or any other member of the victim's family or household, as set out in § 40-35-303(m) and (n).<sup>141</sup>

In determining whether a person convicted of stalking, aggravated stalking, or especially aggravated stalking, or a domestic abuse offense should be granted probation, the Court shall consider the safety and protection of the victim of the offense and of any other member of the victim's family or household.<sup>142</sup>

If the Court grants probation to a person convicted of a domestic abuse offense, it may condition such probation on compliance with one or more orders of the Court, which are not limited to the following:<sup>143</sup>

- Enjoining the perpetrator from threatening to commit or committing acts of violence against the victim or other household members;
- Prohibiting the perpetrator from harassing, annoying, telephoning, contacting or otherwise communicating, either directly or indirectly, with the victim;

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<sup>139</sup> Tenn. Code Ann. § 40-35-313 (2015).

<sup>140</sup> Tenn. Code Ann. §§ 40-35-312, 40-35-213(2015).

<sup>141</sup> Tenn. Code Ann. § 40-35-303(c)(2) (2015).

<sup>142</sup> Tenn. Code Ann. § 40-35-303(m) (2015).

<sup>143</sup> Tenn. Code Ann. § 40-35-303(n) (2015).

- Requiring the perpetrator to stay away from the residence, school, place of employment or a specified place frequented regularly by the victim and by any designated family or household member;
- Prohibiting the perpetrator from possessing or consuming alcohol or controlled substances; and
- Prohibiting the perpetrator from using or possessing a firearm or any other specified weapon and requiring the perpetrator to surrender and forfeit any weapon currently possessed.

In domestic abuse cases where probation is granted, the Court should consider the following additional conditions:

- Supervised probation whereby the Court receives regular progress reports from a probation officer;
- Court ordered domestic abuse intervention program;
- Alternative interventions through community service;
- Restitution to the victim;
- Probation with county jail time;
- Order to pay attorney's fees and costs;
- Community service.

The Court should revoke a domestic abuse perpetrator's probation if he commits any subsequent offenses against the same victim or another victim or fails to comply with the conditions of probation.<sup>144</sup> Several studies of court-mandated perpetrators intervention programs found that between 25 and 37 percent of the offenders mandated to intervention either never showed up at all or dropped out fairly early in the intervention with few or no sanctions imposed by the courts (Chalk and King, 1998). The lack of sanctions for non-completers puts victims in jeopardy since victims are more likely to remain with a perpetrator who goes to intervention (Gondolf and Fisher, 1988).

If the court grants probation to a person convicted of stalking, aggravated stalking or especially aggravated stalking, the court may keep such person on probation for a period not to exceed the maximum punishment for the appropriate classification of offense. Regardless of whether a term of probation is ordered, the court may, in addition to any other punishment otherwise authorized by law, order the defendant to do the following:

- Refrain from stalking any individual during the term of probation;
- Refrain from having any contact with the victim of the offense or the victim's child, sibling, spouse, parent or dependent;
- Be evaluated to determine the need for psychiatric, psychological, or social counseling, and if, determined appropriate by the court, to receive psychiatric, psychological or social counseling at the defendant's own expense;

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<sup>144</sup> Tenn. Code Ann. § 40-35-310, 311(2015).

- If, as the result of such treatment or otherwise, the defendant is required to take medication, order that the defendant submit to drug testing or some other method by which the court can monitor whether the defendant is taking the required medication; and
- Submit to the use of an electronic tracking device, with the cost of such device and monitoring the defendant's whereabouts, to be paid by the defendant.<sup>145</sup>

#### **§6-6.05 Pre-trial or judicial diversion.**

The National Council of Juvenile and Family Court Judges recommends that judges should not accept civil compromises, deferred prosecutions, reduced charges or dismissals where justice is not served by these devices. Alternative dispositions and diversion in domestic abuse cases are frequently inappropriate and send a message to both the victim and the perpetrator that the crime is less serious than comparable crimes against non-family members. When these alternatives are proposed, judges should ascertain that they are in the interest of justice and not simply devices for docket management. Tennessee recognizes two kinds of diversion: pretrial diversion<sup>146</sup> and judicial diversion<sup>147</sup>.

