

PENNSYLVANIA DOMESTIC VIOLENCE BENCHBOOK



www.pcadv.org

888-235-3425

ACKNOWLEDGEMENTS

This Pennsylvania Domestic Violence Benchbook is the result of the collaborative efforts of many individuals who are committed to safety and justice for individuals and families troubled by domestic violence. First and foremost, special thanks are extended to the judges who comprise the Benchbook Advisory Group. Their guidance and support made this Benchbook a reality.

This Benchbook and its updates are supported with funding from the U.S. Department of Justice, Office on Violence Against Women's STOP Violence Against Women Formula Grant. We are indebted to the staff of the Administrative Office of Pennsylvania Courts who contracts with PCADV to use STOP funds to provide judicial education about domestic violence, dating violence, stalking and sexual violence. We greatly appreciate their assistance in helping us find and sustain a diverse group of judicial leaders to advise on this Benchbook and support its distribution. As well, we gratefully acknowledge the staff of the Pennsylvania Commission on Crime and Delinquency, Office of Victims' Services, for their commitment and support of this work.

Susan Higginbotham, Executive Director - PCADV

Danni Petyo, Legal Services Manager - PCADV

2011 BENCHBOOK JUDICIAL ADVISORY GROUP

The Honorable James G. Arner,
Clarion County

The Honorable Michael J. Barrasse,
Lackawanna County

The Honorable John A. Bozza,
Erie County

The Honorable John J. Driscoll,
Westmoreland County

The Honorable Idee C. Fox,
Philadelphia County

The Honorable Carol Hanna,
Indiana County

The Honorable Wayne G. Hummer, Jr.,
Lancaster County

The Honorable Thomas K. Kistler,
Centre County

The Honorable Maureen Lally-Green, (ret'd)
Superior Court of Pennsylvania

The Honorable Eugene F. Scanlon, Jr., (ret'd)
Allegheny County

The Honorable Thomas A. Wallitsch, (ret'd)
Lehigh County

The Honorable Margherita P. Worthington,
Monroe County

This project was supported by PCCD Subgrant #26422-2, awarded by the Pennsylvania Commission on Crime and Delinquency (PCCD) to the Administrative Office of Pennsylvania Courts (AOPC). The opinions, findings and conclusions expressed within this publication/ program/ exhibition are those of the author(s) and do not necessarily reflect the views of PCCD, the AOPC or the U.S. Department of Justice, Office on Violence Against Women.

OF SPECIAL NOTE

The legal discussion in this Benchbook is current as of the date at the bottom of each chapter. The reader is cautioned that the complexity of domestic violence makes it the subject of continuing legislative attention and judicial review. Readers are encouraged to consult appellate opinions issued and legislation enacted after the date in the footer of each individual chapter.

The Emerging Practices section of each chapter represents best practice suggestions from the Advisory Group and from state and national resources. The Emerging Practices sections include suggested practices and sample forms and procedures. These are merely suggestions. The Advisory Group encourages each local court to develop its own policies and practices for domestic violence cases in consultation with the other service and justice providers in the community.

This publication is designed to provide accurate and authoritative information with regard to the subject matter covered. It is distributed with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is sought, the services of a competent professional should be obtained.

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This book and any forms and agreements herein are intended for educational and informational purposes only.

This Benchbook, or parts thereof, may be reproduced and adapted with permission of the Pennsylvania Coalition Against Domestic Violence. Any adaptation or reprint must be accompanied by the following acknowledgement:

This material was adapted from the **Pennsylvania Domestic Violence Benchbook**, 2019-2020 edition, published by the Pennsylvania Coalition Against Domestic Violence, www.pcadv.org.

QUESTIONS ABOUT THIS PUBLICATION

For questions about the content appearing in this book or permission to reprint or adapt material, please contact:

Pennsylvania Coalition Against Domestic Violence
3605 Vartan Way, Suite 101
Harrisburg, PA 17110
1-800-932-4632 or 717-545-6400

CHAPTERS

- Chapter I: The Court's Role in Addressing Domestic Violence
- Chapter II: Evidence
- Chapter III: The Protection From Abuse Act
- Chapter IV: PFA and Custody
- Chapter V: Child and Spousal Support
- Chapter VI: Firearms
- Chapter VII: Custody
- Chapter VIII: Domestic Violence Crimes
- Chapter IX: Stalking
- Chapter X: Enforcement
- Chapter XI: Pro Se Process
- Chapter XII: Minors and Domestic Violence
- Chapter XIII: Teen Dating Abuse
- Chapter XIV: The Protection of Victims of Sexual Violence or Intimidation Act
- Chapter XV: Domestic Violence Lethality Factors
- Chapter XVI: Animal Abuse

ALPHABETICAL INDEX OF APPENDICES - CHAPTER LOCATION

Abusive Behaviors Checklist	III
Affidavit for Relinquishment of Firearms	VI
Categories of Permissible and Impermissible Assistance by Court Personnel/ Domestic Violence Advocates in PFA Matters.....	XI
Child Victim/Witness Hearsay Statements in Various Proceedings	II
Entry of Appearance Form as a Self-Represented Party.....	XI
Information on the Unauthorized Practice of Law for Pennsylvania Court Personnel	XI
Judicial In-Court Procedures for Cases Involving Pro Se Litigants.....	XI
No-Contact Order Information Sheet	XI
Pennsylvania Domestic Violence Resources www.pcadv.org/Find-Help/	I
Petition to Modify PFA Order/ Order Hearing to Modify PFA Order	III
The Protection From Abuse Act 23 PA. C.S. § 6101 et seq. Annotated	III
Protection From Abuse Act Information Sheet.....	XI
Sample Custody/Partial Custody Terms	VII
Sample Procedure for Pro Se Litigants Seeking to Withdraw, Vacate, or Modify a PFA Order	III
Third Party Affidavit of Acceptance and Accountability	IV

ALPHABETICAL INDEX OF SAMPLE FORMS

Abusive Behaviors Checklist	III
Affidavit for Relinquishment of Firearms	VI
Entry of Appearance Form as a Self-Represented Party.....	XI
Pennsylvania State Police Firearms Forms	VI
Petition to Modify PFA Order/ Order Hearing to Modify PFA Order	III
Sample Custody/Partial Custody Terms	VII
Sample Criminal Record/Abuse History Verification	VII
Sample Notice of Relocation.....	VII
Third Party Affidavit of Acceptance and Accountability	IV

CHAPTER I: THE COURT'S ROLE IN ADDRESSING DOMESTIC VIOLENCE

TABLE OF CONTENTS

CHAPTER GOALS.....	3
UNDERSTANDING DOMESTIC VIOLENCE	3
Progression in Response to Domestic Violence	3
Defining Domestic Violence	4
Pennsylvania PFA Act's Definition of Abuse	5
DOMESTIC VIOLENCE STATISTICS.....	6
Domestic Violence Affects Everyone	6
Most Domestic Violence Victims Are Women	6
Same-Sex Domestic Violence	7
Dating Violence	9
Court Sees Only the Tip of the Iceberg.....	9
Separation Violence.....	10
DOMESTIC VIOLENCE IN THE COURTROOM.....	11
Common Attitudes and Conduct of Abusers	11
Common Attitudes and Conduct of Victims	12
THE ROLE OF THE JUDGE IN ADDRESSING DOMESTIC VIOLENCE	13
The Goals of Judicial Intervention	13
Judicial Management of PFA Cases.....	14
Due Process under the PFA Act	14

ROLE OF DOMESTIC VIOLENCE ADVOCATES	15
What is the Role of the Domestic Violence Advocate?.....	15
Safety Planning Requires a Victim-Centered Approach	16
Advocate Communications and Shelter Locations Are Confidential and Protected	16
THE ROLE OF VICTIM ASSISTANCE PERSONNEL.....	18
Victim-Witness Programs.....	18
Address Confidentiality Program	18
EMERGING PRACTICES - THE IMPACT OF JUDICIAL Demeanor	18
EMERGING PRACTICES - EFFECTIVE COURT ORDERS	19
PFA Orders.....	20
Custody and Visitation Orders.....	20
Criminal Proceedings	21
EMERGING PRACTICES - COURT PROCESSES AND SERVICES	21
EMERGING PRACTICES - CONNECTING WITH RESOURCES.....	22
EMERGING PRACTICES - THE JUDGE AS COMMUNITY LEADER.....	24
EMERGING PRACTICES - LETHALITY ASSESSMENT PROGRAM (LAP).....	25
SUMMARY	26
APPENDIX	27
Pennsylvania Domestic Violence Resources	27
Pennsylvania Coalition Against Domestic Violence	27
HOTLINES:	27

CHAPTER GOALS

Society has assigned a vital role to the courts in addressing domestic violence. The purpose of this chapter is to provide information about the behavior of domestic violence perpetrators and victims, domestic violence and the court system, the goals of judicial intervention in domestic violence cases, and the court's obligation to provide access to justice.

UNDERSTANDING DOMESTIC VIOLENCE

Progression in Response to Domestic Violence

From 1993 to 2010, the rate of serious nonfatal intimate partner violence declined 64 percent for males and females.¹ This is largely because social and legal responses to domestic violence have undergone significant changes. Lawmakers have strengthened criminal penalties and policy makers have revised and reconsidered traditional criminal, civil justice, and family law practices. The 1994 federal Violence Against Women Act (and subsequent reauthorizations) spurred courts and law enforcement to implement protocols prioritizing the safety of victims and holding perpetrators accountable.

Researchers from various disciplines continue to study domestic violence to answer questions about its prevalence, incidence, causes, and effects on victims.² This research leads to further reforms and

¹ The estimates in this report are based on data from the National Crime Victimization Survey, which collects information from victims of crime. Nonfatal intimate partner violence includes rape, sexual assault, robbery, aggravated assault, and simple assault committed by a victim's current or former spouse, boyfriend, or girlfriend. Shannan Catalano, *Intimate Partner Violence, 1993–2010* (NCJ 239203), Bureau of Justice Statistics, 2012; <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4536>.

² Andrew Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges 1* (2009) available at <http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/pages/welcome.aspx>. [Hereinafter Klein, *Practical Applications*]; Nat'l Institute of Justice, *Measuring Intimate Partner (Domestic) Violence*, <http://www.nij.gov/topics/crime/intimate-partner-violence/Pages/measuring.aspx>; Ctrs. for Disease Control & Prevention, *FREQUENTLY ASKED QUESTIONS: INTIMATE PARTNER VIOLENCE IN THE UNITED STATES—2010*, <http://www.cdc.gov/violenceprevention/pdf/ipv-report-gas-external-final-02-25-14-a.pdf>. (last visited Nov. 30, 2015).

interventions to stop domestic violence.³ Lately, the justice system and the public health system have teamed up to study violence against women through an injury prevention lens.⁴

A prevention approach complements the PFA Act's purpose.⁵ Pennsylvania's Superior Court has found the primary goal of the Act to be "advance prevention of physical and sexual abuse."⁶

Defining Domestic Violence

Definitional issues affect the validity and utility of research on domestic violence and violence against women.⁷ Employing narrower or broader definitions of domestic violence in social science research influences what behaviors are studied, who is studied, what questions are asked, what conclusions can be drawn, and many other aspects of research methodology and interpretation that can lead to confusion and inappropriate or dangerous application in addressing domestic violence.⁸

Many abusers believe they have the right to make and enforce rules. Many victims routinely evaluate which rules to follow.

In its judicial checklist, the Judicial Subcommittee of the American Bar Association's Commission on Domestic and Sexual Violence assists judges in identifying and understanding domestic violence in the cases that come before them. As the checklist emphasizes: "Domestic violence is about power and control."⁹ The checklist also asserts:

³ For example, the PFA Act has been amended 12 times. With the exception of technical corrections, each amendment broadened the Act. The Lethality Assessment Program, which many Pennsylvania jurisdictions began implementing in 2012, resulted from groundbreaking research on common characteristics of femicides. See Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ JOURNAL, National Institutes of Justice, 2000.

⁴ In 2014, the Centers for Disease Control and Prevention and the National Institute of Justice published the National Intimate Partner and Sexual Violence Survey–2010. This report examines intimate partner violence (IPV) victimization among male and female adults in the United States. The report also provides information about the context of victimization experiences, such as the frequency, severity, patterns, need for services, and impacts of violence experienced over the lifetime and for the prior 12 months. Report and summary available at <https://www.cdc.gov/violenceprevention/nisvs/summaryreports.html>.

⁵ *Fonner v. Fonner*, 731 A.2d 160, 161 (Pa. Super. 1999).

⁶ *Id.* at 161-62 (quoting *Snyder v. Snyder*, 629 A.2d 977, 981 (Pa. Super. 1993)).

⁷ Nat'l Institute of Justice, Measuring Intimate Partner (Domestic) Violence, <http://www.nij.gov/topics/crime/intimate-partner-violence/Pages/measuring.aspx>.

⁸ Office of Justice Programs, National Institute of Justice, Intimate Partner Violence, U.S. Dep't of Justice, <http://www.nij.gov/topics/crime/intimate-partner-violence/Pages/welcome.aspx>.

⁹ ABA COMM'N ON DOMESTIC VIOLENCE, JUDICIAL CHECKLIST (2008), http://www.americanbar.org/content/dam/aba/migrated/domviol/publications/187815_ABA_Checklist_FINAL.authcheckdam.pdf (last visited Nov. 30, 2015).

Domestic violence is chosen behavior and is rarely caused by substance abuse, genetics, stress, illness, or problems in the relationship, although these factors are often used as excuses and can exacerbate violent behavior. Abusers may justify their actions by blaming the victim, but courts should not accept this as a justification.¹⁰

The Office on Violence Against Women of the U.S. Department of Justice further provides a behavioral definition of domestic violence:

[A] pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.”¹¹

The National Institutes for Justice follows the definition of the Centers for Disease Control and Prevention's (CDC) National Center for Injury Prevention and Control. The CDC defines four main types of intimate partner violence: physical violence, sexual violence, threats of physical or sexual violence, and psychological/emotional violence.¹²

Pennsylvania PFA Act's Definition of Abuse

The Pennsylvania PFA Act defines abuse more broadly than just those behaviors that constitute a crime under Pennsylvania's Crimes Code. In addition to criminal behavior constituting abuse,¹³ other acts causing injury or fear are covered.¹⁴ However, the definitions of abuse provided by the CDC and the ABA are broader than either the definition of abuse in the Pennsylvania PFA Act, or the types of abuse addressed in Pennsylvania's criminal law.

For more information about what constitutes abuse under Pennsylvania law, please see [Chapter III: The Protection From Abuse Act](#).

It is important for trial judges to be aware of and knowledgeable about all facets of domestic violence. Even though emotional abuse (e.g., name-calling, verbal attacks, isolation), and economic abuse (e.g., interfering with victim's ability to get or keep a job, refusing to provide access to family funds) are not crimes under Pennsylvania's Criminal Code or abuse under the PFA Act, understanding that these behaviors are part of the abuse constellation may help judges determine

¹⁰ *Id.*

¹¹ U.S. Dept. of Justice, Domestic Violence, <http://www.justice.gov/ovw/domestic-violence>.

¹² Office of Justice Programs, National Institute of Justice, Intimate Partner Violence, U.S. Dep't of Justice, <http://www.nij.gov/topics/crime/intimate-partner-violence/Pages/welcome.aspx>. See also, Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Injury Prevention and Control, *Understanding Intimate Partner Violence Fact Sheet 2014*, available at <http://www.cdc.gov/violenceprevention/pdf/ipv-factsheet.pdf>.

¹³ See PA. C.S. §§ 6102(a)(1) and (3).

¹⁴ See, e.g., PA. C.S. §§ 6102(a)(2),(4),(5).

where there is disputed evidence and “he said”/ “she said” testimony. Awareness of all behaviors comprising domestic violence will further assist judges in fashioning appropriate orders.¹⁵

DOMESTIC VIOLENCE STATISTICS

Domestic Violence Affects Everyone

Research and clinical experiences show that domestic violence occurs among all socioeconomic, racial, cultural, and religious groups,¹⁶ but its prevalence and effects may vary among these different groups. Racial and ethnic minorities are disproportionately affected by domestic violence.¹⁷

Most Domestic Violence Victims Are Women

The body of domestic violence research demonstrates that, over time, the majority of abusers are men and the majority of victims are women in heterosexual relationships.¹⁸

More women than men are victims of intimate partner violence.

The 2011 National Intimate Partner and Sexual Violence Survey, in which more than 7,000 men and 9,000 women were interviewed about their experiences with violent victimization, found that women experience significantly more intimate partner violence than do men.¹⁹ This difference was significant for both the previous 12 months and the person's lifetime and whether the victimization experienced was rape, physical assault, or stalking. Longitudinal studies reveal even higher female

¹⁵ The National Council of Juvenile and Family Court Judges (NCJFCJ) recommends: “All judges must be trained in the dynamics of family violence and how to address it fairly and properly.” NCJFCJ, *Family Violence: Improving Court Practice, Recommendations From the National Council of Juvenile and Family Court Judges' Family Violence Project*, 16 (1990), available at <http://www.ncjfcj.org/resource-library/publications/family-violence-improving-court-practice>. [hereinafter FAMILY VIOLENCE: IMPROVING COURT PRACTICE].

¹⁶ See VAWNET.ORG SPECIAL COLLECTION, DOMESTIC VIOLENCE: POPULATION-SPECIFIC APPROACHES, available at <https://vawnet.org/sc>.

¹⁷ Ctrs. for Disease Control & Prevention, *An Overview of Interpersonal Violence in the United States – 2010 Findings* (2014), available at <http://www.cdc.gov/violenceprevention/pdf/ipv-nisvs-factsheet-v5-a.pdf>.

¹⁸ “Nearly 3 in 10 women and 1 in 10 men in the United States have experienced rape, physical violence, and/or stalking by an intimate partner and reported at least one impact related to experiencing these or other forms of violent behavior in the relationship (e.g., being fearful, concerned for safety, post traumatic stress disorder (PTSD) symptoms, need for health care, injury, contacting a crisis hotline, need for housing services, need for victim's advocate services, need for legal services, missed at least one day of work or school).”

Michele C. Black et al., Nat'l Center for Injury Prevention and Control, Ctrs. for Disease Control & Prevention, *National Intimate Partner and Sexual Violence Survey 2010 Summary Report*, 2 (2011).

¹⁹ *Id.*

victimization rates. From 1994 to 2010, about 4 in 5 victims of intimate partner violence were female, according to the National Crime Victimization Survey.²⁰

Some researchers assert that men and women are equal perpetrators of domestic violence. However, a 2009 review of domestic violence research for law enforcement, judges and prosecutors qualifies that assertion:

Although some sociological research based on self-reporting finds equal rates of male and female partner conflict (including mostly minor physical assaults), behavior that is likely to violate most state and federal criminal and civil (protective order) statutes is typically perpetrated by males.²¹

These findings about domestic violence perpetrators and victims have implications for judges when they encounter and assess domestic violence in criminal, family, and PFA cases.

Same-Sex Domestic Violence

Domestic violence occurs within same-sex relationships.²² The ABA cites research suggesting that same-sex partners reported significantly more intimate partner violence than opposite-sex partners.²³ The 2010 National Intimate Partner and Sexual Violence Survey (NISVS) found that the lifetime prevalence of rape, physical violence, or stalking by an intimate partner was greater for gays, lesbians and bisexuals than for heterosexuals of either gender.²⁴

²⁰ The NCVS collects information on nonfatal crimes reported and not reported to the police from a nationally representative sample of U.S. households. Shannon Catalano, Bureau of Justice Statistics, *Intimate Partner Violence, 1993-2010*, U.S. Dep't of Justice, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4536>.

²¹ Klein, *Practical Applications*, *supra* note 2 at Chapter 3-1, citing R. Macmillan and C. Kruttschnitt. PATTERNS OF VIOLENCE AGAINST WOMEN: RISK FACTORS AND CONSEQUENCES, FINAL REPORT FOR NATIONAL INSTITUTE OF JUSTICE. NCJ 208346, U.S. Dep't. of Justice (2004), available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=208346>.

²² ABA Comm'n on Domestic Violence, Domestic Violence Statistics, available at http://www.americanbar.org/groups/domestic_violence/resources/statistics.html-same-sex.

²³ *Id.*, citing Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, NCJ 18186730 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

²⁴ Lifetime prevalence of rape, physical violence, and/or stalking by an intimate partner for women: Lesbian 43.8%; Bisexual 61.1%; Heterosexual 35.0%; for men: Gay 26.0%; Bisexual 37.3%; Heterosexual 29.0%. Mikel L. Walters, Jieru Chen, and Matthew J. Breiding, Nat'l Center for Injury Prevention and Control, Ctrs. for Disease Control & Prevention, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation* 3 (2011), available at http://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

The 2013 reauthorization of the Violence Against Women Act explicitly bars discrimination based on actual or perceived gender identity and sexual orientation.²⁵ The PFA Act covers same-sex intimate partner relationships.²⁶

Abusive partners in lesbian, gay, bisexual, transsexual and Queer/Questioning relationships (generally referred to as LGBTQ), use all the same tactics to gain and maintain power and control as abusive partners in heterosexual relationships – physical, sexual or emotional abuse, financial control, isolation and more. But abusive partners in LGBTQ relationships also take advantage of societal factors that can make leaving or accessing safety and justice more difficult for same-sex victims.²⁷

LGBTQ victims may avoid reporting for fear that the abuse will be considered evidence that the victim's sexual orientation or gender identity is unhealthy. Additionally, criminal justice personnel and victim assistance providers often underestimate the physical danger involved in same-sex relationship abuse, or fail to recognize that a physically smaller partner may be the perpetrator.²⁸

To determine who is the abusive partner establishing coercive control, judges and law enforcement officers cannot rely on size, physical strength, or perceived masculinity or femininity.²⁹ The NCJFCJ advises that, "[a]ssessing for partner abuse in a relationship requires careful consideration of the context of particular incidents, intent behind the incidents, and the effect on each partner."³⁰

In the NCJFCJ's assessment, mutual protection orders are not the answer and in fact are counterproductive, casting victims as abusive and denying them confidential victim protections.³¹

²⁵ U.S. Dep't of Justice, VAWA 2013 Nondiscrimination Provision: Making Programs Accessible To All Victims Of Domestic Violence, Sexual Assault, Dating Violence, and Stalking, <http://www.justice.gov/ovw/blog/vawa-2013-nondiscrimination-provision-making-programs-accessible-all-victims-domestic>.

²⁶ See *D.H. v. B.O.*, 734 A.2d 409 (Pa. Super. 1999).

²⁷ Nat'l Center for Victims of Crime and the Nat'l Coalition of Anti-Violence Programs, *Why It Matters: Rethinking Victim Assistance for LGBTQ Victims of Hate Violence & Intimate Partner Violence*, 5 (2010), available at http://www.victimsofcrime.org/docs/Reports%20and%20Studies/WhyItMatters_LGBTQreport_press.pdf?sfvrsn=0.

²⁸ *Id.* at 6.

²⁹ Nat'l Council of Juv. & Fam. Ct. Judges, 16 SYNERGY, 10 (2013), available at <http://www.ncjfcj.org/sites/default/files/Synergy16-2.pdf>.

³⁰ *Id.*

³¹ *Id.*

Dating Violence

Intimate partner violence victimization begins early, with nearly 70 percent of female victims and nearly 54 percent of male victims having experienced IPV prior to age 25.³² Nearly 1 in 10 high school students report being hit, slapped, or physically hurt on purpose by a boyfriend or girlfriend in the 12 months before being surveyed.³³ Females aged 20 to 24 are at the greatest risk of nonfatal intimate partner violence³⁴ and stalking victimization.³⁵

Dating relationships are covered under the PFA Act.³⁶ Studies reveal that the frequency and severity of abuse between adult intimate partners increases over time when abuse begins in adolescence.³⁷ Justice system involvement in dating abuse cases, including the arrest and prosecution of juvenile offenders for behavior that rises to the level of a punishable offense, offers an important opportunity for early intervention. Appropriate intervention by the justice system helps to modify the teen abuser's behavior while sending a message about the seriousness of dating abuse. A 2006 study found that court-based intervention for juvenile abuse offenders was especially effective for first-time offenders whose behavior had not yet become entrenched.³⁸ Early justice system intervention also provides teen victims with potentially lifesaving information and connects them with essential services, such as safety planning, counseling, and other support.³⁹

Court Sees Only the Tip of the Iceberg

The court system does not see all of the domestic violence that is occurring; in fact, domestic violence is underreported.⁴⁰ In the sample year 2008, federal data suggests that only 49 percent of the intimate partner violence against females and 72 percent against males was reported to police.

³² Ctrs. for Disease Control & Prevention, *Frequently Asked Questions - Intimate Partner Violence in the United States - 2010*, <http://www.cdc.gov/violenceprevention/pdf/ipv-report-qas-external-final-02-25-14-a.pdf> (last visited Nov. 30, 2015).

³³ Ctrs. for Disease Control & Prevention, *Youth Risk Behavior Surveillance- United States, 2011*, available at <http://www.cdc.gov/MMWR/PDF/SS/SS6104.PDF>.

³⁴ U.S. Dep't of Justice, Bureau of Justice and Statistics, *Intimate Partner Violence in the United States, 1993-2004. Table D.* (2006) available at <http://www.bjs.gov/content/pub/pdf/ipvus.pdf>.

³⁵ Shannon Catalano et al., Bureau of Justice Statistics, *Female Victims of Violence*, NCJ 228356, U.S. Dep't of Justice, available at <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

³⁶ See *Varner v. Holley*, 854 A.2d 520 (Pa. Super. 2004).

³⁷ Paige Hall Smith et al., *A Longitudinal Perspective on Dating Violence Among Adolescent and College-Age Women*, 93 AM. J. PUB. HEALTH 1104 (2003); Am. Bar Ass'n, Nat'l Teen Dating Abuse Prevention Initiative, *Teen Dating Abuse Facts* (2006) (citing S.L. Feld & M.A. Strauss, *Escalation and Desistance of Wife Assault in Marriage*, 27 CRIMINOLOGY 141-161 (1989)).

³⁸ BRENDA UEKERT ET AL., U.S. DEP'T OF JUSTICE, *JUVENILE DOMESTIC AND FAMILY VIOLENCE: THE EFFECTS OF COURT-BASED INTERVENTION PROGRAMS ON RECIDIVISM*, NCJ 2166129 (Dec. 2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/216614.pdf>.

³⁹ *Id.*

⁴⁰ Matthew R. Durose et al., *Family Violence Statistics Including Statistics on Strangers and Acquaintances*, NCJ 207846 70-71(2005), Bureau of Justice Statistics, available at <http://www.bjs.gov/content/pub/pdf/fvs02.pdf>.

Although reporting rates appear to be improving,⁴¹ it would not be unusual for a PFA plaintiff to describe a violent incident that was not reported to police. In addition, the current incident may not be the most significant abuse that the victim experienced, but only the most recent, or the one where a neighbor or family member actually called police.⁴²

Underreporting is especially common for individuals in communities that have historically experienced biases such as racism and heterosexism. An African-American woman may be less likely to report her abuser or seek help because of discrimination, the potential for African-American men's discriminatory treatment, and negative stereotyping.⁴³ Immigrant victims face added fears of being deported, jeopardizing their immigration status, losing custody and access to their children and confronting the cultural ramifications of leaving an abusive spouse.⁴⁴ LGBTQ victims may fear that reporting will result in their being "outed," losing their jobs, housing or custody of children.

A key to ensuring fair access to justice for underrepresented victims is cultural competency. According to the American Judges Association:

Issues of culture arise frequently within the complex framework of domestic violence cases. Culture shapes an individual's response to domestic violence, a batterer's response to intervention and acceptance of responsibility, and access to other services that might be crucial for adult victims, children and perpetrators. Furthermore, the culture of the courtroom, a victim and a perpetrator will impact the consideration and outcome in a case. An understanding of the cultural context can help the court to shape appropriate access and responses that promote safety, accountability, and the fair administration of justice.⁴⁵

Separation Violence

For many victims of domestic violence, separation from their abusers is a very dangerous time. According to a 2012 report, "[s]eparated [vs. married or divorced] females experienced the highest

⁴¹ Klein, *Practical Applications*, *supra* note 92 at 5.

⁴² *Id.*

⁴³ Tricia B. Bent-Goodley, *A Black Experience-Based Approach to Gender-Based Violence*, 3 *SOCIAL WORK* 263 (2009).

⁴⁴ Leslye Orloff and Olivia Garcia, *DYNAMICS OF DOMESTIC VIOLENCE EXPERIENCED BY IMMIGRANT VICTIMS IN BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS*, 6 (2005), available at <http://niwaplibrary.wcl.american.edu/cultural-competency/dynamics-of-violence-against-immigrant-women/1.1-Dynamics-of-Domestic-Violence-in-Immigrant-Families-MANUAL-BB.pdf>.

⁴⁵ Am. Judges Ass'n Domestic Violence Committee, *Domestic Violence & The Courtroom Knowing The Issues... Understanding The Victim*, 2012, available at <http://aja.ncsc.dni.us/pdfs/domestic-violence-the-courtroom.pdf>. See also, Hon. Gail S. Tusan & Sharon Obialo, *Cultural Competence in the Courtroom*, *A Judges Insight*, 15 *GEORGIA BAR J.* (December 2009), available at <http://www.mobar.org/uploadedFiles/Home/Publications/Precedent/2010/Fall/Cultural%20Competence%20in%20the%20Courtroom%20A%20Judge%27s%20Insight.pdf>.

rate of intimate partner violence during the 18-year period” from 1993 to 2010.⁴⁶ The period during and immediately after separation may be the most dangerous time for a victim of domestic violence because the defendant fears losing control of his/her partner and their relationship.

DOMESTIC VIOLENCE IN THE COURTROOM

Common Attitudes and Conduct of Abusers

The ABA Judicial Checklist emphasizes the propensity of abusers to use physical, sexual, or psychological coercion to achieve and maintain power and control over family members.⁴⁷ These behaviors may occur only occasionally, but they can have the effect of keeping the abused partner in constant fear and subordination in hope of avoiding further acts of abuse.

The ABA Judicial Checklist identifies common attitudes and conduct of domestic violence perpetrators:

- consistent attempts to control alleged victim
- minimizing violence
- denying own behavior and blaming the victim or others
- intimidating the victim or others
- appearing presentable and even likeable in court but having a Dr. Jekyll-Mr. Hyde personality at home
- promising “it will never happen again”
- feeling inadequate once caught
- having low esteem
- being jealous and possessive
- using children to “spy” on the other parent
- abusing drugs or alcohol⁴⁸

⁴⁶ Shannan Catalano, Bureau of Justice Statistics, *Intimate Partner Violence, 1993-2010, appendix Table 9: Intimate partner violence against females, by marital status, 1993-2010*, 6 (2012), U.S. Dep’t of Justice, available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>.

⁴⁷ JUDICIAL CHECKLIST, *supra* note 9.

⁴⁸ JUDICIAL CHECKLIST, *supra* note 9.

Common Attitudes and Conduct of Victims

Just as abusers use tactics designed to maintain power and control over their partners, victims behave in ways that help them survive within the web of coercive measures the abuser creates.⁴⁹

Lack of economic resources to leave and remain independent, particularly when the victim has children, weighs against leaving.

The complexities of relationships between the abuser and the victim, including feelings of connection based on faith and love, often cause the victim to deny, minimize, or excuse the violence.⁵⁰ Emotional abuse inflicted by the abuser can lead to low self-esteem and self-blame for the violence.⁵¹ Victims may abuse alcohol or drugs as a method of self-medication to cope with the effects of the violence.⁵²

Many factors limit a victim's ability to leave an abusive relationship. Isolation from friends and family and control over access to resources severely restrict the victim's ability to learn about legal and other options for stopping the violence and/or leaving the relationship.⁵³ Lack of economic resources to become and remain independent from the abuser, particularly if the victim has children, is a key factor weighing against leaving.⁵⁴ Wanting to maintain attachment to the partner, the relationship, the family, the children, and the home also can be powerful influences to stay.⁵⁵ Victims may stay to avoid guilt about the potential consequences of seeking legal or criminal recourse against the abuser -- breaking up the family, separating the children from their father,

⁴⁹ Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence*, 37 CT. REV. 40 (2000). JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES*, 143-145 (1999).

⁵⁰ Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence*, 37 CT. REV. 41-42 (2000).

⁵¹ JUDICIAL CHECKLIST, *supra* note 9.

⁵² JUDICIAL CHECKLIST, *supra* note 9.

⁵³ JUDICIAL CHECKLIST, *supra* note 9.

⁵⁴ Eleanor Lyon, *Welfare and Domestic Violence Against Women: Lessons from Research*, VAWnet National Online Resource Center on Violence Against Women, http://vawnet.org/domestic-violence/print-document.php?doc_id=317&find_type=web_desc_NRCDV. See also, Barbara J. Hart, *Safety and Accountability: The Underpinnings of a Just Justice System*, 41, 45 (1998), available at <http://www.mincava.umn.edu/documents/safety/safety.pdf> (last visited December 20, 2013).

⁵⁵ Kathryn M. Bell and Amy E. Naugle, *Understanding Stay/Leave Decisions In Violent Relationships: A Behavior Analytic Approach*, BEHAVIOR AND SOCIAL ISSUES, 14, 21-45 (2005) available at <http://journals.uic.edu/ojs/index.php/bsi/article/view/119/151>. Among the many factors recognized, commitment to the relationship appears to be particularly salient for predicting a victim's decision to stay in the relationship. See also, Kate Paradine, *The Importance of Understanding Love and Other Feelings in Survivors' Experiences of Domestic Violence*, 37 CT. REV. 43-44 (2000).

causing the abuser to lose his job or go to prison.⁵⁶ Reluctance to subject the abuser to the perceived risk of discriminatory treatment by the criminal justice system may be a significant factor in the decision-making of women of color.⁵⁷

Fear of retaliation and further violence is of paramount concern to a victim considering ending an abusive relationship. Victims are in heightened danger at this time. The essence of domestic violence is power and control, and when a victim attempts to leave the relationship, the abuser intensifies his or her efforts to

maintain control of the victim.⁵⁸ Violence typically increases in frequency and severity, and can be lethal.⁵⁹

THE ROLE OF THE JUDGE IN ADDRESSING DOMESTIC VIOLENCE

The Goals of Judicial Intervention

According to the ABA, effective domestic violence case management will include the following goals for judicial intervention:

- stop the violence
- protect the abused party and children
- protect the safety of family members and the general public
- hold the perpetrator accountable for violence
- rehabilitate the perpetrator
- stop the emotional, financial, and physical abuse used to control and coerce victims and children
- provide restitution to the abused party

⁵⁶ Paradine, *id.*

⁵⁷ JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES, 37-40 (1999). WOMEN OF COLOR NETWORK, DOMESTIC VIOLENCE FACTSHEET, https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf citing, Nash, Shondrah Tarrezz, *Through Black Eyes: African American Women's Construction of Their Experiences With Intimate Male Partner Violence*. 11 VIOLENCE AGAINST WOMEN 1427 (2005).

⁵⁸ Shannan Catalano, Bureau of Justice Statistics, *Intimate Partner Violence in the U.S.: Victim Characteristics* (2007), available at <http://www.bjs.gov/content/pub/pdf/ipvus.pdf>. Martha A. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991); citing Barbara J. Hart, *Beyond the 'Duty to Warn': A Therapist's 'Duty to Protect' Battered Women and Children*, FEMINIST PERSPECTIVES ON WIFE ABUSE, (Kersti Yllo & Michele Bograd, eds., 1988).

⁵⁹ JUDICIAL CHECKLIST, *supra* note 9, Martha A. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991).

- convey to the general public that domestic violence is a crime and “not just a family matter”
- break the intergenerational cycle of violence⁶⁰

Judicial Management of PFA Cases

Pennsylvania's Protection From Abuse Act⁶¹ utilizes unique procedural and substantive protections with the overriding goal of promoting safety and preventing domestic violence.⁶² The Act requires courts to address domestic violence expeditiously, and includes ex parte proceedings as a tool. Because an increasing number of PFA litigants are self-represented judges who are assigned PFA cases as part of their caseload should develop a strong working knowledge of the Act and its requirements.

For more information about the PFA Act and its unique requirements, please see [Chapter III: The Protection From Abuse Act](#). For information about abuse evidence, see [Chapter II: Evidence](#). For information about the court's obligations with regard to firearms and other weapons, see [Chapter VI: Firearms](#). To gain additional understanding of the relief available under the PFA Act, see [Chapter IV: PFA and Custody](#), and [Chapter V: Child and Spousal Support](#).

Due Process under the PFA Act

One critical function of the trial court is to provide due process to litigants. Several Superior Court decisions emphasize the due process rights of litigants under the PFA Act. For example, in **Egelman v. Egelman**, the Superior Court made clear that the PFA Act was intended to provide expedited and ready access to the relief available under the Act.⁶³ Courts may not impose their own barriers to that relief, as the trial court had, by requiring the plaintiff to post bond prior to filing future PFA petitions, limiting hearings regarding the welfare of the child to the custody context only, and awarding attorney fees to the defendant.

The trial court is required to hold an evidentiary hearing in response to a PFA petition. In **Drew v. Drew**, the Superior Court reversed the trial court's decision to dismiss plaintiff's PFA petition and deny plaintiff a final hearing.⁶⁴ The trial court had dismissed the PFA temporary order on the basis of the plaintiff wife's ex parte testimony. She admitted that, although the police were called to the residence, she had failed to tell police, in her husband's presence, that her husband had choked her and had previously abused her. The Superior Court's reversal found that, even if the trial court

⁶⁰ JUDICIAL CHECKLIST, *supra* note 9.

⁶¹ 23 PA. C.S. § 6101 *et seq.*

⁶² Kelley v. Mueller, 861 A.2d 984, 993 (Pa. Super. 2004), *vacated*, 912 A.2d 202 (Pa. 2006). (The PFA Act is not meant to penalize past criminal conduct; rather the primary goal is to prevent physical and sexual abuse).

⁶³ Egelman v. Egelman, 728 A.2d 360 (Pa. Super. 1999).

⁶⁴ Drew v. Drew, 870 A.2d 377 (Pa. Super. 2005).

determined there was not enough abuse to warrant a temporary order, the PFA Act requires a final order hearing to be held.

In **Coda v. Coda** the Superior Court stated that litigants must be afforded the opportunity to present witnesses on their behalf.⁶⁵ It ruled that the trial court had abused its discretion by refusing to grant a continuance to hear from a subpoenaed witness whose testimony was competent and material to the outcome of the hearing. More recently, the Superior Court in **Leshko v. Leshko** delineated the requirements of a full hearing on the issues presented to the court.⁶⁶ Although the defendant, who was represented by counsel, had an opportunity to cross-examine the plaintiff, the court did not allow the defendant to testify on his own behalf. The Superior Court ruled that the trial court, in refusing to allow the defendant to testify, had committed an error of law when it entered an order without conducting a full and meaningful hearing.

Litigants increasingly represent themselves in domestic violence cases. These pro se litigants present special challenges to the court in its goal of providing access to justice and due process for litigants.

For more information about cases involving unrepresented litigants, please see [Chapter XI: Pro Se Process](#).

ROLE OF DOMESTIC VIOLENCE ADVOCATES

What is the Role of the Domestic Violence Advocate?

The term “domestic violence counselor/advocate” is defined by Pennsylvania’s PFA statute as “[a]n individual who is engaged in a domestic violence program, the primary purpose of which is the rendering of counseling or assistance to victims of domestic violence, who has undergone 40 hours of training.”⁶⁷ Domestic violence counselors/advocates are permitted by statute to accompany a party to “any legal proceeding or hearing” that is part of the PFA process.⁶⁸ Most courts appreciate, and even encourage, domestic violence advocates’ participation in the PFA process.

Statements made by a victim to a domestic violence advocate are privileged confidential communications.

Pennsylvania’s PFA statute supplies additional protections to victims who work with domestic violence advocates. As elucidated later in this chapter, the statute provides that statements made by

⁶⁵ Coda v. Coda, 666 A.2d 741 (Pa. Super. 1995).

⁶⁶ Leshko v. Leshko, 833 A.2d 790 (Pa. Super. 2003).

⁶⁷ 23 PA. C.S. § 6102(a). “Domestic Violence Program” is also defined in the statute as a nonprofit organization or program whose primary purpose is to provide services to domestic violence victims that include, but are not limited to, crisis hotline; safe homes or shelters; community education; counseling systems intervention and interface; transportation; information and referral; and victim assistance.

⁶⁸ 23 PA. C.S. § 6116.

a domestic violence victim to an advocate are privileged confidential communications, unless they are waived in a prior signed writing.⁶⁹

Safety Planning Requires a Victim-Centered Approach

Advocates assist domestic violence victims in critical thinking about the design and implementation of safety strategies. Effective safety plans are more than methods to avoid physical violence. They require a comprehensive understanding of the needs, resources, perspectives and culture of each victim.⁷⁰ As part of that process, the victim and advocate work together so that the victim's perspective and the advocate's knowledge, resources, and assistance are combined to enhance and inform the victim's safety strategies.⁷¹ This process should occur within a community response system that coordinates the work and resources of law enforcement, prosecutors, victim advocates, the courts and judiciary, and other governmental and community agencies.⁷²

Well-trained and knowledgeable advocates working within a coordinated system can be the key to ensuring that domestic violence victims remain free from violence.⁷³

In Pennsylvania, each county is served by a domestic violence program. Each program employs advocates who work with victims of domestic violence. The Pennsylvania Coalition Against Domestic Violence (PCADV) provides training and support to advocates and establishes standards by which the individual programs operate.

Hotline numbers for Pennsylvania's county-based domestic violence programs are available at the PCADV website: <http://www.pcadv.org/Find-Help>. The National Domestic Violence Hotline at 800-799-SAFE (7233) also provides referrals and information by phone or online at <http://www.thehotline.org>.

Advocate Communications and Shelter Locations Are Confidential and Protected

In Pennsylvania, confidentiality statutes protect information shared between domestic violence advocates and victims of domestic violence. Moreover, the Pennsylvania Superior Court has held

⁶⁹ 23 PA. C.S. § 6116. This section also provides that the privilege terminates upon death of the victim and that neither the victim nor the advocate waives the confidential communication privilege by reporting child abuse. The child abuse reporting provision is found at 23 PA. C.S. §§ 6311 (a) and (b).

⁷⁰ Jill Davies, *Advocacy Beyond Leaving: Helping Battered Women in Contact With Current or Former Partners*, Family Violence Prevention Fund 6 (2009).

⁷¹ *Id.* at 5.

⁷² NCJFCJ, *Family Violence: Improving Court Practice, Recommendations From the National Council of Juvenile and Family Court Judges' Family Violence Project*, 15 (1990), available at <http://www.ncjfcj.org/resource-library/publications/family-violence-improving-court-practice>.

⁷³ OFFICE ON VIOLENCE AGAINST WOMEN, 2010 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT, U.S. Dep't of Justice, 37 (2010), available at <http://www.justice.gov/sites/default/files/ovw/legacy/2011/08/31/2010-biennial-report-to-congress.pdf>.

that the domestic violence advocate privilege is absolute.⁷⁴ The domestic violence advocate confidentiality statute requires confidentiality of information “[u]nless the victim of domestic violence waives the privilege in a signed writing prior to testimony or disclosure.”⁷⁵ Domestic violence advocates must refuse to comply with attempts to force them to share confidential information obtained from a victim of domestic violence. The public policy behind the strong protections given to confidentiality between victim and domestic violence program advocate reflects the compelling need for open and honest communication and a secure mechanism to assist domestic violence victims in planning for their safety and protection.

Similarly, Pennsylvania law protects the address of the domestic violence program: at no point in the pleadings, proceedings, or hearings may a court require disclosure of the address of the domestic violence program.⁷⁶ Several federal laws also address the confidentiality of information shared between a domestic violence advocate and a victim of domestic violence, and others mandate that the addresses of domestic violence shelters be kept confidential.⁷⁷ Courts can help protect confidential information by ordering confidential addresses when the victim requests it, by excluding domestic violence filings and cases from Internet exposure, and by denying confidential information in the form of requests for discovery, subpoenas, and the like.

For more information about confidentiality and privilege, please see [Chapter II: Evidence](#), under “[Discovery](#).”

⁷⁴ 23 PA. C.S. § 6116; *V.B.T & C.E.T. v. Family Services of Western PA*, 705 A.2d 1325 (Pa. Super. 1998); see, PA. C.S. § 6102 for definitions of “domestic violence counselor/advocate” and “victim”; see also, 42 PA. C.S. § 5945.1 for confidential communications to sexual assault counselors, and 42 PA. C.S. § 5944 for confidential communications to psychiatrists or licensed psychologists.

⁷⁵ 23 PA. C.S. § 6116.

⁷⁶ 23 PA. C.S. § 6112.

⁷⁷ 42 U.S.C. 10402(a)(2)(E) (Family Violence Prevention and Services Act requires grant recipients to provide documentation that procedures have been developed and implemented to protect the confidentiality of records of any individual who receives family violence prevention or treatment services and to maintain the confidential address of the shelter facility). 42 U.S.C. 11375(c)(5) (Homeless Assistance, Emergency Shelter Grants also require grant recipients to maintain confidential records of any individual who receives family violence prevention or treatment services and to maintain the confidential address of the shelter facility). See also, 42 U.S.C. 13951 (Postal Service regulations maintaining the confidentiality of an abused person’s address); 42 U.S.C. 14014 (VAWA requires the Attorney General to conduct a study of how abusive spouses obtain confidential information about victims that the victim wishes to protect); 42 U.S.C. 10604(d) and (e) (VOCA prohibits Federal Government employees from revealing research or statistical information furnished under the VOCA chapter).

THE ROLE OF VICTIM ASSISTANCE PERSONNEL

Victim-Witness Programs

Victim-witness programs have been instituted in every Pennsylvania county to offer victims and witnesses services to help protect their safety, to inform victims about court processes, and to ensure the voices of victims are heard.⁷⁸ Victim-witness program advocates play an important and different role from domestic violence advocates. Victim-witness advocates, typically part of the prosecution staff, support victims, provide information, and explain criminal justice process and procedure. Victim-witness employees provide victims with the notice required of the prosecutor, provide information regarding a case's status, assist in completing victim impact statements, and accompany victims to proceedings. Victim-witness employees may also help the victim seek crime victim compensation and other resources.⁷⁹

Address Confidentiality Program

Victim-witness personnel also assist victims in accessing the protections provided by the Address Confidentiality Program, administered by Pennsylvania's Office of the Victim Advocate. This program, available to victims of stalking, sexual assault and domestic violence, provides eligible participants with a substitute address and a free, confidential mail-forwarding service.⁸⁰ Participation in the program requires the victim to move to a location unknown to the perpetrator.⁸¹

EMERGING PRACTICES - THE IMPACT OF JUDICIAL DEMEANOR

It takes "an act of supreme courage" for domestic violence victims to implore the legal system to address the violence and terrorism of abusers.⁸² Victims of domestic violence and abusers may be emotional, embarrassed, and afraid. The judge's demeanor and actions in the courtroom send powerful messages to domestic violence litigants. It is critical for both the abuser and the victim to see justice in action. Although cases involving domestic violence entail challenging work for judges,

⁷⁸ To locate a victim witness office through the Pennsylvania Office of the Victim Advocate, visit <http://www.ova.pa.gov/Services/Resources/LocateaVictimServiceAgency/Pages/default.aspx> and select a county.

⁷⁹ For more information about victim witness programs and victim rights, please see [Chapter VIII: Domestic Violence Crimes](#).

⁸⁰ Victims may also enroll in the ACP through the [local community-based domestic violence program](#).

⁸¹ This program was authorized by the Domestic and Sexual Violence Victim Address Confidentiality Act, 23 PA. C.S. § 6701 et. seq. For information about the administration of the Address Confidentiality Program, contact the Office of the Victim Advocate at 1-800-563-6399 or visit <http://www.paacp.pa.gov/>. Information for victims interested in accessing this program is found in the [PFA Information Sheet](#), in [Chapter XI: Pro Se Process](#).

⁸² Barbara J. Hart, *Safety and Accountability: The Underpinnings of a Just Justice System* (1998), available at <http://www.mincava.umn.edu/documents/safety/safety.pdf>.

taking an interest in each case and maintaining a respectful and serious demeanor are vital acts for judges to undertake.

It is essential for the court to address the abuser seriously and to indicate that society does not condone or accept the abuser's violent behavior. The court's demeanor can have a profound impact on the abuser by treating the abuser's behavior as insignificant, thereby subtly condoning it, or by treating the abuse as a grave issue meriting the court's time and attention.⁸³

It is also crucial for courts to understand that, for many victims, leaving a violent home is a process, not a single act. The goal of a safe separation is rarely achieved on the first try. Studies show that most victims do eventually achieve separation from their abusers.⁸⁴

Accessing the court is a significant, but not the sole, aspect of a victim's quest for safety. Sometimes the victim returns to the abuser after seeking help from the justice system to stop the violence. For many victims, it is not realistic or even beneficial to break all ties made during a relationship, especially if the victim has children with a former partner.⁸⁵ It is important for judges and court system employees to know their valuable role in maintaining access to justice for those domestic violence litigants who seek it on more than one occasion.

If a domestic violence victim returns again to seek the protections provided by the PFA Act, it is a positive reflection on the court and court employees. Victims will return for help with recurring abuse when court personnel are sincere and helpful. If court employees, through their demeanor, indicate that the victim's solicitation is unwelcome, or that a victim's previous withdrawal of a PFA order has precluded the victim from seeking further help, access to justice has been effectively denied.

EMERGING PRACTICES - EFFECTIVE COURT ORDERS

Effective court orders take into account the particulars of the victim's situation and the likelihood that the abuser will try to find ways to maintain some level of control, either directly or through the children. As a basic requirement, all court orders, whether issued in criminal proceedings, in actions for custody, or in PFA proceedings, should be clear and precise in their terms.⁸⁶ Orders that are clearly written and specific are easier to understand by the parties and by those who may be called upon to enforce them. Vaguely written orders that are open to interpretation by the parties leave

⁸³ Andrew Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* 59 (2009) available at <http://www.nij.gov/topics/crime/intimate-partnerviolence/practical-implications-research/pages/welcome.aspx>.

⁸⁴ Klein, *id.* at 24.

⁸⁵ Jill Davies, *Advocacy Beyond Leaving: Helping Battered Women in Contact With Current or Former Partners*, Family Violence Prevention Fund 4 (2009).

⁸⁶ See generally, Andrea Farney & Roberta Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law Into Family Court Practice*, 54 JUV. & FAM. CT. J. 35, 43-45 (2003). JUDICIAL CHECKLIST, *supra* note 9.

the door open for the abuser to manipulate the victim and decrease the court's ability to sanction violations of the order.⁸⁷

PFA Orders

Court orders issued in PFA and family law proceedings should be comprehensive and detailed and include all the available relief that is warranted.⁸⁸ For PFAs, the ABA Judicial Checklist recommends that judges order all relief necessary to stop the violence; protect the abused party and the children; stop emotional, financial, and physical abuse used to control and coerce the abused party and the children; and provide restitution to the abused party.⁸⁹ The checklist also emphasizes that timely enforcement of PFAs is essential to ensure victim safety and due process.⁹⁰

For more information about the PFA law, procedure, and cases, please see [Chapter III, The Protection From Abuse Act](#). Regarding enforcement of PFA orders, please see [Chapter X: Enforcement](#).

Custody and Visitation Orders

The need for detailed orders is equally critical in custody and visitation cases.⁹¹ The ABA Judicial Checklist highlights the importance of structuring the time, method, and manner of visitation, stressing that judges should not order visitation as "reasonable" or "mutually agreeable" because law enforcement and courts will be unable to enforce such a ruling.⁹² As noted above, such ambiguous terms offer abusers an easy opening to coercion and harassment of the victim.⁹³

In issuing child custody and visitation orders in the context of domestic violence, the court has discretion to consider:

- prohibiting contact between the parties except as specifically provided in the order
- ordering sole custody to the non-abusive parent until the abuser completes court-ordered programs

⁸⁷ Farney & Valente, *id.* at 43-45; JUDICIAL CHECKLIST, *supra* note 9.

⁸⁸ Andrea Farney & Roberta Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law Into Family Court Practice*, 54 JUV. & FAM. CT. J. 35, 43-45 (2003). JUDICIAL CHECKLIST, *supra* note 9.

⁸⁹ JUDICIAL CHECKLIST, *supra* note 9.

⁹⁰ *Id.*

⁹¹ NCJFCJ, *Family Violence: Improving Court Practice, Recommendations From the National Council of Juvenile and Family Court Judges' Family Violence Project*, 22-26 (1990), available at <http://www.ncjfcj.org/resource-library/publications/familyviolence-improving-court-practice>.

⁹² JUDICIAL CHECKLIST, *supra* note 9.

⁹³ Andrea Farney & Roberta Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law Into Family Court Practice*, 54 JUV. & FAM. CT. J. 35, 41-44 (2003); ABA CENTER FOR CHILDREN & THE LAW, A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 99-102, 115 (2001).

- requiring the abusive parent to have only supervised visitation with the children
- limiting children's overnight visitation with the abusive parent
- prohibiting the use of alcohol and drugs in the presence of the child or prior to the visit

It is also imperative that judges consider domestic violence when determining the "best interests of the child."⁹⁴

The ABA Judicial Checklist also advises against, – and the Pennsylvania Rules of Civil Procedure prohibit – requiring mediation when one of the parents is the victim of the other's abuse.⁹⁵

Mediation not only puts the victim at a disadvantage because the balance of power lies with the abuser; it also can be dangerous for the victim and the children because the process increases the risk of retaliation by the abuser. For similar reasons, requiring couples therapy also is not recommended.⁹⁶

For more information about domestic violence issues in custody cases, please see [Chapter VII: Custody](#). For information about custody relief in PFA cases, please see [Chapter IV: PFA and Custody](#).

Criminal Proceedings

In criminal proceedings, judges have effective tools available in pretrial orders and in sentencing to restrict the defendant's access to the victim. Conditions of bail can include specific no-contact/stay away orders, and judges may consider requiring monetary bonds, electronic monitoring, house arrest, or release to an agency that will monitor the defendant and advise the victim of the defendant's release.⁹⁷ Sentencing orders can include incarceration, restitution, fines, monitored probation with specific conditions, abuser intervention programs, drug and alcohol treatment, and no contact with the victim or the children.⁹⁸ When the defendant violates bail conditions, judges should revoke bail.⁹⁹

For more information about promoting safety in criminal cases, please see [Chapter VIII: Domestic Violence Crimes](#) and [Chapter IX: Stalking](#).

EMERGING PRACTICES - COURT PROCESSES AND SERVICES

Ensuring safety in the courthouse is critical to prioritizing victims' safety.¹⁰⁰ Examples of safety measures that courts can implement include screening all people entering the courthouse through

⁹⁴ JUDICIAL CHECKLIST, *supra* note 9. Pennsylvania custody law also contains the requirement that domestic violence be considered by the court in entering custody orders. See 23 PA. C.S. § 5303(a)(3).

⁹⁵ See PA. R. CIV. P. § 1940.3(b).

⁹⁶ JUDICIAL CHECKLIST, *supra* note 9.

⁹⁷ *Id.*

⁹⁸ JUDICIAL CHECKLIST, *supra* note 9.

⁹⁹ See 18 PA. C.S. § 2711(c) Probable cause arrests in domestic violence cases.

¹⁰⁰ *Id.*

metal detectors; providing separate space for victims to wait for hearings; providing security if victims and abusers must wait in the same area; providing courtroom security for hearings in which both the abuser and victim appear; accompanying victims to the car after hearings; and requiring the abuser to remain until the victim can leave the premises.

A recent Pennsylvania Commonwealth Court decision, ***Minich v. County of Jefferson***, held that an ordinance prohibiting firearms in the courthouse is not an impermissible regulation of firearms in violation of 18 Pa. C.S. § 6120. "Inasmuch as the first-floor hallway is a 'court facility,' state criminal law prohibits the possession of a firearm in that hallway."¹⁰¹ The Commonwealth Court interpreted 18 Pa. C.S. § 913, which prohibits possession of a firearm in a court facility.

EMERGING PRACTICES - CONNECTING WITH RESOURCES

A major barrier for many domestic violence victims who want to leave the abuser is a lack of financial resources to live on their own. Victims often need assistance in securing economic and other resources necessary for leading an independent life.¹⁰² These resources might include housing, employment, health care, job skills, life skills, counseling for themselves and their children, and legal assistance to obtain child support, custody, marital property, dissolution of the marriage, and other appropriate and available relief.

Domestic violence advocates assist victims in connecting with resources. The objective of domestic violence advocates' practice is justice and safety for domestic violence victims. For domestic violence victims who may need help navigating the justice system, domestic violence advocates

¹⁰¹ *Minich v. County of Jefferson*, 869 A.2d 1141, 2005 Pa. Commw. LEXIS 104 (2005).

¹⁰² JUDICIAL CHECKLIST, *supra* note 9.

provide outreach;¹⁰³ options counseling and implementation;¹⁰⁴ case preparation;¹⁰⁵ court accompaniment;¹⁰⁶ resource brokering;¹⁰⁷ and safety planning.

Victim-witness or victim service advocates also assist domestic violence crime victims and certain PFA litigants who file and receive a PFA order¹⁰⁸ to receive financial restitution from the Victims Compensation Assistance Program. The Victims Compensation Assistance Program award may cover medical expenses, counseling, loss of earnings, loss of support, stolen benefit cash, relocation expenses, funeral expenses, and crime scene cleanup.¹⁰⁹

Legal assistance is also a key resource for many domestic violence victims. When a victim attempts to use the civil justice system to obtain relief, the abuser may try to convert that system into another tool to maintain control over the victim and to cause further abuse. Without competent legal representation to pursue relief that is their right, or to defend against pre-emptive actions filed by the abuser, many victims forfeit their rights, settle for less relief than the law allows, or give up the struggle to live in safety and freedom from the abuser's control. Judges should encourage lawyers to provide assistance to domestic violence litigants. For example, in some counties, judges strongly

¹⁰³ Because many victims do not know about domestic violence program services, domestic violence advocates engage in outreach activities. Outreach activities inform and educate victims and the community about domestic violence, available services, legal options, and community resources.

¹⁰⁴ Domestic violence advocates inform domestic violence victims of the array of legal options available to them and the procedures necessary for exercising these options. Domestic violence advocates provide information about legal process but do not provide legal advice. For individuals seeking legal advice, domestic violence advocates refer individuals to the prosecutor, legal services attorneys, or to the private bar, and assist victims in accessing available services from these individuals.

¹⁰⁵ Domestic violence advocates assist victims in gathering information to provide justice system personnel with a detailed chronology of events and circumstances. Domestic violence advocates may assist victims in identifying and securing corroborative evidence, potential witnesses, documents, and so on.

¹⁰⁶ Because court appearances may be dangerous and frightening experiences for domestic violence victims, domestic violence advocates accompany victims to court. In so doing, advocates provide emotional support to the victim, enhance victim safety, and provide back-up consultation to justice system personnel when necessary.

¹⁰⁷ The relief authorized by the PFA Act must be supplemented with community resources to fully meet the economic and support requirements of domestic violence victims. Good advocacy, according to domestic violence programs, is tailored to each individual victim of domestic violence. As such, advocacy will include the brokering of resources, such as assisting a victim in securing housing, healthcare, transportation, job training, legal services, and financial assistance.

¹⁰⁸ For eligibility, a crime victim must report the crime to the proper authorities, or a PFA order must be filed, within 72 hours of the crime (unless good cause is shown, or the victim is a minor and meets certain criteria). See PENNSYLVANIA COMMISSION ON CRIME AND DELINQUENCY, MANUAL FOR COMPENSATION ASSISTANCE [hereinafter COMPENSATION MANUAL] available at <http://www.pccd.pa.gov/Victim-Services/Documents/2014%20VCAP%20MANUAL%20Final.pdf>. See also, 18 P.S. § 11.707(a.1).

¹⁰⁹ See COMPENSATION MANUAL *id.* See also, Chapter VIII: Domestic Violence Crimes, Appendix A, [Crime Victims Act](#), 18 P.S. § 11.103.

encourage members of the local bar association to provide pro bono legal services for PFA and custody cases.

EMERGING PRACTICES - THE JUDGE AS COMMUNITY LEADER

Judges can be leaders in addressing domestic violence in the communities they serve. The great respect accorded judges helps them bring together the many and varied groups necessary to address the community crisis of domestic violence. Many judges have helped form or chair domestic violence task forces.¹¹⁰ The National Council of Juvenile and Family Court Judges (NCJFCJ) recommends that judges provide leadership in their courts and communities to ensure that domestic violence cases are effectively managed:

Judges have a mandate to assert leadership to ensure that their courts respond swiftly and fairly to victims of family violence. Judicial leadership should begin by examining and changing where necessary the practices of the court system itself. However, it should also involve all of the major systems within the community in order to develop a comprehensive, coordinated approach to the complex social, legal, health, safety, and behavior issues associated with family violence.¹¹¹

A judge's participation in a domestic violence task force is consistent with judicial ethics. Judges are permitted to engage in activities to improve the law, the legal system, and the administration of justice.¹¹²

For a domestic violence task force to be effective, the task force should involve a broad group of stakeholders representing varying interests in the community. In addition to law enforcement, prosecutors, domestic violence advocates, probation, and victim-witness specialists, the task force should include representatives from children and youth services, the public defender's office, the defense bar, and batterer's intervention programs. Having a broad constituency for the task force insulates the court from a claim that the court's participation connotes bias – in addition to providing a richer and more balanced program.¹¹³

¹¹⁰ See, e.g., Leonard Edwards, *Reducing Family Violence: The Role of the Family Violence Council*, 43 Juv. & Fam. Ct. J. 1 (1992).

¹¹¹ NCJFCJ, *Family Violence: Improving Court Practice, Recommendations From the National Council of Juvenile and Family Court Judges' Family Violence Project*, 15 (1990), available at <http://www.ncjfcj.org/resource-library/publications/familyviolence-improving-court-practice>.

¹¹² PA. CODE OF JUDICIAL CONDUCT, CANON 3.2(D).

¹¹³ NCJFCJ, *Family Violence: Improving Court Practice, Recommendations From the National Council of Juvenile and Family Court Judges' Family Violence Project*, 7 (1990), available at <http://www.ncjfcj.org/resource-library/publications/familyviolence-improving-court-practice>.

As a community leader, judges want also to be certain that the courts provide adequate access to justice, court security, compliance with legal requirements, and a court system that suitably responds to the needs of a diverse citizenry, including minority and immigrant populations.¹¹⁴

EMERGING PRACTICES - LETHALITY ASSESSMENT PROGRAM (LAP)

The victim, who knows the abuser best, is typically the optimal predictor of an abuser's dangerousness. The victim is aware of the threat behind a look, gesture, or statement that may seem innocuous to someone outside the relationship. In addition, extensive research has identified several factors indicating heightened risk of homicide by an intimate partner.¹¹⁵ That research led to the development of the Lethality Assessment, a screening tool used to identify the level of danger a victim has of being killed by an intimate partner. Using that information, the Lethality Assessment Program (LAP) promotes an innovative partnership between domestic violence programs and law enforcement agencies. By setting up a routine practice of communication, collaboration, and cooperation, LAP provides effective lifesaving services for victims at high risk of being killed.

LAP was initially developed by a team of researchers working with the Maryland Network Against Domestic Violence, and is now being implemented throughout Pennsylvania and the United States. The fundamental goals of LAP are to reduce the occurrence of domestic violence-related fatalities and enhance the safety of victims and their children, law enforcement, and communities.

LAP is a partnership between law enforcement officers and domestic violence advocates that assesses victims for risk of being killed- then connecting them with services. LAP trains officers responding to a domestic violence call to ask brief screening questions to identify lethality risk factors. Officers at the scene immediately connect high-risk victims with the local domestic violence hotline. The hotline worker creates a safety plan with the victim and urges the victim to come to the program for services.

PCADV began implementing LAP in Pennsylvania in 2012 with 12 pilot sites - 12 counties, 12 domestic violence programs and 19 law enforcement agencies. As of November 2015, LAP has been implemented in 38 counties and 161 jurisdictions.

¹¹⁴ *Id.* at 15-16. See generally, Gail Pendleton, *Ensuring Fairness and Justice For Non-Citizen Survivors of Domestic Violence*, 54 JUV. & FAM. CT. J. 69 (2003); and Richard Wright & Judge Wadie Thomas Jr., *Disproportionate Representation: Communities of Color in the Domestic Violence, Juvenile Justice and Child Welfare Systems*, 54 JUV. & FAM. CT. J. 87 (2003).

¹¹⁵ Jacqueline Campbell, et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 TRAUMA VIOLENCE ABUSE 243 (2007). Jacqueline Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. PUBLIC HEALTH, 1089 (2003).

SUMMARY

Domestic violence is a pattern of assault and controlling behaviors, including physical, sexual, and psychological attacks and economic deprivation and coercion. Research and clinical experiences show that domestic violence occurs among all socioeconomic, racial, cultural, and religious groups. The majority of perpetrators are men and the majority of victims are women.

Common attitudes and conduct of domestic violence perpetrators include persistent attempts to control the victim, minimizing and denying the violence, and blaming the victim or others for the behavior, presenting a likeable image to the court, and using the children to manipulate and control the victim.

Judges and court personnel play critical roles in helping victims escape the violence imposed by abusers. Judges can use the court's power to hold abusers accountable by issuing and enforcing orders that thwart the power and control tactics of the abuser and maximize the victim's opportunities for safety and autonomy. Courts and judges can facilitate access to remedies available under the law by making the courthouse safe for victims and linking them to services. Collaborations among justice system partners and community-based agencies can lead to the most effective strategies for stopping domestic violence.

APPENDIX

Pennsylvania Domestic Violence Resources

Pennsylvania Coalition Against Domestic Violence

3605 Vartan Way, Suite 101

Harrisburg PA 17110

Office: (717) 545-6400

Office: (800) 932-4632

Fax: (717) 671-8149

Legal: 888-23-LEGAL

www.pcadv.org

HOTLINES:

<http://www.pcadv.org/Find-Help>

The Pennsylvania Coalition Against Domestic Violence website lists hotlines and program information for county-based programs in Pennsylvania

1-800-799-SAFE (7233)

National Domestic Violence Hotline

CHAPTER II: EVIDENCE

TABLE OF CONTENTS

CHAPTER GOALS.....	6
DISCOVERY	6
No Discovery in Protection From Abuse Cases.....	6
Domestic Violence Advocate Communications Not Discoverable	6
Address Confidentiality	6
RULES OF EVIDENCE	7
JUDICIAL NOTICE.....	7
Custody Actions - Evidence of Prior Crimes	7
RELEVANCE	8
Pennsylvania Rules of Evidence - Rule 401 - Definition of Relevant Evidence	8
Relevance - General Rule.....	8
Evidence of Abuse Relevant Despite Lapse in Time	8
Abuse occurring three years earlier	8
Abuse occurring 17 months earlier	8
Relevance and Prior Abuse	9
Prior abuse as motive	9
Prior abuse showing accident unlikely.....	10
Prior abuse explaining the <i>res gestae</i> of the case	10
Pattern of abuse showing natural development of the case.....	11
Prior abuse indicating malice, sequence of events.....	11
Prior abuse demonstrating nature of the relationship.....	12
Prior abuse to establish family environment	12
Evidence of abuse admissible to show reason for delay in reporting assault.....	12
Error for court to bar testimony re: past abuse that led to PFA consent order	13
Prior abuse in PFA cases	13

WITNESS COMPETENCY	14
General Rule - Pennsylvania Rule of Evidence 601(a).....	14
Incompetency - Immaturity	14
Factual Analysis for Incompetency - Immaturity	14
"Taint" in Child Sexual Abuse Allegations	15
Burden of proof is on the defendant.....	15
When is taint appropriately raised?.....	16
SPOUSAL COMMUNICATIONS	16
General Rule - Civil and Criminal.....	16
Criminal - Privileged Confidential Spousal Communications	17
Communication must be made in confidence.....	17
Where spousal communication creates or furthers disharmony.....	17
Criminal Privilege Against Adverse Spousal Testimony.....	18
"Act of Violence" exception.....	18
Adverse Testimony and Confidential Communications Privileges	19
Subpoenaed Spousal Testimony	19
Spousal Communications in Civil Cases	20
Confidential communications between spouses	20
Spouses as witnesses	20
Child abuse cases	20
CONTENTS OF WRITINGS, RECORDINGS - BEST EVIDENCE	21
HEARSAY	21
Hearsay Defined	21
Hearsay Exceptions	21
Hearsay Exceptions Case Law	22
Prior inconsistent statements, victim available for cross examination	22
Present sense impression - 911 tapes	23
Police reports as business records	24
CONFRONTATION: ADMISSIBILITY OF HEARSAY STATEMENTS BY AN UNAVAILABLE WITNESS.....	24

Confrontation Defined.....	25
United States Constitution.....	25
Pennsylvania Constitution	25
Confrontation and Hearsay.....	25
Purpose of confrontation and hearsay.....	25
Objecting to Out-of-Court Statements: Hearsay and Confrontation.....	26
The Confrontation Clause Applies Only in Criminal Cases.....	26
Criminal cases	26
Unavailable witness	27
No prior opportunity to cross examine.....	27
Prior opportunity cases – Preliminary Hearing	28
Statements by an Unavailable Witness Admissible Without Confrontation	29
Testimonial statements	30
Objective, primary purpose test.....	30
Some hearsay statements admissible pursuant to primary purpose test.....	31
Excited utterances	31
Statements for the Purpose of Medical Treatment.....	32
Reports - forensic reporting	33
Reports - machine-generated reports.....	34
Medical reports.....	34
Records	35
Child Witness Statements	35
Tender Years exception	35
Child testimony via contemporaneous alternative method.....	36
Child statements to social workers.....	36
Child statements to medical personnel	38
Testimonial Statements Admissible in Certain Situations	38
Prior opportunity to cross-examine	38
Statements offered to prove something other than the truth.....	38
Forfeiture by wrongdoing	39
Tape-recorded testimony and video-conferencing	40
Present sense impression – victim call to mother	41
CHILD HEARSAY STATEMENTS	42
Child Victim and Witness Act.....	42
Out of court statement.....	42
Determination regarding child’s unavailability.....	42
Who may be present	43
Notice of statement to defendant	43

Other Child Hearsay Exceptions	43
AUTHENTICATION OF EVIDENCE	44
General Rule - Pennsylvania Rule of Evidence 901(a).....	44
Electronic Communications and Authentication of Evidence	45
Instant messages.....	45
Text messages.....	45
Email Messages.....	46
EXPERTS AND SCIENTIFIC EVIDENCE.....	46
Generally	46
Pennsylvania Requirements for Expert Testimony and Scientific Evidence	46
Pennsylvania Rules of Evidence	46
Frye test used for admissibility of scientific evidence	47
Experts may rely on information outside of the record	48
EVIDENCE ISSUES IN SPECIFIC CIVIL PROCEEDINGS.....	48
Protection From Abuse	48
Custody.....	50
JUDGES MAY QUESTION WITNESSES	50
Generally	50
The Pennsylvania Rules of Evidence.....	50
Cases Regarding Witness Examination by Court	51
Criminal cases	51
Civil cases	51
OTHER RELEVANT INFORMATION	52
Link Between Emotional Abuse and Physical Violence	52
Battering Tends to be a Pattern of Violence.....	52
Separation Assault - Danger Increases At Separation	52
Domestic Violence is Relevant to Parental Fitness	53

EMERGING PRACTICES - RELEVANCE OF PRIOR ABUSE.....	53
EMERGING PRACTICES - THE USE OF EXPERT TESTIMONY.....	54
EMERGING PRACTICES - BATTERED WOMAN’S SYNDROME	55
EMERGING PRACTICES - UNDERSTANDING RELUCTANT/UNWILLING VICTIMS.....	56
EMERGING PRACTICES: SOCIAL MEDIA IN DOMESTIC VIOLENCE PROSECUTIONS... 	57
Social Media and Domestic Violence.....	57
Fraudulent Social Media Evidence	59
PFA Cases and Social Media Evidence	60
Discovery of Social Media	60
Preserving Social Media Evidence.....	61
Admission of Social Networking Evidence.....	62
Authentication of Social Media Evidence in Criminal Cases	62
Hearsay.....	63
APPENDIX	65
Child victim/witness hearsay statements in various proceedings	65

CHAPTER GOALS

Domestic violence cases present unique discovery and evidence issues. Judges who read this chapter will learn about the limits on discovery, including the absolute privilege accorded communications between domestic violence victims and advocates, and the confidentiality of domestic violence shelter locations.

This chapter also reviews cases discussing the relevance of prior instances of abuse and hearsay issues, and special procedures used when children are victims or witnesses.

Relevant information is provided regarding domestic violence as a pattern and the increased danger of violence at separation. Guidance is given addressing expert testimony and reluctant witnesses. Practical tools are included.

DISCOVERY

No Discovery in Protection From Abuse Cases

Although discovery is permitted in some family law matters, Pennsylvania Rules of Court prohibit discovery in Protection From Abuse (PFA) proceedings, unless authorized by court order.¹

Domestic Violence Advocate Communications Not Discoverable

Communications between a victim and a domestic violence program advocate are legally privileged and not subject to discovery or disclosure.² A similar privilege applies to communications between a victim and a sexual assault counselor.³

Address Confidentiality

In an attempt to preserve safety, a victim may wish to keep his or her current location a secret. In response to victim safety concerns, Pennsylvania's Legislature enacted address confidentiality provisions as part of the PFA Act. Section 6112 of the PFA Act provides that, upon receiving plaintiff's request for nondisclosure of his or her telephone number and whereabouts, and upon concluding that the defendant poses a threat of continued danger to the plaintiff, the court shall direct law enforcement, human service agencies, and school districts not to disclose the presence of the plaintiff or child in the jurisdiction or school district. Section 6112 also provides for

¹ PA. R. CIV. P. 1930.5(a).

² 23 PA. C.S. § 6116; *see also* V.B.T. v. Family Services of Western PA, 705 A.2d 1325 (Pa. Super. 1998), *aff'd*, 728 A.2d 953 (Pa. 1999) (domestic violence counselor privilege absolute). The privilege also extends to co-participants who are present during counseling and advocacy. 23 PA. C.S. § 6116.

³ 42 PA. C.S. § 5945.1; *see also* Commw. v. Wilson, 602 A.2d 1290 (Pa. Super. 1992).

confidentiality of domestic violence programs and shelters: “[t]he court shall in no event direct disclosure of the address of a domestic violence program.”⁴

RULES OF EVIDENCE

The Pennsylvania Rules of Evidence apply in both civil and criminal cases. There may be specific statutory requirements for certain types of evidence, e.g., spousal privilege, that are different in civil and criminal matters.

JUDICIAL NOTICE

A court may take judicial notice of adjudicative facts that are not subject to reasonable dispute because the fact is either (1) generally known within the territorial jurisdiction of the trial court, ; or, (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.⁵

In general, judicial notice of the records of another case usually cannot be taken in a current case, even if the court is aware of the other case. For instance, in [*Styers v. Bedford Grange Mutual Insurance Company*](#), the plaintiff sued the insurance company for breach of an insurance contract.⁶ The trial court took judicial notice of criminal charges and a nolo contendere plea against one of the plaintiffs and relied on this information to sustain preliminary objections filed by the defendant. The Superior Court reversed the trial court’s determination finding that, while it is appropriate for a court to take judicial notice of a fact that the parties have admitted to or that is incorporated into a complaint by reference to another action, the information regarding the criminal charges and nolo plea were not included in the pleadings before the court. Therefore, the court dismissed the plaintiff’s complaint in error.

Custody Actions – Evidence of Prior Crimes

Trial courts are required to provide for an evaluation of any custody litigant convicted of certain crimes prior to awarding any form of custody to ensure that the offending party does not pose a threat to the child.⁷ Similarly, when a party to a custody action has been charged with certain crimes, the court must consider whether the person who has been charged poses a risk of physical, emotional or psychological harm to the child.⁸ [Refer to Chapter VII: Custody, Section G. Mandatory Consideration of Criminal Convictions and Pending Charges.](#)

⁴ 23 PA. C.S. § 6112.

⁵ PA. R. EVID. 201.

⁶ [Styers v. Bedford Grange Mutual Insurance Company, 900 A.2d 895 \(Pa. Super. 2006\).](#)

⁷ 23 PA. C.S. § 5329(a).

⁸ 23 PA. C.S. § 5330(b).

It would not be acceptable for the court to obtain criminal docket sheet information as an official judicial notice of the results of that check.⁹

RELEVANCE

Pennsylvania Rules of Evidence – Rule 401 – Definition of Relevant Evidence

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹⁰

Relevance – General Rule

All relevant evidence is admissible, except as otherwise provided by law.¹¹ However, there are limitations to admissibility of relevant evidence – “although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹²

Evidence of Abuse Relevant Despite Lapse in Time

Abuse occurring three years earlier

PFA orders granted within three years prior to a murder are relevant and admissible. In ***Commonwealth v. Drumheller***, a capital murder case arising from the stabbing murder of a defendant’s former girlfriend, the Pennsylvania Supreme Court held that evidence of three PFA orders in the 34 months prior to the murder was relevant and admissible.¹³

Abuse occurring 17 months earlier

Abuse occurring 17 months prior to the victim’s death is relevant and admissible. In ***Commonwealth v. Ulatoski***, the trial court admitted three witnesses’ testimony regarding bruises

⁹ According to the disclaimer on Pennsylvania’s Unified Judicial System web portal site, “Neither the courts of the Unified Judicial System of the Commonwealth of Pennsylvania nor the Administrative Office of Pennsylvania Courts assumes any liability for inaccurate or delayed data, errors or omissions on these docket sheets. *Docket sheet information should not be used in place of a criminal history background check, which can only be provided by the Pennsylvania State Police.*” Pa. Unified Judicial Webportal, Common Pleas Court Docket Sheets, <http://ujportal.pacourts.us/DocketSheets/CP.aspx>.

¹⁰ PA. R. EVID. 401.

¹¹ PA. R. EVID. 402.

¹² PA. R. EVID. 403.

¹³ ***Commw. v. Drumheller***, 808 A.2d 893 (Pa. 2002).

they had observed on the victim (wife) as long as 17 months before her death.¹⁴ The district attorney introduced the evidence of defendant's prior acts to show that the death of the victim (wife) was more likely intentional than accidental. The defendant argued that the evidence of bruising was too remote in time. The Pennsylvania Supreme Court rejected defendant's argument, concluding that while some testimony may involve events so remote from the date of the crime that it has no probative value, "no rigid rule can be formulated for determining when such evidence is no longer relevant."¹⁵

In so holding, the Supreme Court referred to its earlier decision in [*Commonwealth v. Petrakovich*](#), where the Court held "it is generally true that remoteness of the prior instances of hostility and strained relations affects the weight of that evidence, but not its admissibility."¹⁶

Relevance and Prior Abuse

The Pennsylvania Rule of Evidence Rule 404(b) also is at issue in domestic violence cases. This rule addresses character evidence. Generally, under 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity with the previous bad acts. However, evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.¹⁷

Prior abuse as motive

Prior criminal charges against the defendant that were dropped at the victim's request are admissible. In [*Commonwealth v. Reid*](#), while charges of sexually assaulting his 14-year-old stepdaughter were pending against him, defendant killed his estranged wife and the 14-year-old stepdaughter.¹⁸ As a result of earlier incidents of defendant's spousal abuse, criminal charges had previously been filed against defendant for terroristic threats, assault, and harassment; these charges had been dropped at defendant's (wife's) request. Evidence regarding these earlier dropped charges was admitted during the murder trial; on appeal, defendant claimed this admission was erroneous.

The remoteness of prior instances of abuse affects the weight of the evidence, but not its admissibility.

¹⁴ [*Commw. v. Ulatoski*, 371 A.2d 186 \(Pa. 1976\)](#).

¹⁵ *Id.* at 191.

¹⁶ [*Commw. v. Petrakovich*, 329 A.2d 844, 850 \(Pa. 1974\)](#).

¹⁷ PA. R. EVID. 404(b)(2).

¹⁸ [*Commw. v. Reid*, 811 A.2d 530 \(Pa. 2002\)](#), *cert. denied*, *Reid v. Pennsylvania*, 540 U.S. 850 (2003).

Observing that a trial court may exclude relevant evidence if its prejudicial impact outweighs the probative value, the Supreme Court nonetheless upheld the trial court's admission into evidence of the assault, terroristic threats, and harassment charges, which were filed and withdrawn. This evidence was relevant to defendant's motive for killing the victims because they refused to withdraw the sexual assault charges.¹⁹

Prior abuse showing accident unlikely

The trial court admitted the defendant's prior act of murdering his first wife under circumstances extremely similar to the death of his second wife; in [*Commonwealth v. Boczkowski*](#), both the Pennsylvania Superior Court and Supreme Court sustained this admission of evidence on appeal. In this case, the defendant's second wife was found dead in the parties' hot tub. The autopsy revealed that she died as a result of asphyxiation caused by blunt force trauma to her neck. Her blood alcohol level at the time of her death was .22 percent. The defendant's physical examination showed fresh scratch marks on his arms, sides, and hands. The victim's friends testified that in the months before her death, the defendant tried to portray the victim as an alcoholic when, in fact, they had rarely seen the victim intoxicated.

Trial evidence also established that, four years earlier, defendant's first wife had been found dead in her bathtub in another state. The factual similarities of the two deaths were startling: both women died in a tub, both women were in their thirties and in good health. In both instances, the defendant reported that the victim had been drinking prior to entering the tub. In both instances the defendant had fresh scratch marks on his arms, hands, and torso. In both instances the defendant told police he'd had a minor argument with the victim on the day before her death. Additionally, the autopsies of both victims revealed they had died from asphyxiation, not drowning.²⁰

The Supreme Court held that evidence is admissible if it is relevant, in other words, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact – and its probative value outweighs the likelihood of unfair prejudice.²¹ The court observed that defendant's description of circumstances surrounding the victim's death (i.e., defendant's claim that she had been drinking) suggested an accident; therefore evidence regarding circumstances surrounding defendant's first wife's death was admissible.²²

Prior abuse explaining the *res gestae* of the case

In [*Commonwealth v. Dillon*](#), the Pennsylvania Supreme Court ruled on the admission of evidence in order to explain a child's lengthy delay in reporting sexual abuse.²³ The prosecution may introduce evidence of defendant's violence and abuse towards the child's mother and brother as part of its

¹⁹ *Commw. v. Reid*, 811 A.2d 530, 550-51 (Pa. 2002).