#### **§6-6.06 No contact orders.**

The Court should issue no contact orders even in those cases where the perpetrator's sentence includes a period of incarceration. This can prevent the perpetrator from calling the victim from jail or contacting her or him by mail during the period of incarceration. A no contact order can be issued as a term of probation.<sup>148</sup>

#### **§6-6.07 Victim restitution.**

The Attorney General's Task Force on Family Violence concluded that:

*Making abusers accountable for their conduct includes financial responsibilities. In addition to contributing to the cost of their own treatment, abusers should also, when appropriate, provide restitution to the victim for all expenses resulting from the crime. These should include lost wages, medical, counseling and other treatment fees, and replacement value of any property destroyed by the abuser. In the event that a judge does not issue such an order, he should specifically state his reasoning for not doing so in the record (Attorney General's Task Force on Family Violence: Final Report, 1984).*

<sup>145</sup> Tenn. Code Ann. § 39-17-315(e) (2015).

<sup>146</sup> Tenn. Code Ann. § 40-15-105 (2015).

<sup>147</sup> Tenn. Code Ann. § 40-35-313 (2015).

<sup>148</sup> Tenn. Code Ann. § 40-35-303(n)(2015).

In Tennessee a sentencing court may direct a perpetrator to make restitution to the victim of the offense as a condition of probation.<sup>149</sup> Whenever the Court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the Court shall order the pre-sentence service officer to include in the pre-sentence report documentation regarding the nature and amount of the victim's pecuniary loss. The Court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The Court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.

In determining the amount and method of payment or other restitution, the Court shall consider the financial resources and future ability of the perpetrator to pay or perform. For the purposes of this section, pecuniary loss means:

- All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the perpetrator; and
- Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

#### **§6-6.08 Criminal injuries compensation program.**

Tennessee law provides compensation for victims of violent crimes.<sup>150</sup> There is no prohibition against domestic abuse victims receiving compensation. They are subject to the same conditions as other victims: that they have cooperated with investigation and prosecution, and have not contributed to or participated in the conduct which led to the bodily injury. The crime must have been reported to law enforcement, generally within 48 hours, but failure of the victim to report the crime because the victim is physically unable to do so, a victim of sexual assault, or a victim of domestic abuse may all constitute good cause.<sup>151</sup>

A victim of a sexually-oriented crime shall be entitled to forensic medical examinations without charge to the victim. T.C.A. § 29-13-118 provides that no bill for the examination shall be submitted to the victim. The claim must be filed no later than one (1) year after the date of the examination. The amount of compensation must not exceed \$750, and the payment does not prohibit the victim from receiving other benefits.<sup>152</sup>

Law enforcement officers are required to submit kits to TBI for testing within 60 days of receipt. T.C.A. §39-13-519 establishes the process for collection and storage of “hold

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<sup>149</sup> Tenn. Code Ann. § 40-35-304(2015).

<sup>150</sup> Tenn. Code Ann. § 29-13-101 to -119 (2015).

<sup>151</sup> Tenn. Code Ann. § 29-13-108(a) (2015).

<sup>152</sup> T.C.A. § 29-13-118 (2015).

kits,” a kit that is coded with a number rather than a name pending the victim’s report to law enforcement. Law enforcement officers must store the “hold kit” for up to 3 years. If an adult victim reports the alleged offense to the police, or the victim is a minor, the healthcare provider shall attached the victim’s name to the kit to TBI for DNA testing. Once the victim makes the report, the law enforcement agency shall have 60 days from the date of the police report to send the sexual assault evidence collection kit to the state crime lab for DN testing. Hold kits are not tested until victim makes a report. To provide implementation of the protocols and uniform policy for handling, maintenance, and testing of sexual evidence kits and hold kits, the domestic violence state coordinating council has developed a model policy for law enforcement agencies.<sup>153</sup>

### **§6-6.09 Disposition of confiscated weapons.**

It is a federal offense for any person who has been convicted of a misdemeanor domestic violence offense to ship, transport, possess, or receive any firearm or ammunition, if such shipping, transport, possession, or receipt is in or affects interstate or foreign commerce.<sup>154</sup> Law enforcement officers and members of the active duty military are not exempted from the firearms restrictions.<sup>155</sup>

Under state law, law enforcement is required to confiscate and a Court of record with criminal jurisdiction to declare as contraband any weapon that is possessed, used, or sold in violation of the law. The provisions of Tenn. Code Ann. § 39-17-1317 (2008), relative to the disposition of confiscated weapons, shall govern all weapons seized at the time of arrest that were used or threatened to be used by the perpetrator to commit the crime. If multiple weapons were seized, the Court shall have authority only to confiscate the weapon or weapons actually used or threatened to be used by the perpetrator to commit the crime. All other weapons seized shall be returned upon disposition of the case.<sup>156</sup> However, compliance with this provision in cases of convicted domestic abuse defendants would require that the judge or law enforcement officer violate both state and federal law, which prohibits transfer of firearms to any person convicted of a domestic abuse offense.<sup>157</sup> Firearms which must be returned should be transferred to a third party who is duly warned that transfer of the firearms back to the perpetrator is a federal offense.