²⁰ [*Commw. v. Boczkowski*, 846 A.2d 75 \(Pa. 2004\).](#)

²¹ *Id.*

²² *Id.*

²³ [*Commw. v. Dillon*, 925 A.2d 131 \(Pa. 2007\).](#)

case in chief, as a res gestae exception. A res gestae exception to Rule 404(b) allows admission of evidence of other crimes when relevant to furnish the context or complete story of the events surrounding a crime.

The Supreme Court reasoned that a jury may consider evidence of a lack of prompt complaint in cases involving sexual offenses, and the res gestae declaration is relevant and admissible to explain why a victim may delay in reporting. In *Dillon*, a young woman who had been sexually assaulted almost daily by the defendant from age nine to 12 first disclosed the assaults when she was 15. She disclosed the assaults after the defendant was convicted of aggravated assault and incarcerated for breaking her brother's arm.

The Supreme Court found that there was "no doubt" that the evidence of the defendant's physical abuse of the victim's mother and brother, including the aggravated assault conviction, was relevant for purposes other than to show his bad character and criminal propensity. The evidence was probative of the reasons for the victim's delay in reporting – her experiences with the defendant, and those of her family members, caused her to fear making a prompt report. In addition, the prior bad acts evidence was relevant for res gestae purposes, i.e., to explain the events surrounding the sexual assaults, so that the case presented to the jury did not appear in a vacuum.

Pattern of abuse showing natural development of the case

[*Commonwealth v. Jackson*](#) is a case involving domestic violence that stretched over a period of 10 years and involved frequent police calls to the home, repeated violations of numerous PFA orders and culminated in the perpetrator's murder of his long-time girlfriend.²⁴ The defendant claimed that testimony of several police officers about the defendant's pattern of abuse against the victim and repeated violations of PFA orders that continued for 10 years was unduly prejudicial, because the defendant admitted that he killed the victim.

The Superior Court found that the testimony of the various officers demonstrated that the defendant's abuse of the victim continued to escalate until the defendant ultimately murdered the victim. It found that the challenged evidence showed the chain of events that formed the history of the case and is part of its natural development.

Prior abuse indicating malice, sequence of events

Evidence regarding prior bad acts can be admitted to show a chain or sequence of events and to show malice, motive, intent, and ill will. Thus in [*Commonwealth v. Drumheller*](#), evidence of prior protection from abuse petitions filed by the victim against the defendant in the three years preceding the victim's murder were admissible to show sequence of events and to show defendant's

²⁴ [*Commw. v. Jackson*, 900 A.2d 936 \(Pa. Super. 2006\)](#). Case codified and superseded by statute Pa. R.A.P. 1925 as stated in *Commw. v. Hepfer*, 965 A.2d 270 (Pa. Super. 2009).

malice toward victim.²⁵ The evidence suggested that defendant's abuse of the victim continued during the entire three-year period.²⁶

Prior abuse demonstrating nature of the relationship

In [*Commonwealth v. Powell*](#), a capital case involving the beating murder of the defendant's six-year-old son, evidence that the defendant threw a glass of water in his son's face was admitted to show intent, malice and the nature of the relationship with his son.²⁷ According to the Supreme Court, admission of this evidence provided insight into the relationship, which was characterized by the defendant's quick temper, anger and impatience with the characteristics and the developmental level of a small child, and helped establish this perpetrator's motive for killing his son: impatience with and dislike of the child.

Prior abuse to establish family environment

In *Powell*, the perpetrator of abuse obtained custody of his six-year-old son when the child's mother was in a residential drug and alcohol treatment program.²⁸ Within six months, the perpetrator had isolated his son and abused him repeatedly, until one particularly violent, lengthy and brutal beating resulted in the child's death. The perpetrator admitted during the trial that he had killed the boy and objected to testimony from the child's mother that he had abused her during their relationship. On appeal, the Supreme Court found that the testimony was useful for the jury in understanding how the perpetrator was able to isolate the child and keep him away from his mother, the other adult most likely to notice the abuse and protect him. The perpetrator's prior abuse of the child's mother provided context for her testimony that she took little action when the perpetrator refused to allow her access to her son or let her speak with him alone.

Evidence of abuse admissible to show reason for delay in reporting assault

In [*Commonwealth v. Page*](#), a sexual abuse prosecution where the perpetrator was accused of repeatedly assaulting his stepdaughter over a period of several years, the victim testified that she did not report the abuse earlier because she was afraid of the perpetrator.²⁹ The trial court allowed her to testify that the perpetrator frequently hit her mother and threatened her and her mother. On appeal, the Superior Court found that this prior bad acts testimony was relevant to show the reason for the victim's delay in reporting the abuse, as well as to support the victim's testimony that she feared the perpetrator and believed he would carry out threats made to her mother and her.

²⁵ [*Commw. v. Drumheller*, 808 A.2d 893 \(Pa. 2002\).](#)

²⁶ *Id.* at 904-905.

²⁷ [*Commw. v. Powell*, 956 A.2d 406 \(Pa. 2008\).](#)

²⁸ *Id.*

²⁹ [*Commw. v. Page*, 965 A.2d 1212 \(Pa. Super. 2009\).](#)

Error for court to bar testimony re: past abuse that led to PFA consent order

In [*Buchalter v. Buchalter*](#), the plaintiff claimed that the defendant threatened to “beat the crap out of her” during a conversation about custody arrangements for their younger children.³⁰ She testified that she believed the defendant had broken into her cell phone and accessed her phone messages. She also testified that defendant’s wife’s sister grabbed her, threw her into a fence, grabbed the back of her hair and pushed her face in the dirt during her older child’s baseball game, after she had asked defendant, his brother and his wife and wife’s sister to leave the game. After the physical assault by defendant’s sister-in-law, plaintiff claimed that defendant commented, “Next time you’ll learn to keep your mouth shut.” Plaintiff claimed that, after this incident, defendant threatened to get his sister-in-law to assault plaintiff again.

To help explain why the plaintiff feared the defendant as a result of his current threats, plaintiff offered testimony regarding the defendant’s prior abuse which had led to plaintiff filing for, and defendant consenting to, a previous PFA order. The trial court barred the plaintiff from testifying about the prior abuse, reasoning that the evidence of prior abuse that led to the consent PFA order could not be considered by the court in the current PFA case.

The trial court denied the plaintiff’s request for a PFA order, and the plaintiff appealed. On appeal, the Superior Court reasoned that, in order to assess whether the plaintiff was in reasonable fear of imminent serious bodily injury from the defendant, the facts surrounding the prior PFA consent order were relevant to an understanding as to the reasonableness of the plaintiff’s fear. The Superior Court vacated the trial court’s order and remanded the case back to the trial court for further proceedings.

Prior abuse in PFA cases

In civil PFA cases, evidence of prior abuse is relevant and admissible. For instance, in [*Snyder v. Snyder*](#), the trial court admitted and considered wife’s testimony that abuse occurred on several previous occasions, some incidents occurring five months earlier.³¹ The Superior Court affirmed the trial court. In [*Raker v. Raker*](#), the Superior Court affirmed the trial court’s admission of testimony regarding the defendant’s abusive conduct that had occurred four months earlier.³² In [*Miller v. Walker*](#), the trial court admitted testimony regarding abuse that had occurred six years earlier.³³ The Superior Court affirmed and stated: “In light of the protective purposes of the [PFA] act, it was within the trial court’s discretion to hear any relevant evidence that would assist it in its obligation to assess [the victim’s] entitlement to and need for a protection from abuse order...Past abusive conduct on the appellant’s part was a crucial inquiry necessary for entry of a proper order.”³⁴

³⁰ [*Buchalter v. Buchalter*, 959 A.2d 1260 \(Pa. Super. 2008\).](#)

³¹ [*Snyder v. Snyder*, 629 A.2d 977 \(Pa. Super. 1993\).](#)

³² [*Raker v. Raker*, 847 A.2d 720 \(Pa. Super. 2004\).](#) Four months earlier, defendant had thrown a huge boulder in front of the lawn mower his wife was using. *Id.* at 723.

³³ [*Miller v. Walker*, 665 A.2d 1252 \(Pa. Super. 1995\).](#)

³⁴ *Id.* at 1259.

WITNESS COMPETENCY

General Rule - Pennsylvania Rule of Evidence 601(a)

The general rule for competency provides that “every person is competent to be a witness” except as provided by statute or by the rules of evidence.³⁵ An example of an individual who is statutorily incompetent to testify is the domestic violence advocate.³⁶

Incompetency - Immaturity

Questions regarding witness competence may arise when children are victims or witnesses of domestic violence. Pursuant to Pennsylvania Rule of Evidence Rule 601(b):

A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:

- 1) is or was, at any relevant time, incapable of perceiving accurately;
- 2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
- 3) has an impaired memory; or
- 4) does not sufficiently understand the duty to tell the truth.³⁷

Factual Analysis for Incompetency - Immaturity

The application of 601(b) raises a factual question to be resolved by the trial court. Expert testimony may be used when competency under this standard is at issue.³⁸ In [*Commonwealth v. D.J.A.*](#), during a taped interview, a 5-year-old sexual assault victim told the county child protective services worker that her father put his private area in her mouth.³⁹ She also later alleged other sexual assaults by her father. At trial, three years later, the defendant father’s expert witness testified that the child protective services worker’s interview techniques tainted the victim’s testimony. The trial court found the then 8-year-old victim was incompetent to testify based on the victim’s taped interview responses to the child protective services worker three years earlier. The Superior Court reversed this part of the trial court’s decision, finding that the trial court committed an abuse of discretion when it determined the child protective services worker’s interview techniques tainted the victim’s

³⁵ PA. R. EVID. 601(a).

³⁶ 23 PA. C.S. § 6116. This section states, in pertinent part: “Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a co-participant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim.”

³⁷ PA. R. EVID. 601(b).

³⁸ *Commw. v. Baker*, 353 A.2d 454 (Pa. 1976).

³⁹ [*Commw. v. D.J.A.*, 800 A.2d 965 \(Pa. Super. 2002\).](#)

recollection of the acts her father performed on her.⁴⁰ In addition, the Superior Court also found that the trial court also improperly relied on inadmissible expert testimony when the trial court determined the taped interviews were tainted.⁴¹

“Taint” in Child Sexual Abuse Allegations

“Taint” is the implantation of false memories or the distortion of actual memories through improper and suggestive interview techniques.⁴² When a child accuses a family member of sexually abusing him or her, the defendant often claims that the child’s testimony was tainted by another person’s influence.⁴³ Until the defendant raises a question of competency, or taint, a child – like every witness – is presumed competent.⁴⁴

Burden of proof is on the defendant

In [*Commonwealth v. Delbridge*](#), the Pennsylvania Supreme Court reviewed a challenge to a conviction for indecent assault and other charges arising from the defendant’s sexual abuse of his minor children.⁴⁵ The children were aged 4 and 6 when they reported his abuse, and defendant argued that their statements alleging his abuse were tainted.

After the Superior Court affirmed the trial court’s judgment of sentence, the Pennsylvania Supreme Court granted allocatur and determined that an allegation of “taint” raises a legitimate question of witness competency in cases involving sex abuse allegations by young children. Accordingly, the court held that taint is a subject to be explored during a hearing testing the competency of a child witness in a sex abuse case.⁴⁶

When taint is alleged, the party alleging taint bears the burden of: (1) presenting some evidence of taint at the competency hearing before exploration of taint is considered; and (2) overcoming the child’s presumption of competency by clear and convincing evidence.⁴⁷

The Supreme Court remanded the case to the trial court for an additional competency hearing where the defendant could present evidence of taint. On remand, the trial court again found the children to be competent. The trial court found that defendant failed to demonstrate the presence of

⁴⁰ *Id.* at 975.

⁴¹ *Id.*

⁴² [*Commw. v. Delbridge \(Delbridge I\)*, 855 A.2d 27, 30 \(Pa. 2003\)](#).

⁴³ See, e.g., *Commw. v. Hunzer*, 868 A.2d 498 (Pa. Super. 2005); *Commw. v. Alston*, 864 A.2d 539 (Pa. Super. 2004).

⁴⁴ See *Commw. v. Pena*, 31 A.3d 704 (Pa. Super. 2011) (citing PA. R. EVID. 601(a)) (holding that every witness, including children, are presumed competent and admonishing the trial court for determining, *sua sponte*, that a 14-year-old witness was incompetent based on her mental health problems).

⁴⁵ [*Commw. v. Delbridge*, 771 A.2d 1 \(Pa. Super. 2001\)](#), [appeal granted 783 A.2d 764 \(Pa. 2001\)](#), [remanded by 855 A.2d 27 \(Pa. 2003\)](#), [appeal after remand 859 A.2d 1254 \(Pa. 2004\)](#).

⁴⁶ [*Commw. v. Delbridge \(Delbridge II\)*, 859 A.2d 1254, 1256 \(2004\)](#).

⁴⁷ *Id.*

taint and accordingly failed to meet his burden of proving his children's allegations were compromised by taint.⁴⁸

When is taint appropriately raised?

The Superior Court has definitively held that taint and other competency challenges become less appropriate with age, and are "totally irrelevant as a matter of law by age fourteen."⁴⁹ Taint is "only 'a legitimate question for examination in cases involving complaints of sexual abuse made by young children.'"⁵⁰ In most instances, the ability of a child to recall events is a question of credibility, not taint.⁵¹

In [*Commonwealth v. Pena*](#), defendant was charged with repeatedly sexually assaulting two minors, aged 14 and 15, who were living in his house at the time of the assaults. The girls were previously assaulted by two of their uncles, and both were diagnosed with mental health and behavioral problems as a result of the prior abuse. Defendant filed a motion to preclude the girls from testifying. After a hearing, the trial court declared the girls incompetent to testify based on taint. On review, the Superior Court reversed, finding that taint, which challenges the ability of a minor witness to "observe an event and accurately recall that observation," is only appropriate in cases involving "young children." The Court expressly held that "[w]hen a witness is at least fourteen years old, he or she is entitled to the same presumption of competence as an adult witness."⁵² Credibility, not taint, was the proper evidentiary function allowing the court to weigh the ability of the child to testify truthfully.

Moreover, the Superior Court addressed the trial court's additional finding that one of the girls was incompetent to testify based on her mental health problem. The Superior Court explained that a trial court could not act as a party's advocate and, because defendant did not raise competency in this manner, it was an abuse of discretion for the trial court to make such a finding sua sponte. The trial court was further admonished for making such a decision, explaining that "the record [was] devoid of objective medical evidence such as information about the psychotropic medication and its effect on memory, or medical testimony regarding ... [the child's] condition."⁵³

SPOUSAL COMMUNICATIONS

General Rule - Civil and Criminal

⁴⁸ *Delbridge II*, 859 A. 2d at 1259.

⁴⁹ [*Commw. v. Pena*, 31 A.3d 704 \(Pa. Super. 2011\)](#).

⁵⁰ *Id.* (quoting *Delbridge I*, 855 A.2d at 39) (emphasis in original).

⁵¹ *Id.* (citing *Commw. v. Judd*, 897 A.2d 1224 (Pa. Super. 2006); *Commw. v. Moore*, 980 A.2d 647 (Pa. Super. 2009)).

⁵² *Id.*

⁵³ *Id.*

Protection of the privacy of spousal communications is rooted in the common law. However, there are exceptions to this protection. Legislative enactments and court decisions have diminished, and in some cases, eliminated the spousal communication protections in situations involving domestic violence.

Criminal – Privileged Confidential Spousal Communications

There is a general privilege protecting, in criminal proceedings, certain confidential communications between spouses. This privilege is based on a public policy desire to preserve the peace, harmony, and confidence in the spousal relationship. The privilege states:

Except as otherwise provided in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.⁵⁴

Communication must be made in confidence

Whether a communication is to be considered confidential depends on the character of the communication, as well as the relation of the parties. For a communication to be privileged, it must be made in confidence with the intention that it must not be divulged.⁵⁵

Where spousal communication creates or furthers disharmony

There are instances when the spousal confidential privilege would not apply. Where the interspousal communications are intended to create or further disharmony in the marriage, the communications are not privileged “confidential” communications.⁵⁶ In [*Commonwealth v. Spetzer*](#), the defendant battered his wife throughout the marriage.⁵⁷ The defendant tried to protect the following conversations: (1) defendant admitted to his wife that he raped her 12-year-old daughter and boasted about how he threatened the daughter with a knife; (2) defendant repeatedly threatened and attempted to intimidate wife and daughter into recanting their accounts to the police and district attorney; (3) defendant repeatedly attempted to force wife to bring her two daughters to a motel room where defendant could rape them. The Pennsylvania Supreme Court held that wife’s testimony regarding these communications would not be privileged. The Court evaluated the policy basis behind the confidential spousal communications privilege and held that the defendant husband’s statements were not protected:

⁵⁴ 42 Pa. C.S. § 5914.

⁵⁵ [*Commw. v. Spetzer*, 813 A.2d 707, 719 \(Pa. 2002\)](#) (citing *Seitz v. Seitz*, 32 A.2d 578 (Pa. 1895)).

⁵⁶ *Spetzer*, 813 A.2d at 719. The facts of this case are helpful for someone seeking to understand what types of controlling behaviors batterers use. The defendant engaged in a broad range of physical, sexual, emotional, and financial abuse in his efforts to dominate his wife and her children. *Id.* at 708-714.

⁵⁷ *Id.*

Certainly, the persistent and sadistic statements at issue here, concerning husband's actual and contemplated crimes against his wife and her children cannot rationally be excluded on the pretext that 'considerations of domestic peace forbid their disclosure.'⁵⁸

Criminal Privilege Against Adverse Spousal Testimony

Pennsylvania law also provides a privilege against adverse spousal testimony, which may be waived by the testifying spouse. There are exceptions to this privilege in certain criminal cases, including cases involving domestic violence. This privilege provides as follows:

Except as otherwise provided in this subchapter, in a criminal proceeding a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse, except that there shall be no such privilege:

- 1) in proceedings for desertion and maintenance;
- 2) in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband or wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them;
- 3) applicable to proof of the fact of marriage, in support of a criminal charge of bigamy alleged to have been committed by or with the other; or
- 4) in any criminal proceeding in which one of the charges pending against the defendant includes murder, involuntary deviate sexual intercourse, or rape.⁵⁹

"Act of Violence" exception

The court applied the act of violence exception to the privilege against adverse spousal testimony in [*Commonwealth v. John*](#).⁶⁰ In this case, the defendant husband set fire to a building in which his wife was playing bingo. The defendant also pulled a knife on one of the parties' children as the wife and children were walking home from the blaze. In the defendant's criminal trial, the wife sought to avoid testifying, claiming spousal privilege.

After an in camera hearing, in which the wife testified that she was in the building when the defendant set fire to it, the trial court held that the act of violence exception applied and directed the wife to testify. Evidence showed that the defendant was angry because his wife had chosen to go to bingo instead of spending the evening drinking with him. Evidence also indicated that pursuant to the parties' Protection From Abuse agreement, the defendant was prohibited from coming to the wife's home. The Superior Court affirmed the trial court's decision that the defendant's fire-setting

⁵⁸ *Id.* at 721.

⁵⁹ 42 PA. C.S. § 5913.

⁶⁰ [Commw. v. John, 596 A.2d 834 \(Pa. Super. 1993\)](#).

was an act of violence directed at his wife, eliminating the privilege against adverse spousal testimony.

Adverse Testimony and Confidential Communications Privileges

The removal of the privilege against adverse spousal testimony in 42 Pa. C.S. § 5913 does not supersede the spousal confidential communications privilege found at 42 Pa. C.S. § 5914; the two privileges co-exist. In other words, a spouse may have a privilege to refuse to testify against his or her spouse about certain communications, even in a case where his or her spouse is charged with threatening, attempting, or committing acts of bodily injury against the testifying spouse.

Even when the witness spouse is called to give testimony adverse to the defendant spouse, the witness spouse is still not competent to testify regarding confidential communications between the spouses.

Subpoenaed Spousal Testimony

Because the exceptions listed in 42 Pa. C.S. § 5913(2) indicate that there “shall be no privilege” in cases involving assault, the trial court does not have discretion to quash a prosecution subpoena seeking to compel a victim wife’s testimony in a criminal case where the defendant husband was charged with assaulting and harassing his wife. This was the holding of the Pennsylvania Supreme Court in [*Commonwealth v. Kirkner*](#).⁶¹ In this case, a husband strangled his wife, struck her in the face, and shoved her to the ground. The wife told police about the incident and permitted them to photograph her bruises and abrasions. She also wrote a two-page statement about the incident.

The court does not have discretion to quash a prosecution subpoena seeking to compel a wife’s testimony where the defendant was charged with assaulting her.

After the wife failed to appear at the preliminary hearing, the Commonwealth issued a trial subpoena. The wife sought to quash the subpoena, and after colloquy with the wife, the trial court quashed the subpoena finding, inter alia, that the wife’s decision to not testify was her own and not a result of her husband’s coercion, that the wife did not fear for her personal safety, that the wife was not financially dependent on her husband, that the wife was educated and had legal training, and that the wife’s decision to not testify was motivated by her desire to preserve her marriage and family.

Pennsylvania’s Superior Court affirmed the trial court, but the Supreme Court reversed, finding that the word “shall” in the statute was mandatory, and removed the trial court’s discretion. The Pennsylvania Supreme Court commented that the discretion rests with the prosecution whether to subpoena a domestic violence victim to testify about assaults committed by a spouse.

⁶¹ [*Commw. v. Kirkner*, 805 A.2d 514 \(Pa. 2002\)](#).

Spousal Communications in Civil Cases

Confidential communications between spouses

In civil proceedings, confidential communications between spouses are protected, with some exceptions. The confidential communication privilege provides as follows:

Except as otherwise provided in this subchapter, in a civil matter neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon trial.⁶²

Spouses as witnesses

In civil cases, generally, a spouse is incompetent to testify against the other, with some exceptions.⁶³ The statutory exceptions include the following proceedings:

- 1) For divorce, including ancillary proceedings for partition or property division.
- 2) For support relating to the protection or recovery of marital or separate property.
- 3) For the custody or care of children, including actions or proceedings relating to visitation rights and similar matter.
- 4) Arising under the [Protection From Abuse Act].
- 5) When a statute applicable to the action or proceeding provides either expressly or by necessary implication that spouses may testify in the action against the other.⁶⁴

Child abuse cases

The Child Protective Services Law creates an exception to several privileged communications, including the spouse as adverse witness and spousal confidential communications privileges:

(c) Privileged communications.—Except for privileged communications between a lawyer and a client and between a minister and a penitent, a privilege of confidential communication between husband and wife or between any professional person, including, but not limited to, physicians, psychologists, counselors, employees of hospitals, clinics, day-care centers and schools and their patients or clients shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse.⁶⁵

⁶² 42 Pa. C.S. § 5923.

⁶³ 42 Pa. C.S. § 5924(a).

⁶⁴ 42 Pa. C.S. § 5924(b).

⁶⁵ 23 Pa. C.S. § 6381(c).

The Pennsylvania Supreme Court discussed the relationship between this provision and the privilege for confidential communications between spouses in ***Commonwealth v. Spetzer***.⁶⁶ The Court's discussion indicates that spousal privilege would be waived in instances involving child abuse.

CONTENTS OF WRITINGS, RECORDINGS - BEST EVIDENCE

Original recordings may be unnecessary under the Best Evidence rule if the content of the recording does not provide evidence of the substantial components of the crime. In ***Commonwealth v. Fisher***, the abuser was convicted of assault, child endangerment, and possession of an instrument of a crime.⁶⁷ The jury heard testimony from the child victim and heard tapes made by the victim's mother of voice mail messages she received from defendant, her former boyfriend, after the victim's mother and defendant had separated.⁶⁸ On appeal, the defendant alleged that the tape recordings made by the victim's mother of his voice mail messages violated the "best evidence" rule. The defendant's voice mail messages expressed sorrow at the termination of victim's (mother's) relationship with the defendant and anger over the charges pending against defendant. In the taped messages, the defendant claimed no one would believe the victim's mother or her "nut-ball" son.⁶⁹ Because the tape recordings did not provide evidence of the substantial components of the offenses for which defendant was convicted, the original voice mail system recordings were unnecessary.⁷⁰

HEARSAY

Hearsay Defined

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."⁷¹ Hearsay is generally inadmissible at trial, unless an exception applies.

Hearsay Exceptions

Certain hearsay exceptions, codified in the Pennsylvania Rules of Evidence, may apply to testimony in domestic violence cases. These include the following:

⁶⁶ [Commw. v. Spetzer, 813 A.2d 707, 719 \(Pa. 2002\)](#) (citing *Seitz v. Seitz*, 32 A.2d 578 (Pa. 1895)).

⁶⁷ [Commw. v. Fisher, 764 A.2d 82 \(Pa. Super. 2000\)](#).

⁶⁸ *Id.* at 87-88.

⁶⁹ *Id.* at 88-89.

⁷⁰ *Id.*; see also PA. R. EVID. 1003, 1004(4).

⁷¹ PA. R. EVID. 801(c).

Rule 803(1) - Present Sense Impression

A statement describing an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.⁷²

Rule 803(2) - Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.⁷³

Rule 803(3) - Then-Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. A statement of memory or belief to prove the fact remembered or believed is included in this exception only if it relates to the execution, revocation, identification, or terms of declarant's will.⁷⁴

Rule 803(6) - Records of Regularly Conducted Activity

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate a lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.⁷⁵

Rule 803(25) - Admissions by Party-Opponent

A party-opponent's own admissions may be allowed in to evidence as an exception to hearsay if certain criteria are met.⁷⁶

Hearsay Exceptions Case Law

Prior inconsistent statements, victim available for cross examination

Where the witness is available for cross-examination, the witness's prior inconsistent statement may be used. In [*Commonwealth v. Carmody*](#), a victim of domestic violence appeared at the police

⁷² PA. R. EVID. 803(1).

⁷³ PA. R. EVID. 803(2).

⁷⁴ PA. R. EVID. 803(3).

⁷⁵ PA. R. EVID. 803(5).

⁷⁶ PA. R. EVID. 803(25).

station at 2 a.m. to report that the defendant had just assaulted her.⁷⁷ The officer observed physical evidence of assault. The police officer asked the victim to go in the back room and write out her statement of events. The victim's written statement described the assault and added that the defendant had threatened to kill the victim while holding a knife to her throat.

At the preliminary hearing the victim recanted, claiming that the defendant had not hit or threatened her and testifying instead that she had been drinking, blacked out, and could not remember any of the events that occurred that night. The officer testified regarding his observations of the victim and produced the victim's written statement.⁷⁸ Although the defendant was bound over for trial, the defendant subsequently successfully sought habeas corpus as to the terroristic threat charge based on defendant's claim that victim's written statement was inadmissible hearsay and the only evidence against him. The Commonwealth appealed.

On appeal, the Superior Court held that the victim's written statement to the police officer was not an excited utterance because there was a lapse in time and some intervening events had occurred prior to the victim's writing of her statement. However, the Superior Court held that the written statement constituted victim's prior inconsistent statement and was admissible as an exception to the hearsay rule.

A witness's prior inconsistent statement may be admitted for impeachment purposes, but may also be admitted as substantive evidence if it meets the additional requirements of reliability.⁷⁹ The two additional requirements are: (1) whether the statement is given under reliable circumstances, and (2) whether the declarant is available for cross-examination. A statement reduced to writing and signed and adopted by the witness meets the reliable circumstances test.⁸⁰ The question in *Carmody* was whether the victim was available for cross-examination. The victim's claim that she wrote the statement during a blackout did not render her unavailable for cross-examination. The Superior Court reversed the habeas corpus and remanded.⁸¹

Present sense impression – 911 tapes

Emergency response 911 tapes are evaluated for admissibility based on a balancing test, which requires judges to balance the relevancy of the evidence with the possible prejudicial effect it may have on the jury.⁸²

⁷⁷ [Commw. v. Carmody, 799 A.2d 143 \(Pa. Super. 2002\).](#)

⁷⁸ *Id.* at 145-46.

⁷⁹ *Id.* at 148.

⁸⁰ *Id.*

⁸¹ *Id.* at 148-49.

⁸² *Commw. v. Groff*, 514 A.2d 1382 (Pa. Super. 1986) (holding that a 911 tape was prejudicial in nature and should not have been admitted, but that admission was harmless error).

Emergency response 911 tapes are often admitted as a present sense impression exception under the hearsay rules, provided the prejudicial value does not outweigh their probative benefit.⁸³

Present sense impression was the basis for admission of hearsay telephone statements made by the victim to her mother shortly prior to the victim's murder. In [*Commonwealth v. Coleman*](#), a woman called her mother, told her that the defendant, her boyfriend, would not let her leave the apartment, that he was going to hang up the telephone and kill her.⁸⁴ The phone connection ended, and the mother called the police. The police arrived at the daughter's apartment 10 minutes later, and found the defendant on a street nearby. The police subsequently found the daughter murdered in her apartment.

The trial court admitted the daughter's statements as an excited utterance. On appeal, the Pennsylvania Supreme Court held that the statement was not an excited utterance but a statement of present sense impression admissible as a hearsay exception.⁸⁵

For more information on the admissibility of statements to a 911 operator or emergency responder, refer to the section on [Statements by an Unavailable Witness Admissible without Confrontation](#).

Police reports as business records

A police report may be admitted pursuant to the Uniform Business Records and Evidence Act, 42 Pa. C.S. § 6108, provided the custodian or other qualified witness testifies to its identity and mode of preparation. Without such authentication at trial, the police report is inadmissible.⁸⁶ However, admission of a police report or business record may raise constitutional concerns in criminal cases where the declarant is unavailable to testify.

CONFRONTATION: ADMISSIBILITY OF HEARSAY STATEMENTS BY AN UNAVAILABLE WITNESS

Even if an out-of-court statement is admissible under a hearsay exception, the Confrontation Clause may bar admission of the statement in a criminal case, depending on the "primary purpose" for which the statement was made.

⁸³ *Commw. v. Cunningham*, 805 A.2d 566 (Pa. Super. 2002).

⁸⁴ [*Commw. v. Coleman*, 326 A.2d 387 \(Pa. 1974\)](#).

⁸⁵ *Id.* at 389.

⁸⁶ *Coda v. Coda*, 666 A.2d 741 (Pa. Super. 1995).

Confrontation Defined

United States Constitution

The Sixth Amendment of the United States Constitution provides: “[I]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”⁸⁷

Pennsylvania Constitution

The Pennsylvania Constitution now mirrors the United States Constitution’s Confrontation Clause.⁸⁸

The Pennsylvania electorate passed a constitutional amendment to the right to confrontation in 2003. The original language of Article I, Section 9, provided that the accused had the right to “meet the witnesses face-to-face.” This language was struck and replaced with the right “to be confronted with the witnesses against him.” The amendment was upheld in [Bergdoll v. Commonwealth](#), which held that Pennsylvania’s constitutional amendment did not run afoul of the United States Constitution by removing the “face-to-face” language.⁸⁹

Pennsylvania’s Confrontation Clause provides defendants with the same protection as the Sixth Amendment Confrontation Clause contained in the United States Constitution.⁹⁰

Confrontation and Hearsay

Purpose of confrontation and hearsay

Confrontation and hearsay share common themes. Both require direct testimony of a declarant (an individual who makes a statement out of court), with limited exceptions. These safeguards are designed to ensure that statements admitted into evidence are trustworthy. But the right to confrontation goes a step further to ensure that defendants in a criminal proceeding are able to elicit the truth through cross-examination of their accuser.

Face-to-face cross-examination is not required, but it is preferred. Face-to-face cross-examination “must occasionally give way to considerations of public policy and the necessities of the case.”⁹¹ Courts have allowed closed-circuit, videotaped, or tape-recorded testimony if the victim or witness is

⁸⁷ U.S. CONST. amend VI.

⁸⁸ PA. CONST. art. I, § 9 (“In all criminal prosecutions the accused hath a right ... to be confronted with the witnesses against him.”).

⁸⁹ [Bergdoll v. Commonwealth](#), 858 A.2d 185 (Pa. Commw. Ct. 2004) (en banc), *aff’d* 874 A.2d 1148 (Pa. 2005).

⁹⁰ *Commw. v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009) (citing *Commw. v. Geiger*, 944 A.2d 85, 97 n.6 (Pa. Super. 2008), *appeal denied* 964 A.2d 1 (Pa. 2009)).

⁹¹ *Commw. v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009) (quoting *Maryland v. Craig*, 497 U.S. 836, 840 (1990) (permitting a six-year-old victim of sexual assault and battery to testify via one-way, closed-circuit television)).

particularly vulnerable, too ill to travel, or located outside the United States.⁹² However, courts do not generally allow the use of alternative methods for testimony to save resources or for judicial efficiency.⁹³

For more information on alternatives to face-to-face testimony, refer to the [Tape-recorded testimony and video conferencing](#) section.

Objecting to Out-of-Court Statements: Hearsay and Confrontation

It is important to remember that even if a statement is admissible under the hearsay rules, additional analysis is needed to ensure the statement does not unjustly prevent a criminal defendant from confronting his or her accuser. Essentially, when hearsay is offered in a criminal case, a defendant may raise three objections: (1) violation of the hearsay rules in the federal or Pennsylvania Rules of Evidence; (2) violation of the Sixth Amendment right to confrontation in the United States Constitution; or (3) violation of the Article 1, Section 9 right to confrontation in the Pennsylvania Constitution.⁹⁴

The Confrontation Clause Applies Only in Criminal Cases

The Confrontation Clause applies only in criminal cases where the prosecution seeks to admit a statement of an unavailable witness and the defendant did not have a prior opportunity to cross-examine the witness.

Criminal cases

The right to confrontation attaches in criminal proceedings. It guarantees the right of criminal defendants to confront all witnesses against them. When an individual makes an out-of-court, testimonial statement, but is unavailable to testify at a criminal trial, the right to confrontation will bar admission of that statement unless a limited exception applies (refer to the section on [Statements by an Unavailable Witness Admissible without Confrontation](#)).

Confrontation rights apply at all “critical stages” of a criminal proceeding. “A critical stage is a point in the proceeding at which substantive rights may be preserved or lost.”⁹⁵ For instance, preliminary

⁹² See, e.g., *Commw. v. Geiger*, 944 A.2d 85 (Pa. Super. 2008) (upholding the admission of prerecorded testimony of a 10-year-old and 6-year-old victim of severe child abuse after making a finding that face-to-face testimony in front of defendant would cause the children severe emotional distress); see also *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007); *Bush v. Wyoming*, 193 P.3d 203 (Wy. 2008); *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

⁹³ *Atkinson*, 987 A.2d at 743 (overturning the admission of testimony via video-conferencing by an alleged co-conspirator who was incarcerated in state prison. The prosecution’s interest in “convenience and cost-saving” were not sufficiently compelling reasons to substitute face-to-face confrontation).

⁹⁴ PA. CODE Art. VIII (Hearsay), Introductory Comment.

⁹⁵ See, e.g., *Commw. v. Atkinson*, 987 A.2d 743, 747 (Pa. Super. 2009) (citing *Commw. v. Holzer*, 389 A.2d 101, 105 (Pa. 1978)).

and suppression hearings are both critical stages that affect a defendant's substantive rights and, therefore, confrontation applies.⁹⁶

The Confrontation Clause applies only in criminal cases where prosecution seeks to admit statement of an unavailable witness, and defendant did not have prior opportunity to cross-examine.

The right to confrontation does not attach in civil cases.⁹⁷ This means that the right of confrontation does not apply in PFA, custody, or divorce proceedings. Therefore, when an individual makes an out-of-court statement, but is unavailable to testify at a civil trial, the statement is admissible if it fits within a hearsay exception. Confrontation rights do apply to indirect criminal contempt proceedings for violations of a PFA order.

Unavailable witness

The right to confrontation is only violated when an individual makes an out-of-court statement, but does not testify at trial. If an individual makes an out-of-court statement, and testifies at a criminal trial, the right to confrontation is not violated.

Unavailability is defined in Pennsylvania Rule of Evidence 804(a). Unavailability is limited to the following situations: (1) exemption based on privilege; (2) refusal, in spite of a court order; (3) lack of memory; (4) death, injury, or physical/mental illness; or (5) inability to subpoena or otherwise reasonably procure attendance.⁹⁸

No prior opportunity to cross examine

Hearsay statements of an unavailable witness are inadmissible unless the defendant had a "full and fair opportunity to cross-examine" the witness.⁹⁹

Even if the defendant had an opportunity to cross-examine the witness at a preliminary hearing or other phase in a criminal proceeding, that opportunity may not have been "full and fair." A defendant lacks a "full and fair" opportunity for cross examination "where the defense has been

⁹⁶ See *id.*

⁹⁷ *United States v. Zucker*, 161 U.S. 475, 481 (1896) ("The sixth amendment relates to a prosecution of an accused person which is technically criminal in nature. ... The [confrontation] clause has no reference to any proceeding ... which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed.").

⁹⁸ PA. R. EVID. 804(a); see also FED. R. EVID. 804(a).

⁹⁹ See, e.g., *Commw. v. Leak*, 22 A.3d 1036, 1044 (Pa. Super. 2011) (citing *Commw. v. Bazemore*, 614 A.2d 684, 688 (Pa. 1992) ("Whether prior testimony was given at trial or at any other proceeding, where, as here, admission of that prior testimony is being sought as substantive evidence against the accused, we conclude that the standard to be applied is that of full and fair opportunity to cross-examine.")).

denied access to vital impeachment evidence either at or before the time of the prior proceeding at which that witness testified.”¹⁰⁰

Prior opportunity cases – Preliminary Hearing

In [*Commonwealth v. Leak*](#), the defendant was not deprived of his right to confrontation when videotaped testimony from the preliminary hearing was admitted at trial.¹⁰¹ The court explained that the defendant was “on notice” that the witness was terminally ill at the time of the preliminary hearing and, therefore, “had every reason to prepare as if the preliminary hearing would be his only opportunity to cross-examine.” The fact that defense counsel did not have a medical report prior to the preliminary hearing was of no issue because defense counsel did not show that he was denied access or was prevented from subpoenaing the records on his own.

In [*Commonwealth v. Wholaver*](#), the defendant was not deprived of his right to confrontation when prior unsworn statements and statements made at the preliminary hearing were admitted at trial.¹⁰² The defendant was charged with sexually assaulting his two daughters. The defendant’s two daughters and wife provided testimony at a preliminary hearing on the sexual offense charges. Trial on the defendant’s sexual assault charges was scheduled for Jan. 13, 2003. Shortly before midnight on Dec. 24, 2002, the defendant fatally shot his wife and daughters. At the defendant’s murder trial, the court admitted the victims’ preliminary hearing testimony. The doctrine of forfeiture by wrongdoing was also raised as grounds to admit the statements, but the court saved that issue for another day, holding instead that confrontation did not apply because the defendant was already given the opportunity to cross-examine the victims’ statements.

Looking to the United States Supreme Court for guidance, the court explained that in cases where the purpose of cross-examination is met at a preliminary hearing by “probing into areas such as bias and testing the veracity of the testimony,” the confrontation requirements in the United States Constitution are met. The court noted that Wholaver’s attorney was able to explore bias, motive, inconsistency, outside influence, and veracity in the preliminary hearing and, as such, the defendant was afforded the right to confront witnesses against him.

Videotaped Deposition¹⁰³

In [*Commonwealth v. McClendon*](#), a videotaped deposition was admissible.¹⁰⁴ Confrontation was not an issue because the defendant and the defendant’s current attorney were present at the deposition and were given ample opportunity to cross-examine. Further, the defendant’s new attorney had ample opportunity to impeach the videotaped deposition with prior sworn statements.

¹⁰⁰ See, e.g., *Leak*, 22 A.3d at 1043-46. (citing *Bazemore*, 614 A.2d at 688).

¹⁰¹ [*Commw. v. Leak*, 22 A.3d 1036 \(Pa. Super. 2011\).](#)

¹⁰² [*Commw. v. Wholaver*, 989 A.2d 883 \(Pa. 2010\)](#), cert. denied, 131 S. Ct. 332 (2010).

¹⁰³ Depositions may be used in criminal proceedings.

¹⁰⁴ [*Commw. v. McClendon*, 874 A.2d 1223 \(Pa. Super. 2005\).](#)

Full and Fair Opportunity to Cross-Examine

In ***Commonwealth v. Kemmerer***, the court upheld the admission of a child's statements to a social worker about sexual abuse by the defendant, applying the Tender Years hearsay exception.¹⁰⁵ Defendant claimed that he was denied "full and meaningful" cross-examination because "counsel for the defendant never had an opportunity to question the victim in regards to the statement allegedly made to [the social worker] because the victim never testified to the facts contained [in that statement]." The court found that the defendant's counsel had a full and fair opportunity to cross-examine the child at two stages of the proceeding, at a Tender Years hearing and at the trial, where the child testified via closed-circuit television. The court explained that the defendant knew of the social worker's statement, and knew that it would be admissible at trial. Therefore, the defendant had ample opportunity to question the child about the statement.

Different Attorney at Trial

In ***Commonwealth v. McClendon***, admission of a videotaped deposition of an unavailable witness was upheld, in spite of the fact that defendant had a different attorney at trial.¹⁰⁶ The court found that the new attorney "was unable to specify to any meaningful degree how her questions would have differed." The court further explained that counsel could have impeached the deposition with any prior sworn statements.

Statements by an Unavailable Witness Admissible Without Confrontation

Generally, testimonial statements by an unavailable witness are inadmissible. Non-testimonial statements by an unavailable witness are generally admissible, provided the statement falls within an appropriate hearsay exception and meets other applicable evidentiary rules.

¹⁰⁵ [Commw. v. Kemmerer, 33 A.3d 39 \(Pa. Super. 2011\).](#)

¹⁰⁶ [Commw. v. McClendon, 874 A.2d 1223 \(Pa. Super. 2005\).](#)

Testimonial statements

Testimonial statements are statements that are “objectively”¹⁰⁷ made for the “primary purpose” of “establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.”¹⁰⁸ Other out-of-court statements are considered non-testimonial and are admissible, subject to any applicable rules of evidence.¹⁰⁹

Objective, primary purpose test

To make a determination on the admissibility of a statement, courts must examine the totality of the circumstances surrounding the statement. Relevant factors include:

- The presence of an ongoing emergency to an individual, first responders, or the public¹¹⁰
- The individual’s medical condition¹¹¹
- The type of weapon involved
- The objective perspective of the declarant and the interrogator

¹⁰⁷ *Michigan v. Bryant*, 562 U.S. ---, 131 S. Ct. 1143, 1154 (2011) (providing further clarity for the primary purpose test enumerated in *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

In *Bryant*, police officers responded to a report that an individual had been shot. The officers found the victim on the ground next to his vehicle, bleeding from a bullet wound. The officers asked the victim who shot him, and the victim identified the defendant and explained that he had driven six blocks to the gas station from the house where he was shot. This led police to the defendant’s house, where they found traces of the victim’s blood and a bullet. The Court found that the victim’s statements to police were non-testimonial because, when accounting for all facts and circumstances, the objective purpose of the police interrogation and the victim’s statements was to respond to an ongoing emergency. The *Bryant* Court explained that the primary purpose inquiry is objective, explaining:

The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.

Id. at 1156.

¹⁰⁸ *Davis v. Washington*, 547 U.S. 813, 822 (2006); see also *Bryant*, 562 U.S. at 344, 131 S. Ct. at 1142.

¹⁰⁹ *Whorton v. Bockting*, 549 U.S. 406 (2007). *Whorton v. Bockting* eliminated any confusion over the vitality of *Ohio v. Roberts*, which required all hearsay statements by an unavailable witness to have an indicia of reliability. *Id.* at 420. The *Whorton* Court definitively stated, “the Confrontation Clause has no application to [nontestimonial] statements.” *Id.*

¹¹⁰ “An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.” *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 1148 (2011).

¹¹¹ *Id.* at 1148 (“A victim’s medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim’s ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.”).

- Whether the statement fits within a hearsay exception¹¹²
- Other relevant circumstances

Some hearsay statements admissible pursuant to primary purpose test

"[D]ying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause."¹¹³ The Supreme Court has not directly addressed whether this exception will defeat all confrontation clause objections, but several opinions have alluded to the fact that dying declarations are still a recognized exception.¹¹⁴ Justice Ginsburg elaborated on the possible exception in her dissenting opinion in [Michigan v. Bryant](#):

The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception ... applied to statements made by a person about to die and aware that death was imminent.¹¹⁵

Recently, state courts have begun to recognize dying declarations as an exception to the Confrontation Clause.¹¹⁶

Excited utterances

When a hearsay statement is admissible under the excited utterance exception, it may be admissible if the circumstances indicate that the individual making the statement did not anticipate that the statement would be used for future prosecution at the time the statement was made.

In [Davis v. Washington](#), a victim's statements to a 911 operator were non-testimonial because the statements were made in the context of an ongoing emergency.¹¹⁷ At the time of the call, the victim – the defendant's ex-girlfriend – did not know where the defendant was, so the danger of another assault was ongoing. The defendant had fled after breaking into his ex-girlfriend's apartment and assaulting her. The Davis Court explained that the victim was describing events as they were occurring while facing an ongoing emergency, rather than describing past events.

¹¹² *Id.* at n.9 ("Many other exceptions to the hearsay rules similarly rest on the belief that certain statements are, by their nature, made for the purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions."); *Bullcoming v. New Mexico*, 564 U.S. ---, n.1 (2011) (Sotomayor, J., concurring) ("Bryant deemed reliability, as reflected in the hearsay rules, to be 'relevant', [but] not 'essential'.").

¹¹³ *Bryant*, 131 S. Ct. at n.1 (citing *Crawford v. Washington*, 541 U.S. 36, 56 (2004); *Giles v. California*, 554 U.S. 353, 358-59 (2008)).

¹¹⁴ See *Crawford*, 541 U.S. at 56; *Giles*, 554 U.S. at 358-59; *Bryant*, 131 S. Ct. at n.1.

¹¹⁵ [Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 1176-77 \(2011\)](#) (Ginsburg, J., dissenting) (internal citations omitted).

¹¹⁶ See, e.g., *Cobb v. State*, 16 So.3d 207 (Fla. Dist. Ct. App. 2009) ("[A] dying declaration is an exception to the Sixth Amendment's Confrontation Clause."); *State v. Beauchamp*, 796 N.W.2d 780 (Wi. 2011); *Satterwhite v. Virginia*, 695 S.E.2d 555 (Va. Ct. App. 2010).

¹¹⁷ [Davis v. Washington, 547 U.S. 813 \(2006\)](#).

In ***Hammon v. Indiana***, a victim's statements to police about an attack – where the victim's husband broke the glass door on their wood furnace, flames were coming out of the furnace, and husband threw his wife on the ground into the broken furnace glass – were testimonial.¹¹⁸

The Court explained that, at the time the statements were made, police had diffused (this means to spread over a wide area; do you mean defused, which means to reduce danger?) the argument and separated the parties into separate rooms, so the emergency was no longer "ongoing."

*Note: The Supreme Court mentioned this case in *Bryant*, explaining that the outcome would have been different if the defendant had a firearm or other weapon because the threat to the victim – in spite of the physical separation between the victim and defendant – would have been ongoing.¹¹⁹

In ***United States v. Hinton***, statements made to a 911 operator to report that the defendant threatened the caller with a firearm were non-testimonial.¹²⁰ Recognizing that some 911 calls are made with the motive to "bear testimony," such circumstances were absent from this case. The court found that the "most likely reason for a 911 call is for health or safety" and, thus, the call was non-testimonial.

The court held that statements to police identifying the defendant, while the declarant was in the police cruiser looking for his assailant, were testimonial and improperly admitted at trial.

In ***Commonwealth v. Gray***, statements made to police at a crime scene were non-testimonial where the declarant, a young pregnant woman, was attacked by her mother's boyfriend shortly before the statements were made, and the statements were made to get help.¹²¹ The boyfriend was still in the process of attacking the declarant's mother, stabbing her in the arm, face, and head with a knife and a screwdriver. The court explained that the young woman was not subject to "formal, structured police interrogation" and volunteered the information in an attempt to diffuse (defuse?) an emergency. The court found that it was unreasonable to conclude that an objective witness in this situation would have known that their statements would be used for future prosecution.

In ***Commonwealth v. Abrue***, a police officer's statements to a fellow officer immediately after an altercation with the defendant, a prisoner, were testimonial.¹²² The court explained that the officer's description of the events to his fellow officer was "precisely what a witness does on direct examination" and, as a result, was a "weaker substitute for live testimony."

Statements for the Purpose of Medical Treatment

Statements to medical personnel are non-testimonial when the statement is made for the primary purpose of obtaining medical treatment. However, when a statement to medical personnel is

¹¹⁸ *Id.* (companion case, decided in conjunction with *Davis v. Washington*).

¹¹⁹ *Bryant*, 131 S. Ct. at 1148.

¹²⁰ [United States v. Hinton, 423 F.3d 355 \(3d Cir. 2005\).](#)

¹²¹ [Commw. v. Gray, 867 A.2d 560, 577 \(Pa. Super. 2005\).](#)

¹²² [Commw. v. Abrue, 11 A.3d 484 \(Pa. Super. 2010\).](#)

elicited for the primary purpose of future litigation or at the direction of police, the statement may be considered testimonial.¹²³

Refer to the section on [Child statements to medical personnel](#) for information.

In **Green v. Maryland**, the victim of sexual assault was treated at a hospital.¹²⁴ After her release, the police sent her to a sexual assault specialist for a second examination. The Green court found that a medical report from the sexual assault specialist, and the statements contained therein, was inadmissible testimonial evidence because the report was conducted at the request of police and was not “for treatment purposes.” The report of her initial treatment was admitted with limited redaction. The second report was not for the purpose of health assessment. To the contrary, the second report was prepared with the objective intent of gathering evidence for future prosecution, so the report was deemed testimonial and was inadmissible at trial.

Reports - forensic reporting

Forensic laboratory reports are testimonial. Therefore, to properly admit a forensic laboratory report, the original certifying analyst must testify in court or must have been subject to cross-examination by the defendant before trial. “Surrogate testimony ... does not meet the constitutional requirement. The accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.”¹²⁵

In [Melendez-Diaz v. Massachusetts](#), signed certificates from the state laboratory that identified a white powdery substance as cocaine and connected the cocaine to the defendant were inadmissible, in violation of the Confrontation Clause.¹²⁶ Absent testimony by the analysts who certified the certificate, the evidence could not be admitted. The Court explained that the certificates are affidavits and, therefore, fall within a “core class of testimonial statements.”

In **Bullcoming v. New Mexico**, the defendant was convicted of an aggravated driving-while-intoxicated charge based on a forensic lab report that indicated the defendant’s blood alcohol level was .21 grams per hundred milliliters, “an inordinately high level.”¹²⁷ The analyst who certified the report was unavailable to testify at the hearing because he was placed on unpaid leave for an undisclosed reason prior to the hearing. The prosecution presented testimony from an alternative

¹²³ See *Melendez-Diaz v. Massachusetts*, 557 U.S. ---, 129 S. Ct. 2527 (2009); *Bryant*, 131 S. Ct. at n.2; *Giles*, 554 U.S. at 376 (“[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”).

¹²⁴ *Green v. Maryland*, 22 A.3d 941 (Md. Ct. App. 2011).

¹²⁵ *Bullcoming v. New Mexico*, 564 U.S. 305, 131 S. Ct. 2705, 2707 (2011); see also *Melendez-Diaz*, 129 S. Ct. 2527.

¹²⁶ [Melendez-Diaz v. Massachusetts](#), 557 U.S. 305, 129 S. Ct. 2527 (2009).

¹²⁷ *Bullcoming*, 131 S. Ct. 2705.

analyst, who was a qualified expert in the type of technology used to measure the defendant's blood alcohol level.

The Supreme Court reversed and remanded the decision for a new hearing, finding that the forensic laboratory report was testimonial.

The Court dismissed the claim that the original analyst was a "mere scrivener" because the report contained "more than a machine generated number." The analyst certified that he received an intact blood sample, followed appropriate procedures, and did not encounter circumstances or conditions that would affect the validity of the results. The Court further explained that if the original analyst were to have testified, the defense counsel could have inquired into the analyst's proficiency, veracity, and attention to detail. Additionally, defense counsel could have inquired into the reason for the analyst's unpaid leave.

The Court also dismissed the argument that the substitute analyst's statement was admissible because it was "sworn," while the original analyst's certification was "unsworn." The Court explained that the original certification was "formalized" in a signed document and, thus, the lack of notarization did not remove it from the Confrontation Clause analysis.

Reports - machine-generated reports

Purely machine-generated reports are likely non-testimonial, but no binding case law has addressed this issue to date.

The Supreme Court found that the analyst's report was barred by the Confrontation Clause based on additional information provided by the analyst in his certification, in ***Bullcoming v. New Mexico***.¹²⁸ But, in her concurring opinion, Justice Sotomayor wrote to distinguish the case from a purely machine-generated report, "such as a printout from a gas chromatograph" that is used to measure blood alcohol level. She explained that a purely machine-generated report is more likely to be admissible.¹²⁹

Medical reports

Medical reports that are created for the primary purpose of medical treatment are non-testimonial.¹³⁰ However, when a medical report is created by direction of police, the report may be considered testimonial.

For more information the treatment of statements to medical personnel contained in medical reports, refer to the section on [Statements for the Purpose of Medical Treatment](#).

¹²⁸ [Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 \(2011\)](#).

¹²⁹ *Id.* (Sotomayor, J., concurring in part).

¹³⁰ *Melendez-Diaz*, 129 S. Ct. 2527; *Bryant*, 131 S. Ct. at n.2; *Giles*, 554 U.S. at 376 ("[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.").

Records

Business and public records are generally considered nontestimonial. This is because business and public records are “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.”¹³¹

Certificate of Non-Record: A certificate attesting to the absence of a record is a violation of the Confrontation Clause in the Second, Third, Fifth, Ninth, and D.C. Circuits¹³² because a certificate of non-record is exclusively prepared for trial.

Child Witness Statements

There are a variety of ways to introduce child witness statements without requiring face-to-face cross-examination of the child. Even though Bryant expands the court’s inquiry to look at the objective primary purpose of the declarant and the objective intent of the interrogator, the following legal conventions and case law indicate that child witness statements can still be introduced without requiring the child to testify in open court.

Tender Years exception

The Tender Years exception¹³³ allows a child victim’s out-of-court statements to be admitted at trial when the statements are relevant and possess an indicia of reliability, as determined by the circumstances at the time the statements were made. Whether, and to what extent, the Tender Years exception survived after the introduction of Crawford’s testimonial requirement has yet to be determined.

Applying the objective, primary purpose test to statements that fit within the Tender Years exception requires a case-by-case analysis of the underlying facts of the case.

Pursuant to the objective, primary purpose test enumerated in Bryant, courts must examine all of the attendant circumstances to determine whether the child’s statements were testimonial, including the objective intent of both the child and the interrogator. As a result of the nature of child interrogation, the crux of this inquiry will often rest on the balance between the child and the interrogator’s objective intent. For instance, a child of tender years is unlikely to objectively believe that his or her statements to a social worker or a doctor will be used in a criminal trial. However, a social worker or a doctor likely sets out to gather information from the child for that very purpose.

¹³¹ *Melendez-Diaz*, 129 S. Ct. at 2539.

¹³² *United States v. Madarikan*, 356 Fed.Appx. 532 (2d Cir. 2009); *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010); *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010); *Tabaka v. District of Columbia*, 976 A.2d 173 (D.C. Cir. 2009); see also *Gov’t of the Virgin Islands v. Gumbs*, 2011 U.S. App. LEXIS 9322 (3d Cir. May 4, 2011) (non-precedential opinion).

¹³³ Tender Years Hearsay Act, 42 PA. C.S. § 5985.1 (explaining that a child’s out-of-court statements are admissible, regardless of whether the child testifies, if the court finds “that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability.”).

Child testimony via contemporaneous alternative method

In Pennsylvania, any prosecution involving a child victim or child material witness “may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and transmitted by a contemporaneous alternative method.”¹³⁴ The attorney for the defendant, along with the Commonwealth, the judge, the court reporter, and other necessary persons are allowed in the room, but the court “shall ensure that the child cannot hear or see the defendant.”¹³⁵

Before allowing the use of a contemporaneous method of testimony, the court is required to determine whether testifying in open court will cause the child to suffer “serious emotional distress that would substantially impair the child victim’s or material witness’ ability to reasonably communicate.”¹³⁶

For more information on the use of Contemporaneous Alternative Testimony by a Child, refer to the [Tape-recorded testimony and video-conferencing](#) section.

In ***New Jersey v. Coder***, statements by a 3-year-old to her mother about a sexual assault by the defendant, the apartment superintendent, were non-testimonial.¹³⁷ The court explained that the statements “lack[ed] any indicia that they resulted from law enforcement efforts ‘to establish or prove past events potentially relevant to later criminal prosecution.’”

Child statements to social workers

In ***Commonwealth v. Allshouse***, the Pennsylvania Supreme Court found that a 4-year-old child’s statements to a social worker about how her father twisted and dislocated her infant brother’s arm were not testimonial.¹³⁸ The court applied the initial primary purpose test established in *Davis*, which looked to whether there was an ongoing emergency and whether the primary purpose of the interrogation was to establish past events. The court found that there was an ongoing emergency, even though the child was questioned seven days after the incident, and the child was relocated to her grandparents’ house. The court explained that there was sufficient question about whether the child was subject to ongoing abuse, so the emergency was ongoing.

The court also explained that the primary purpose of the child should be examined objectively, based on what a child that age of average maturity and intellect would believe. The court noted that the social worker did not wear a badge, and that the social worker was charged with ensuring the child’s safety, which meant that the purpose of the social worker’s inquiry was only partially

¹³⁴ 42 PA. C.S. § 5985.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *New Jersey v. Coder*, 968 A.2d 1175 (N.J. 2009).

¹³⁸ *Commw. v. Allshouse (Allshouse I)*, 985 A.2d 847 (Pa. 2009), *vacated & remanded* *Allshouse v. Pennsylvania*, --- U.S. ---, 131 S. Ct. 1597 (2011), *affirmed* [Commw. v. Allshouse \(Allshouse II\)](#), No. 55 WAP 2008 (Pa. Jan. 21, 2012).

investigatory. But ultimately, the court found that there was an ongoing emergency, and concluded that the statement was non-testimonial without looking to the primary purpose of the interrogation.

Finally, the court explained that even if the statement was testimonial, the statement was duplicative and, therefore, admission of the child's statements to the social worker was harmless error. The child also made statements to her mother, which the court found to be non-testimonial and, therefore, admissible under the Tender Years exception without raising confrontation issues.

The decision in *Allshouse I* was appealed to the United States Supreme Court, which remanded the case to the Pennsylvania Supreme Court for a decision consistent with the United States Supreme Court's holding in ***Michigan v. Bryant***.¹³⁹ On its second review of the case, the Pennsylvania Supreme Court in ***Commonwealth v. Allshouse (Allshouse II)***,¹⁴⁰ affirmed the holding in *Allshouse I*, finding that the child's statements were nontestimonial and admissible under the Tender Years exception.

In relevant part, the court in *Allshouse II* found that, pursuant to the objective primary purpose test enumerated in *Bryant*, the child's statement was not for future prosecution. The court looked to whether the emergency was ongoing and to the formality of the inquiry, in light of the age and capacity of the child.

The court first addressed whether there was an ongoing emergency in the case, and explained that it was an important part of the inquiry, but was not dispositive.¹⁴¹ The court found that this factor was met because father had alleged that the 4-year-old child was responsible for the infant's broken arm. The court found that, even though the children were removed from the defendant's home, the infant's safety was still at issue.

In a concurring opinion, Justice Castille explained, "investigative efforts undertaken by county agencies responsible for child protection services" should typically be considered non-testimonial, given the fact that the statutory purpose of Children and Youth Services is to "provid[e] protective services to prevent further abuses to children."¹⁴²

The court next found that the lack of formality in the interview was significant, and supported the conclusion that the primary purpose of the interview was not to obtain testimony. The interviewer was dressed in jeans, and he sat on the porch. Moreover, the interview was "cut short" when the child's brother interrupted. The court explained that it was necessary to view these circumstances in the context of the child's age, capacity, and experience, as these factors contributed to totality of the

¹³⁹ *Allshouse v. Pennsylvania*, --- U.S. ---, 131 S. Ct. 1597 (2011).

¹⁴⁰ [*Commw. v. Allshouse \(Allshouse II\)*, No. 55 WAP 2008 \(Pa. Jan. 20, 2012\)](#).

¹⁴¹ *Allshouse II*, No. 55 WAP 2008, at 15-16 ("[T]he existence of an emergency is not the end of the inquiry.").

¹⁴² *Id.* (Castille, J., concurring) (quoting 23 Pa. C.S. § 6362) ("[M]y best prediction of the High Court's response to Pennsylvania child protection services investigations by county agencies, in terms of the new Confrontation Clause regime, is that it will afford substantial weight to the legislative design defining the agencies' purposes in terms of the provision of essential services.")

circumstances. In total, these factors allowed the court in *Allshouse II* to conclude that the statements were non-testimonial and, therefore, admissible pursuant to the Tender Years exception.

The court in *Allshouse II* explained that statements to a physician who interviewed the child a week after the Children and Youth Services worker at the physician's office may have been testimonial based on the formality and potential lack of ongoing emergency.¹⁴³ However, the court declined to opine on the admissibility of the statements because it found that any error was harmless error because the statements were cumulative.

In ***New Jersey v. Buda***, the court held that a child victim's statement to a social worker was non-testimonial.¹⁴⁴ The court explained that the social worker's role in "responding to a life-threatening emergency is no different in kind than the function being performed by the 911 officer in *Davis*; she was seeking information from a victim to determine how best to remove the very real threat of continued bodily harm and even death from this 3-year-old child."

Child statements to medical personnel

In ***Colorado v. Vigil***, the Colorado Supreme Court upheld the admission of statements by a 7-year-old regarding a sexual assault by the father's co-worker.¹⁴⁵ The child's father had interrupted the assault, called 911, and a doctor from the child protection team later performed an examination. In response to the doctor's question, "Did anyone hurt you?" the child responded affirmatively. The court admitted the child's response, even though the doctor was a member of a child protection team, because it found that the doctor's question was necessary to understand the nature of the child's injuries and the best course of treatment.

Testimonial Statements Admissible in Certain Situations

Prior opportunity to cross-examine

Testimonial statements are admissible when the defendant had a prior opportunity to cross-examine. Refer to the section titled [The Confrontation Clause Applies Only in Criminal Cases](#).

Statements offered to prove something other than the truth

Testimonial statements are admissible when they are offered to prove something other than the truth of the matter asserted.

¹⁴³ *Id.* at 27 ("We would have difficulty concluding that [the child's] statement to [the physician] was given during an ongoing emergency, as the ... interview ... took place ... nearly two weeks after" defendant alleged that child was responsible for the infant's broken arm).

¹⁴⁴ *New Jersey v. Buda*, 949 A.2d 761 (N.J. 2008).

¹⁴⁵ *Colorado v. Vigil*, 127 P.3d 916, 923 (Colo. 2006).

In [*Commonwealth v. Detsch*](#), a letter from Brazilian law enforcement that connected pictures found in a defendant's computer files to a series of child pornography photos was admissible.¹⁴⁶ This letter was clearly testimonial because it was prepared by law enforcement to assist in a criminal investigation, but the letter was nonetheless admissible. The trial court expressly limited admission of the letter to explain the actions of a detective in the investigation, and not to prove whether the photos, in fact, met the definition of child pornography. Confrontation was no longer an issue because the letter was not admitted to prove the truth of the matter asserted.

Forfeiture by wrongdoing

Testimonial statements are admissible when the defendant intentionally caused the witness' unavailability. As with all evidentiary rulings, the defendant's intent to make the witness unavailable must be shown by a preponderance of the evidence.¹⁴⁷ However, the nature of the substantive proof necessary to meet the intent requirement is the subject of considerable disagreement. It is unclear whether general proof of a defendant's history of isolation and control over a victim is sufficient to prove intent to make the witness unavailable, or whether more specific evidence of intentional witness tampering is required.

In [*Giles v. California*](#), the defendant was on trial for the murder of his ex-girlfriend, Avie.¹⁴⁸ At trial, the prosecutor admitted testimony from a police officer who had responded to a domestic violence call three weeks earlier. The police officer testified that Avie was crying and told the officer that Giles had assaulted her, choked her, punched her in the face and head, and threatened her with a knife, saying, "If I catch you fucking around I'll kill you."¹⁴⁹

The United States Supreme Court upheld the validity of the forfeiture doctrine, but found that the defendant must have "engaged in conduct designed to prevent the witness from testifying."¹⁵⁰ The Court remanded to the lower court for further findings on the defendant's specific intent to make Avie unavailable to testify.

On remand, the appellate court found that the prosecutor failed to present sufficient evidence that the defendant killed Avie with intent to prevent her from testifying or cooperating with prosecution.¹⁵¹ However, the court left the door open for the prosecutor to present evidence of the defendant's intent in a retrial.

¹⁴⁶ [*Commw. v. Detsch*, 2011 Pa. D. & C.5th 118 \(Pa. C.P. Berks July 14, 2010\)](#), [*Commw. v. Detsch*, 2011 Pa. D. & C.5th 118 \(Pa. C.P. Berks July 14, 2010\)](#), *aff'd* 24 A.3d 455 (Pa. Super. 2011).

¹⁴⁷ PA. R. EVID. 104; *Davis*, 547 U.S. at 833 (observing that the "preponderance of the evidence" standard is the standard used for making these sorts of evidentiary decisions); see also *Ridgeway v. Conway*, 2011 U.S. Dist. LEXIS 92228 (W.D.N.Y. Aug. 18, 2011).

¹⁴⁸ [*Giles v. California*, 554 U.S. 353 \(2008\)](#).

¹⁴⁹ *People v. Giles*, 2d Crim. No. B166937 (Ca. Ct. App. Feb. 25, 2009) (unpublished opinion).

¹⁵⁰ *Giles*, 554 U.S. at 359-60 (emphasis in original).

¹⁵¹ *People v. Giles*, 2d Crim. No. B166937 (Ca. Ct. App. Feb. 25, 2009) (unpublished opinion).

Intent to Cause Unavailability: Applying Giles to Domestic Violence Cases

Five Justices – including Justices Souter, Ginsburg, Breyer, Kennedy, and Stevens – agreed that evidence of a history of domestic violence, “which is meant to isolate the victim from outside help,” is sufficient to meet the intent requirement for the forfeiture doctrine to apply.¹⁵² Justice Scalia also honed in on the unique nature of a domestic violence relationship, explaining that “[a]cts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions.”¹⁵³ Scalia then concluded that “[e]arlier abuse, or threats of abuse, intended to dissuade a victim from resorting to outside help would be highly relevant to this inquiry.”¹⁵⁴

Tape-recorded testimony and video-conferencing

The use of tape-recorded testimony or video-conferencing as a substitute for face-to-face testimony is appropriate in some cases where the use of such technology is necessary to serve a compelling state interest. Before allowing the use of such technology, the court must “have ... an evidentiary hearing to determine if video testimony [is] warranted based on the specific facts relating to an individual witness.”¹⁵⁵

Closed-circuit, one-way video testimony

In [*Commonwealth v. Geiger*](#), the defendant was convicted of third-degree murder, criminal conspiracy, and endangering the welfare of children for her role in the death of her niece and the severe neglect and abuse of three other nieces.¹⁵⁶ At her trial, the three surviving nieces testified via closed-circuit, one-way video. In accordance with the Pennsylvania statute regarding recorded testimony, 42 Pa. C.S. § 5984.1, the defendant was able to hear and observe the testimony, but the children were not able to see or hear the defendant. The prosecutor, counsel for the defendant, the court reporter, the children’s psychiatric counselor, and the children’s foster parents were in the room with the children. The court also allowed the defendant to cross-examine the children through her counsel by notifying the court that she had a question. And, before allowing the closed-circuit testimony, the court heard testimony from a child psychologist that “face-to-face confrontation ... would cause [the children] ‘severe emotional distress.’” The court accepted this conclusion, finding that subjecting the children to testifying in front of the defendant “would cause the girls serious emotional distress, and would impair their ability to testify accurately and honestly.”

The use of closed-circuit, one-way video testimony was upheld on appeal. The Superior Court relied on the United States Supreme Court’s decision in [*Maryland v. Craig*](#),¹⁵⁷ which “recognized the

¹⁵² *Giles*, 553 U.S. at 380 (Souter, J. & Ginsburg, J. concurring).

¹⁵³ *Id.* at 377 (Scalia, J. majority).

¹⁵⁴ *Id.*

¹⁵⁵ *Commw. v. Atkinson*, 987 A.2d 743 (Pa. Super. 2009).

¹⁵⁶ [*Commw. v. Geiger*, 944 A.2d 85 \(Pa. Super. 2008\)](#), appeal denied *Commw. v. Geiger*, 964 A.2d 1 (Pa. 2009).

¹⁵⁷ [*Maryland v. Craig*, 497 U.S. 836 \(1990\)](#).

difficulties that child victims may experience when they are asked to confront their abusers face-to-face.” The Craig Court upheld the use of testimony by children via one-way, closed-circuit video, explaining that the “right to face-to-face confrontation is not absolute and the state may infringe upon this right to protect a compelling state interest.” The Court explained that protecting “the mental and physical well-being of a child” is sufficiently compelling to warrant infringement on the constitutional right to face-to-face confrontation.

In [*Commonwealth v. Kemmerer*](#), a child’s testimony via closed-circuit testimony was sufficient to meet the Confrontation Clause requirements.¹⁵⁸ And, because the child testified via closed-circuit television, other statements by the child were able to come in without raising confrontation concerns.

The section [Child testimony via contemporaneous alternative method](#) has further information on the use of one-way, closed-circuit testimony for children.

Two-way video testimony

In [*Commonwealth v. Atkinson*](#), at the initial hearing, the trial court allowed an alleged co-conspirator to testify via two-way, video-conferencing technology.¹⁵⁹ At the time, the co-conspirator was incarcerated in state prison. On appeal, the Superior Court found that the use of video-conferencing was not supported by a compelling state interest and, therefore, was unconstitutional. But, because the testimony was cumulative, the error was harmless and the trial court’s ultimate decision was upheld. In finding the testimony unconstitutional, the Superior Court explained that “convenience and cost-saving are not sufficient reasons to deny constitutional rights.”

In reaching its decision, the court drew from [*Maryland v. Craig*](#),¹⁶⁰ where the United States Supreme Court allowed for a “necessity-based exception for face-to-face, in-courtroom confrontation where the witness’ inability to testify invokes the state’s interest in protecting the witness – from trauma in child sexual abuse or ... from physical danger or suffering.”¹⁶¹ The Atkinson court articulated a test from Craig, finding that the right to face-to-face courtroom confrontation gives way when there is both sufficiently compelling public policy and where the testimony has indicia of reliability.

Present sense impression – victim call to mother

Present sense impression was the basis for admission of hearsay telephone statements made by the victim to her mother shortly prior to the victim’s murder. In [*Commonwealth v. Coleman*](#), a woman called her mother, told her that the defendant, her boyfriend, would not let her leave the apartment, that he was going to hang up the telephone and kill her.¹⁶² The phone connection ended, and the

¹⁵⁸ [Commw. v. Kemmerer, 33 A.3d 39 \(Pa. Super. 2011\)](#), see also 42 Pa. C.S. § 5985.

¹⁵⁹ [Commw. v. Atkinson, 987 A.2d 743 \(Pa. Super. 2009\)](#).

¹⁶⁰ *Maryland v. Craig*, 497 U.S. 836 (1990).

¹⁶¹ *Atkinson*, 987 A.2d 743 (quoting *Horn v. Quarterman*, 508 F.3d 305 (5th Cir. 2007)) (citing *Maryland v. Craig*, 497 U.S. 836 (1990)).

¹⁶² [Commw. v. Coleman, 326 A.2d 387 \(Pa. 1974\)](#).

mother called the police. The police arrived at the daughter's apartment 10 minutes later, and found the defendant on a street nearby. The police subsequently found the daughter murdered in her apartment.

The trial court admitted the daughter's statements as an excited utterance. On appeal, the Pennsylvania Supreme Court held that the statement was not an excited utterance but a statement of present sense impression admissible as a hearsay exception.¹⁶³

CHILD HEARSAY STATEMENTS

Child Victim and Witness Act

Children who are victims of, or witnesses to, violent crimes may receive special treatment concerning statements they have made to others regarding the abuse. The Child Victim and Witness Act, 42 Pa. C.S. § 5981 et seq., was enacted to provide child victim witnesses with procedures to protect them during their involvement with the justice system.

Out of court statement

The Act includes civil and criminal proceedings. Pursuant to the Act, out-of-court statements describing homicide, assault, kidnapping, sexual offenses, burglary, or robbery made by a child victim or witness who, at the time of the statement was 12 years or younger, are admissible in evidence, provided certain conditions are met. These conditions require that the court find that the evidence is relevant; that the statement's time, content, and circumstances provide sufficient indicia of reliability; and the child must either testify at the proceeding or be unavailable as a witness.¹⁶⁴

Children who are victims of, or witnesses to, violent acts may receive special treatment concerning statements they have made regarding the abuse.

Determination regarding child's unavailability

Before the court may make a determination that the child is unavailable as a witness, the court must determine, based on available evidence, that testifying would cause such serious emotional distress that it would impair the child's ability to reasonably communicate.¹⁶⁵ In order to make this determination, the court may do either, or both, of the following:

- 1) Observe and question the child either inside or outside the courtroom.

¹⁶³ *Id.* at 389.

¹⁶⁴ 42 PA. C.S. § 5985.1(a).

¹⁶⁵ *Id.* at § 5985.1(a.1).

- 2) Hear testimony of a parent or custodian or any other person... who has dealt with the child in a therapeutic or medical setting.¹⁶⁶

Who may be present

If the court observes or questions the child to make this determination, the defendant may not be present. If the court hears testimony from other individuals to make this determination, the court must permit the defendant, the defendant's attorney, the district attorney (for criminal cases), and the plaintiff's attorney (for civil cases) to be present.¹⁶⁷

Notice of statement to defendant

Sufficient notice must be given to the defendant by the opposing party regarding the particulars of the child's statement and the proponent's intention to offer the statement so that the defendant may have fair opportunity to "prepare to meet" the statement.¹⁶⁸

If the court hears testimony from others regarding child's unavailability, the court must allow defendant, defendant's counsel, and prosecutor or plaintiff's counsel to be present.

Notice is an essential requirement for the application of this Act. Actual notice to the defendant is required, and the notice must be given sufficiently in advance. The Superior Court in [*Commonwealth v. Crossley*](#) stated "the defendant is entitled to a type of notice that is direct and specific in order to provide a meaningful opportunity to challenge the hearsay." The notice provisions of this rule "are strict and must be strictly observed."¹⁶⁹ Failure to provide notice results in the inadmissibility of the hearsay evidence.¹⁷⁰

Other Child Hearsay Exceptions

Even if a child's statements do not meet the criteria of the Child Victim and Witness Act, the statements may be admissible under other hearsay exceptions. For example, the admission of a child witness's excited utterance was upheld in the [*Commonwealth v. Boczkowski*](#) murder case.¹⁷¹ In Boczkowski, the defendant's 5-year-old son stated to a neighbor that his "mommy was screaming so loud last night that I had to put my hands up over my ears. She wouldn't stop screaming, and I

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at § 5985.1(a.2).

¹⁶⁸ *Id.* at § 5985.1(b).

¹⁶⁹ [*Commw. v. Crossley*, 711 A.2d 1025 \(Pa. Super. 1998\).](#)

¹⁷⁰ 42 PA. C.S. § 5985.1(b).

¹⁷¹ [*Commw. v. Boczkowski*, 846 A.2d 75 \(Pa. 2004\).](#)

saw her in the bathroom holding her hands up, and daddy told me to get out.”¹⁷² Defendant challenged the admission of the neighbor’s testimony regarding the boy’s hearsay statements, claiming that the statements were too remote in time to constitute an excited utterance.

The Supreme Court reviewed the circumstances surrounding the boy’s statement and the law regarding the excited utterance exception to the hearsay rule. For a statement to be considered an excited utterance, it must be made spontaneously and without opportunity for reflection. It must be shown that the declarant witnessed an event so sufficiently startling and close in point of time as to render thought processes inoperable and that the declarations were a spontaneous reaction to the event. There is no clear-cut rule regarding time sequence; each fact-specific determination must be made case by case.¹⁷³

Turning to the facts, the court observed that the boy saw the event, was sent to bed, and was awakened by his father in the middle of the night and taken to the neighbors where he returned to sleep. The statement was made the next morning without prompting to the neighbor while she was feeding the boy breakfast.¹⁷⁴ The Supreme Court concluded that given the time the boy spent sleeping, it is unlikely that his statement was affected by reflection or any outside influences, and upheld the admission of the neighbor’s testimony regarding his excited utterance.¹⁷⁵

AUTHENTICATION OF EVIDENCE

General Rule - Pennsylvania Rule of Evidence 901(a)

Pennsylvania Rule of Evidence 901(a) states:

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Rule 901(b) illustrates various methods by which authentication may be accomplished. The main method to be discussed in this chapter involves 901(b)(4), “Distinctive Characteristics and the Like.” Appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with circumstances may be sufficient to prove what a proponent claims it to be.

¹⁷² *Boczowski*, 846 A.2d at 95.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 95-96.

¹⁷⁵ *Id.*

Electronic Communications and Authentication of Evidence

Electronic communications, such as e-mail and instant messages, are evaluated on a case-by-case basis as any other document to determine whether there has been adequate foundational showing of its relevance and authenticity.¹⁷⁶

Instant messages

In *In re F.P.*, the Superior Court first established that instant and text messages were to be authenticated in the same way that other writings were authenticated: on a case-by-case basis.¹⁷⁷ In this case, threats delivered by instant message were properly authenticated, even though the messages were sent under the sender's screen name. The circumstances showed that the sender referred to himself by his first name, repeatedly accused the victim of stealing from him, and noted that the victim talked to school personnel about the threatening instant messages. All of this evidence was corroborated by testimony that the defendant was upset with the victim for allegedly stealing from him.

Text messages

In *Commonwealth v. Koch*, the defendant appealed her conviction for drug offenses, claiming that drug sale text messages found on her cell phone were not properly authenticated and were inadmissible hearsay.¹⁷⁸ Koch resided with her paramour, and her brother was also present when the police found drugs and drug paraphernalia in the residence. The police also seized two cell phones, one of which belonged to Koch. The messages found on Koch's cell phone were transcribed and admitted at trial, despite Koch's objections that they were hearsay and lacked authentication. Some of the transcribed messages were drug-related, but others were not, and Koch clearly had not written some of the messages.

On appeal, Koch claimed that, due to lack of authentication, admission of the text messages and their use in proving the Commonwealth's case against her amounted to reversible error. The Superior Court observed that authentication is required prior to admission of evidence. Text messages are defined as "writings or other data transmitted electronically by cellular telephones" for purposes of Pennsylvania's Wiretap Act. In order to determine what is required to authenticate text messages, the Superior Court looked to the treatment accorded other electronic communications. It observed that it had earlier rejected an argument that e-mails or text messages are inherently unreliable due to their relative anonymity and the difficulty in connecting them to their author. The electronic communications and instant messages should be evaluated, case by case, as to whether an adequate foundation demonstrates authenticity. Authentication may include factual information or references to the involved parties or other circumstantial evidence identifying the sender.

¹⁷⁶ *In re F.P.*, 878 A. 2d 91 (Pa. Super. 2005).

¹⁷⁷ *In re F.P.*, 878 A. 2d 91 (Pa. Super. 2005).

¹⁷⁸ *Commw. v. Koch*, 39 A.3d 996 (Pa. Super. 2011), *aff'd* 106 A.3d 705 (Pa. 2014).

Authentication is a prerequisite for admission, and requires more than mere confirmation that a number or address belonged to a particular person. Circumstantial evidence demonstrating the identity of the sender is necessary; the court could not admit the evidence for the reason that doubts regarding the identity of the sender went to the weight of the evidence rather than its authenticity. The person to whom the number is assigned does not always exclusively use the cell phone. Therefore, the circumstantial evidence corroborating the identity of the sender is necessary. In this case, no evidence was offered to show that Koch wrote the drug-related messages, nor were there any contextual clues that would tend to reveal the identity of the sender. The fact that the cell phone was found on a table in close proximity to Koch was not sufficient to authenticate the messages. Because the messages constituted hearsay, and the evidentiary value of the messages depended entirely on the truth of their content, and because no hearsay exception applied, the Superior Court reversed Koch's conviction and remanded for a new trial.

Email Messages

In [*Hood-O'Hara v. Wills*](#), a PFA case, the defendant offered copies of emails that were purportedly sent from the plaintiff's mother's email account.¹⁷⁹ The plaintiff's mother denied sending the emails, which accused the plaintiff of drinking alcohol excessively, and further stated that an unauthorized person had accessed her email account. The trial court excluded the emails as inadmissible hearsay because the emails were not authenticated as having been sent by the plaintiff's mother. On appeal, the Superior Court found that the emails were properly excluded.

EXPERTS AND SCIENTIFIC EVIDENCE

Generally

A full discussion of expert testimony and scientific evidence is beyond the scope of this book. The following is a brief overview of the Pennsylvania Rules of Evidence regarding expert testimony and a discussion of Pennsylvania case law establishing criteria for admission of expert testimony and scientific evidence.

Pennsylvania Requirements for Expert Testimony and Scientific Evidence

Pennsylvania Rules of Evidence

Rule 702. Testimony by Experts

If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified

¹⁷⁹ [*Hood-O'Hara v. Wills*, 873 A. 2d 757 \(Pa. Super. 2005\).](#)

as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Expert testimony must be based on scientific, technical, or other specialized knowledge. The specialized knowledge must be reliable and valid. In addition, expert testimony is permitted only as an aid to the jury when the subject matter is related to a science, skill, or occupation beyond the knowledge or experience of the average layperson. If the issue involves a matter of common knowledge, expert testimony is inadmissible.¹⁸⁰

The expert must be qualified by knowledge, skill, experience, training or education; this determination is a finding of fact to be made by the trial court. Finally, expert testimony must have an adequate degree of certainty.

Frye test used for admissibility of scientific evidence

The admissibility of expert scientific evidence depends on the general acceptance of the evidence by the relevant scientific community. In 1977, Pennsylvania adopted the Frye test¹⁸¹ for the admissibility of novel expert testimony in **Commonwealth v. Topa**. The Frye test, together with Pennsylvania Rule of Evidence 702, provides that novel scientific evidence is “admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community.”¹⁸² Since the Topa case, the Pennsylvania Supreme Court affirmed that Frye will continue to be controlling law on the admissibility of scientific evidence and clarified its application in [Grady v. Frito-Lay, Inc.](#)¹⁸³

To properly apply the Frye test, the Grady Court set forth the following requirements:

- The proponent of expert scientific evidence bears the burden of establishing all the elements for its admission under Pennsylvania Rule of Evidence 702, which includes showing that the Frye rule is satisfied.¹⁸⁴
- In applying the Frye rule, the proponent of the evidence must prove that the methodology an expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial. This does not mean, however, that the proponent must prove that the scientific community has also generally accepted the expert’s conclusion.¹⁸⁵
- Under Pennsylvania Rule of Evidence 702, the Frye requirement is only one of several criteria. Rule 702 also mandates that scientific testimony be given by a “witness who is qualified as an expert by knowledge, skill, experience, training or education . . .” Whether

¹⁸⁰ Commw. v. Topa, 369 A.2d 1277 (Pa. 1977).

¹⁸¹ *Id.*

¹⁸² [Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1044 \(Pa. 2003\).](#)

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1044-45.

¹⁸⁵ *Id.*

a witness is qualified to render opinions and whether his testimony passes the Frye test are two distinct inquiries that must be raised and developed separately by the parties, and ruled upon separately by the trial courts.¹⁸⁶

- The standard of appellate review that applies to a Frye issue is abuse of discretion.¹⁸⁷

Following the **Grady v. Frito-Lay, Inc.** decision, a number of Superior Court cases have dealt with the admissibility of scientific evidence.¹⁸⁸ These cases emphasize the Superior Court's view that the Frye test only applies when a party wishes to introduce novel scientific evidence obtained from the conclusions of an expert witness.¹⁸⁹

Experts may rely on information outside of the record

The Pennsylvania Rules of Evidence also permit experts to rely on information outside the record to base an opinion.

Rule 703. Bases of an Expert's Opinion Testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

EVIDENCE ISSUES IN SPECIFIC CIVIL PROCEEDINGS

Protection From Abuse

The purpose of the Protection From Abuse Act is to protect victims of domestic violence from perpetrators of abuse.¹⁹⁰ The primary goal of the Act is to "advance prevention of physical and sexual abuse."¹⁹¹ PFA cases are often initiated pro se, or with the assistance of a non-attorney advocate or a court clerk. Because of the purpose of the Act and the nature of the procedures

¹⁸⁶ *Id.* at 839 A.2d at 1045-46.

¹⁸⁷ *Id.*

¹⁸⁸ See *Haney v. Pagnanelli*, 830 A.2d 978 (Pa. Super. 2003); *Trach v. Fellin*, 830 A.2d 978 (Pa. Super. 2003); *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. 2003); *M.C.M. v. Milton Hershey Med. Ctr.*, 834 A.2d 1155 (Pa. Super. 2003); *Tucker v. Community Med. Ctr.*, 833 A.2d 217 (Pa. Super. 2003); *Cummins v. Rosa*, 846 A.2d 148 (Pa. Super. 2004).

¹⁸⁹ *Reading Radio, Inc.*, 833 A.2d 199.

¹⁹⁰ *Fonner v. Fonner*, 731 A.2d 160, 161 (Pa. Super. 1999).

¹⁹¹ *Id.* at 161-62 (quoting *Snyder v. Snyder*, 629 A.2d 977, 981 (Pa. Super. 1993)).

involved, relaxed evidentiary standards are applied. For example, specificity in pleadings is not required; testimony about incidents not specifically pleaded in the petition is admissible.¹⁹²

Additionally, there is no timeliness requirement for evidence in a PFA action; as in criminal cases cited previously in this chapter, evidence about older, previous abusive incidents may be admitted if it is relevant and probative.¹⁹³

It is not appropriate for trial courts to refuse to admit testimony about incidents not in the pleadings or outside of a specific judge-imposed time frame.

It is within the sound discretion of the trial judge to decide whether to admit evidence in a PFA action.¹⁹⁴ Domestic violence is most often a pattern of incidents or a pattern of dominance and coercion that may have developed over many years. Pennsylvania appellate courts have held that it is inappropriate for a trial court to refuse to admit testimony about abuse not in the pleadings. It is also inappropriate for a trial court to refuse to admit testimony regarding incidents occurring outside of a specific judge-imposed time frame.¹⁹⁵ Evidence offered in a PFA case may be evaluated in the context of the preventive purpose of the act and the pro se nature of the filings, and using a thorough knowledge of domestic violence.

The Superior Court found that evidence of husband throwing a boulder in wife's direction four months earlier supported the trial court's entry of a PFA order in ***Raker v. Raker***.¹⁹⁶

The Superior Court found that it was erroneous for the PFA trial court to abruptly stop testimony regarding the father's assault on his daughter after learning there was a custody order in place in ***Lawrence v. Bordner***.¹⁹⁷ It was error for the trial court to determine that a PFA order was unwarranted and to limit any requested custody restrictions to a custody action. The court erred in

¹⁹² See *Snyder*, 629 A.2d at 977 (concluding that it was not error for the trial court to admit evidence of two incidents of a husband's prior abuse, which were not alleged in a wife's PFA petition). In *Snyder*, the petitioner filed *pro se*. *Id.* The Court found requiring Petitioners to delineate all the incidents of abuse would place an impracticable burden on the Petitioner. *Id.* at 982 n.2.

¹⁹³ See *Miller v. Walker*, 665 A.2d 1252, 1259 (Pa. Super. 1995) (stating that the PFA Act's protective purposes require flexibility in admission of evidence relating to past acts of abuse, and the father's past abusive conduct was a crucial inquiry necessary for entry of a proper order); see also *Raker v. Raker*, 847 A.2d 720 (Pa. Super. 2004) (considering a past incident of abuse in conjunction with current acts to establish reasonable fear on the part of the victim).

¹⁹⁴ "Questions concerning the admission or exclusion of evidence are within the sound discretion of the trial court and may be reversed on appeal only when a clear abuse of discretion is apparent." *Snyder*, 629 A.2d at 982 (quoting *Soda v. Baird*, 600 A.2d 1274, 1277 (Pa. Super. 1991)).

¹⁹⁵ See generally *Snyder*, 629 A.2d 977; *Miller*, 665 A.2d 1252.

¹⁹⁶ *Raker v. Raker*, 847 A.2d 720 (Pa. Super. 2004).

¹⁹⁷ [Lawrence v. Bordner](#), 907 A.2d 1109 (Pa. Super. 2006).

limiting the plaintiff to custody relief under the child custody statute as her exclusive remedy for the alleged abuse.

Custody

Pennsylvania's child custody law makes child safety a priority and gives weighted consideration to factors that affect the safety of the child, including domestic violence.¹⁹⁸ Specifically, the statute provides as follows:

- a) Factors ---In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:
- 2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate safeguards and supervision of the child.¹⁹⁹

For a more detailed discussion of custody evidence issues, please see [Chapter VII: Custody](#).

JUDGES MAY QUESTION WITNESSES

Generally

Sometimes, the litigants may not produce all of the information or testimony that the judge may need in order to make a decision. Provided that the judge is only seeking to obtain information, and provided the court's action does not unduly prejudice the other party, the judge is generally permitted to call witnesses and ask questions.

The Pennsylvania Rules of Evidence

Rule 614 allows a judge to call witnesses and ask questions:

- a) Calling. Consistent with its function as an impartial arbiter, the court, with notice to the parties, may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
- b) Examining. Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness.
- c) Objections. A party may object to the court's calling or examining a witness when given notice that the witness will be called or when the witness is examined. When requested to

¹⁹⁸ 23 PA. C.S. § 5328.

¹⁹⁹ 23 PA. C.S. § 5328(a)(2).

do so, the court must give the objecting party an opportunity to make objections out of the presence of the jury.

Cases Regarding Witness Examination by Court

Criminal cases

Questioning of witnesses by judges is carefully scrutinized and challenged in criminal jury trials. The following are some example cases:

- Clarification of an expert's testimony, by asking if the defendant's alleged conduct would have been impossible, was permissible.²⁰⁰
- Skeptical question asked of the defendant's wife was permissible because it was necessary for clarification, and the judge instructed the jury that he was neutral.²⁰¹
- Interrupting direct examination and questioning the defendant's credibility was abuse of discretion.²⁰²
- Asking the witness five times if he was certain of the facts and repeatedly warning the witness about the penalty of perjury was abuse of discretion.²⁰³

Civil cases

Generally, when a civil trial judge is challenged for examining witnesses, the case involves a jury. When a jury is involved, witness examination by the judge is permitted, provided the judge's examination does not suggest that the judge is biased in favor of one party over the other, or has an opinion regarding the witness' testimony.²⁰⁴ Judges are permitted to ask questions of witnesses to clarify testimony or to fully develop the facts.²⁰⁵

Judges are permitted to ask questions of witnesses to clarify testimony or to fully develop the facts.

For information regarding the role of the court in pro se proceedings, please see Chapter XI: Pro Se Process.

²⁰⁰ Commw. v. Ables, 590 A.2d 334 (Pa. Super. 1991).

²⁰¹ Commw. v. Purcell, 589 A.2d 217 (Pa. Super. 1991).

²⁰² Commw. v. Hammer, 494 A.2d 1054 (Pa. 1985).

²⁰³ Commw. v. Laws, 378 A.2d 812 (Pa. 1977).

²⁰⁴ See generally MANNER OR EXTENT OF TRIAL JUDGE'S EXAMINATION OF WITNESSES IN CIVIL CASES, 6 A.L.R. 4th 951 (2005).

²⁰⁵ See, e.g., Pratt v. Stein, 444 A.2d 674 (Pa. Super. 1982).

OTHER RELEVANT INFORMATION

Link Between Emotional Abuse and Physical Violence

Violence perpetrated against women by intimates is often accompanied by emotionally abusive and controlling behavior. According to the National Violence Against Women survey, women whose partners were jealous, controlling, or verbally abusive were significantly more likely to report being raped, physically assaulted, and/or stalked by their partners.²⁰⁶ Having a verbally abusive partner was the variable most likely to predict that a woman would be victimized by an intimate partner.²⁰⁷ According to the survey report authors, the strong statistical link between violence and emotionally abusive and controlling behavior in intimate relationships supports the theory that much of the violence perpetrated against women by male partners is part of a systematic pattern of dominance and control.²⁰⁸

Battering Tends to be a Pattern of Violence

Battering tends to be a pattern of violence rather than a one-time occurrence. The National Intimate Partner and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention (CDC) and released in December 2011, reports that “violent acts ... are frequently experienced in the context of other violence committed by the same perpetrator.”²⁰⁹

An estimated one-third of batterers abuse their intimate partner again within two years.²¹⁰ Over a longer period of time, repeat rates are even higher: In Colorado, between 1994 and 2005, nearly 60 percent of domestic violence offenders were arrested more than once.²¹¹

Separation Assault - Danger Increases At Separation

Separation is often the most dangerous time for domestic violence victims. Research confirms that abusers often use escalated and more injurious violence at and after the time that the victim

²⁰⁶ PATRICIA TJADEN & NANCY THOENNES, NAT’L INSTITUTE OF JUSTICE & CTRS. FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (July 2000). The National Institute of Justice and the Centers for Disease Control and Prevention cosponsored this survey through a grant to the Center for Policy Research. The Center conducted telephone interviews with a representative sample of 8,000 U.S. women and 8,000 U.S. men about their experiences as victims of various forms of violence, including intimate partner violence.

²⁰⁷ *Id.* at Executive Summary iv, 34.

²⁰⁸ *Id.* at 34.

²⁰⁹ CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT, at 39 (2011), available at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

²¹⁰ ANDREW R. KLEIN, U.S. DEP’T OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES at 19 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

²¹¹ *Id.* at 20.

separates from the abuser²¹² and when the victim seeks assistance from law enforcement or the court.

Domestic Violence is Relevant to Parental Fitness

According to materials published by the American Bar Association's Commission on Domestic Violence, domestic violence is "extremely relevant" to parental fitness. A history of domestic violence can indicate that the perpetrating parent physically or emotionally abuses the child as well as the other parent. The American Bar Association's Commission on Domestic Violence reports that "[a] wide array of studies reveal a significant overlap between domestic violence and child abuse, with most finding that both forms of abuse occur in 30-60 percent of violent families."²¹³ Moreover, children are often in more danger after the parents separate because "[m]any batterers' motivation to intimidate and control their victims through the children increases after separation, due to loss of other methods of exerting control."²¹⁴

EMERGING PRACTICES - RELEVANCE OF PRIOR ABUSE

In criminal cases, courts have clearly established that they are interested in, and willing to admit, evidence of prior bad acts of the defendant, even against claims that admission of information regarding the defendant's prior abuse will unduly prejudice the jury. In criminal cases, and especially capital murder cases, every effort is taken to ensure the defendant receives a fair trial before the jury. However, information regarding the defendant's prior abuse of the victim has been admitted to show motive,²¹⁵ absence of mistake or accident,²¹⁶ malice or ill will,²¹⁷ or chain or sequence of events, such as the continuing and escalating nature of abuse.²¹⁸

The relevance rules apply in both criminal and civil cases. In civil cases involving domestic violence, including both PFA and custody cases, it is important for judges to admit evidence of prior bad acts that show motive, opportunity, intent, preparation, plan, absence of mistake or accident, malice, chain or sequence of events, and the escalating nature of abuse.

PFA and custody cases are heard by the court, not a jury, and the court may admit the testimony, but assign appropriate weight to "less recent" evidence of abuse. Domestic violence typically involves a pattern of incidents of dominance and coercion that develops over time. In addition, domestic violence typically escalates over time, with separation being the most dangerous time for domestic

²¹² SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (MARITAL STATUS) (2007), available at <http://www.bjs.gov/content/pub/pdf/ipvus.pdf>

²¹³ ABA Comm'n on Domestic Violence, *10 Custody Myths and How to Counter Them*, at 1 (2006), available at http://www.americanbar.org/content/dam/aba/migrated/domviol/custody_myths.authcheckdam.pdf.

²¹⁴ *Id.* at 2.

²¹⁵ *Commw. v. Reid*, 811 A.2d 530, 550-51 (Pa. 2002).

²¹⁶ *Commw. v. Boczkowski*, 846 A.2d 75 (Pa. 2004).

²¹⁷ *Commw. v. Drumheller*, 808 A.2d 893 (Pa. 2002).

²¹⁸ *Id.*

violence victims. When courts admit and consider prior instances of abuse in making their determinations, the protective and preventive purposes of the PFA Act are addressed. Courts that admit and consider prior abuse in custody cases also meet the requirements of Pennsylvania's custody statute.²¹⁹

EMERGING PRACTICES - THE USE OF EXPERT TESTIMONY

Expert testimony may be helpful in understanding domestic violence and a victim's reactions to the violence perpetrated against him or her. There are benefits and risks to the use of expert testimony in domestic violence proceedings.

Some of the benefits of expert testimony include the following:

- Expert testimony can enlighten the court or jury about victim behavior that does not fit the stereotype of a "good" victim. For example, an expert could discuss why some victims appear as angry and hostile witnesses, or why a victim is emotionless, showing lack of affect. An expert could educate the fact-finder about why some victims use alcohol or drugs as a direct reaction to the violence or may commit crimes at their abuser's direction.²²⁰
- Expert testimony can provide information to the court or jury that the general public may not know. This information is often essential to develop a fair assessment of the evidence presented at trial. For example, an expert could discuss the risks associated with separation violence and why a victim would stay with the abuser – because it is the option that best protects the victim and the victim's children.²²¹
- Expert testimony can also educate the court and jury about the vast social science research and information that have developed over the past 25 years.²²²

Despite the benefits associated with expert testimony in domestic violence cases, there are also risks to using this type of evidence. Risks of expert testimony include the following:

- The monetary costs associated with offering expert testimony are significant, and they are often the single factor that prohibits introduction of this information.²²³ One tool often used to isolate and control victims of domestic violence is economic dependency. An abuser may not have "allowed" the victim to work outside the home or have access to the

²¹⁹ 23 PA. C.S. § 5303(a)(3); *Snyder v. Snyder*, 629 A.2d 977, 981-82 (Pa. Super. 1993).

²²⁰ See generally Jane H. Aiken & Jane C. Murphy, *Dealing with Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, COURT REVIEW (Summer 2000).

²²¹ *Id.* at 13.

²²² *Id.*

²²³ *Id.* at 16.

finances. A victim who is now separated from the abuser may still be experiencing these financial hardships.

- Providing expert testimony diverts valuable and already-strained resources. For example, regularly offering expert testimony at PFA proceedings will slow the process down, making it difficult for the PFA proceedings to remain expedited and efficient.²²⁴
- Another concern is the inference the court or jurors may draw about cases where expert testimony is not offered. If experts are regularly used to explain victim behavior and to explain the psychology of battering, fact-finders may make assumptions about the motivation of domestic violence victims who do not offer such testimony.

Pennsylvania courts allow, on a case by case, evidence regarding the reasonable belief of a domestic violence victim who commits a crime.²²⁵ The trial court is given broad discretion to decide when to allow expert testimony and when to exclude it. It is important that judges carefully consider expert testimony when it is offered; most individuals' life experiences do not adequately prepare them to understand domestic violence and its effects.

EMERGING PRACTICES - BATTERED WOMAN'S SYNDROME

Battered Woman's Syndrome was most easily understood as a way to explain battering by looking at a set of symptoms believed to be exhibited in women who were victims of domestic violence.²²⁶ This theory of battering is an attempt to explain domestic violence from a psychological perspective, and has not been adopted in Pennsylvania as a formally recognized affirmative defense. Expert testimony, however, regarding the effects of battering is admissible as it relates to a theory of self-defense.²²⁷

In Pennsylvania, defenses available to a battered woman accused of a crime may include justification, including the use of force for self-protection or to protect others.²²⁸ Generally, the use of force toward another person is justifiable when the person using force reasonably believes that such force is immediately necessary to protect himself or herself against unlawful force by another person at the time.²²⁹ The use of deadly force is not justifiable unless the person using force reasonably believes that such force is necessary to protect himself or herself against death, serious bodily injury, kidnapping, or forced sexual intercourse.²³⁰

Continued abuse and the escalation of abuse may lead a victim to reasonably believe in the necessity to defend himself or herself against imminent serious bodily injury or death. Expert

²²⁴ *Id.*

²²⁵ [Commw. v. Miller, 634 A.2d 614 \(Pa. Super. 1993\).](#)

²²⁶ ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 23-24 (2000).

²²⁷ *Miller*, 634 A.2d 614.

²²⁸ 18 PA. C.S. §§ 501, 505, 506.

²²⁹ 18 PA. C.S. § 505(a).

²³⁰ 18 PA. C.S. § 505(b)(2).

testimony and other information regarding the cumulative effects of physical and psychological abuse help assess the reasonableness of a battered person's fear of imminent death or serious bodily harm with respect to a self-defense claim.²³¹

Expert testimony on battering and its effects is admissible to aid a jury in understanding a criminal defendant's state of mind relevant to a claim of self-defense.²³² The Superior Court held in *Commonwealth v. Miller* that expert testimony regarding battered woman's syndrome is:

... admissible as probative evidence of the defendant's state of mind as it relates to a theory of self-defense. The syndrome does not represent a defense to homicide in and of itself, but rather, is a type of evidence that may be introduced on the question of the reasonable belief requirement of self-defense in cases that involve a history of abuse between the victim and the defendant.²³³

This type of expert evidence is relevant to the defendant's state of mind and should not be introduced to improperly bolster the credibility of the defendant, but rather, to aid the jury in evaluating the defendant's behavior and state of mind given the abusive environment that existed.²³⁴

When a defendant raises the issue of self-defense, the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt.²³⁵ While there is no burden on a defendant to prove the claim before the defense is properly at issue at trial, there must be some evidence, from whatever source, to justify a finding of self-defense.²³⁶ If there is any evidence that will support the claim, then the issue is properly before the fact finder.²³⁷

EMERGING PRACTICES - UNDERSTANDING RELUCTANT/UNWILLING VICTIMS

Judges often have experience with victims of domestic violence who recant their testimony or refuse to testify against an abuser. Various professionals may be frustrated by this perceived refusal to cooperate with the court system or with the legal case being pursued.

A victim of domestic violence may refuse to testify against the abuser for myriad reasons, including fear of retaliation or a desire to preserve the relationship. A domestic violence victim may attempt to maintain a civil relationship with the abuser due to the necessity of future interactions surrounding shared children or other involuntary interactions. Forcing a victim to testify could drastically increase the victim's risk of future harm and the level of danger the victim and the children may experience.

²³¹ *Commw. v. Stonehouse*, 555 A.2d 772 (Pa. 1989).

²³² *Miller*, 634 A.2d 614.

²³³ *Id.* at 622.

²³⁴ *Id.*

²³⁵ *Commw. v. Samuel*, 590 A.2d 1245, 1247 (Pa. 1991).

²³⁶ *Commw. v. Black*, 376 A.2d 627, 630 (Pa. 1977).

²³⁷ *Commw. v. Mayfield*, 585 A.2d 1069, 1071 (Pa. Super. 1991); see also *Commw. v. Torres*, 766 A.2d 342, 345 (Pa. 2001).

Although the U.S. Supreme Court's Crawford decision will make it more difficult to prosecute a domestic violence criminal case without victim testimony, many criminal cases can proceed without victim testimony if prosecutors, police, and other investigators gather and preserve evidence, conduct thorough investigations, and use non-hearsay and non-testimonial victim statements. Cases that are brought to court that rely solely on victim testimony may place the victim in greater danger, and this practice may cause the case to fail if the victim refuses to testify.

If the trial court believes that the victim is refusing to testify because of safety concerns or coercion, one appropriate response might be referral to a domestic violence advocate to address safety-planning issues. Another alternative is for the court to issue a protective order under Section 4954 of the Crimes Code.²³⁸ A court with jurisdiction over any criminal matter may, after a hearing that may include hearsay or the declarations of the prosecutor that the witness or victim has been intimidated or is reasonably likely to be intimidated, issue a protective order.²³⁹

If a victim is resistant for another reason, the court may carefully assess the circumstances and uphold due process protections. Judicial compulsion that penalizes a victim may jeopardize victim safety and deter the victim from seeking future help from the criminal justice system.

EMERGING PRACTICES: SOCIAL MEDIA IN DOMESTIC VIOLENCE PROSECUTIONS

More and more frequently, evidence in civil and criminal cases is gleaned from personal social media pages. A greater understanding of the way social media are used – and misused – enhances judges' ability to effectively rule on whether social media evidence is relevant and admissible in court.

For many people, especially in younger generations, social media are a primary form of communication. People share intimate details about their private lives on social media, from mundane daily activities to major life events. Pictures, comments, and video are available for friends – and often the public – to see. As a result, social media contain a wealth of information that can be used as evidence in criminal and civil cases.

Social Media and Domestic Violence

Evidence that may seem innocuous takes on new meaning when one understands how technology enables abusive behavior. Stalking is a perfect example. Research suggests that cyber-stalking continues to grow in large part because the Internet provides a safe haven for offenders to

²³⁸ 18 PA. C.S. § 4954.

²³⁹ *Id.*

theoretically hide behind a veil of anonymity.²⁴⁰ In a 2007 analysis of online stalking, Michael Pittaro draws comparisons between classic stalking and cyber-stalking:

[R]esearch findings suggest that stalking is a criminal offense motivated by interpersonal hostility and aggressive behaviors stemming from power and control issues rather than material gain or sexual obsession. Cyber-stalking, like traditional offline stalking, is fueled by rage, power, control, and anger that may have been precipitated by a victim's actions or, in some cases, the victim's inactions.²⁴¹

While courts may be hesitant to accept evidence from social media sites, case law is evolving quickly to embrace the introduction of this evidence.

In **United States v. Todd Hart**, Hart pleaded guilty to stalking and invasion of privacy charges.²⁴² He sent threatening emails to his 24-year-old victim, whom he met on an online dating service and lived with briefly. After she ended the relationship he threatened her with emails that stated, "You called the cops but they can't do anything" and "You are going to ... die."²⁴³

Those emails were sent through a website that hides the sender and makes the emails difficult to track. The website's software automatically deleted the emails 20 minutes after the victim opened them.²⁴⁴ In order for police to see the messages, an officer had to sit at the woman's computer and wait for incoming messages.²⁴⁵ Hart also used spoofing technology to repeatedly call and threaten his victim. Spoofing allowed him to change his voice and make it appear as though the call was coming from a different phone number.²⁴⁶ Prosecutors believe that in just one night, Hart sent a sewer repairman, a pizza deliveryman and an electrician to the victim's father's house. Hart is also believed to have withdrawn the victim from her graduate program without her knowledge and canceled her application to take the Medical College Aptitude Test (MCAT).²⁴⁷

In **United States v. Elonis**, a Pennsylvania man used Facebook to launch a campaign of terror against his former employer, his estranged wife, and a kindergarten class.²⁴⁸ He sent a message to his former employer saying that he had access to the entrance gates, and they would not be able to

²⁴⁰ Michael L. Pittaro, *Cyber Stalking: An Analysis of Online Harassment and Intimidation*, 1 INT'L J. CYBER CRIMINOLOGY 180 (2007) available at <http://www.cybercrimejournal.com/pittaroijccvol1is2.htm>.

²⁴¹ *Id.*

²⁴² *United States v. Todd Hart*, U.S. Eastern District Court, Case number DPAE2:10CR000672-001. Vernon Clark, *Ex-Septa Worker Gets Prison for Electronic Stalking*, THE INQUIRER (Phila.), (March 22, 2011), available at http://www.philly.com/philly/news/local/20110322_SEPTA_worker_gets_prison_for_electronic_stalking.html.

²⁴³ *Id.*

²⁴⁴ *Id.*; see also *Hide My Ass, Anonymous Email*, <http://www.hidemyass.com/anonymous-email>.

²⁴⁵ Vernon Clark, *Ex-Septa Worker Gets Prison for Electronic Stalking*, THE INQUIRER (Phila.), (March 22, 2011)

²⁴⁶ *Id.* Spoofing allows a person to disguise both his or her voice and caller ID to make a phone call or send a text message. The spoofer can choose any phone number to show up on the recipient's caller ID. Spoofing allows an abuser to manipulate or threaten the victim anonymously because the victim is made to think that it is someone else calling – a parent, friend, workplace, or child care. See <http://www.spoofcard.com/>.

²⁴⁷ Vernon Clark, *Ex-Septa Worker Gets Prison for Electronic Stalking*, THE INQUIRER (Phila.), (March 22, 2011)

²⁴⁸ *United States v. Elonis*, 2011 U.S. Dist. LEXIS 121401 (E.D. Pa. Oct. 12, 2011).

secure them from “a man as mad as me.”²⁴⁹ He also made direct threats to area elementary schools: “Enough elementary schools in a 10-mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a kindergarten class.”²⁵⁰ He then made threats and described how he would use a knife to kill his estranged wife – “Leave her bleedin’ from her jugular in the arms of her partner.”²⁵¹

Fraudulent Social Media Evidence

Domestic violence is a personal crime, committed by someone who knows very intimate details about the victim. Thus, perpetrators frequently have access to their victim’s account either because they demand access or use fraudulent means to obtain access. The biggest evidentiary hurdle facing the introduction of social media evidence is authentication. Fraudulent social media use is very common – especially in domestic violence cases.²⁵²

For instance, perpetrators often use spyware, which can be remotely installed on a victim’s phone or computer, to record the victim’s online activities. Spyware keeps a real-time log of everything a user enters on the monitored computer or phone – including passwords, bank account information, and correspondence. If a perpetrator logs in to a victim’s email or social media account using the victim’s credentials, any information, images and comments posted by the perpetrator appear to come from the victim. Also, a perpetrator may create a fake page or account in the victim’s name. Posting on the bogus page, a perpetrator can make it appear that the victim is guilty of abusive or criminal behavior. Such identity fraud is meant to shame victims, sabotage their personal and professional relationships, and damage their reputations.

In a Westmoreland County case, Travis Allen Davis created a fake Facebook page in the name of an Ohio ex-girlfriend in order to coerce a former Pennsylvania girlfriend into getting back together with him.²⁵³ Under the guise of his alias, Davis threatened to send sexually explicit photos and video of the Pennsylvania woman to her current boyfriend.²⁵⁴ Davis had taken the photos and video without

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See Laurie Baughman, *Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators* 19 WIDENER L.J. 933, 953-63 (2010).

²⁵³ *Man Charged in Facebook Stalking Case: Davis Created a Fake Profile in the Name of a Woman He Had Raped*, NBCNEWS.COM (Aug. 25, 2010), http://www.msnbc.msn.com/id/38851897/ns/technology_and_science-security/t/man-charged-facebook-stalking-case/.

“Westmoreland County, Travis Allen Davis, 23, of 3015 Brentwood Drive, New Castle, pleaded guilty to intimidation of witness or victim and terroristic threats with intent to terrorize another. He was sentenced to six to 23 months in jail. He was ordered to undergo a mental health evaluation and follow all recommended treatment.” Decisions of the Westmoreland County Judges, *The Tribune-Review*, April 9, 2011, http://triblive.com/x/pittsburghtrib/news/westmoreland/s_731486.html-ixzz3WkepihE7.

²⁵⁴ *Id.*

her knowledge. He was arrested outside his Pennsylvania victim's home, armed with a firearm and a box cutter.²⁵⁵

PFA Cases and Social Media Evidence

Perpetrators manufacture social media evidence to make it appear as though victims are lying, irresponsible, and untrustworthy. Authenticating social media evidence is particularly important in domestic violence cases, where the victim's credibility often becomes the center of the case. While there is a lesser burden of proof in civil cases than in criminal matters, it is just as important for the court to be sure that social media exhibits have been properly authenticated before admitting them into evidence.

In **Hood-O'Hara v. Wills**, the Pennsylvania Superior Court upheld a trial court's decision to exclude e-mail evidence proffered by the defendant.²⁵⁶ The superior court agreed that the trial judge aptly excluded the emails as improperly authenticated hearsay.²⁵⁷

Discovery of Social Media

As of this writing, Pennsylvania appellate courts have yet to opine directly on the issue of the discoverability of information contained on a litigant's social media site, but three decisions from common pleas courts provide guidance.

In **McMillen v. Hummingbird Speedway, Inc.**, a Jefferson County judge held that information contained on personal social media accounts was not privileged or protected from discovery.²⁵⁸ The plaintiff sued for damages for injuries he sustained during a stock car race. The defendant, Hummingbird Speedway, sought discovery of any social network sites McMillen belonged to, as well as his user names and passwords. McMillen refused to disclose the requested information, claiming that it was confidential.

Because public portions of McMillen's social networking site showed evidence of him on a fishing trip and doing other activities that belied his injured state, Hummingbird Speedway filed a Motion to Compel Discovery.²⁵⁹

In issuing an order granting the motion to compel, the court explained, "Where there is an indication that a person's social network sites contain information relevant to the prosecution or defense of a lawsuit...access to those sites should be freely granted."²⁶⁰

²⁵⁵ *Id.*

²⁵⁶ *Hood-O'Hara v. Wills*, 873 A. 2d 757 (Pa. Super. 2005).

²⁵⁷ *Id.*

²⁵⁸ *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. D. & C. Dec. LEXIS 270, 2010 WL 4403285 (Pa. C.P. Jefferson Sept. 9, 2010).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

In 2011, a Northumberland County court followed the McMillen court's rationale and found that the publicly accessible portions of the plaintiff's social networking pages revealed sufficient relevant information to warrant an order to compel discovery and for preservation of those sites by the plaintiff.²⁶¹ In **Zimmerman v. Weis Markets, Inc.**, the plaintiff sued a supermarket chain for damages for injuries he sustained during a forklift accident at the chain's warehouse. The plaintiff alleged that his health was seriously and permanently impaired and that he endured significant pain and suffering as a result of the accident.²⁶² The defendants filed a Motion to Compel Discovery after the public portions of the plaintiff's social media pages revealed that he enjoyed motorcycle riding and bike stunts and showed pictures of him in shorts.²⁶³ Zimmerman averred at depositions that he no longer wore shorts due to the scarring from the accident.²⁶⁴

In 2012, however, the Northumberland County judge in **Dietrich v. Buy Rite Liquidators, Inc.**, found that a defendant had not presented sufficient indicia to warrant compelling him to provide discovery in the form of all of his cell phone records.²⁶⁵ Dietrich filed an action seeking damages for injuries he suffered after tripping over an empty wooden pallet in an aisle of the store. Buy-Rite Liquidators sought discovery of Dietrich's cell phone bill for the date of the accident, contending that he was on his phone and not paying attention and, therefore, did not see what they described as an "open and obvious" condition.²⁶⁶ In his opinion, Judge Saylor noted:

As ... in Zimmerman, some additional "factual predicate for the examination" is necessary under the discovery rules, as "fishing expeditions" will not be authorized. The questionable relevance, the privacy rights, and the undue burden imposed on the Plaintiff are all too substantial to not give greater weight against disclosure, where Defendant's request is based only on assumption or surmise.²⁶⁷

Preserving Social Media Evidence

Social media and technology-based evidence is easy for the account holder to manipulate or remove from a site. While postings and pictures are not necessarily permanently deleted from a social networking site, it is infinitely more difficult for the opposing party to access deleted social media evidence. In light of this reality, courts may receive requests to enter preservation orders for social media sites as well as for computers and electronic devices. Preservation orders deter the problem of disappearing evidence, while allowing the other party to access information that is integral to proving their case. Jennifer Ellis with Freedman Consulting, Inc., who regularly writes

²⁶¹ Zimmerman v. Weis Markets, Inc., 2011 Pa. D. & C. Dec. LEXIS 187 (Pa. C.P. Northumberland, May 19, 2011).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Dietrich v. Buy-Rite Liquidators, Inc., 25 Pa. D. & C.5th 1 (Pa. C.P. Northumberland Feb. 9, 2012).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

about social media and family law, suggests that attorneys establish that the information on the social networking site will be relevant to their case in their request to the court for preservation orders and, if necessary, motions to compel.²⁶⁸

Most social networking sites have simplified their subpoena policy to allow prosecutors and law enforcement to obtain a user's content for the purpose of a criminal investigation. Facebook, for instance, will preserve user account information for 90 days after receipt of formal legal process.²⁶⁹ After the request to preserve is received, Facebook will respond to requests for data provided the request is not overly broad or vague.²⁷⁰ Other social media sites, such as Twitter, Foursquare, Myspace, and LinkedIn, also have data retention and subpoena policies.

Admission of Social Networking Evidence

As with any effort to admit evidence to the court, the Rules of Evidence place certain burdens on the proponent and provide grounds for objection to opponents. In particular, social media and other forms of electronic evidence are most commonly objected to based on lack of authentication and hearsay because these forms of evidence are subject to falsification and are necessarily created out of court.

Authentication of Social Media Evidence in Criminal Cases

Authentication requires sufficient corroborating evidence to connect the user to the statement. The determination is made on a "case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity."²⁷¹

The Pennsylvania Superior Court in *In re F.P.*, for example, admitted evidence from an online chat in which the defendant referred to himself by name, used conforming speech patterns, and corroborated details of an event in question.²⁷² The Pennsylvania Supreme Court accepted allocator in *Commonwealth v. Koch*, which turned on whether text messages on the defendant's cell phone were properly authenticated at trial.²⁷³ In *Koch*, the court definitively ruled that authentication of electronic evidence necessarily followed the same authentication rules as other evidence: There must be circumstantial evidence corroborating that the electronic evidence was indeed sent to and/or received by the purported sender and/or receiver.²⁷⁴

²⁶⁸ Jennifer Ellis, *Social Media and Electronic Discovery: The Positives and Negatives of Using Social Media in Litigation*, Pa. Bar Institute (2011).

²⁶⁹ Facebook, Information for Law Enforcement Authorities, <https://www.facebook.com/safety/groups/law/guidelines>.

²⁷⁰ *Id.*

²⁷¹ *In re F.P.*, 878 A.2d 91 (Pa. Super. 2005).

²⁷² *Id.*

²⁷³ *Commw. v. Koch*, 39 A.3d 996 (Pa. Super. 2011).

²⁷⁴ *Id.*

The ultimate standard for authentication is fairly low – it requires presentation of “evidence sufficient to support a finding that the matter in question is what the proponent claims.”²⁷⁵ Records kept by the social media sites reveal a unique IP address for each computer from which a comment or data is posted on the site. It may be possible to match the IP address of the perpetrator’s computer with the post to show that the perpetrator – not the victim – created the post.

One of the few Pennsylvania cases to address email authentication was in the context of a Protection From Abuse case **Hood-O’Hara v. Wills**, in which the Pennsylvania Superior Court upheld a trial court’s decision to exclude e-mail evidence proffered by the defendant.²⁷⁶

Hearsay

As an out-of-court “statement,” social networking evidence – by way of posts, comments, or messages – is subject to the hearsay doctrine when introduced in court as proof that the content is substantively true.²⁷⁷ Further, the printed pages from social networking sites can be considered hearsay because the data is subject to human error, the driving purpose behind the hearsay doctrine.²⁷⁸ Therefore, in order to introduce evidence from a social networking site or information from the businesses that run those sites, an exception would have to apply.

The Pennsylvania Rules of Evidence provide a number of exceptions to the hearsay rule. Only a few, however, may apply to evidence from social networking sites. Admission by party-opponent is one of these exceptions that would permit a court to admit social networking evidence.²⁷⁹ Where a party posts to a social networking site and evidence of that post is introduced by the opponent and properly authenticated, the “admissions” exception should allow that information to come in over hearsay objections.²⁸⁰ Also, information posted by others on a party opponent’s site may be admissible as a tacit admission by the party.

In other words, a statement posted on someone else’s site that the posting individual does not repudiate may be considered an “adoptive admission.”²⁸¹

²⁷⁵ PA. R. EVID. 901.

²⁷⁶ Hood-O’Hara v. Wills, 873 A. 2d 757 (Pa. Super. 2005).

²⁷⁷ PA. R.E. 803.

²⁷⁸ Stacy Schesser, MySpace on the Record: The Admissibility of Social Website Content Under the Federal Rules of Evidence, FIRST MONDAY, Dec. 4, 2006, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1419/1337> (citing Susannah Fox & Mary Madden, Pew Internet & Am. Life Project, *Data Memo: Generations Online 3* (2005), available at http://www.pewinternet.org/~media/Files/Reports/2006/PIP_Generations_Memo.pdf.pdf).

²⁷⁹ PA. R.E. 803(25).

²⁸⁰ Hood-O’Hara v. Wills, 873 A. 2d 757 (Pa. Super. 2005); Pa. R.E. 803(25).

²⁸¹ PA. R.E. 803(25). The full text of the rule indicates the particulars of what statements fit within this hearsay exception. “The statement is offered against a party and is (A) the party’s own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its

Another possible route for admissibility depends upon the content of the posting or hearsay evidence. The "[t]hen existing mental, emotional, or physical condition" exception to hearsay may prove to be another mechanism for a litigant to overcome an objection of hearsay.²⁸² Rule 803(3) of the Pennsylvania Rules of Evidence defines this hearsay exception as "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health."²⁸³

For victims of domestic violence, posts may indicate their feelings of fear or concern about their abuser's conduct, and an abuser's posts may reflect their anger or illustrate their intent to harm their victim without necessarily threatening the victim directly. Because of the instantaneous nature of social networking, this hearsay exception may permit a court to admit evidence of the victim's fear or the abuser's intent that would otherwise be considered hearsay.

truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject... ." *Id.*

²⁸² PA. R.E. 803(3).

²⁸³ *Id.*

APPENDIX

Child victim/witness hearsay statements in various proceedings

	PFA temporary order proceeding	PFA final order hearing	Co PFA contempt proceedings (quasi-criminal in nature)	Criminal cases
General Admissibility	Admissible, regardless of whether the child testifies. These are <i>ex parte</i> hearings; safety is the overriding goal, and due process protections are temporarily suspended. 23 Pa. C.S. § 6107(b).	Probably admissible, provided the requirements of 42 Pa. C.S. § 5985.1 are met, regardless of whether the child testifies.	Non-testimonial statements are admissible, provided the requirements of 42 Pa. C.S. § 5985.1 are met. See Commonwealth v. Hunzer , 868 A.2d 498 (Pa. Super. 2005). Testimonial statements may also be admissible if the child testifies at the hearing, either directly or via closed-circuit television. See Commonwealth v. Geiger , 987 A.2d 743 (Pa. Super. 2008); 42 Pa. C.S. § 5984.1 (recorded testimony).	Non-testimonial statements are admissible, provided the requirements of 42 Pa. C.S. § 5985.1 are met. See Commonwealth v. Hunzer , 868 A.2d 498 (Pa. Super. 2005). Testimonial statements may also be admissible if the child testifies at the hearing, either directly or via closed-circuit television. See Commonwealth v. Geiger , 987 A.2d 743 (Pa. Super. 2008); 42 Pa. C.S. § 5984.1 (recorded testimony).
Notice Requirements	None. Temporary PFA order proceedings are <i>ex parte</i> . 23 Pa. C.S. § 6107(b).	Yes, 42 Pa. C.S. § 5985.1 requires notice of statement and particulars sufficient that defendant has fair opportunity to prepare to meet statement, See Commonwealth v. Crossley , 711 A.2d 1025 (Pa. Super. 1998).	Yes, 42 Pa. C.S. § 5985.1 requires notice of statement and particulars sufficient that defendant has fair opportunity to prepare to meet statement. See Commonwealth v. Crossley , 711 A.2d 1025 (Pa. Super. 1998).	Yes, 42 Pa. C.S. § 5985.1 requires notice of statement and particulars sufficient that defendant has fair opportunity to prepare to meet statement. See Commonwealth v. Crossley , 711 A.2d 1025 (Pa. Super. 1998).

	PFA temporary order proceeding	PFA final order hearing	Co PFA contempt proceedings (quasi-criminal in nature)	Criminal cases
Other Due Process Protections	Sworn testimony or affidavit and verification are required. Additional due process protections come into play at PFA final order hearing. See 23 Pa. C.S. §§ 6106, 6107(b).	Yes, 42 Pa. C.S. § 5985.1 contains other due process protections. Child must either testify or court must hold <i>in camera</i> hearing to determine whether child is unavailable because testifying will cause emotional distress such that child cannot communicate. Defendant's attorney may be present.	Yes, 42 Pa. C.S. § 5985.1 contains other due process protections. Child must either testify or court must hold <i>in camera</i> hearing to determine whether child is unavailable because testifying will cause emotional distress such that child cannot communicate. Defendant's attorney may be present.	Yes, 42 Pa. C.S. § 5985.1 contains other due process protections. Child must either testify or court must hold <i>in camera</i> hearing to determine whether child is unavailable because testifying will cause emotional distress such that child cannot communicate. Defendant's attorney may be present.
Sixth Amendment / PA Constitutional Right to Confrontation	Confrontation does not apply because this is an <i>ex parte</i> , civil hearing.	Confrontation is probably not implicated. PFA proceedings are civil in nature. Generally, the right to confrontation applies in criminal cases only. No PA appellate cases on this issue.	Confrontation likely applies because PFA contempt proceedings are quasi-criminal. However, child hearsay statements may still be admissible. Non-testimonial statements are admissible notwithstanding confrontation. Testimonial statements are admissible if the child testifies, either directly or via closed-circuit television. (See above).	Yes, confrontation applies. However, child hearsay statements may still be admissible. Non-testimonial statements are admissible notwithstanding confrontation. Testimonial statements are admissible if the child testifies, either directly or via closed-circuit television. (See above)



THE ANNOTATED PENNSYLVANIA PROTECTION FROM ABUSE ACT

Updated: March 2020

Pennsylvania Coalition Against Domestic Violence
3605 Vartan Way, Suite 101 | Harrisburg, PA 17110
717.545.6400 | PCADV.org | 2019
[PCADV Legal Direct: 717-671-4767](#)
[PCADV Legal Toll Free: 888-235-3425](#)

**PCADV's Civil Legal Representation Initiative
is made possible by funding from the
Pennsylvania Department of Human Services.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	V
<u>PENNSYLVANIA PROTECTION FROM ABUSE ACT, 23 PA.C.S. § 6101 ET SEQ.</u>	1
§ 6101. SHORT TITLE OF CHAPTER	1
§ 6102. DEFINITIONS.....	1
§ 6103. JURISDICTION	15
§ 6104. FULL FAITH AND CREDIT AND FOREIGN PROTECTION ORDERS	17
§ 6105. RESPONSIBILITIES OF LAW ENFORCEMENT AGENCIES.....	18
§ 6106. COMMENCEMENT OF PROCEEDINGS	21
§ 6107. HEARINGS	24
§ 6108. RELIEF	32
6109. SERVICE OF ORDERS	53
§ 6110. EMERGENCY RELIEF BY MINOR JUDICIARY	54
§ 6111. DOMESTIC VIOLENCE COUNSELOR/ADVOCATE	55
§ 6112. DISCLOSURE OF ADDRESSES.....	55
§ 6113 ARREST FOR VIOLATION OF ORDER	56
§ 6114. CONTEMPT FOR VIOLATION OF ORDER OR AGREEMENT	58
§ 6115. REPORTING ABUSE AND IMMUNITY.....	70
§ 6116. CONFIDENTIALITY.....	70
§ 6117. PROCEDURE AND OTHER REMEDIES	71

Table of Contents

§ 6119. IMMUNITY 73

§ 6120. INABILITY TO PAY 74

§ 6121. WARRANTLESS SEARCHES..... 74

§ 6122. CONSTRUCTION..... 74

APPELLATE STANDARDS 74

THE PFA ACT’S RELATIONSHIP WITH OTHER PROCEEDINGS 77

SECTIONS AND CASES 81

TABLE OF AUTHORITIES

PENNSYLVANIA SUPREME COURT CASES

<i>Carlacci v. Mazaleski</i> , 798 A.2d 186 (Pa. 2002).....	72
<i>Commonwealth v. Baker</i> , 766 A.2d 328 (Pa. 2001)	73, 74
<i>Commonwealth v. Bortz</i> , 909 A.2d 1221 (Pa. 2006).....	75, 93
<i>Commonwealth v. Majeed</i> , 694 A.2d 336 (Pa. 1997).	93
<i>Commonwealth v. Stallworth</i> , 781 A.2d 110 (Pa. 2001).....	63, 92
<i>Commonwealth v. Staton</i> , 38 A.3d 785 (Pa. 2012).....	94
<i>Commonwealth v. Stonehouse</i> , 555 A.2d 772 (Pa. 1989).	95
<i>Commonwealth v. Yerby</i> , 679 A.2d 217 (Pa. 1996).	81

PENNSYLVANIA SUPERIOR COURT CASES

<i>B.T.W., O/B/O T.L. v. P.J.L.</i> , 956 A.2d 1014 (Pa. Super. 2008).	2, 6, 19
<i>Boykai v. Young</i> , 83 A.3d 1043 (Pa. Super. 2014).	1
<i>Boykin v. Brown</i> , 868 A.2d 1264 (Pa. Super. 2005).....	3, 32, 90, 91
<i>Brooks-Gall v. Gall</i> , 840 A.2d 993 (Pa. Super. 2003).	43, 92
<i>Buchhalter v. Buchhalter</i> , 959 A.2d 1260 (Pa. Super. 2008).....	3, 33
<i>Burke v. Bauman</i> , 814 A.2d 206 (Pa. Super. 2002).	5, 30
<i>C.H.L. v. W.D.L.</i> , 214 A.3d 1272, (Pa. Super 2019).....	42
<i>Chronister v. Brennenman</i> , 742 A.2d 190 (Pa. Super. 1999).	8
<i>Cipolla v. Cipolla</i> , 398 A.2d 1053 (Pa. Super. 1979).	38
<i>Coda v. Coda</i> , 666 A.2d 741 (Pa. Super. 1995).....	32, 33, 37
<i>Commonwealth v. Abed</i> , 989 A.2d 23 (Pa. Super. 2010).....	76
<i>Commonwealth v. Barger</i> , 743 A.2d 477 (Pa. Super. 1999).	75
<i>Commonwealth v. Brumbaugh</i> , 932 A.2d 108 (Pa. Super. 2007).	71
<i>Commonwealth v. Burton</i> , 624 A.2d 138 (Pa. Super. 1993).	74
<i>Commonwealth v. Charnik</i> , 921 A.2d 1214 (Pa. Super. 2007).....	19, 72, 84
<i>Commonwealth v. Felder</i> , 2017 Pa. Super. 1009.....	73
<i>Commonwealth v. Haigh</i> , 874 A.2d 1174 (Pa. Super. 2005).	72
<i>Commonwealth v. Jackson</i> , 10 A.3d 341 (Pa. Super. 2010).....	80
<i>Commonwealth v. Jackson</i> , 900 A.2d 936 (Pa. Super. 2006).....	93
<i>Commonwealth v. Lambert</i> , 147 A. 3d 1221 (Pa. Super. 2016).....	69
<i>Commonwealth v. Leach</i> , 729 A.2d 608 (Pa. Super. 1999).....	81
<i>Commonwealth v. Miller</i> , 634 A.2d 614 (Pa. Super. 1993).....	94
<i>Commonwealth v. Mitchell</i> , 986 A.2d 1241 (Pa. Super. 2009).	70
<i>Commonwealth v. Moore</i> , 978 A.2d 988 (Pa. Super. 2009).	71, 78
<i>Commonwealth v. Nelson</i> , 690 A.2d 728 (Pa. Super. 1997).	74, 75
<i>Commonwealth v. Ortiz</i> , 802 A.2d 617 (Pa. Super. 2002), <i>aff'd</i> , 825 A.2d 629 (Pa. 2003).	67
<i>Commonwealth v. Padilla</i> , 885 A.2d 994 (Pa. Super. 2005).	28, 64
<i>Commonwealth v. Smith</i> , 552 A.2d 292 (Pa. Super. 1988).....	39
<i>Commonwealth v. Snell</i> , 737 A.2d 1232 (Pa. Super. 1999).	79
<i>Commonwealth v. Taylor</i> , 137 A.3d 611.	73
<i>Commonwealth v. Walsh</i> , 36 A.3d 613 (Pa. Super. 2012).	12, 68
<i>Commonwealth v. Zerphy</i> , 481 A.2d 670 (Pa. Super. 1984).	82
<i>Costello v. Costello</i> , 666 A.2d 1096 (Pa. Super. 1995)	91
<i>Courtney v. Courtney</i> , 2019 Pa.Super 50.....	86
<i>Custer v. Cochran</i> , 933 A.2d 1050 (Pa. Super. 2007).	2, 15
<i>D.H. v. B.O.</i> , 734 A.2d 409 (Pa. Super. 1999).	10, 13
<i>DeHaas v. DeHaas</i> , 708 A.2d 100 (Pa. Super. 1998), appeal denied, 732 A.2d 615 (Pa. 1998).....	3, 8, 31

Table of Contents

Dragani v. Dragani, 42 Pa. D. & C. 4th 295 (Bucks 1999), aff'd, 752 A.2d 426 (Pa. Super. 2000).....	47
Drew v. Drew, 870 A.2d 377 (Pa. Super. 2005).....	30, 35, 88
Dye v. McCoy, 621 A.2d 144 (Pa. Super. 1993).....	9, 41
Egelman v. Egelman, 728 A.2d 360 (Pa. Super. 1999).....	26, 42, 48
Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. 1985).....	31, 38
Evans v. Braun, 12 A.3d 395 (Pa. Super. 2010).....	13
Ferko-Fox v. Fox, 68 A.3d 917 (Pa. Super. 2013).....	35, 37
Ferri v. Ferri, 854 A.2d 600 (Pa. Super. 2004).....	4, 7, 32, 88
Fonner v. Fonner, 731 A.2d 160 (Pa. Super. 1999).....	4
Gabel v. Gabel, 26 Pa. D. & C. 4th 83 (Montg. 1994), aff'd, 659 A.2d 8 (Pa. Super. 1995).....	9
Gerace v. Gerace, 631 A.2d 1360 (Pa. Super. 1993).....	38, 50, 82
Graham v. Flippen 2018 PA Super 20 (Decided February 2, 2018).....	86
H.M.H. On Behalf of Minor, L.M.H. v. D.J.G., 2019 PA Super 156.....	15
Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992).....	30, 37, 39, 40, 49
Hill v. Randolph, 24 A.3d 866 (Pa. Super. 2011).....	69
Holderman v. Hagner, 760 A.2d 1189 (Pa. Super. 2000).....	50
Hood-O'Hara v. Wills, 873 A.2d 757 (Pa. Super. 2005).....	20, 32, 90
In re Penny R., 509 A.2d 338 (Pa. Super. 1986).....	31
In the Matter of the Estate of Elaine L. Cochran, 738 A.2d 1029 (Pa. Super. 1999).....	92
K.B. v. Terrence Tinsley, 2019 PA Super 116.....	11
K.D. v. J.D., 696 A.2d 232 (Pa. Super. 1997).....	32
Karch v. Karch, 885 A.2d 535 (Pa. Super. 2005).....	6, 23, 33
Kelley v. Mueller, 861 A.2d 984 (Pa. Super. 2004), vacated, 912 A.2d 202 (Pa. 2006).....	46, 89
Krassnoski v. Rosey, 684 A.2d 635 (Pa. Super. 1996).....	48, 90
Kuhlmeier v. Kuhlmeier, 817 A.2d 1127 (Pa. Super. 2003).....	51, 88
Laczkowski v. Laczkowski, 496 A.2d 56 (Pa. Super. 1985).....	91
Landis v. Landis, 869 A.2d 1003 (Pa. Super. 2005).....	91
Lanza v. Simconis, 914 A.2d 902 (Pa. Super. 2006).....	29
Lawrence v. Bordner, 907 A.2d 1109 (Pa. Super. 2006).....	7, 29, 42
Lee v. Carney, 645 A.2d 1363 (Pa. Super. 1994).....	38, 89
Lee v. Lee, 978 A.2d 380 (Pa. Super. 2009).....	92
Leonard v. Smith, 684 A.2d 622 (Pa. Super. 1996), appeal denied, 698 A.2d 595 (Pa. 1997).....	80
McCance v. McCance, 908 A.2d 905 (Pa. Super. 2006).....	4, 16
McKelvey v. McKelvey, 771 A.2d 63 (Pa. Super. 2001).....	49
Melvin v. Melvin, 580 A.2d 811 (Pa. Super. 1990).....	38
Mescanti v. Mescanti, 956 A.2d 1017 (Pa. Super. 2008).....	10
Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).....	3, 8, 34, 38, 89, 90
N.T. ex. Rel. K.R.T. v. F.F., 2015 PA Super 139 (June 15, 2015).....	18
Olivieri v. Olivieri, 678 A.2d 393 (Pa. Super. 1996).....	15, 16
P.E.S. v. K.L., 720 A.2d 487 (Pa. Super. 1998).....	85
R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).....	5, 10, 14, 31, 90
Raker v. Raker, 847 A.2d 720 (Pa. Super. 2004).....	4, 34, 90, 91
Rosenberg v. Rosenberg, 504 A.2d 350 (Pa. Super. 1986).....	41
Scott v. Shay, 928 A.2d 312 (Pa. Super. 2007).....	14
Slusser v. DeBoer, 985 A.2d 974 (Pa. Super. 2009), appeal denied, 4 A.3d 1055 (Pa. 2010).....	14
Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).....	5, 6, 30, 32, 34, 38, 39, 40, 89
Stamus v. Dutcavich, 938 A.2d 1098 (Pa. Super. 2007).....	50, 67, 84
T.K. v. A.Z., 157 A. 3d 974 (Pa. Super. 2017).....	6, 9, 33
Takosky v. Henning, 906 A.2d 1255 (Pa. Super. 2006).....	79
Thompson v. Thompson, 963 A.2d 474 (Pa. Super. 2008).....	2, 29
Trout v. Strube, 97 A.3d 387 (Pa. Super. 2014).....	78
V.B.T. v. Family Services of Western Pennsylvania, 705 A.2d 1325 (Pa. Super. 1998), aff'd, 728 A.2d 953 (Pa. 1999).....	83

Table of Contents

Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004).	13, 17, 35, 77
Viruet v. Cancel, 727 A.2d 591 (Pa. Super. 1999).	7, 8, 26
Vito v. Vito, 551 A.2d 573 (Pa. Super. 1988).	75
Wagner v. Wagner, 564 A.2d 162 (Pa. Super. 1989).	71
Weir v. Weir, 631 A.2d 650 (Pa. Super. 1993).	5, 30, 31, 34
Yankowskie v. Lenker, 526 A.2d 429 (Pa. Super. 1987)	16

PENNSYLVANIA COMMONWEALTH COURT CASES

Dunkelberger v. Pa. Board of Probation & Parole, 593 A.2d 8 (Pa. Commw. 1991).	93
--	----

PENNSYLVANIA COURT OF COMMON PLEAS CASES

Boyle v. Boyle, 12 Pa. D. & C. 3rd 767 (Allegheny 1979).	35
Counterman v. Shoemaker, 14 Pa. D. & C. 4th 217, aff'd, 625 A.2d 95 (Pa. Super. 1992).	5, 14
Devereaux v. Thomas, 38 Pa. D. & C. 4th 129 (Phila. 1998).	85
Jiminez v. Jiminez, 81 Berks L.J. 323 (1988).	1
Keith v. Keith, 28 Pa. D. & C.3d 462 (Lanc. 1984).	9

U.S. DISTRICT COURT CASES

DeOrio v. Delaware County, No. 08-5762, 2009 U.S. Dist. LEXIS 65176, 2009 WL 2245067 (E.D. Pa. 2009).	46
---	----

U.S. STATUTES AND AUTHORITIES

18 U.S.C. § 2266 (relating to definitions)	17
18 U.S.C. § 922(d)(8) (relating to firearm transfer and protection orders)	47
18 U.S.C. § 922(g)(9) (relating to firearm possession and protection orders)	47
27 CFR § 478.125a (relating to personal firearms collection)	45

PENNSYLVANIA STATUTES

18 Pa.C.S. § 2709 (relating to harassment and stalking)	48, 75, 94
18 Pa.C.S. § 2903 (relating to false imprisonment)	6
18 Pa.C.S. § 2904 (relating to interference with custody of children)	40
18 Pa.C.S. § 4906 (relating to false reports to law enforcement authorities)	25
18 Pa.C.S. § 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms)	16, 45, 56, 57, 59, 87
18 Pa.C.S. § 6108 (relating to return of relinquished firearms, other weapons and ammunition and additional relief)	59
18 Pa.C.S. § 6111 (relating to sale or transfer of firearms)	57
18 Pa.C.S. § 6113 (relating to licensing of dealers)	54
18 Pa.C.S. § 6115 (relating to loans on, or lending or giving firearms prohibited)	57
18 Pa.C.S. § 6142 (relating to locking device for firearms)	57
18 Pa.C.S. § 907 (relating to possessing instruments of crime)	18
18 Pa.C.S. Ch. 49 (relating to falsification and intimidation)	88
18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles)	54, 55, 58, 60
18 Pa.C.S. Ch. 61 Subch. A (relating to Uniform Firearms Act).	24
20 Pa.C.S. Ch. 51 Subch. B (relating to appointment of guardian)	25
23 Pa. C.S. §4326 (relating to mandatory inclusion of child medical support)	43
23 Pa.C.S. § 4324 (relating to inclusion of medical support)	43
23 Pa.C.S. § 5303 (relating to award of custody, partial custody or visitation)	91
23 Pa.C.S. § 6102 (relating to definitions)	1, 2, 3, 4, 5, 14
23 Pa.C.S. § 6103 (relating to jurisdiction)	18, 20
23 Pa.C.S. § 6104 (relating to full faith and credit and foreign protection orders)	20, 23

Table of Contents

23 Pa.C.S. § 6105 (relating to responsibilities of law enforcement agencies).....	21, 23, 27, 63, 77, 86
23 Pa.C.S. § 6106 (relating to commencement of proceedings)	25, 49, 50, 64
23 Pa.C.S. § 6107 (relating to hearings)	27, 28, 29, 35, 37, 41, 43, 50
23 Pa.C.S. § 6108 (relating to relief)	23, 36, 38
23 Pa.C.S. § 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping)	44
23 Pa.C.S. § 6109 (relating to service of orders).....	51, 62
23 Pa.C.S. § 6110 (relating to emergency relief by minor judiciary)	17, 23, 63
23 Pa.C.S. § 6111 (relating to domestic violence counselor/advocate)	65
23 Pa.C.S. § 6113 (relating to arrest for violation of order)	25, 51, 66, 67, 88
23 Pa.C.S. § 6114 (relating to contempt for violation of order or agreement)	51, 68, 78
23 Pa.C.S. § 6115 (relating to reporting abuse and immunity).....	31, 83
23 Pa.C.S. § 6116 (relating to confidentiality)	17, 83
23 Pa.C.S. § 6117 (relating to procedure and other remedies)	84, 85
23 Pa.C.S. Ch. 43 (relating to support matters generally)	43
23 Pa.C.S. Ch. 45 (relating to reciprocal enforcement of support orders)	43
23 Pa.C.S. Ch. 53 (relating to custody)	41
23 Pa.C.S. Ch. 63 (relating to child protective services).....	6
42 Pa.C.S. § 1123 (relating to jurisdiction and venue)	17
42 Pa.C.S. § 1126 (relating to masters)	17
42 Pa.C.S. § 2503 (relating to right of participants to receive counsel fees).....	48
42 Pa.C.S. § 5322 (relating to bases of personal jurisdiction over persons outside this Commonwealth)	18
42 Pa.C.S. § 5985.1, the Tender Years Hearsay Exception Act	33
42 Pa.C.S. § 6302 (relating to definitions).....	77
42 Pa.C.S. § 9711 (relating to sentencing procedure for murder of the first degree)	63
42 Pa.C.S. Ch. 63 (relating to juvenile matters)	77
42 Pa.C.S. Ch. 83 (relating to wrongful use of civil proceedings)	88
P.L. 177, No. 175, the Administrative Code of 1929	27, 77
P.L. 390, No. 212, the Right-to-Know Law	24, 55, 60, 61

RULES

Pa.R.C.P. 1023.1 (relating to Scope. Signing of Documents. Representations to the Court. Violation).....	26
Pa.R.C.P. 1930.5(a) (relating to discovery in domestic relations matters).	91
Pa.R.C.P. 2027, 2028 (relating to minors as parties)	17, 35
Pa.R.E. 801 (relating to hearsay evidence)	90

PENNSYLVANIA PROTECTION FROM ABUSE ACT, 23 PA.C.S. § 6101 ET SEQ.

§ 6101. SHORT TITLE OF CHAPTER

This chapter shall be known and may be cited as the Protection from Abuse Act.

§ 6102. DEFINITIONS

(a) General rule. —The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Abuse.” The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

Case Law Illustration: Abuse Includes “Past Abuse”

Jiminez v. Jiminez, 81 Berks L.J. 323 (1988).

The Protection from Abuse Act (PFAA or the Act) does not contain a specific time requirement for filing a petition. The trial court found plaintiff’s PFA petition timely filed under the circumstances where plaintiff’s husband’s brother attacked her eight months prior to the filing.

(1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.

Case Law Illustrations: Rape and Sexual Assault

Boykai v. Young, 83 A.3d 1043 (Pa. Super. 2014).

Physical force is not necessary to establish abuse under the PFA Act in cases of rape or sexual assault. A victim can show the element of forcible compulsion in rape by intellectual, moral, emotional or psychological force. Sexual assault requires that the victim refused to consent to sexual relations. Wife’s credible testimony that Husband refused to support their household and provide food for her and their child unless she engaged in sexual relations amounted to intellectual or psychological force. Wife’s testimony supported a finding of either rape or sexual assault, both of which are abuse under section 6102(a)(1) of the PFA Act.

Case Law Illustrations: Bodily Injury

B.T.W., O/B/O T.L. v. P.J.L., 956 A.2d 1014 (Pa. Super. 2008).

Bruising and marks on the child's back from a belt constitute bodily injury under the Act. Child's Grandmother filed for a PFA against the child's Stepmother who had a custody order for primary custody of the child. The trial court found that Stepmother had smacked the child, hit her with a belt and pulled her hair. The court also found that the child was bruised and hit with a belt again when she did not help at home quickly enough. Testimony at the hearing revealed that the child had marks on her back from the belt. On appeal the Superior Court found sufficient evidence to demonstrate that T.L. had been abused and suffered bodily injury in the process, which warranted issuance of a PFA order.

Custer v. Cochran, 933 A.2d 1050 (Pa. Super. 2007).

The Court found "that there was sufficient evidence to support a finding that [Brother] attempted to cause and intentionally, or at least recklessly, caused bodily injury to [Sister]." Sister is about 5 feet, 3 inches tall, and weighs about 125 pounds, while Brother is about 6 feet tall, and 240 pounds, almost twice Sister's weight. Sister testified that on November 9, 2004, Brother "forced his way into her office, knocking her backwards, causing her to hit her leg and knock over a stool. When she attempted to return the eyeglasses that came off his head during their scuffle, he hit her arm which, until approximately two weeks prior, had been splinted following surgery." Sister experienced pain after the incident in the arm for several days and resumed wearing the splint.

Case Law Illustrations: Indecent Assault

Thompson v. Thompson, 963 A.2d 474 (Pa. Super. 2008).

Grabbing Plaintiff in a sexual way without her consent during a custody exchange established abuse under the PFA statute. Plaintiff testified that Defendant "forcibly grabbed her breasts and crotch" without her consent while making lascivious comments, such as "you know you like it." The Superior Court agreed with the trial court's finding that Defendant's actions met the definition of indecent assault found under Pennsylvania's penal code, 18 Pa.C.S. § 3126(a), thereby establishing abuse under the PFA act as defined in section 6102(a)(1). Indecent assault is an abusive act under the statute and thus warranted the entry of a final protection order against Defendant.

Case Law Illustrations: Abuse Need Not Rise to Level of Criminal Activity

Boykin v. Brown, 868 A.2d 1264 (Pa. Super. 2005).

A PFA petitioner is only required to establish that abuse has occurred by preponderance of the evidence and not beyond a reasonable doubt. Thus, a determination by a district attorney or the police as to whether or not to file criminal charges against a defendant is irrelevant to the court's determination under the PFAA.

DeHaas v. DeHaas, 708 A.2d 100 (Pa. Super. 1998), appeal denied, 732 A.2d 615 (Pa. 1998).

Definition of abuse did not require infliction of actual physical injury.

Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).

Father's infliction of bodily injury on his son was not so severe as to rise to the level of criminal culpability, but did not preclude a PFA order under the PFAA inasmuch as the Act addresses prevention and not punishment of abuse.

(2) Placing another in reasonable fear of imminent serious bodily injury.

Case Law Illustrations: Past Instances of Abuse That Formed the Basis of an Agreed Order May Show Reasonableness of Fear in Current Petition

Buchhalter v. Buchhalter, 959 A.2d 1260 (Pa. Super. 2008).

A trial court erred when it refused to allow Petitioner to testify regarding the instances of abuse that formed the basis for a prior protection order entered by consent of the parties. The Superior Court held that the "facts surrounding the prior PFA consent order are relevant to an understanding as to the reasonableness of [Petitioner's] fear relative to the present petition." The trial court erroneously concluded that it acted within its discretion to exclude Petitioner's testimony of past abuse because the court did not find the petitioner credible.

Case Law Illustrations: Actual Physical Injury Not Required

McCance v. McCance, 908 A.2d 905, 911 (Pa. Super. 2006).

Defendant appealed entry of final PFA order against him filed by his sister-in-law, his brother's wife. He asserted there was insufficient evidence to enter a final PFA. The Superior Court found that the defendant's "verbal chiding, intimidating demeanor (blocking [plaintiff's] vehicular access), threat of retaliation, and striking of [plaintiff's] vehicle to the point of damaging it" combined to meet the definition of abusive behavior prohibited by 23 Pa. C.S. § 6102(a)(2).

Ferri v. Ferri, 854 A.2d 600 (Pa. Super. 2004).

Actual physical injury is not required for the entry of a final order but "reasonable fear of imminent bodily injury" must be demonstrated.

Fonner v. Fonner, 731 A.2d 160 (Pa. Super. 1999).

Placing another in reasonable fear of imminent serious bodily injury provides that the victim's fear of serious bodily injury must simply be reasonable. The section does not call for actual physical contact. A victim is not required to wait for physical or sexual abuse to occur in order for the Act to apply.

Case Law Illustrations: Specific Intent of Perpetrator Not Required to Show Reasonable Fear of Imminent Serious Bodily Injury

Raker v. Raker, 847 A.2d 720 (Pa. Super. 2004).

The focus for the trial court's determination was whether the plaintiff had reasonable fear and the husband's actual intent was "of no moment." Husband's entrance into wife's half of duplex in the middle of the night, coupled with past incidents of abuse by husband towards wife were sufficient to establish that wife reasonably feared serious bodily injury from her husband.

Case Law Illustrations: Bodily Injury, Reasonable Fear of Imminent Serious Bodily Injury, False Imprisonment

Fonner v. Fonner, 731 A.2d 160 (Pa. Super. 1999).

Court found abuse under section 6102(a)(2) where appellant was angry, loud, upset and badgering; appellant restricted victim's movement by standing in front of her and touching and holding her arm; appellant followed appellee into another room and punched the wall in front of her while standing at a fairly close distance; wife testified that appellant had threatened to hit her and she believed that he would hit her; and appellant had threatened to hit her in the past. Victim's fear of imminent serious bodily injury must simply be reasonable. The goal of the Act is to prevent physical/ sexual abuse, so a victim need not wait for physical/ sexual abuse to occur for the Act to apply.

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

Respondent's attempt to grab petitioner's purse and keys; dragging her; holding her for 10-15 minutes; forcibly restraining her while screaming at her; picking her up and throwing her down; strangling her; and threatening to have sex with her fit the definition of abuse under sections 6102(a)(2), and (a)(3). Wife was also bruised several places on her body.

Weir v. Weir, 631 A.2d 650, 654 (Pa. Super. 1993).

Driving at excessive rate of speed over dark, winding roads and pinning petitioner against a concrete abutment with a van are "attempts to cause bodily injury or serious bodily injury" under the Act. These acts also "placed petitioner ... in fear of sustaining imminent bodily injury."

Case Law Illustrations: Threats Sufficient to Establish Reasonable Fear

R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).

A threat to kill, without actual or attempted physical violence, is abuse and may serve as the basis for the issuance of an order under the Act.

Counterman v. Shoemaker, 14 Pa. D. & C. 4th 217, aff'd, 625 A.2d 95 (Pa. Super. 1992).

Plaintiff was placed in reasonable fear of bodily injury by defendant calling her on phone, stating he had a gun and threatening to kill her, her fiancé and her family.

Case Law Illustration: Telephone Calls Sufficient to Establish Reasonable Fear

Burke v. Bauman, 814 A.2d 206, 209 (Pa. Super. 2002).

In reversing the trial court, the Superior Court held that “[i]t is possible for a person to be placed in reasonable fear of imminent bodily injury based on telephone calls, particularly when coupled with the alleged abuser’s past history of violence.” Defendant called the petitioner and said: (1) “I’ll get you back. You are going to burn for this;” “(2) These are promises, not threats;” and (3) “I will be thinking every day if I go to jail how I can’t wait to get out and make you pay. I’m going to get someone to destroy you and the rest of your stuff.”

Case Law Illustration: Court May Infer Reasonable Fear from Testimony

T.K. v. A.Z., 157 A. 3d 974 (Pa. Super. 2017).).

The Court rejected defendant’s assertion that the plaintiff never testified she was in fear. Stating that although she never specifically used the word “fear”, she clearly had deep concern for her safety, testifying that she believed the defendant’s behavior would eventually escalate from stalking to physical harm.

Karch v. Karch, 885 A.2d 535 (Pa. Super. 2005).

The court determines a witness's credibility and may infer fear based on the witness's testimony describing the defendant's actions. The court will not infer that the failure of police to act on a report of domestic violence means that the victim is not credible.

(3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).

Case Law Illustrations: Restraining Victim Is Interference with Liberty

Snyder v. Snyder, 629 A.2d 977, 984 (Pa. Super. 1993).

“Presently, the appellant has admitted to restraining the appellee during two of the incidents *supra*. During one incident, he admitted restraining her for a period of ten-fifteen minutes. ... [W]e believe there was sufficient evidence for the court to conclude by a preponderance of the evidence that the appellant knowingly restrained the appellee so as to interfere substantially with her liberty.”

(4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).

Case Law Illustrations: Children and Definition of Abuse

B.T.W., O/B/O T.L. v. P.J.L., 956 A.2d 1014, 1016-17 (Pa. Super. 2008).

The Superior Court affirmed the entry of a protection order on behalf of Plaintiff's minor granddaughter against the child's Stepmother. "The trial court found that T.L. had been 'smacked and hit with a belt and had her hair pulled, and that [she] was bruised and hit with a belt again when she did not help at home quickly enough.' Testimony at the hearing revealed that T.L. had marks on her back from the belt." Evidence from the hearing also supported the assertion that Stepmother and her husband, neither of whom had a driver's license, had driven the child in the car. The Superior Court found, therefore, a sufficiency of evidence to demonstrate that the child, "had been abused, suffering bodily injury in the process, and had been placed in fear of serious bodily injury, all of which warranted issuance of a protection from abuse order."

Lawrence v. Bordner, 907 A.2d 1109, 1114 (Pa. Super. 2006).

Mother filed a PFA on behalf of her teenage daughter against the father. Daughter testified that her father put his hands around her throat, choked her, dragged her into the kitchen, choked her again, and then threw her into the dining room. The trial court stopped the hearing during the daughter's testimony and asked whether a custody order existed between mother and father. Upon learning that there was a pre-existing custody order whereby mother had primary and father had partial custody the trial court directed mother to file a Petition to Modify Custody and dismissed the PFA. The Superior Court reversed and remanded. The trial court committed reversible error when it abruptly stopped the minor daughter's testimony and determined that mother was not entitled to a final PFA Order. The trial court limited mother to a custody action as her exclusive remedy for the alleged abuse due to the parties' pre-existing custody order. The Superior Court found that a trial court needs to first determine if a PFA is warranted and if "a permanent PFA is proper, it shall then decide whether the terms of the custody Order would be in conflict with the PFA order and require a specific suspension or supersedance of the custody Order."

Ferri v. Ferri, 854 A.2d 600 (Pa. Super. 2004).

Trial court erred by entering PFA order where mother was found to have struck her seven-year-old daughter in the face but no evidence of injury such as crying or bruising was presented. Nor was any evidence presented that the child suffered reasonable fear as a result of the incident. The Superior Court noted "[w]e do not believe the General Assembly intended the [PFA] Act to tie the hands of parents who may have to discipline their children appropriately."

Viruet v. Cancel, 727 A.2d 591 (Pa. Super. 1999).

Trial court erred in finding plaintiff's lawsuit to be frivolous where defendant hit her daughter multiple times, and grandmother testified that she saw bruises on granddaughter's back, right arm, right knee and left eye. Officer testified he saw bruises on child's left eye, left side of her

back, right arm and left arm. Pictures of bruises taken by the officer were introduced as evidence. Medical records substantiated injuries.

Chronister v. Brenneman, 742 A.2d 190, 192 (Pa. Super. 1999).

The PFAA does not prohibit a parent from using physical punishment to discipline a 16-year-old daughter for misconduct. The father's motivation for hitting his daughter four or five times across the buttocks was punishment and there was no evidence of "malevolent infliction of pain or an attempt to terrorize his daughter." Furthermore, while the daughter experienced pain, she was not bruised. As such, the conduct did not amount to abuse under the PFAA.

DeHaas v. DeHaas, 708 A.2d 100 (Pa. Super. 1998), appeal denied 732 A.2d 615 (Pa. 1998).

Evidence that mother held down child in bathtub, forcing child to swallow the water, that child choked, and had been in fear of imminent serious bodily injury was sufficient to support finding that mother "abused" child within meaning of the PFAA.

Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).

Definition of "abuse" in the PFAA that includes reference to Child Protective Services Law does not limit abuse to serious physical injury to a child, but rather includes both bodily injury caused intentionally, knowingly, or recklessly as well as serious bodily injury. The PFAA is distinguished from Child Protective Services Law and the Crime Code. The burdens, standards of proof and purposes of the laws are different. The definition of "abuse" under the PFAA is broader. For a remedy to be available under PFAA, it is not necessary that physical harm to a child be as serious as that which is required for a child to be removed from his home and placed in protective custody. Corporal punishment inflicted recklessly or in enraged manner may result in bodily injury permitting issuance of protection order under PFAA. See also, *Viruet v. Cancel*, above.

Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).

Protective order entered against Father on behalf of two minor children as a result of Father's spanking one child with a board, leaving bruises on child's legs. Son testified that Father struck him with a board and caused pain; that Father gripped his arm and caused a bruise; and that he was afraid Father might do these things again. Daughter testified that she heard son crying after Father took board into son's room and that she feared similar punishment. Mother testified that she observed bruising on the children on prior occasions.

Dye v. McCoy, 621 A.2d 144 (Pa. Super. 1993).

Striking a five-year-old child across her nose with a belt buckle and slapping her face while she watched cartoons was abuse under the PFAA. Father and girlfriend were enjoined from contact with child for one year.

Gabel v. Gabel, 26 Pa. D. & C. 4th 83 (Montg. 1994), aff'd, 659 A.2d 8 (Pa. Super. 1995).

14-year-old daughter filed PFA against mother. Mother had verbally abused child, shook her violently, pushed and grabbed her and kneed her in the ribs, causing injuries. Mother's actions did not comport with reasonable traditional notions of discipline. Parent's harm to a child is abuse under the PFAA even if the child provoked the parent's actions. The parent was removed from the marital residence for six months.

Keith v. Keith, 28 Pa. D. & C.3d 462 (Lanc. 1984).

Defendant had been convicted of sexually abusing his children in the past. His close proximity to them, although it caused them great stress, was not sufficient to establish abuse.

(5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

Case Law Illustration: Knowingly Engaging in a Course of Conduct or Repeatedly Committing Acts Toward Another

T.K. v. A.Z., 157 A. 3d 974 (Pa. Super. 2017).

The Court found that the defendant's behavior fell squarely within the meaning of abuse under 23 Pa. C.S. § 6102(a)(5) when the plaintiff's testimony established that the defendant repeatedly followed her in his vehicle at grocery stores, sporting events, outside while the kids were playing, and at other locations. He called the children during the plaintiff's custodial time to say, "Daddy is near the house," and then drove past her home honking the car horn. He tried to maintain verbal contact with the plaintiff despite prior court orders limiting communication to court-monitored applications and put a nail in her tire after taking the children to therapy.

Mescanti v. Mescanti, 956 A.2d 1017 (Pa. Super. 2008).

The actions of a defendant should be considered in the totality of the circumstances and considered as a whole when determining abuse as a course of conduct. Husband's actions over a period of months, wherein he provoked arguments; routed through Wife's personal belongings; prevented Wife from sleeping; followed her when she was out with friends; prevented her from leaving the residence; locked her out of the residence; verbally threatened her saying "you better not go to sleep;" and cocked his guns within earshot of Wife; established a course of conduct that put Wife in reasonable fear of bodily injury.

Scott v. Shay, 928 A.2d 312 (Pa. Super. 2007).

Plaintiff was molested as a child by Appellant, who was convicted of indecent assault. In the years that followed, Plaintiff saw Defendant at various places around the community where

both lived. In August 2004, Defendant visited Plaintiff's house, ostensibly to talk to her father, and revealed that his cousin was their neighbor. In October 2005, Plaintiff and Defendant attended the same church social gathering, where Defendant stared and smiled at her several times, despite being asked to stay away from her by other church members. Plaintiff then filed for, and trial court entered, a final order. The Superior Court reversed. It found that subsequent events occurring over a year apart and under different circumstances that did not resemble each other did not constitute a pattern of conduct rising to the level necessary for a protection order. (See also Family or Household Member).

R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).

Court found abuse where former boyfriend, a male university student, made repeated unwanted phone calls and sent e-mail messages (including the statement "you're not answering me, you'll die"). Defendant informed Plaintiff that he suffered from obsessive-compulsive disorder and plaintiff was the object of his obsession. Plaintiff testified that she was "very scared" by increasingly hostile messages and was afraid to walk around campus even in the daylight.

D.H. v. B.O., 734 A.2d 409 (Pa. Super. 1999).

The court determined that there was insufficient evidence to support a finding that Defendant had engaged in a repeated course of conduct which would place Plaintiff in reasonable fear of bodily injury where physical threats were only directed towards Plaintiff's boss and that the one threat to Plaintiff was regarding finances. Plaintiff terminated the relationship after returning home from out of town and finding several "disturbing" phone messages with his employer. Defendant contacted Plaintiff via pager and telephone calls, at work and at home, a total of 13 times over 5 days. Defendant threatened to strangle Plaintiff's boss.