### **§6-6.10 Court-mandated intervention for domestic abuse perpetrators.**

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<sup>153</sup> T.C.A. §39-13-519 (2015).

<sup>154</sup> 18 U.S.C.A. § 922(g)(9) (2015).

<sup>155</sup> 18 U.S.C.A. § 925(a) (2015).

<sup>156</sup> Tenn. Code Ann. § 36-3-620(b) (2015).

<sup>157</sup> 18 U.S.C. §922(d)(8) (2015) prohibits the transfer (or return) of firearms to anyone currently subject to a protection order. 18 U.S.C. §922(d)(9) (2015) prohibits the transfer (or return) of firearms to anyone ever convicted of a misdemeanor crime of domestic violence.



Court-ordered intervention for domestic abuse perpetrators can be a valuable tool in some cases. On the other hand, significant concerns exist regarding the effectiveness of court mandated intervention. These include that it:

- is sometimes used as a substitute for court actions designed to protect the safety of the victim and/or children;
- is a calendar management tool used to relieve overcrowded calendars;
- often has inadequate guidelines regarding the number and content of sessions the perpetrator must attend;
- is inadequately monitored by counselors, probation departments, and courts;
- communicates the message that domestic abuse is less serious than crimes against strangers;
- does not take into account that many perpetrators who appear to be first-time perpetrators have often committed unreported domestic abuse assaults; and
- may teach the perpetrator more effective battering or control strategies from other group members.

In addition, there is some evidence that perpetrator intervention programs may not be effective with all perpetrators. Specifically, violence toward intimates may be more intractable to interventions for men with longer and more serious histories of intimate violence, men with criminal histories for stranger violence, and men with histories of traumatic exposure to violence as children (Chalk and King, 1998, Hamberger and Hastings, 1989; Fagan, *et al.*, 1984). It is essential that the victim's safety is addressed through development of a safety plan, including issuance of Orders of Protection before ordering domestic abuse perpetrators to attend intervention:

In light of these concerns, the Domestic Violence Coordinating Council<sup>158</sup> has promulgated Rules for Batterer's Intervention Programs.<sup>159</sup> Judges wherever possible should only mandate intervention for perpetrators by programs that have been certified pursuant to the Rules for Batterer's Intervention Programs and should encourage perpetrators intervention programs that are not certified to seek certification. The domestic assault law provides that defendants should complete available counseling programs that address violence and control issues, including batterer's intervention programs certified by the domestic violence state coordinating council or any court-ordered drug or alcohol treatment program. Failure of the defendant to complete the program is considered a violation of the defendant's alternative sentencing program and the judge may revoke the defendant's participation in such program and order execution of the sentence.<sup>160</sup> The law specifically states that:

As part of a defendant's alternative sentencing for a violation of this section, The sentencing judge may direct the defendant to complete a drug or alcohol treatment program or available counseling programs that address violence and control issues including, but not limited to, a

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<sup>158</sup> Pursuant to Tenn. Code Ann. §§ 38-12-110, 36-3-601(2015).

<sup>159</sup> Rules of Domestic Violence State Coordinating Council 0490-1 (effective December 9, 1999).

<sup>160</sup> T.C.A. § 39-13-111 (2015).

batterer's intervention program that has been certified by the domestic violence state coordinating council. Completion of a non-certified batterer's intervention program shall only be ordered if no certified program is available in the sentencing county. No batterer's intervention program, certified or non-certified, shall be deemed complete until the full term of the program is complete, and a judge may not require a defendant to attend less than the full term of a program as part of a plea agreement or otherwise. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's alternative sentence program and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence.

Judges should familiarize themselves with the Rules for Batterer's Intervention Programs and ensure that any programs to which perpetrators are ordered meet the criteria outlined in the Rules. A copy of the Rules for Batterer's Intervention Programs is included in the Appendices.