K.B. v. Terrence Tinsley, 2019 PA Super 116.

Petitioner and Defendant were intimate partners who broke up as a result of Defendant's verbal abuse, which escalated dramatically after the break-up. After a hearing, the trial court granted Petitioner a two-year PFA Order. Defendant appealed, arguing that there was insufficient evidence to support the entry of the PFA Order. The Superior Court rejected Petitioner's argument, finding that the behavior described at trial, which included incessant texts and phone calls, public verbal abuse, stabbing an air mattress in front of plaintiff, and physically accosting her in a parking lot, supported the entry of the PFA Order. The Superior Court also rejected claims that the Defendant was not able to explore the Petitioner's motive to show that she was vindictive in filing the PFA as hearing transcripts showed he had ample opportunity to present this argument.

"Adult." An individual who is 18 years of age or older.

"Appropriate law enforcement agency." The duly constituted municipal law enforcement agency that regularly provides primary police services to a political subdivision or, in the absence of any such municipal law enforcement agency, the Pennsylvania State Police installation that regularly provides primary police services to the political subdivision.

“Certified copy.” A paper copy of the original order of the issuing court endorsed by the appropriate clerk of that court or an electronic copy of the original order of the issuing court endorsed with a digital signature of the judge or appropriate clerk of that court. A raised seal on the copy of the order of the issuing court shall not be required.

“Comparable court.” A foreign court that:

- (1) has subject matter jurisdiction and is authorized to issue ex parte, emergency, temporary or final protection orders in that jurisdiction; and
- (2) possessed jurisdiction over the parties when the protection order was issued in that jurisdiction.

“Commercial Armory.” A for-profit entity which holds the appropriate Federal and State licenses to possess and secure firearms of third persons.

“Confidential communications.” All information, whether written or spoken, transmitted between a victim and a domestic violence counselor or advocate in the course of the relationship. The term includes information received or given by the domestic violence counselor or advocate in the course of the relationship, as well as advice, reports, statistical data, memoranda or working papers, records or the like, given or made in the course of the relationship. The term also includes communications made by or to a linguistic interpreter assisting the victim, counselor or advocate in the course of the relationship.

“Domestic violence counselor/advocate.” An individual who is engaged in a domestic violence program, the primary purpose of which is the rendering of counseling or assistance to victims of domestic violence, who has undergone 40 hours of training.

“Domestic violence program.” A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims which include, but are not limited to, crisis hotline; safe homes or shelters; community education; counseling systems intervention and interface; transportation, information and referral; and victim assistance.

“Family or household members.” Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.

Case Law Illustration: Related by “Affinity” Defined

Commonwealth v. Walsh, 36 A.3d 613, 618 (Pa. Super. 2012).

Child and her mother resided with Walsh for many years. Mother sought and received a temporary PFA on behalf Child following allegations of sexual abuse of Child by Walsh. After entry of the order, Walsh induced Child’s friend to pass on threats to Child. The friend told Child and Child’s older sister contacted the police. The trial court found Walsh guilty of indirect criminal contempt, sentenced to six months of probation, and entered a final PFA Order for three years. Walsh appealed, claiming that his relationship to Child was not covered in the PFA Act and that making statements to a third party is not a violation of a PFA order. The Pennsylvania Superior Court upheld the trial court and found that Child met the definition of

“family and household member” under the Act. The Court looked to the definition of the word “affinity” within the Act and concluded that, while the term is not defined directly in the Act, the definition of “affinity” in Webster’s Dictionary includes “as related by marriage or ties other than by blood.” In this case, Walsh and Mother resided together for 13 years, Walsh had been involved in Child’s life since she was five years old, during which time he treated her like a stepdaughter, and her two half-siblings were the children of Mother and Walsh. The Court held that the Child was related to Walsh by affinity because the facts in this case established that they were related through ties other than blood. The Court clarified that, consistent with the goal of the Act to provide the Courts with flexibility to protect and prevent further abuse, “it is incumbent upon [the Court] to interpret ‘affinity’ so as to include this relationship.”

Case Law Illustrations: “Intimate Partners” Defined: Dating Relationship Included

Evans v. Braun, 12 A.3d 395 (Pa. Super. 2010).

“Sexual or Intimate Partners” includes a dating relationship that establishes the domestic, romantic or familial link necessary for standing under the PFA Act even if the relationship is of short duration. Plaintiff, Evans, and Defendant, Braun, went on two dates. On the second date, Braun told Evans that he had a gun. After the date, he took Evans to his residence to meet his son. While at the residence, Braun pulled the gun from his waistband and handed the gun to Evans. He commented on its weight and told her it could put a very big hole in her. Evans was unsure if he was trying to intimidate or impress her. Subsequently the relationship deteriorated. Evans asked Braun to meet her at a restaurant to apologize for misunderstandings between them. When Braun arrived, he was sarcastic and aggressive. Braun told Evans, “Don’t forget I have this” and showed her the gun in his waistband. Alarmed, Evans filed for a PFA. Braun argued that he and Evans were not intimate partners. The trial court granted a final order after a hearing, and the Superior Court affirmed, finding that a dating relationship, even though short-lived, had some measure of personal interaction elected by the parties and thus qualified as an intimate relationship.

Varner v. Holley, 854 A.2d 520, 522 (Pa. Super. 2004)

“A dating relationship, such as the relationship between appellant and Varner, meets the relationship requirement of the Act.”

D.H. v. B.O., 734 A.2d 409 (Pa. Super. 1999).

Evidence was sufficient to demonstrate an intimate relationship where the PFA petition referred to appellant as a “former roommate and homosexual lover” and the complainant testified that he and appellant formerly had a sexual relationship lasting approximately one and one-half months.

R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).

Plaintiff averred that defendant was her former “boyfriend.” Where defendant made no objection to this description, the parties were considered “intimate partners” and had a relationship that was covered under PFAA.

Counterman v. Shoemaker, 14 Pa. D. & C. 4th 217 (Monroe 1992), aff’d, by 625 A.2d 95 (Pa. Super. 1992).

PFA order against ex-boyfriend as “former intimate partner.”

Case Law Illustration: “Sexual or Intimate Partners” Definition Limited to those Parties with Domestic, Romantic and/or Familial Link

Scott v. Shay, 928 A.2d 312 (Pa. Super. 2007).

Plaintiff was molested as a child by Defendant, who was convicted of indecent assault. In the years that followed, Plaintiff saw Defendant at various places around the community where both lived. In August 2004, Defendant visited Plaintiff’s house, ostensibly to talk to her father, and revealed that his cousin was their neighbor. In October 2005, Plaintiff and Defendant attended the same church social gathering, where Defendant stared and smiled at her several times, despite being asked to stay away from her by other church members. Plaintiff then filed for, and trial court entered, a final order. Defendant appealed, based on standing and sufficiency of the evidence. To have standing to petition for a PFA an individual must fall into one of the categories defined in section 6102, “Family or household members.”

The Superior Court reversed and found that the only way Plaintiff and Defendant met the statutory definition would be if the court interpreted “sexual or intimate partner” to include assailant and victim. The Court determined that this interpretation did not fall within the rubric of PFA Act, because a sexual assault crime like Defendant’s against Plaintiff did not in and of itself establish the domestic, romantic and/or familial link necessary for standing under the PFAA.

Case Law Illustration: Related by Consanguinity

Slusser v. DeBoer, 985 A.2d 974 (Pa. Super. 2009), appeal denied, 4 A.3d 1055 (Pa. 2010).

Defendant was the grandfather of plaintiff’s daughter. Plaintiff and Defendant’s son never married, but they had a child in common. As such, Plaintiff and Defendant had a direct blood relationship to each other through Plaintiff’s minor child. This relationship by consanguinity adequately provided jurisdiction to the trial court.

H.M.H. On Behalf of Minor, L.M.H. v. D.J.G, 2019 PA Super 156.

Petitioner filed for a PFA on behalf of her thirteen-year-old daughter against the child’s first cousin based on allegations of sexual abuse. A temporary PFA was granted, and the parties proceeded to a final PFA hearing. At the final PFA hearing, the Court requested an offer of proof

from Mother's counsel regarding a prima facie case of abuse and standing. The trial court dismissed the PFA without prejudice on the grounds that Mother failed to present a prima facie case and that the relationship of first cousins did not meet the definition of "family" in the PFA Act. The Superior Court reversed the trial court's decision holding that lack of terms and familial limits in the PFA Act meant it was intended to include broader language to encompass a plethora of relationships. In addition, the Superior Court also stated that because the language around relation by consanguinity in the PFA Act is clear and unambiguous and it encompasses first cousins who are related by blood.

Case Law Illustrations: Persons Related by Consanguinity Need Not Reside Together

Custer v. Cochran, 933 A.2d 1050 (Pa. Super. 2007).

Brother challenged the trial court's jurisdiction to enter a final PFA order against him because he and Sister were business partners. He contended that pursuant to the decision in *Olivieri v. Olivieri*, 678 A.2d 393 (Pa. Super. 1996), the trial court should have dismissed Sister's petition for a protection order. In *Olivieri*, the Superior Court held that the PFA Act was not intended to resolve a dispute between business partners who happen to be siblings but did not reside together. The Superior Court rejected Brother's arguments. The Court found that the plain language of the statute includes "persons related by consanguinity" and it held that siblings are persons related by consanguinity. The Court recognized that the PFA Act previously required siblings to reside together in order to be eligible for relief under the Act. However, the legislature expanded the language of the statute and the present version's plain language did not require a domestic relationship. The Superior Court expressly overruled the *Olivieri* decision with regard to that decision's suggestion that the present version of the PFA Act imposes a common residency requirement. While the court agreed with Brother that the purpose of the Act is to protect victims of domestic violence, the Court found that pursuant to canons of statutory construction it could not disregard the plain language of the statute. Since Sister's petition clearly fell within the ambit of the PFA Act, the trial court did not err in hearing evidence on that petition.

Case Law Illustration: "Living as Spouses" Defined

Yankowskie v. Lenker, 526 A.2d 429 (Pa. Super. 1987).

Whether parties were living together at the time of the abuse is not dispositive. Courts should consider the (1) duration of relationship; (2) frequency of contact between parties; (3) whether parties are financially interdependent; (4) whether parties have children together or have raised children together; and (5) whether parties have engaged in tasks directed toward maintaining a common household.

Case Law Illustration: Related by "Affinity" Defined

McCance v. McCance, 908 A.2d 905, 910 (Pa. Super. 2006) P10.

The Superior Court interpreted "affinity" in the PFAA to include a family relationship of brother-in-law and sister-in-law in a PFA filed by plaintiff against her husband's brother. The Court found that:

"[s]uch an interpretation does not do violence to the purpose of the Act, which is to forestall escalation of disputes among family members where injury may be on the horizon. See *Mahorsky v. Mahorsky*, 22 D. & C. 3d 210, 213 (1982) ("The entire thrust of the [Protection from Abuse Act and rules of civil procedure is to create an efficient, simple and rapid vehicle for the resolution of family disputes."); contrast *Olivieri v. Olivieri*, 678 A.2d 393 (Pa. Super. 1996) (PFA was not a vehicle to resolve dispute between sister and brother feuding as partners about the way the business was being operated)."

Case Law Illustration: Business Partners, Though Family, Not Family or Household Members

Olivieri v. Olivieri, 678 A.2d 393 (Pa. Super. 1996).

PFAA did not apply to a dispute between business partners, who happened to be brother and sister, over the operation of a jointly owned business. Portions overruled by *Custer v. Cochran*, 933 A.2d 1050 (Pa. Super. 2007), *supra*.

"Firearm." Any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon as defined by 18 Pa.C.S. § 6105(i) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).

"Foreign protection order." A protection order as defined by 18 U.S.C. § 2266 (relating to definitions) issued by a comparable court of another state, the District of Columbia, Indian tribe or territory, possession or commonwealth of the United States.

"Hearing officer." A district justice, judge of the Philadelphia Municipal Court, bail commissioner appointed under 42 Pa.C.S. § 1123 (relating to jurisdiction and venue), master appointed under 42 Pa.C.S. § 1126 (relating to masters) and master for emergency relief.

"Master for emergency relief." A member of the bar of the Commonwealth appointed under section 6110(e) (relating to emergency relief by minor judiciary).

"Minor." An individual who is not an adult.

Case Law Illustration: Capacity of Minors

Varner v. Holley, 854 A.2d 520, 523 (Pa. Super. 2004).

PFAA permits the entry of a PFA order against a minor. However, the minor must be represented by a guardian "who shall supervise and control the conduct of the action on behalf of the minor" pursuant to the Pennsylvania Rules of Civil Procedure Nos. (relating to minors as parties) & 2028. The Court found that the PFA order entered by consent agreement against 17-year-old defendant was void because the defendant did not have a guardian or parent with him

at the PFA hearing. Therefore, the defendant later could not be found in indirect criminal contempt of that PFA.

“Other weapon.” Anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have. The term does not include a firearm.

“Safekeeping permit.” A permit issued by a sheriff allowing a person to take possession of any firearm, other weapon or ammunition that a judge ordered a defendant to relinquish in a protection from abuse proceeding.

“Secure visitation facility.” A court-approved visitation program offered in a facility with trained professional staff operated in a manner that safeguards children and parents from abuse and abduction.

“Sheriff.”

(1) Except as provided in paragraph (2), the sheriff of the county.

(2) In a city of the first class, the chief or head of the police department.

“Victim.” A person who is physically or sexually abused by a family or household member. For purposes of section 6116 (relating to confidentiality), a victim is a person against whom abuse is committed who consults a domestic violence counselor or advocate for the purpose of securing advice, counseling or assistance. The term shall also include persons who have a significant relationship with the victim and who seek advice, counseling or assistance from a domestic violence counselor or advocate regarding abuse of the victim.

“Weapon.” Anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have. The term includes a firearm which is not loaded or lacks a magazine, clip or other components to render it immediately operable and components which can readily be assembled into a weapon as defined by 18 Pa.C.S. § 907 (relating to possessing instruments of crime).

(b) Other terms. —Terms not otherwise defined in this chapter shall have the meaning given to them in 18 Pa.C.S. (relating to crimes and offenses).

§ 6103. JURISDICTION

(a) General rule. —The court shall have jurisdiction over all proceedings under this chapter.

(b) Effect of departure and nonresidence. —The right of the plaintiff to relief under this chapter shall not be affected by either of the following:

(1) The plaintiff’s leaving the residence or household to avoid further abuse.

(2) The defendant’s absence from this Commonwealth or the defendant’s nonresidence in this Commonwealth, provided that the court has personal jurisdiction over the defendant in accordance with 42 Pa.C.S. § 5322 (relating to bases of personal jurisdiction over persons outside this Commonwealth).

Case Law Illustrations: Personal Jurisdiction: Minimum Contacts

N.T. ex. Rel. K.R.T. v. F.F., 2015 PA Super 139 (June 15, 2015)

The Pennsylvania Superior Court reversed the trial court's order overruling Defendant's preliminary objections based upon lack of personal jurisdiction, vacated the temporary PFA order, and dismissed Plaintiff's PFA petition. Plaintiff filed a PFA petition alleging that abuse occurred in California leading Plaintiff to flee to Pennsylvania. Defendant filed preliminary objections on the basis of lack of jurisdiction and the trial court overruled those objections. The trial court ruled that while Defendant had never resided in Pennsylvania, his action of hiring a private investigator in Pennsylvania established the minimum contacts necessary to confer personal jurisdiction. Defendant and Plaintiff resided in California. Defendant filed for and eventually obtained custody of the parties' child in California. However, when he initiated his custody action, Plaintiff's whereabouts were unknown and Defendant hired a private investigator to locate Plaintiff. The private investigator found traces of Plaintiff in Pennsylvania and therefore transferred the case to a private investigator in Pennsylvania. The Superior Court found that the PFA Act makes clear that a petitioner may only obtain relief against an out-of-state defendant if the court has personal jurisdiction over the defendant established pursuant to Pennsylvania's long-arm statute, 42 Pa. C.S. 5322. In the instant case, the Superior Court found that Defendant's hiring of a private investigator to locate Plaintiff eight months prior to the PFA action was insufficient to establish personal jurisdiction.

Case Law Illustration: UCCJEA Confers Jurisdiction in PFA

B.T.W., O/B/O T.L. v. P.J.L., 956 A.2d 1014 (Pa. Super. 2008).

Grandmother filed a PFA Petition on behalf of grandchild against the child's Stepmother. Stepmother resided in Maryland. Stepmother conceded personal jurisdiction but challenged the trial court's subject matter jurisdiction over the matter because all of the alleged abuse occurred in Maryland. The Superior Court found that 23 Pa.C.S. § 5422 conferred continuing exclusive jurisdiction over the custody matter and that jurisdiction endured so long as the child's connections to the Commonwealth remained. Appellee grandmother, a partial physical custodian, resided in Pennsylvania, thus the nexus between the child and the Commonwealth remained intact. The Court looked to the definition of "child custody proceedings" in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and found that the definition included "a proceeding for... protection from domestic violence." 23 Pa.C.S. § 5402. The PFA petition placed custody of the child at issue, thus the PFA hearing fell within the statutory definition and established the court's authority to enter the PFA order.

Case Law Illustration: Court Loses Jurisdiction to Set Aside Final Order After Thirty-Day Appeal Period

Commonwealth v. Charnik, 921 A.2d 1214 (Pa. Super. 2007).

Plaintiff wife obtained final PFA against Defendant husband following an evidentiary hearing. About two months later Defendant moved back into the residence, at Plaintiff's invitation, to

assist with their ill son. Although Plaintiff admitted at the ICC hearing that she had invited Defendant to return, Defendant was found guilty of violating the PFA. In June, Defendant kicked in Plaintiff's door at a custody exchange. He was again found guilty of violating the PFA. In July, Plaintiff petitioned to withdraw the PFA order, which was granted by the trial court. Defendant motioned the trial court to expunge the final PFA order and the two ICC convictions; the court denied both requests. On appeal, the Superior Court determined that the ICC convictions were criminal in nature, covered by the Criminal History Record Information Act, 18 Pa.C.S. § 9122(b), and upheld the trial court's decision denying expungement. The Superior Court also discussed withdrawal of a PFA, stating that a petition may be withdrawn, but a final order must be set aside by a judicial act. Despite the fact that the trial court set aside the final PFA, the Superior Court stated that based on the rules of civil and appellate procedure, the trial court did not have jurisdiction to set aside its order after the 30-day appeal period had ended and no motion for reconsideration had been filed.

Case Law Illustration: Leaving the Residence Does Not Preclude Protection

Hood-O'Hara v. Wills, 873 A.2d 757, 761 (Pa. Super. 2005).

Appellant challenged the entry of a final PFA order issued against him claiming that the parties had been separated for approximately six weeks and no credible abuse occurred after separation. The Superior Court affirmed the lower court and found this argument lacking. The Superior Court cited to section 6103, which specifically states that "the right of the [appellee] to relief ... shall not be affected by [appellee] leaving the residence or household to avoid further abuse."

§ 6104. FULL FAITH AND CREDIT AND FOREIGN PROTECTION ORDERS

(a) General rule. —A court shall recognize and enforce a valid foreign protection order issued by a comparable court. The validity of a foreign protection order shall only be determined by a court.

(b) Affirmative defense. —Failure by a comparable court to provide reasonable notice and opportunity to be heard shall be an affirmative defense to any charge or process filed seeking enforcement of a foreign protection order. A comparable court shall have complied with that court's notice requirements and shall have given the defendant the opportunity to be heard before the foreign order was issued. In the case of ex parte orders, the comparable court shall have complied with that court's notice requirements and have given the defendant an opportunity to be heard within a reasonable period of time after the order was issued, consistent with due process.

(c) Invalid orders. —A foreign protection order issued by a comparable court against a party who has filed a petition, complaint or other written pleading for a protection order is not valid and not entitled to full faith and credit if:

(1) no cross or counter petition, complaint or other written pleading was filed seeking the protection order; or

(2) a cross or counter petition, complaint or other written pleading was filed and the court did not make a specific finding that each party was entitled to a protection order.

(d) Filing a foreign protection order. —A plaintiff may file a certified copy of a foreign protection order with the prothonotary in any county within this Commonwealth where the plaintiff believes enforcement may be necessary. The following provisions shall apply:

(1) No costs or fees associated with filing a foreign protection order shall be assigned to the plaintiff, including the cost of obtaining certified copies of the order. Costs and fees associated with filing a foreign protection order may be assessed against the defendant.

(2) Upon filing of a foreign protection order, a prothonotary shall transmit, in a manner prescribed by the Pennsylvania State Police, a copy of the order to the Pennsylvania State Police registry of protection orders.

(3) Filing of a foreign protection order shall not be a prerequisite for service and enforcement.

(e) Orders issued in another judicial district within this Commonwealth. —The filing of an order issued in another judicial district within this Commonwealth is not required for enforcement purposes.

§ 6105. RESPONSIBILITIES OF LAW ENFORCEMENT AGENCIES

(a) General rule. —The police department of each municipal corporation, the Pennsylvania State Police and the sheriff of each county shall insure that all their officers, deputies and employees are familiar with the provisions of this chapter. Instruction concerning protection from abuse shall be made a part of the training curriculum for all trainee officers and deputies. All law enforcement agencies within this Commonwealth shall adopt a written domestic violence policy.

(b) Notice of service and rights. —Each law enforcement agency shall provide the abused person with oral and written notice of the availability of safe shelter and of domestic violence services in the community, including the hotline number for domestic violence services. The written notice, which shall be in English and Spanish and any additional language required by local rule of court, shall include the following statement:

“If you are the victim of domestic violence, you have the right to go to court and file a petition requesting an order for protection from domestic abuse pursuant to the Protection from Abuse Act (23 Pa.C.S. Ch. 61), which could include the following:

(1) An order restraining the abuser from further acts of abuse.

(2) An order directing the abuser to leave your household.

(3) An order preventing the abuser from entering your residence, school, business or place of employment.

(4) An order awarding you or the other parent temporary custody of or temporary visitation with your child or children.

(5) An order directing the abuser to pay support to you and the minor children if the abuser has a legal obligation to do so.”

(c) Mandatory report. —Each law enforcement agency shall make an incident report, on a form prescribed by the Pennsylvania State Police, consistent with the report required by the Federal National Incident-Based Reporting System (NIBRS). The mandate for incident report completion shall not be operative until the Pennsylvania State Police have implemented NIBRS. The incident report may include the following:

- (1) Names, addresses and telephone numbers of the victim, the accused, any witnesses and the caller.**
- (2) A second permanent address and telephone number for the victim, such as a close family member or a friend.**
- (3) A statement of the relationship between the victim and the accused.**
- (4) A narrative for the incident, including the date, time and whether the accused appeared intoxicated or under the influence of a controlled substance.**
- (5) What, if any, weapons were used or threatened to be used.**
- (6) A description of any injuries observed by the officer.**
- (7) A description of any injuries described by the victim but not observed by the officer and an indication that the injury was not observed.**
- (8) Documentation of any evidence that would tend to establish that a crime was committed.**
- (9) An indication of whether an arrest was made and the reason for electing not to arrest, whether there was a warrantless arrest, an arrest with a warrant or no arrest.**
- (10) Whether the accused actually was arrested or whether there is an outstanding arrest warrant.**
- (11) The crimes with which the accused was charged.**
- (12) If the accused was arrested and arraigned, whether bail was set and any conditions of bail imposed.**
- (13) If the officer did not arrest or seek an arrest warrant even though arrest was authorized, a detailed explanation of the reasons for the officer’s decision not to arrest.**
- (14) The names and ages of any children present in the household and their address and telephone number if children were relocated.**
- (15) Notation of previous incidents of which the officer is personally aware.**
- (16) Notation of previous incidents reported by the victim or witnesses.**
- (17) If an officer was injured in the incident, the nature and circumstances of the injury.**

Case Law Illustration: Failure of Police to File Report Does Not Preclude Issuance of PFA Order.

Karch v. Karch, 885 A.2d 535, 538 (Pa. Super. 2005).

There is no onus on the victim to force police departments to comply with section 6105 as a prerequisite for obtaining a PFA order. The court will not infer that the failure of police to act on a report of domestic violence means that the victim is not credible. “It is well settled that neither the PFA Act nor case law requires that a police report be filed in order to obtain a PFA.”

(d) Notice of arrest. —All law enforcement agencies shall make reasonable efforts to notify any adult or emancipated minor protected by an order issued under this chapter of the arrest of the defendant for violation of an order as soon as possible. Unless the person cannot be located, notice of the arrest shall be provided not more than 24 hours after preliminary arraignment.

(e) Statewide registry. —

(1) The Pennsylvania State Police shall establish a Statewide registry of protection orders and shall maintain a complete and systematic record and index of all valid temporary and final court orders of protection, court-approved consent agreements and a foreign protection order filed pursuant to section 6104(d) (relating to full faith and credit and foreign protection orders). The Statewide registry shall include, but need not be limited to, the following:

- (i) The names of the plaintiff and any protected parties.**
- (ii) The name and address of the defendant.**
- (iii) The relationship between the plaintiff and defendant.**
- (iv) The date the order was entered.**
- (v) The date the order expires.**
- (vi) The relief granted under sections 6108(a)(1), (2), (4), (6) and (7) (relating to relief) and 6110(a) (relating to emergency relief by minor judiciary).**
- (vii) The judicial district in which the order was entered.**
- (viii) Where furnished, the Social Security number and date of birth of the defendant.**
- (ix) Whether or not any or all firearms, other weapons or ammunition were ordered relinquished.**

(2) The prothonotary shall send, on a form prescribed by the Pennsylvania State Police, a copy of the protection order or approved consent agreement to the Statewide registry of protection orders so that it is received within 24 hours of the entry of the order. Likewise, amendments to or revocation of an order shall be transmitted by the prothonotary within 24 hours of the entry of the order for modification or revocation. The Pennsylvania State Police shall enter orders, amendments and revocations in the Statewide registry of protection orders within eight hours of receipt. Vacated or expired orders shall be purged from the registry.

(3) The registry of the Pennsylvania State Police shall be available at all times to inform courts, dispatchers and law enforcement officers of any valid protection order involving any defendant.

(4) When an order granting relief under section 6108(a)(7) has been entered by a court, such information shall be available to the Pennsylvania State Police for the purpose of conducting a

criminal history records check in compliance with the applicable provisions of 18 Pa.C.S. Ch. 61 Subch. A (relating to Uniform Firearms Act).

(5) Information contained in the Statewide registry shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(f) Information concerning crimes of violence. —Each police department in a city, borough or township and the Pennsylvania State Police shall transmit to the Pennsylvania State Police, in a manner prescribed by the Pennsylvania State Police, the information specified in subsection (c) related to crimes of violence between family or household members.

(g) Annual report. —The Pennsylvania State Police shall annually compile and analyze the incident report data received and publish a Statewide report which includes aggregate, county and department-based statistical profiles. The Pennsylvania State Police shall transmit a copy of the annual report to the Governor, the General Assembly and each domestic violence program in this Commonwealth.

(h) Enforcement of foreign protection orders. —

(1) All foreign protection orders shall have the presumption of validity in this Commonwealth, and police officers shall make arrests for violations thereof in the same manner as set for violations of protection orders issued within this Commonwealth. Until a foreign order is declared to be invalid by a court, it shall be enforced by all law enforcement personnel in this Commonwealth.

(2) A police officer shall rely upon any copy of a foreign protection order which has been presented to the officer by any source and may verify the existence of a protection order consistent with the provisions of section 6113(a) (relating to arrest for violation of order). The fact that a foreign protection order has not been filed with a prothonotary or entered into the Pennsylvania State Police registry shall not be grounds for law enforcement to refuse to enforce the order.

(i) Immunity. —The following entities shall be immune from civil liability for good faith conduct in any action arising in connection with a court's finding that the foreign order is invalid or unenforceable:

(1) Law enforcement agencies and their agents and employees.

(2) County correctional and detention facilities and their agents and employees.

(3) Prothonotaries and their agents and employees.

§ 6106. COMMENCEMENT OF PROCEEDINGS

(a) General rule. —An adult or an emancipated minor may seek relief under this chapter for that person or any parent, adult household member or guardian ad litem may seek relief under this chapter on behalf of minor children, or a guardian of the person of an adult who has been declared incompetent under 20 Pa.C.S. Ch. 51 Subch. B (relating to appointment of guardian) may seek relief on behalf of the incompetent adult, by filing a petition with the court alleging abuse by the defendant.

(a.1) False reports.—A person who knowingly gives false information to any law enforcement officer with the intent to implicate another under this chapter commits an offense under 18 Pa.C.S. § 4906 (relating to false reports to law enforcement authorities).

(a.2) Notification of defendant’s occupation. —The plaintiff shall notify the court if the plaintiff has reason to believe that the defendant is a licensed firearms dealer, is employed by a licensed firearms dealer or manufacturer, is employed as a writer, researcher or technician in the firearms or hunting industry or is required to carry a firearm as a condition of employment.

(a.3) Notification of need to protect plaintiff.—The plaintiff shall notify the court anytime during the period commencing upon filing the petition and granting of an order or approving a consent agreement at a hearing held under section 6107 (a) (relating to hearings) if the plaintiff has reason to believe the plaintiff’s safety is at risk. In such a case, the court shall direct the Pennsylvania State Police, the municipal police or the sheriff to accompany the plaintiff to the plaintiff’s residence to retrieve personal belongings or to accompany the plaintiff while the petition or order is served upon the defendant by the sheriff or competent adult, as set forth in the Pennsylvania Rules of Civil Procedure.

(a.4) Notification regarding child abuse investigation.—

(1) If the plaintiff has knowledge of a founded or indicated report of child abuse under Chapter 63 (relating to child protective services) involving the defendant, the petition shall include that information together with the name of the investigative agency.

(2) The notice of hearing and order shall include notice to the defendant that an order issued under this chapter may have an impact on the defendant under Chapter 63. The court shall develop procedures to implement the provisions of this paragraph.

(b) Plaintiff fees not permitted. —No plaintiff seeking relief under this chapter shall be charged any fees or costs associated with the filing, issuance, registration or service of a petition, motion, complaint, order or any other filing. Prohibited fees or costs shall include, but are not limited to, those associated with modifying, withdrawing, dismissing or certifying copies of a petition, motion, complaint, order or any other filing, as well as any judicial surcharge or computer system fee. No plaintiff seeking relief under this chapter shall be charged any fees or costs associated with filing a motion for reconsideration or an appeal from any order or action taken pursuant to this chapter. Nothing in this subsection is intended to expand or diminish the court’s authority to enter an order pursuant to Pa.R.C.P. No. 1023.1 (relating to Scope. Signing of Documents. Representations to the Court. Violation).

Case Law Illustrations: Court May Not Require Posting of a Bond Prior to Filing Petition

Viruet v. Cancel, 727 A.2d 591 (Pa. Super. 1999).

Trial court erred in imposing a bond requirement as a pre-condition for filing future PFA petitions. Plain reading of the PFAA makes it clear that a court cannot impose financial restrictions, such as requiring the posting of a bond prior to filing a petition. The Act is designed to be expeditious in nature, and the imposition of posting a bond prior to filing a PFA petition will frustrate that purpose and the legislative intent to remove financial barriers to obtaining protection from abuse.

Egelman v. Egelman, 728 A.2d 360 (Pa. Super. 1999).

Authority of a trial court to impose a pre-condition on the filing of future PFA petitions was a question of law; gatekeeping mechanisms to control the filing of petitions under the PFAA are contrary to the intent and the provisions of the Act and case law.

(c) Assessment of fees and costs against the defendant. —When an order is granted pursuant to this chapter, fees and costs shall be assessed against the defendant. The court shall waive fees and costs upon a showing of good cause or when the court makes a finding that the defendant is not able to pay the costs. Nothing in this subsection is intended to expand or diminish the court’s authority to enter an order pursuant to Pa.R.C.P. No. 1023.1.

(d) Surcharge on order.—When a protection order is granted under section 6107(a) (relating to hearings), other than pursuant to an agreement of the parties, a surcharge of \$100 shall be assessed against the defendant. All moneys received from surcharges shall be distributed in the following order of priority:

(1) \$25 shall be forwarded to the Commonwealth and shall be appropriated to the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105.

(2) \$50 shall be retained by the county and shall be used to carry out the provisions of this chapter as follows:

(i) \$25 shall be used by the sheriff.

(ii) \$25 shall be used by the court.

(3) \$25 shall be forwarded to the Department of Public Welfare for use for victims of domestic violence in accordance with the provisions of section 2333 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.

(d.1) Limitation. —The surcharge allocated under subsection(d)(1) and (3) shall be used to supplement and not to supplant any other source of funds received for the purpose of carrying out the provisions of this chapter.

(e) Court to adopt means of service. —The court shall adopt a means of prompt and effective service in those instances where the plaintiff avers that service cannot be safely effected by an adult individual other than a law enforcement officer or where the court so orders.

(f) Service by sheriff. —If the court so orders, the sheriff or other designated agency or individual shall serve the petition and order.

(g) Service of petition and orders. —The petition and orders shall be served upon the defendant, and orders shall be served upon the police departments and sheriff with appropriate jurisdiction to enforce the orders. Orders shall be promptly served on the police and sheriff. Failure to serve shall not stay the effect of a valid order.

Case Law Illustration: Verbal Notice from Police of Emergency PFA Order Satisfied Due Process

Commonwealth v. Padilla, 885 A.2d 994 (Pa. Super. 2005).

Verbal notice provided by the police to the defendant informing him of the no-contact order and the consequences of violating that order was sufficient to comply with the service requirements of due process.

(g.1) Service of original process of a successful foreign protection order. — No plaintiff or petitioner shall be charged any costs or fees associated with the service of original process of a foreign protection order. Costs or fees associated with the service of original process of a foreign protection order may be assessed against the defendant.

(h) Assistance and advice to plaintiff. —The courts and hearing officers shall:

(1) Provide simplified forms and clerical assistance in English and Spanish to help with the writing and filing of the petition for a protection order for an individual not represented by counsel.

(2) Provide the plaintiff with written and oral referrals, in English and Spanish, to the local domestic violence program, to the local legal services office and to the county bar association's lawyer referral service.

§ 6107. HEARINGS

General rule.—Within ten business days of the filing of a petition under this chapter, a hearing shall be held before the court, at which the plaintiff must prove the allegation of abuse by a preponderance of the evidence. The court shall, at the time the defendant is given notice of the hearing, advise the defendant of the right to be represented by counsel, of the right to present evidence, of the right to compel attendance of the witnesses, of the method by which witnesses may be compelled, of the possibility that any firearm, other weapon or ammunition owned and any firearm license possessed may be ordered temporarily relinquished, of the options for relinquishment of a firearm pursuant to this chapter, of the possibility that Federal or State law may prohibit the possession of firearms, including an explanation of 18 U.S.C. §922 (g)(8) (relating to unlawful acts) and 18 Pa.C.S. §6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms), and that any protection order granted by a court may be considered in any subsequent proceedings under this title. This notice shall be printed and delivered in a manner which easily attracts attention to its content and shall specify that child custody is one of the proceedings where prior protection orders may be considered.

Case Law Illustrations: Issue Preservation

Thompson v. Thompson, 963 A.2d 474 (Pa. Super. 2008).

Failure to object to purported errors and bring them to the trial court's attention will result in waiver of those issues on appeal. Defendant argued that he was not permitted to make an opening and closing statement, that he was not permitted to present witnesses on his behalf, that the trial court limited and hurried cross-examination, and that the trial court failed to enforce its sequestration order. The Superior Court's careful review of the record revealed that Defendant failed to specifically object to each issue at the time of the trial. Because he did not object, the issues were waived.

Case Law Illustration: Plaintiff Entitled to an Evidentiary Hearing

Lanza v. Simconis, 914 A.2d 902, 906 (Pa. Super. 2006).

Plaintiff filed *pro se* for a temporary PFA and appeared before the court on that petition. When the defendant appeared at the same time, the trial court permitted the defendant to participate in the hearing. Plaintiff was not represented by counsel, was not given an opportunity to present witnesses in support of her allegation of abuse and did not cross-examine the defendant. Instead, the trial court conducted the hearing in a narrative fashion featuring competing accusations and denials. At the end of the hearing, the trial court denied plaintiff's petition because it could not determine which party was being truthful. The Superior Court found that "while the trial court held a hearing on January 10, 2006, it is clear that such did not comport with the necessary requirements of a hearing under Subsection 6107(a)." The Court further held that for a hearing pursuant to Section 6107(a) to comport with due process, "the parties must, at a minimum, have the opportunity to present witnesses, testify on one's behalf, and cross-examine the opposing party and his/her witnesses." The Superior Court declined to address whether a trial court was required to hold an initial, *ex parte* hearing that excludes the defendant regarding a request for a temporary PFA order, finding that issue waived on appeal.

Lawrence v. Bordner, 907 A.2d 1109, 1114 (Pa. Super. 2006).

Remand warranted where trial court abruptly stopped a minor daughter's testimony and determined that her mother was not entitled to a final PFA Order. The trial court limited the mother to a custody action as her exclusive remedy for the alleged abuse due to the parties' pre-existing custody order. The Superior Court found that a trial court needs to first determine if a PFA is warranted and if "a permanent PFA is proper, it shall then decide whether the terms of the custody Order would be in conflict with the PFA order and require a specific suspension or supersedance of the custody Order."

Drew v. Drew, 870 A.2d 377 (Pa. Super. 2005).

The statutory use of the word "shall" mandates the court to hold an evidentiary hearing where plaintiff has the opportunity to appear, with counsel, to submit evidence and witnesses in support of her allegation that she was abused.

Burke v. Bauman, 814 A.2d 206 (Pa. Super. 2002).

The use of the term “shall” in the PFAA creates a mandatory duty to hold an evidentiary hearing on the merits of a PFA petition. The trial court erred when it failed to grant a continuance and dismissed a PFA petition with prejudice without conducting a mandatory evidentiary hearing to determine the merits of the PFA petition.

Weir v. Weir, 631 A.2d 650 (Pa. Super. 1993).

A petition brought under the PFAA that does not contain a *prima facie* allegation of abuse does not deprive a trial court of authority to conduct a hearing on the petition, especially since most petitions are brought *pro se*.

Case Law Illustration: Plaintiff Is Not Rigorously Limited to Allegations in Petition

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

Evidence of prior abuse incidents not “pleaded” in wife’s *pro se* PFA petition was admissible given the recent nature of the incidents and their probative relevance. The statute does not anticipate that the person filing a petition will be rigorously limited to the specific allegations in the petition. The PFAA is meant to focus on prevention of abuse.

Case Law Illustration: Timing of the Hearing

Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992).

The term “shall,” as used in the PFAA imposes a mandatory limitations period (10 days) within which hearings must be conducted. The court lacked authority to grant husband relief under the PFAA after limitations period on emergency PFA order against wife had expired and the court had not scheduled nor continued a hearing.

In re Penny R., 509 A.2d 338 (Pa. Super. 1986).

In all cases in which an emergency *ex parte* order is issued under the provisions of the PFAA, a hearing shall be held within 10 days of a motion by the parties regardless of whether the order arose from a petition or from another exigent circumstance. The trial court abused its discretion in effecting an *ex parte* order without a meaningful hearing prior or subsequent to its issuance. The trial court had *sua sponte* vacated a stipulated PFA order and discontinued visitation based upon an unsolicited letter from a counselor in a related dependency proceeding that indicated overnight visitation was adverse to the child’s best interests.

Case Law Illustration: No Right to Jury Trial

Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. 1985).

A defendant has no right to a jury trial in a PFA case (civil proceeding or contempt proceeding). See also, section 6115(b)(3).

Case Law Illustrations: No Right to Counsel

DeHaas v. DeHaas, 708 A.2d 100 (Pa. Super. 1998), appeal denied, 732 A.2d 615 (1998).

The court was not required to appoint independent counsel for children with respect to which parent sought PFA order. The procedural requirements of Child Protective Services Law did not apply to the PFAA. Nothing in the Act imposes the procedural requirements of the CPSL to proceedings under the PFAA.

Weir v. Weir, 631 A.2d 650 (Pa. Super. 1993).

Neither the PFAA statute nor the Constitution requires that respondent be given court appointed counsel. Rather, the PFAA requires that the court advise respondent of the right to be represented at a hearing by counsel.

R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).

A hearing was held at which the student was entitled to present witnesses in his own defense and to cross-examine witnesses, including plaintiff. The Court found that the defendant had received a fair hearing although unrepresented by counsel. The defendant had to bear the consequences for failing to secure an attorney in time for the hearing.

Case Law Illustrations: Preponderance of the Evidence Standard

Hood-O'Hara v. Wills, 873 A.2d 757, 761 (Pa. Super. 2005).

The PFAA does not require that a plaintiff present police or medical documentation of abuse in order to prevail under the preponderance of the evidence standard. "Nowhere in the [PFA Act] itself, or in the body of case law interpreting it, is there a requirement that a police report be filed or that there be medical evidence of an injury in order to sustain the burden of proof."

Boykin v. Brown, 868 A.2d 1264 (Pa. Super. 2005).

A PFA petitioner is only required to establish that abuse has occurred by preponderance of the evidence and not beyond a reasonable doubt. Thus, a determination by a district attorney or the police as to whether or not to file criminal charges against a defendant is irrelevant to the court's determination under the PFAA.

Ferri v. Ferri, 854 A.2d 600, 603 (Pa. Super. 2004).

Preponderance of the evidence is the burden that the plaintiff must meet in proving abuse under the PFAA. This standard is defined as the greater weight of the evidence.

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

The plaintiff's burden of proof on a PFA petition is a preponderance of the evidence burden.

Coda v. Coda, 666 A.2d 741 (Pa. Super. 1995).

Wife's testimony was sufficient to support PFA when the wife testified that her husband grabbed her by her hair, dragged her across the floor, and kicked her in her chest and back for a period of 15 to 20 minutes.

Case Law Illustration: The PFA Proceeding is a Civil Action

K.D. v. J.D., 696 A.2d 232 (Pa. Super. 1997).

Proceedings against an allegedly abusive parent under the PFAA are not "criminal proceedings" as contemplated by the provision of Child Victims and Witnesses Act that renders hearsay testimony of child victims of sexual abuse admissible. ("Tender Years" Hearsay Exception Act, 42 Pa.C.S. § 5985.1 was amended in 2000 to include civil hearings.)

Case Law Illustration: Court May Infer Reasonable Fear from Testimony

T.K. v. A.Z., 157 A. 3D 974 (Pa. Super. 2017).

The Court rejected defendant's assertion that the plaintiff never testified she was in fear. Stating that although she never specifically used the word "fear", she clearly had deep concern for her safety, testifying that she believed the defendant's behavior would eventually escalate from stalking to physical harm.

Karch v. Karch, 885 A. 2d 535 (Pa. Super. 2005).

The court determines a witness's credibility and may infer fear based on the witness's testimony describing the defendant's actions. The court will not infer that the failure of police to act on a report of domestic violence means that the victim is not credible. Neither the PFAA nor any case law require a plaintiff to present medical evidence of injury or require that a police report be filed as a prerequisite to obtaining a PFA order.

Case Law Illustration: Police Report Not Admissible

Coda v. Coda, 666 A.2d 741 (Pa. Super. 1995).

A police report was not properly introduced into evidence because no official custodian or qualified witness introduced it.

Case Law Illustrations: Prior Instances of Abuse Are Admissible

Buchhalter v. Buchhalter, 959 A.2d 1260, 1263 (Pa. Super. 2008).

A trial court erred when it refused to allow Petitioner to testify regarding the instances of abuse that formed the basis for a prior protection order entered by consent of the parties. The Superior Court held that the "facts surrounding the prior PFA consent order are relevant to an understanding as to the reasonableness of [Petitioner's] fear relative to the present petition."

The trial court erroneously concluded that it acted within its discretion to exclude Petitioner's testimony of past abuse because the court did not find the petitioner credible.

Raker v. Raker, 847 A.2d 720 (Pa. Super. 2004).

Wife's testimony regarding past incidents of violence by her husband were admissible in the context of a determination of whether wife experienced reasonable fear when her husband entered her home in the middle of the night. The court noted that the issue of the admissibility of testimony regarding prior instances of abuse or incidents not pleaded in the petition was well settled by case law and quoted *Miller v. Walker*.

Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).

Six-year-old prior instances of abuse are admissible and important. Protective purposes of the PFAA required flexibility in the admission of evidence relating to past acts of abuse, and a father's past abusive conduct was crucial inquiry necessary for entry of proper order.

Weir v. Weir, 631 A.2d 650 (Pa. Super. 1993).

Evidence of a husband's prior abuse was relevant and probative with respect to whether the husband's subsequent conduct reasonably placed his wife in fear of imminent serious bodily injury; thus, the evidence was admissible in the wife's PFAA action.

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

Questions concerning the admission of past incidents of abuse at hearing are within the sound discretion of the trial court and may be reversed on appeal only when a clear abuse of discretion is apparent. The trial court did not abuse its discretion in admitting evidence of acts of abuse that were not included in plaintiff's *pro se* petition given the recent nature of the incidents and their probative relevance.

Case Law Illustration: Findings by Court Not Required

Weir v. Weir, 631 A.2d 650 (Pa. Super. 1993).

A judge in a PFA hearing is not required to make an adjudication containing a statement of issues, specific factual findings or legal conclusions. The PFAA does not mandate the trial court to specify findings of abuse in a PFA proceeding.

Case Law Illustration: Minor Defendant Requires a Guardian for the Entry of a Valid Protection Order

Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004).

Final PFA void because the defendant was a minor at the time that he consented to the entry of a final order and because he was unrepresented by a guardian, as defined in Pa. Rules of Civil Procedure Nos. 2027 & 2028. The appearance of the minor defendant's probation officer did not qualify as an adult interested in the minor to provide guidance regarding the minor's

position. Therefore, the minor could not be found in indirect criminal contempt (ICC) of the final order for going to plaintiff's workplace.

(b) Temporary orders. —

(1) If a plaintiff petitions for a temporary order for protection from abuse and alleges immediate and present danger of abuse to the plaintiff or minor children, the court shall conduct an ex parte proceeding.

Case Law Illustrations: Constitutionality of PFA Act

Boyle v. Boyle, 12 Pa. D. & C. 3rd 767 (Allegheny 1979).

The PFAA bears a real and substantial relationship to its purpose of protecting abuse and therefore is a valid exercise of police power such that a constitutional challenge regarding a spouse's exclusion from jointly held property for a temporary period without an opportunity to be heard would not prevail.

Case Law Illustration: Standard for Entry of a Temporary Protection Order

Drew v. Drew, 870 A.2d 377, 378 (Pa. Super. 2005).

"The *ex parte* hearings conducted in order to secure a temporary PFA Order... require only that the petitioner convince the court he or she is in 'immediate and present danger of abuse'" as opposed to the hearing required under section 6107(a) where plaintiff's burden is the preponderance of the evidence.

Case Law Illustration: "Ex parte hearing" requires more than a judicial examination of the PFA petition

Ferko-Fox v. Fox, 68 A.3d 917 (Pa. Super. 2013).

An "*ex parte proceeding*" requires more than a judicial officer examining the PFA petition. An *in-camera* review of a PFA petition, without the petitioner present, is insufficient to protect a defendant's due process rights. Under § 6107(b) of the PFA Act, an in-person examination of the petitioner is necessary prior to the entry of a temporary protection order because it permits the court to inquire about the facts and circumstances detailed in the petition, observe the petitioner's injuries, and assess the petitioner's motive and demeanor.

(2) The court may enter such a temporary order as it deems necessary to protect the plaintiff or minor children when it finds they are in immediate and present danger of abuse. The order shall remain in effect until modified or terminated by the court after notice and hearing.

(3) In addition to any other relief, the court may, pursuant to section 6108 (relating to relief), direct that the defendant temporarily relinquishes to the sheriff any firearms, other weapons or ammunition for the duration of the temporary order if the petition demonstrates any of the following:

(i) Abuse which involves a firearm or other weapon.

(ii) An immediate and present danger of abuse. In determining whether an immediate and present danger of abuse exists, the court shall consider a number of factors, including, but not limited to:

(A) Whether the temporary order of protection from abuse is not likely to achieve its purpose in the absence of such a condition.

(B) Whether the defendant has previously violated a protection from abuse order.

(C) Whether past or present abuse to the plaintiff or any of the plaintiff's minor children resulted in injury.

(D) Whether the abuse occurred in public.

(E) Whether the abuse includes:

(I) threats of abuse or suicide;

(II) killing or threatening to kill pets;

(III) an escalation of violence;

(IV) stalking or obsessive behavior;

(V) sexual violence; or

(VI) drug or excessive alcohol use.

(4) If the court orders the defendant to temporarily relinquish any firearm, other weapon or ammunition pursuant to paragraph (3), the defendant shall decide in what manner the defendant is going to relinquish any firearm, other weapon or ammunition listed in the order.

Relinquishment may be to the sheriff pursuant to section 6108(a)(7) or to a third party for safekeeping pursuant to section 6108.3 (relating to relinquishment to third party for safekeeping).

(c) Continued hearings

(1) If a hearing under subsection (a) is continued and no temporary order is issued, the court may make ex parte temporary orders under subsection (b) as it deems necessary.

(2) If a hearing is scheduled to take place within three business days after a defendant is served under section 6106 (relating to commencement of proceedings), the court shall grant a continuance until the three-business day period has elapsed, if requested by the defendant.

(3) The court shall notify the defendant of the right to such continuance.

Case Law Illustrations: Continuance permitted to protect petitioner during pendency of evidentiary hearing

Ferko-Fox v. Fox, 68 A.3d 917 (Pa. Super. 2013).

Pursuant to section 6107(c), trial courts have discretion to grant a continuance for a final PFA hearing and to enter or continue a temporary PFA order if necessary to protect the petitioner or their children for the duration of the continuance. Whether a trial court properly granted or denied a continuance is reviewed on an abuse of discretion standard. In *Ferko-Fox*, wife sought representation from the local legal services organization, but it was unable to represent her at

the original hearing date. Pursuant to its authority under section 6107(c), the trial court granted wife a continuance to obtain counsel and continued her temporary order until the final order hearing.

Case Law Illustration: Continuance Required

Coda v. Coda, 666 A.2d 741 (Pa. Super. 1995).

Trial court erred when it denied the defendant's request for a continuance because a subpoenaed witness (a police officer) was not present.

Case Law Illustration: Continuance Extends Jurisdiction

Heard v. Heard, 614 A.2d 255, 260 (Pa. Super. 1992).

"The trial court neither scheduled nor continued a hearing on husband's petition within the ten-day limitations period set forth in 23 Pa. C.S. 6107(a). Because the limitations period on the alleged petition filed by the husband had expired, the trial court had no authority to grant the husband relief under the PFA Act." But the court did have jurisdiction over the wife's petition, even though the wife's first hearing date was continued due to her hospitalization.

§ 6108. RELIEF

(a) General rule.—Subject to subsection (a.1), the court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include:

Case Law Illustrations: Purpose of the PFA Act Is to Prevent Physical and Sexual Abuse

Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).

The intent of remedies provided by the PFAA is to allow persons to reside peaceably and without fear of injury within their own families or residences.

Lee v. Carney, 645 A.2d 1363 (Pa. Super. 1994).

The purpose of the PFAA is to protect victims of domestic violence from the perpetrators of such abuse.

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

The PFAA is meant to focus on prevention of abuse. The PFAA is not meant to penalize past criminal conduct. The primary goal of the Act is to advance prevention of physical and sexual abuse.

Melvin v. Melvin, 580 A.2d 811 (Pa. Super. 1990).

PFAA protections are in addition to and not in place of traditional remedies already provided by law.

Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. 1985).

Summary disposition is essential since the primary goal of the PFAA is advance prevention of physical and sexual abuse, not retrospective punishment.

Cipolla v. Cipolla, 398 A.2d 1053 (Pa. Super. 1979).

The PFAA was a vanguard measure dealing with the problem of wife and child abuse.

Case Law Illustrations: Court Has Broad Powers of Relief

Gerace v. Gerace, 631 A.2d 1360, 1361 (Pa. Super. 1993).

Court may order a defendant to return a plaintiff's property when procuring it by herself would potentially subject her to danger. Per the broad relief allowed under section 6108(a), "the court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the Petitioner or minor children." Here, a stepfather argued he was not in control of the premises where the property was located and that he was in jail; prior to arrest stepfather had lived with mother and had exercised control over stepdaughter's property. He admitted disposing of the property prior to arrest and could have made arrangements by telephone to have the property returned.

Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992).

The court is empowered to grant broad relief to bring about cessation of abuse.

Case Law Illustration: No Requirement to Grant Least Burdensome Remedy

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

In determining an appropriate remedy under the PFAA, the court is not required to order the least burdensome remedy. Exclusion of the husband from a marital residence was an appropriate remedy where escalating incidents of abuse had occurred; the husband broke in while wife was on business trip; he refused to leave despite his initial voluntary agreement to refrain from entering marital residence.

Case Law Illustration: PFA Consent Order Does Not Bar Criminal Prosecution

Commonwealth v. Smith, 552 A.2d 292 (Pa. Super. 1988).

After a defendant hit his wife with his car and struck her head and neck, the police arrested him and charged him with simple assault, aggravated assault, and recklessly endangering another person. The day after the incident, the wife filed a PFA petition, and a consent agreement was

entered. No appeal of the PFA consent agreement was ever filed. On appeal, the Court rejected defendant's argument that the PFA consent agreement barred criminal prosecution for the same conduct.

- (1) Directing the defendant to refrain from abusing the plaintiff or minor children.**
- (2) Granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant or restoring possession to the plaintiff if the residence or household is jointly owned or leased by the parties, is owned or leased by the entirety or is owned or leased solely by the plaintiff.**

Case Law Illustrations: Excluding Defendant from the Residence

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

A trial court did not err in directing the exclusion of the respondent from a jointly owned marital residence where less burdensome alternative remedies existed. The PFAA does not anticipate that a typical remedy would be to structure an order so that the abusive spouse could remain in residence with the abused person.

Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992).

The exclusion of a husband from a marital residence for a two-week period, as opposed to a substantially longer period, was within trial court's discretion.

- (3) If the defendant has a duty to support the plaintiff or minor children living in the residence or household and the defendant is the sole owner or lessee, granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant or restoring possession to the plaintiff or, with the consent of the plaintiff, ordering the defendant to provide suitable alternate housing.**
- (4) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children. In determining whether to award temporary custody or establish temporary visitation rights pursuant to this paragraph, the court shall consider any risk posed by the defendant to the children, as well as risk to the plaintiff. The following shall apply:**
 - (i) A defendant shall not be granted custody, partial custody or unsupervised visitation where it is alleged in the petition, and the court finds after a hearing under this chapter, that the defendant:**
 - (A) abused the minor children of the parties or poses a risk of abuse toward the minor children of the parties; or**
 - (B) has been convicted of violating 18 Pa.C.S. § 2904 (relating to interference with custody of children) within two calendar years prior to the filing of the petition for protection order or that the defendant poses a risk of violating 18 Pa.C.S. § 2904.**

(ii) Where the court finds after a hearing under this chapter that the defendant has inflicted abuse upon the plaintiff or a child, the court may require supervised custodial access by a third party. The third party must agree to be accountable to the court for supervision and execute an affidavit of accountability.

(iii) Where the court finds after a hearing under this chapter that the defendant has inflicted serious abuse upon the plaintiff or a child or poses a risk of abuse toward the plaintiff or a child, the court may:

(A) award supervised visitation in a secure visitation facility; or

(B) deny the defendant custodial access to a child.

(iv) If a plaintiff petitions for a temporary order under section 6107(b) (relating to hearings) and the defendant has partial, shared or full custody of the minor children of the parties by order of court or written agreement of the parties, the custody shall not be disturbed or changed unless the court finds that the defendant is likely to inflict abuse upon the children or to remove the children from the jurisdiction of the court prior to the hearing under section 6107(a). Where the defendant has forcibly or fraudulently removed any minor child from the care and custody of a plaintiff, the court shall order the return of the child to the plaintiff unless the child would be endangered by restoration to the plaintiff.

(v) Nothing in this paragraph shall bar either party from filing a petition for custody under Chapter 53 (relating to custody) or under the Pennsylvania Rules of Civil Procedure.

(vi) In order to prevent further abuse during periods of access to the plaintiff and child during the exercise of custodial rights, the court shall consider, and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children from abuse.

Case Law Illustrations: Custody and Visitation

Rosenberg v. Rosenberg, 504 A.2d 350 (Pa. Super. 1986).

In a footnote, the court disapproved of a procedure whereby permanent custody and visitation orders were entered in PFA proceedings. The PFAA was not intended to replace other, established proceedings for determination of permanent custody of children.

Dye v. McCoy, 621 A.2d 144 (Pa. Super. 1993).

The trial court entered a final PFA on behalf of the minor child but nevertheless directed that a previously entered custody order remain in place in the stated belief that it did not have the authority to alter or modify it. The Superior Court remanded the case back for further consideration as to whether the terms of the custody order were in conflict with the PFA Order. In doing so, the Superior Court held that “the trial court shall consider and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children from abuse....where the PFA Order conflicts with a custody order, then the PFA court should include direction that the PFA order supersedes or suspends the prior custody order.”

Egelman v. Egelman, 728 A.2d 360 (Pa. Super. 1999).

On appeal, the Superior Court held that trial courts may not order that future concerns about the welfare of a child be determined exclusively in a custody proceeding. “If a basis for relief is established in the Act, notwithstanding the availability of another proceeding, such relief should be forthcoming under the law. Denial of consideration of a petition for temporary custody in a PFA proceeding because special relief is available in a custody proceeding is improper because it ignores the special benefits the legislature intended to confer on the victims of domestic violence that are not generally available in emergency custody cases.”

Lawrence v. Bordner, 907 A.2d 1109, 1114 (Pa. Super. 2006).

The Superior Court held that it was reversible error for the trial court to abruptly determine that a PFA was unwarranted and to limit the mother to custody relief under the child custody statute as her exclusive remedy for the alleged abuse. “The trial court’s refusal to find a PFA was warranted and/or modify the existing Custody Order was in error in that in doing so, it placed its concern with civil procedure over a consideration of the best interest of [the child].”

C.H.L. v. W.D.L., 214 A.3d 1272, (Pa. Super 2019).

The trial court entered a final PFA that awarded Mother temporary sole custody of the child pending an upcoming custody conference. Father appealed, arguing that the custody provisions of the PFA were invalid because they did not contain a best interest of the child analysis. The trial court affirmed the trial court’s decision, holding that a PFA court need not conduct a best interests custody analysis to award **temporary** custody as form of relief under section 6108 of the Protection From Abuse Act. In addition, the court clarified as to when a PFA Order superseded a custody order and vice versa. “Custody wise, a PFA order is not designed to impose anything but emergency relief. See *Dye for McCoy*, [supra](#), 621 A.2d at 145. To understand this, look no further than the PFA Act: ‘Nothing in this paragraph [relating to temporary custody as a form of relief] shall bar either party from filing a petition for custody under Chapter 53 (relating to custody) or under the Pennsylvania Rules of Civil Procedure.’ See [§ 6108\(a\)\(4\)\(v\)](#). But while the domestic violence emergency is still pending, a PFA order may alter a pre-existing custody order and remand for clarification to avoid conflict. See *Dye for McCoy*, [621 A.2d at 145](#). ‘To hold otherwise would have the effect of emasculating the central and extraordinary feature of the PFA which is to prospectively control and prevent domestic violence.’” *Id.*

Case Law Illustrations: No Sua Sponte Orders

Brooks-Gall v. Gall, 840 A.2d 993 (Pa. Super. 2003).

A mother brought a PFA petition on behalf of her children against their father and trial court declared the children dependent at the PFA hearing and had Child Protective Services remove the children from the mother. The Court held that trial court’s *sua sponte* actions violated the

parents' due process rights as well as the Pennsylvania Juvenile Act. The Court noted the compelling public policy consideration of the chilling affect that the trial court's action would have on victims of domestic violence seeking protection orders.

(5) After a hearing in accordance with section 6107(a), directing the defendant to pay financial support to those persons the defendant has a duty to support, requiring the defendant, under sections 4324 (relating to inclusion of medical support) and 4326 (relating to mandatory inclusion of child medical support), to provide health coverage for the minor child and spouse, directing the defendant to pay all of the unreimbursed medical expenses of a spouse or minor child of the defendant to the provider or to the plaintiff when he or she has paid for the medical treatment, and directing the defendant to make or continue to make rent or mortgage payments on the residence of the plaintiff to the extent that the defendant has a duty to support the plaintiff or other dependent household members. The support order shall be temporary, and any beneficiary of the order must file a complaint for support under the provisions of Chapters 43 (relating to support matters generally) and 45 (relating to reciprocal enforcement of support orders) within two weeks of the date of the issuance of the protection order. If a complaint for support is not filed, that portion of the protection order requiring the defendant to pay support is void. When there is a subsequent ruling on a complaint for support, the portion of the protection order requiring the defendant to pay support expires.

(6) Prohibiting the defendant from having any contact with the plaintiff or minor children, including, but not limited to, restraining the defendant from entering the place of employment or business or school of the plaintiff or minor children and from harassing the plaintiff or plaintiff's relatives or minor children.

(7) Prohibiting the defendant from acquiring or possessing any firearm for the duration of the order, ordering the defendant to temporarily relinquish to the sheriff or appropriate law enforcement agency any firearms under the defendant's possession or control, and requiring the defendant to relinquish to the sheriff or the appropriate law enforcement agency any firearm license issued under section 6108.3 (relating to relinquishment to third party for safekeeping) or 18 Pa.C.S. §6106 (relating to firearms not to be carried without a license) or 6109 (relating to licenses) the defendant may possess. The court may also order the defendant to relinquish the defendant's other weapons or ammunition that have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children. A copy of the court's order shall be transmitted to the chief or head of the appropriate law enforcement agency and to the sheriff of the county of which the defendant is a resident. When relinquishment is ordered, the following shall apply:

(i)(A) The court's order shall require the defendant to relinquish such firearms, other weapons, ammunition and any firearm license pursuant to the provisions of this chapter within 24 hours of service of a temporary order or the entry of a final order or the close of the next business day as necessary by closure of the sheriffs' offices, except for cause shown at the hearing, in which case the court shall specify the time for relinquishment of any or all of the defendant's firearms.

(B) A defendant subject to a temporary order requiring the relinquishment of firearms, other weapons or ammunition shall, in lieu of relinquishing specific firearms, other weapons

or ammunition which cannot reasonably be retrieved within the time for relinquishment in clause (A) due to their current location, provide the sheriff or appropriate law enforcement agency with an affidavit listing the firearms, other weapons or ammunition and their current location. If the defendant, within the time for relinquishment in clause (A), fails to provide the affidavit or fails to relinquish, pursuant to this chapter, any firearms, other weapons or ammunition ordered to be relinquished which are not specified in the affidavit, the sheriff or the appropriate law enforcement agency shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement authorities. The defendant shall not possess any firearms, other weapons or ammunition specifically listed in the affidavit provided to the sheriff or the appropriate law enforcement agency pursuant to this clause for the duration of the temporary order.

(C) As used in this subparagraph, the term “cause” shall be limited to facts relating to the inability of the defendant to retrieve a specific firearm within 24 hours due to the current location of the firearm.

(ii) The court’s order shall contain a list of any firearm, other weapon or ammunition ordered relinquished. Upon the entry of a final order, the defendant shall inform the court in what manner the defendant is going to relinquish any firearm, other weapon or ammunition ordered relinquished. Relinquishment may occur pursuant to Section 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or 6108.3 or to the sheriff or the appropriate law enforcement agency pursuant to this paragraph. Where the sheriff or the appropriate law enforcement agency is designated, the sheriff or the appropriate law enforcement agency shall secure custody of the defendant’s firearms, other weapons or ammunition and any firearm license listed in the court’s order for the duration of the order or until otherwise directed by court order. In securing custody of the defendant’s relinquished firearms, the sheriff or the appropriate law enforcement agency shall comply with 18 Pa.C.S. § 6105(f)(4) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms). In securing custody of the defendant’s other weapons and ammunition, the sheriff or the appropriate law enforcement agency shall provide the defendant with a signed and dated written receipt which shall include a detailed description of the other weapon or ammunition and its condition. The court shall inform the defendant that firearms, other weapons or ammunition shall be deemed abandoned when the conditions under 18 Pa.C.S. §6128(a) (relating to the abandonment of firearms, other weapon or ammunition) are satisfied and may then be disposed of in accordance with 18 Pa.C.S. §6128.

(iii) The sheriff or the appropriate law enforcement agency shall provide the plaintiff with the name of the person to which any firearm, other weapon or ammunition was relinquished.

(iv) Unless the defendant has complied with subparagraph (i)(B) or section 6108.2 or 6108.3, if the defendant fails to relinquish any firearm, other weapon, ammunition or firearm license within 24 hours or upon the close of the next business day due to closure of sheriffs’ or appropriate law enforcement agencies’ offices or within the time ordered by the court upon cause being shown at the hearing, the sheriff or the appropriate law enforcement agency shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement agencies, as appropriate.

(v) Any portion of any order or any petition or other paper which includes a list of any firearm, other weapon or ammunition ordered relinquished shall be kept in the files of the court as a permanent record thereof and withheld from public inspection except:

(A) upon an order of the court granted upon cause shown;

(B) as necessary, by law enforcement, and court personnel; or

(C) after redaction of information listing any firearm, other weapon or ammunition.

(vi) As used in this paragraph, the term “defendant’s firearms” shall, if the defendant is a licensed firearms dealer, only include firearms in the defendant’s personal firearms collection pursuant to 27 CFR § 478.125a (relating to personal firearms collection).

Case Law Illustration: Firearms Return

DeOrio v. Delaware County, No. 08-5762, 2009 U.S. Dist. LEXIS 65176, 2009 WL 2245067 (E.D. Pa. 2009).

Due process and equal protection claims under the Fourteenth Amendment respecting firearms removal in a Protection from Abuse Action require rational basis analysis. Post-deprivation judicial review satisfies procedural due process, and acquiring a court order for return of firearms is not shocking or egregious, thus conforming with substantive due process. No arbitrary deprivation of a liberty interest occurs because the decision to return the firearms is placed with the court and not the sheriff. The PFA Act provides for return of firearms via a petition; thus, defendant holds the key to his own rights.

Case Law Illustration: Search and Seizure of Weapons

Kelley v. Mueller, 861 A.2d 984, 993 (Pa. Super. 2004), vacated, 912 A.2d 202 (Pa. 2006).

The Pennsylvania Supreme Court vacated the Pa. Superior Court's order in *Kelley v. Mueller*. The Supreme Court reasoned that the substantive issues were not properly preserved for appeal. Plaintiff filed for a temporary PFA stating that her boyfriend had threatened to kill her, and had pointed his father's loaded handgun at her. Although the defendant swore there were no weapons, the trial court judge directed the sheriff to search and seize any weapons found in the residence and the family hunting cabin. The trial judge based its order on the broad powers granted by the PFAA to protect a party from danger by removing weapons. The defendant and his father appealed to the Superior Court. Upholding the trial court's order, the Pa. Superior Court reasoned that the trial court had discretion in choosing a remedy for the petitioner; the facts in this case indicated to the trial court that plaintiff was in danger; and the PFAA was broad enough to cover the trial court's actions. The Pennsylvania Supreme Court vacated the Superior Court order and reinstated the trial court's order. The Supreme Court found that the Superior Court had erred when it addressed substantive issues raised by appellants on appeal. Despite appellants challenging the trial court's authority to order a search of the residence and seizure of weapons in their appellate brief, because they never raised these due process and constitutional issues at the trial court level, the issues were waived.

Case Law Illustration: Federal Firearms Prohibition

Dragani v. Dragani, 42 Pa. D. & C. 4th 295 (Bucks 1999), aff'd, 752 A.2d 426 (Pa. Super. 2000).

The Brady Indicator, which disqualified a defendant from possessing or purchasing firearms, was warranted as a part of the PFA order where the defendant had a history of owning or possessing firearms and had physically abused plaintiff. The Brady Indicator extended the prohibitions regarding the possession, receipt and purchase of firearms to persons who are subject to a final PFA order provided the order meets the following criteria. The PFA order is entered after a hearing of which the defendant received actual notice and had an opportunity to be heard; the protected person is an “intimate partner” of the defendant; the order provides that the defendant is restrained from harassing, stalking or threatening plaintiff; and the defendant represents a credible threat to the physical safety of the plaintiff, or the terms of the order prohibit defendant from using, attempting to use or threatening to use physical force against the plaintiff that would reasonably be expected to cause bodily injury. Where a federal firearms prohibition applies, the defendant may be subject to prosecution by the appropriate federal authorities if he possesses, receives or purchases firearms at any time while the order is in effect. **(The Brady Indicator box has been removed from the PFA forms. However, the U.S. Gun Control Act’s prohibitions on possession and transfer of firearms may still apply to a defendant who is subject to an active PFA order. See 18 U.S.C. §§ 922(d)(8) (relating to firearm transfer and protection orders) and 922(g)(9) (relating to firearm possession and protection orders).)**

(7.1) If the defendant is a licensed firearms dealer, ordering the defendant to follow such restrictions as the court may require concerning the conduct of his business, which may include ordering the defendant to relinquish any Federal or State license for the sale, manufacture or importation of firearms as well as firearms in the defendant’s business inventory. In restricting the defendant pursuant to this paragraph, the court shall make a reasonable effort to preserve the financial assets of the defendant’s business while fulfilling the goals of this chapter.

(8) Directing the defendant to pay the plaintiff for reasonable losses suffered as a result of the abuse, including medical, dental, relocation and moving expenses; counseling; loss of earnings or support; costs of repair or replacement of real or personal property damaged, destroyed or taken by the defendant or at the direction of the defendant; and other out-of-pocket losses for injuries sustained. In addition to out-of-pocket losses, the court may direct the defendant to pay reasonable attorney fees. An award under this chapter shall not constitute a bar to litigation for civil damages for injuries sustained from the acts of abuse giving rise to the award or a finding of contempt under this chapter.

Case Law Illustration: Plaintiff Entitled to Award of Attorney’s Fees

Krassnoski v. Rosey, 684 A.2d 635 (Pa. Super. 1996).

The PFAA authorizes award of attorneys' fees even if a plaintiff was represented by Legal Services attorney. The decision to award fees is within the trial court's discretion. The Legislature included a provision in the PFAA for recovery of counsel fees to encourage victims of domestic abuse, who are often financially dependent upon their abusers, to take advantage of the protections offered by the Act and to include a financial disincentive to deter abusers from further abusive conduct. Trial court may consider defendant's ability to pay award of attorneys' fees in determining whether to make an award. The fact that defendant's income is less than plaintiff's is not conclusive of the issue, but may be relevant in finding ability to pay. The trial court should not deny counsel fees on the basis that the defendant's conduct during the litigation was not dilatory, vexatious, or obstructive.

Case Law Illustrations: Defendant Not Entitled to Award of Attorneys' Fees

Egelman v. Egelman, 728 A.2d 360 (Pa. Super. 1999).

There is no provision under the PFAA authorizing a court to award attorneys' fees to a prevailing defendant. The only remedy a prevailing defendant is entitled to under the Act is for a non-prevailing petitioner to pay the fees and costs of the petition. Court erred in awarding attorneys' fees to the defendant.

Krassnoski v. Rosey, 684 A.2d 635 (Pa. Super. 1996).

Court is not authorized to award attorneys' fees to defendant under 42 Pa.C.S. § 2503(a)(9). Application of that provision is appropriate where attorneys' fees are not specifically authorized by statute. Under the PFAA, when counsel fees are statutorily authorized to promote the purposes of a particular legislative scheme, the trial court should not determine the appropriateness of counsel fees under the general standards applicable in all litigation.

(9) Directing the defendant to refrain from stalking or harassing the plaintiff and other designated persons as defined in 18 Pa.C.S. § 2709 (relating to harassment and stalking).

(10) Granting any other appropriate relief sought by the plaintiff.

(a.1) Final order or agreement.--The following apply:

(1) Any final order must direct the defendant to refrain from abusing, harassing, stalking, threatening or attempting or threatening to use physical force against the plaintiff or minor children and must order that the defendant is subject to the firearms, other weapons or ammunition and firearms license prohibition relinquishment provisions under subsection (a)(7).

(2) A final agreement may direct the defendant to refrain from abusing, harassing, stalking, threatening or attempting or threatening to use physical force against the plaintiff or minor children and may order that the defendant is subject to the firearms, other weapons or ammunition and firearms license prohibition and relinquishment provisions under subsection (a)(7).

(b) Identifying information.—Any order issued under this section shall, where furnished by either party, specify the Social Security number and date of birth of the defendant.

(c) Mutual orders of protection.—Mutual orders of protection shall not be awarded unless both parties have filed timely written petitions, complied with service requirements under section 6106 (relating to commencement of proceedings) and are eligible for protection under this chapter. The court shall make separate findings and, where issuing orders on behalf of both petitioners, enter separate orders.

Case Law Illustration: No Mutual Orders of Protection Without Cross-Petitions

McKelvey v. McKelvey, 771 A.2d 63 (Pa. Super. 2001).

Trial court cannot, *sua sponte*, enter a mutual no-abuse order. Trial court does not have the authority to enter a protection order against a wife when the husband did not petition for an order. Plaintiff filed a PFA petition and obtained a temporary PFA order. At the hearing, over counsel's objection, the court suggested the entry of a mutual PFA order. Plaintiff expressed her willingness to enter into such an order. The trial court erred when it disregarded the clear language of the statute and entered a mutual PFA order. Because the case implicated the jurisdiction of the court to enter a mutual order, the appellate court found that the stipulation to the order could not bind the plaintiff. See also, *Heard v. Heard*, 614 A.2d 255 (Pa. Super. 1992).

(d) Duration and amendment of order or agreement.—A protection order or approved consent agreement shall be for a fixed period of time not to exceed three years. The court may amend its order or agreement at any time upon subsequent petition filed by either party.

Case Law Illustrations: Petition Required to Modify

Stamus v. Dutcavich, 938 A.2d 1098 (Pa. Super. 2007).

Trial court errs when it dismisses a final protection order when no petition to modify has been filed by either party prior to the expiration date of the order in question. The statutory text requires a petition filed by a party to modify a final order; thus, the issue of dismissal was not before the court, and a court cannot rule on matters not before it.

Case Law Illustrations: Duration of Order

Holderman v. Hagner, 760 A.2d 1189 (Pa. Super. 2000).

The maximum duration period of a PFA order runs from the date of the final order on the petition and not from the date of a prior temporary *ex parte* proceeding.

Case Law Illustration: Enforcement Is Not Time-Barred

Gerace v. Gerace, 631 A.2d 1360 (Pa. Super. 1993).

A petition for return of property was not time-barred where it was filed after the expiration of the protective order. There is no statute of limitation for obeying a court order or requesting the enforcement of a court order.

(e) Extension of protection orders. —

(1) An extension of a protection order may be granted:

- (i) Where the court finds, after a duly filed petition, notice to the defendant and a hearing, in accordance with the procedures set forth in sections 6106 and 6107, that the defendant committed one or more acts of abuse subsequent to the entry of the final order or that the defendant engaged in a pattern or practice that indicates continued risk of harm to the plaintiff or minor child.**
- (ii) When a contempt petition or charge has been filed with the court or with a hearing officer in Philadelphia County, but the hearing has not occurred before the expiration of the protection order, the order shall be extended, at a minimum, until the disposition of the contempt petition and may be extended for another term beyond the disposition of the contempt petition.**
- (iii) If the plaintiff files a petition for an extension of the order and the defendant is or was incarcerated and will be released from custody in the next 90 days or has been released from custody within the past 90 days. The plaintiff does not need to show that the defendant committed one or more acts of abuse subsequent to the entry of the order or that the defendant engaged in a pattern or practice that indicates continued risk of harm to the plaintiff or minor children as set forth in subparagraph (i).**

Case Law Illustration: PFA Extensions

Kuhlmeier v. Kuhlmeier, 817 A.2d 1127 (Pa. Super. 2003).

If the trial court schedules a hearing for a specific date but that date falls on a day after the PFA order expires; the trial court still has jurisdiction to extend a PFA after an evidentiary hearing. Local rules are not valid if they conflict with state rules or statutes.

(2) Service of an extended order shall be made in accordance with section 6109 (relating to service of orders).

(3) There shall be no limitation on the number of extensions that may be granted.

(f) Support procedure.—The domestic relations section shall enforce any support award in a protection order where the plaintiff files a complaint for support under subsection (a)(5).

(g) Notice.—Notice shall be given to the defendant, in orders issued under this section, stating that violations of an order will subject the defendant to arrest under section 6113 (relating to arrest for violation of order) or contempt of court under section 6114 (relating to contempt for violation of

order or agreement). Resumption of coresidency on the part of the plaintiff and defendant shall not nullify the provisions of the court order.

(h) Title to real property unaffected.—No order or agreement under this chapter shall in any manner affect title to any real property.

(i) Third parties and affidavits.—A court requiring relinquishment of firearms under this section shall provide for the hearing of petitions by third parties who request the return of a firearm relinquished by the defendant under subsection (a)(7). The following apply:

(1) A third party claiming to be the lawful owner of a firearm relinquished by the defendant under subsection (a)(7) may request the return of the firearm by providing proof of ownership and a sworn affidavit.

(2) The affidavit under paragraph (1) must affirm all of the following:

(i) The third party who is the lawful owner will not intentionally or knowingly return to the defendant the firearm or allow access to the firearm by the defendant.

(ii) The third party who is the lawful owner understands that violating subparagraph (i) constitutes a misdemeanor of the second degree under 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles).

(iii) If the third party who is the lawful owner is a family or household member of the defendant, any firearm returned under this section must be stored in a gun safe to which the defendant does not have access and will not be permitted to access, or stored in a location outside the third party's home to which the defendant does not have access.

(3) If the court orders the return of a firearm under this section, prior to the return of the firearm, the sheriff shall independently confirm that the person seeking relief under this section is legally eligible to possess firearms under Federal and State law. The sheriff shall conduct the background check as soon as practicable after the court enters an order under this section.

§ 6108.1. Return of relinquished firearms, other weapons and ammunition and additional relief.

(a) General rule.—Any court order requiring the relinquishment of firearms, other weapons or ammunition shall provide for the return of the relinquished firearms, other weapons or ammunition to the defendant upon expiration of the order or dismissal of a petition for a protection from abuse order. The defendant may take custody of the firearms, other weapons and ammunition provided that the defendant is otherwise eligible to lawfully possess the relinquished items. The defendant shall not be required to pay any fees, costs or charges associated with the returns, whether those fees, costs or charges are imposed by the Pennsylvania State Police, any local law enforcement agency or any other entity, including a licensed importer, licensed manufacturer or licensed dealer in order to secure return of the relinquished firearms, other weapons or ammunition. The sheriff's or the other appropriate law enforcement agency's office shall maintain a weapons return form that the defendant may fill out and return to the office once a temporary or final protection from abuse order has been dismissed or expires.

(a.1) Conditions for return.—The following conditions must be satisfied prior to the firearms, other weapons or ammunition being returned to the defendant:

- (1) The firearms, other weapons or ammunition relinquished must not be evidence of a crime.**
- (2) The defendant or owner must not be otherwise prohibited by applicable Federal and State law, or another condition, including, but not limited to, bail, from taking possession of the firearms, other weapons or ammunition seized.**
- (3) The defendant or owner must have been given a clearance by the Pennsylvania State Police Instant Check System Unit or through the National Instant Criminal Background Check System (NICS), requested by the sheriff's office.**

(a.2) Notice to the plaintiff.—The plaintiff of the protection from abuse order shall be notified of the defendant's request to return the firearms, other weapons or ammunition.

(a.3) Petition for return.—If there is a determination under subsection (a.1) that the defendant is ineligible to regain possession of the firearms, other weapons or ammunition, the defendant or owner may file a petition appealing that determination and seeking their return. A copy of the petition must be served upon the plaintiff, sheriff and the district attorney.

(a.4) Abandonment.—Any firearms, other weapons or ammunition shall be deemed abandoned when the conditions under 18 Pa.C.S. §6128(a) (relating to abandonment of firearm, weapon or ammunition) are satisfied and may then be disposed of in accordance with 18 Pa.C.S. §6128.

(b) Modification of court's order providing for return of relinquished firearm, other weapon or ammunition. - Any other person may petition the court to allow for the return of that other person's firearms, other weapons and ammunition prior to the expiration of the court's order. The petition shall be served upon the plaintiff and the plaintiff shall be given notice and an opportunity to be heard regarding that petition.

(c) Modification of court's order to provide for alternative means of relinquishing firearms, other weapons or ammunition.— The defendant may petition the court for modification of the order to provide for an alternative means of relinquishment in accordance with this chapter. The petition shall be served upon the plaintiff, and the plaintiff shall have an opportunity to be heard at the hearing as provided in subsection (d). Where the court orders a modification pursuant to this subsection providing for alternative means of relinquishment, the sheriff shall proceed as directed by the court.

(d) Hearing.—Within ten business days of the filing of any petition under this section, a hearing shall be held before the court.

(e) Definitions.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Other person." Any person, except the defendant, who is the lawful owner of a firearm, other weapon or ammunition relinquished pursuant to this chapter.

"Safekeeping." The secure custody of a firearm, other weapon or ammunition ordered relinquished by an active protection from abuse order.

§ 6108.2. Relinquishment for consignment sale, lawful transfer or safekeeping.

(a) General rule.—Notwithstanding any other provision of law, a defendant who is the subject of a final protection from abuse order, which order provides for the relinquishment of firearms, other weapons or ammunition during the period of time the order is in effect may, within the time frame specified in the order and in lieu of relinquishment to the sheriff or the appropriate law enforcement agency, relinquish to a dealer licensed pursuant to 18 Pa.C.S. § 6113 (relating to licensing of dealers) any firearms, other weapons or ammunition for consignment sale, lawful transfer or safekeeping. The dealer may charge the defendant a reasonable fee for accepting relinquishment and for storage of any firearms, other weapons or ammunition.

(b) Affidavit.—A defendant relinquishing firearms, other weapons or ammunition to a dealer pursuant to subsection (a) shall obtain an affidavit from the dealer on a form prescribed by the Pennsylvania State Police which shall include, at a minimum, the following:

- (1) The caption of the case in which the protection from abuse order was issued.
- (2) The name, address, date of birth and Social Security number of the defendant.
- (3) A list of the firearms, other weapons or ammunition, including, if applicable, the manufacturer, model and serial number.
- (4) The name and license number of the dealer licensed pursuant to 18 Pa.C.S. § 6113 and the address of the licensed premises.
- (5) An acknowledgment that the firearms, other weapons or ammunition will not be returned to the defendant or sold or transferred to a person the dealer knows is a member of the defendant's household, while the defendant is the subject of an active protection from abuse order pursuant to section 6108, which order provides for the relinquishment of the firearm, other weapon or ammunition being returned, sold or transferred.
- (6) An acknowledgment that the firearms, other weapons or ammunition, if sold or transferred, will be sold or lawfully transferred in compliance with 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles).

(c) Failure to provide affidavit.—A defendant relinquishing firearms, other weapons or ammunition to a dealer pursuant to subsection (a) shall, within the time frame specified in the order for relinquishing firearms, other weapons or ammunition provide to the sheriff the affidavit obtained pursuant to subsection (b) and relinquish to the sheriff any firearms, other weapons or ammunition ordered to be relinquished which are not specified in the affidavit, in an affidavit provided in accordance with section 6108(a)(7)(i)(B) (relating to relief) or in an acknowledgment of receipt from a third party provided to the sheriff pursuant to section 6108.3 (relating to relinquishment to third party for safekeeping). If the defendant fails to comply with this subsection, the sheriff shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement agencies.

(d) Form.—The Pennsylvania State Police shall develop and make available a form to be used by dealers to accept possession of firearms, other weapons and ammunition for consignment sale, lawful transfer or safekeeping pursuant to this section.

(e) Transfer upon entry of final order.—Upon entry of a final protection from abuse order issued pursuant to section 6108, a defendant who had relinquished firearms, other weapons or ammunition to the sheriff pursuant to a temporary order may request that the firearms, other weapons or ammunition be relinquished to a dealer for consignment sale, lawful transfer or safekeeping pursuant to this section. If the defendant can identify a licensed dealer willing to accept the firearms, other weapons or ammunition in compliance with this section, the court shall order the sheriff to transport the firearms, other weapons or ammunition to the licensed dealer at no cost to the defendant or the licensed dealer.

(f) Nondisclosure.— The affidavit obtained under subsection (c) shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(g) Definitions.— As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Safekeeping." The secure custody of firearms, other weapons or ammunition ordered relinquished by an active protection from abuse order.

"Sale or lawful transfer." Any sale or transfer to a person other than the defendant or a member of the defendant's household which is conducted in accordance with 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles).

§ 6108.3. Relinquishment to third party for safekeeping.

(a) General rule.—A defendant who is the subject of a protection from abuse order, which order provides for the relinquishment of firearms, other weapons or ammunition during the period of time the order is in effect, may, within the time frame specified in the order and in lieu of relinquishment to the sheriff, relinquish any firearms, other weapons or ammunition for safekeeping to a third party who meets the requirements of a third party under subsection (b) (3).

(b) Transfer to third party.—

(1) A defendant wishing to relinquish firearms, other weapons or ammunition to a third party pursuant to subsection (a) shall, within the time frame specified in the order for relinquishing firearms, other weapons and ammunition, report to the sheriff's office in the county where the order was entered along with the third party.

(2) Upon determination by the sheriff that the third party is not prohibited from possessing firearms, other weapons or ammunition pursuant to any Federal or State law and after the defendant and third party have executed the affidavits required under paragraph (3), the sheriff shall issue a safekeeping permit to the third party, which shall include, at a minimum, a list of the firearms, other weapons and ammunition which will be relinquished to the third party. The permit shall be issued at no cost to the third party or defendant. The permit shall require the third party to possess the defendant's firearms, other weapons and ammunition until the time that:

(i) the sheriff revokes the safekeeping permit pursuant to subsection (c)(1); or

(ii) the sheriff accepts return of the safekeeping permit pursuant to subsection (d).

(3) (i) A defendant wishing to relinquish firearms, other weapons or ammunition to a third party pursuant to subsection (a) shall, in the presence of the sheriff or the sheriff's designee, execute an

affidavit on a form prescribed by the Pennsylvania State Police which shall include, at a minimum, the following:

- (A) The caption of the case in which the protection from abuse order was issued.
 - (B) The name, address, date of birth and the Social Security number of the defendant.
 - (C) The name, address and date of birth of the third party.
 - (D) A list of the firearms, other weapons and ammunition which will be relinquished to the third party, including, if applicable, the manufacturer, model and serial number.
 - (E) An acknowledgment that the defendant will not take possession of any firearm, other weapon or ammunition relinquished to the third party, until the sheriff accepts return of the safekeeping permit pursuant to subsection (d).
 - (F) A plain language summary of 18 Pa.C.S. § 6105 (a.1)(2) and (c)(6) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).
 - (G) A plain language summary of 18 U.S.C. § 922(g)(8) (relating to unlawful acts).
- (ii) A third party who will be accepting possession of firearms, other weapons and ammunition pursuant to subsection (a) shall, in the presence of the sheriff or the sheriff's designee, execute an affidavit on a form prescribed by the Pennsylvania State Police which shall include, at a minimum, the following:
- (A) The caption of the case in which the protection from abuse order was issued.
 - (B) The name, address and date of birth of the defendant.
 - (C) The name, address, date of birth and the Social Security number of the third party.
 - (D) A list of the firearms, other weapons and ammunition which will be relinquished to the third party, including, if applicable, the manufacturer, model and serial number.
 - (E) An acknowledgment that no firearm, other weapon or ammunition relinquished to the third party will be returned to the defendant, until the sheriff accepts return of the safekeeping permit pursuant to subsection (d).
 - (F) A plain language summary of 18 Pa.C.S. §§ 6105(a.1)(5) and (c)(6), 6111(c) (relating to sale or transfer of firearms) and 6115 (relating to loans on, or lending or giving firearms prohibited).
 - (G) A plain language summary of this section.
 - (H) An acknowledgment that the third party is not prohibited from possessing firearms, other weapons or ammunition pursuant to any Federal or State law.
 - (I) An acknowledgment that the third party is not subject to an active protection from abuse order.
 - (J) An acknowledgment that the defendant has never been the subject of a protection from abuse order issued on behalf of the third party.
 - (K) An acknowledgment that any firearms, other weapons and ammunition relinquished to the third party will be stored using a locking device as defined in paragraph (1) of the

definition of "locking device" in 18 Pa.C.S. § 6142(f) (relating to locking device for firearms) or in a secure location to which the defendant does not have access.

(L) A detailed description of the third-party liability pursuant to this section relating to civil liability.

(M) An acknowledgment that the third party shall inform the sheriff of any change of address for the third party within seven days of the change of address.

(N) An acknowledgment that the third party and the defendant are not family or household members.

(O) An acknowledgment that the third party is one of the following:

(I) An attorney at law, and further acknowledgment that the attorney at law and the defendant are in an attorney-client relationship. The attorney at law and the defendant shall sign a written agreement stating in substantially the following form: "Firearms can be relinquished to the attorney at law upon the express, written condition that the firearm(s) will be returned to the defendant, or otherwise transferred, only if in strict conformance with applicable law.

(II) A commercial armory, and further acknowledgment that the owner or operator of the commercial armory is not a family or household member of the defendant; the commercial armory is a secure storage facility designed to store firearms; the commercial armory possesses all Federal and State licenses to storage firearms; and a form stating substantially the following: "Firearms can be relinquished to the commercial armory upon the express, written condition that firearm(s) will be returned, or transferred, to the defendant only in strict conformance with applicable law."

(4) The defendant shall, within the time frame specified in the order and in lieu of relinquishment to the sheriff, relinquish the firearms, other weapons and ammunition specified in the affidavits provided to the sheriff pursuant to paragraph (3) to the third party who has been issued a safekeeping permit pursuant to paragraph (2). Upon relinquishment of the firearms to the third party, the third party shall sign an acknowledgment of receipt on a form prescribed by the Pennsylvania State Police, which shall include, at a minimum, an acknowledgment that the firearms were relinquished to the third party within the time frame specified in the order.

(5) Within 24 hours of the issuance of the safekeeping permit issued to the third party pursuant to paragraph (2) or by close of the next business day as necessary due to the closure of the sheriff's office, the defendant shall return the signed acknowledgment of receipt required under paragraph (4) to the sheriff in the county where the order was entered.

(6) If the defendant fails to provide the acknowledgment of receipt to the sheriff as required under paragraph (5), an affidavit prepared in accordance with section 6108(a)(7)(i)(B) (relating to relief), an affidavit under section 6108.2 (relating to relinquishment for consignment sale, lawful transfer or safekeeping) or fails to relinquish any firearms, other weapons or ammunition, the sheriff shall, at a minimum, provide immediate notice to the court, the plaintiff and appropriate law enforcement agencies.

(c) Revocation of safekeeping permit.—

(1) The sheriff shall revoke a third party's safekeeping permit and require the third party to relinquish to the sheriff any firearms, other weapons or ammunition which were relinquished to the third party by a defendant pursuant to subsection (a) upon determining or being notified that any of the following apply:

(i) A protection from abuse order has been entered against the third party.

(ii) The third party is prohibited from possessing firearms, other weapons or ammunition pursuant to any Federal or State law.

(iii) The defendant has been convicted of a violation of 18 Pa.C.S. Ch. 61 (relating to firearms and other dangerous articles) or any other offense involving the use of a firearm.

(iv) The defendant has been held in indirect criminal contempt for violating a provision of the protection from abuse order consistent with section 6108(a)(1), (2), (6), (7) or (9) (relating to relief).

(2) Upon revocation of a safekeeping permit, the sheriff shall seize the safekeeping permit and all of the defendant's firearms, other weapons and ammunition which were relinquished to the third party. If revocation of the safekeeping permit was:

(i) Required pursuant to paragraph (1)(i) or (ii), the sheriff shall notify the defendant that the firearms, other weapons and ammunition which were relinquished to the third party are in the sheriff's possession and that the defendant may report to the sheriff's office in order to relinquish the firearms, other weapons and ammunition to a subsequent third party pursuant to this section or to a licensed dealer pursuant to section 6108.2.

(ii) Required pursuant to paragraph (1)(iii) or (iv), the sheriff shall maintain possession of the firearms, other weapons and ammunition until the defendant is no longer prohibited from possessing firearms, other weapons and ammunition pursuant to any Federal or State law unless:

(A) the defendant has the firearms, other weapons and ammunition relinquished to a licensed dealer pursuant to section 6108.2; or

(B) the sheriff is directed to relinquish the firearms, other weapons and ammunition pursuant to a court order.

(d) Return of safekeeping permit. —

(1) Following expiration of a protection from abuse order, which order provided for the relinquishment of firearms, other weapons or ammunition, the defendant and the third party shall report to the sheriff's office to return the safekeeping permit. Upon a determination by the sheriff that the defendant is:

(i) Not prohibited from possessing firearms, other weapons and ammunition, the sheriff shall accept the return of the safekeeping permit, and the third party shall relinquish to the defendant all of the defendant's firearms, other weapons and ammunition which were relinquished to the third party pursuant to this section.

(ii) Prohibited from possessing a firearm, other weapon or ammunition pursuant to any Federal or State law, the sheriff shall accept return of the permit and seize from the third party all of the defendant's firearms, other weapons and ammunition which were relinquished to the third

party pursuant to this section. The sheriff shall return to the defendant any firearm, other weapon or ammunition which the defendant is lawfully entitled to possess.

(2) Upon issuance of a court order pursuant to 18 Pa.C.S. § 6105(f)(2) or section 6108.1(b) (relating to return of relinquished firearms, other weapons and ammunition and additional relief) which modifies a valid protection from abuse order by allowing the defendant to take possession of a firearm, other weapon or ammunition that had previously been ordered relinquished, the defendant and the third party shall report to the sheriff's office to return the safekeeping permit. The sheriff shall proceed as directed by the court order.

(3) If a third party wishes to relinquish the defendant's firearms, other weapons and ammunition prior to return of the safekeeping permit pursuant to paragraph (1), the sheriff shall accept return of the safekeeping permit and shall seize all of the defendant's firearms, other weapons and ammunition from the third party. The sheriff shall notify the defendant that the firearms, other weapons and ammunition, which were relinquished to the third party are in the sheriff's possession and that the defendant may relinquish the firearms, other weapons and ammunition to a subsequent third party pursuant to this section or to a licensed dealer pursuant to section 6108.2.

(e) Civil liability.—A third party who intentionally or knowingly violates any of the provisions of this section shall, in addition to any other penalty prescribed in this chapter or 18 Pa.C.S. Ch. 61, be civilly liable to any person for any damages caused thereby and, in addition, shall be liable to any person for punitive damages in an amount not to exceed \$5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of the costs.

(f) Forms.—The Pennsylvania State Police shall develop and make available:

(1) Forms to be used by sheriffs to issue safekeeping permits pursuant to subsection (b)(2).

(2) Affidavit forms and receipt forms to be used by defendants and third parties as required under subsection (b)(3) and (4).

(g) Transfer upon final entry.—A defendant who has previously relinquished firearms, other weapons or ammunition to the sheriff pursuant to a temporary order shall be permitted to have the firearms, other weapons and ammunition relinquished to a third party pursuant to this section following entry of a final protection from abuse order, which order provides for the relinquishment of firearms, other weapons or ammunition during the period of time the order is in effect.

(h) Nondisclosure.—All copies of the safekeeping permit issued under subsection (b)(2) retained by the sheriff and the affidavits and forms obtained under subsection (b)(3) and (4) shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(i) Definitions.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Safekeeping." The secure custody of firearms, other weapons or ammunition, which were ordered relinquished by an active protection from abuse order.

"Third party." A person, other than the defendant, who:

(1) Is not a member of the defendant's household.

(2) Is not prohibited from possessing firearms pursuant to any Federal or State law.

§ 6108.4. Registry or database of firearm ownership.

(a) Confidentiality.—Information retained to ensure compliance with this chapter and to document the return of firearms shall not be subject to access under the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.

(b) Construction.—Nothing in this chapter shall be construed to allow a government agency or law enforcement agency, or an agent or employee of either, or any other person or entity to create, maintain or operate a database or registry of firearm ownership within this Commonwealth. However, information may be retained to ensure compliance with this chapter and to document the return of firearms.

§ 6108.5. Penalties for release of information.

Any person who violates section 6108(a)(7)(v) (relating to relief) by releasing information with the intent and purpose of committing such violation commits a misdemeanor of the third degree.

§6108.6. Penalty for failure to secure firearms.

In addition to any other penalty provided by 18 Pa.C.S. Ch.61 Subch. A (relating to the Uniform Firearms Act), a commercial armory which violates the provisions of this chapter regarding safekeeping shall forfeit all Federal and State licenses related to firearms.

§6108.7. Order to seal record from public view.

(a) General rule—Notwithstanding any other provision of this chapter, an individual who has entered into a consent agreement approved by the court under section 6108(a) (relating to relief) may petition the court for an order to seal the record of the individual from public view. The court may grant the order if the petitioner proves all of the following by clear and convincing evidence:

- (1)** The consent agreement for which the individual seeks relief under this section is the only such consent agreement to which the individual has ever been subject, and that, during the period in which the consent agreement was in effect, the individual did not violate an order or consent agreement under section 6108;
- (2)** A period of at least ten years has elapsed since the expiration of the consent agreement;
- (3)** The individual has not been subject to another final protection from abuse order under section 6108.
- (4)** The individual has not been convicted of one of the following offenses where the victim is a family or household member:
 - (i)** An offense set forth in 18 Pa.C.S. §2711 (relating to probable cause arrests in domestic violence cases).

(ii) An offense equivalent to subparagraph (I) under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.

(b) Notice to district attorney and plaintiff.—

- (1) The petitioner shall serve a copy of the petition under subsection (a) to the district attorney and to the plaintiff within ten days of the filing of the petition.
- (2) The district attorney and the plaintiff shall have an opportunity to be heard at the hearing.
- (3) Within 30 days of receipt of notice, the district attorney or plaintiff may file objections to the petition.
- (4) If no objection under paragraph (3) is timely filed, the court may grant the petition without further hearing if the requirements of this section have been met.
- (5) As used in this subsection, the term “plaintiff” means the person who entered into the consent agreement with the defendant.

(c) Notice to prothonotary.—Notice of an order to seal the individual’s record from public view shall promptly be submitted to the prothonotary of the county holding the record. The prothonotary may not permit a member of the public from accessing the individual’s record regarding the consent agreement. Nothing in this section shall be construed to limit access of the record of the individual by a criminal justice agency as defined in 18 Pa.C.S. §9102 (relating to definitions).

6109. SERVICE OF ORDERS

(a) Issuance.—A copy of an order under this chapter shall be issued to the plaintiff, the defendant and the police department with appropriate jurisdiction to enforce the order or agreement in accordance with the provisions of this chapter or as ordered by the court or hearing officer.

Case Law Illustration: Where Defendant Was Not Served with PFA Order, He Was Not Subject to the Order; As a Result, He Could Not Be Sentenced to Death for Murdering His Wife

Commonwealth v. Stallworth, 781 A.2d 110 (Pa. 2001).

The Pennsylvania Supreme Court considered a PFA order in the context of a death sentence for murder. The trial court had allowed the use of the existence of the PFA as evidence indicative of the defendant’s intent and motive for the crime. The victim had obtained a PFA order on the day before her death. On appeal, the court noted that the admission into evidence of prior bad acts is within the sound discretion of the trial court, and an appellate court will only reverse upon a showing of an abuse of that discretion. During the lower court’s sentencing phase, the jury had also been instructed that at the time of the killing, the defendant was subject to a PFA order restricting his behavior toward the victim. The jury found this to be an aggravating circumstance warranting the imposition of the death penalty. On appeal, the Supreme Court

held that because the defendant was not served with the order and did not have anecdotal knowledge of the existence of the PFA order, he was not “subject to” that order for the purposes of establishing an aggravating circumstance under 42 Pa.C.S. § 9711(d)(18). Therefore, he was improperly sentenced to death. The court found the term “subject to” was not clear or free from ambiguity and should be subject to the most restrictive interpretation, which would require that a defendant either be given actual notice of the PFA or have the equivalent knowledge of a PFA order. There was no record evidence that the defendant had such knowledge.

(b) Placement in registry.—Upon receipt of an order, the police department shall immediately place the order in a county registry of protection orders. The police department shall assure that the registry is current at all times and that orders are removed upon expiration thereof. County registries shall not be required when the Pennsylvania State Police registry provided for in section 6105(e) (relating to responsibilities of law enforcement agencies) is established and is fully operational.

§ 6110. EMERGENCY RELIEF BY MINOR JUDICIARY

(a) General rule.—When:

(1) in counties with less than four judges, the court is unavailable:

- (i) from the close of business at the end of each day to the resumption of business the next morning;**
- (ii) from the end of the business week to the beginning of the business week; and**
- (iii) during the business day by reason of duties outside the county, illness or vacation;**

(2) in counties with at least four judges, the court is unavailable:

- (i) from the close of business at the end of each day to the resumption of business the next morning; and**
- (ii) from the end of the business week to the beginning of the business week;**

a petition may be filed before a hearing officer who may grant relief in accordance with section 6108(a)(1), (2) and (6) or (1) and (6) (relating to relief) if the hearing officer deems it necessary to protect the plaintiff or minor children from abuse upon good cause shown in an ex parte proceeding. Immediate and present danger of abuse to the plaintiff or minor children shall constitute good cause for the purposes of this subsection.

Case Law Illustration: Verbal Notice from Police of Emergency PFA Order Satisfies Due Process

Commonwealth v. Padilla, 885 A.2d 994 (Pa. Super. 2005).

Verbal notice provided by a police officer to the defendant informing him of the emergency no-contact order and the consequences of violating that order was sufficient to comply with the service requirements of due process.

(b) Expiration of order.—An order issued under subsection (a) shall expire at the end of the next business day the court deems itself available. The court shall schedule hearings on protection orders entered by hearing officers under subsection (a) and shall review and continue in effect protection orders that are necessary to protect the plaintiff or minor children from abuse until the hearing, at which time the plaintiff may seek a temporary order from the court.

(c) Certification of order to court.—An emergency order issued under this section and any documentation in support thereof shall be immediately certified to the court. The certification to the court shall have the effect of commencing proceedings under section 6106 (relating to commencement of proceedings) and invoking the other provisions of this chapter. If it is not already alleged in a petition for an emergency order, the plaintiff shall file a verified statement setting forth the abuse of defendant at least five days prior to the hearing. Service of the verified statement shall be made subject to section 6106.

(d) Instructions regarding the commencement of proceedings.—Upon issuance of an emergency order, the hearing officer shall provide the plaintiff instructions regarding the commencement of proceedings in the court of common pleas at the beginning of the next business day and regarding the procedures for initiating a contempt charge should the defendant violate the emergency order. The hearing officer shall also advise the plaintiff of the existence of programs for victims of domestic violence in the county or in nearby counties and inform the plaintiff of the availability of legal assistance without cost if the plaintiff is unable to pay for them.

(e) Master for emergency relief.—The president judge of a court of common pleas of a judicial district may, with the approval of the Administrative Office of Pennsylvania Courts, provide for the selection and appointment of a master for emergency relief on a full-time or part-time basis. The number of masters for emergency relief shall be fixed by the president judge with the approval of the Administrative Office of Pennsylvania Courts. The compensation of a master for emergency relief shall be fixed and paid by the county.

§ 6111. DOMESTIC VIOLENCE COUNSELOR/ADVOCATE

A domestic violence counselor/advocate may accompany a party to any legal proceeding or hearing under this chapter.

§ 6112. DISCLOSURE OF ADDRESSES

During the course of a proceeding under this chapter, the court or hearing officer may consider whether the plaintiff or plaintiff's family is endangered by disclosure of the permanent or temporary address of the plaintiff or minor children. Neither in the pleadings nor during proceedings or hearings under this chapter shall the court or hearing officer require disclosure of the address of a

domestic violence program. Where the court concludes that the defendant poses a threat of continued danger to the plaintiff and where the plaintiff requests that his or her address, telephone number and information about whereabouts not be disclosed, the court shall enter an order directing that law enforcement agencies, human service agencies and school districts (both in which a plaintiff's child in custody of the plaintiff is or has been enrolled) shall not disclose the presence of the plaintiff or the child in the jurisdiction or district or furnish any address, telephone number or any other demographic information about the plaintiff and child except by further order of the court.

§ 6113 ARREST FOR VIOLATION OF ORDER .

(a) General Rule.—An arrest for violation of an order issued pursuant to this chapter or a foreign protection order may be without warrant upon probable cause whether or not the violation is committed in the presence of the police officer or sheriff in circumstances where the defendant has violated a provision of an order consistent with section 6108(a)(1), (2), (3), (4), (6), (7) or (9) (relating to relief). The police officer or sheriff may verify the existence of a protection order by telephone, radio or other electronic communication with the appropriate police department, Pennsylvania State Police registry, protection order file or issuing authority. A police officer or sheriff shall arrest a defendant for violating an order issued under this chapter by a court within the judicial district, issued by a court in another judicial district within this Commonwealth or a foreign protection order issued by a comparable court.

(b) Seizure of firearms, other weapons and ammunition.—Subsequent to an arrest, the police officer or sheriff shall seize all firearms, other weapons and ammunition used or threatened to be used during the violation of the protection order or during prior incidents of abuse and any other firearms in the defendant's possession. As soon as it is reasonably possible, the arresting officer shall deliver the confiscated firearms, other weapons and ammunition to the office of the sheriff. The sheriff shall maintain possession of the firearms, other weapons and ammunition until the court issues an order specifying the firearms, other weapons and ammunition to be relinquished and the persons to whom the firearms, other weapons and ammunition shall be relinquished.

(c) Procedure following arrest.—Subsequent to an arrest, the defendant shall be taken by the police officer or sheriff without unnecessary delay before the court in the judicial district where the contempt is alleged to have occurred. When that court is unavailable, the police officer or sheriff shall convey the defendant to a district justice designated as appropriate by local rules of court or, in the city of Pittsburgh, to a magistrate of the Pittsburgh Magistrates Court or, in counties of the first class, to the appropriate hearing officer. For purposes of procedure relating to arraignments for arrest for violation of an order issued under this chapter, the judges of Pittsburgh Magistrates Court shall be deemed to be district justices.

(d) Preliminary arraignment.—The defendant shall be afforded a preliminary arraignment without unnecessary delay.

(e) Other emergency powers unaffected.—This section shall not be construed to in any way limit any of the other powers for emergency relief provided in this chapter.

(f) Hearing.—A hearing shall be scheduled within ten days of the filing of the charge or complaint of indirect criminal contempt. The hearing and any adjudication shall not preclude a hearing on other criminal charges underlying the contempt, nor shall a hearing or adjudication on other criminal charges preclude a hearing on a charge of indirect criminal contempt.

Case Law Illustration: Hearing on Criminal Contempt

Stamus v. Dutcavich, 938 A.2d 1098 (Pa. Super. 2007).

Statute directs that when the police have initiated a proceeding for indirect criminal contempt, the court must schedule a hearing within ten days, at which hearing, the court must determine if the defendant has violated the order. Court errs when it issues a rule to show cause instead of scheduling a contempt hearing.

Commonwealth v. Ortiz, 802 A.2d 617 (Pa. Super. 2002), aff'd, 825 A.2d 629 (Pa. 2003).

A lower court misinterpreted section 6113(f) when it dismissed PFA contempt charges because a hearing was held 11 days after the contempt charge was filed. The PFAA specifies that “a hearing shall be *scheduled* within ten days” and does not require that the hearing must be held within ten days pursuant to section 6113(f).

§ 6113.1. Private criminal complaints for violation of order or agreement

(a) General rule.—A plaintiff may file a private criminal complaint against a defendant, alleging indirect criminal contempt for a noneconomic violation of any provision of an order or court-approved consent agreement issued under this chapter or a foreign protection order, with the court, the office of the district attorney or the district justice in the jurisdiction or county where the violation occurred, except that, in a city of the first class, a complaint may only be filed with the family division of the court of common pleas or the office of the district attorney.

(b) Procedure service.—Procedure for filing and service of a private criminal complaint shall be provided as set forth by local rule. No fees or costs associated with the prosecution of the private criminal complaint shall be assigned to the plaintiff at any stage of the proceeding, including, but not limited to, filing, service, failure to prosecute, withdrawal or dismissal. Nothing in this subsection is intended to expand or diminish the court's authority to enter an order pursuant to Pa.R.C.P. 1023.1 (relating to Scope. Signing of Documents. Representations to the Court. Violation).

(c) Fees and costs.—After a finding of indirect criminal contempt, fees and costs may be assessed against the defendant. The court shall waive fees and costs imposed pursuant to this chapter, upon a showing of good cause or when the court makes a finding that the defendant is not able to pay the costs associated with the indirect criminal contempt action. Nothing in this subsection is intended to expand or diminish the court's authority to enter an order pursuant to Pa.R.C.P. No. 1023.1.

§ 6114. CONTEMPT FOR VIOLATION OF ORDER OR AGREEMENT

(a) General rule.—Where the police, sheriff or the plaintiff have filed charges of indirect criminal contempt against a defendant for violation of a protection order issued under this chapter, a foreign protection order or a court-approved consent agreement, the court may hold the defendant in indirect criminal contempt and punish the defendant in accordance with law.

Case Law Illustration: Consent Based Orders Without a Finding of Abuse Are Enforceable with Criminal Contempt

Commonwealth v. Nelson, 690 A.2d 728 (Pa. Super. 1997).

Consent-based protective orders are enforceable by indirect criminal contempt proceedings under the PFAA, even if the orders are unaccompanied by admissions of abuse.

Case Law Illustration: Threats conveyed to third party

Commonwealth v. Walsh, 36 A.3d 613 (Pa. Super. 2012).

Child and her mother resided with Walsh for many years. Mother sought and received a temporary PFA on behalf of Child following allegations of sexual abuse of Child by Walsh. After entry of the order, Walsh induced Child's friend to pass on the threat to Child. The friend conveyed the threat to Child. The trial court found Walsh guilty of indirect criminal contempt, sentenced to six months of probation, and entered a final PFA Order for three years. Walsh appealed, claiming that his relationship to Child did not satisfy the requirement under the PFA Act and that his action, making threats to a third party, did not violate the PFA order. The Pennsylvania Superior Court found that sufficient evidence was established for indirect criminal contempt: the order was sufficiently specific and clear; Walsh had notice of the order; Walsh knowingly and willfully made threatening statements to Child's friend to be conveyed to Child, despite the Order's prohibition on such conduct; and Walsh made the statements with wrongful intent. Based on these findings, the Court upheld Walsh's conviction.

Case Law Illustration: Social Media Posts

Commonwealth v. Lambert, 147 A. 3d 1221 (Pa. Super. 2016).

Social media posts by the defendant support a finding of indirect criminal contempt when an abuser's mere posting of any reference to his or her victim on social media, regardless of content, is automatically considered tantamount to making impermissible contact with the victim. The PFA order in this case specifically prohibited the defendant from posting "any remark(s) and/or images regarding [Victim], on any social network(s) including but [not] limited to, Facebook, Myspace, Twitter, or any other electronic networks." Defendant posted a series of posts to Facebook which alluded to a nameless former paramour, his disapproval of how the relationship ended, and different emotions he was experiencing because of unfair treatment from her and the justice system. He also changed his profile picture to a photograph which contained a set of matching nautical star tattoos, which he and his former paramour obtained

during their relationship. The Superior Court also held that the prohibition did not violate free speech provisions as it was not concerned with the content of Defendant's speech but, instead, with the protected party as the target of his speech.

Case Law Illustrations: Multiple ICC Charges Are Not Prohibited

Hill v. Randolph, 24 A.3d 866 (Pa. Super. 2011).

The PFA Act does not bar prosecution of multiple indirect criminal contempt (ICC) charges that stem from violations of the same order, nor are double jeopardy or trial-by-jury rights implicated by two consecutive six-month sentences for a total incarceration of one year. Defendant entered the home of the plaintiff who had a PFA order against him that evicted and excluded him from her home. The order also prohibited Defendant from abusing the plaintiff. While he was in her home, Defendant attacked the plaintiff; strangled her until close to unconsciousness, threatened to kill her, and threw orange juice at her. Defendant was charged for violations of two distinct sections of the PFA order: one ICC for his entry into the residence, and another for his abuse of the plaintiff. Defendant challenged his convictions and argued that prosecution of two ICC counts arising from the same criminal episode, involving the same PFA order, and the imposition of an aggregate sentence greater than six months violated double jeopardy, deprived him of the right to trial by jury and contravened the intent of the PFA Act. The superior court affirmed the convictions and sentence. The court found that the specific language of the PFA Act contemplates multiple counts of indirect criminal contempt for more than one violation. Since Defendant was properly convicted of two different ICC acts, he was not punished twice for the same abusive act, and not subjected to double jeopardy. Defendant was not entitled to a jury trial even though the two ICC convictions exposed him to an aggregate sentence greater than six months. Additionally, the superior court found that the PFA Act's inherent flexibility over contempt sentences permitted the criminal justice system to effectively provide for the needs of victims of domestic violence. Thus, the sentence imposed did not run contrary to the proper construction of the PFA Act.

Case Law Illustrations: Sentence for Indirect Criminal Contempt

Commonwealth v. Mitchell, 986 A.2d 1241 (Pa. Super. 2009).

Mitchell appealed from a judgment of sentence in which he was found guilty of indirect criminal contempt for a PFA violation and found guilty of harassment. Mitchell's mother received a PFA preventing him from having any contact with her. On April 12, 2008, (4/12) he threw a brick through her window. On April 29 (4/29), he kicked her door and asked for money, then threw a brick through her window. These incidents were docketed at two different docket numbers; one docket number for the 4/12 incidents and one docket number for the 4/29 incidents. Mitchell was convicted of charges arising from the 4/12 incident. He also was convicted criminally of harassment and an ICC for the 4/29 incident and sentenced to 90 days incarceration on the harassment and to six months on the ICC. Mitchell appealed the 4/29 convictions, but when ordered to file the 1925(b) statement, he filed his statement to the wrong docket number (the 4/12 incident, which was not appealed). In addition, his counsel

filed an Anders brief seeking permission to withdraw. The Superior Court found Mitchell failed to preserve any issues on the 4/29 docket number for appeal. The Court, however, did determine that the sparse record prevented it from reviewing if counsel should be permitted to withdraw. The Court also found the flat six month sentence on the ICC was valid, but it vacated the judgment of sentence on the harassment for failure to impose a minimum and a maximum sentence. The Court noted that Mitchell's full appellate rights would apply after re-sentencing and he could file an appeal at that time.

Wagner v. Wagner, 564 A.2d 162 (Pa. Super. 1989).

Although an indirect criminal contempt proceeding is criminal in nature, a sentencing court is not required to give contemptor a minimum as well as a maximum sentence. The sentence is best left to the sentencing court, within the limits stated in the PFA Act. Requiring minimum and maximum sentences would weaken the effectiveness of the Act; if the legislature intended such sentencing requirements, it could have written them into the PFA Act. Subsequent case law limits this case to indirect criminal contempt brought under the statutory provisions of the PFA Act. *Commonwealth v. Williams, 753 A.2d 856, 865 (Pa. Super. 2000).*

Case Law Illustrations: Defendant Entitled to Evidentiary Hearing on Ineffective Assistance of Counsel in ICC Hearing Without Filing for Post-trial Relief

Commonwealth v. Moore, 978 A.2d 988 (Pa. Super. 2009).

Defendant raised an ineffective assistance of counsel claim when the court found him in contempt of a PFA Order and sentenced him to jail. Because the public defender's office represented defendant for the ICC, the public defender (PD) requested an extension of time to file post-sentencing motions, because PD now had a conflict of interest and needed to find alternate counsel. The trial court opined that it did not have jurisdiction to extend the time limits. The defendant appealed. The Superior Court found that judicial economy and fairness dictate that if a defendant raises an ineffective assistance of counsel claim when found in contempt of a protection order and sentenced to imprisonment, he is entitled to an evidentiary hearing on the ineffectiveness assistance claim in order to create a record sufficient to assess the claims on direct appeal. If defendant must wait for post-conviction relief, he likely will have served out his sentence before the appellate court reaches the issue.

Case Law Illustration: Clear, Specific Order Enables Enforcement

Commonwealth v. Brumbaugh, 932 A.2d 108 (Pa. Super. 2007)

A PFA final order was entered on behalf of a 16-year-old minor child. The child called the Defendant to attend a party with her. Defendant rode in the car with and went to the party with the protected child. Defendant was found guilty of an ICC. He appealed, arguing that the evidence was insufficient to prove that Defendant acted with wrongful intent. The Court disagreed, finding that the Commonwealth had met its burden of proof. The order was clear and stated that Defendant was prohibited from having contact with the protected party. Defendant had notice because he consented to the order in writing. Defendant chose to attend

the party with the victim, thereby willfully violating the Order. Intent can be imputed by the substantial certainty that Defendant would be in violation of the Order when he chose to travel with the protected party in the same vehicle. The Superior Court affirmed the judgment of sentence.

Case Law Illustration: PFA Indirect Criminal Contempt Expungement Governed by Criminal History Record Information Act

Commonwealth v. Charnik, 921 A.2d 1214 (Pa. Super. 2007).

Mrs. Charnik (Plaintiff) obtained a final protection order against Mr. Charnik (Defendant) after an evidentiary hearing. The trial court found Defendant guilty of an ICC on two separate occasions. Subsequently, Plaintiff petitioned for and obtained permission to withdraw the PFA order. Defendant motioned the trial court to expunge the final PFA order and the two ICC convictions; the court denied both requests. On appeal, the Superior Court upheld the trial court's decision that denied expungement.

The Court found that ICC convictions are criminal in nature and covered by the Criminal History Record Information Act, 18 Pa.C.S. § 9122(b). Therefore, Defendant's convictions could not be expunged unless he was at least seventy years old and free of arrest or prosecution for ten years, or dead for three years. Since neither criterion applied to Defendant, the trial court could not expunge his ICC convictions.

As for expungement of the final PFA order, the Superior Court found that it could not be expunged because the trial court had conducted a due process hearing, found abuse and Defendant had not appealed nor filed for reconsideration of that decision. Defendant analogized his case to *Carlacci v. Mazaleski*, 798 A.2d 186 (Pa. 2002), a Pennsylvania Supreme Court case wherein the Court found that a defendant seeking to protect his reputation has a right to expungement when the order entered is a temporary one and there are no findings of fact made in conjunction with the *ex parte* order. The Superior Court refused to extend the *Carlacci* rationale to the Charnik case.

Case Law Illustration: Wrongful Intent Required for Conviction

Commonwealth v. Haigh, 874 A.2d 1174 (Pa. Super. 2005).

In a case where defendant questioned plaintiff wife about her health in the courtroom during an indirect criminal contempt (ICC) proceeding, defendant was not guilty of ICC despite existence of a PFA that prohibited any contact with wife. The wife testified at a subsequent ICC hearing that her husband's contact did not place her in fear. The Superior Court found insufficient evidence to establish that defendant acted with "wrongful intent" pursuant to *Commonwealth v. Baker* (see below) and reversed the lower court's conviction.

Commonwealth v. Taylor, 137 A.3d 611.

The no contact PFA order allowed the parties to communicate through text message for the sole purpose of custody scheduling. The Defendant contacted the Plaintiff, through the minor

children, and then directly by text to discuss the sale of the marital residence. The Superior Court held that the Defendant's intent was not to discuss matters involving the children's well-being or custody schedule, but instead was to discuss with Plaintiff the outstanding issues regarding their jointly-held real property, and to impress upon her his desire to come to a quick resolution. The Court also stated that they could not discern a legitimate reason for the subject communication other than to harass or annoy the Plaintiff. The Court held that the Defendant's communication satisfied the "wrongful intent" requirement under the ICC statute, and subsequently affirmed his ICC conviction.

Commonwealth v. Felder, 2017 Pa. Super. 1009.

Petitioner obtained a Final PFA Order against the Defendant which stated that Defendant shall not abuse, harass, stalk, or threaten the Petitioner. However, it did not limit other contact between the Defendant and the Petitioner. After obtaining the PFA Order, Petitioner continued to live with Defendant and a roommate. Subsequently, an incident occurred where the Defendant refused to allow the Petitioner to enter the residence. The Petitioner went to unlock the door to the residence herself, and the Defendant then proceeded to grab her fingers and twist them to lock the door. They went back and forth for several minutes until the Petitioner's fingers started getting numb and she snatched her hand from under the door. Petitioner's fingers were red, swollen and numb for a few days following the incident. Defendant was convicted of an ICC and appealed this conviction. The Superior Court upheld his conviction stating that the Defendant's action of twisting and manipulating her fingers until they "became numb, painful, and swollen" rose to the level of abuse as his actions were intentional and caused bodily injury. In addition, the trial court found there was sufficient evidence to prove that the Defendant acted with "wrongful intent" stating, "Defendant's wrongful intent is demonstrated by the testimony of the witnesses as there is no other valid explanation for his conduct."

Case Law Illustration: Threats

Commonwealth v. Baker, 766 A.2d 328 (Pa. 2001).

Defendant's statement, "I'm going to kill this bitch," could not subject defendant to conviction for contempt of a temporary order that prohibited defendant from "threatening ... the plaintiff or placing her in fear of abuse," because the defendant made the statement while incarcerated and the statement was not conveyed to the plaintiff. To establish contempt, there must be sufficient evidence that (1) the order was definite, clear, specific and leaves no doubt or uncertainty in the mind of the person to whom it was addressed of the prohibited conduct; (2) the contemnor must have notice of the specific order; (3) the act constituting the violation must have been volitional; and (4) the contemnor must have acted with wrongful intent.

Case Law Illustration: The PFA Act's Criminal Contempt Provision Takes Precedence Over Local Rules of Criminal Procedure

Commonwealth v. Burton, 624 A.2d 138 (Pa. Super. 1993).

The specific provision of the PFAA that vests jurisdiction in the Court of Common Pleas to adjudicate and impose punishment for indirect criminal contempt of a PFA order takes precedence over broader and more general language of a Philadelphia municipal court statute and rules of criminal procedure, which apply to commission of any criminal offense with a penalty not exceeding five years. The criminal rule referencing the right to jury trial upon appeal following imposition of sentence by a municipal court judge is rendered nugatory by the Legislature's abolition of such right in the PFAA context.

Case Law Illustrations: Nature of Indirect Criminal Contempt Proceedings

Commonwealth v. Nelson, 690 A.2d 728 (Pa. Super. 1997).

Indirect criminal contempt and PFAA actions are two distinct actions. PFA proceedings are initiated in an effort to stop the perpetration of abuse and are civil in nature. The indirect criminal contempt action, however, is criminal in nature and seeks to punish violations of the protective order. Additionally, the court found that the coordinate jurisdiction rule did not operate where, as in the instant matter, the PFA and ICC were two separate actions and not the same case. The Commonwealth also argued that the trial court's failure to enforce the PFA violated the coordinate jurisdiction rule – a judge with coordinate jurisdiction sitting in the same case should not overrule a colleague's decision in the absence of extraordinary circumstances. The Superior Court rejected this argument because ICC and PFA action are not the same case.

Vito v. Vito, 551 A.2d 573, 574 (Pa. Super. 1988).

Proceedings involving civil contempt differ from those involving criminal contempt. The critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. "If it is for civil contempt, the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive to vindicate the authority of the court."

Case Law Illustration: Burden of Proof

Commonwealth v. Nelson, 690 A.2d 728 (Pa. Super. 1997).

Defendant may be found guilty of indirect criminal contempt only if the Commonwealth proves every element beyond a reasonable doubt.

Case Law Illustration: Admission of Prior Bad Acts

Commonwealth v. Barger, 743 A.2d 477 (Pa. Super. 1999).

A court may admit evidence of other crimes in a contempt proceeding where there is a legitimate evidentiary purpose for such evidence. Evidence of prior bad acts generally is not admissible if offered merely to show bad character or a propensity for committing bad acts.

Defendant's earlier actions and past history of physically abusive conduct toward the victim and her mother were intimidating and threatening and the repeated assaults facilitated intimidating the victim into silence. Admission was appropriate to show the reason for the victim's delay in reporting the crimes and to prove lack of consent to sexual assaults.

Case Law Illustration: Violation of a PFA Order Plus Stalking Conviction on Same Victim Triggers 3rd Degree Felony Charge

Commonwealth v. Bortz, 909 A.2d 1221, 1224 (Pa. 2006).

The Pennsylvania Supreme Court confirmed that a prior indirect criminal contempt conviction for violation of a PFA order issued under 23 Pa.C.S. § 6108 is grounds for grading a subsequent first conviction for stalking as a felony of the third-degree under 18 Pa.C.S. § 2709.1.) The defendant ignored the provisions of a PFA by calling, delivering love notes, and making unannounced visits to plaintiff's home. Despite being convicted three times of PFA violations, defendant persisted. The defendant was then convicted of stalking, graded as a third-degree felony, and other offenses. Defendant appealed. The Pa. Superior Court upheld the trial court's decision holding that the stalking statute graded a stalking offense as a third-degree felony where the defendant was previously convicted of a crime of violence. The dissenting Pa. Superior Court Judge contended that the defendant was never convicted of a "crime of violence," but rather adjudicated in civil contempt of the PFA order. Because the defendant's violations involved love notes, absent any threat or act of violence, the judge saw no evidentiary basis to uphold a felony grading. The defendant later used this argument in his appeal. The Pa. Supreme Court upheld the Superior Court's decision, noting: "The stalking statute clearly reads that a first-time offender who was previously convicted of a crime of violence involving the same victim, family, or household member including a violation of an order issued under 23 Pa.C.S. §6108 will receive a third-degree gradation. To read the statute in any other manner would fail to give effect to all of its terms."

Case Law Illustration: Waivers

Commonwealth v. Abed, 989 A.2d 23 (Pa. Super. 2010).

Defendant's admissions during a civil contempt hearing on a PFA violation were admissible during his criminal trial for harassment, stalking and contempt. The trial court properly denied Defendant's suppression motion. Trial court also properly denied Defendant's motion for acquittal for contempt of the PFA order during his criminal trial on contempt, stalking and harassment when the actual order was not entered into the record. Defendant failed to object to brief statements by the District Attorney that the PFA entered against him was a "stay-away" order restricting him from contacting the victim or going to her residence. Defendant did not object that the PFA was improperly characterized or that the actual document should have been entered into the record. Thus, the issue was waived.

(a.1) Jurisdiction.—A court shall have jurisdiction over indirect criminal contempt charges for violation of a protection order issued pursuant to this chapter or a foreign protection order in the county where

the violation occurred and in the county where the protection order was granted. A court shall have jurisdiction over indirect criminal contempt charges for violation of a foreign protection order in the county where the violation occurred.

(a.2) Minor defendant.—Any defendant who is a minor and who is charged with indirect criminal contempt for allegedly violating a protection from abuse order shall be considered to have committed an alleged delinquent act as that term is defined in 42 Pa.C.S. § 6302 (relating to definitions) and shall be treated as provided in 42 Pa.C.S. Ch. 63 (relating to juvenile matters).

Case Law Illustration: Minor Defendant

Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004).

While the PFAA does allow for the entry of a PFA order against a minor, the minor cannot be found guilty of indirect criminal contempt if he was not represented at the original PFA hearing by a guardian “who shall supervise and control the conduct of the action on behalf of the minor” pursuant to the Pennsylvania Rules of Civil Procedure.

(b) Trial and punishment.—

(1) A sentence for contempt under this chapter may include:

- (i)(A) a fine of not less than \$300 nor more than \$1,000 and imprisonment up to six months; or**
(B) a fine of not less than \$300 nor more than \$1,000 and supervised probation not to exceed six months; and
- (ii) an order for other relief set forth in this chapter.**

(2) All money received under this section shall be distributed in the following order of priority:

- (i) \$100 shall be forwarded to the Commonwealth and shall be appropriated to the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105 (relating to responsibilities of law enforcement agencies).**
- (ii) \$100 shall be retained by the county and shall be used to carry out the provisions of this chapter as follows:**
 - (A) \$50 shall be used by the sheriff.**
 - (B) \$50 shall be used by the court.**
- (iii) \$100 shall be forwarded to the Department of Public Welfare for use for victims of domestic violence in accordance with the provisions of section 2333 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.**
- (iv) Any additional money shall be forwarded to the Commonwealth and shall be used by the Pennsylvania State Police to establish and maintain the Statewide registry of protection orders provided for in section 6105.**

(3) The defendant shall not have a right to a jury trial on a charge of indirect criminal contempt. However, the defendant shall be entitled to counsel.

(4) Upon conviction for indirect criminal contempt and at the request of the plaintiff, the court shall also grant an extension of the protection order for an additional term.

Case Law Illustration: Extension of PFA based Indirect Criminal Contempt Conviction

Trout v. Strube, 97 A.3d 387 (Pa. Super. 2014).

Plaintiff filed an appeal of the Trial Court's order denying her petition to extend her PFA order based on Defendant's conviction of an ICC. Plaintiff petitioned for the extension 18 months after the Defendant's conviction and cited section 6114(b)(4) of the PFA Act. County practice did not permit Plaintiff to make a request for an extension of her PFA order at the time of the ICC hearing. Section 6114(b)(4) states "upon conviction for indirect criminal contempt and at the request of the plaintiff, the court shall also grant an extension of the protection order for an additional term." In the instant case, the Superior Court ruled that because Plaintiff failed to make her request at the ICC hearing, she was not entitled to an extension of the PFA order under section 6114(b)(4). The Superior Court further found that the county practice for seeking an extension following an ICC conviction was at odds with the PFA Act and thus had to be remedied.

(5) Upon conviction for indirect criminal contempt, the court shall notify the sheriff of the jurisdiction which issued the protection order of the conviction.

(6) The minimum fine required by subsection (b)(1) allocated pursuant to subsection (b)(2)(i) and (iii) shall be used to supplement and not to supplant any other source of funds received for the purpose of carrying out the provisions of this chapter.

Case Law Illustrations: Post-trial Practice

Commonwealth v. Moore, 978 A.2d 988 (Pa. Super. 2009).

Defendant Moore sought an extension of time to file a post-trial motion based on ineffective assistance of counsel in an indirect criminal contempt hearing. The trial court denied the motion, finding that it lacked jurisdiction to grant the extension and that the Post-conviction Collateral Relief Act (PCRA) was the appropriate method of seeking relief. On appeal, the Superior Court agreed that the PCRA applied, but PCRA was not a timely method for relief in a PFA case because the six months maximum sentence would expire prior to court review of the PCRA petition. The Superior Court found the trial court had discretion to grant the motion for extension of time, and judicial economy supported hearing ineffective assistance of counsel claim in a post-sentence evidentiary hearing.

Case Law Illustrations: Sentence for Indirect Criminal Contempt

Takosky v. Henning, 906 A.2d 1255, 1258 (Pa. Super. 2006).

Defendant appealed the trial court's order that found him in indirect criminal contempt for violating a final PFA order against him. The trial court's order found the defendant guilty of the

violation but postponed sentencing until a later date. The Superior Court quashed the appeal because the order was not a final appealable order. “It is well settled that unless sanctions or imprisonment is imposed, an Order declaring a party to be in contempt is held to be interlocutory and not appealable.”

Leonard v. Smith, 684 A.2d 622 (Pa. Super. 1996), appeal denied, 698 A.2d 595 (Pa. 1997).

Sentence of 18 months (for three counts of indirect criminal contempt) was not excessive even though defendant also received criminal sentence on charges arising from same incident. Post-adjudication expressions of remorse need not be considered in determining appropriate sentence for violating PFA order.

Commonwealth v. Snell, 737 A.2d 1232 (Pa. Super. 1999).

While punishing the contemnor is the primary goal of a contempt proceeding, the intent is also to prevent further abuse. The relief set forth in the PFAA is specifically enacted to stop the perpetration of abuse and includes extending a PFA order when a court finds the defendant engaged in a pattern that indicates continued risk of harm to the victim. The court found it had the authority in a contempt proceeding to bring about the cessation of abuse by extending the PFA order for one year, without a separate civil proceeding. The defendant was not deprived of due process because of the heightened standard of proof. Defendant also had notice the court that could grant such relief upon a finding of guilt and the contempt hearing provided him with sufficient opportunity to be heard.

(c) Notification upon release.—The appropriate releasing authority or other official as designated by local rule shall use all reasonable means to notify the victim sufficiently in advance of the release of the offender from any incarceration imposed under subsection (b). Notification shall be required for work release, furlough, medical leave, community service, discharge, escape and recapture. Notification shall include the terms and conditions imposed on any temporary release from custody. The plaintiff must keep the appropriate releasing authority or other official as designated by local rule advised of contact information; failure to do so will constitute waiver of any right to notification under this section.

(d) Multiple remedies.—Disposition of a charge of indirect criminal contempt shall not preclude the prosecution of other criminal charges associated with the incident giving rise to the contempt, nor shall disposition of other criminal charges preclude prosecution of indirect criminal contempt associated with the criminal conduct giving rise to the charges.

Case Law Illustrations: Double Jeopardy

Commonwealth v. Jackson, 10 A.3d 341 (Pa. Super. 2010).

Offenses that provide a basis for an indirect criminal contempt of a PFA Order may also be charged as criminal offenses so long as the double jeopardy clause is not offended. Jackson was charged with burglary, assault and criminal trespass, as well as an indirect criminal contempt violation of a PFA. On appeal, Jackson questioned whether or not the double

jeopardy clause attached because the criminal charges arose from the same incident as the indirect criminal contempt of the PFA order. The Superior Court applied the *Blockburger v. U.S.*, 284 U.S. 299 (1932) “same elements” test and determined that the criminal trespass charge consisted of the same elements as the indirect criminal contempt and therefore could not both be charged against Jackson. However, a comparison of the elements of burglary and assault revealed that each contained unique elements as compared to the indirect criminal contempt charge and thus the criminal charges for burglary and assault did not offend double jeopardy.

Leonard v. Smith, 684 A.2d 622 (Pa. Super. 1996), appeal denied, 698 A.2d 595 (Pa. 1997).

Double jeopardy did not bar a contempt conviction for violation of a PFA order even though an appellant had been sentenced criminally for charges arising from the same incident. The PFA did not include the elements of the offenses for which the appellant was convicted in a criminal proceeding. The violation concerned defiant trespass and assault, and the defendant had already been sentenced on charges of stalking, harassment by communication, and criminal mischief arising from the same incident. Neither defiant trespass nor assault had the same elements as the offenses of conviction.

Commonwealth v. Yerby, 679 A.2d 217 (Pa. 1996).

After being convicted and sentenced for contempt of a PFA Order, Appellant was subsequently charged and convicted of reckless endangerment, of another person, possession of an instrument of crime, terroristic threats, unlawful restraint and based on the same incident which resulted in the ICC conviction. On appeal, the Pennsylvania Supreme Court held that double jeopardy does attach to criminal contempt prosecutions and that the Blockburger (Same Elements) Test is the appropriate method to determine whether the subsequent prosecution violates double jeopardy. Under the Blockburger Test, if each offense requires proof of an element that the other does not, the offenses are separate and double jeopardy does not apply. That being said, the court also held that the elements of the offenses are not to be compared in the most literal sense. Since no substantive criminal statute contains the same elements as criminal contempt, if the analysis was simply focused on statutory elements, any double jeopardy protection would be “illusory.” As such, the court must consider the actual circumstances/events that led to the criminal contempt conviction as part of the criminal contempt double jeopardy analysis. In applying this rule to Yerba, the Court determined that his subsequent criminal prosecution did not violate the double jeopardy clause because the record for the contempt proceeding did not indicate which wrongful behavior led to the contempt conviction. While the conviction could have been the threats made, it could also have been based on the physical assault, etc.

Commonwealth v. Leach, 729 A.2d 608 (Pa. Super. 1999).

The trial court found defendant Leach guilty of nine counts of stalking, nine counts of criminal mischief and ICC of a protection order. Defendant vandalized victim’s vehicle nine separate

times, smashing the windshield three times and flattening 13 tires. The defendant challenged the nine separate acts of stalking, arguing that the nine counts arose from a single sequence of behavior directed to a common goal. The Superior Court found that Defendant's nine acts of are part of a course of conduct and the circumstances indicate his intent to place the victim in fear of injury or in emotional distress. Each stalking act in an established course of conduct is a separate offense and punishable as a separate offense; the repetitive nature shows the obsession with the victim and the escalation of violence.

Commonwealth v. Zerphy, 481 A.2d 670 (Pa. Super. 1984).

Victim alleged defendant violated her PFA when he struck her in the face with his fists and later showed up at her residence with a rifle. The victim requested assistance from the Pennsylvania State Police. When the police arrived at the victim's residence, Zerphy fired a shot at the police car and hit the front grill. The police ordered Zerphy to drop the rifle; he pointed it at the troopers, and then put it on the ground. The police arrested him, charging him with attempted homicide, recklessly endangering another person, aggravated assault, disorderly conduct, and criminal mischief. The victim petitioned to hold Zerphy in contempt for a violation of the PFA Order. The Superior Court found the indirect criminal contempt was clearly a separate and distinct offense from the conduct that resulted in the criminal charges. A proceeding for indirect criminal contempt under the PFAA and subsequent prosecution for crimes that composed the contempt do not present governmental harassment requiring compulsory joinder. In this case, the contemptuous conduct related to the victim; the criminal charges resulted from shooting at police officers.

§ 6114.1. Civil contempt or modification for violation of an order or agreement

(a) General rule.—A plaintiff may file a petition for civil contempt with the issuing court alleging that the defendant has violated any provision of an order or court-approved agreement issued under this chapter or a foreign protection order.

(b) Civil contempt order.—Upon finding of a violation of a protection order or court-approved consent agreement issued under this chapter or a foreign protection order, the court, either pursuant to petition for civil contempt or on its own accord, may hold the defendant in civil contempt and constrain him in accordance with law.

(c) Sentencing.—A sentence for civil contempt under this chapter may include imprisonment until the defendant complies with provisions in the order or consent agreement or demonstrates the intent to do so, but in no case, shall a term of imprisonment under this section exceed a period of six months.

(d) Jury trial and counsel.—The defendant shall not have a right to a jury trial; however, the defendant shall be entitled to counsel.

Case Law Illustration: Timing of Petition for Contempt

Gerace v. Gerace, 631 A.2d 1360 (Pa. Super. 1993).

A petition alleging that stepfather failed to comply with PFA order requiring him to return stepdaughter's property to her was not time-barred. The petition was in response to stepfather's failure to comply with an affirmative order to return the property and not due to his noncompliance with the PFA order. Stepfather had argued the petition was filed after expiration of the PFA order. The court noted that there is no statute of limitations for obeying a court order or requesting the enforcement of a court order, and stepfather was not actually adjudged in contempt of court.

§ 6115. REPORTING ABUSE AND IMMUNITY

(a) Reporting.—A person having reasonable cause to believe that a person is being abused may report the information to the local police department.

(b) Contents of report.—The report should contain the name and address of the abused person; information regarding the nature and extent of the abuse and information which the reporter believes may be helpful to prevent further abuse.

(c) Immunity.—A person who makes a report shall be immune from a civil or criminal liability on account of the report unless the person acted in bad faith or with malicious purpose.

§ 6116. CONFIDENTIALITY

Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a coparticipant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim. Neither the domestic violence counselor/advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance.

Case Law Illustration: Confidentiality

V.B.T. v. Family Services of Western Pennsylvania, 705 A.2d 1325 (Pa. Super. 1998), aff'd, 728 A.2d 953 (Pa. 1999).

Privilege created under confidentiality provision of the PFAA is absolute and extends to records as well as oral testimony. The language of the statute creates no exceptions to the privilege. Parents and plaintiff child were barred from discovery of materials that were protected under the PFAA and Juvenile Act. Waiver of the privilege must be in writing. Although foster child previously had testified about facts surrounding her abuse by her father in a criminal trial, this

did not constitute a waiver of sexual assault counselor privilege or domestic violence counselor/advocate privilege.

§ 6117. PROCEDURE AND OTHER REMEDIES

(a) General rule.—Unless otherwise indicated in this chapter, a proceeding under this chapter shall be in accordance with applicable general rules and shall be in addition to any other available civil or criminal remedies. The plaintiff and the defendant may seek modification of an order issued under section 6108 (relating to relief) at any time during the pendency of an order. Except as otherwise indicated in this chapter, modification may be ordered after the filing of a petition for modification, service of the petition and a hearing on the petition.

Case Law Illustrations: Modification or Dismissal Requires Petition

Stamus v. Dutcavich, 938 A.2d 1098 (Pa. Super. 2007).

Either party may seek a modification of an order by filing a petition; however, the trial court errs when it dismisses a final protection order when no petition to modify has been filed. A court cannot rule on matters not before it; without the filing of a petition to modify, the issue is not before the court.

Case Law Illustrations: PFA Expungement Limited

Commonwealth v. Charnik, 921 A.2d 1214 (Pa. Super. 2007).

Mrs. Charnik (Plaintiff) obtained a final protection order against Mr. Charnik (Defendant) after an evidentiary hearing. The trial court found Defendant guilty of an ICC on two separate occasions. Subsequently, Plaintiff petitioned for and obtained permission to withdraw the PFA order. Defendant motioned the trial court to expunge the final PFA order and the two ICC convictions; the court denied both requests. On appeal, the Superior Court upheld the trial court's decision that denied expungement.

The Court found that ICC convictions are criminal in nature and covered by the Criminal History Record Information Act, 18 Pa.C.S. § 9122(b). Therefore, Defendant's convictions could not be expunged unless he was at least seventy years old and free of arrest or prosecution for ten years, or dead for three years. Since neither criterion applied to Defendant, the trial court could not expunge his ICC convictions.

As for expungement of the final PFA order, the Superior Court found that it could not be expunged because the trial court had conducted a due process hearing, found abuse and Defendant had not appealed nor filed for reconsideration of that decision. Defendant analogized his case to *Carlacci v. Mazaleski*, 798 A.2d 186 (Pa. 2002), a Pennsylvania Supreme Court case wherein the Court found that a defendant seeking to protect his reputation has a right to expungement when the order entered is a temporary one and there are no findings of

fact made in conjunction with the *ex parte* order. The Superior Court refused to extend the *Carlacci* rationale to the Charnik case.

Carlacci v. Mazaleski, 798 A.2d 186, 191 (Pa. 2002).

Adopting the holding of *P.E.S. v. K.L.* below, the Pennsylvania Supreme Court concluded that there is a right to petition for expungement of a PFA record where the petitioner seeks to protect his reputation. Although the PFAA does not expressly provide for expungement, the right exists under the due process clause of the Pennsylvania Constitution. The PFA order was temporary and in effect for 41 days in the instant matter. A hearing was never held; rather, the parties stipulated that the temporary PFA order be declared null and void *ab initio*. The court concluded that a court does not need to apply the Wexler balancing test in a PFA expungement proceeding when: “(1) a PFA petition filed against a PFA defendant has been dismissed by a court order, as in *P.E.S.*; or (2) the PFA proceedings never evolve beyond the temporary order stage, as in the instant case.”

P.E.S. v. K.L., 720 A.2d 487 (Pa. Super. 1998).

While expungement is not a remedy available under section 6117 of the PFAA, the trial court does have authority to expunge a PFA record in limited circumstances where a respondent seeks to protect his or her reputation. A defendant asserted that his reputation and livelihood were threatened by the public court files because he was an interstate child custody specialist who acted as a custody evaluator and *guardian ad litem*. The plaintiff failed to appear and pursue her abuse petition and no hearing was held within the required ten-day period (a temporary order was never entered).

Devereaux v. Thomas, 38 Pa. D. & C. 4th 129 (Phila. 1998).

Defendant argued that because the PFA petition was vacated without a hearing on the merits, the records should be expunged from the state registry mandated by the 1994 amendments to the PFAA (23 Pa.C.S. § 6105). The Court found that the Commonwealth has a legitimate interest in maintaining accurate records of abuse data, which could help identify future victims and petitioners who file multiple or frivolous claims. These administrative records remain valuable even if a case has ended for lack of prosecution. The fact that a case was dismissed for lack of prosecution told the court only that the action was not heard on the merits; it said nothing about the existence or the lack of wrongdoing by the defendant. The Court balanced the defendant’s perceived harm of being unable to obtain a position with the FBI (because the FBI had access to the registry) with the state’s need to prevent abuse. The Court also considered that a remedy for expunction was not provided in the PFA statute as it is in criminal statutes and the Child Protection Act, and therefore it was reasonable to conclude the lack of such a provision was deliberate.

Graham v. Flippen 2018 PA Super 20 (Decided February 2, 2018).

Defendant petitioned for expungement of four separate Protection from Abuse matters. There were three separate PFA petitions filed by the defendant’s intimate partner Lynna Flippen against

the defendant and one filed by Defendant against Lynna Flippen. Defendant had been convicted of the murders of Lynna Flippen and her acquaintance, Ernest Yarbrough and received two life sentences. The trial court denied the request, and Defendant appealed. The Superior Court reversed the trial court's decision, recognizing that all the PFAs had even temporary and dismissed before a hearing. As such, the expungements had been warranted as a matter of law. The Superior Court also rejected the prosecution's argument that the PFA records could not be expunged because they were used as evidence in Defendant's murder case, stating that the expungements were proper as a matter of law and that granting them would not erase them from evidentiary record of the murder trial.

(b) Remedies for bad faith.—Notwithstanding any other provision of law, upon finding that an individual commenced a proceeding under this chapter in bad faith, a court shall direct the individual to pay to the defendant actual damages and reasonable attorney fees. Failure to prove an allegation of abuse by a **preponderance of the evidence shall not, by itself, result in a finding of bad faith.**

Case Law Illustrations: Bad Faith Filing

Courtney v. Courtney, 205 A.3d. 318 (Pa. Super 2019).

After Petitioner withdrew her petition for a Protection From Abuse Order upon the parties reaching an agreement regarding custody exchanges, the court held a hearing on Defendant's petition for counsel fees. The trial court found that Petitioner had filed her petition for a Protection From Abuse Order in bad faith and ordered her to pay \$310 in attorneys fees to Defendant's counsel. Upon appeal, the Pennsylvania Superior Court reversed, holding that the trial court's finding of bad faith based on Petitioner's failure to prove her allegations by a preponderance of the evidence was improper and explicitly against the language of 23 Pa.C.S. §6117(b). Along the same lines, the Superior Court also held that the trial court's finding was unsupported by the certified record and that the trial court had simply restated Plaintiff's allegations of forcible entry from an earlier petition and noted that there had not actually been a hearing on the PFA petition. Courtney is the first published opinion in Pennsylvania interpreting the concept of bad faith in the context of a PFAA.

§ 6119. IMMUNITY

(a) General rule.—Law enforcement agencies and their employees, including police officers and sheriffs, shall, except as provided in subsection (b), be immune from civil liability for actions taken in good faith to carry out their duties relating to the seizure and relinquishment of firearms, other weapons and ammunition as provided for in this chapter, except for gross negligence, intentional misconduct or reckless, willful or wanton misconduct.

(b) Exception.—Law enforcement agencies and their employees, including police officers and sheriffs, shall be liable to the lawful owner of confiscated, seized or relinquished firearms in accordance with 18 Pa.C.S. § 6105(f) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms) and shall be liable to the lawful owner of confiscated, seized or relinquished

other weapons or ammunition for any loss, damage or substantial decrease in the value of the other weapons or ammunition that is a direct result of a lack of reasonable care by the law enforcement agency or its employees.

§ 6120. INABILITY TO PAY

(a) Order for installment payments.—Upon plea and proof that a person is without the financial means to pay a fine, a fee, economic relief ordered under section 6108(a)(8) (relating to relief) or a cost, a court may order payment of money owed in installments appropriate to the circumstances of the person and shall fix the amounts, times and manner of payment.

(b) Use of credit cards.—The treasurer of each county may allow the use of credit cards and bank cards in the payment of money owed under this chapter.

§ 6121. WARRANTLESS SEARCHES

Except as provided in section 6113 (relating to arrest for violation of order), nothing in this chapter shall authorize a warrantless search for firearms, other weapons or ammunition.

§ 6122. CONSTRUCTION

Nothing in this chapter shall be construed to preclude an action for wrongful use of civil process pursuant to 42 Pa.C.S. Ch. 83 Subch. E (relating to wrongful use of civil proceedings) or criminal prosecution for a violation of 18 Pa.C.S. Ch. 49 (relating to falsification and intimidation).

APPELLATE STANDARDS

SCOPE OF REVIEW

Kuhlmeier v. Kuhlmeier, 817 A.2d 1127 (2003).

Where the appellate challenge to the trial court's order involves the application of law, an appellate court's scope of review is plenary.

STANDARD OF REVIEW

Ferri v. Ferri, 854 A.2d 600 (2004).

In the context of a PFA order, the appellate court reviews the trial court's legal conclusions for an error of law or an abuse of discretion. See also, *Drew v. Drew, 870 A.2d 377 (Pa. Super. 2005).*

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

Reviewing court must view the evidence in the light most favorable to the verdict winner, granting that party the benefit of all reasonable inferences, and determine only whether the evidence produced at trial was sufficient to sustain the verdict.

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

Trial court has discretion in choosing between remedies afforded under the Act and the determination is reviewed under an abuse of discretion standard.

Kelley v. Mueller, 861 A.2d 984 (Pa. Super. 2004), vacated, 912 A.2d 202 (Pa. 2006).

An abuse of discretion has occurred when the trial court's order is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will or without support in the record.

MOOTNESS

Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).

Review of final order was not moot despite its expiration. Case falls within well-recognized exception to the mootness doctrine as a case that has important public policy considerations and yet may escape review. PFA orders are usually temporary and it is seldom that a court has the opportunity to review one before it expires.

PFA ORDER REGARDING CUSTODY APPEALABLE DESPITE SEPARATE PROCEEDING

Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).

PFA ordered father to refrain from abusing parties' children and granted mother legal custody of children. PFA order was a final order subject to appeal as of right, even though the parties might also have been involved in separate custody action concerning the same children.

CONSENT ORDERS ARE CONCLUSIVE AND WILL ONLY BE REVIEWED FOR FRAUD OR MUTUAL MISTAKE

Lee v. Carney, 645 A.2d 1363 (Pa. Super. 1994).

A decree entered by consent of the parties is so conclusive that it will be reviewed only on a showing that an objecting party's consent was obtained by fraud or that it was based upon a mutual mistake. When the order succeeds in terminating the abuse, the purpose of the Act is fulfilled and the appellate court will not judge the parties' wisdom in choosing the terms.

ATTORNEYS' FEES ON APPEAL

Krassnoski v. Rosey, 684 A.2d 635 (Pa. Super. 1996).

This appeal was necessitated by a judge's ruling denying counsel fees in an action under the PFAA, which was unrelated to substantive issues regarding defendant's abusive conduct or to the PFA order itself. An award of appellate counsel fees would not further the statutory purposes of the Act, nor was the defendant's conduct dilatory or vexatious allowing an award under the specific statutory authorization of the Act or under the Rules of Appellate Procedure.

CREDIBILITY OF WITNESSES

Raker v. Raker, 847 A.2d 720 (Pa. Super. 2004).

A finder of fact is entitled to weigh evidence and assess credibility and to believe all, part or none of the evidence presented.

R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).

In reviewing validity of PFA order, appellate court must defer to lower court's determination of credibility of witnesses at the hearing.

Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).

Trial court is empowered to assess credibility of witnesses.

EVIDENTIARY QUESTIONS

Boykin v. Brown, 868 A.2d 1264 (Pa. Super. 2005).

Questions concerning the admission or exclusion of evidence are within the sound discretion of the trial court and may be reversed on appeal only when a clear abuse of discretion is present.

Hood-O'Hara v. Wills, 873 A.2d 757 (Pa. Super. 2005).

Electronic communication (e-mail) will only be admitted if it does not constitute hearsay pursuant to Pa.R.E. and if the communication can be properly authenticated. Discovery is not permitted in PFA actions without leave of the trial court pursuant to Pa.R.C.P. 1930.5(a).

BURDEN OF PROOF

Boykin v. Brown, 868 A.2d 1264 (Pa. Super. 2005).

The PFAA does not seek to determine criminal culpability; rather in such an action the petitioner must only prove the allegation of abuse by the preponderance of the evidence.

Raker v. Raker, 847 A.2d 720 (Pa. Super. 2004).

The preponderance of the evidence standard is defined as the greater weight of the evidence, i.e., to tip a scale slightly is the criteria or requirement for preponderance of the evidence.

THE PFA ACT'S RELATIONSHIP WITH OTHER PROCEEDINGS

CUSTODY PROCEEDINGS

Landis v. Landis, 869 A.2d 1003 (Pa. Super. 2005).

In a custody action the trial court must consider the parties' past violent or abusive conduct, which may include but is not limited to abuse as defined in the PFAA pursuant to 23 Pa.C.S. § 5303(a)(3). When a trial court fails to make this consideration, it is reversible error. *See also, Costello v. Costello, 666 A.2d 1096 (Pa. Super. 1995)* (custody case remanded where trial court failed to develop full and complete record regarding PFA against father and father's drug and alcohol abuse).

DIVORCE PROCEEDINGS

Laczkowski v. Laczkowski, 496 A.2d 56 (Pa. Super. 1985).

PFA proceeding is quasi-criminal whereas relief under Divorce Code is equitable. The PFAA must be construed *in pari materia* with the Divorce Code since they were enacted for different, but not incompatible, purposes.

EQUITABLE DISTRIBUTION

Lee v. Lee, 978 A.2d 380 (Pa. Super. 2009).

In an equitable distribution proceeding, husband was not entitled to 25-month rental credit for the time he was evicted and excluded from the marital residence because of wife's protection

from abuse order. Equitable distribution lies in equity, and equity demands clean hands; husband's bad behavior prompted the PFA, and equity prevented recovery for the rental credit after the PFA issued.

DEPENDENCY PROCEEDINGS

Brooks-Gall v. Gall, 840 A.2d 993 (Pa. Super. 2003).

A mother brought a PFA petition on behalf of her children against their father; trial court declared the children dependent at the PFA hearing and had Child Protective Services remove the children from the mother. The Court held that trial court's *sua sponte* actions violated the parents' due process rights as well as the Pennsylvania Juvenile Act. The Court noted the compelling public policy consideration of the chilling affect the trial court's action would have on victims of domestic violence seeking protection orders.

ESTATES

In the Matter of the Estate of Elaine L. Cochran, 738 A.2d 1029 (Pa. Super. 1999).

The defendant's conduct before and after the issuance of a PFA was wholly inconsistent with the marital relationship and constituted a willful and malicious desertion within the meaning of the forfeiture statute. Husband forfeited spousal share of his wife's estate when his conduct resulted in his removal from the marital residence for one year or more.

CRIMINAL PROCEEDINGS

Commonwealth v. Stallworth, 781 A.2d 110 (Pa. 2001).

The Pennsylvania Supreme Court considered a PFA order in the context of a death sentence for murder. During the lower court's sentencing phase, the jury had been instructed that, at the time of the killing, the defendant was subject to a PFA order restricting his behavior toward the victim. The jury found this to be an aggravating circumstance warranting the imposition of the death penalty. On appeal, the Supreme Court held that because the defendant was not served with the order and did not have anecdotal knowledge of the existence of the PFA order, he was not "subject to" that order for the purposes of establishing an aggravating circumstance. Therefore, he was improperly sentenced to death. The court found the term "subject to" was not clear or free from ambiguity and should be subject to the most restrictive interpretation, which would require that a defendant either be given actual notice of the PFA or have the equivalent knowledge of a PFA order. There was no record evidence that the defendant had such knowledge.

Commonwealth v. Majeed, 694 A.2d 336 (Pa. 1997).

Violation of a PFA order may create criminal culpability. Defendant was convicted of burglary after forcibly entering his home with the intent to commit a crime. Defendant had been

excluded from the home pursuant to the PFA order. Defendant's unlawful entry facilitated his harassment of the plaintiff. If the only sanction for defendant's behavior was indirect criminal contempt, the purpose underlying the PFAA (to prevent domestic violence and concomitantly to promote the security of the home) would be frustrated. The Commonwealth has an interest in enforcing a PFA and is not precluded from using a violation of the PFA order to create an element of burglary.

Dunkelberger v. Pa. Board of Probation & Parole, 593 A.2d 8 (Pa. Commw. 1991).

Parolee being held in criminal contempt for violation of a PFA order provides a basis for the Board to recommit the parolee as a convicted parole violator.

Commonwealth v. Jackson, 900 A.2d 936, 940-41 (Pa. Super. 2006).

The Pennsylvania Superior Court sustained the trial court's discretion to admit the evidence of past abuse, including PFA orders, because the evidence indicated that the defendant had a motive to kill his girlfriend. The evidence presented at trial established that defendant had a history of assaulting the victim and had violated numerous PFA orders obtained by the victim. On the night of the victim's death, defendant and the victim were arguing and defendant strangled her with the vacuum cord. The court found admission of the past abuse proper. "Furthermore, evidence of prior abuse between a defendant and a homicide victim tending to establish motive, intent, malice, or ill will is generally admissible."

Commonwealth v. Bortz, 909 A.2d 1221 (Pa. 2006).

The Pennsylvania Supreme Court confirmed that violation of a PFA order plus stalking conviction triggers a third-degree felony charge. A prior ICC conviction for violation of a PFA order (under 23 Pa.C.S. § 6108) is grounds for grading a subsequent first stalking conviction as a third-degree felony (under 18 Pa.C.S. § 2709.1).)The Pa. Superior Court upheld the trial court's decision holding that the stalking statute graded a stalking offense as a third-degree felony where the defendant was previously convicted of a crime of violence. The Pa. Supreme Court upheld the Superior Court's decision.

PFA AS AGGRAVATING FACTOR IN CRIMINAL HOMICIDE

Commonwealth v. Staton, 38 A.3d 785 (Pa. 2012).

In this review of a death penalty case, the Pennsylvania Supreme Court considered the use of a PFA as an aggravating factor. The victim, Ms. Yohn, was granted a temporary PFA. At a hearing on the final order, at which the defendant did not appear, the court granted a final PFA order. At the homicide trial, Staton contested whether or not he had notice of the PFA. Notice of the PFA is important, because without notice, the PFA cannot be an aggravating factor in the sentence. The aggravating factor applies only where the defendant has actual knowledge of the PFA order. Staton argued that he did not have notice, and believed that Ms. Yohn had withdrawn the PFA petition. There was no court order, however, withdrawing or modifying the PFA. The court concluded that the defendant must have either actual or the equivalent

knowledge of the PFA for the Commonwealth to use it as an aggravating factor. The court determined that Staton had such knowledge. Staton testified that the victim told him about the PFA. Other witnesses also testified that Staton talked to them about the PFA. Although Staton never received actual service of the PFA, the court found that he had equivalent knowledge of the existence of a PFA and use of the aggravating factor was appropriate. The judgment of sentence was affirmed.

BATTERED WOMAN SYNDROME

Commonwealth v. Miller, 634 A.2d 614, 621 (Pa. Super. 1993).

Miller appealed her judgment of sentence following conviction of third degree murder at a bench trial. The trial court sentenced her to five to twelve years of imprisonment. Miller and the victim, Mark Smith, resided together several years. During an argument prior to the shooting, Smith poked Miller in the chest, slapped her, and burned her with a cigarette. Miller claimed she acted in self-defense when both parties reached for a knife that fell from Smith's pants. Miller also testified to many previous abusive incidents by Smith against her. The Superior Court remanded for an evidentiary hearing on battered woman syndrome in the context of self-defense. Battered Woman's Syndrome is "admissible as probative evidence of defendant's state of mind as it related to self-defense." The syndrome is not a defense to homicide, but provides the type of "evidence which may be introduced on the question of the reasonable belief requirement of self-defense in cases which involve a history of abuse between the victim and the defendant." Evidence of battered woman syndrome may not be used to bolster the credibility of the defendant; failure to present such evidence is not per se ineffectiveness of counsel.

Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989).

A victim of years of severe physical and psychological domestic abuse shot and killed the perpetrator of the abuse. Both parties were police officers. The Pennsylvania Supreme Court reversed the judgment of a sentence finding the defendant guilty of third degree murder, and remanded for a new trial because of the ineffectiveness of trial counsel in not requesting the proper jury instructions on self-defense and voluntary manslaughter. Trial counsel failed to request jury instructions that would require the jury to consider the cumulative effects of psychological and physical abuse when assessing the reasonableness of a battered person's fear of imminent death or serious bodily harm with respect to a claim of self-defense, and when assessing what constitutes sufficient provocation to support a conviction for voluntary manslaughter. The jury should have been apprised of the fact that the abuse the defendant suffered for three years was to be considered by the jury with respect to the reasonableness of her fear of imminent danger of death or serious injury. Also, a party may establish sufficient provocation to support a conviction for manslaughter by the cumulative impact of a series of related events. The test for adequate provocation remains whether a reasonable person, confronted with this series of events, became impassioned to the extent that his or her mind was incapable of cool reflection.

Counsel also failed to present expert testimony on the battered woman syndrome where uncontradicted testimony revealed that the defendant was a victim of such abuse. Because Battered Woman Syndrome is not within the ordinary training, knowledge and experience of jurors, expert testimony is admissible as the basis for proving justification in the use of deadly force where the defendant has been shown to be a victim of psychological and physical abuse. [Defendant was retried and found not guilty, and all criminal charges were dismissed. She was later reinstated to the police force and awarded back pay.]

SECTIONS AND CASES

§ 6101. Short title of chapter

§ 6102. Definitions

Boykai v. Young, 83 A.3d 1043 (Pa. Super. 2014).
Boykin v. Brown, 868 A.2d 1264 (Pa. Super. 2005).
B.T.W., O/B/O T.L. v. P.J.L., 956 A.2d 1014 (Pa. Super. 2008).
Buchhalter v. Buchhalter, 959 A.2d 1260 (Pa. Super. 2008).
Burke v. Bauman, 814 A.2d 206 (Pa. Super. 2002).
Commonwealth v. Walsh, 36 A.3d 613 (Pa. Super. 2012).
Counterman v. Shoemaker, 14 Pa. D. & C. 4th 217 (Monroe 1992), *aff'd*, 625 A.2d 95 (Pa. Super. 1992).
Chronister v. Brenneman, 742 A.2d 190 (Pa. Super. 1999).
Custer v. Cochran, 933 A.2d 1050 (Pa. Super. 2007).
DeHaas v. DeHaas, 708 A.2d 100 (Pa. Super. 1998), *appeal denied*, 732 A.2d 615 (Pa. 1998).
D.H. v. B.O., 734 A.2d 409 (Pa. Super. 1999).
Dye v. McCoy, 621 A.2d 144 (Pa. Super. 1993).
Evans v. Braun, 12 A.3d 395 (Pa. Super. 2010).
Ferri v. Ferri, 854 A.2d 600 (Pa. Super. 2004).
Fonner v. Fonner, 731 A.2d 160 (Pa. Super. 1999).
Gabel v. Gabel, 26 Pa. D. & C. 4th 83 (Montg. 1994), *aff'd*, 659 A.2d 8 (Pa. Super. 1995).
H.M.H. On Behalf of Minor, L.M.H. v. D.J.G., 2019 PA Super 156.
Jiminez v. Jiminez, 81 Berks L.J. 323 (1988).
Karch v. Karch, 885 A.2d 535 (Pa. Super. 2005).
K.B. v. Terrence Tinsley, 2019 PA Super 116
Keith v. Keith, 28 Pa. D. & C. 3d 462 (Lanc. 1984).
Lawrence v. Bordner, 907 A.2d 1109 (Pa. Super. 2006).
McCance v. McCance, 908 A.2d 905 (Pa. Super. 2006).
Mescanti v. Mescanti, 956 A.2d 1017 (Pa. Super. 2008).
Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995)
Olivieri v. Olivieri, 678 A.2d 393 (Pa. Super. 1996).
Raker v. Raker, 847 A.2d 720 (Pa. Super. 2004).
R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).
Scott v. Shay, 928 A.2d 312 (Pa. Super. 2007).
Slusser v. DeBoer, 985 A.2d 974 (Pa. Super. 2009), *appeal denied*, 4 A.3d 1055 (Pa. 2010).
Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).
T.K. v. A.Z., 157 A. 3D 974 (Pa. Super. 2017).
Thompson v. Thompson, 963 A.2d 474 (Pa. Super. 2008).
Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004)
Viruet v. Cancel, 727 A.2d 591 (Pa. Super. 1999).
Weir v. Weir, 631 A.2d 650 (Pa. Super. 1993).
Yankowskie v. Lenker, 526 A.2d 429 (Pa. Super. 1987)

§ 6103. Jurisdiction

B.T.W., O/B/O T.L. v. P.J.L., 956 A.2d 1014 (Pa. Super. 2008).
Commonwealth v. Charnik, 921 A.2d 1214 (Pa. Super. 2007).
Hood-O'Hara v. Wills, 873 A.2d 757 (Pa. Super. 2005).
N.T. ex. Rel. K.R.T. v. F.F., 2015 PA Super 139 (June 15, 2015)

§ 6104. Full faith and credit and foreign protection orders

§ 6105. Responsibilities of law enforcement agencies

Karch v. Karch, 885 A.2d 535 (Pa. Super. 2005).