It is recommended that the Court order the perpetrator to *successfully* complete the program, since it is difficult to predict how long the rehabilitation process will take with a particular perpetrator. This approach may lead to a lower rate of recidivism (Sonkin, 1986). There is growing consensus among domestic abuse experts that a minimum of one year is required for intervention to be effective. If the perpetrator successfully completes intervention sooner, a perpetrator can seek early termination of the probation or diversion period. Experts in treating domestic abuse perpetrators point out that battering represents a complex, long-term behavior pattern that is not easily changed (Klein, 1989). The Rules for Batterer's Intervention Programs require attendance for at least 24 weekly class sessions in order to meet successful discharge criteria.<sup>161</sup>

The Court's order for a domestic abuse perpetrator to attend the intervention program should mandate that the perpetrator attend an intervention program which specifically focuses on the violent behavior and not on concurrent problems, such as substance abuse, relationship problems, etc. The Court should consider issuing a criminal court no contact order in cases where the victim appears to be in danger of intimidation or assault from the perpetrator. Where the perpetrator appears to have a substance abuse problem, the Court should consider ordering concurrent treatment for substance abuse. Domestic abuse and substance abuse are separate problems that require separate solutions (Kantor and Straus, 1986).

Any court-ordered intervention should be accompanied by an admonition, backed by appropriate action, that failure to follow through may result in revocation of probation and reinstatement of criminal charges. Several studies of court-mandated perpetrators intervention programs found that between 25 and 37 percent of the offenders mandated to an intervention program either never showed up at all or dropped out fairly early in the program with few or no sanctions imposed by the courts (Chalk and King, 1998).

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<sup>161</sup> Rules of Domestic Violence State Coordinating Council 0490-1.05 (effective December 9, 1999).

The lack of sanctions for non-completers puts victims in jeopardy since victims are more likely to remain with a perpetrator who goes to an intervention program (Gondolf and Fisher, 1988).

Victims should not be required to participate in court-mandated treatment programs intended for perpetrators. Perpetrators must take responsibility for their violent behavior in order for treatment to be successful. Requiring victim participation in the same program as the perpetrator serves only to remove the focus of the treatment from the perpetrator, thereby reinforcing the perpetrator's tendency to externalize the cause of the violence onto others. In most cases, the victim is not a party to the criminal action so the Court lacks jurisdiction to make such an order. The Rules for Batterer's Intervention Programs forbid certified programs from allowing victims, or perpetrator's current partners, to attend the perpetrator's group.<sup>162</sup>

Experts in treating domestic abuse perpetrators have identified the following standards for perpetrator's treatment programs.<sup>163</sup> The Rules for Batterer's Intervention Programs embody these standards. The program philosophy should:

- Clearly define domestic abuse as a crime, rather than as a pathology or mental disorder;
- Define domestic abuse as a learned and socially sanctioned set of behaviors, which can be changed by the perpetrator;
- Hold the perpetrator accountable for the violence in a manner that does not collude with the perpetrator in blaming the victim's behavior for the violence or the perpetrator's use of alcohol or drugs as the cause;
- Make stopping the violence the primary goal of the program, taking priority over keeping the couple together or resolving other relationship issues;
- Define violence as part of a pattern of coercive control that includes physical, emotional, sexual, and economic abuse.

The program components should include:

- Initial and on-going assessments of the danger posed to the victim by the perpetrator and procedures for alerting both the victim and appropriate authorities should the victim's safety become a concern;
- Adequate initial assessment of significant factors that may influence the perpetrator's ability to benefit from treatment (i.e. psychosis, organic impairment);
- A minimum of one year of weekly sessions, with additional sessions available within the program or through referrals when indicated;<sup>164</sup>

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<sup>162</sup> Rules of Domestic Violence State Coordinating Council 0490-1.05 (effective December 9, 1999).

<sup>163</sup> This list was adapted from the County of Los Angeles Domestic Violence Council's publication, "Batterer's Treatment Program Guidelines," June, 1988.

<sup>164</sup> The Rules for Batterer's Intervention Programs require attendance for at least 24 weekly sessions. Rules of Domestic Violence State Coordinating Council 0490-1.05 (effective December 9, 1999).

- The use of group counseling as the intervention of choice; this approach decreases the perpetrator's isolation and dependency on the victim and insures the perpetrator is accountable to the group;
- Procedures for conducting an ongoing assessment of the perpetrator's violent propensities throughout the course of the intervention, such as informing the perpetrator at the beginning of the program that the victim and others will be contacted periodically to assess whether the violence has stopped;
- Demonstrated ability to submit progress reports to the probation department once a month;
- Require perpetrators with substance abuse problems to attend group substance-free and to seek concurrent treatment for substance abuse;
- Procedures for reporting any new offense committed by a court-mandated client during the intervention to appropriate court authorities;
- Language capabilities sufficient to treat a monolingual non-English speaking perpetrator;
- A limited confidentiality policy whereby the victim is entitled to information from the program regarding the acceptance or rejection of the perpetrator into the program, whether the perpetrator is attending the program, termination, cause for termination, and warnings about anticipated violence.