§ 6106. Commencement of proceedings

Commonwealth v. Padilla, 885 A.2d 994 (Pa. Super. 2005).
Egelman v. Egelman, 728 A.2d 360 (Pa. Super. 1999).
Viruet v. Cancel, 727 A.2d 591 (Pa. Super. 1999).

§ 6107. Hearings

Boykin v. Brown, 868 A.2d 1264 (Pa. Super. 2005).
Boyle v. Boyle, 12 Pa. D. & C. 3rd 767 (Allegheny 1979).
Buchhalter v. Buchhalter, 959 A.2d 1260 (Pa. Super. 2008).
Coda v. Coda, 666 A.2d 741 (Pa. Super. 1995).
DeHaas v. DeHaas, 708 A.2d 100 (Pa. Super. 1998), *appeal denied*, 732 A.2d 615 (Pa. 1998).
Drew v. Drew, 870 A.2d 377 (Pa. Super. 2005).
Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. 1985).
Ferko-Fox v. Fox, 68 A.3d 917 (Pa. Super. 2013).
Ferri v. Ferri, 854 A.2d 600 (Pa. Super. 2004).
Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992).
Hood-O'Hara v. Wills, 873 A.2d 757 (Pa. Super. 2005).
In re Penny R., 509 A.2d 338 (Pa. Super. 1986).
K.D. v. J.D., 696 A.2d 232, 1997 Pa. Super.
Karch v. Karch, 885 A.2d 535 (Pa. Super. 2005).
Lanza v. Simconis, 914 A.2d 902 (Pa. Super. 2006).
Lawrence v. Bordner, 907 A.2d 1109 (Pa. Super. 2006).
Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).
R.G. v. T.D., 672 A.2d 341 (Pa. Super. 1996).
Raker v. Raker, 847 A.2d 720 (Pa. Super. 2004).
Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).
Thompson v. Thompson, 963 A.2d 474 (Pa. Super. 2008).
Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004).
Weir v. Weir, 631 A.2d 650 (Pa. Super. 1993).

§ 6108. Relief

Brooks-Gall v. Gall, 840 A.2d 993 (Pa. Super. 2003).
Cipolla v. Cipolla, 398 A.2d 1053 (Pa. Super. 1979).
Commonwealth v. Smith, 552 A.2d 292 (Pa. Super. 1988).
DeOrio v. Delaware County, No. 08-5762, 2009 U.S. Dist. LEXIS 65176, 2009 WL 2245067 (E.D. Pa. 2009).
Dragani v. Dragani, 42 Pa. D. & C. 4th 295 (Bucks 1999), *aff'd*, 752 A.2d 426 (Pa. Super. 2000).
Dye v. McCoy, 621 A.2d 144 (Pa. Super. 1993).
Egelman v. Egelman, 728 A.2d 360 (Pa. Super. 1999).
Eichenlaub v. Eichenlaub, 490 A.2d 918 (Pa. Super. 1985).
Gerace v. Gerace, 631 A.2d 1360 (Pa. Super. 1993).

Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992).
Holderman v. Hagner, 760 A.2d 1189 (Pa. Super. 2000).
Kelley v. Mueller, 861 A.2d 984 (Pa. Super. 2004), *vacated*, 912 A.2d 202 (Pa. 2006).
Krassnoski v. Rosey, 684 A.2d 635 (Pa. Super. 1996).
Kuhlmeier v. Kuhlmeier, 817 A.2d 1127 (Pa. Super. 2003).
Lawrence v. Bordner, 907 A.2d 1109 (Pa. Super. 2006).
Lee v. Carney, 645 A.2d 1363 (Pa. Super. 1994).
McKelvey v. McKelvey, 771 A.2d 63 (Pa. Super. 2001).
Melvin v. Melvin, 580 A.2d 811 (Pa. Super. 1990).
Miller v. Walker, 665 A.2d 1252 (Pa. Super. 1995).
Rosenberg v. Rosenberg, 504 A.2d 350 (Pa. Super. 1986).
Snyder v. Snyder, 629 A.2d 977 (Pa. Super. 1993).
Stamus v. Dutcavich, 938 A.2d 1098 (Pa. Super. 2007).
T.K. v. A.Z., 157 A. 3D 974 (Pa. Super. 2017).

§ 6109. Service of orders

Commonwealth v. Stallworth, 781 A.2d 110 (Pa. 2001).

§ 6110. Emergency relief by minor judiciary

Commonwealth v. Padilla, 885 A.2d 994 (Pa. Super. 2005).

§ 6111. Domestic violence counselor/advocate

§ 6112. Disclosure of addresses

§ 6113. Arrest for violation of order

Commonwealth v. Ortiz, 802 A.2d 617 (Pa. Super. 2002), *aff'd*, 825 A.2d 629 (Pa. 2003).
Stamus v. Dutcavich, 938 A.2d 1098 (Pa. Super. 2007).

§ 6114. Contempt for violation of order or agreement

Commonwealth v. Abed, 989 A.2d 23 (Pa. Super. 2010).
Commonwealth v. Aikins, 618 A.2d 992 (Pa. Super. 1993).
Commonwealth v. Baker, 766 A.2d 328 (Pa. 2001).
Commonwealth v. Barger, 743 A.2d 477 (Pa. Super. 1999).
Commonwealth v. Bortz, 909 A.2d 1221 (Pa. 2006).
Commonwealth v. Brumbaugh, 932 A.2d 108 (Pa. Super. 2007).
Commonwealth v. Burton, 624 A.2d 138 (Pa. Super. 1993).
Commonwealth v. Charnik, 921 A.2d 1214 (Pa. Super. 2007).
Commonwealth v. Decker, 664 A.2d 1028 (Pa. Super. 1995).
Commonwealth v. Felder, 2017 Pa. Super. 1009.
Commonwealth v. Haigh, 874 A.2d 1174 (Pa. Super. 2005).
Commonwealth v. Jackson, 10 A.3d 341 (Pa. Super. 2010).
Commonwealth v. Lambert, 147 A. 3d 1221 (Pa. Super. 2016).
Commonwealth v. Leach, 729 A.2d 608 (Pa. Super. 1999).
Commonwealth v. Manney, 617 A.2d 817 (Pa. Super. 1992).
Commonwealth v. Mitchell, 986 A.2d 1241 (Pa. Super. 2009).
Commonwealth v. Moore, 978 A.2d 988 (Pa. Super. 2009).
Commonwealth v. Nelson, 690 A.2d 728 (Pa. Super. 1997).
Commonwealth v. Snell, 737 A.2d 1232 (Pa. Super. 1999).
Commonwealth v. Taylor, 137 A.3d 611. (Pa. Super. 2016).

Commonwealth v. Walsh, 36 A.3d 613 (Pa. Super. 2012).

Commonwealth v. Yerby, 679 A.2d 217 (Pa. 1996).

Commonwealth v. Zerphy, 481 A.2d 670 (Pa. Super. 1984).
Gerace v. Gerace, 631 A.2d 1360 (Pa. Super. 1993).
Hill v. Randolph, 24 A.3d 866 (Pa. Super. 2011).
Leonard v. Smith, 684 A.2d 622 (Pa. Super. 1996), *appeal denied*, 698 A.2d 595 (Pa. 1997).
Takosky v. Henning, 906 A.2d 1255 (Pa. Super. 2006).
Trout v. Strube, 97 A.3d 387 (Pa. Super. 2014).
Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004).
Vito v. Vito, 551 A.2d 573 (Pa. Super. 1988).
Wagner v. Wagner, 564 A.2d 162 (Pa. Super. 1989).

§ 6115. Reporting abuse and immunity

§ 6116. Confidentiality

V.B.T. v. Family Services of Western Pennsylvania, 705 A.2d 1325 (Pa. Super. 1998), *aff'd*, 728 A.2d 953 (Pa 1999).

§ 6117. Procedure and other remedies

P.E.S. v. K.L., 720 A.2d 487 (Pa. Super. 1998).
Carlacci v. Mazaleski, 798 A.2d 186 (Pa. 2002).
Commonwealth v. Charnik, 921 A.2d 1214 (Pa. Super. 2007).
Courtney v. Courtney, 205 A.3d 318 (Pa. Super. 2019)
Devereaux v. Thomas, 38 Pa. D. & C. 4th 129 (Phila. 1998).
Graham v. Flippen 2018 PA Super 20 (Decided February 2, 2018)
Stamus v. Dutcavich, 938 A.2d 1098 (Pa. Super. 2007).

§ 6119. Immunity

§ 6120. Inability to pay

§ 6121. Warrantless searches

§ 6122. Construction

CHAPTER III: THE PROTECTION FROM ABUSE ACT

TABLE OF CONTENTS

CHAPTER GOALS.....	8
PURPOSE OF PFA ACT; CONSTITUTIONALITY.....	8
PFA PROCEDURE.....	8
Courts to Provide Forms and Clerical Assistance	8
Jurisdiction and Venue	9
Jurisdiction	9
Venue	9
Three Different Types of PFA Orders	9
Plaintiff Filing Fees Prohibited	10
Assessment of Fees and Costs Against Defendant.....	10
Emergency PFA Proceedings.....	10
Temporary PFA Proceedings	11
Relief.....	11
Special consideration for weapon and/or ammunition relinquishment at the <i>ex parte</i> temporary order proceeding	12
Service	12
No Discovery.....	13
Juveniles as PFA Litigants.....	14
Full Faith and Credit	14
Statewide Registry.....	14
PFAD System.....	15
PARTIES COVERED BY THE PFA ACT	15
Plaintiff	15

Defendant	16
Definition of Family or Household Member	16
Dating relationships	16
Sexual orientation	17
Relationship by "consanguinity" includes brother and sister business partners when brother abused sister at work	17
Relationship by "consanguinity" includes relationship between child's mother and child's paternal grandfather	17
Relationship by "affinity" includes brother- and-sister-in-law relationship	18
Relationship by "affinity" includes relationship between child and parent's long-term, live-in partner	18
Relationship between sexual assault victim and perpetrator of assault not covered by PFA Act	18
WHAT CONSTITUTES ABUSE UNDER THE PFA ACT?	19
PROVING ABUSE	19
Burden of Proof	19
Prior Abuse Is Relevant and Admissible	20
Filing PFA Petition Weeks After Last Abusive Incident Does Not Cause Complaint To Fail	20
Evidence of Medical Treatment Is Not Required	20
Force Is Not Required to Establish Sexual Abuse	21
Evidence of Police Action Is Not Required	21
Court May Not Use Criminal Culpability Standard in Evaluating PFA Claim	22
Actual Physical Injury Not Required; Reasonable Fear Is Adequate	22
Physical blocking and wall punching	22
Dangerous driving	22
Splashing water onto child's face	23
Blocking car, yelling obscenities and verbal threats, hitting car with fist and causing damage	23
Perpetrator's intent is not relevant to reasonable fear determination	23
Verbal/Written Threats Sufficient	23
Threats to kill - e-mail threat	23
Telephone threat	24
False Imprisonment Is Abuse	24
Stalking Is Abuse	24
Repeated calls and e-mails	25

Child Abuse.....	25
Child abuse under PFA Act differs from Child Protective Services (CPS) and criminal law	25
Excessive, reckless corporal punishment is child abuse	26
Corporal punishment which does not cause bruising or fear is not abuse.....	26
 CONTINUING A FINAL ORDER HEARING AND/OR A TEMPORARY PFA ORDER	27
Court May Issue Continued <i>Ex Parte</i> Temporary Orders	27
 PROCEDURE - FINAL PFA HEARINGS.....	27
General Rule	27
Required Notices	27
<i>No Prima Facie</i> Allegation of Abuse: Plaintiff Still Entitled to a Hearing	28
Court Must Schedule Final Order Hearing; Court Cannot Dismiss Petition at Temporary Order Stage ..	28
The Evidentiary Hearing Must Comport with Due Process	29
Plaintiff Not Limited to Allegations in Petition.....	30
Court May Not Defer PFA Determination To Prosecutor’s Charge Decision.....	30
Timing of the Hearing	30
No Right to Court-Appointed Counsel	31
Specific Findings Not Required	31
Identifying Information	31
Surcharge.....	31
No Conversion of PFA to CPS Proceeding.....	31
 RELIEF AVAILABLE UNDER THE PFA ACT.....	32
General Rule - Broad Relief Available	32
Do Not Abuse.....	32
Exclusive Possession or Suitable Housing.....	32
Custody.....	32
No unsupervised physical custody if defendant abused child or poses a risk of abuse.....	33

No unsupervised physical custody if defendant interfered with custody or poses a risk of interference with custody.....	33
Supervised custodial access by a third party requires affidavit.....	33
No access to child or, at most, supervised physical custody in facility for serious abuse of plaintiff or child.....	33
Ordering child returned to plaintiff's custody.....	33
Additional safety conditions.....	34
Trial court cannot refuse to consider custody relief request.....	34
The impact of custody relief on other custody orders.....	35
Child's best interest must be considered.....	35
Support	36
Temporary support may be ordered	36
Plaintiff must file support complaint.....	36
No Contact	36
Firearms, Ammunition and Other Weapons Relinquishment.....	37
Weapons.....	37
Firearms relinquishment.....	37
Factors for firearms removal at <i>ex parte</i> proceeding.....	37
Firearms prohibition, license surrender	38
Copy of PFA weapons order to police.....	38
Public access to firearms list prohibited	38
Procedures and rules for enforcement regarding firearms relinquishment.....	38
Weapons return/federal prohibition	39
Pay Reasonable Losses	40
Award of counsel fees.....	40
Without a showing of bad faith, court may not award counsel fees to defendant.....	40
No Stalking or Harassing	41
Any Other Relief	41
MUTUAL ORDERS ONLY IN VERY LIMITED CIRCUMSTANCES	41
DURATION OF ORDER	42
INSTALLMENT PAYMENTS ALLOWED	42
DISCONTINUANCE, WITHDRAWAL, AND MODIFICATION	42
Procedures to End a PFA Action or Modify an Order	42
Discontinuance	43
Withdrawal.....	43

Modification.....	43
Petition is Required for Court to Dismiss or Modify a PFA Order	44
STATUTORY SAFETY CONSIDERATIONS IN PFA PROCEEDINGS	44
PFA Court Protection of Location, Telephone Number	44
Address Confidentiality Program	44
Domestic Violence Advocate Privilege and Court Accompaniment	45
Federal Restrictions on Electronic Disclosure of Victim Information	45
EXTENSION OF PFA ORDERS.....	46
Extension Generally.....	46
Extension Shall Be Granted in Contempt Proceeding	46
Extension May Be Granted if Petition Filed Before Expiration of PFA Order	47
No Requirement That Contempt Charge Be Filed Before Extension Request	47
ENFORCEMENT	47
Arrest for Violations.....	47
Verbal Notice of PFA Order Adequate for ICC Determination	48
Defendant - Not Plaintiff - Can Be Arrested and Held In Contempt for Violating No-Contact Terms of PFA	49
Sentencing, Criminal Prosecution	49
EXPUNGEMENT	49
OTHER RELEVANT INFORMATION	50
Domestic Violence Includes Criminal and Non-Criminal Behavior.....	50
Domestic Violence Is Purposeful Behavior.....	50
Women Experience Domestic Violence More Than Men	50
Power and Control and Domestic Violence	51
Domestic Violence Typically Escalates Over Time	51
Abuse Can Be Facilitated by Technology Misuse	51
Separation Is The Most Dangerous Time	51

EMERGING PRACTICES - SAFETY IN THE COURTHOUSE	52
EMERGING PRACTICES - <i>PRO SE</i> PRACTICE TOOLS	52
EMERGING PRACTICES - LEARNING ABOUT THE DOMESTIC VIOLENCE SOCIAL CONTEXT.....	53
EMERGING PRACTICES - RELIEF CONSIDERATIONS.....	54
Custody.....	54
Financial Support.....	54
“No Contact” Provision.....	55
Surrender of Weapons.....	56
Reimbursement for Losses.....	56
Prohibition Against Stalking and Harassment.....	57
EMERGING PRACTICES - SAFETY AND DENIALS OF TEMPORARY ORDERS.....	57
EMERGING PRACTICES - SAFETY WHEN THE COURT RECEIVES REQUESTS FOR MODIFICATION	58
EMERGING PRACTICES - USING THE PFAD SYSTEM	58
EMERGING PRACTICES - IMPORTANCE OF JUDICIAL/COURT STAFF DEMEANOR.....	59
APPENDICES	61
A - ABUSIVE BEHAVIORS CHECKLIST.....	61
B - SAMPLE PROCEDURE FOR <i>PRO SE</i> LITIGANTS SEEKING TO DISCONTINUE, WITHDRAW, OR MODIFY A PFA ORDER	63
C. PETITION FOR MODIFICATION OF PROTECTION FROM ABUSE ORDER	66

D. ORDER FOR HEARING FOR MODIFICATION OF PROTECTION FROM ABUSE ORDER67

E. BILINGUAL COURT FORMS.....67

F. THE PROTECTION FROM ABUSE ACT, 23 PA. C.S. § 6101 ET SEQ. ANNOTATED...67

CHAPTER GOALS

The purpose of this chapter is to inform the reader about the Protection From Abuse Act (PFA Act). The Act establishes the procedure for obtaining a PFA order, defines abuse, and delineates the persons to whom the Act applies. Abuse can be physical or verbal, and it does not have to rise to the level of a crime to fall within the realm of the PFA Act. With protection as its stated goal, the PFA Act authorizes judges to order a wide range of relief for victims.

PURPOSE OF PFA ACT; CONSTITUTIONALITY

The purpose of the PFA Act is to protect victims of domestic violence.¹ The Act's provisions are written to enable courts to respond quickly and flexibly to both early signs and subsequent acts of abuse.² The primary goal of the Act is not to penalize past criminal conduct; rather, it is intended to provide advance prevention of physical and sexual abuse.³

The Act, which permits ex parte temporary orders, is constitutionally valid. The temporary suspension of due process rights of the alleged abuser is necessary to meet the special circumstances of domestic violence cases.⁴

PFA PROCEDURE

Courts to Provide Forms and Clerical Assistance

Pennsylvania courts are required to provide simplified PFA forms and clerical assistance in English and Spanish to help unrepresented potential PFA litigants with the writing and filing of PFA petitions.⁵ Courts are also required to provide the plaintiff with written and oral referrals in both English and [Spanish](#)⁶ to the [local domestic violence program](#), to the [local legal services office](#), and to the [county bar association's lawyer referral service](#).⁷

¹ 23 PA. C. S. §§ 6101-22.

² *Commw. v. Snell*, 737 A.2d 1232 (Pa. Super. 1999).

³ *Snyder v. Snyder*, 629 A.2d 977 (Pa. Super. 1993).

⁴ *Heard v. Heard*, 614 A.2d 255 (Pa. Super. 1992).

⁵ 23 PA. C.S. § 6106(h)(1).

⁶ Bilingual forms are available from the Unified Judicial System of Pennsylvania website at <http://www.pacourts.us/forms/for-the-judiciary>. PFA documents are available in Arabic, Chinese, French, Haitian Creole, Khmer, Korean, Polish, Portuguese, Russian, Spanish and Vietnamese. Criminal Protective Order documents are available in Chinese, Khmer, Russian, Spanish and Vietnamese.

⁷ 23 PA. C.S. § 6106(h)(2).

Jurisdiction and Venue

Jurisdiction

The right of the plaintiff to PFA relief is not affected by:

- the plaintiff's leaving the residence or household to avoid further abuse, or
- the defendant's absence from Pennsylvania or the defendant's non-residence in Pennsylvania, provided that the court has personal jurisdiction over the defendant in accordance with Pennsylvania's long-arm statute.⁸

Venue

A PFA action seeking exclusive possession of the household or residence may only be brought in the county in which the household or residence is located.⁹ Otherwise, a PFA action may be brought where the plaintiff resides, either temporarily or permanently, or is employed; or where the defendant may be served; or where the abuse occurred.¹⁰ Temporary residence may include a stay at a domestic violence shelter.

Three Different Types of PFA Orders

There are three different types of protection orders that may be issued under the PFA Act: emergency, temporary and final orders.

- Emergency protection orders are ex parte and are typically issued on nights and weekends by magisterial district or municipal court judges.
- Temporary protection orders are also ex parte, and are issued by common pleas court judges during regular business hours.
- Final PFA orders are issued by the common pleas court after the defendant is given notice and opportunity to be heard. A final PFA order can be entered by agreement or after a hearing.

⁸ 23 PA. C.S. § 6103(b); 42 PA. C.S. § 5322 (long arm jurisdiction). Some acts that would subject a PFA defendant to jurisdiction under the long-arm statute may include transacting business within Pennsylvania; owning real estate in Pennsylvania; causing harm or tortious injury in Pennsylvania by an act or omission within or outside of Pennsylvania; and/or violating any Pennsylvania statute. 42 PA. C.S. § 5322(a).

⁹ PA. R. CIV. P. 1901.1(b).

¹⁰ PA. R. CIV. P. 1901.1(a).

Plaintiff Filing Fees Prohibited

The PFA statute prohibits courts from charging filing fees or costs to plaintiffs.¹¹ No fees or costs may be charged for “filing, issuance, registration or service of a petition, motion, complaint, order or any other filing.”¹² The prohibited fees or costs include, but are not limited to, those associated with modifying, withdrawing, dismissing, or certifying copies of a petition, motion, complaint, order, or any other filing, as well as any judicial surcharge or computer system fee.¹³

In addition, PFA plaintiffs may not be charged “any fees or costs associated with filing a motion for reconsideration or an appeal.”¹⁴ Gatekeeping mechanisms to control the filing of petitions under the PFA Act frustrate the purpose of the Act and are prohibited.¹⁵

Assessment of Fees and Costs Against Defendant

When a PFA order is granted, fees and costs shall be assessed against the defendant.¹⁶ The court is required to waive fees and costs upon a showing of good cause or when the court makes a finding that the defendant is not able to pay.¹⁷

Emergency PFA Proceedings

When the court is unavailable, generally after hours and on weekends, the minor judiciary may enter an emergency PFA order after an ex parte proceeding.¹⁸ A plaintiff must file a petition and demonstrate “good cause.”¹⁹ Immediate and present danger of abuse to the plaintiff or minor children shall constitute “good cause” for an emergency PFA.²⁰

Relief available in an emergency PFA is limited to directing defendant to refrain from abusing plaintiff and children, granting exclusive possession of the household to plaintiff, and prohibiting defendant from having contact with the plaintiff and children.²¹ This provision also permits the court to prohibit harassment of plaintiff’s relatives.²²

An emergency PFA order expires at the close of the next business day during which the court is available. The statute directs the trial court to make provisions for continuing the emergency PFA order to protect a plaintiff and minor children until the hearing, at which time the victim can seek a

¹¹ 23 PA. C.S. § 6106(b).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Viruet v. Cancel*, 727 A.2d 591 (Pa. Super. 1999); *Egelman v. Egelman*, 728 A.2d 360 (Pa. Super. 1999).

¹⁶ 23 PA. C.S. § 6106(c).

¹⁷ *Id.*

¹⁸ 23 PA. C.S. § 6110(a)

¹⁹ 23 PA. C.S. § 6110(a).

²⁰ 23 PA. C.S. § 6110(a).

²¹ 23 PA. C.S. §§ 6110(a); 6108(1), (2), (6).

²² 23 PA. C.S. §§ 6108(a)(6), 6110(a).

temporary PFA order.²³ However, an emergency PFA is not a prerequisite or precondition for securing a temporary PFA order.

Magisterial district judges, judges of the Philadelphia Municipal Court, bail commissioners, and attorney masters may hear emergency PFA petitions when the court is unavailable. In counties of fewer than four judges, this generally means on nights, weekends, and when judges are unavailable because of duties outside the county, illness or vacation.²⁴ In counties of four or more judges, this means at night and from the end of one business week to the beginning of the next business week.²⁵

Temporary PFA Proceedings

The person seeking protection must file a PFA petition. If the petitioner alleges immediate and present danger of abuse, the court of common pleas is required to conduct an ex parte proceeding.²⁶ If the court finds that petitioner is in immediate and present danger of abuse, it may issue a temporary PFA order.²⁷ The court may provide any relief in a temporary order that is available in the PFA Act, including an order for temporary relinquishment of firearms.²⁸ The temporary order shall remain in effect until the court modifies or terminates it after notice and hearing.²⁹

Relief

The relief that a judge may order as part of the temporary protection from abuse order includes the following:

- No abuse
- Eviction of defendant from plaintiff's solely owned or leased residence or plaintiff and defendant's jointly owned or leased residence
- Exclusive possession of shared home to plaintiff if defendant owes a duty of support to plaintiff or minor children, and defendant is sole owner or lessee
- Temporary child custody and protective child custody provisions
- No contact with plaintiff or minor children
- Relinquish weapons that were used or threatened to be used against plaintiff

²³ 23 PA. C.S. § 6110(b).

²⁴ 23 PA. C.S. § 6110(a)(1).

²⁵ 23 PA. C.S. § 6110(a)(2).

²⁶ 23 PA. C.S. § 6107(b); *Ferko-Fox v. Fox*, 68 A.3d 917 (Pa. Super. 2013)(holding that the ex parte proceeding requirement for temporary PFA petitions require the court to conduct a hearing with the petitioner present. In camera review of the petition alone is not sufficient to meet the strictures of due process.).

²⁷ *Ferko-Fox v. Fox*, 68 A.3d 917 (Pa. Super. 2013).

²⁸ 23 PA. C.S. § 6107(b)(3).

²⁹ 23 PA. C.S. § 6107(b).

- Pay reasonable expenses and losses suffered as a result of abuse
- No stalking or harassing
- Any other appropriate relief³⁰

Special consideration for weapon and/or ammunition relinquishment at the *ex parte* temporary order proceeding

The court may direct firearm relinquishment for the duration of the temporary order if the PFA petition demonstrates any of the following:

Abuse that involves a firearm or other weapon; or an immediate and present danger of abuse. In determining whether an immediate and present danger of abuse exists, *the court shall consider a number of factors, including, but not limited to:*

- whether the temporary order of Protection From Abuse is not likely to achieve its purpose in the absence of such a condition
- whether the defendant has previously violated a Protection From Abuse order
- whether past or present abuse to the plaintiff or any of the plaintiff's minor children resulted in injury
- whether the abuse occurred in public
- whether the abuse includes:
 - threats of abuse or suicide
 - killing or threatening to kill pets
 - an escalation of violence
 - stalking or obsessive behavior
 - sexual violence
 - drug or excessive alcohol use³¹

Service

Service of PFA petitions and orders may be made by the sheriff or a competent adult by handing a copy to the defendant, an adult family member or person in charge at the defendant's residence, the

³⁰ 23 PA. C.S. §§ 6107(a), 6108(a).

³¹ 23 PA. C.S. § 6107(b)(3).

person in charge of defendant's workplace, or defendant's agent.³² Service may also be accomplished by special order of court.³³

In a PFA matter, if personal service cannot be made within 48 hours after a PFA petition is filed, the court may issue a special order authorizing service by another means, including service by regular and certified mail.³⁴ An affidavit of service must be filed.³⁵

When a PFA defendant has been given verbal notice by police of the existence of a PFA order and of the consequences for violating the order, this notice is sufficient to sustain a finding of contempt.

In ***Commonwealth v. Padilla***, a victim obtained a PFA order late on a Friday afternoon directing that the defendant have no contact with her.³⁶ Early Sunday morning, the victim called to notify the police of the existence of the PFA order and to seek assistance because the defendant had been attempting to gain entry to her home and had been threatening her by telephone. When police arrived at the victim's residence, she handed her cell phone to the police officer, indicating that the defendant was on the phone. During this and a subsequent call, the officer advised the defendant of the existence of the no-contact PFA order, and of the consequences for violating the order. Nevertheless, the defendant continued to threaten and harass the victim by telephone for several more hours until the defendant was served with a copy of the order late on Sunday afternoon. After the defendant received a copy of the order, he stopped placing telephone calls to the victim.

The defendant was held in contempt for violating the PFA order and appealed, claiming that his due process rights were violated. On appeal, his conviction was affirmed. The Superior Court referred to the preventive and protective nature of the Act and found that verbal notice of the existence of the PFA order and of the consequences for the violation was sufficient to satisfy the notice requirements.³⁷

No Discovery

There is no discovery in Protection From Abuse proceedings unless authorized by order of court.³⁸

A final PFA order against a juvenile is enforceable only if the juvenile has a guardian representative at the final order hearing.

³² PA. R. CIV. P. 1930.4(a).

³³ *Id.*

³⁴ PA. R. CIV. P. 1930.4(b).

³⁵ PA. R. CIV. P. 1901.4.

³⁶ [*Commw. v. Padilla*, 885 A.2d 994 \(Pa. Super. 2005\).](#)

³⁷ *Id.*

³⁸ PA. R. CIV. P. 1930.5.

Juveniles as PFA Litigants

A parent, *guardian ad litem*, or adult household member may bring a PFA claim on behalf of a minor child.³⁹ A minor can also be named as a respondent/defendant in a PFA action and will be subject to the provisions of the Juvenile Act for violations. A juvenile respondent does not have the right to court-appointed counsel in initial PFA proceedings. However, for a final PFA order against a juvenile to be valid and enforceable, the juvenile respondent/defendant must have a guardian to represent the juvenile and to supervise and control the conduct of the action on the juvenile's behalf.⁴⁰

For more information about minors as PFA litigants or other issues involving minors and domestic violence, please see Chapter XII, Minors and Domestic Violence and Chapter XIII, Teen Dating Abuse.

Full Faith and Credit

The PFA Act provides that a "court shall recognize and enforce a valid foreign protection order issued by a comparable court."⁴¹ This section of the PFA Act gives the court guidance regarding the procedural and substantive requirements that a foreign order must meet in order to be valid and eligible for enforcement.⁴² A plaintiff may file a certified copy of the foreign PFA with the prothonotary in counties where enforcement may be necessary, but the plaintiff is not required to file or register the certified copy for the order to be enforced.⁴³

No filing fee may be charged to the plaintiff for filing the foreign PFA.⁴⁴ The PFA statute requires law enforcement agencies to honor and enforce foreign protection orders.⁴⁵

Statewide Registry

Upon the filing of a temporary or final protection order, or any subsequent order withdrawing, granting or dismissing a protection order, the prothonotary shall transmit a copy of the order to the state police PFA registry in a manner prescribed by the Pennsylvania State Police.⁴⁶

The registry is available to inform law enforcement officers, dispatchers and the courts of the existence and terms of PFA orders. The prothonotary is to transmit all PFA orders including temporary PFA orders, final PFA orders, modified PFA orders and consent PFA orders. In addition,

³⁹ 23 PA. C.S. §§ 6110(a); 6108(1), (2), (6).

⁴⁰ PA. R. CIV. P. 2027; Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004).

⁴¹ 23 PA. C.S. § 6104(a).

⁴² 23 PA. C.S. § 6104.

⁴³ 23 PA. C.S. § 6104(d).

⁴⁴ 23 PA. C.S. § 6104(d)(1). Nor may the plaintiff be charged for the costs of obtaining certified copies of the foreign order. Costs and fees associated with filing a foreign protection order may be assessed against the defendant. *Id.*

⁴⁵ 23 PA. C.S. § 6105(h).

⁴⁶ PA. R. CIV. P. 1901.4(c) and comments.

the prothonotary is to transmit any order withdrawing or extending a PFA order and an order denying plaintiff's request for a final PFA order.⁴⁷ Emergency PFAs are not included in the registry.

PFAD System

The Protection From Abuse Database (PFAD) is an electronic statewide database. PFAD's mission is to establish and maintain a database of all PFA proceedings in Pennsylvania. It is a computer archival system designed to complement the operation of the Pennsylvania State Police's Protection Order Registry. Since April 2009, PFAD has operated under the direct oversight of the Pennsylvania State Police.

For court administrators and prothonotaries who use it, the PFAD system facilitates compliance with the Rules of Civil Procedure by allowing the prothonotary and court administration employees to register, via computer, information that the prothonotary is required to transmit to the state police.

The PFAD database automates the PFA process in the courts; creates and disseminates the state police's Protection From Abuse summary data sheet - information necessary for inclusion in the state police registry; and contains all standard PFA forms as approved by the Pennsylvania Supreme Court in addition to other forms necessary in PFA cases.

PFAD also contains electronic forms for indirect criminal contempt and civil contempt proceedings and houses both civil and criminal contempt orders issued by judges across the state.

Records from PFAD are immediately available 24 hours a day, 365 days a year to authorized users (courts, law enforcement agencies, attorneys) via a secured Internet web site.

Please visit the Protection from Abuse Database website for more information about [PFAD](#).

PARTIES COVERED BY THE PFA ACT

Plaintiff

Under the PFA Act, a petition may be filed by any of the following:

- an adult or an emancipated minor seeking relief for themselves
- a parent, adult household member or guardian ad litem seeking relief on behalf of minor children
- a guardian of the person of an adult who has been declared incompetent seeking relief for the incompetent adult.⁴⁸

⁴⁷ PA. R. CIV. P. 1901.4, note and explanatory comment (1997).

⁴⁸ 23 PA. C.S. § 6106(a).

Defendant

A PFA petition may be filed against a person who is a “family or household member,” a sexual or intimate partner or a person who shares biological parenthood with the person seeking relief.⁴⁹

Definition of Family or Household Member

“Family or household member” is defined in the PFA Act as “[s]pouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.”⁵⁰

Dating relationships

The Superior Court of Pennsylvania has provided guidance regarding the meaning of “sexual or intimate partners” under the Act.

In **R.G. v. T.D.**, plaintiff and defendant were college students.⁵¹ Plaintiff sought a PFA against defendant averring that he was her former boyfriend and alleging that his harassing, stalking, and threatening behavior was causing her fear. At trial, the defendant made no objection to her description of him as her former boyfriend, so this relationship was considered an “intimate partner” relationship. In **Varner v. Holley**, the Superior Court affirmed the holding in R.G., and held that a dating relationship meets the relationship requirement of the PFA Act.⁵²

The holdings from R.G. and Varner were further clarified in **Evans v. Braun**, a 2010 Superior Court case that found that two dates were enough to satisfy the “sexual or intimate partner” standard.⁵³ The Superior Court explained that, even though short-lived, the relationship had a measure of personal interaction elected by the parties and, thus, qualified as an intimate partnership for the purpose of the PFA Act.⁵⁴

The PFA Act applies equally to gay, lesbian, bisexual, and transgender relationships.

See Chapter XIII, Teen Dating Violence, for more information about dating violence and special consideration for dating violence victims.

⁴⁹ 23 Pa. C.S. § 6102(a).

⁵⁰ *Id.*

⁵¹ [R.G. v. T.D.](#), 672 A.2d 341 (Pa. Super. 1996).

⁵² [Varner v. Holley](#), 854 A.2d 520 (Pa. Super. 2004).

⁵³ [Evans v. Braun](#), 12 A.3d 395 (Pa. Super. 2010).

⁵⁴ *Id.*

Sexual orientation

All intimate partnerships are covered under the PFA Act, regardless of sexual orientation.⁵⁵ Where plaintiff testified that he had a six-week sexual relationship with his “former roommate and homosexual lover,” the Superior Court found the evidence was sufficient to establish an intimate relationship under the PFA Act.⁵⁶

Relationship by “consanguinity” includes brother and sister business partners when brother abused sister at work

In **Custer v. Cochran**, a sister and brother were involved in a family business, along with two other siblings.⁵⁷ The siblings were involved in a business dispute; the sister and one of the other siblings sued for corporate dissolution based on the brother’s threats and oppression. In addition, the sister obtained a PFA against her brother because of an incident that arose at work. During a conversation at work, the brother continually yelled at his sister, followed her and pushed his way into her office, knocking her over backwards. When the sister tried to return the eyeglasses that had fallen off her brother’s head during the scuffle, he hit her arm, which recently had been in a splint following surgery. The brother also ransacked her purse and office, throwing contents onto the floor and out the door. The brother was much bigger than his sister and had acted violently towards her in the past.

The Pennsylvania Superior Court affirmed the trial court’s entry of a PFA in this case, determining that the sister was looking for protection from her brother’s abuse, she was not asking the PFA court to resolve their business dispute.⁵⁸

Relationship by “consanguinity” includes relationship between child’s mother and child’s paternal grandfather

A child’s mother filed a PFA order after the child’s paternal grandfather showed her a handgun and issued a veiled threat about being allowed to see his grandchild. The child’s mother and father (the defendant’s son) were never married. The trial court entered an order evicting the paternal grandfather from the mother’s home, and prohibited all contact with her, except under very limited circumstances. The paternal grandfather appealed, claiming that the PFA Act did not cover the relationship between him and the child’s mother. On appeal, the Superior Court affirmed the trial court’s entry of a PFA order, determining that the mother and paternal grandfather both “have a direct blood relationship to the child, and by extension are inextricably linked to each other by that relationship.”⁵⁹

⁵⁵ [D.H. v. B.O., 734 A.2d 409 \(Pa. Super. 1999\).](#)

⁵⁶ *Id.*

⁵⁷ [Custer v. Cochran, 933 A.2d 1050 \(Pa. Super. 2007\).](#)

⁵⁸ *Id.*

⁵⁹ [Slusser v. DeBoer, 985 A.2d 974 \(Pa. Super. 2009\).](#)

Relationship by “affinity” includes brother- and-sister-in-law relationship

The term “affinity” in the PFA Act’s definition of “family and household member” includes the familial relationship of brother-in-law and sister-in-law. In **McCance v. McCance**, the sister-in-law filed for and received a PFA order from the trial court.⁶⁰ The PFA filing resulted from a custody exchange incident where her brother-in-law jumped in front of her car, yelled obscenities and verbal threats, and struck her car with his fist hard enough to cause \$1,000 in damages. The defendant challenged his sister-in-law’s standing, claiming that their relationship was not covered under the PFA Act. The Superior Court examined the definition of affinity and affirmed the trial court’s entry of the PFA order.⁶¹

Relationship by “affinity” includes relationship between child and parent’s long-term, live-in partner

In **Commonwealth v. Walsh**, the Superior Court affirmed that a child had an affinity relationship with his mother’s domestic partner.⁶² In this case, the child’s mother sought and received a temporary PFA order on the child’s behalf.⁶³ After entry of the order, the defendant induced the child’s friend to pass on threats to the child. The trial court found the defendant guilty of indirect criminal contempt, sentenced him to six months’ probation, and extended the final PFA order for three years. On appeal, the Superior Court upheld the conviction, finding that defendant and child were related by affinity, which is defined as “marriage or by ties other than blood.”⁶⁴ The court explained that the child and defendant resided together for 13 years, the defendant was involved in the child’s life since she was 5 years old, and the defendant treated the child like a stepdaughter.⁶⁵ Consistent with the goal of the PFA Act to provide the courts with flexibility to protect and prevent further abuse, “it is incumbent upon [the court] to interpret ‘affinity’ so as to include this relationship.”⁶⁶

Relationship between sexual assault victim and perpetrator of assault not covered by PFA Act

The Superior Court determined that a sexual assault victim and her perpetrator do not have an “intimate partner” relationship that may be covered by the PFA Act in **Scott v. Shay**.⁶⁷ The Superior Court analyzed the intent of the PFA Act and reviewed the types of relationships covered, including dating relationships.⁶⁸ The court distinguished between intimate partners as those persons who

⁶⁰ [McCance v. McCance, 908 A.2d 905 \(Pa. Super. 2006\).](#)

⁶¹ *Id.*

⁶² [Commw. v. Walsh, 36 A.3d 613 \(Pa. Super. 2012\).](#)

⁶³ *Id.*

⁶⁴ *Id.* at 618.

⁶⁵ *Id.*

⁶⁶ *Id.* at 618-19.

⁶⁷ [Scott v. Shay, 928 A.2d 312 \(Pa. Super. 2007\).](#)

⁶⁸ *Id.*

mutually choose to enter relationships and are covered by the Act and those persons whose only relationship is perpetrator and sexual assault victim.⁶⁹

WHAT CONSTITUTES ABUSE UNDER THE PFA ACT?

Physical injury is not a prerequisite for a finding of abuse under the statute, and the abuse does not have to rise to the level of criminality to qualify for protection under the PFA Act.⁷⁰ The PFA Act includes five categories of abuse.⁷¹

The defendant's action must fall within at least one category to qualify as abuse under the statute:

- attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury or any of various listed crimes of rape and sexual assault
- placing another in reasonable fear of imminent serious bodily injury⁷²
- causing another to be falsely imprisoned⁷³
- physically or sexually abusing minor children⁷⁴
- knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following that person, without proper authority, under circumstances that place that person in reasonable fear of bodily injury⁷⁵

PROVING ABUSE

Burden of Proof

At the final order hearing, the plaintiff must prove the allegations of abuse by a preponderance of the evidence.⁷⁶

⁶⁹ *Id.* at 316-17.

⁷⁰ [Fonner v. Fonner, 731 A.2d 160 \(Pa. Super. 1999\)](#); [R.G. v. T.D., 672 A.2d 341 \(Pa. Super. 1996\)](#); [Miller v. Walker, 665 A.2d 1252 \(Pa. Super. 1995\)](#).

⁷¹ 23 PA. C.S. § 6102(a).

⁷² See *Fonner*, 731 A.2d 160 (physical injury not required); see also [Weir v. Weir, 631 A.2d 650 \(Pa. Super. 1993\)](#) (physical menace put plaintiff in fear of bodily injury).

⁷³ 18 PA. C.S. § 2903.

⁷⁴ The PFA Act definition of child abuse includes, but is not limited to, abuse covered by the Child Protective Services Law. 23 PA. C.S. § 6102(a)(4). [Viruet v. Cancel, 727 A.2d 591 \(Pa. Super. 1999\)](#); [Miller v. Walker, 665 A.2d 1252 \(Pa. Super. 1995\)](#); see also, [Chronister v. Brenneman, 742 A.2d 190 \(Pa. Super. 1999\)](#) (parents may use physical punishment to discipline children).

⁷⁵ *R.G.*, 672 A.2d at 341.

⁷⁶ 23 PA. C.S. § 6107(a). The burden of proof in an indirect criminal contempt proceeding is beyond a reasonable doubt. See [Commw. v. Nelson, 690 A.2d 728 \(Pa. Super. 1997\)](#).

Prior Abuse Is Relevant and Admissible

Evidence of prior abuse is relevant and admissible in PFA and criminal cases.⁷⁷ Defendants in both civil and criminal cases have repeatedly challenged the admission of “old” abuse; on appeal, Pennsylvania appellate courts have upheld the admission of this evidence. In the criminal context, evidence of abuse that began 10 years prior to the victim’s murder was admitted to show the escalation of the abuse, the chain or sequence of events which formed the history of the case, and demonstrated the perpetrator’s motive, malice and ill will toward the victim.⁷⁸

PFA appellate cases also demonstrate that “old” instances of abuse are relevant and admissible. For example, in **Snyder v. Snyder**, the trial court admitted pro se the plaintiff wife’s testimony regarding abuse that had occurred on several previous occasions, some incidences occurring five months earlier.⁷⁹ The Superior Court affirmed the trial court’s consideration of this testimony.

Similarly, in **Raker v. Raker**, the Superior Court approved the trial court’s consideration of testimony regarding the defendant’s threatening and abusive behavior toward his wife that occurred four months earlier.⁸⁰ In **Miller v. Walker**, the trial court admitted testimony regarding abuse by the defendant father that occurred six years earlier, and the Superior Court affirmed.⁸¹

Filing PFA Petition Weeks After Last Abusive Incident Does Not Cause Complaint To Fail

In **Hood-O’Hara v. Wills**, the defendant argued on appeal that, because the plaintiff had not claimed that any incidences of abuse occurred during the six-week separation prior to her filing of the petition, the complaint should be dismissed.⁸² The plaintiff testified to several prior instances of abuse, some occurring two months and two years prior to filing. The Superior Court rejected the defendant’s argument, stating, “[T]his court has previously held that the Protection From Abuse Act requires flexibility in the admission of evidence and that prior instances of abuse are relevant and admissible.”⁸³

Evidence of Medical Treatment Is Not Required

In **Karch v. Karch**, the plaintiff testified during the PFA hearing that she and her husband were engaged in a heated discussion about their pending divorce.⁸⁴ During the discussion, her husband made the shape of a gun with his hands and “fired it while touching his wife’s head with enough

⁷⁷ For more information, see [Chapter II: Evidence](#).

⁷⁸ *Commw. v. Jackson*, 900 A.2d 936 (Pa. Super. 2006).

⁷⁹ [Snyder v. Snyder](#), 629 A.2d 977 (Pa. Super. 1993).

⁸⁰ [Raker v. Raker](#), 847 A.2d 720 (Pa. Super. 2004).

⁸¹ [Miller v. Walker](#), 665 A.2d 1252 (Pa. Super. 1995).

⁸² [Hood-O’Hara v. Wills](#), 873 A.2d 757 (Pa. Super. 2005).

⁸³ *Id.* at 761.

⁸⁴ [Karch v. Karch](#), 885 A.2d 535 (Pa. Super. 2005).

force to cause pain.”⁸⁵ The husband then told her, “There is your future.”⁸⁶ After the trial court entered a PFA order, the husband appealed, claiming the wife’s testimony should not have been credited because she did not seek medical treatment. The Superior Court found that neither the PFA Act nor case law require victims to seek medical treatment or that there be medical evidence for testimony to be found credible.⁸⁷

Force Is Not Required to Establish Sexual Abuse

The Pennsylvania Superior Court recently ruled in **Boykai v. Young** that requiring a current or former intimate partner to submit to sex as a condition for receiving financial support amounts to both intellectual and psychological force.⁸⁸ The court held that such an act meets the definition of abuse under the Protection From Abuse Act, and upheld the trial court’s order granting the victim a final PFA order.

Evidence of Police Action Is Not Required

Even though the PFA Act requires police to file an incident report when responding to a domestic violence call, the lack of such a report does not preclude the issuance of a PFA order. In **Hood-O’Hara v. Wills**, the plaintiff’s former boyfriend appealed the entry of a PFA order against him, arguing that because there were no police reports, the trial judge erred when the judge found the plaintiff to be more credible.⁸⁹ The Superior Court stated, “Nowhere in the PFA Act itself or in the body of case law interpreting it is there a requirement that a police report be filed.”⁹⁰

In **Karch v. Karch**, the plaintiff went to the police station after the incident, reported the incident and, afraid to go home, slept in her car in the police station parking lot. The police did not file a report. In appealing the PFA order entered against him, the defendant (plaintiff’s husband) claimed that the police department’s failure to file the report precluded the entry of a PFA order. In response, the Superior Court cited **Hood-O’Hara v. Wills** for the principle that neither the PFA Act nor case law require that a police report be filed to obtain a PFA, and stated:

We wish to make it abundantly clear that this court will not infer that the failure of the police to act on a report of domestic violence means that the victim is not credible, and we will not place the onus on the victim to force police departments to comply with [the mandatory reporting requirement of the PFA Act] as a prerequisite for obtaining a PFA. Lastly, the husband has not cited to any legal authority to support the ludicrous notion that the failure of the police to comply with [the mandated reporting] should be held against the victim.⁹¹

⁸⁵ *Id.* at 538-39.

⁸⁶ *Id.* at 539.

⁸⁷ *Id.*

⁸⁸ [Boykai v. Young](#), 83 A.3d 1043 (Pa. Super. 2014).

⁸⁹ *Hood-O’Hara*, 873 A.2d 757.

⁹⁰ *Id.* at 761.

⁹¹ *Karch*, 885 A.2d at 538 (citing *Hood-O’Hara*, 873 A.2d 757).

Court May Not Use Criminal Culpability Standard in Evaluating PFA Claim

In **Boykin v. Brown**, the plaintiff filed a PFA petition against her former intimate partner, alleging that he had raped her during a visitation exchange.⁹² The trial court held a hearing where the defendant admitted to sex, but declared it was consensual. The trial court conditioned the entry of the PFA upon whether the county prosecutor decided to file charges. The trial court dismissed the PFA petition after learning that the county prosecutor decided not to file charges. The Superior Court reversed and remanded, observing that the burden of proof in a PFA case is a preponderance of the evidence and that it was erroneous to hold the plaintiff to a criminal culpability standard.⁹³

Actual Physical Injury Not Required; Reasonable Fear Is Adequate

Physical blocking and wall punching

The PFA Act requires only that a victim's fear of imminent serious bodily injury be reasonable. The Act does not call for actual physical contact, and a victim is not required to wait for physical or sexual abuse for the Act to apply. Thus, in **Fonner v. Fonner**,⁹⁴ testimony that the defendant husband followed the wife through the home, was angry, upset, loud and badgering, stood in front of her and blocked her exit, touched her arm and at one point punched the wall in front of his wife was adequate to support the wife's claim that the defendant's actions placed her in reasonable fear of imminent bodily harm.⁹⁵

Actual physical injury is not required under the PFA Act.

Dangerous driving

Driving at excessive speeds and using the car to trap a victim can constitute abuse. In **Weir v. Weir**, the defendant and victim were traveling in their car, discussing their pending divorce. The defendant husband began driving at an excessive rate of speed over dark winding roads and, at one point, after the victim wife got out of the parties' van, the defendant used the van to trap the victim between the van and a concrete bridge abutment.⁹⁶ Although the victim had no physical injuries, these acts were sufficient to constitute abuse.⁹⁷

⁹² [Boykin v. Brown](#), 868 A.2d 1264 (Pa. Super. 2005).

⁹³ *Id.*

⁹⁴ [Fonner v. Fonner](#), 731 A.2d 160 (Pa. Super. 1999).

⁹⁵ *Id.* at 163.

⁹⁶ [Weir v. Weir](#), 631 A.2d 650 (Pa. Super. 1993).

⁹⁷ *Id.* at 657.

Splashing water onto child's face

Splashing water onto a child's face, while holding the child down in a tub may cause fear and constitute abuse. In **DeHaas v. DeHaas**, the defendant held her child down in the bathtub and splashed water onto the child's face, causing the child to choke and be in fear.⁹⁸ The trial court held that even though the child suffered no physical harm, the child's fear was adequate to support entry of an order, and the Superior Court affirmed.⁹⁹

Blocking car, yelling obscenities and verbal threats, hitting car with fist and causing damage

In **McCance v. McCance**, during a custody exchange, the father blocked his sister-in-law's car, yelled obscenities and verbal threats, and struck her car with his fist hard enough to cause \$1,000 in damages.¹⁰⁰ Other evidence established that the father "had anger issues," a drinking problem, and was physically violent with others in the past.

The Superior Court affirmed the trial court's determination that the father's acts had placed his sister-in-law in reasonable fear of imminent serious bodily injury sufficient to support the entry of a PFA order.¹⁰¹

Perpetrator's intent is not relevant to reasonable fear determination

In **Raker v. Raker**, the husband appeared at 2 a.m. in the wife's half of a duplex with socks on his hands and holding a knife or a large nail. The wife testified to prior abusive behavior.¹⁰² The trial court entered a PFA order based on the plaintiff's claim that her husband's actions placed her in fear, and the husband appealed, claiming that there was insufficient evidence to support her claim. On appeal, the Superior Court affirmed, finding that the focus for a trial court's determination is whether the husband's acts placed his wife in fear of imminent serious bodily injury. The court further found that the husband's actual intent was "of no moment."¹⁰³

Verbal/Written Threats Sufficient

Threats to kill - e-mail threat

Verbal threats may cause reasonable fear. An e-mailed threat to kill without actual or attempted physical violence may serve as the basis for the issuance of a PFA order.¹⁰⁴

⁹⁸ [DeHaas v. DeHaas, 708 A.2d 100 \(Pa. Super. 1998\).](#)

⁹⁹ *Id.*

¹⁰⁰ [McCance v. McCance, 908 A.2 905 \(Pa. Super. 2006\).](#)

¹⁰¹ *Id.* at 910-11.

¹⁰² [Raker v. Raker, 847 A.2d 720 \(Pa. Super. 2004\).](#)

¹⁰³ *Id.* at 726.

¹⁰⁴ See [R.G. v. T.D., 672 A.2d 341 \(Pa. Super. 1996\).](#)

Telephone threat

A telephone threat may constitute abuse. In **Burke v. Bauman**, the defendant telephoned the victim, his former girlfriend, to arrange retrieval of his clothes from her residence.¹⁰⁵ During the call, the two discussed criminal charges that the defendant was facing as a result of his destruction of the victim's property. He threatened her during these calls. "I'll get you back. You are going to burn for this. I will be thinking every day if I go to jail how I can't wait to get out and make you pay. I'm going to get someone to destroy you and the rest of your stuff." The defendant had previously pushed the victim, smashed property, kicked holes in walls and doors, displayed fits of rage at the victim's children, and destroyed her car.

The trial court entered a temporary order, but at the final hearing, the victim was hospitalized and unavailable. After a discussion with counsel, the trial court entered an order dismissing the plaintiff's petition, stating that the telephone threats were insufficient to support a finding of abuse. The Superior Court reversed, finding that a person can be placed in reasonable fear of imminent bodily injury based on telephone calls, especially when coupled with past incidents of abuse.¹⁰⁶

False Imprisonment Is Abuse

The PFA Act incorporates the criminal code definition of false imprisonment in its definition of abuse.¹⁰⁷ False imprisonment is committed when an individual knowingly restrains another unlawfully so as to interfere substantially with his or her liberty.¹⁰⁸ The Superior Court held that an abuser's restraint of his wife for a period of 10 to 15 minutes was sufficient to meet the definition of false imprisonment under the PFA Act in **Snyder v. Snyder**.¹⁰⁹

Stalking Is Abuse

The PFA statute provides that stalking is abuse, defining it as follows:

Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury.¹¹⁰

The PFA statute's stalking definition expressly limits itself to the PFA Act and makes it inapplicable to criminal proceedings.¹¹¹ There are two significant differences between the definition of stalking in the crimes code and its definition in the PFA Act.

¹⁰⁵ [Burke v. Bauman, 814 A.2d 206 \(Pa. Super. 2002\).](#)

¹⁰⁶ *Id.* 814 A.2d at 209.

¹⁰⁷ 23 PA. C.S. § 6102(a).

¹⁰⁸ 18 PA. C.S. § 2903.

¹⁰⁹ [Snyder v. Snyder, 629 A.2d 977 \(Pa. Super. 1993\).](#)

¹¹⁰ Compare 23 PA. C.S. § 6102(a) and 18 Pa. C.S. § 2709.1.

¹¹¹ *Id.*

- The PFA definition requires only reasonable fear and does not require the involvement of substantial emotional distress to prove stalking.¹¹² Also, the PFA definition requires a family and household relationship for the court to have jurisdiction.
- The crimes code definition of stalking does not require any specific relationship between the defendant and victim for a charge to arise.¹¹³

To learn more about stalking crimes and stalking as abuse, see Chapter IX: Stalking.

Telephone or e-mail threats can place a person in reasonable fear of imminent bodily injury.

Repeated calls and e-mails

In **R.G. v. T.D.**, the Superior Court affirmed that abuse had occurred when a university student made repeated telephone calls, sent e-mail messages, including threatening ones, and advised his former girlfriend, also a student, that he was obsessive-compulsive and she was his obsession object.¹¹⁴ The former girlfriend testified that she was very scared of his increasingly hostile messages and fearful of walking around campus, even in daylight.¹¹⁵

Child Abuse

Child abuse under PFA Act differs from Child Protective Services (CPS) and criminal law

The definition of child abuse in the PFA Act includes and incorporates the definitions of child and sexual abuse set forth in the Child Protective Services law,¹¹⁶ but does not limit the PFA Act's definition of child abuse to abuse as defined in the CPS Law.¹¹⁷ The child abuse definition under the PFA Act is broader than the criminal statute and child protective services definition. Therefore, the child abuse protections of the PFA Act apply even when the abuse against a child does not rise to the level that would result in an indicated report of child abuse or removal of a child from the home under CPS law.¹¹⁸ It is also not necessary for the level of violence against the child to give rise to criminal culpability for the PFA Act to apply.¹¹⁹

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ [R.G. v. T.D., 672 A.2d 341 \(Pa. Super. 1996\).](#)

¹¹⁵ *Id.*

¹¹⁶ 23 PA. C.S. § 6102(a)(4).

¹¹⁷ 23 PA. C.S. §§ 6102(a), 6303(b.1).

¹¹⁸ See [Viruet ex rel. Velasquez v. Cancel, 727 A.2d 591 \(Pa. Super. 1999\).](#)

¹¹⁹ See [Miller v. Walker, 665 A.2d 1252 \(Pa. Super. 1995\).](#)

The PFA Act definition of “child abuse” is broader than the definition under the criminal statute or CPS law.

Excessive, reckless corporal punishment is child abuse

Children can qualify for a PFA order under other definitions of abuse as well, for instance, when a child receives bodily injury as a result of excessive corporal punishment. In **Miller v. Walker**, plaintiff filed a PFA petition on behalf of her minor children, alleging that the defendant (the children’s father) spanked their son with a board, causing bruises on the child’s leg.¹²⁰ The son testified that his father hit him with a board on the leg and grabbed his arm, causing him to bruise.¹²¹ The daughter testified that she heard her brother crying after their father took a board into her brother’s room.¹²² Photographs of the bruises were also introduced.¹²³ The trial court entered a PFA order and the Superior Court affirmed, holding that “[c]orporal punishment inflicted recklessly or in an enraged manner may result in bodily injury, supporting issuance of a PFA order.”¹²⁴

Corporal punishment which does not cause bruising or fear is not abuse

In **Ferri v. Ferri**, the Superior Court reversed a trial court order entering a PFA on behalf of a 6-year-old child whose mother had slapped her.¹²⁵ The slap did not leave a bruise and there was no testimony at the trial court level that the child was in imminent fear of bodily injury.¹²⁶ A similar outcome was reached in **Chronister v. Brenneman**, where a father administered corporal punishment by hitting his 16-year-old daughter with a strap across the buttocks after she admitted lying to him.¹²⁷ The Superior Court held this act did not constitute abuse; there was no evidence that the strapping resulted in anything more than a temporary painful condition and the strapping did not leave bruises.¹²⁸

¹²⁰ *Id*

¹²¹ *Id.* at 1254.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1258.

¹²⁵ [Ferri v. Ferri, 854 A.2d 600 \(Pa. Super. 2004\).](#)

¹²⁶ *Id.*

¹²⁷ [Chronister v. Brenneman, 742 A.2d 190 \(Pa. Super. 1999\).](#)

¹²⁸ *Id.*

CONTINUING A FINAL ORDER HEARING AND/OR A TEMPORARY PFA ORDER

Court May Issue Continued *Ex Parte* Temporary Orders

Pursuant to section 6107(c) of the PFA Act, trial courts have discretion to continue a final PFA hearing – even beyond the 10-day hearing requirement – when requested by either a plaintiff or defendant.¹²⁹ Courts may enter or continue a temporary PFA order if necessary to protect the petitioner or their children for the duration of the continuance.¹³⁰ The court's decision to deny or grant a continuance is reviewed using an abuse of discretion standard.¹³¹

If a defendant has not yet been served with a temporary order prior to the final order hearing, a court may reissue the temporary order and schedule a new final order hearing within 10 business days of the order's reissuance. The court may also wish to select an alternative means of serving defendant as permitted in the Pennsylvania Rules of Civil Procedure.¹³²

PROCEDURE – FINAL PFA HEARINGS

General Rule

The PFA Act requires that, within 10 business days of the filing of a PFA petition, a hearing shall be held before the court, at which time the plaintiff must prove allegations of abuse by a preponderance of the evidence.¹³³

Required Notices

The trial court must, at the time the defendant is notified of the hearing, advise the defendant of:

- The right to be represented by counsel
- The possibility that firearms, other weapons and ammunition may be ordered to be relinquished
- The options for firearms relinquishment

¹²⁹ 23 PA. C.S. § 6107(c); [Ferko-Fox v. Fox, 68 A.3d 917 \(Pa. Super. 2013\)](#); PA. R. CIV. P. 216(A)(4).

¹³⁰ *Id.*

¹³¹ *Ferko-Fox*, 68 A.3d 917.

¹³² PA. R. CIV. P. 1930.4(b).

¹³³ 23 PA. C.S. § 6107(a). This section has been interpreted to require that the court schedule a final order hearing even if it denies the PFA plaintiff's request for a temporary order. See [Section 0, paragraph 0](#) of this chapter for more information.

- The possibility that federal law may prohibit possession of firearms, including an explanation of the federal prohibition for certain protection orders¹³⁴
- The fact that any protection order granted by a court may be considered in subsequent PFA proceedings
- The fact that prior protection orders may be considered in custody proceedings.¹³⁵

Notice must be printed and delivered in a manner that easily attracts attention to its content.¹³⁶

See Chapter IV: PFA and Custody for more information regarding custody in PFA proceedings. See Chapter VI: Firearms for more information about firearms issues in domestic violence matters.

No Prima Facie Allegation of Abuse: Plaintiff Still Entitled to a Hearing

A petition brought under the PFA Act that does not contain a prima facie allegation of abuse does not deprive the trial court of authority to conduct a hearing on the petition. A PFA petition does not need to contain prima facie allegations of abuse because petitions are often initiated pro se.

In **Weir v. Weir**, the Superior Court rejected a husband's argument that his wife's petition did not contain a prima facie allegation of abuse and declined to adopt the husband's argument that trial courts lack authority to conduct a hearing on a PFA petition that may not contain a prima facie allegation of abuse.¹³⁷ The Superior Court observed that PFA petitions are often pro se, and stated:

To dismiss inartfully drafted petitions which may not, on their face, be couched in precise definitional terms set forth in the statute would eviscerate the purpose and goals of the PFA Act, which is to provide spouses, household members, intimate partners and children with immediate temporary protection from abuse.¹³⁸

See Chapter XI: Pro Se Process for more information about the court's response to pro se litigants.

Court Must Schedule Final Order Hearing; Court Cannot Dismiss Petition at Temporary Order Stage

In **Drew v. Drew**, the Superior Court reversed a trial court's decision to dismiss plaintiff's temporary order petition and deny her a final order hearing.¹³⁹ The pro se plaintiff alleged that her husband grabbed her in a chokehold, covering her mouth and nose with his hand, causing her to fall to the ground. She alleged that this incident was the latest in a series of abusive incidents. The court obtained an ex parte statement from her, during which she admitted that the police were called to

¹³⁴ 18 U.S.C. § 922(g)(8),

¹³⁵ *Id.*

¹³⁶ *Id.*; see also PA. R. CIV. P. 1905 (notice form).

¹³⁷ [Weir v. Weir, 631 A.2d 650 \(Pa. Super. 1993\).](#)

¹³⁸ *Id.* at 654.

¹³⁹ [Drew v. Drew, 870 A.2d 377 \(Pa. Super. 2005\).](#)

the residence, but also that she did not tell them in the presence of her husband that she had been abused.

The trial court denied temporary order relief and a final hearing request on the basis of the wife's ex parte, pro se testimony. The Superior Court reversed, explaining that section 6107(a) provides that a hearing shall be held within 10 days, at which time the plaintiff must prove the allegation of abuse by a preponderance of the evidence. The court found that the use of the word "shall" mandated that a hearing be held.¹⁴⁰

The Evidentiary Hearing Must Comport with Due Process

Having both parties testify at the ex parte temporary order proceeding and subsequently refusing to hold a final order hearing led to reversal of a trial court's decision in **Lanza v. Simconis**.¹⁴¹ In this case, the plaintiff's pro se petition alleged that the defendant ripped the phone out of her hands and from the wall as she was attempting to use it, pushed her against the wall, and threatened to kill her.¹⁴² At the temporary order proceeding, which would ordinarily be held ex parte,¹⁴³ the defendant appeared and the trial court took testimony from both parties, which consisted of back-and-forth statements and counter-statements.¹⁴⁴ At the end of the temporary order proceeding, the judge dismissed the PFA petition, indicating that the parties' testimony was in conflict and that the judge could not decide which of them was telling the truth.¹⁴⁵

A plaintiff may testify to abuse that was not alleged in the pleadings.

The plaintiff appealed, claiming that the court failed to schedule and hold a proper evidentiary hearing within 10 days in accordance with section 6107. The plaintiff argued that the proceeding held by the court did not meet the requirements of due process. Because the plaintiff was not given the opportunity to appear with counsel, submit evidence and witnesses to support her claim or cross-examine the defendant, the proceeding could not constitute a final order hearing. The Superior Court agreed with the plaintiff and reiterated that due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner," and reversed the trial court's order dismissing the case. The Superior Court compared the burdens of proof applicable to temporary proceedings (plaintiff to convince court that plaintiff is in immediate and present danger of abuse)

¹⁴⁰ *Id.* See *Cipolla* 398 A.2d 1053, 1054 (hearing must be held regardless of whether ex parte order issued).

¹⁴¹ [Lanza v. Simconis, 914 A.2d 902 \(Pa. Super. 2006\)](#).

¹⁴² *Id.* at 904.

¹⁴³ See *Ferko-Fox v. Fox*, 68 A.3d 917, n.6 (Pa. Super. 2013) (explaining that PFA defendants are "barred from participating" in ex parte temporary order proceedings).

¹⁴⁴ *Lanza*, 914 A.2d at 904.

¹⁴⁵ *Id.*

and final proceedings (plaintiff must prove abuse by a preponderance of the evidence).¹⁴⁶ To support its conclusion, the court pointed to “shall” in section 6107 and its prior holding in *Drew*.

Plaintiff Not Limited to Allegations in Petition

In ***Snyder v. Snyder***, the trial court allowed the plaintiff to testify to incidents of abuse by her defendant husband that were not listed in plaintiff’s pro se petition.¹⁴⁷ The Superior Court upheld the admission and consideration of the incidents not pleaded in the petition due to their recent nature (occurring within a few months prior to filing) and their probative relevance. The Superior Court also stated that the PFA Act does not anticipate that the person filing a petition will be rigorously limited to the specific allegations in the petition, and that given the protective and preventive purpose of the Act, a requirement of specificity in the pleadings would frustrate the expeditious nature of the PFA Act.

Court May Not Defer PFA Determination To Prosecutor’s Charge Decision

A PFA judge may not base a determination on whether abuse occurred on the presence or absence of criminal charges relating to the abuse. The PFA Act does not require that acts rise to the level of criminal culpability in order for abuse to be found. This was the Superior Court’s holding in ***Boykin v. Brown***.¹⁴⁸ In this case, the plaintiff filed a PFA complaint against her former intimate partner, alleging that he had raped her during a visitation exchange. At a hearing, the defendant admitted to having sex with the plaintiff, but claimed it was consensual. The trial court continued the hearing, and determined it would enter a PFA order only if the police filed criminal charges based upon the incident. When the district attorney’s office did not file charges, the court dismissed the PFA complaint. The Superior Court reversed and remanded, holding that the prosecutor’s decision whether to charge was not relevant to the PFA court’s decision.

Timing of the Hearing

The term “shall” as used in the PFA Act imposes a mandatory period of 10 business days, within which final order hearings must be conducted.¹⁴⁹

¹⁴⁶ *Id.*

¹⁴⁷ [Snyder v. Snyder, 629 A.2d 977 \(Pa. Super. 1993\).](#)

¹⁴⁸ [Boykin v. Brown, 868 A.2d 1264 \(Pa. Super. 2005\).](#)

¹⁴⁹ *Heard*, 614 A.2d 255. If a hearing is not held [within this 10-day period] the trial court lacks jurisdiction to grant relief to the filing party. *P.E.S. v. K.L.* 720 A.2d 487, 789 (Pa. Super. 1998). *citing Heard* 614 A.2d 255, 258. For indirect criminal contempt proceedings, however, the statute requires merely that the hearing be scheduled within ten days of filing the charge or complaint of indirect criminal contempt. See 23 PA. C.S. § 6113(f); [Commw. v. Ortiz, 802 A.2d 617 \(Pa. Super. 2002\)](#), *aff’d*, 573 Pa. 373, 825 A.2d 629 (2003).

No Right to Court-Appointed Counsel

Although PFA litigants have the right to be represented by counsel at the final order hearing,¹⁵⁰ indigent parties have no right to court-appointed counsel.¹⁵¹

Specific Findings Not Required

A judge in a PFA hearing is not required to make an adjudication containing a statement of issues, specific factual findings or legal conclusions. There is no statutory mandate to set out a specific finding of abuse in a PFA proceeding.¹⁵²

Identifying Information

Where either party furnishes it, the final order shall specify the defendant's Social Security number and date of birth.¹⁵³ This information is forwarded by the prothonotary to the Pennsylvania State Police and entered into its Protection Order Registry. The registry is part of the Commonwealth Law Enforcement Assistance Network (CLEAN), which allows law enforcement inside and outside the commonwealth to verify existing protection orders for enforcement.

Surcharge

According to the Act, if the court enters the final PFA order after a hearing, a surcharge of \$100 shall be assessed against the defendant. If the parties enter into an agreement that becomes the order, the surcharge does not apply.¹⁵⁴

No Conversion of PFA to CPS Proceeding

It is a violation of due process for a court hearing child abuse allegations in a PFA action to convert the PFA action into a child dependency proceeding under the Child Protective Services Law and declare the child dependent.¹⁵⁵ However, it is important to note that, in certain circumstances, a PFA finding of abuse with a child as a protected party constitutes a founded report of child abuse under the CPS law.¹⁵⁶

¹⁵⁰ 23 Pa. C.S. § 6107(a).

¹⁵¹ [Weir v. Weir, 631 A.2d 650 \(Pa. Super. 1993\).](#)

¹⁵² *Id.*

¹⁵³ 23 Pa. C.S. § 6108(b).

¹⁵⁴ 23 Pa. C.S. § 6106(d). The \$100 surcharge is distributed as follows: \$25 to the Commonwealth, appropriated to the PSP; \$25 to the Pennsylvania Department of Public Welfare for use for victims of domestic violence; and \$50 to the county for implementing PFA provisions (\$25 to the sheriff and \$25 to the court). *Id.*

¹⁵⁵ [Brooks-Gall v. Gall, 840 A.2d 993 \(Pa. Super. 2003\).](#)

¹⁵⁶ 23 Pa. C.S. § 6303(a) (i) Only one individual is charged with the abuse in the PFA action; (ii) only that individual defends against the charge; (iii) the adjudication involves the same factual circumstances involved in the allegation of child abuse; and (iv) the PFA adjudication finds that the child abuse occurred.

RELIEF AVAILABLE UNDER THE PFA ACT

General Rule – Broad Relief Available

The legislature crafted the PFA Act to provide broad relief to protect victims of domestic violence from abuse. Under the Act, the court may grant any order necessary to bring about the cessation of abuse.¹⁵⁷

The Superior Court recognized the broad relief provisions of the PFA Act in **Gerace v. Gerace**,¹⁵⁸ where it affirmed the trial court's order that a stepfather pay his stepdaughter \$8,680.85 to remedy the stepfather's failure to comply with the trial court's previous PFA order. The previous order directed the stepfather to return certain personal property to the stepdaughter. The broad relief provisions of the Act permitted the trial court to direct the stepfather to return his stepdaughter's property when procuring it by herself would potentially subject her to danger.

Do Not Abuse

The PFA court may direct the defendant to refrain from abusing plaintiff or minor children.¹⁵⁹

Exclusive Possession or Suitable Housing

The PFA court may grant exclusive possession of the residence owned or leased by the plaintiff or jointly owned or leased by the plaintiff and defendant.¹⁶⁰ If the defendant solely owns or leases the residence and the defendant has a duty to support the plaintiff or children, the PFA court may grant exclusive possession of the residence to the plaintiff, or, if the plaintiff agrees, require the defendant to provide suitable alternative housing.¹⁶¹

Custody

The PFA court may award temporary custody or establish temporary visitation rights with regard to the parties' minor children. In determining whether to award temporary custodial rights in a PFA order, the court shall consider any risk posed by the defendant to the children as well as risk to the plaintiff.¹⁶²

¹⁵⁷ 23 PA. C.S. § 6108(a).

¹⁵⁸ [Gerace v. Gerace, 631 A.2d 1360 \(Pa. Super. 1993\).](#)

¹⁵⁹ 23 PA. C.S. § 6108(a)(1).

¹⁶⁰ 23 PA. C.S. § 6108(a)(2).

¹⁶¹ 23 PA. C.S. § 6108(a)(3).

¹⁶² 23 PA. C.S. § 6108(a)(4).

No unsupervised physical custody if defendant abused child or poses a risk of abuse

If, after a hearing, the court finds that the defendant abused the parties' minor children or poses a risk of abuse to the children, the court shall not grant custody, partial custody or unsupervised visitation to defendant.¹⁶³

No unsupervised physical custody if defendant interfered with custody or poses a risk of interference with custody

If, after a hearing, the court finds that the defendant has been convicted of interfering with the custody of children or poses a risk of violating the criminal law prohibiting interference with custody of children, the court shall not grant custody, partial custody, or unsupervised visitation to the defendant.¹⁶⁴

Supervised custodial access by a third party requires affidavit

If, after a hearing, the court finds that defendant has inflicted abuse on the plaintiff or a child, the court may require supervised custodial access by a third party. The third party must agree to be accountable to the court for the supervision and to execute an affidavit of accountability.¹⁶⁵ See a Sample Third Party Affidavit Of Acceptance And Accountability and other information about supervised custodial access in Chapter IV: PFA and Custody.

No access to child or, at most, supervised physical custody in facility for serious abuse of plaintiff or child

If, after a hearing, the court finds that the defendant has inflicted serious abuse on the plaintiff or child, or poses a risk of abuse to the plaintiff or child, the court may award supervised visitation in a secure visitation facility, or may deny the defendant custodial access to a child.¹⁶⁶

Ordering child returned to plaintiff's custody

Where the defendant has forcibly or fraudulently removed a minor child from the care and custody of the plaintiff, the court shall order the return of the child unless the child would be endangered by the restoration.¹⁶⁷

¹⁶³ 23 PA. C.S. § 6108(a)(4)(i)(A).

¹⁶⁴ 23 PA. C.S. § 6108(a)(4)(i)(B).

¹⁶⁵ 23 PA. C.S. § 6108(a)(4)(ii).

¹⁶⁶ 23 PA. C.S. § 6108(a)(4)(iii).

¹⁶⁷ 23 PA. C.S. § 6104(a)(4)(iv).

The court may not direct that concerns about a child's welfare be addressed only in custody, not PFA proceedings.

Additional safety conditions

To prevent further abuse to the plaintiff and child, the court shall consider, and may impose, conditions necessary to ensure the safety of the plaintiff and children in a custody award.¹⁶⁸ Such conditions may include time limitations on custodial transfers, specific locations for transfers, and other conditions.

Trial court cannot refuse to consider custody relief request

In ***Egelman v. Egelman***, the Superior Court found that the trial court had erred when it directed that hearings regarding the welfare of the child could be heard only in the custody context, and not a PFA petition.¹⁶⁹ Denial of consideration of a petition for temporary custody in a PFA proceeding because special relief is available in a custody proceeding is improper because it ignores the special benefits the legislature intended to confer on the victims of domestic violence not generally available in emergency child custody cases.¹⁷⁰

In ***Lawrence v. Bordner***, a mother filed a PFA petition on behalf of her 15-year-old daughter against the child's father.¹⁷¹ The petition alleged that the father threw the daughter against the wall and threatened to punch her in the face. The petition also described other instances of abuse. The trial court entered a temporary PFA order. At the final order hearing, the father did not appear. The mother testified that, pursuant to a court order, she had custody and the father had partial physical custody of their daughter; however, the parties had informally arranged for the daughter to live with the father and his wife.

The daughter began to testify about the incident of abuse that led to the PFA petition. She testified that her father brought home a bottle of vodka, which he proceeded to drink and to offer to her. The daughter told her father that she didn't want to be around him when he drank, and that she was calling her stepmother to pick her up. The father then called the stepmother and advised her that if she came near daughter, he would kill her. The daughter and father continued to argue, and the father put his hands around his daughter's neck and choked her. The struggle continued, and the father choked his daughter again, and threw her into the other room.

As the daughter was detailing the abuse, the trial court interrupted, inquiring about the existence of a custody order. After learning that the daughter had resumed living with her mother, the trial court

¹⁶⁸ 23 PA. C.S. § 6108(a)(4)(vi).

¹⁶⁹ [Egelman v. Egelman](#), 728 A.2d 360 (Pa. Super. 1999).

¹⁷⁰ *Id.* at 365.

¹⁷¹ [Lawrence v. Bordner](#), 907 A.2d 1109 (Pa. Super. 2006).

refused to enter a PFA order. The judge indicated that he did not want to participate in a PFA proceeding, which would lead to a modification of an existing custody order.

On appeal, the Superior Court reversed, determining that the trial court erred when it refused to modify the existing custody order or to find that a PFA order was warranted.¹⁷²

The impact of custody relief on other custody orders

In its ruling in **Dye v. McCoy**,¹⁷³ the Superior Court reiterated that the purpose of the custody relief section of the PFA Act is to ensure the safety of the children above and beyond any other orders or relationships. For this reason, neither a pre-existing nor a subsequent custody order may nullify a PFA order. “To hold otherwise would have the effect of emasculating the central and extraordinary feature of the PFA, which is to prospectively control and prevent domestic violence.”¹⁷⁴ In 2006, this holding was reaffirmed by the Superior Court in **Lawrence v. Bordner**.¹⁷⁵

If the terms of a previously existing custody order conflict with a PFA order, the court may alter the custody order to avoid conflict.¹⁷⁶ However, the court must consider the child’s best interest in making this determination.¹⁷⁷

Child’s best interest must be considered

In considering custody relief under the PFA Act, a child’s best interest must be addressed.¹⁷⁸ In **Shandra v. Williams**, after the plaintiff mother informed the defendant that she was ending their relationship, the defendant called her names, threatened her, and acted as if he were going to strike her while the parties’ toddler was sitting on the plaintiff’s lap.¹⁷⁹ The court granted a PFA order that prohibited the defendant from abusing the plaintiff or the child and terminating the defendant’s contact with the child. The PFA modified an existing custody order granting the defendant contact with the child. No evidence about the child’s best interest was introduced during the hearing. The Superior Court reversed, and held that a court must consider the child’s best interest before denying a PFA defendant all contact with the child.

In **Lawrence v. Bordner**, the Superior Court reversed the trial court’s refusal to consider a PFA order for a child subject to an existing custody order.¹⁸⁰ Reaffirming its holding in Shandra, the court ruled

¹⁷² *Id.*

¹⁷³ [Dye v. McCoy, 621 A.2d 144 \(Pa. Super. 1993\).](#)

¹⁷⁴ *Id.*

¹⁷⁵ *Lawrence*, 907 A.2d at 1113.

¹⁷⁶ *Id.*

¹⁷⁷ [Shandra v. Williams, 819 A.2d 87 \(Pa. Super. 2003\)](#); see also *Lawrence*, 907 A.2d 1109.

¹⁷⁸ *Shandra*, 819 A.2d 87.

¹⁷⁹ *Id.*

¹⁸⁰ *Lawrence*, 907 A.2d at 1109.

that the trial judge's over-riding concern must be the best interest and welfare of the child, including the child's physical, intellectual, emotional and spiritual well-being.

For more information about custody relief in PFA cases, see Chapter IV: PFA and Custody.

Support

The PFA court may, after a hearing, direct the defendant to pay spousal and/or child support.¹⁸¹

Temporary support may be ordered

If the defendant has a duty to support the plaintiff or minor children, the PFA court may enter a temporary support order at the time of the final hearing.¹⁸² The order may direct the defendant to pay support to the plaintiff, require the defendant to provide health care coverage for the plaintiff and minor children, direct the defendant to pay for unreimbursed medical expenses for the plaintiff and minor children, or to make mortgage/rent payments on the plaintiff's or children's residence.¹⁸³

Plaintiff must file support complaint

A PFA support order is temporary, and the plaintiff must file for support within two weeks of the date the PFA order was issued. If a plaintiff does not file for support within this time, the support provision in the PFA order is void. When there is a subsequent ruling on a complaint for support, the support provision in the PFA order expires.

For more information about support issues in domestic violence cases, please see Chapter V: Child and Spousal Support.

No Contact

The PFA court may prohibit a defendant from contacting the plaintiff and minor children, including at the plaintiff's place of employment and the children's school, and from harassing the plaintiff, the plaintiff's relatives or minor children.¹⁸⁴

¹⁸¹ 23 PA. C.S. § 6108(a)(5).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ 23 PA. C.S. § 6108(a)(6).

Firearms, Ammunition and Other Weapons Relinquishment

Weapons

The PFA court may order the defendant to relinquish to the sheriff any weapons and ammunition that the defendant owns or possesses.¹⁸⁵

Firearms relinquishment

The PFA court may order the defendant's firearms relinquished regardless of whether the firearms were used or threatened to be used.¹⁸⁶

Factors for firearms removal at *ex parte* proceeding

The PFA Act provides a list of factors for the court to consider in determining whether to order weapons relinquishment at the *ex parte* temporary order proceeding.¹⁸⁷

The factors include:

- the petition demonstrates abuse with a firearm or other weapon "immediate and present danger of abuse" shown by any of several factors:
 - whether defendant previously violated a PFA order
 - whether defendant's past or present abuse resulted in injury to the plaintiff or children
 - whether the abuse occurred in public
- whether the abuse included threats of abuse or suicide
- killing or threatening pets
- an escalation of violence
- stalking or obsessive behavior
- sexual violence
- drug or excessive alcohol use¹⁸⁸

In addition, the court must consider whether the temporary PFA order would be likely to achieve its purpose if firearms or other weapons are not taken away.¹⁸⁹

¹⁸⁵ 23 PA. C.S. § 6108(a)(7).

¹⁸⁶ *Id.*

¹⁸⁷ 23 PA. C.S. § 6107(b)(3).

¹⁸⁸ 23 PA. C.S. § 6107(b)(3).

¹⁸⁹ 23 PA. C.S. § 6107(b)(3)(ii)(A).

Firearms prohibition, license surrender

The court may also prohibit the defendant from acquiring or possessing any firearms during the duration of the order, and may require the defendant to relinquish any firearms license that the defendant may possess.¹⁹⁰

Copy of PFA weapons order to police

A copy of the PFA order shall be transmitted to the county sheriff's department and to the local police force.¹⁹¹

Public access to firearms list prohibited

Sometimes a perpetrator of domestic violence has more than one firearm; in some instances, perpetrators have many firearms.

The PFA Act requires that any list of firearms must be kept part of the "permanent record" of the court and may not be made accessible to the public, except upon court order; as necessary by law enforcement and court personnel; or after redaction of information listing the firearms.¹⁹² PFA petition forms and order forms include a firearms list as "Attachment A."¹⁹³

Therefore, the PFA petition and order may be part of the public record, but any list of firearms in Attachment A must be kept separate. Law enforcement and court personnel may have a copy of Attachment A if necessitated by their jobs. Despite the privacy protection for Attachment A, it is clear that the plaintiff and his or her attorney of record may be given a full copy of the PFA petition and order, including the list of firearms in Attachment A. The defendant, and his or her attorney of record may be given a full copy of the PFA petition and order, including Attachment A. In addition, it is fully permissible to enter the petition, order, and Attachment A into PFAD.

Procedures and rules for enforcement regarding firearms relinquishment

The PFA Act contains extensive and complicated procedures for firearms surrender, storage and return.¹⁹⁴ These procedures are covered more fully in Chapter VI: Firearms.

Each county sheriff's office is responsible for overseeing firearms surrender, storage and return processes. When a PFA court orders a defendant to relinquish firearms, the defendant may have 24

¹⁹⁰ *Id.* Most defendants who are subject to PFA orders are also prohibited from owning or possessing guns under federal law. [For more information, see Chapter VI: Firearms.](#)

¹⁹¹ *Id.*

¹⁹² 23 PA. C.S. § 6108(a)(7)(v).

¹⁹³ PA. R. CIV. P. 1905.

¹⁹⁴ See 23 PA. C.S. §§ 6108(a)(7); 6108(a)(7.1), 6108.1; 6108.2; 6108.3; 6108.4; 6108.5.

hours after service of the PFA order (or until the close of the next business day if the sheriff's office is not open) to relinquish the firearms, other weapons and ammunition.¹⁹⁵

In some circumstances, the defendant may relinquish firearms to a third party for safekeeping; however, this process must be administered by and overseen by the sheriff's office and must be completed within the 24-hour relinquishment time frame.¹⁹⁶ If a third-party safekeeping arrangement is approved and a third-party safekeeping permit is issued by the sheriff, the defendant has 24 hours to file an acknowledgement of receipt of firearms by the third party. If the defendant does not surrender the firearms, other weapons and ammunition within 24 hours, the sheriff or police may arrest the defendant and seize all firearms.¹⁹⁷

If the defendant is unable to surrender the firearms because of their current location, the defendant must sign a "cause" affidavit listing the firearms and their current location and give this to the sheriff. If the defendant follows this procedure at the final order hearing, the defendant must show cause – the reason the firearms could not be retrieved within the allotted time frame. The court then specifies a time frame and procedure for weapons surrender.¹⁹⁸

After the final order hearing, the defendant may make arrangements to transfer the firearms from safekeeping for sale through a federally licensed dealer. This is the only method that may be followed with regard to sale of firearms by a defendant subject to a PFA order.¹⁹⁹

Surrendered firearms may not be returned to a PFA defendant during the pendency of a PFA order – to do so may subject the defendant and the persons responsible for returning the firearms to criminal and civil liability.²⁰⁰ The only firearms transfer option available to a defendant is after the final PFA order; the defendant may authorize transfer from the safe-keeper directly to a federally licensed firearms dealer for sale of the firearms.²⁰¹

For more information about these issues, please see Chapter VI: Firearms.

Weapons return/federal prohibition

Under federal law, some defendants are prohibited from receiving or possessing firearms during the term of a protection order against them.²⁰² In addition, an individual who knowingly transfers a firearm to a prohibited individual may be subject to federal criminal prosecution.²⁰³ Federal law

¹⁹⁵ 23 PA. C.S. §§ 6108(a)(7); 6108.2; 6108.3.

¹⁹⁶ 23 PA. C.S. § 6108.3.

¹⁹⁷ 23 PA. C.S. § 6113(b).

¹⁹⁸ 23 PA. C.S. § 6108(a)(7).

¹⁹⁹ 23 PA. C.S. § 6108.2.

²⁰⁰ See 18 U.S.C. § 922(d)(8).

²⁰¹ 23 PA. C.S. §§ 6108.1 and 6108.2; 18 U.S.C. § 922(d)(8).

²⁰² 18 U.S.C. § 922(g)(8).

²⁰³ 18 U.S.C. § 922(d)(8).

prohibits a state court judge who has knowledge that an individual is subject to a PFA or other protection order from returning firearms to that individual.

Pay Reasonable Losses

The PFA court may direct the defendant to pay the plaintiff for reasonable losses suffered as a result of abuse, including medical, dental, relocation and moving expenses, loss of earnings or support, costs of repair or replacement of property damaged, destroyed, or taken by the defendant, or other out-of-pocket expenses. In addition, the court may direct the defendant to pay the plaintiff's reasonable attorney's fees.²⁰⁴

Award of counsel fees

A PFA plaintiff may be awarded counsel fees, even where a legal services attorney represents the plaintiff. In **Krassnoski v. Rosey**, the Superior Court examined the attorney fees relief provision and policy.²⁰⁵ The Court held that the PFA Act authorizes an award of attorney fees on behalf of a successful plaintiff, even if the plaintiff has free representation by a legal services attorney. The Superior Court further observed that the policy underlying the PFA statutory provision permitting recovery of counsel fees serves a twofold purpose: first, to encourage victims of domestic abuse, who are often financially dependent upon their abusers, to take advantage of the protections offered by the Act; and, second, to include a financial disincentive to deter abusers from further abusive conduct.²⁰⁶

Counsel fees may be awarded to the plaintiff. Without a showing of bad faith, a court may not award counsel fees to a defendant.

Without a showing of bad faith, court may not award counsel fees to defendant

The PFA Act authorizes the court to order the PFA plaintiff to pay the defendant's actual damages and reasonable attorneys' fees if the court finds that the plaintiff commenced the PFA action in bad faith.²⁰⁷ However, failure to prove abuse does not constitute bad faith.²⁰⁸ Although there is currently no appellate case law interpreting this provision of the PFA Act, other appellate cases involving bad-faith claims have required a showing of fraud, dishonesty or corruption.²⁰⁹

²⁰⁴ 23 PA. C.S. § 6108(a)(8).

²⁰⁵ [Krassnoski v. Rosey, 684 A.2d 635 \(Pa. Super. 1996\)](#).

²⁰⁶ *Id.* at 637-38.

²⁰⁷ These amendments were signed into law in November 2005 and took effect May 9, 2006.

²⁰⁸ 23 PA. C.S. § 6117(b).

²⁰⁹ See *Frick v. McClelland*, 122 A.2d 43, 45 (Pa. 1956); *Cummins v. Atlas R.R. Construction Co.*, 814 A.2d 742 (Pa. Super. 2002); *Thunberg v. Strause*, 682 A.2d 295, 299 (Pa. 1996); see also [Egelman v. Egelman, 728 A.2d](#)

No Stalking or Harassing

The PFA court may direct defendant to refrain from stalking or harassing plaintiff and other designated persons.²¹⁰ For more information about stalking crimes or stalking as a form of abuse, please see Chapter IX: Stalking.

Any Other Relief

The PFA court may grant any other appropriate relief sought by plaintiff.²¹¹ Examples of other relief include: ordering defendant to return personal items such as car keys, passport, driver's license or other identification to the plaintiff; ordering the defendant to attend drug and alcohol counseling; ordering the defendant to attend a batterer's intervention program, etc.

MUTUAL ORDERS ONLY IN VERY LIMITED CIRCUMSTANCES

Under the PFA Act, no mutual orders may be entered unless specific requirements are met. The Act provides that a court may not award mutual orders of protection, unless each party filed timely written complaints, service is appropriately accomplished, and each party is independently eligible for protection under the Act. A court confronted with two competing PFA petitions must make separate findings and, if granting protection for each party, must issue separate orders.²¹²

No mutual PFA orders unless:

- 1) Both parties timely file
- 2) Service is accomplished
- 3) Both parties are eligible under PFA Act

If these factors are met, the court must make separate findings and issue separate orders.

[360 \(Pa. Super. 1999\)](#) (holding - prior to adoption of section 6117 -that attorneys' fees were not available to a defendant, as it was contrary to the intent of the PFA Act).

²¹⁰ 23 PA. C.S. § 6108(a)(9). This relief section specifically states: Directing the defendant to refrain from stalking or harassing the plaintiff and other designated persons as defined in 18 Pa. C.S. § 2709 (relating to harassment and stalking).

"Family and household members" is defined in section 2709.1 of the criminal code as: "Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood."

²¹¹ 23 PA. C.S. § 6108(a)(10).

²¹² 23 PA. C.S. § 6108(c).

The trial court does not have jurisdiction to enter mutual orders by stipulation if one party did not timely file a written petition for PFA relief.²¹³ In **McKelvey v. McKelvey**, a wife filed a PFA petition against her husband, and the court entered a temporary order.²¹⁴ At the hearing, both sides presented testimony regarding injuries suffered at the hands of the other. Based on the testimony, the trial court suggested that the PFA order be mutual. The wife's attorney objected, arguing that the husband did not file a PFA petition and an order could not be entered against his wife. His wife, however, agreed to enter into a mutual order, which the court entered. The wife later appealed the mutual order and the Superior Court held that the language of the Act specifically prohibited mutual orders unless each party filed an independent petition.

DURATION OF ORDER

A protection order or approved consent agreement shall be for a fixed period of time not to exceed three years.²¹⁵ The maximum duration period of a PFA order runs from the date the final order is entered, not from the date of a prior temporary ex parte proceeding or final hearing date.²¹⁶ When a PFA contempt petition or a contempt charge has been filed, but the underlying PFA order is set to expire before the hearing will occur, the PFA order will be automatically extended until the disposition of the contempt petition, and the court may grant additional extension(s) after the contempt hearing.²¹⁷ The Act provides that there shall be no limit on the number of extensions that may be granted.²¹⁸

INSTALLMENT PAYMENTS ALLOWED

If the court finds that a person is without financial means to pay a fine, fee, PFA economic relief or a cost, the court may order installment payments and may fix the manner and the amount of each payment.²¹⁹

DISCONTINUANCE, WITHDRAWAL, AND MODIFICATION

Procedures to End a PFA Action or Modify an Order

²¹³ [McKelvey v. McKelvey](#), 771 A.2d 63 (Pa. Super. 2001).

²¹⁴ *Id.*

²¹⁵ 23 PA. C.S. § 6108(d).

²¹⁶ *Holderman v. Hagner*, 760 A.2d 1189 (Pa. Super. 2000).

²¹⁷ 23 PA. C.S. § 6108(e).

²¹⁸ 23 PA. C.S. § 6108(e)(3).

²¹⁹ 23 PA. C.S. § 6120(a).

Rule 1901.8 of the Pennsylvania Rules of Civil Procedure delineates the procedures for a plaintiff to end a PFA action or for the plaintiff or defendant to modify an order, depending on the stage of the proceeding.²²⁰

Discontinuance

If a PFA plaintiff is not granted a temporary order, or decides not to proceed to an evidentiary hearing, the plaintiff may file a Praecipe to Discontinue with the prothonotary to end the action.²²¹ The plaintiff can also make an oral motion to discontinue the action at a hearing.²²²

Refer to [Appendix C](#) for a sample Petition to Modify. This petition can be used for any kind of modification to a PFA Order.

Withdrawal

If a temporary order is granted, a PFA petitioner may discontinue the PFA proceeding by filing a petition with the court before the final order hearing or may make an oral motion to withdraw the petition at the final order hearing.²²³

Modification

Thirty days after a final PFA order is entered, the court no longer retains jurisdiction to dismiss or vacate the final PFA order.²²⁴ However, either party may file a petition to modify the order at any time after the order is issued. If the petitioner would like the PFA order to end, they may petition to modify the order so that it expires on an earlier date.²²⁵

The court holds a hearing on the petition, and the judge can use the day after the hearing date as the PFA order's new expiration date. The court uses the Amended Final Order Form in the PFA

²²⁰ PA. R. CIV. P. 1901.8.

²²¹ PA. R. CIV. P. 1901.8(a).

²²² *Id.*

²²³ PA. R. CIV. P. 1901.8(b).

²²⁴ PA. R. CIV. P. 1901.8(c). In [Commw. v. Charnik, 921 A.2d 1214 \(Pa. Super. 2007\)](#), the Superior Court considered an appeal by a PFA defendant who was not permitted to expunge his PFA contempt convictions and underlying final PFA order by the trial court. After affirming the trial court's refusal to expunge the final PFA order and the two PFA contempt convictions, the Superior Court further noted that the trial court had erred when it entered an order allowing the PFA plaintiff to withdraw the final PFA order. The Superior Court based this determination on an application of Pa. R. Civ. P. 1901.7 and 1930.2(a), observing that, according to the Pennsylvania Rules of Civil Procedure, when a final order or judgment is entered, an appeal must be filed or reconsideration must be granted within 30 days. Otherwise, the judgment becomes final. However, although Rules of Procedure do apply to PFA proceedings, the PFA statute expressly anticipates and permits modification petitions and hearings, and does not limit these proceedings to the 30-day window. See 23 PA. C.S. §§ 6108(d); 6108.1(b)-(c).

²²⁵ 23 PA. C.S. § 6108(d).

Database – PFAD – to input the new expiration date, and the order expires at the end of that day. The amended order must be transferred to the Pennsylvania State Police on the same day of the hearing.

Petition is Required for Court to Dismiss or Modify a PFA Order

In ***Stamus v. Dutcavich***, the defendant violated a PFA order by borrowing guns and taking the parties' children target shooting while subject to a PFA order that prohibited him from having firearms.²²⁶ As a result of this incident, police filed an indirect criminal complaint and, at the hearing, the trial court found the defendant's violation to be de minimus. Without request or petition from either party, the trial court dismissed the underlying PFA order. The Superior Court reversed the dismissal, finding that the plain language of the PFA Act requires a petition for modification before the court is authorized to consider a request to modify the PFA order. The Superior Court noted that public policy directed a finding in favor of the plaintiff, observing that "victims of abuse may be less likely to report PFA order violations if they fear that the court might dismiss the order at a subsequent hearing."²²⁷

STATUTORY SAFETY CONSIDERATIONS IN PFA PROCEEDINGS

PFA Court Protection of Location, Telephone Number

The PFA Act includes a provision that allows a court to protect the confidentiality of the address, telephone number, demographic information, and other information about the location of the plaintiff or a minor child if the court finds that the defendant poses a continuing risk or threat to the plaintiff.²²⁸ This provision also maintains the confidentiality of the domestic violence shelter's address.²²⁹

Address Confidentiality Program

The Domestic Violence and Sexual Violence Victim Address Confidentiality Act established an Address Confidentiality Program (ACP) for victims of domestic violence, sexual assault or stalking.²³⁰ Pennsylvania's Office of the Victim Advocate (OVA) administers this program. The ACP provides:

- a substitute address for qualifying victims who have moved to a new location unknown to the perpetrator
- a free confidential first-class mail forwarding service²³¹

²²⁶ [Stamus v. Dutcavich, 938 A.2d 1098 \(Pa. Super. 2007\).](#)

²²⁷ *Id.*

²²⁸ 23 PA. C.S. § 6112.

²²⁹ *Id.*

²³⁰ 23 Pa. C.S. §§ 6701 – 6713.

²³¹ See 23 PA. C.S. § 6701-13.

Victims must apply for the ACP in person through a local domestic violence, sexual assault, or victim service program. ACP applicants must provide a telephone number and address to the Office of Victim Advocate, and must list all pending civil and criminal proceedings in which the applicant is a victim, witness, plaintiff or defendant. Applicants must notify the OVA if they are on probation or parole, and must notify the OVA of an address or name change within five days.²³² The OVA may not disclose the confidential address of a participant except under limited circumstances to a state or local government agency that obtained a waiver; to a person or agency pursuant to a qualifying emergency; or to a person as directed by court order.²³³ Criminal penalties apply to anyone who intentionally, knowingly or recklessly attempts to gain or gains access to a confidential address by fraud or misrepresentation.²³⁴

Domestic Violence Advocate Privilege and Court Accompaniment

The PFA statute codifies an evidentiary privilege of confidentiality between a victim of domestic violence and a domestic violence counselor or advocate. Pursuant to the PFA Act, privileged information “includes all information, whether written or spoken, transmitted between a victim and a domestic violence counselor or advocate in the course of the relationship.”²³⁵ This includes information received or given by the domestic violence counselor or advocate in the course of the relationship as well as advice, reports, statistical data, memoranda or working papers, records or the like, given or made in the course of the relationship. It also includes communications facilitated by a linguistic interpreter assisting the victim, counselor or advocate.²³⁶

The PFA Act authorizes a domestic violence counselor or ,advocate to accompany a party to any legal proceeding or hearing under Chapter 23.²³⁷

For more information about domestic violence counselor/advocates, please see Chapter I: The Court’s Role in Addressing Domestic Violence, and Chapter XI: Pro Se Process.

Federal Restrictions on Electronic Disclosure of Victim Information

The Violence Against Women Act (VAWA) is a series of federal laws designed to improve services for, and responses to, violence against women. In 2005, VAWA was amended to restrict the information about victims that a court may make available electronically. With the exception of secured registry information shared for law enforcement purposes, VAWA prohibits the electronic posting of information that could identify a victim of sexual assault, stalking, or domestic violence. Specifically, if the publication could reveal the identity of the victim, VAWA prohibits publication about any of the following court pleadings:

²³² 23 PA. C.S. § 6705.

²³³ 23 PA. C.S. §§ 6708-6710.

²³⁴ 23 PA. C.S. § 6711.

²³⁵ 23 PA C.S. § 6102(a).

²³⁶ *Id.*

²³⁷ 23 PA. C.S. § 6111.

- the issuance of a protection order
- the filing for a protection order
- the registration of a foreign order²³⁸

The Administrative Office of Pennsylvania Courts issued a policy setting forth parameters for public access and inspection of electronic case records in the systems under its control. The policy provides that victim information, including name, address and other contact information in an electronic record should not be accessible by the public.²³⁹

PFA orders can be extended:

- a) if the court finds the defendant violated a final PFA order*
 - b) when defendant's behavior indicates a continued risk of harm*
 - c) sua sponte as part of a contempt proceeding, even where no extension petition filed,*
-

EXTENSION OF PFA ORDERS

Extension Generally

PFA orders may be extended if the court finds that the defendant committed one or more acts of abuse after the entry of the final PFA order or that the defendant engaged in a pattern or practice that indicates continued risk of harm to the plaintiff or minor child.²⁴⁰ An extension also shall be granted if a contempt petition or charge has been filed, but the hearing has not occurred before the protection order expires.²⁴¹ The PFA Act directs the court to extend the PFA order for another term if the defendant is convicted of indirect criminal contempt and the plaintiff requests an extension.²⁴² There is no limit to the number of extensions that a judge may grant.²⁴³

Extension Shall Be Granted in Contempt Proceeding

A court shall order an extension of a PFA order as part of a contempt determination, if requested by the plaintiff.²⁴⁴ Observing that the overriding purpose of the PFA Act is to allow courts to act swiftly to protect victims of continuing domestic abuse, the Superior Court affirmed the trial court's decision extending a PFA order as part of its order in an indirect criminal contempt hearing in

²³⁸ 18 U.S.C. §§ 2265, 2266(5).

²³⁹ See Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania, 36 Pa.Bull. at 7234 (Dec. 2, 2006).

²⁴⁰ 23 PA. C.S. § 6108(e)(1)(i).

²⁴¹ 23 PA. C.S. § 6108(e)(1)(ii).

²⁴² 23 PA CONS. STAT. § 6114(b)(4).

²⁴³ 23 PA. C.S. § 6108(e)(3).

²⁴⁴ 23 PA. C.S. § 6114(b)(4).

Commonwealth v. Snell.²⁴⁵ In 2006, this holding was codified in section 6114(b), which specifically authorizes the contempt court to extend a PFA order for an additional term if the plaintiff so requests.²⁴⁶

Extension May Be Granted if Petition Filed Before Expiration of PFA Order

The court has authority to grant an extension of a PFA order when the petitioner has filed a request for an extension prior to the expiration of the PFA order, even if the hearing on the request for the extension does not occur until after the original PFA order expires. In **Kuhlmeier v. Kuhlmeier**, the Superior Court reversed the trial court's dismissal of a wife's PFA extension request.²⁴⁷ The Superior Court observed that the wife timely filed the extension request before the end of the existing PFA order. It appeared that the hearing date (scheduled for after expiration of the existing PFA order) was selected according to the court's schedule. The Superior Court held that: "The petitioner ... cannot be penalized for scheduling delays which are beyond the petitioner's control."²⁴⁸

No Requirement That Contempt Charge Be Filed Before Extension Request

In **Kuhlmeier v. Kuhlmeier**, the Superior Court also invalidated a local court rule that required, as a condition to extending a PFA order, that there be a filing or charge for indirect criminal contempt during the pendency of the PFA order.²⁴⁹ The court found that the local rule added a requirement that was not in the PFA statute; the addition was in conflict with the PFA statute and, therefore, was invalid.²⁵⁰

ENFORCEMENT

Arrest for Violations

The police or sheriff shall arrest a defendant, without a warrant upon probable cause, when the defendant violates the following relief provisions (prohibitions?) in a PFA order:

- no abuse
- exclusive possession of the residence
- custody or visitation
- no contact

²⁴⁵ [Commw. v. Snell, 737 A.2d 1232 \(Pa. Super. 1999\)](#). See also Trout v. Strube, 97 A.3d 387 (Pa. Super. 2014).

²⁴⁶ 23 PA. C.S. § 6114(b)(4).

²⁴⁷ [Kuhlmeier v. Kuhlmeier, 817 A.2d 1127 \(Pa. Super. 2003\)](#).

²⁴⁸ *Id.* at 1130.

²⁴⁹ *Kuhlmeier*, 817 A.2d 1127.

²⁵⁰ *Id.* at 1130.

- weapons relinquishment
- no stalking²⁵¹

Arrest for violation of a PFA is mandatory, and defendants who are arrested shall be immediately taken before the court.²⁵²

Subsequent to the arrest, the police officer or sheriff “shall seize all firearms, other weapons and ammunition used or threatened to be used during the violation or during prior incidents of abuse and any other firearms in the defendant’s possession.”²⁵³

Verbal Notice of PFA Order Adequate for ICC Determination

In **Commonwealth v. Padilla**, the Superior Court examined a due process claim raised by a PFA defendant who was convicted of indirect criminal contempt of a PFA order.²⁵⁴

In Padilla, the victim obtained a no-contact PFA order late on a Friday afternoon. Early on Sunday morning, the victim called police because the PFA defendant had been threatening her over the telephone and had tried to gain entry to her home. The defendant had not been physically served with the PFA order; however, a police officer left a voice mail message for the defendant about the PFA order, and later spoke with the defendant by telephone.

The officer: (1) told the defendant that the plaintiff had a PFA order against him, (2) directed the defendant not to contact plaintiff and (3) made the defendant aware of the consequences of violating the order. Despite this warning, the defendant continued to call and threaten the plaintiff. After being served with the PFA order, the defendant stopped calling and harassing the plaintiff.

The trial court held the defendant in contempt. The defendant appealed the finding, claiming that the verbal notice given him by the police officer was inadequate to comply with the service requirements of due process. The Superior Court upheld the finding of indirect criminal contempt and found that the verbal explanation provided by telephone adequately conveyed notice of the PFA order and possible criminal penalties for violation of the order. The court observed that in section 6106(a), the PFA Act provides that the failure to serve a PFA order does not stay the effect of the order.

The court recognized that there are special exigencies in PFA cases, and observed that “since the point of the statute is to protect the victim from injury or death at the hands of the abuser, resort may be had to extraordinary measures when necessary to ensure that orders designed to provide protection actually do so.”²⁵⁵

²⁵¹ 23 PA. C.S. § 6113(a).

²⁵² 23 PA. C.S. § 6113(a), (c).

²⁵³ 23 PA. C.S. § 6113(b).

²⁵⁴ [Commw. v. Padilla, 885 A.2d 994 \(Pa. Super. 2005\).](#)

²⁵⁵ *Padilla*, 885 A.2d at 997.

Defendant - Not Plaintiff - Can Be Arrested and Held In Contempt for Violating No-Contact Terms of PFA

Where a PFA order clearly prohibited the defendant “from having any contact with the plaintiff,” the fact that the plaintiff invited the defendant to attend a party with her was no defense to an Indirect Criminal Contempt (ICC) charge for violating the PFA order. This was the Superior Court’s determination in **Commonwealth v. Brumbaugh**, which affirmed the trial court’s decision holding the defendant in indirect criminal contempt of a PFA order.²⁵⁶

Sentencing, Criminal Prosecution

When a judge holds a defendant in indirect criminal contempt, the judge can order:

- a prison term of up to six months and a fine of not less than \$300 and not more than \$1,000
- supervised probation and a fine between \$300 and \$1,000²⁵⁷
- other relief as listed in the PFA Act
- an extension of the PFA order if the plaintiff so requests²⁵⁸

Prosecution for indirect criminal contempt does not remove the availability of other criminal charges.²⁵⁹ Additionally, a plaintiff may file a private criminal complaint for violation of a PFA order, as well as a petition for civil contempt.²⁶⁰

For more information about enforcement of PFA orders, see Chapter X: Enforcement.

EXPUNGEMENT

Certain ex parte PFA records may be subject to expungement; however, courts may not expunge a final PFA order entered after a hearing or any subsequent ICC convictions for violating that order.²⁶¹

In **Carlacci v. Mazeleski**, the Pennsylvania Supreme Court concluded that there is a right to petition for expungement of certain ex parte PFA records, although there is no specific PFA Act authorization to do so.²⁶² According to the Supreme Court, the right exists under the due process clause of the

²⁵⁶ [Commw. v. Brumbaugh, 932 A.2d 108 \(Pa. Super. 2007\)](#). The PFA Act allows the trial court to enter indirect criminal or civil contempt orders against the defendant only. The plain language of the Act is clear that the defendant, not the plaintiff, is bound by the order and may be held in contempt. See 23 PA. C.S. §§ 6113(a), 6114(a).

²⁵⁷ 23 PA. C.S. § 6114(b).

²⁵⁸ 23 PA. C.S. § 6114(b)(4).

²⁵⁹ 23 PA. C.S. § 6114(d).

²⁶⁰ 23 PA. C.S. §§ 6113.1(a); 6114.1.

²⁶¹ [Commw. v. Charnik, 921 A.2d 1214 \(Pa. Super. 2007\)](#).

²⁶² [Carlacci v. Mazeleski, 798 A.2d 186 \(Pa. 2002\)](#).

Pennsylvania Constitution. The underlying facts in *Carlacci* involve the entry of an ex parte temporary order that was continued by stipulation and remained in effect for 41 days. The parties then entered into a written stipulation, incorporated into an order of court, which declared the temporary protection from abuse order null and void ab initio.²⁶³ The defendant in the PFA action sought to have the record of the PFA expunged but the trial court denied the defendant's motion. The Superior Court affirmed the trial court's denial, but the Pennsylvania Supreme Court reversed, basing its decision to expunge on the fact that the proceedings were ex parte in nature and the parties' stipulation that the PFA proceedings were "null and void ab initio."²⁶⁴

See the text of the PFA Act, complete with case annotations in Appendix F.

OTHER RELEVANT INFORMATION

Domestic Violence Includes Criminal and Non-Criminal Behavior

Domestic violence consists of a wide range of behaviors. Some acts of domestic violence are criminal in nature, such as hitting, kicking, shoving, scratching, biting, strangling, assaulting with a weapon, rape, sexual assault, harassment, threats of violence, stalking, destruction of property and cruelty to pets. Other domestic violence behaviors may not constitute criminal conduct, such as degrading comments, suicide threats, controlling the abused party's time and activities, and controlling access to family resources: food, shelter, and money.²⁶⁵

Domestic Violence Is Purposeful Behavior

Domestic violence is not accidental, out-of-control behavior. Domestic violence is purposeful and instrumental behavior. The pattern of abuse is directed at achieving compliance from or control over the abused party.²⁶⁶

Women Experience Domestic Violence More Than Men

A national study done by the U.S. Centers for Disease Control found that more women experience intimate partner violence than men.²⁶⁷ In addition, as the severity of abuse increased, there was a

²⁶³ *Id.* at 187.

²⁶⁴ *Id.* at 191.

²⁶⁵ Janet Carter et al., *Domestic Violence in Civil Court Cases: A National Model for Judicial Education*, FAMILY VIOLENCE PREVENTION FUND, 1, 22-23 (1992), available at <https://www.ncjrs.gov/pdffiles1/Photocopy/151643NCJRS.pdf>.

²⁶⁶ *Id.*

²⁶⁷ Nat'l Ctr for Injury Prevention and Control, Ctrs. for Disease Control & Prevention, *National Data on Intimate Partner Violence, Sexual Violence, and Stalking Fact Sheet*, available at <http://www.cdc.gov/violenceprevention/pdf/nisvs-fact-sheet-2014.pdf>, citing Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization* -

corresponding increase in women victims. For example, women were almost twice as likely to experience an intimate partner who hit them with something hard, kicked or beat them, or burned them on purpose.²⁶⁸

Power and Control and Domestic Violence

Domestic violence is often accompanied by emotionally abusive and controlling behavior. A national survey found that women whose partners were jealous, controlling, or verbally abusive were significantly more likely to report being raped, physically assaulted, or stalked by their partners.²⁶⁹

Domestic Violence Typically Escalates Over Time

Domestic violence is rarely a one-time event; without effective intervention, it typically increases in frequency and severity over time.²⁷⁰

Abuse Can Be Facilitated by Technology Misuse

Although developments in technology, such as cell phones, global positional system (GPS) devices and computers enhance society, abusers frequently misuse technology to locate, spy on, threaten, stalk and harass their victims.²⁷¹

Separation Is The Most Dangerous Time

Separation is the most dangerous time for a domestic violence victim. Studies indicate that, when a woman leaves her abuser, her risk of serious violence or death increases dramatically.²⁷²

National Intimate Partner and Sexual Violence Survey, United States, 2011, 63 Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report (2014).

²⁶⁸ *Id.*

²⁶⁹ PATRICIA TJADEN & NANCY THOENNES, NAT'L INSTITUTE OF JUSTICE AND THE CENTERS FOR DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, 1, 9-11 (2000), <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

²⁷⁰ AMERICAN JUDGES ASSOCIATION, DOMESTIC VIOLENCE & THE COURTROOM: UNDERSTANDING THE PROBLEM...KNOWING THE VICTIM, at 2, <http://aja.ncsc.dni.us/domviol/page2.html>.

²⁷¹ See Stalking Resource Center, Stalking Fact Sheet, available at https://www.victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf?sfvrsn=2 citing Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization - National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report (2014).

²⁷² "Separated [vs. married or divorced] females experienced the highest rate of intimate partner violence during the 18-year period" from 1993 to 2010. This "separation violence" is reflected in long-term data - See Shannan Catalano, *Bureau of Justice Statistics, Intimate Partner Violence, 1993-2010, appendix Table 9: Intimate partner violence against females, by marital status, 1993-2010*, 6 (2012), U.S. Dep't of Justice, available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>.

For more information about domestic violence, please see Chapter I: The Court's Role in Addressing Domestic Violence. For more information about the misuse of technology in stalking, see Chapter IX: Stalking.

EMERGING PRACTICES - SAFETY IN THE COURTHOUSE

Safety for PFA litigants is extremely important. For a variety of reasons, it takes great courage for a victim of domestic violence to seek assistance from the legal system. Separating from the abuser entails great physical risk, as separation increases the potential for violence. Upon separation, an abuser will sense that the abuser has lost control over the victim and will use violence to regain control.²⁷³ Abusers also may retaliate with violence for publicity surrounding the victim's seeking assistance from the legal system. In addition to physical safety concerns, victims also have emotional safety concerns. Seeking legal help to end the battering is an acknowledgment that the victim's efforts alone are not enough, and that a relationship with a person the victim cares about may be over. Seeking help from the legal system also may be very embarrassing for the abused victim, because it requires disclosing personal and private information.

For these reasons, it is important for the court to provide, if possible, a private place for PFA plaintiffs to meet with court (or advocate) staff for purposes of completing PFA paperwork. Separate courthouse waiting areas also are important. Sometimes an abuser will learn that a victim has decided to seek a PFA order against the abuser and will show up at the courthouse seeking to dissuade the victim or to counter-file a PFA complaint against the victim.

EMERGING PRACTICES - PRO SE PRACTICE TOOLS

In addition to the forms that must be made available pursuant to the PFA Act, some courts make additional written information available: legal referrals, court processes and procedures, expected courtroom demeanor, and the like. Information is made available to plaintiffs and defendants. Judges may find that the process runs more smoothly when unrepresented litigants are given adequate information about the proceedings in advance.

The Rules of Civil Procedure require pro se parties to file an Entry of Appearance form listing any prior representation and a location where the court is authorized to send correspondence.²⁷⁴ A pro se party may list an alternative address, which is particularly important for victims of domestic violence who are residing at a confidential location.

See more information in Chapter XI, Pro Se Process.

²⁷³ *Id.*

²⁷⁴ PA. R. CIV. P. 1930.8

EMERGING PRACTICES - LEARNING ABOUT THE DOMESTIC VIOLENCE SOCIAL CONTEXT

The Protection From Abuse Act²⁷⁵ is a powerful civil statute, but the full range of its relief is sometimes underutilized in the justice system. By virtue of the broad range of relief it contains and the expedited manner in which that relief may be granted, the PFA Act gives judges the power to provide comprehensive protection to victims of domestic violence.²⁷⁶ However, there is reluctance to order the full range of relief specified in the PFA Act.²⁷⁷ This hesitancy may be because courts regard PFA petitioners with skepticism and question their motives for filing such actions.²⁷⁸

The Pennsylvania Supreme Court's Racial and Gender Bias Report offered this criticism:

Implementation and enforcement of the PFA Act is left to the discretion of individual judges. If a judge is not sensitive to the dynamics of domestic violence, a survivor's petition is more likely to be met with skepticism or to be dismissed.²⁷⁹

The Pennsylvania Superior Court has underscored the preventive and protective nature of the Act.²⁸⁰ Taking time to learn about domestic violence can help judges to fashion orders that facilitate the safety of the victim and children. Custody and support relief are integral to the safety of the domestic violence victim and the parties' children.²⁸¹ Judges who issue effective PFA orders tailor each order to the unique set of facts and circumstances presented in every case and use the full range of relief available in the PFA Act to ensure that safety is achieved.

A firm understanding of domestic violence will help judges appreciate the need to provide the full range of relief available in the PFA Act, and to issue orders that distill the enormous powers of the PFA statute into effective tools to protect victims of domestic violence.

²⁷⁵ 23 PA. C.S. §§ 6101-22.

²⁷⁶ 23 PA. C.S. §§ 6107, 6108, 6110; see also, Gerace v. Gerace, 631 A.2d 1360 (Pa. Super. 1993); Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992).

²⁷⁷ "Moreover, the full measure of remedies available under the PFA Act is not consistently granted." PA. SUPREME COURT, FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 388 (2003), available at <http://www.pa-interbranchcommission.com/pdfs/FinalReport.pdf> [hereinafter RACIAL & GENDER BIAS REPORT].

²⁷⁸ "If the judicial system is to understand domestic violence as something more than a criminal assault case, it must first examine and understand the nature of domestic violence and how the intimate relationship between the abuser and the survivor gives rise to a unique dynamic that distinguishes domestic violence from other crimes. Without this understanding, courts may be less likely to accept the survivor's assertions, which, in turn, may bring rejection of their PFA petitions, thereby jeopardizing their safety." *Id.* at 388, 396, 402.

²⁷⁹ RACIAL & GENDER BIAS REPORT, *supra* note 277, at 388. See also, AMERICAN JUDGES ASSOCIATION, DOMESTIC VIOLENCE & THE COURTROOM, *supra* note 270.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 400-401.

For more information about domestic violence, see Chapter I: The Court's Role in Addressing Domestic Violence.

EMERGING PRACTICES - RELIEF CONSIDERATIONS

Custody

Safety during custody exchanges and for children who are spending time with a parent who has abused the other parent should be of paramount concern. Through the custody provisions of the PFA Act found at 23 Pa. C.S. § 6108(a)(4), the court has enormous power to protect children from the risks associated with domestic violence. A judge may wish to draft PFA orders that include custody provisions reflective of the circumstances alleged in the petition for the PFA.²⁸² If a victim of domestic violence is in fear of further abuse from the defendant, provisions of a stale custody order that do not address this fear fail to protect the plaintiff or the parties' children.²⁸³ The legislature recognized the necessity of including custody relief in the PFA Act to stop abuse and to provide for the safety and security of the plaintiff and minor children.²⁸⁴ Well-drafted, detailed, specific custody provisions in PFA orders can assist in ensuring this safety.

Judges may address custody change due process concerns raised by the best interest requirements of the Shandra case²⁸⁵ by advising the parties that the court will take testimony on the child's best interest during the PFA hearing.²⁸⁶ Alternatively, the court may indicate that the custody changes brought about by the PFA relief are temporary in nature and may direct the parties to proceed with filing a custody action.

Please see Chapter IV: PFA and Custody for more information, including sample language for custody relief provisions in a PFA order.

Financial Support

A judge may order the defendant to pay financial and medical support, as well as to provide health insurance coverage, pay for unreimbursed medical expenses, and make rent or mortgage payments on the plaintiff's residence.²⁸⁷ Within two weeks of the issuance of the PFA order, the plaintiff must initiate a separate support action by filing a complaint for support.²⁸⁸ If the complaint for support is not filed, the portion of the PFA order that requires financial support under this subsection is void.²⁸⁹

²⁸² See [Dye v. McCoy, 621 A.2d 144 \(Pa. Super. 1993\)](#).

²⁸³ RACIAL & GENDER BIAS REPORT, *supra* note 277, at 401.

²⁸⁴ See [Egelman v. Egelman, 728 A.2d 360 \(Pa. Super. 1999\)](#).

²⁸⁵ See discussion at Section I(4)(i) of this chapter.

²⁸⁶ [Shandra v. Williams, 819 A.2d 87 \(Pa. Super. 2003\)](#).

²⁸⁷ 23 PA. C.S. § 6108(a)(5).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

The domestic relations section must enforce any award of support in a PFA order provided the plaintiff has complied with the filing requirements.²⁹⁰

Safety requires timely and adequate resources. Adequate support may enable the plaintiff to avoid returning to the defendant. Ordering financial support through the PFA may be vital to a plaintiff's survival and independence.²⁹¹ Abusers sometimes control the financial resources and prohibit the victim from having any knowledge of, or access to, finances. Depending on the scheduling of the support conference, the temporary support required by the PFA order may be the only income the victim has during the pendency of the proceedings, which could be several months.

A fair interim support provision in a PFA order may send a vital message to the plaintiff and defendant and set the stage for the rest of their separation. To the plaintiff, a financial support order may represent an acknowledgment that the court appreciates the danger and urgency of the situation and does not condone or tolerate the defendant's abusive control. A financial support order may also debunk the stories the abuser has told the victim regarding the victim's inability to receive financial support from the abuser, and it may help to resolve the victim's doubts about maintaining independence and that the victim and children can survive financially.

Judges who wish to consider a support order request at the final hearing may include a notice in the temporary order requiring the parties to bring pay stubs, pay records, or other income information to the final hearing. Because the support guidelines can be applied in a reasonably straightforward manner in the majority of cases, it should be relatively easy for the court to review income information during the PFA proceeding and to enter a temporary support order.²⁹²

For more information about support issues in domestic violence cases, see Chapter V: Child and Spousal Support.

"No Contact" Provision

A judge can prohibit a defendant from having any contact with the plaintiff or minor children.²⁹³ The judge can order the defendant to stay away from the plaintiff's or minor children's place of employment or school. In addition, the judge can prohibit the defendant from harassing the plaintiff, minor children, or the plaintiff's relatives.²⁹⁴

Issuing and enforcing a "No Contact" order helps to protect the victim from post-separation coercion, and it may help a victim maintain autonomy. It may also increase the sense of well-being, safety, and security felt by a victim and the parties' children if they know that they will not see the defendant unexpectedly and without making specific prior arrangements over which they have some control. Additionally, abusers use many tactics during separation to persuade a victim to

²⁹⁰ 23 PA. C.S. § 6108(f).

²⁹¹ RACIAL & GENDER BIAS REPORT, *supra* note 277, at 400.

²⁹² See PA. R. CIV. P. 1910.16.1.

²⁹³ 23 PA. C.S. § 6108(a)(6).

²⁹⁴ *Id.*

reunite, from sending flowers and writing apologetic letters to making threats and using physical violence.

Surrender of Weapons

Weapons surrender and prohibition are governed by federal and state law, as well as by a specific provision in the PFA Act.²⁹⁵ Section 6108(a)(7) allows the court to order the defendant to temporarily relinquish the defendant's weapons.²⁹⁶ The PFA court may also prohibit the defendant from acquiring or possessing any other weapons for the duration of the order and may require the defendant to relinquish any firearm licenses. However, even if a judge fails to include language that prohibits use and possession of weapons in a PFA order, a judge does not have the authority to override the federal restrictions on gun possession by ordering that the restrictions do not apply to the defendant in a specific situation.

Chapter VI: Firearms includes detailed information about the removal of weapons, restrictions on weapon use and possession in order to protect victims of domestic violence from their abusers and liability for third parties who knowingly return firearms to prohibited individuals.

Reimbursement for Losses

A judge can order a defendant to pay the plaintiff for reasonable losses suffered as a result of the abuse, as well as for reasonable attorney fees.²⁹⁷ The PFA Act allows a court to restore the plaintiff to the position he or she would have been in had the abuse not occurred. The statute includes a nonexclusive list of losses and expenses for which reimbursement may be appropriate.

Reimbursement for losses may include:

- medical and dental bills
- relocation and moving expenses
- counseling
- loss of earnings or support
- costs of repair or replacement of real or personal property damaged, destroyed, or taken by the defendant or at the direction of the defendant
- other out-of-pocket losses for injuries sustained²⁹⁸

The court has enormous flexibility to restore the plaintiff's financial condition to the level that existed prior to the abuse. During separation, the economic situation of many victims of domestic violence is

²⁹⁵ 23 PA. C.S. § 6108(a)(7).

²⁹⁶ *Id.*

²⁹⁷ 23 PA. C.S. § 6108(a)(8).

²⁹⁸ *Id.* For information regarding restitution under the Crimes Code, see 18 PA. C.S. § 1106.

precarious. Victims list financial concerns and lack of resources as reasons for returning to their abusers.

Prohibition Against Stalking and Harassment

PFA orders that specifically prohibit stalking and harassment simplify enforcement. A judge can direct the defendant to refrain from stalking or harassing the plaintiff or other designated persons.²⁹⁹ Such language supports contempt charges if a defendant pursues stalking behaviors. The defendant cannot claim to be unaware that harassment was prohibited if it is stated in plain language, and the plaintiff does not need to justify the stalking as abusive or threatening.

By specifically prohibiting stalking and harassment in the PFA order, a judge clearly conveys an understanding of the impact of stalking and a refusal to tolerate this behavior.

Chapter IX: Stalking contains a detailed discussion of the effects stalking can have on a victim of domestic violence, the danger of stalking, and the importance of preventing stalking and harassment.

EMERGING PRACTICES - SAFETY AND DENIALS OF TEMPORARY ORDERS

If the court, after an appropriate ex parte temporary proceeding, determines that the facts alleged by the victim do not warrant the entry of a temporary order, the court should allow the victim to make the decision on how to proceed. In this instance, the court should allow the victim to choose to amend the temporary order petition (if more information is needed); to withdraw the temporary order petition (in which case no hearing will be scheduled); or to proceed with having a hearing within 10 days. The petitioner can amend the petition prior to the 10-day hearing.

Placing the safety of victims and prevention of abuse as primary goals will guide judges who face requests for dismissal or modification of PFA orders.

It is important to remember that violence typically escalates at separation.³⁰⁰ The hearing notice may be the first time the defendant is notified that the victim is actively seeking external assistance to end the abuse. It is vital for the court to remind plaintiffs of the real possibility of a retaliatory act, and the importance of planning ways to stay safe and protect the children. Otherwise, the court's action may place a victim at risk by leaving the victim without court-ordered protection while advising the abuser that the victim is publicly seeking to separate from the abuser. The court can have a significant impact on ensuring a victim's safety by referring all plaintiffs to a [local domestic violence program](#). Domestic violence programs can help victims make safety plans and provide other supportive services.

²⁹⁹ 23 PA. C.S. § 6108(a)(9).

³⁰⁰ See Catalano, *supra* note 272.

EMERGING PRACTICES - SAFETY WHEN THE COURT RECEIVES REQUESTS FOR MODIFICATION

Courts may often experience a situation where a victim receives a PFA order as a result of severe abuse, yet soon thereafter seeks to modify the order to end or shorten the PFA's duration. There are several steps the court may take to increase safety in this situation.

- If the court is concerned for the victim and is worried that the victim may be further harmed by the abuser, it is appropriate to say so. It may be the first time a person in authority has expressed personal concern for the victim and may give the victim the additional encouragement needed to resist the abuser's coercion and manipulation.³⁰¹
- If the abuser accompanies the victim when the victim seeks to modify the order, a judge may separate the victim from the abuser and speak to the victim privately about the victim's intentions and whether the victim is being coerced to seek the modification.
- A judge may ask the victim to speak with a domestic violence advocate before the victim decides to terminate or withdraw the order; or the judge can offer to have an advocate come to the courthouse to speak with the victim before the victim decides to end the PFA order.
- In the event that the victim is adamant in intending to resume cohabitation with the abuser, the judge may suggest that the victim modify the PFA order to delete the "no contact" provisions, while retaining the "do not abuse" provisions. In this way, the victim will be able to cohabit with the abuser, but can seek enforcement of the PFA order if the abuser batters the victim again.

A Sample of Procedure for Pro Se Litigants to Discontinue, Withdraw, or Modify a PFA Order including a Judge's Colloquy is located in [Appendix B](#).

EMERGING PRACTICES - USING THE PFAD SYSTEM

The Protection From Abuse Database (PFAD) is an electronic database that maintains records of PFA proceedings in Pennsylvania. It is designed to complement the statutorily mandated Protection Order Registry maintained by the Pennsylvania State Police.

This archival database automates the PFA process in the courts, creates and disseminates the State Police Protection From Abuse Summary Data Sheet information necessary for inclusion in the State Police Registry, and contains all standardized PFA forms approved by the Pennsylvania Supreme Court as well as other forms necessary for protection-from-abuse cases. Records from PFAD are

³⁰¹ JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES, 155-58 (1999).

available 24 hours a day, 365 days per year to authorized users (including the courts, law enforcement agencies, and members of the private bar) via a secured Internet site.

The PFAD web site also contains electronic forms relevant to the enforcement of PFA and other protection orders, including forms for Civil Contempt and Indirect Criminal Contempt.

Courts using PFAD find that it facilitates the court's efforts in assisting pro se litigants, as required by Pennsylvania law, and that it facilitates transmission of the statutorily required information to the state police. As of April 2014, all 67 counties utilized PFAD.

EMERGING PRACTICES - IMPORTANCE OF JUDICIAL/COURT STAFF DEMEANOR

It is an act of supreme courage for domestic violence victims to implore the civil legal system to bring its authority to bear against the violence and terrorism of abusers.³⁰² Victims of domestic violence may be very frightened and emotional. They may be embarrassed and ashamed about their situation. Defendants may also be frightened, emotional, embarrassed and ashamed. It is important for both the victim and the abuser to see justice in action. Although working in a domestic violence court is challenging labor, taking interest in each case and maintaining a respectful and appropriate demeanor are some of the most important things judges and court staff can do.

Leaving a violent home is a process, not a single act. Some studies indicate that it takes the victim an average of six attempts at separating before this goal is accomplished. Researchers agree that most victims do not request civil orders after the first abuse incident or assault.³⁰³ Often, victims petition courts for orders after failing to stem the abuse through other means. Most victims who petition courts for protection orders have suffered several years of abuse with the same abuser before coming to court for the first time.

Experienced justice system professionals understand that accessing the court is an important - but not the only - way a victim tries to find safety. For many reasons, such as family ties and lack of financial resources or housing alternatives, the victim returns to the abuser after obtaining a PFA order from the justice system. Each time a victim separates from the abuser, the victim gains additional information and strength.

Rather than a failure or a burden, it is a positive reflection on the court and the court employees when a victim returns to the court for additional help. Domestic violence victims will return for help when court personnel are welcoming and have not, through their demeanor, indicated to the victim

³⁰² Barbara J. Hart, *Safety and Accountability: The Underpinnings of a Just Justice System* (1998), <http://www.mincava.umn.edu/documents/safety/safety.pdf> (last visited December 20, 2013).

³⁰³ ANDREW KLEIN, NAT'L INST. OF JUST., PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES, 56 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/22572s2.pdf>

that the request for help is unwelcome or unwanted, or that the victim's previous withdrawal of a PFA order has precluded the victim from seeking help in the future.

PFA proceedings give the court an opportunity to address the abuser seriously and indicate that the abuser's behavior is not accepted in society. The court's demeanor can have a profound impact on the abuser, either by treating the abuser's behavior as insignificant, thereby condoning it, or by treating the abuser's behavior as a serious issue that merits the court's time and attention.

Protective orders are effective in deterring repeat abuse by many, but not all, perpetrators. A 2009 research review for the National Institutes of Justice concludes that

Depending on how reabuse is measured, over what period of time, and what countermeasures either the victim (e.g., getting a protective order or going into hiding) or the criminal justice system takes (arresting or locking up the abuser), a hard core of approximately one-third of abusers will reabuse in the short run, and more will reabuse in the long run.³⁰⁴

The court may impose civil or criminal remedies and sanctions that maximize protection of current and future victims from the abuser. Courts that do so communicate that community safety and offender accountability are paramount.

³⁰⁴ *Id.* at 19.

APPENDICES

A - ABUSIVE BEHAVIORS CHECKLIST

NOTE: The following is a sample checklist for courts to make available to PFA litigants. Courts using this form allow the PFA plaintiff to attach the checklist to the PFA complaint.

Thank you to The Hon. Thomas King Kistler, Centre County Court of Common Pleas, for providing this sample checklist.

Abusive Behaviors				
Type of Abuse	Location(s) where abuse occurred	Date(s) of incidents	Physical injuries, if any	Police contact?
Threatening/harassing phone calls				
Threat by physical or sexual abuse of children				
Threat by displaying or pointing weapon, access to weapons				
Threat by cruelty to animals				
Throwing things at or in the direction of the victim				
Grabbing				
Shoving or pushing				
Forcing sexual contact				
Physically abusing children in household				
Sexually abusing children in household				
Slapping (with open hand)				
Punching (with closed fist)				

APPENDIX A

Kicking				
Using a weapon (including but not limited to a firearm)				
Biting				
Choking or strangling (any grabbing of the neck)				
Beating				
Forcing to stay in closet, room, home or location				
Physically restraining/holding down the victim				
**Threat to injure self/others ** Threat by following **Threat by damage to property **Name calling/directed use of obscenities				

**Indicates behaviors, which alone may not constitute physical abuse, but may be used to induce and/or heighten fear in victim.

Signature _____

Date _____

B - SAMPLE PROCEDURE FOR PRO SE LITIGANTS SEEKING TO DISCONTINUE, WITHDRAW, OR MODIFY A PFA ORDER

NOTE: The following is a sample procedure and colloquy. Each court may modify the procedure and colloquy to reflect its preferred approach.

Thank you to Judge Eugene F. Scanlon, Allegheny County Court of Common Pleas (now retired), for providing this sample colloquy.

PFA Unit Clerk:

Plaintiff/Petitioner seeking to withdraw, discontinue or modify a PFA order is directed to the PFA Unit. There, a PFA clerk meets with the individual and explains the options available pursuant to the Pennsylvania Rules of Civil Procedure, Rule 1901.8, depending on the stage in the proceeding:

- **Discontinue: If a PFA plaintiff is not granted a temporary order, or decides not to proceed to an evidentiary hearing, the plaintiff may file a Praecipe to Discontinue with the Prothonotary to end the action. The plaintiff can also make an oral motion to discontinue the action at a hearing.**
- **Withdraw: If a temporary order is granted, a PFA petitioner may discontinue the PFA proceeding by filing a petition with the court before the final order hearing or may make an oral motion to withdraw the petition at the final order hearing.**
- **Modify: Thirty days after a final PFA order is entered, the court no longer retains jurisdiction to dismiss or vacate the final PFA order. However, either party may file a petition to modify the order at any time after the order is issued. If the petitioner would like the PFA order to end, they may petition to modify the order so that it expires on an earlier date.**

The clerk does not tell the PFA petitioner which option to select, and does not provide legal advice. When the PFA litigant is fully apprised of all discontinuance, withdrawal and modification options, the clerk helps the PFA petitioner to file a Praecipe to Discontinue or to complete a petition to withdraw or modify, as directed by the litigant.

For petitions to be withdrawn or modified, the PFA clerk may attach the allegation from the PFA litigant's original PFA complaint for the court to review. The PFA clerk will also ask for photo identification from the PFA litigant to confirm that the person seeking to withdraw the petition or modify the PFA order is who they claim to be. The PFA clerk then refers the petitioner to a domestic violence advocate who is stationed within the courthouse.

APPENDIX B

Domestic Violence Advocate

The domestic violence advocate reviews the process with the PFA plaintiff and discusses safety and available community resources with the PFA plaintiff. Neither the advocate nor the PFA Unit Clerk provides legal advice to the pro se plaintiff, but they do provide legal information about the discontinuance/withdrawal/modification process.

Judge

Plaintiffs seeking to withdraw a petition or modify a final order appear before the judge. The judge holds a record proceeding to address the petition to withdraw or modify the PFA order.

Sample Opening Statement to Plaintiffs Seeking Discontinuance / Withdrawal / Modification

Over the many years, this court has become sensitive to the plight of many individuals who find themselves stuck in a relationship involving violence. We see many people who come to court to obtain a temporary PFA, get a final PFA order, and then within days, weeks or months are back in court asking us to modify or vacate the PFA. Typically we hear reasons such as “the parties are trying to work the matter out,” or “he has promised not to hit me again,” or “he has promised not to drink or abuse drugs,” etc.

You are here today asking me to (withdraw, vacate or modify) your PFA order. Because I am concerned for your safety, I want to be sure that you are comfortable with what you are doing and have a good understanding of the possible consequences of your actions. I want to be certain that you know we are here and are open and available to you and very sensitive to the situation in which you may find yourself. We want to emphasize that no individual deserves to be treated or abused the way you have alleged that you were. Further, any concerns that you have over financial support or child care, or that the children might miss the abuser, can possibly be addressed through services that may be available to you. I trust that, in your meeting with the advocates before you came to court, these points were made clear to you and that you now wish to proceed to a hearing to either modify or vacate your PFA.

Questions by court:

After a statement identifying the caption of the case, docket number, etc., the court asks the individual to identify himself or herself and explain the relationship to the defendant. The judge proceeds with the following questions:

Q: You are here today asking this court to modify/vacate a final PFA entered by this court on (date).

Q: On that day you gave testimony before a judge of this court and approximately 7-10 days before that for the temporary PFA you gave similar testimony to the same or a different judge

APPENDIX B

of this court. Your previous testimony was that you were in fear of serious and imminent bodily injury at the hands of the defendant as the result of certain conduct he/she had engaged in (court will read allegations from temporary petition if especially egregious).

Q: Was that testimony truthful?

Q: Did those things happen to you?

Q: Are you saying today that you are no longer in fear of serious and imminent danger in the hands of this defendant?

Q: Is it the truth that you are no longer afraid of this defendant?

Q: Have you been threatened, coerced or intimidated in any manner by the defendant or anyone acting for him to come in here today to request that we modify or vacate your PFA?

Q: Have you taken any drugs, prescription or otherwise, or consumed any alcoholic beverages that impair your ability to understand the questions I have asked you?

Q: Do you do this of your own free will?

Q: Do you want me to grant this motion?

Q: In the event that things do not work out for you and this defendant, do you understand that if there is any further violence directed toward you, that you may return to this court to seek immediate protection?

APPENDICES C -F

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA

_____	:	
PLAINTIFF	:	
vs.	:	NO. _____
_____	:	
DEFENDANT	:	

C. PETITION FOR MODIFICATION OF PROTECTION FROM ABUSE ORDER

1. The petition of _____ (Plaintiff) (Defendant) respectfully represents that on _____ (Date) a Final Protection From Abuse Order was entered.
2. Petitioner requests that this Order be modified as follows:
3. This Order should be modified because:

WHEREFORE, Petitioner requests that the Court modify the existing Protection From Abuse Order.

(Petitioner)

I verify that the statements made in this Petition for Modification of Protection From Abuse Order are true and correct. I understand that if I make false Statements herein, that I am subject to the criminal penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities that could result in a fine and/or prison term.

(Date)

(Petitioner)

D. ORDER FOR HEARING FOR MODIFICATION OF PROTECTION FROM ABUSE ORDER

A Protection From Abuse Modification hearing is scheduled for _____
at _____ A.M./P.M. on _____ (Date).
at the _____ County Courthouse, Courtroom _____.

By the Court,

J.

Distribution:

E. BILINGUAL COURT FORMS

Bilingual forms are available from the Unified Judicial System of Pennsylvania website at <http://www.pacourts.us/forms/for-the-judiciary>. PFA documents are available in Arabic, Chinese, French, Haitian Creole, Khmer, Korean, Polish, Portuguese, Russian, Spanish and Vietnamese. Criminal Protective Order documents are available in Chinese, Khmer, Russian, Spanish and Vietnamese.

F. THE PROTECTION FROM ABUSE ACT, 23 PA. C.S. § 6101 ET SEQ. ANNOTATED

(See separate tab.)

CHAPTER IV: PFA AND CUSTODY

TABLE OF CONTENTS

CHAPTER GOALS.....	3
UNDERSTANDING CUSTODY TERMS.....	3
Definitions	3
PFA RELIEF PROVISIONS AFFECTING CUSTODY	4
VARIOUS PFA PROCEEDINGS AFFECT CUSTODY	5
Emergency PFA Proceedings Before Magisterial District Judges /Municipal Judges	6
Temporary PFA Proceedings - Ex Parte Custody Relief	6
Final PFA Hearings - Court Has Authority To Override Existing Orders and Agreements.....	6
Abuse of child - no custody, partial custody, or unsupervised visitation	6
Abuse of plaintiff or child - supervised custodial access.....	7
Serious abuse of plaintiff or child - supervised physical custody in a secure facility or no custodial access	7
Overriding previous order or agreement with a "No Contact" order.....	7
PFA CASES INVOLVING CUSTODY RELIEF	7
PFA Court May Alter Terms of Existing Custody Order.....	7
Court May Not Refuse to Consider PFA Custody Relief	8
PFA Proceedings Not Intended to Establish Custody on a Permanent Basis	9
Court Must Consider Best Interests of Child Before Denying PFA Defendant All Contact With Child	9
Court May Not Convert PFA Proceedings Into Child Dependency Proceedings	10
OTHER RELEVANT INFORMATION	11
Claims of False Reporting	11
Patterns of Domestic Violence are Seen During Custody Litigation	11

Judicial Concerns with Custody in PFA Proceedings	11
PFA is for Protection	12
EMERGING PRACTICES - PRIORITIZING SAFETY NEEDS IN ABUSE SITUATIONS	12
EMERGING PRACTICES - RECOMMENDED CUSTODY CONDITIONS.....	14
Pennsylvania Law	14
NCJFCJ Recommendations	14
Use Specific Terms	15
EMERGING PRACTICES - SELECTED EVIDENCE ISSUES IN PFA CUSTODY CASES	15
Violence Impairs an Abuser's Ability to Parent	15
Mutual Allegations of Abuse	16
EMERGING PRACTICES - CUSTODY WITH SAFETY AS PRIORITY	16
APPENDIX - THIRD PARTY AFFIDAVIT OF ACCEPTANCE AND ACCOUNTABILITY	18

CHAPTER GOALS

The goal of this chapter is to provide substantive and related statistical information regarding how custody is addressed in Protection From Abuse (PFA) cases. PFA “No Contact” provisions, PFA custody relief provisions, procedure and related cases are reviewed.

For more about custody outside the context of PFA matters, see Chapter VII - Custody.

UNDERSTANDING CUSTODY TERMS

Definitions

Custody law specifically defines the forms and types of custody a parent or party may have. Using the terms below -- as defined in the child custody law¹ -- will make PFA terms and conditions consistent and make it easier to reconcile with previous or subsequent custody orders.

Legal custody: The right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions.

- Shared legal custody - the right of more than one individual to obtain legal custody of the child
- Sole legal custody - the right of one individual to obtain exclusive legal custody of the child

Physical custody: The actual physical possession and control of a child.

- Partial physical custody - the right to assume physical custody of the child for less than a majority of the time
- Primary physical custody - the right to assume physical custody of the child for the majority of the time
- Shared physical custody - the right of more than one individual to physical custody of the child, each having significant periods of physical custodial time with the child
- Sole physical custody - the right of one individual to exclusive physical custody of the child.
- Supervised physical custody - custodial time during which an agency or an adult designated by the court or agreed upon by the parties monitors the interaction between the child and the individual with those rights.

¹ 23 PA. C.S. § 5322(a).

PFA RELIEF PROVISIONS AFFECTING CUSTODY

Custody is affected by PFA orders in one of two ways:

- 1) The court can grant an order on behalf of minor children that prohibits contact between the defendant and the children.²
- 2) The court can grant a PFA order with specific temporary custody relief or temporary visitation rights.³

The court has authority to order “no contact” between the plaintiff and minor children and the defendant as follows:

(a) GENERAL RULE – The court may grant any protection order or approve any consent agreement to achieve cessation of abuse of the plaintiff or minor children. The order or agreement may include:

(6) Prohibiting the defendant from having any contact with the plaintiff or minor children, including, but not limited to, restraining the defendant from entering the place of employment or business or school of the plaintiff or minor children and from harassing the plaintiff or plaintiff's relatives or minor children.⁴

The PFA Act provides the court with broad discretion to enter custody provisions that protect and promote the safety of the plaintiff victim and minor children.

(a) GENERAL RULE – The court may grant any protection order or approve any consent agreement to achieve cessation of abuse of the plaintiff or minor children. The order or agreement may include:

(4) Awarding temporary custody or establishing temporary visitation rights regarding minor children. In determining whether to award temporary custody or establish temporary visitation rights pursuant to this paragraph, the court shall consider any risk posed by the defendant to the children as well as risk to the plaintiff. The following shall apply:

(i) A defendant shall not be granted custody, partial custody or unsupervised visitation where it is alleged in the petition, and the court finds after a hearing under this chapter, that the defendant:

(A) abused the minor children of the parties, poses a risk of abuse toward the minor children of the parties; or

² 23 PA. C.S. § 6108(a)(6).

³ 23 PA. C.S. § 6108(a)(4).

⁴ 23 PA. C.S. § 6108(a)(6).

(B) has been convicted of violating 18 Pa.C.S. § 2904 (relating to interference with custody of children) within two calendar years prior to the filing of the petition for protection order or that the defendant poses a risk of violating 18 Pa.C.S. § 2904.

(ii) Where the court finds after a hearing under this chapter that the defendant has inflicted abuse upon the plaintiff or a child, the court may require supervised custodial access by a third party. The third party must agree to be accountable to the court for supervision and execute an affidavit of accountability.

(iii) Where the court finds after a hearing under this chapter that the defendant has inflicted serious abuse upon the plaintiff or a child, or poses a risk of abuse toward the plaintiff or a child, the court may:

(A) award supervised visitation in a secure visitation facility; or

(B) deny the defendant custodial access to a child.

(iv) If a plaintiff petitions for a temporary order under section 6107(b) (relating to hearings) and the defendant has partial, shared or full custody of the minor children of the parties by order of court or written agreement of the parties, the custody shall not be disturbed or changed unless the court finds that the defendant is likely to inflict abuse upon the children or to remove the children from the jurisdiction of the court prior to the hearing under section 6107(a). Where the defendant has forcibly or fraudulently removed any minor child from the care and custody of a plaintiff, the court shall order the return of the child to the plaintiff unless the child would be endangered by restoration to the plaintiff.

(v) Nothing in this paragraph shall bar either party from filing a petition for custody under Chapter 53 (relating to custody) or under the Pennsylvania Rules of Civil Procedure.

(vi) In order to prevent further abuse during periods of access to the plaintiff and child during the exercise of custodial rights, the court shall consider, and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children from abuse.⁵

VARIOUS PFA PROCEEDINGS AFFECT CUSTODY

Depending on the stage of the PFA proceeding, and on whether the parties have a previous custody order or agreement, courts have varying levels of authority to grant relief in PFA actions.

⁵ 23 PA. C.S. § 6108(a)(4).

Emergency PFA Proceedings Before Magisterial District Judges /Municipal Judges

In Pennsylvania, the minor judiciary has authority to grant emergency relief when the common pleas court is unavailable; however, the relief that may be awarded by the minor judiciary does not include custody and is limited to: (1) no abuse, (2) exclusive possession of the residence, and (3) no contact.⁶ Although there are no specific provisions for custody relief, a parent may petition for “No Contact” emergency relief from the minor judiciary on behalf of the children who have been abused. If a “No Contact” order is entered on behalf of a child, the order will affect, temporarily, any existing custody rights the defendant may have.

Temporary PFA Proceedings - Ex Parte Custody Relief

Emergency orders issued by the minor judiciary expire at the end of the next business day that the common pleas court is available.⁷ Typically, the abused individual files a petition for a temporary order at this time. The PFA plaintiff may petition the court on an ex parte basis and may seek child custody restrictions as part of the requested relief.⁸ At the ex parte proceeding the court may issue an order providing for all or some of the plaintiff’s requested relief and schedule a final order hearing date; or deny the plaintiff’s request for a temporary order and schedule a final order hearing date.⁹

If the parties have a written agreement or court order that gives the defendant partial, shared or full custody, the court may not disturb the agreement or order unless the court finds the defendant is likely to abuse or flee with the children.¹⁰ If the judge finds that the defendant is likely to harm or flee with the children, the court may supersede an existing custody order by entering a “No Contact” PFA order on behalf of the children or by entering other custody relief.¹¹

Final PFA Hearings - Court Has Authority To Override Existing Orders and Agreements

The court has the right to override existing custody orders or agreements at the final PFA hearing.¹²

Abuse of child - no custody, partial custody, or unsupervised visitation

If, after the final hearing (also known as the 10-day hearing), the common pleas court finds that the defendant abused the child/children or has been convicted of interference with the custody of the

⁶ 23 PA. C.S. § 6110(a).

⁷ 23 PA. C.S. § 6110(b).

⁸ 23 PA. C.S. §§ 6107(b), 6108(a)(4).

⁹ 23 PA. C.S. § 6107(a); see also [Fenko-Fox v. Fox](#), 68 A.3d 917 (Pa. Super. 2013), [Drew v. Drew](#), 870 A.2d 377 (Pa. Super. 2005); [Burke v. Bauman](#), 814 A.2d 206 (Pa. Super. 2002).

¹⁰ 23 PA. C.S. § 6108(a)(4)(iv).

¹¹ 23 PA. C.S. § 6108(a)(4)(vi).

¹² [Dye v. McCoy](#), 621 A.2d 144 (Pa. Super. 1993).

children within two years of filing of the petition, the court may not award the defendant custody, partial custody or unsupervised visitation.¹³

Abuse of plaintiff or child – supervised custodial access

If, after the hearing, the court finds that the defendant has abused the plaintiff or a child, the court may order supervised physical custody. Third-party custody supervisors must agree to be accountable to the court for supervision and execute an affidavit of accountability.¹⁴

Serious abuse of plaintiff or child – supervised physical custody in a secure facility or no custodial access

Where, after notice and hearing, the court finds that the defendant has inflicted serious abuse upon the plaintiff or child, or poses a risk of abuse toward the plaintiff or child, the court may award supervised physical custody in a secure visitation facility or may deny defendant custodial access to the child.¹⁵

Overriding previous order or agreement with a “No Contact” order

At the final PFA hearing, the court may enter a “No Contact” order between the defendant and the child nullifying an existing custody order or agreement,¹⁶ provided the court makes findings regarding the child’s best interests.¹⁷

PFA CASES INVOLVING CUSTODY RELIEF

PFA Court May Alter Terms of Existing Custody Order

If the terms of a custody order conflict with a PFA order, the court may alter the custody order to avoid conflict. In **Dye v. McCoy**, the mother sought a PFA on behalf of her five-year-old daughter against the father and his girlfriend.¹⁸

At the hearing, testimony from witnesses established that, during a weekend visit, the father struck the child across her face with his belt buckle, and father’s girlfriend gave the child an unprovoked

¹³ 23 Pa. C.S. § 6108(a)(4)(i).

¹⁴ 23 Pa. C.S. § 6108(a)(4)(ii).

¹⁵ 23 Pa. C.S. § 6108(a)(4)(iii).

¹⁶ [Dye v. McCoy, 621 A.2d 144 \(Pa. Super. 1993\).](#)

¹⁷ See [Shandra v. Williams, 819 A.2d 87 \(Pa. Super. 2003\).](#)

¹⁸ See *Dye*, 621 A.2d at 144.

slap across her face.¹⁹ The PFA court entered an order that prohibited the father and his girlfriend from having contact with the child for one year.²⁰

At the time of the PFA court's order, there was an existing custody order, which had been entered about one month earlier by a different judge. The PFA judge stated on the record that the custody order was to remain in effect, commenting that the judge did not believe the PFA Act authorized the judge to alter the custody order.²¹ The Superior Court disagreed, reversing the trial court.²²

Neither a pre-existing nor a subsequently filed custody order shall nullify a custody provision in a PFA order.

The Superior Court observed that the custody relief provisions of the PFA Act have the purpose of child safety above other orders or relationships. The court held that the relief provisions preclude a custody award, either preexisting or following the PFA order, from nullifying the PFA order. The Superior Court stated: "[T]o hold otherwise would have the effect of emasculating the central and extraordinary feature of the PFA which is to prospectively control and prevent domestic violence."²³

Because the previously existing custody order was not made part of the record, the Superior Court remanded for the sole determination of whether the custody order terms were in conflict with the PFA order, requiring a specific suspension of the custody order by the PFA order.

Court May Not Refuse to Consider PFA Custody Relief

The court may not order that future concerns about the welfare of a child be determined exclusively in a custody proceeding. This was the Pennsylvania Superior Court's holding in **Egelman v. Egelman**.²⁴ In this case, the mother sought and received a PFA order on behalf of the parties' son. The court found abuse and restricted the father's custodial time to supervised court visitation for a few hours every other weekend.

After this PFA order expired, the mother sought additional PFA orders on the child's behalf on two occasions, the first occurring about one year after the expiration of the PFA order, and the second occurring two years after the expiration of the first order. The trial court dismissed both of these PFA petitions.

In its order dismissing the last PFA petition filed by the mother on her son's behalf, the trial court ordered that all future proceedings concerning the son's welfare be heard only in a custody

¹⁹ *Id.* at 145.

²⁰ *Id.* at 144.

²¹ *Id.* at 145.

²² *Id.* at 145-146.

²³ *Id.*

²⁴ [Egelman v. Egelman, 728 A.2d 360 \(Pa. Super. 1999\).](#)

proceeding.²⁵ The court also established a procedure requiring the mother to post a bond prior to filing any additional PFA petitions against the father, and awarded attorney fees to the father.

The court may not require that PFA plaintiffs seeking custody relief pursue that relief exclusively in custody proceedings.

The Superior Court affirmed the trial court's dismissal of the mother's PFA petition on behalf of the child, but reversed the trial court's order awarding attorney's fees to the father, requiring the mother to post a bond, and precluding her from seeking custody relief as part of a PFA petition.²⁶ The Superior Court compared the protective and preventive nature of the PFA Act to Pennsylvania's custody and child protective services laws. The Court found that Pennsylvania's child custody and child protective services laws serve different purposes from the PFA Act and are not substitute remedies for the remedies afforded by the PFA Act.²⁷

PFA Proceedings Not Intended to Establish Custody on a Permanent Basis

PFA proceedings are not meant to establish custody on a permanent basis. In **Rosenberg v. Rosenberg**, during contentious divorce and PFA proceedings, the mother was granted temporary custody of the parties' children and the father was granted visitation.²⁸ Four amended orders regarding visitation and support were entered. The mother subsequently denied the father visitation, alleging that he had sexually abused the parties' younger daughter, and the father filed for contempt. The father's contempt petition and the various subsequent custody/partial custody arrangements had been filed under the Protection From Abuse action. In a footnote, the Superior Court disapproved of this practice, stating that the PFA Act was enacted to provide "immediate protection from physical abuse; it was not intended to replace other, established proceedings for the determination of permanent custody of children."²⁹

Court Must Consider Best Interests of Child Before Denying PFA Defendant All Contact With Child

A PFA court facing a request to modify a previously existing custody order must consider the child's best interests before denying the PFA defendant all contact with the child.³⁰ In **Shandra v. Williams**, the mother and child visited with the father, a convicted felon, at a halfway house. During the visit, the mother informed the father that their relationship was over. The father called the mother names and acted as if he was going to punch her. While this incident occurred, the parties' toddler was

²⁵ *Id.* at 363; see also [Lawrence v. Bordner](#), 907 A.2d 1109 (Pa. Super. 2006).

²⁶ *Id.*

²⁷ *Id.* at 365-66.

²⁸ [Rosenberg v. Rosenberg](#), 504 A.2d 350 (Pa. Super. 1986).

²⁹ *Id.* at 351.

³⁰ [Shandra v. Williams](#), 819 A.2d 87 (Pa. Super. 2003).

sitting on the mother's lap. Subsequently, the father telephoned the mother and verbally threatened her.

PFA defendants must be afforded due process and an opportunity to address best interests where custody relief is issued under the PFA Act.

The trial court entered a PFA order that included "no contact" provisions for the mother and the parties' child. In so doing, the trial court modified a previously existing visitation/custody order. The father appealed, claiming that the trial court erred, because there was no testimony regarding the child's best interests, and that the court based its modification of custody not on the best interests of the child, but rather on the father's behavior.

The Superior Court held that in failing to consider evidence regarding the child's best interests, the trial court did not provide the father with due process relevant to the custody aspect of the case.³¹ The Superior Court affirmed the trial court's PFA order, which directed "no abuse," and reversed that part of the trial court's order suspending the existing custody order.³²

Court May Not Convert PFA Proceedings Into Child Dependency Proceedings

It is reversible error for a PFA court to convert PFA proceedings into child dependency proceedings under the Juvenile Act.³³ In **Brooks-Gall v. Gall**, the mother brought a PFA action on behalf of her children against their father. About one month before the PFA proceeding, the trial court had awarded primary physical custody to the father as part of the parties' divorce proceedings. At the final PFA hearing, the trial court stated that it believed that the mother was attempting to use the PFA proceeding to circumvent the court's earlier custody decision. The court, observing that the children were afraid of the father, declared the children dependent and ordered the county children and youth services agency to remove the children from their mother and father.

On appeal, the Superior Court reversed the trial court, holding that the trial court's sua sponte actions violated the parents' due process rights as well as Pennsylvania's child dependency law.³⁴ The Court noted the public policy concern that sua sponte actions like that of the trial court would have a chilling effect; victims of domestic violence would not seek PFA court intervention and protection if they risked losing their children to the child welfare system.³⁵

³¹ *Id.*

³² *Id.*

³³ [Brooks-Gall v. Gall](#), 840 A.2d 993 (Pa. Super. 2003).

³⁴ *Id.*

³⁵ *Id.*

OTHER RELEVANT INFORMATION

Claims of False Reporting

Contrary to widespread beliefs, research findings suggest that reports of child abuse do not increase during divorce. According to the American Psychological Association, false reporting of family violence occurs infrequently:

Although many people believe that women especially will lodge false charges of child abuse or battering against their spouses in an effort to manipulate or retaliate, the rate of false reports in these circumstances is no greater than for other crimes.³⁶

Patterns of Domestic Violence are Seen During Custody Litigation

Separation does not end the violence for most victims of domestic violence. Patterns of domestic violence begin, continue, or escalate during separation and, for intimate partners with children, during custody litigation.³⁷ According to a 2012 report, “[s]eparated [vs. married or divorced] females experienced the highest rate of intimate partner violence during the 18-year period” from 1993 to 2010.³⁸

Judicial Concerns with Custody in PFA Proceedings

Some judges have expressed concern when asked to include orders prohibiting contact between a parent and a child or for custody relief. Perhaps the concern grows from the fact that PFA proceedings are short in duration and judges feel they do not have the time to give full consideration to custody during the PFA proceeding. Remembering that the overall purpose of PFA proceedings is safety for the parties and children, and that separation increases risk for domestic

³⁶ AM. PSYCHOLOGICAL ASS’N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 12 (1996), [hereinafter AM. PSYCHOLOGICAL ASS’N REPORT]; see also, PETER JAFFE, NANCY LEMON & SAMANTHA POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 7-9 (2002) (disputing allegations of false reporting of domestic violence); Daniel G. Saunders & Karen Oehme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*, VAWnet.org Nat’l Resource Ctr. on Domestic Violence, 7 (2007), available at <https://vawnet.org/material/child-custody-and-visitation-decisions-domestic-violence-cases-legal-trends-risk-factors>.

³⁷ LOU BROWN ET AL., STOP DOMESTIC VIOLENCE: AN ACTION PLAN FOR SAVING LIVES 104-105 (1997), cited in ABA CENTER FOR CHILDREN & THE LAW, A JUDGE’S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 131 (2008) [hereinafter A JUDGE’S GUIDE], http://apps.americanbar.org/legalservices/probono/childcustody/judges_guide.pdf (last visited Nov. 30, 2015).

³⁸ Shannan Catalano, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Intimate Partner Violence, 1993-2010*, 6 (2012), U.S. Dep’t of Justice, available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>.

violence victims and their children, judges should consider and address “No Contact” and custody relief requests in PFA actions.³⁹

PFA is for Protection

Violent marriages and intimate partnerships place children at risk. The risks faced by children when one parent is physically abused are well documented.⁴⁰

EMERGING PRACTICES - PRIORITIZING SAFETY NEEDS IN ABUSE SITUATIONS

Because the purpose of the Protection From Abuse Act is advance prevention of physical and sexual abuse rather than retrospective punishment of criminal behavior,⁴¹ the court should consider the safety of the victim and child versus the risks when faced with a request for custody as part of a PFA petition.

Judges may be uncomfortable with ex parte requests for custody or a “No Contact” provision prohibiting contact between the defendant and the parties’ child. The National Council of Juvenile and Family Court Judges recognizes this discomfort, but urges judges to grant relief:

Judges may be uncomfortable issuing ex parte orders that evict the offender from the family home, require the payment of spousal or child support, or award custody of the children to the petitioner. Without such provisions, however, the victim cannot be protected. Property, safety, and due process rights of persons who have jeopardized the physical safety of others should be yielded until an expedited hearing.⁴²

Judges also have expressed fear that the expedited process for PFA proceedings will encourage parents, primarily mothers, to file PFA proceedings in situations where no abuse has occurred in an attempt to gain strategic benefits in custody.⁴³

³⁹ Research indicates that children are at risk for physical and psychological abuse when there is domestic violence in the home. Frequently, separation and/or divorce will escalate the abuser’s behavior. It is therefore critical that the emotional and physical safety of the child and the abused parent be the primary focus in decision-making. ABA CENTER FOR CHILDREN & THE LAW, A JUDGE’S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 87 (2008).

⁴⁰ Lundy Bancroft and Jay G. Silverman, *Assessing Abusers’ Risk to Children*, in PETER JAFFE, L. BAKER, & A. CUNNINGHAM (EDS.) PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 101 (2004). See also, *Assessing Risk to Children from Batterers* 3 (2002), by the same authors, available at <https://vawnet.org/material/assessing-risk-children-batterers>.

⁴¹ See *Snyder v. Snyder*, 629 A.2d 977 (1993).

⁴² NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ FAMILY VIOLENCE PROJECT 22 (1990), available at <http://www.ncjfcj.org/resource-library/publications/family-violence-improving-court-practice>.