In most states, monitoring of the perpetrator's progress is a shared responsibility between the probation department, the intervention program, and the Court. The most successful intervention in domestic abuse cases occurs when the counselor and probation officer work collaboratively (Ganley, 1986).

The importance of effective monitoring of a domestic abuse perpetrator's progress in court-mandated intervention cannot be overstated. If the Court orders the perpetrator to attend the intervention program for the violence, and then fails to insure that the conditions of the order are met, the victim often finds herself in an even more dangerous situation than before the Court's intervention. If the Court does not have a process for holding the perpetrator accountable for the violence, then his belief that he is above the law and that he has a right to use violence within the family is reinforced. Several studies of court-mandated perpetrators intervention programs found that between 25 and 37 percent of the offenders mandated to the intervention program either never showed up at all or dropped out fairly early in the intervention with few or no sanctions imposed by the courts (Chalk and King, 1998). The lack of sanctions for non-completers puts victims in jeopardy since victims are more likely to remain with a perpetrator who goes to an intervention program (Gondolf and Fisher, 1988).

Failure by the Court to monitor the perpetrator's progress in an intervention program also reinforces the victim's belief that the perpetrator is more powerful than the legal system and may result in some victims becoming reluctant to call the police when they are re-assaulted. Without adequate monitoring of the perpetrator's attendance and progress in the intervention program, both the Court and the victim have to rely solely on the perpetrator's self-report regarding his or her follow-through with the intervention program's mandates. This may lead the victim to make false assessments regarding

the perpetrator's willingness to take responsibility for the violence and to change the behavior. In addition, the Court is asked to make a decision regarding case disposition without adequate information.

The judge can preserve the integrity of the monitoring process by requiring that the Court be given specific information concerning the perpetrator's progress. Some judges have scheduled regular case monitoring docket days where files are reviewed for communications from the perpetrator, attorney, or perpetrator's program administrator that the perpetrator is complying with the order.

To preserve the integrity of court-mandated intervention, the Court should vigorously enforce any conditions imposed on the perpetrator during the intervention period. If the Court finds that the perpetrator is not performing satisfactorily in the assigned program or that he has re-offended, the Court should reinstate criminal proceedings. Giving the perpetrator "another chance" conveys the same message as when the victim gives him or her "another chance." It reinforces the perpetrator's belief that by manipulating both the victim and the criminal justice system, the consequences of the violent behavior can be avoided.

If the perpetrator fails to comply with the conditions of the intervention program, the Court should not re-refer the perpetrator to the same or a different intervention program. Re-referral may well reinforce the perpetrator's belief that he or she can manipulate and control the Court's response to the violence. The program administrators may recommend whether the Court order re-enrollment or not. The Court can take a leading role in ensuring that procedures for handling noncompliance with court-mandated intervention are coordinated between the intervention program, the probation officer, and the Court. If the Court terminates the perpetrator from court-ordered intervention due to unsuccessful completion of the program or noncompliance with court orders, the judge should insure that this information is added to the perpetrator's criminal history.

#### **§6-6.11 Dismissals.**

- As with other forms of disposition, the manner in which the Court handles the termination of an action plays a critical role in addressing the conditions which allow domestic abuse to continue and escalate. In cases where dismissal is appropriate and the victim requests dismissal, it is important to convey that the case is being dismissed based on the evidence, not on the victim's requests. If dismissals are automatically granted whenever the victim requests it, the message to the perpetrator and the victim is that the victim, not the Court, controls the case. This provides the perpetrator with less incentive to stop the violent behavior, since it becomes clear that criminal court action can be avoided through intimidation and control of the victim.

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## **APPENDICES**

- 1. Domestic Violence Judicial Policy Statement**
- 2. Domestic Violence Judicial Policy Guidelines**
- 3. “Assessing Whether Batterers Will Kill,” by Barbara Hart**
- 4. Judicial Ethics and Domestic Violence, by Bernard W. Greene**
- 5. Law Enforcement Model Policy**
- 6. Rules for Batterers Intervention Programs**
- 7. Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A JUDGE’S Guide**