⁴³ This concern was expressed by the trial court in *Egelman v. Egelman*, 728 A.2d 360, 363 (Pa. Super. 1999).

Research makes a case against this misperception.

- Rather than being falsely reported, domestic violence is underreported, according to statistics. Women who experience intimate partner violence fail to report the crime to law enforcement six times more often than women who experience stranger violence.⁴⁴
- The high proportion of women seeking PFAs reflects the fact that the large majority of victims of domestic abuse are women.⁴⁵
- In most families troubled by domestic violence, mothers serve as the primary caretaker of the children.⁴⁶ That abused mothers are seeking PFA custody relief does not infer an exploitative motive, but a protective one that reflects the family's current assignment of childcare responsibilities. In spite of concerns about expedited proceedings and false claims, judges must carefully determine whether the facts of the particular case before them warrant a protective order and accompanying temporary custody relief.

PFA custody awards are not intended to replace other established proceedings for determination of permanent custody of children,⁴⁷ and courts may not order that future concerns about the welfare of a child be determined exclusively in a custody proceeding. According to the Superior Court in the Egelman case, it was improper for the trial court to deny consideration of a petition for temporary custody in a PFA proceeding, because special relief was available in a custody proceeding.⁴⁸ The

⁴⁴ AM. PSYCHOLOGICAL ASS'N REPORT, AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 10, 12-13 (1996).

⁴⁵ In addition, men are the perpetrators of child abuse in the majority of cases. AM. PSYCHOLOGICAL ASS'N REPORT, AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 9-13 (1996).

⁴⁶ See LUNDY BANCROFT & JAY SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002). Bancroft and Silverman's observations of their clients, members of batterers' intervention programs, demonstrate the lack of involvement:

Batterers tend to be uninvolved and neglectful parents (usually in combination with periods of authoritarian involvement) and to be less physically affectionate with their children than are non-batterers. (Citation omitted.) The prevailing view among our clients is that their children are part of their domain of authority, yet they consider the work of caring for the children to be the responsibility of the mother. They commonly perceive children to be a hindrance or annoyance and may arrange pretexts to be away from home much of the time in order to evade parenting responsibilities. ...

Our clients are not reliable in knowing the names of their children's schoolteachers or daycare providers, knowing the details of medical conditions or the names of doctors, or being able to describe their children's interests, strengths, or ambitions. Batterer's lack of knowledge about their children often reveals itself in behavioral expectations that are not appropriate to children's ages, most commonly taking the form of expecting children to behave like mature adults.

Id. at 32.

⁴⁷ [Rosenberg v. Rosenberg](#), 504 A.2d 350 (Pa. Super. 1986).

⁴⁸ [Egelman v. Egelman](#), 728 A.2d 360 (Pa. Super. 1999).

denial ignored the special benefits that Pennsylvania's legislature intended to confer on victims of domestic violence, benefits not generally available in emergency custody cases.

EMERGING PRACTICES - RECOMMENDED CUSTODY CONDITIONS

Pennsylvania Law

Pennsylvania law provides that, to prevent further abuse, a court can impose conditions on a custody award as necessary to ensure the safety of the plaintiff and the child/children during the exercise of custodial rights.⁴⁹

Female domestic violence victims are significantly less likely to report their abuse to law enforcement

NCJFCJ Recommendations

The National Council of Juvenile and Family Court Judges recommends the following conditions of visitation in cases involving domestic and family violence:⁵⁰

- Do not require or encourage contact between the parties.
- Order visitation in a location physically separate from the abused party (whether supervised or unsupervised).
- Require transfer of children between the parents in the presence of a third party and in a protected setting (e.g., police station or visitation center).
- Start with short, daytime visits in a public place, and increase length only if things are going well.
- Include "no alcohol or drug" provisions for the visiting parent, and detail the immediate consequence of violation (e.g., other parent should call the police).
- Place limits on overnight visitation.
- Require the perpetrator to successfully complete a batterer's intervention program, drug/alcohol program, or parenting education program before being allowed visitation.
- Require a bond from the batterer to ensure the child's safe return.
- Build in automatic return dates for court to review how the order is working.

⁴⁹ 23 PA. C.S. § 6108(a)(4).

⁵⁰ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE 34 (1994).

- Do not order the victim into counseling with the perpetrator as a precondition of custody or visitation.

Use Specific Terms

When crafting a PFA order involving custody, partial custody, or visitation provisions, using specific language will help prevent further disputes and aid police officers who may have to assist in enforcement. Vague clauses such as “reasonable visitation” are not effective. Courts should refuse to order visitation “as may be agreed by the parties” in domestic violence situations.

Permitting future agreement can cause confusion with “No Contact” provisions – an abuser could claim that the custody agreement required contact. Vague arrangements also require subsequent custody/visitation negotiations that can lead to further abuse, often in front of the children.

Refer to Chapter VII: Custody, Appendix A for specifically worded custody awards and conditions that may be used in PFA or custody orders.

EMERGING PRACTICES - SELECTED EVIDENCE ISSUES IN PFA CUSTODY CASES

Violence Impairs an Abuser’s Ability to Parent

Courts may overlook the impact of having an abuser as a parental figure, but experts argue that misbehavior necessarily impairs the abuser’s ability to parent. The abusing parent’s need to control the other parent overshadows the ability to provide security, serve as a role model, and protect the child or children from harm.⁵¹ An abusive parent’s behavior can hurt children in a variety of ways:

- Children may witness the abuser’s violent behavior and perceive it as normal and acceptable.⁵²
- Children may learn gender roles and stereotypes based on dominance and subordination and incorporate these roles into their lives.⁵³
- Abusers may use children as pawns to continue the pattern of coercion and control over the other parent.⁵⁴
- Abusers may belittle the other parent in front of the children.⁵⁵

⁵¹ PETER JAFFE, NANCY LEMON & SAMANTHA POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 7-9 (2002) at 30-33.

⁵² *Id.* at 30.

⁵³ Lundy Bancroft, *The Parenting of Men Who Batter*, 39 CT. REV. 44, 46 (2003).

⁵⁴ *Id.* at 47.

⁵⁵ *Id.*

- Abusers may direct violence toward the children, particularly after separation from the victim.⁵⁶
- In the long term, the trauma and anxiety associated with living with a violent family member can render children increasingly more susceptible to feelings of insecurity, self-loathing and isolation.⁵⁷

As stated earlier, there is also a high degree of congruence between partner abuse and child abuse. Moreover, many battering partners will begin to abuse the parties' children following separation, because the other parent is not around to protect the children during their time with the abuser. Additionally, separation is often the first time that the abusing parent is faced with all of the parenting responsibilities for substantial periods of time.⁵⁸

Mutual Allegations of Abuse

Sometimes courts will hear mutual allegations of abuse in the context of a PFA or custody case. Rather than allowing the mutual abuse allegations to cancel each other out, courts should investigate further to discern whether a party acted in self-defense or to protect children. According to the American Law Institute, acting in reasonable self-defense or to protect another does not constitute domestic violence.⁵⁹

For additional information about evidence issues involved in custody and domestic violence cases, refer to Chapter II: Evidence and Chapter VII: Custody.

EMERGING PRACTICES - CUSTODY WITH SAFETY AS PRIORITY

Nearly every family law institute or judicial association encourages judges to seriously consider the effect of domestic violence on a family and enter orders for custody, partial custody, and visitation accordingly.

The American Law Institute, in *Principles of the Law of Family Dissolution: Analysis and Recommendations*, observed the following about domestic violence in the section on parenting plan criteria:

The court is obligated to recognize all forms of domestic violence and may not disregard evidence of it whatever its severity. It should take the evidence seriously and not assume that most allegations of violence are exaggerated or unfounded. At

⁵⁶ *Id.* at 45, 47; PETER JAFFE, NANCY LEMON & SAMANTHA POISSON, *CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY* 32-33 (2002)

⁵⁷ Lundy Bancroft, *The Parenting of Men Who Batter*, 39 CT. REV. 46 (2003).

⁵⁸ Lundy Bancroft and Jay G. Silverman, *Assessing Abusers' Risk to Children*, in PETER JAFFE, L. BAKER, & A. CUNNINGHAM (EDS.) *PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION* 151-156 (2004).

⁵⁹ AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* 258 (2002).

the same time, the limits it imposes must be appropriate to the circumstances, taking into account the severity and frequency of the physical harm or threats. In ordering a measure designed to protect a child or a child's parent ... courts should recognize that abusers often use access to the child as a way to continue abusive behavior against a parent. Protection of the safety and welfare of an abused parent is consistent with the primary objective of furthering the safety and welfare of the child.⁶⁰

Victims leaving an abusive relationship need courts to recognize that custody and visitation orders require safety considerations above all else.

Supervision of custodial time provided by a neutral third party can enhance safety for the child. The NCJFCJ asserts that family members are rarely appropriate as supervisors for custody.⁶¹

The American Law Institute asserts that acting in reasonable self-defense or to protect another does not constitute domestic violence.

Family members may be unable to withstand the manipulation of the abuser or, if aligned with the abuser, may be more likely to tolerate inappropriate conduct or violations of the order.

Judges who order supervised visitation may find that some abusers do not visit at all after their efforts to gain access to their former partner using custody as a pretext have been thwarted.

⁶⁰ *Id.* at 258.

⁶¹ NCJFCJ, *A Judicial Guide to Child Safety in Custody Cases* 34 (2008), available at http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf.

APPENDIX - THIRD PARTY AFFIDAVIT OF ACCEPTANCE AND ACCOUNTABILITY

[CAPTION]

THIRD PARTY AFFIDAVIT OF ACCEPTANCE AND ACCOUNTABILITY

1. My name is _____.
2. I reside at _____.
3. I understand that the court has prohibited the above-named Defendant from abusing, threatening or harassing the above-named Plaintiff.
4. I also understand that the Defendant is not to take the children listed on this affidavit out of my physical custody during any period of supervised visitation.
5. I understand that it is my responsibility to call the police and to report any violations of the above-mentioned requirements.
6. I understand that it is my responsibility to inform the above-mentioned Plaintiff if any violations occur.
7. I have agreed to provide supervised visitation for [Name of parent whose visits will be supervised] _____ to visit with the following child/children:

[List names and birthdates of children]:

8. I have agreed to supervise visitation on the following day(s), date(s) and time(s): _____

and location(s):

9. I further understand that if for any reason I am unable to supervise visitation at any time, I shall contact the above-mentioned Plaintiff at least two (2) hours prior to scheduled visitation time. I shall also contact the above-named Defendant at least two (2) hours prior to scheduled visitation time.

10. I further understand that should I be unable to continue to provide supervised visitation on a long-term or permanent basis, I shall contact both [parent with primary custody] _____ and [supervised visitation parent] _____. I shall also notify the court in writing within twenty-four (24) hours of my termination of supervision services. I agree to contact the court at:

[name of Court Contact Personnel and Court Address:]

[OR alternatively if the parties have counsel:]

10. I further understand that should I be unable to continue to provide supervised visitation on a long-term or permanent basis, I shall contact both _____, attorney for the parent with primary custody and _____, attorney for the supervised visitation parent in writing within twenty-four (24) hours of my termination of supervision services.

11. I understand that if I fail to comply with the restrictions and duties stated above, I may be held civilly or criminally liable.

Signature of Affiant/Third Party Supervisor

Sworn and subscribed to before me this ____ day of _____, 20__

(NOTARIAL SEAL)

Notary signature

CHAPTER V: SPOUSAL AND CHILD SUPPORT

TABLE OF CONTENTS

CHAPTER GOALS.....	2
PENNSYLVANIA’S SUPPORT LAW – OVERVIEW.....	2
Liability for Support.....	2
Support Guidelines	2
Persons Authorized to Bring Support Actions.....	2
Venue	3
Entitlement Issues	3
SUPPORT PROVISIONS IN PFA ACT	3
PFA Act Permits Court to Award Temporary Support.....	3
Enforcement of Support Provisions in PFA Order	4
SPECIAL CHILD SUPPORT SAFETY PROVISIONS FOR SITUATIONS INVOLVING DOMESTIC VIOLENCE	5
Family Violence Option – Good Cause	5
Safeguarding Location Information of Domestic Violence Victims.....	6
OTHER RELEVANT INFORMATION	8
The Connection Between Domestic Violence and Victim Poverty.....	8
Abusers Sabotage Attempts by Victims to Seek Employment	9
Victims Cite Financial Concerns As One of the Main Obstacles to Leaving an Abuser	9
EMERGING PRACTICES.....	10
PFA Temporary Support Relief Can Be Any Amount	10
Facilitating Safety for Support Proceedings.....	10

CHAPTER GOALS

This chapter provides background information regarding Pennsylvania's child and spousal support laws and discusses the support relief provisions of the Protection From Abuse Act. It also reviews special domestic violence safety provisions, discusses economic issues involved in domestic violence, and provides practice tips.

PENNSYLVANIA'S SUPPORT LAW – OVERVIEW

Liability for Support

The Pennsylvania statute that establishes support liability provides that:

- Married persons are liable for the support of each other according to their respective abilities to provide support as provided by law.
- Parents are liable for the support of their children who are unemancipated and 18 years or younger.
- Parents may be liable for the support of their children who are 18 years or older.¹

Support Guidelines

Generally, child and spousal support are to be awarded pursuant to statewide guidelines² found in the Pennsylvania Rules of Civil Procedure.³ There are three limited exceptions, one of which outlines that support rules are not applicable to temporary support ordered under the PFA Act.⁴

Persons Authorized to Bring Support Actions

The following individuals may bring a support action:

- a by a person, including a minor parent or a minor spouse, to whom a duty of support is owing
- on behalf of a minor child by a person having custody of the child, without appointment as guardian ad litem
- on behalf of a minor child by a person caring for the child regardless of whether a court order grants that person custody of the child
- a public body or private agency having an interest in the case, maintenance or assistance of a person to whom a duty of support is owing
- a parent, guardian or public or private agency on behalf of an unemancipated child over eighteen years of age to whom a duty of support is owing
- any person who may owe a duty of support to a child or spouse⁵

¹ 23 PA. C.S. § 4321.

² 23 PA. C.S. § 4322.

³ PA. R. CIV. P. 1910.1 to .50.

⁴ Pa. R. Civ. P. 1910.1(b)(1)-(3).

⁵ PA. R. CIV. P. § 1910.3.

Venue

According to the Pennsylvania Rules of Civil Procedure, generally, a support action may be brought in the county in which the:

- defendant resides
- defendant is regularly employed
- plaintiff resides and that county is the county in which the last marital domicile was located and in which the plaintiff has continued to reside
- child resides if the relief sought includes child support⁶

When certain circumstances exist, jurisdiction is acquired over the defendant pursuant to Pennsylvania's long arm statute and the action may be brought where the plaintiff resides.⁷

Entitlement Issues

Paternity

Pennsylvania recognizes a presumption of paternity for children born into intact marriages. In addition, Pennsylvania recognizes paternity by estoppel, which precludes a parent who has held the child out as the parent's own from avoiding support responsibilities. Either party may challenge paternity for children born out of wedlock.⁸

Spousal Support Entitlement

An exception to a spouse's obligation to pay spousal support exists where the spouse receiving support engages in behavior that would constitute grounds for a fault divorce.⁹ If the court finds that grounds for a fault-based divorce exist, the spouse at fault is not entitled to support.¹⁰ The fault grounds are listed in section 3301(a) of the Divorce Code.¹¹

SUPPORT PROVISIONS IN PFA ACT

PFA Act Permits Court to Award Temporary Support

Pursuant to the relief provisions of the PFA Act, the court may, at the final order hearing, direct the defendant to provide various types of interim support and insurance coverage to those persons for whom the defendant has a duty to support (spousal and/or child support).¹²

⁶ PA. R. CIV. P. § 1910.2(a)(1)-(4).

⁷ PA. R. CIV. P. § 1910(2)(b); *see* 23 PA. C.S. § 4342(c).

⁸ 23 PA. C.S. § 4343(c)(1).

⁹ K.E.M. v. P.C.S., 38 A.3d 798 (Pa. 2012).

¹⁰ S.M.C. v. W.P.C., 44 A.3d 1181 (Pa. Super. 2012).

¹¹ 23 PA. C.S. § 3301(a).

¹² 23 PA. C.S. § 6108(a)(5).

If interim support is awarded in a PFA, the plaintiff must file a support complaint within two weeks or the PFA support provisions are void.

At the final order hearing, the PFA court is authorized to require the defendant to pay support, provide or maintain health insurance coverage for the spouse and child,¹³ pay unreimbursed medical expenses, and/or make rent or mortgage payments.¹⁴ PFA support is temporary in nature, and if the plaintiff does not file a support complaint with domestic relations within two weeks of the PFA order, the support provisions contained within the PFA order are void.¹⁵

The specific temporary support relief provision of the PFA Act states:

(a) General rule:

The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include:

(5) After a hearing in accordance with section 6107(a), directing the defendant to pay financial support to those persons the defendant has a duty to support, requiring the defendant, under sections 4324 (relating to inclusion of medical support) and 4326 (relating to mandatory inclusion of child medical support), to provide health coverage for the minor child and spouse, directing the defendant to pay all of the unreimbursed medical expenses of a spouse or minor child of the defendant to the provider or to the plaintiff when he or she has paid for the medical treatment, and directing the defendant to make or continue to make rent or mortgage payments on the residence of the plaintiff to the extent that the defendant has a duty to support the plaintiff or other dependent household members. The support order shall be temporary, and any beneficiary of the order must file a complaint for support under the provisions of Chapters 43 (relating to support matters generally) and 45 (relating to reciprocal enforcement of support orders) within two weeks of the date of the issuance of the protection order. If a complaint for support is not filed, that portion of the protection order requiring the defendant to pay support is void. When there is a subsequent ruling on a complaint for support, the portion of the protection order requiring the defendant to pay support expires.¹⁶

Enforcement of Support Provisions in PFA Order

When the court awards interim support to a PFA plaintiff and the plaintiff timely files with the domestic relations section, the PFA support award continues until the domestic relations section enters a subsequent support ruling.¹⁷ After the plaintiff files a support complaint with the domestic relations section, that office provides enforcement of the PFA support award.¹⁸

¹³ 23 PA. C.S. §§ 4324 and 4326.

¹⁴ 23 PA. C.S. § 6108(a)(5).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The PFA enforcement provisions for support differ from the PFA enforcement provisions for other types of relief. For example, law enforcement is directed to arrest defendants who violate the custody, exclusive possession, do not abuse, relinquishment of firearms and no-contact provisions of a PFA order. 23 PA. C.S. § 6113.

(f) Support Procedure:

The domestic relations section shall enforce any support award in a protection order where the plaintiff files a complaint for support under subsection (a)(5).¹⁹

For information regarding PFA enforcement, refer to Chapter X: Enforcement.

SPECIAL CHILD SUPPORT SAFETY PROVISIONS FOR SITUATIONS INVOLVING DOMESTIC VIOLENCE

The majority of women who receive public assistance have experienced abuse and look to the welfare system as part of their safety net when escaping an abusive relationship.²⁰ But some public benefit regulations require victims to have some level of contact with an abuser, which can place them at an increased risk of harm. Numerous studies have also found that seeking education, training, or work can exacerbate domestic violence.²¹ Initially, Congress incorporated special domestic violence safety provisions into the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).²² These provisions were subsequently reauthorized.²³

Family Violence Option – Good Cause

Individuals receiving public benefits must cooperate with child support enforcement agencies to receive benefits such as Temporary Aid to Needy Families (TANF) and General Medical Assistance (GA), unless the public benefit recipient establishes “good cause” for an exemption.²⁴ In Pennsylvania, safety concerns of victims of domestic violence are sufficient to excuse a recipient from complying with child support enforcement agencies.²⁵ This exemption is commonly known as the Family Violence Option.²⁶

The Department of Human Services will grant a victim of domestic violence a “good cause” waiver of a TANF requirement if compliance would result in one of the following:

- Make it more difficult for the individual or family member to escape domestic violence
- Unfairly penalize the individual or family member because of domestic violence
- Place the individual or family member at further risk of domestic violence²⁷

In addition, Pennsylvania allows for cooperation waivers if:

- The child was conceived as a result of rape or incest

¹⁹ 23 PA. C.S. § 6108(f).

²⁰ See E. Lyon, *Welfare, Poverty and Abused Women: New Research and its Implications*, 6 (2000), Nat’l Resource Ctr. on Domestic Viol., available at <https://vawnet.org/material/welfare-poverty-and-abused-women-new-research-and-its-implications>.

²¹ Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOCIAL ISSUES 655 (2000).

²² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

²³ 42 U.S.C. 602(a)(7).

²⁴ 55 PA. CODE § 187.27.

²⁵ See 55 PA. CODE § 108.1-108-18.

²⁶ *Id.*

²⁷ 55 PA. CODE § 108.8.

- Legal proceedings are pending for adoption of the child before a court
- An agency is working to help the individual to decide whether or not the child should be placed for adoption and the discussions have not progressed for more than three months²⁸

Support court judges may see the “good cause” waiver in effect in support proceedings where the domestic relations section seeks the judge’s signature on an order terminating child support. Such a proposed order will indicate that the support order is being terminated “at the request of the Department of Human Services.”

Safeguarding Location Information of Domestic Violence Victims

Federal law requires states to safeguard information regarding the whereabouts of domestic violence victims and their children where disclosure would be harmful to the party or children.²⁹ In Pennsylvania, information is safeguarded in the Pennsylvania Child Support Enforcement System by placing a Family Violence Indicator on the individual’s electronic file.³⁰

The FVI protection is not limited to welfare cases, and may be entered for any party to the support action, including the child, custodial parent, noncustodial parent, caretaker, and/or spouse.³¹

Entry of the FVI on PACSES is intended to prohibit the release of information on the whereabouts of one party or of the child to the other party in the support action if there is a PFA order or if there is reason to believe that the release of information may result in physical or emotional harm to the party or the child.³² When an FVI is placed in the PACSES file, the domestic relations office is directed to remove the following information about the protected party/parties on correspondence to the parties:

- the residential address and telephone number
- name and address of the employer, education, training, or work program or other work activity
- name and address of the child’s school and the identity and location of child care or medical providers
- whether the individual or family member is living in a domestic violence shelter and the location of the shelter
- the amount of benefits received³³

The FVI is transmitted to the federal Parent Locator database and will protect confidential information.³⁴

²⁸ 55 PA. CODE § 187.27.

²⁹ 42 U.S.C. § 654(26)(C)-(E); 45 C.F.R. § 302.31(c).

³⁰ 55 PA. CODE § 108.14; 42 U.S.C. § 653(b)(2); 45 C.F.R. § 307.11(f)(l)(x).

³¹ PENNSYLVANIA DEP’T OF HUMAN SERVICES, BUREAU OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT HANDBOOK, 5 (Aug. 2012) available at <https://www.humanservices.state.pa.us/csww/csww/forms/Pub%20266%209-11.pdf>. See also 55 PA. CODE § 108.14.

³² 42 U.S.C. § 654(26)(B), (C); 55 PA. CODE § 108.14.

³³ 55 PA. CODE § 108.14.

³⁴ 55 PA. CODE § 108.16(b)(3).

An FVI safeguards information re: the whereabouts of certain domestic violence victims on the PACSES system...authorization to override these protections is very limited.

Authorization to seek an FVI override is limited and, before the FVI protections may be overridden, certain procedural protections must occur.³⁵ First, the override request must be made by an “authorized person”³⁶ and the request must be made for an “authorized purpose.”³⁷

An “authorized person” under the law is one of the following:

- a state plan agent or attorney charged with recovering child or spousal support amounts³⁸
- the court which has authority to issue a child support order³⁹
- the resident parent, legal guardian, attorney, or agent of a child;⁴⁰
- an authorized state agency⁴¹
- an entity designated as a Central Authority for child support enforcement in a reciprocating foreign or treaty country⁴²
- an agent or attorney of a participating Parent Locator Service state, who has the duty or authority to enforce a child custody or visitation determination⁴³
- any court having jurisdiction to make or enforce a child custody or visitation determination⁴⁴
- any agent or attorney of the U.S. or a state having a Parent Locator Service agreement who has the duty or authority to investigate, enforce or bring a prosecution with respect to unlawful taking or restraint of a child⁴⁵

An “authorized purpose” under the law, is one of the following:

- for purposes of establishing parentage, or establishing, setting the amount of, modifying or enforcing child support obligations⁴⁶
- for purposes of enforcing anti-kidnapping laws, or making and enforcing a child custody determination to “authorized persons”⁴⁷

³⁵ 42 U.S.C. §§ 653(b) and 663(b) and (c).

³⁶ 42 U.S.C. §§ 653(c) and 663(d)(2).

³⁷ 42 U.S.C. §§ 653(a)(2)-(3), and 663(b).

³⁸ 42 U.S.C. § 653(c).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ 42 U.S.C. § 663(d)(2).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 42 U.S.C. § 653(a)(2).

⁴⁷ 42 U.S.C. §§ 653(a)(3), 663(b).

When the Parent Locator Service denies a request for information because the file contains an FVI, it notifies the requester that an “authorized person” may, for an “authorized purpose,” petition the state court for a one-time manual override of the FVI.⁴⁸

The petition must include the following:

- name of requester
- Social Security Number of the requester
- Relationship of requester to protected person(s)
- description of requester as an authorized person
- description of the reason for the request as an “authorized purpose”
- name(s) of protected person(s)
- SSN(s) of protected person(s) and
- protected persons’ identifications (if applicable)⁴⁹

The petition is filed with a state trial court judge. If the judge denies the petition, the Parent Locator Service takes no action, and the FVI override process ends. If the state court judge enters the order, the Pennsylvania Bureau of Child Support Enforcement completes further analysis and processing. The bureau then completes its own investigation and, if appropriate, forwards the petition and order to the Parent Locator Service.⁵⁰

OTHER RELEVANT INFORMATION

The Connection Between Domestic Violence and Victim Poverty

Studies indicate that domestic violence creates and sustains poverty for victims. On the other hand, economic stress and hardship may increase the risk of domestic violence.⁵¹ Research of women welfare recipients in

⁴⁸ 42 U.S.C. § 653(b)(2)(B). *Family Violence (FV) Indicator Override*, DCL-98-122, US Dep’t of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, <http://www.acf.hhs.gov/programs/css/resource/family-violence-fv-indicator-override> (This publication by the Office of Child Support Enforcement, an office of the Administration of Children and Families, outlines the process to obtain an FVI indication override.)

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Claire M. Renzetti, *Economic Stress and Domestic Violence*, VAWNET.ORG (2009), (internal citations omitted) at http://www.vawnet.org/Assoc_Files_VAWnet/AR_EconomicStress.pdf. See also, Jody Raphael & Richard M. Tolman, *Trapped by Poverty; Trapped by Abuse, New Evidence Documenting the Relationship Between Domestic Violence and Welfare* 4 (1997), <http://humanservices.ucdavis.edu/resource/uploadfiles/x%20Trapped%20by%20Poverty,%20Trapped%20by%20Abuse.pdf> (last visited Nov. 30, 2015).

several states indicates high rates of domestic violence.⁵² The effects of poverty can be multiplied by the effects of racial, ethnic and cultural factors for women of color who are domestic violence victims.⁵³

Abusers Sabotage Attempts by Victims to Seek Employment

When a domestic violence victim seeks education, training or work, the abuser frequently escalates the violence.⁵⁴ In addition to direct physical violence, emotional abuse, stalking, and harassment, abusers often refuse to cooperate with childcare or travel arrangements, hindering the victim's efforts within the workforce.⁵⁵

Such tactics are often referred to as economic abuse and include damaging or destroying women's work clothes or books and other items associated with their jobs or job training, inflicting facial cuts and bruises or other visible injuries to keep them from going to work, promising to care for their children, but not showing up or becoming unavailable at the last minute, and stalking women while they are at work. For women with disabilities, such abuse may include removing the battery from an electric wheelchair, taking away or breaking a telecommunication device for the deaf or hearing impaired, or not assisting with daily routines and grooming.⁵⁶

In a Western Pennsylvania study of women in a job readiness program, 46 percent reported their partners were jealous about the possibility of the woman meeting someone new at work, 21 percent were threatened or harassed while at work, and 32 percent were told they would not be able to succeed at work or school. Twelve percent of the participants were told by their abusers that working women were bad mothers, and 8 percent were told that they could work, but only if they kept up with their housework.⁵⁷

Victims Cite Financial Concerns As One of the Main Obstacles to Leaving an Abuser

Victims who stay with or return to an abuser often cite financial concerns.⁵⁸ If an abuser forbids the victim to work outside the home or sabotages the victim's efforts to obtain education, training or outside employment,

⁵² Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 44 (2005), available at http://www.researchgate.net/profile/Natalie_Sokoloff/publication/7701217_Domestic_violence_at_the_intersections_of_race_class_and_gender_challenges_and_contributions_to_understanding_violence_against_marginalized_women_in_diverse_communities/links/544106.

⁵³ Raphael & Tolman, *supra* note 51 at 48. Research on male perpetrators also suggests that men who experience unemployment are at a greater risk of perpetrating domestic violence. "[C]omparing ... femicide perpetrators with other abusive men, ... unemployment was the most important demographic risk factor for acts of intimate partner femicide." Jacquelyn C. Campbell, *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM J PUBLIC HEALTH, 1089 (2003) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>.

⁵⁴ Renzetti, *supra* note 51 at 3.

⁵⁵ Renzetti, *supra* note 51 at 3. See, e.g., Raphael & Tolman, *supra* note 51; E. Lyon, *Welfare and Domestic Violence Against Women: Lessons from Research*, Conn. School of Social Work (August 2002), available at <https://vawnet.org/material/welfare-and-domestic-violence-against-women-lessons-research>.

⁵⁶ Renzetti, *supra* note 51 at 3.

⁵⁷ Lisa D. Brush, *Battering, Traumatic Stress and Welfare to Work Transition*, 6 VIOLENCE AGAINST WOMEN, 1025, 1039-1065 (2000).

⁵⁸ Deborah Anderson, Daniel Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 TRAUMA, VIOLENCE AND ABUSE 163 (2003); Adrienne Adams et al., *Development*

the victim is left with no financial resource and must rely on the abuser for basic necessities. Without financial resources, victims often attempt to leave, only to return to the abuser when they are unable to secure adequate food and shelter for themselves and their children. Many women who do escape abusive relationships experience a lower standard of living once they leave; ending up living in poverty, depending on government assistance, or becoming homeless.⁵⁹ For women of color, racially discriminatory employment and housing practices compound abusers' control tactics.⁶⁰

EMERGING PRACTICES

PFA Temporary Support Relief Can Be Any Amount

A judge who chooses to order support relief as part of a PFA order may order any amount deemed necessary. The PFA court does not need to comply with the support guidelines or even refer to the support guidelines in making a decision.⁶¹

In awarding interim support, the judge may want to make an educated guess based on reports from the litigants regarding weekly average take-home pay and such major expenses as food, rent, car payments, and daycare.

If the judge is familiar with the support guidelines, or has support guidelines available, the court may make an estimate based on a guideline amount. Again, the PFA support award is temporary, and is intended to help facilitate victim safety by allowing the victim enough money to meet basic needs until the victim can file and obtain support through the standard domestic relations section process.⁶²

In addition, or as an alternative, the court can order the PFA defendant to maintain certain fixed expenses, such as mortgage or rent payments, car payments, utility payments, and insurance.⁶³

Any PFA support relief ordered by the court is temporary in nature, and is not precedent for subsequent support proceedings.⁶⁴

Facilitating Safety for Support Proceedings

Remembering that the time surrounding separation is especially dangerous for domestic violence victims and their children,⁶⁵ some courts have established special procedures designed to enhance victim safety. For example, to facilitate the necessary filing of a support complaint with the domestic relations section, some

of the Scale of Economic Abuse, 14 VIOLENCE AGAINST WOMEN 563, 568 (2008), http://wbg.org.uk/GBA_Present_2_2951060362.pdf (last visited Nov. 30, 2015).

⁵⁹ Adams *supra* note 58 at 568 (2008).

⁶⁰ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REVIEW 1241, 1246 (1991), available at <http://www.jstor.org/stable/1229039>.

⁶¹ The Pennsylvania Rules of Civil Procedure specifically excepts (or accepts?) requests for temporary support or other relief in PFA proceedings from the general obligation to comply with court rules regarding support. PA. R. CIV. P. 1910.1(a), (b)(2).

⁶² 23 PA. C.S. § 6108(a)(5).

⁶³ *Id.*

⁶⁴ *Id.*; see also PA. R. CIV. P. 1910.1(a) and (b)(2) (providing that support awards in PFA proceedings need not comply with Pennsylvania's rules regarding support).

⁶⁵ Shannan Catalano, Bureau of Justice Statistics, *Intimate Partner Violence, 1993–2010*, 6 (2012), U.S. Dep't of Justice, available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>.

courts will have a representative of domestic relations available during PFA court to complete necessary paperwork.

Most counties require support litigants to pass through a metal detector to access the support conference area. Many have a sheriff's deputy available. Other courts permit support conferences to be held by telephone, provided adequate information regarding the parties' income and expenses is obtained in advance.

CHAPTER VI: FIREARMS

TABLE OF CONTENTS

CHAPTER GOALS.....	6
FIREARM POSSESSION RIGHTS	6
United States Constitution - Second Amendment Rights.....	6
Pennsylvania Constitution - Rights Under Article I, Section 21.....	7
Other Guidance From a Federal Appellate Court.....	8
The Constitutionality of PFA Act Firearms Restrictions	8
DOMESTIC VIOLENCE WEAPONS RESTRICTIONS - PENNSYLVANIA'S PFA ACT	9
Trial Courts Have Authority to Order Relinquishment of All Firearms	9
Notice on PFA Orders	10
Emergency PFA Proceeding - No Firearms Relinquishment	10
Ex Parte Temporary Order Proceeding.....	10
Firearms Relinquishment	10
"Immediate and Present Danger"	11
Options for relinquishment following ex parte / temporary order	11
Final PFA Order Proceeding - Firearms Relinquishment.....	11
Firearms Relinquishment Procedures.....	12
24-Hour Timeframe	12
Cause exception to firearms surrender requirement.....	12
Relinquish to the sheriff or other appropriate law enforcement agency	12
Relinquish to third party.....	13
Revocation of the third party safekeeping permit.....	14
Return of safekeeping permit	14
Relinquishing to licensed firearms dealer	15
Third party civil and criminal liability.....	16
Law Enforcement May Arrest For Non-Compliance	16
Protection of Firearms Ownership Information.....	17
Safekeeping permits/ affidavits	17

Lists of firearms in PFA petitions and orders.....	17
Return of Firearms, Other Weapons and Ammunition and Additional Relief	17
At the end of the order	17
Modification of Relinquishment Order	18
Seizure Mandated In Contempt Arrest	18
Immunity of Law Enforcement.....	18
PFA Defendant Who Is a Licensed Firearms Dealer	19
Required Notices Regarding PFA Orders and Firearms	19
Required notices by the court.....	19
Required notices by sheriff.....	20
DOMESTIC VIOLENCE WEAPONS RESTRICTIONS - WEAPONS SURRENDER/ SEIZURE	20
Historical PFA Case Law Regarding Weapons Seizure	20
PFA Act Regarding Seizure of Firearms, Other Weapons and Ammunition.....	21
PENNSYLVANIA'S CRIMES CODE FIREARMS RESTRICTIONS	22
Persons Subject to PFA Order That Directs Firearms Relinquishment	22
If PFA defendant fails to timely surrender firearms/other weapons	22
If PFA defendant subsequently obtains/possesses firearms during PFA order	22
Persons Who Accept Firearms From a PFA Defendant.....	23
Restrictions on Defendant After Qualifying Protection Order	23
Federal Gun Law Defines "Intimate Partner" More Narrowly Than PFA Act.....	23
After Notice and Opportunity to Participate, Orders Prohibiting Abuse Trigger Federal Firearms Prohibitions	24
Cases Interpreting Hearing Requirements	24
Unrepresented, illiterate defendant agrees to protection order	24
Protection order entered by agreement	25
<i>Ex parte</i> order, extended at defendant's request.....	25
Preliminary and formal arraignment leading to no contact order - "actual notice"	26
Failure to appear at a hearing.....	26
Federal Prohibition Operates In Addition to PFA Order Restriction	27
Restrictions on Firearms Transfers to Defendant	27

Service Weapons Exemptions to Firearms Prohibitions Following PFA Order.....	27
--	----

FEDERAL FIREARMS RESTRICTIONS FOLLOWING A DOMESTIC VIOLENCE CONVICTION..... 28

Background	28
Federal law firearms prohibitions.....	28

Domestic Violence Misdemeanor Crimes.....	28
Relationship requirement.....	28
Relationship does not need to be an element of the crime.....	29
Misdemeanor conviction involving bodily injury.....	30
Reckless endangerment/ disorderly conduct conviction	31
Proof of Relationship	31

Conviction Triggers Disability	32
---	-----------

No Service Weapon Exemption.....	32
---	-----------

Knowing Transfer to Disqualified Individuals Is a Crime	32
--	-----------

Judicial Notice Obligations for Domestic Violence Firearms Prohibitions	33
--	-----------

FEDERAL FIREARMS RESTRICTIONS UPHELD IN DOMESTIC VIOLENCE CASES 34

Second Amendment Challenges	34
--	-----------

Commerce Clause and Tenth Amendment Challenges	34
---	-----------

Due Process and Notice Arguments	34
---	-----------

Ex Post Facto Challenges.....	35
--------------------------------------	-----------

Waiver, Vagueness and Overreaching Challenges	35
--	-----------

Supremacy Clause Applies to Federal Firearms Prohibitions	36
--	-----------

PENALTIES FOR VIOLATING FEDERAL FIREARMS RESTRICTIONS 36

FEDERAL FIREARM RIGHTS RESTORATION 37

Restoration Under Federal Law	37
--	-----------

State Courts Have Very Little Authority.....	37
---	-----------

State Statute Cannot Restore Civil Rights for Federal Firearms Purposes	38
--	-----------

STATE AND FEDERAL FIREARMS BACKGROUND CHECK PROCEDURES	39
Pennsylvania Procedures.....	39
Appeals	39
Case Law - Information Used to Evaluate Prohibitions	39
Case Law - Standing to Challenge Permits/ Expungements	40
The National Instant Criminal Background Check System (NICS)	41
SUMMARY - WHAT STATE COURT JUDGES MAY AND MAY NOT DO WITH REGARD TO FIREARMS.....	43
OTHER RELEVANT INFORMATION	44
Domestic Violence and Firearms Are a Lethal Combination	44
Firearms Increase Risks in the Home	44
EMERGING PRACTICES: ASK, ORDER, ENFORCE	45
EMERGING PRACTICES - SEPARATION VIOLENCE MAKES FIREARMS REMOVAL A VITAL PROTECTION	47
EMERGING PRACTICES - ADVISORY WARNINGS FOR DEFENDANTS	47
EMERGING PRACTICES - RELINQUISHMENT OF FIREARMS	48
EMERGING PRACTICES - FIREARMS RETURN PROCEDURES	49
EMERGING PRACTICES - PRIORITIZE VICTIM AND COMMUNITY PROTECTION	51
EMERGING PRACTICES - MAKING A RECORD.....	51
APPENDICES	53
A - APPLICATION FOR A PENNSYLVANIA LICENSE TO SELL FIREARMS	53
B - APPLICATION FOR A PENNSYLVANIA LICENSE TO CARRY FIREARMS	55

C - PENNSYLVANIA LICENSE TO CARRY FIREARMS	57
D - AFFIDAVIT FOR RELINQUISHMENT OF FIREARMS	58
E - AFFIDAVIT OF SAFEKEEPING PERMIT FOR RELINQUISHMENT OF FIREARMS.....	60
F - PICS BACKGROUND CHECK REQUEST	63
G - PENNSYLVANIA INSTANT CHECK SYSTEM CHALLENGE	64
H - COURT NOTIFICATION OF PROHIBITING OFFENSE	68
I - NOTIFICATION OF MENTAL HEALTH COMMITMENT	69

CHAPTER GOALS

This chapter has several purposes. First, it addresses Second Amendment issues raised by domestic violence firearms limitations. Second, it explains Pennsylvania laws restricting firearms and other weapons in domestic violence cases. Third, because federal firearms laws affect and are triggered by actions of Pennsylvania state trial judges, this chapter explains the federal firearms restrictions and discusses retrieval and return activities that trial judges may and may not undertake. Domestic violence and firearms can be a deadly combination; the chapter supplies judicial tools to help facilitate safety in domestic violence firearms situations.

FIREARM POSSESSION RIGHTS

United States Constitution – Second Amendment Rights

The Second Amendment to the U.S. Constitution states: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹ In 2008, the United States Supreme Court in ***District of Columbia v. Heller*** ruled that the Second Amendment is not a collective right, but rather guarantees an individual's right to possess a firearm and to use that firearm for traditionally lawful purposes, such as self-defense within the home.² But in making this determination, the Court also found that the right to keep and bear arms is subject to limitation. The court explained that the individual right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."³

The Court provided examples of the historical decisions of various courts upholding prohibitions on carrying concealed weapons against Second Amendment challenges. The Supreme Court advised that other limitations would be lawful as well. As stated by the Court:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁴

The Court noted that this list of "presumptively valid regulatory measures" was given as example only, and the list was not meant to be exhaustive.⁵ Finally, the Court suggested, based on historical review, that the banning of "dangerous and unusual weapons" like assault weapons, is lawful under the Second Amendment.⁶

¹ U.S. CONST. amend. II.

² [*District of Columbia v. Heller*, 128 S. Ct. 2783 \(2008\)](#).

³ *Id.* at 2816.

⁴ *Id.* at 2816-2817.

⁵ *Id.* at 2817 n. 26.

⁶ *Id.* at 2817.

While the Court found that gun possession and ownership are personal rights and emphasized that the government could place limits on these rights, the Court did not provide a full list of restrictions that are lawful. Nor did the Court identify the standard of scrutiny to be applied in evaluating restrictions on the right to bear arms for lawful, personal use. In other words, the Court did not tell lower courts how to evaluate restrictions on the individual right to possess and bear arms.

Historically, three traditional levels of review have been recognized and applied to legislative restrictions and Constitutional rights: (1) rational basis, (2) intermediate scrutiny, and (3) strict scrutiny.

Laws reviewed using the “rational basis” test are presumed constitutional, and the court must uphold a law under the rational basis standard so long as the law/regulation bears a rational relationship to a legitimate governmental purpose.⁷ Laws subject to strict scrutiny analysis are presumptively unconstitutional and the burden is on the state to demonstrate that the law is narrowly tailored to achieve a compelling governmental interest.⁸ Intermediate scrutiny falls between these two types of scrutiny. Intermediate scrutiny is met if the law or regulation involves important governmental interests that are furthered by substantially related means.⁹

With regard to the three traditional levels of review, both the majority and the dissent in *Heller* appear to suggest that rational basis review is not the correct standard.¹⁰ The decision also appears to infer that strict scrutiny is not the correct standard. The *Heller* majority implicitly rejected the strict scrutiny standard when it identified the limitations listed above as “presumptively lawful regulatory measures.” The dissent proposed an intermediate scrutiny type of “interest balancing inquiry.” The majority refused to identify an approach or level of scrutiny to be applied, and while it appeared to reject both strict scrutiny and rational basis analysis, it also criticized the interest balancing inquiry. The Court recognized that it was leaving many questions unanswered about the constitutionality of various firearms restrictions.¹¹ The Court indicated that because it was the Court’s first in-depth examination of the Second Amendment, other issues would be addressed in the future, “if and when those exceptions come before us.”¹²

Pennsylvania Constitution – Rights Under Article I, Section 21

Unlike the U.S. Constitution, Pennsylvania’s Constitution has always specifically recognized the right of an individual to possess a firearm for personal defense. Article I, Section 21 of the Pennsylvania Constitution provides: “The right of citizens to bear arms in defen[s]e of themselves and the State shall not be questioned.” This right is not unlimited, however. Pennsylvania’s appellate courts have made it clear that although the right to bear arms is a constitutional right, it may be restricted in

⁷ *Heller v. Doe*, 509 U.S. 312, 320 (1993).

⁸ *Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

⁹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2860 (2008).

¹⁰ *Id.* at 2816-19 (majority); 2851-52 (dissent).

¹¹ *Id.* at 2821-22.

¹² *Id.* at 2821.

Pennsylvania's exercise of police power for the good order of society and for the protection of its citizens.¹³

Other Guidance From a Federal Appellate Court

Although there are no Pennsylvania appellate cases addressing the constitutionality of the PFA Act's firearms restrictions,¹⁴ one federal appellate court found that the Second Amendment provides an individual right to firearms but upheld the protection order restriction. In **United States v. Emerson**, the Fifth Circuit Court of Appeals decided in 2001 that, while the Second Amendment protects an individual's right to possess a firearm, the restrictions placed on a defendant subject to a final protection order are acceptable, constitutional restrictions.¹⁵

The Constitutionality of PFA Act Firearms Restrictions

Both the United States Supreme Court and Pennsylvania appellate courts have articulated that the right to personal gun possession is not unlimited and can be restricted. However, as stated above, there are no Pennsylvania appellate cases on the constitutionality of firearms restrictions in a PFA order, nor are there any Third Circuit cases on this issue.

The issue may arise whether the firearms restrictions imposed by the PFA Act would survive constitutional scrutiny. Some direction may be found in Pennsylvania's 2006 Protection From Abuse Act amendments. The legislative history of the Act contains a careful balancing of the constitutional right to gun possession and safety for domestic violence victims. In passing the amendments, the legislature made findings and declarations regarding the necessity for the firearms provisions and their constitutionality.

Specifically, the General Assembly declared:

- 1) The provisions of 23 Pa. C.S. Ch. 61 (relating to protection from abuse) are necessary and proper in that they further the Commonwealth's compelling State interest to protect victims of domestic violence from abuse.
- 2) The Second Amendment to the Constitution of the United States and section 21 of Article I of the Constitution of Pennsylvania recognize a fundamental right to keep and bear arms.
- 3) The limitation of firearm rights for the duration of a protection from abuse order as authorized by 23 Pa. C.S. Ch. 61 is a reasonable regulation, a valid exercise of the police

¹³ See, e.g., *Commw. v. Ray*, 272 A.2d 275 (Pa. 1970), vacated on other grounds, 292 A.2d 410 (Pa. 1972); *Gardner v. Jenkins*, 541 A.2d 406 (Pa. Commw. 1988); *Minnich v. County of Jefferson*, 919 A.2d 356 (Pa. Commw. 2007).

¹⁴ To date, there are no Pennsylvania appellate cases addressing the constitutionality of the PFA Act's firearms restrictions.

¹⁵ [U.S. v. Emerson, 270 F.3d 203 \(5th Cir. 2001\)](#); rehearing denied 281 F.3d 1281 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002).

power of the Commonwealth and furthers the compelling State interest to protect victims from abuse.

- 4) As provided in 23 Pa. C.S. Ch. 61, a court may impose limitations on firearm rights prohibiting someone who has engaged in domestic violence from possessing firearms when the court deems it appropriate to do so in order to protect a victim.¹⁶

DOMESTIC VIOLENCE WEAPONS RESTRICTIONS - PENNSYLVANIA'S PFA ACT

Trial Courts Have Authority to Order Relinquishment of All Firearms

The PFA Act grants trial courts the authority to order weapons relinquishment.¹⁷ Indeed, the court is required to order the relinquishment of firearms, other weapons, etc. as part of a final order entered after a hearing.¹⁸

¹⁶ PA. CONST., art 1, § 21, historical notes; 23 PA. C.S. § 6101, historical & statutory notes, *available at*: <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2005&sessInd=0&billBody=H&billTyp=B&billNbr=1717&pn=2918>.

¹⁷ 23 PA. C.S. § 6108(a)(7).

Subject to subsection (a.1), the court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include:

...

(7) Prohibiting the defendant from acquiring or possessing any firearm for the duration of the order, ordering the defendant to temporarily relinquish to the sheriff or the appropriate law enforcement agency any firearms under the defendant's possession or control, and requiring the defendant to relinquish to the sheriff or the appropriate law enforcement agency any firearm license issued under section 6108.3 (relating to relinquishment to third party for safekeeping) or 18 Pa.C.S. § 6106 (relating to firearms not to be carried without a license) or 6109 (relating to licenses) the defendant may possess. The court may also order the defendant to relinquish the defendant's other weapons or ammunition that have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children. A copy of the court's order shall be transmitted to the chief or head of the appropriate law enforcement agency and to the sheriff of the county of which the defendant is a resident. 23 PA. C.S. § 6108(a)(7).

¹⁸ 23 Pa.C.S. §6108(a.1) Final Order or Agreement – The following apply

(1) Any final order must direct the defendant to refrain from abusing, harassing, stalking, threatening or attempting or threatening to use physical force against the plaintiff or minor children and must order that the defendant is subject to the firearms, other weapons or ammunition and firearms license prohibition relinquishment provisions under subsection (a)(7).

(2) A final agreement may direct the defendant to refrain from abusing, harassing, stalking, threatening or attempting or threatening to use physical force against the plaintiff or minor children and may order

Notice on PFA Orders

The PFA Act requires the court to give defendants notice of firearm restrictions.¹⁹ Defendants must be made aware of the possibility that any firearms, other weapon or ammunition owned by the defendant as well as any firearms licenses may be ordered relinquished; the options for relinquishment are also set forth.²⁰ The revised notice also includes information that the federal firearms law may prohibit possession of firearms including an explanation of section 922(g)(8) of the federal crimes code (federal protection order firearm prohibition) and 18 Pa.C.S. §6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).²¹ Finally, the court must inform the defendant that the firearms, other weapons, or ammunition shall be deemed abandoned when the conditions under 18 Pa.C.S. 6128(a) relating to abandonment of firearm, weapon, or ammunition) are satisfied and may then be disposed of in accordance with 18 Pa.C.S. §6128.²²

Emergency PFA Proceeding – No Firearms Relinquishment

Magisterial district judges and other minor judiciary do not have authority to order relinquishment of firearms or other weapons pursuant to the PFA Act.²³ Pursuant to the emergency protection order provisions of the statute, magisterial district judges and other minor judiciary may only grant the following relief: no abuse, eviction / exclusive possession, and no contact.

Under the PFA Act, judges have the authority to order relinquishment of all firearms a defendant may possess.

Ex Parte Temporary Order Proceeding

Firearms Relinquishment

At the ex parte temporary order stage, the PFA Act authorizes the court to order firearms relinquishment if either of the following factors is demonstrated in the plaintiff's PFA petition: allegations of abuse with a firearm or other weapon, or "immediate and present danger of abuse."²⁴

that the defendant is subject to the firearms, other weapons or ammunition and firearms license prohibition and relinquishment provisions under subsection (a)(7).

¹⁹ 23 PA. C.S. § 6107(a).

²⁰ 23 PA. C.S. § 6107(a).

²¹ *Id.* Federal firearms provisions are discussed later in this section.

²² 18 P.C.S. §6108(a)(7)

²³ 23 PA. C.S. § 6110(a).

²⁴ 23 PA. C.S. § 6107(b)(3).

“Immediate and Present Danger”

In evaluating whether there is an “immediate and present danger of abuse,” the court shall consider a number of factors, including but not limited to:

- Whether the temporary PFA order is not likely to achieve its purpose if there is no requirement that weapons be surrendered;
- Whether the defendant has previously violated a PFA order;
- Whether any of the past or present abuse to plaintiff or the children resulted in injury;
- Whether the abuse occurred in public;
- Whether the abuse includes: threats of abuse or suicide, killing or threatening to kill pets, an escalation of violence, stalking or obsessive behavior, sexual violence, or drug or excessive alcohol use.²⁵

Options for relinquishment following ex parte / temporary order

If, at the temporary order stage, the court orders the defendant to relinquish his or her firearms, other weapons and ammunition, the defendant has three options. The defendant may choose to relinquish by: (1) relinquishing to the sheriff or other appropriate law enforcement agency,²⁶ (2) relinquishing to a licensed firearms dealer, or (3) relinquishing to a third party for safekeeping (if the defendant or the third party qualify).²⁷ Please refer to the later section on [Firearms Relinquishment Procedures](#) for more information.

Final PFA Order Proceeding – Firearms Relinquishment

In addition to relinquishment at the temporary order stage, the PFA Act authorizes the trial court to order the defendant to relinquish firearms, other weapons and ammunition at the final order proceeding. If the final order is entered after a hearing, trial court must order the relinquishment of firearms, other weapons, or ammunition if the final order is entered after a hearing.²⁸ On the other hand, if the final order is entered pursuant to an agreement between the parties, the firearms relinquishment provision is permissive and determined by the agreement between the parties.²⁹ However, it should be noted that even if a the parties enter a consent agreement with no firearms relinquishment provision, the defendant may still be prohibited from owning or possessing a firearm

²⁵ *Id.*

²⁶ “Appropriate law enforcement agency:” The duly constituted municipal law enforcement agency that regularly provides primary police services to a political subdivision or, in the absence of any such municipal law enforcement agency, the Pennsylvania State Police installation that regularly provides primary police services to the political subdivision.

²⁷ 23 Pa. C.S. § 6107(b)(4).

²⁸ 23 Pa.C.S. §6108(a.1)(1)

²⁹ 23 Pa.C.S. §6108(a.1)(2)

under federal and state law and should be so advised.³⁰ For more information, please refer to the later section on [Restrictions on Defendant After Qualifying Protection Order](#).

When a PFA order directs gun surrender, the defendant generally has 24 hours to comply.

If the court orders relinquishment at the final order stage, the defendant has three options available for relinquishment: (1) relinquish to the sheriff or appropriate law enforcement agency for safekeeping; (2) relinquish to a licensed firearms dealer for sale, transfer or safekeeping; or (3) relinquish to a qualified third party for safekeeping.

Firearms Relinquishment Procedures

24-Hour Timeframe

When a temporary or final PFA order requires relinquishment, the relinquishment must occur within 24 hours of the entry of the order, or by the close of the next business day if the office of the sheriff or other appropriate law enforcement agency is not open to accept the firearms or Affidavit of Relinquishment.³¹

Cause exception to firearms surrender requirement

The only exception to the 24-hour surrender requirement is if the PFA defendant is able to show “cause,” which is limited to factors that impede the defendant’s ability to retrieve a specific firearm for relinquishment due to the location of the firearm.³² If the defendant can show “cause” at the final order hearing, the court must specify the time for relinquishment of the firearms³³ and the defendant must provide the sheriff with an affidavit listing these firearms, other weapons and ammunition and their location.³⁴

Relinquish to the sheriff or other appropriate law enforcement agency

If the sheriff or appropriate law enforcement agency is designated to accept the defendant’s firearms, other weapons, or ammunition pursuant to the temporary or final PFA Order, the sheriff or appropriate law enforcement agency shall provide the defendant with a signed and dated receipt

³⁰ 18 Pa.C.S. §6105(c)(6)

³¹ 23 PA. C.S. § 6108(a)(7)(i)(A).

³² 23 PA. C.S. § 6108(a)(7)(i)(A), (C).

³³ *Id.*

³⁴ 23 PA. C.S. § 6108(a)(7)(i)(B).

containing a detailed description of the firearm(s) and its condition.³⁵ Law enforcement is prohibited from marking or engraving firearms that are in their custody and, unless reasonable suspicion exists to believe that a firearm has been used in the commission of a crime, law enforcement may not test-fire the firearms in their custody.³⁶

Relinquish to third party

In lieu of relinquishing to the sheriff or other appropriate law enforcement agency, the defendant may choose to relinquish firearms, other weapons and ammunition to a third party for safekeeping.³⁷ The third party cannot be a member of the defendant's family or household and must be legally competent to own or possess firearms under state and federal law. In addition, the third party must either be a licensed commercial armory or an attorney with whom the defendant shares an attorney/client relationship.³⁸

Both the defendant and the third party must complete an Affidavit of Relinquishment/Safekeeping wherein the third party acknowledges responsibility to secure and store the surrendered firearms and acknowledges the potential civil and criminal liability for the unauthorized return of the firearms to the defendant.³⁹ See the Appendix section for the [Affidavit for Relinquishment of Firearms](#) and [Affidavit of Safekeeping Permit for Relinquishment of Firearms](#).

After the defendant and the third party sign the affidavits, the sheriff requests that the Pennsylvania State Police conduct a background check on the defendant and on the third party. If the background check indicates that the third party is legally qualified to possess firearms, the sheriff will issue a safekeeping permit to the third party. This permit must include a list of the firearms, other weapons and ammunition that the third party will keep.⁴⁰ The permit requires the third party to hold the

³⁵ 23 PA. C.S. § 6108(a)(7)(ii).

³⁶ 18 PA. C.S. § 6105(f)(4).

³⁷ 23 PA. C.S. § 6108.3(a).

³⁸ 23 PA. C.S. § 6108.3(b)(3).

³⁹ 23 PA. C.S. § 6108.3(b)(3)(ii). The affidavit must include the caption, the name, address and date of birth of the defendant, the name, address, and date of birth of the third party, a list of the firearms, other weapons and ammunition which the third party will take possession of, and acknowledgment that the firearms, other weapons or ammunition will not be returned to the defendant until the sheriff accepts the safekeeping permit, a plain language summary of state statutes relating to firearms, a plain language summary of section 6108.3 of the PFA Act, an acknowledgment that the third party is not prohibited from possessing firearms under state or federal law, an acknowledgment that the third party is not subject to a protection from abuse order, an acknowledgement that the defendant has never been the subject of a protection order on behalf of the third party, an acknowledgement that the firearms, other weapons and ammunition will be stored in a locked device and that the defendant does not have access to the firearms, a detailed description of the criminal and civil liability attaching to the third party and an acknowledgment that the third party will inform the sheriff of any change of address for the third party within seven days of the address change. *Id.*

⁴⁰ 23 PA. C.S. §§ 6108(a)(7)(1), 6108.3(b)(2). Note: the PSP did not create a separate "safekeeping permit" form; the PSP advised sheriffs to use the affidavit as the safekeeping permit form.

firearms, other weapons and ammunition until the safekeeping permit is returned to the sheriff or the sheriff revokes the safekeeping permit.⁴¹

Revocation of the third party safekeeping permit

Although the defendant may select a third party who may accept and safely keep the firearms, other weapons and ammunition after securing a safekeeping permit, a safekeeping permit is not irrevocable.

The sheriff shall revoke the safekeeping permit and seize the defendant's firearms, other weapons, or ammunition shall for any of the following reasons:

- a PFA order is entered against the third party
- the third party is prohibited from having firearms under a state or federal law
- the defendant is convicted of a violation of 18 Pa. C.S. Ch. 61 (relating to firearms and other dangerous articles) or any offense involving use of a firearm
- the defendant is convicted of indirect criminal contempt for violating the PFA order⁴²

If the safekeeping permit is revoked because the third party is disqualified by the sheriff, the sheriff seizes the firearms. The sheriff then notifies the defendant that the firearms, other weapons and ammunition that were relinquished to the third party are now in the sheriff's possession. The defendant may start the process to transfer the firearms, other weapons and ammunition to a different third party (if permitted) or to a licensed firearms dealer.⁴³

If the revocation is due to the defendant's being convicted for the crimes listed previously, the sheriff maintains possession of the firearms, other weapons and ammunition until either the defendant is no longer prohibited under federal or state law, the defendant relinquishes to a licensed firearms dealer or the sheriff is directed to relinquish per a court order."⁴⁴

Return of safekeeping permit

Upon expiration of the order if defendant relinquished items to a third party

When the PFA order expires, the defendant and the third party shall report to the sheriff's office to return the safekeeping permit.⁴⁵ The sheriff will determine if the defendant is legally permitted to possess firearms, and if so, the sheriff will accept the safekeeping permit, at which time the third

⁴¹ 23 PA. C.S. § 6108.3(b)(2)(i)-(ii).

⁴² 23 PA. C.S. § 6108.3(c)(1)(i)-(iv).

⁴³ 23 PA. C.S. § 6108.3 (c)(2)(i).

⁴⁴ 23 PA. C.S. § 6108.3(c)(2)(ii).

⁴⁵ 23 PA. C.S. § 6108.3(d)(1).

party shall turn the firearms, other weapons and ammunition over to the defendant.⁴⁶ If the defendant is not permitted to legally possess firearms, the sheriff shall accept the safekeeping permit from the third party and seize the firearms, other weapons and ammunition from the third party's possession.⁴⁷

If the third party safekeeper no longer wishes to act as safe keeper

If the third party in possession of the defendant's firearms, other weapons and ammunition no longer wants to act as a safe keeper, the third party may return the safekeeping permit to the sheriff.⁴⁸ The sheriff will accept the permit and seize the firearms, other weapons and ammunition from the third party. The sheriff will notify the defendant that the items are in the sheriff's possession, and that the defendant may relinquish to a new third party, a licensed firearms dealer or the sheriff.⁴⁹

Upon court order

In very rare instances, a defendant who is subject to a PFA order may fall under an exception to the state and federal firearms prohibitions and could seek the return of surrendered guns during the pendency of a PFA order. For example, federal gun prohibitions include a "service weapon exemption."⁵⁰ This exemption allows firearms possession by a protection order defendant who is a member of the armed services or police if that firearm is used in his or her line of work.⁵¹ However, the exemption applies only while the defendant is on duty.⁵² If the court enters a modification to the PFA order directing that the defendant be permitted to possess a firearm, the defendant and the third party may return the safekeeping permit to the sheriff and the sheriff will follow the direction set forth in the court order.⁵³

Relinquishing to licensed firearms dealer

Defendant may relinquish to dealer after final order hearing

After the final PFA order hearing, the defendant subject to a relinquishment PFA order may identify a licensed firearms dealer to whom the defendant wishes to relinquish the firearms, other weapons

⁴⁶ 23 PA. C.S. § 6108.3(d)(1)(i).

⁴⁷ 23 PA. C.S. § 6108.3(d)(1)(ii).

⁴⁸ 23 PA. C.S. § 6108.3(d)(3).

⁴⁹ 23 PA. C.S. § 6108.3(d)(3).

⁵⁰ 18 U.S.C. § 925(a)(1)

⁵¹ A judge could still use discretion to determine that a PFA defendant should possess no guns, even if the defendant had a service weapon for use in his or her line of work. For more information about the service weapon exemption, please see the later section on [Service Weapons Exemptions to Firearms Prohibitions Following PFA Order](#).

⁵² *Id.*

⁵³ 23 PA. C.S. § 6108.3(d)(2).

and ammunition for consignment sale, lawful transfer or safekeeping.⁵⁴ The defendant must obtain from the dealer a form affidavit, secure the required information, and present the affidavit to the sheriff.⁵⁵ Firearms, other weapons and ammunition not listed on the affidavit must be surrendered to the sheriff.⁵⁶

If defendant first relinquished to sheriff, defendant may transfer/relinquish to dealer

If the defendant relinquished firearms, other weapons and ammunition to the sheriff under a temporary order, the defendant may, after the entry of a final order, transfer the firearms, weapons and ammunition to a licensed firearms dealer if he or she can find a dealer willing to accept the firearms, other weapons and ammunition.⁵⁷ Providing the defendant can locate a dealer willing to accept the items, the PFA statute directs the court to order the transfer to the dealer at no cost to the defendant or the dealer.⁵⁸

Third party civil and criminal liability

A third party safe keeper risks criminal and civil liability if the safe keeper violates the safekeeping provisions of the PFA Act. A third party who intentionally or knowingly violates the provisions of the section dealing with safekeeping of firearms shall be civilly liable for damages, up to \$5,000 in punitive damages and reasonable attorney's fees.⁵⁹ Criminal penalties may also apply; a third party safe keeper commits a first degree misdemeanor if the safe keeper knowingly returns a firearm, other weapon or ammunition to a PFA defendant or knowingly allows a PFA defendant to have access to the firearm, other weapon or ammunition.⁶⁰

Law Enforcement May Arrest For Non-Compliance

If the defendant fails to surrender the firearms, other weapons or ammunition or provide the affidavit to the sheriff within the 24-hour time frame, the sheriff must notify the court, the plaintiff and appropriate law enforcement authorities of this failure.⁶¹ Law enforcement, including the sheriff, also may arrest the defendant for failing to comply with firearms surrender provisions.⁶²

⁵⁴ 23 PA. C.S. §§ 6108.2(a), (e).

⁵⁵ 23 PA. C.S. §§ 6108.2(b), (c). The information required in the affidavit includes the caption, name, address, date of birth and Social Security number of defendant, list of items surrendered, the name, address and license number of the dealer, and acknowledgment that the firearms will not be returned to the defendant during the duration of the order and an acknowledgment that sale or transfer of the firearms and ammunition will be done lawfully. See the Dealer Affidavit form provided by the PSP in [Appendix D](#).

⁵⁶ 23 PA. C.S. § 6108.2(c).

⁵⁷ 23 PA. C.S. § 6108.2(e).

⁵⁸ *Id.*

⁵⁹ 23 PA. C.S. § 6108.3(e).

⁶⁰ 18 PA. C.S. § 6105(a)(5).

⁶¹ 23 PA. C.S. §§ 6108(a)(7); 6108.2(c); 6108.3; 6113(a).

⁶² 23 PA. C.S. § 6113(a).

Protection of Firearms Ownership Information

Safekeeping permits/ affidavits

The PFA Act clarifies that information created and maintained about firearms in order to fulfill the firearms surrender and third party safekeeping requirements do not create a database or registry of firearms ownership.⁶³ In addition, this information maintained by the sheriff is not subject to Pennsylvania's Right To Know law.⁶⁴

Lists of firearms in PFA petitions and orders

Lists of firearms contained in PFA petitions and orders must be kept in the court's permanent files, and may not be made available to the public except: (1) upon court order, (2) as necessary by law enforcement and court personnel, or (3) after redaction of the list of firearms.⁶⁵ In order to facilitate compliance with this requirement, and to facilitate redaction of the list of firearms, the form "Attachment A" was created. Attachment A is affixed to the PFA petition and order; it lists, individually, the firearms to be relinquished.

The prohibition against compiling lists or registries of firearms ownership does not prohibit the entry of petitions and orders into the PFAD system. Likewise, the plaintiff, defendant and their attorneys of record are entitled to a complete copy of the petition and order, including Attachment A.

There are criminal consequences for violating the firearms list protection. An individual who violates the firearms list protection by releasing the information with the intent and purpose of violating the protection commits a third-degree misdemeanor.⁶⁶

Return of Firearms, Other Weapons and Ammunition and Additional Relief

At the end of the order

If the court's order includes a provision for relinquishment of firearms, other weapons and ammunition, the order must also provide for the return of those items when the order expires or if it is dismissed.⁶⁷ First, the defendant must fill out and return the "weapons return form" to the office of the sheriff or appropriate law enforcement agency and notify the plaintiff of the request.⁶⁸ In addition, the following conditions must be met for the return of the firearm:

⁶³ 23 PA. C.S. § 6108(4)(a)-(b).

⁶⁴ 23 PA. C.S. § 6108.3(h). The Right To Know Law can be found at 65 P.S. § 67.101 *et seq.*

⁶⁵ 23 PA. C.S. § 6108.5. However, it is apparent that plaintiff and plaintiff's attorney of record, and defendant and defendant's attorney of record may have a copy of this list, known as Attachment A.

⁶⁶ 23 PA. C.S. § 6108.5.

⁶⁷ 23 PA. C.S. § 6108.1.

⁶⁸ 23 Pa.C.S. §6108.1(a); 23 Pa.C.S. §6108.1(a.2)

- The firearm, other weapon or ammunition must not be evidence of a crime.
- The defendant or owner must not be otherwise prohibited by applicable Federal or State law, or another condition, including, but not limited to, bail, from taking possession of the firearms, other weapons or ammunition seized;
- The defendant or owner must have been given a clearance by the Pennsylvania State Police Instant Check Unit or through the National Instant Criminal Background Check System (NICS), requested by the sheriff's office.⁶⁹

If the sheriff or appropriate law enforcement agency determines that the defendant is not eligible to regain possession of the firearms, the defendant or owner may file a petition appealing that determination with the Court of Common Pleas. The petition must be served upon the plaintiff, the sheriff, and the district attorney.⁷⁰

Modification of Relinquishment Order

The defendant may also petition the court to change the method of relinquishment. The petition must be served on the plaintiff, who must have an opportunity to be heard on the matter.⁷¹

Seizure Mandated In Contempt Arrest

If the defendant is arrested for a violation of a protection order, the PFA Act mandates seizure of all firearms, other weapons and ammunition used or threatened to be used in the violation or during prior incidents of abuse, as well as any other firearms in the defendant's possession.⁷² Weapons confiscated by police after a violation should be turned over to the sheriff's office in a reasonably timely manner, and the sheriff is charged with retaining possession until directed to do otherwise by a court order.⁷³

Immunity of Law Enforcement

The PFA Act provides immunity from civil liability for law enforcement officers and agencies for good faith actions in taking possession of firearms, other weapons and ammunition while carrying out their duties, except for situations entailing gross negligence, intentional misconduct or reckless, willful or wanton misconduct.⁷⁴ However, law enforcement agencies and employees shall be held liable for damage or substantial decrease in value of relinquished items resulting from lack of reasonable care by the agencies or employees.⁷⁵

⁶⁹ 23 Pa.C.S. §6108.1(a.1)

⁷⁰ 23 Pa.C.S. §6108.1(a.3)

⁷¹ 23 PA. C.S. § 6108.1(c).

⁷² 23 PA. C.S. § 6113(b).

⁷³ *Id.*

⁷⁴ 23 PA. C.S. § 6119(a).

⁷⁵ 23 PA. C.S. § 6119(b).

PFA Defendant Who Is a Licensed Firearms Dealer

If a PFA defendant is a licensed firearms dealer, the order may contain any restrictions the court deems necessary concerning the dealer's business, including relinquishment of federal or state licenses for sale, manufacture or import of firearms and relinquishment of firearms in the business inventory.⁷⁶ The court is directed to use reasonable efforts to preserve the defendant's business financial assets while fulfilling the purpose of the PFA Act.⁷⁷

Required Notices Regarding PFA Orders and Firearms

Required notices by the court

To the defendant re: firearms

The court must give the PFA defendant notice of the defendant's firearms surrender options, and notice that the PFA defendant may be subject to certain firearms prohibitions. The PFA Notice of Hearing and Order forms set forth in Pennsylvania Rule of Procedure No. 1905(a) contain this notice.⁷⁸

To the sheriff re: ICC, involuntary commitment, firearms

The court must notify the sheriff when the court does any of the following:

- finds a PFA defendant in indirect criminal contempt (ICC) (this notice goes to the sheriff of the jurisdiction that issued the PFA order)⁷⁹
- adjudicates a person incompetent or orders an involuntary commitment⁸⁰
- sentences a defendant to a crime that would disqualify the defendant from firearms possession.⁸¹

⁷⁶ 23 PA. C.S. § 6108(a)(7.1).

⁷⁷ *Id.*

⁷⁸ See 23 PA. C.S. § 6108(a)(7)(i)(B); PA. R. CIV. P. 1905.

⁷⁹ 23 PA. C.S. § 6114(b)(5). No form has been prepared for this required notification; the court could add the sheriff's office to its distribution list for ICC orders. The notice must be sent to the sheriff of the jurisdiction that issued the PFA order.

⁸⁰ 18 PA. C.S. § 6109(i.1)(2). A copy of the form for Notification Of Mental Health Commitment is found in Appendix I.

⁸¹ 18 PA. C.S. § 6109(i.1)(1). A copy of the form for Court Notification Of Prohibiting Offense is found in Appendix H.

To the Pennsylvania State Police re: mental health commitment

Pennsylvania's Uniform Firearms Act requires the court to notify the Pennsylvania State Police when the court adjudicates an individual as incompetent or commits an individual to a mental institution.⁸² The state police developed a form for the courts to use, the Notification of Mental Health Commitment, which can be obtained on the AOPC website.⁸³ Refer to [Appendix I](#) for an example of a Notification Of Mental Health Commitment form.

Required notices by sheriff

The sheriff must give the plaintiff the name of any third party selected for safekeeping.⁸⁴ If the defendant fails to comply with firearms surrender provisions, the sheriff must give notice to the court, the plaintiff and law enforcement.⁸⁵

DOMESTIC VIOLENCE WEAPONS RESTRICTIONS - WEAPONS SURRENDER/ SEIZURE

Historical PFA Case Law Regarding Weapons Seizure

The issue of a PFA court's authority to order that weapons be seized was first addressed by a Pennsylvania appellate court in **Kelly v. Mueller**.⁸⁶ In this case, the trial court ordered the defendant to surrender his weapons, including his father's handgun, which he used to threaten the victim. When the sheriff's office sought to retrieve the defendant's weapons, he denied having weapons and signed a statement to that effect. The victim then returned to court and advised that she saw the weapons in the home shared by the defendant and his father. The trial court entered a supplemental order, directing the sheriff to search the home and his family's hunting cabin, and to seize all weapons.

The trial court opined that it had broad power pursuant to the PFA Act to remove all weapons within a defendant's control,⁸⁷ and suggested that if the father filed a petition, it would schedule proceedings to address the father's allegation that the search of his property and seizure of his handgun was unlawful.

On appeal, the Superior Court affirmed the trial court's orders, but remanded for the father's due process hearing. The Superior Court affirmed the trial court's orders for search and seizure of the weapons. The Court based its decision on a review of the special exigencies of abuse cases, the

⁸² 18 PA. C.S. § 6111.1(f).

⁸³ Notification of Mental Health Commitment: <http://www.pacourts.us/assets/files/setting-846/file-152.pdf?cb=c5b872>.

⁸⁴ 23 PA. C.S. § 6108(a)(7)(iii).

⁸⁵ 23 PA. C.S. § 6108(a)(7)(iv).

⁸⁶ [Kelly v. Mueller, 861 A.2d 984 \(Pa. Super. 2004\)](#), vacated [912 A.2d 202 \(Pa. 2006\)](#).

⁸⁷ *Id.* (citing 23 PA. C.S. § 6108(a)(10)).

protective and preventive nature of the PFA Act, and due process analysis used in domestic relations and juvenile cases. The Court held that if the trial court cannot reach weapons located where an abuser resides, it “nullifies the preventive thrust of the most critical section of the Act, that is, to disarm the abuser.”⁸⁸

Upon PFA violation arrest, law enforcement shall seize all firearms in defendant’s possession.

On further appeal, the Pennsylvania Supreme Court vacated the Superior Court’s order and reinstated the trial court’s order. The Supreme Court reasoned that the substantive constitutional issues of the appeal were waived when appellant failed to raise the issues at the trial court level.⁸⁹

PFA Act Regarding Seizure of Firearms, Other Weapons and Ammunition

The PFA Act gives courts the authority to order relinquishment of ammunition, other weapons that were used or threatened to be used and all firearms, whether they were used or threatened to be used. However, it does limit the authority of the court, sheriff and law enforcement to seize firearms, other weapons and ammunition at the time of entry of the temporary or final PFA order. The Act establishes various methods for firearms, other weapons and ammunition to be surrendered or relinquished by the defendant.⁹⁰

In addition, the PFA Act expressly refuses to authorize law enforcement seizure of firearms if the PFA defendant has not violated the PFA order:

Warrantless searches.

Except as provided in section 6113 (relating to arrest for violation of order) nothing in this chapter shall authorize a warrantless search for firearms, other weapons, or ammunition.⁹¹

In contrast, if a PFA defendant violates the order and is arrested, law enforcement or sheriff shall seize all firearms, other weapons and ammunition used or threatened to be used during the violation or during prior incidents of abuse and any firearms in the defendant’s possession.⁹² Law enforcement/sheriff may arrest for violations of these provisions of the Act: no abuse;⁹³ exclusive

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See 23 PA. C.S. §§ 6108(a)(7), 6108.2, 6108.3.

⁹¹ 23 PA. C.S. § 6121.

⁹² 23 PA. C.S. § 6113(a)-(b).

⁹³ 23 PA. C.S. § 6108(a)(1).

possession;⁹⁴ custody;⁹⁵ no contact;⁹⁶ weapons/firearms relinquishment (including failure to timely relinquish firearms, other weapons and ammunition);⁹⁷ and no stalking/harassing.⁹⁸

PENNSYLVANIA'S CRIMES CODE FIREARMS RESTRICTIONS

Persons Subject to PFA Order That Directs Firearms Relinquishment

If PFA defendant fails to timely surrender firearms/other weapons

Under the Pennsylvania Uniform Firearms Act of 1995 (Uniform Firearms Act),⁹⁹ a defendant commits a second degree misdemeanor if he or she is subject to a PFA order directing relinquishment and knowingly fails to relinquish firearms, other weapons, or ammunition within the time allotted.¹⁰⁰ In addition, upon conviction for failure to relinquish firearms pursuant to a PFA Order, the defendant is prohibited from owning or possessing firearms for five years from the date of conviction, final release from confinement, or final release from supervision, whichever comes later.¹⁰¹ The PFA Act also covers this offense; a PFA defendant who fails to timely relinquish firearms, other weapons and ammunition as ordered is in indirect criminal contempt of the court's PFA order.¹⁰²

If PFA defendant subsequently obtains/possesses firearms during PFA order

The Uniform Firearms Act also criminalizes subsequent firearms possession by a defendant whose PFA order directs relinquishment. Thus, a PFA defendant whose firearms were relinquished will violate if he or she possesses firearms anytime during the pendency of the order.¹⁰³ This offense is graded as a first-degree misdemeanor.¹⁰⁴ The PFA Act also deems this offense an indirect criminal contempt of the PFA order that directed relinquishment (and non-possession).¹⁰⁵

⁹⁴ 23 PA. C.S. § 6108(a)(2).

⁹⁵ 23 PA. C.S. § 6108(a)(4).

⁹⁶ 23 PA. C.S. § 6108(a)(6).

⁹⁷ 23 PA. C.S. § 6108(a)(7).

⁹⁸ 23 PA. C.S. § 6108(a)(9).

⁹⁹ 18 PA. C.S. § 6101 *et seq.*

¹⁰⁰ 18 PA. C.S. § 6105(a.1)(2).

¹⁰¹ 18 Pa.C.S. §6105(a.1)(10)

¹⁰² 23 PA. C.S. § 6113(a).

¹⁰³ 18 PA. C.S. § 6105(c)(6)

¹⁰⁴ 18 PA. C.S. § 6119.

¹⁰⁵ 23 PA. C.S. § 6113(a).

Persons Who Accept Firearms From a PFA Defendant

If a third party safe keeper returns firearms to PFA defendant while relinquishment order is in effect

According to the Uniform Firearms Act, a third-party safe keeper who knowingly or intentionally returns a firearm to a PFA defendant or allows the PFA defendant access to the firearms during the pendency of a PFA order directing relinquishment has committed a first-degree misdemeanor.¹⁰⁶

If an unauthorized person intentionally or knowing accepts firearms from a PFA defendant

A person who intentionally or knowingly accepts possession of a firearm, other weapons or ammunition from a PFA order defendant and is not a licensed firearms dealer or an acceptable third-party safe keeper under 23 Pa.C.S. 6108.3 has committed a third-degree misdemeanor.¹⁰⁷

Restrictions on Defendant After Qualifying Protection Order

The federal Gun Control Act of 1968, as amended (Gun Control Act), makes it a federal crime for a person who is subject to a “qualifying protection order” to possess a firearm or ammunition, or to ship or receive a firearm or ammunition in interstate commerce.¹⁰⁸

A qualified protection order pursuant to the Gun Control Act, must have each of these features:

- the order must be issued after a hearing for which the defendant had notice and an opportunity to participate
- the order must restrain the defendant from harassing, stalking, or threatening the intimate partner or child of the intimate partner or defendant, OR the order must restrain the defendant from engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to the intimate partner or child
- the order must either include a finding that the respondent/defendant represents a credible threat to the physical safety of the victim or child or the order by its terms specifically prohibits the use, attempted use, or threatened use of physical force against the victim or child that would reasonably be expected to cause bodily injury.¹⁰⁹

Federal Gun Law Defines “Intimate Partner” More Narrowly Than PFA Act

The federal Gun Control Act defines protected parties more narrowly than Pennsylvania’s PFA Act. For purposes of the Gun Control Act’s firearms prohibition, the term “intimate partner” means a spouse or former spouse, a person who has or had a child in common with the respondent/defendant, or a person who cohabits or has cohabited with the

¹⁰⁶ 18 PA. C.S. § 6105(a.1)(5).

¹⁰⁷ 18 PA. C.S. § 6105(a.1)(3)(i).

¹⁰⁸ 18 U.S.C. § 922(g)(8).

¹⁰⁹ 18 U.S.C. § 922(g)(8)(A)-(C) (emphasis added).

respondent/defendant.¹¹⁰ Therefore, unlike relationships covered in Pennsylvania's PFA law, the federal firearms prohibitions do not apply to protection orders involving siblings, in-laws, or non-cohabiting dating relationships.

After Notice and Opportunity to Participate, Orders Prohibiting Abuse Trigger Federal Firearms Prohibitions

In Pennsylvania, a temporary ex parte PFA order does not trigger the federal firearms disability, but any protection order entered after the defendant had notice and an opportunity to participate does trigger the disability. Even if the defendant did not appear at the final PFA order hearing, provided that the defendant received proper notice, the final PFA order will subject the defendant to the federal firearms disability.

In addition, even when the order is not captioned as a PFA order, if the order (issued after notice and an opportunity to be heard) prohibits threats or physical abuse to the plaintiff, plaintiff's child, or plaintiff and defendant's child, the federal firearms disability applies. Therefore, provided the relationship and notice requirements are met, "stay away," "no harassment," "no threat," and "do not abuse" orders, including those under divorce or custody captions, trigger the federal firearms disability.

Cases Interpreting Hearing Requirements

Although the Third Circuit Court of Appeals has not yet ruled on the meaning of a protection order "hearing" that would lead to the abuser's federal firearms disability, the Fifth, Sixth, and Eighth Circuit Courts have examined this issue.

Unrepresented, illiterate defendant agrees to protection order

In ***United States v. Spruill***, the Fifth Circuit Court of Appeals held that no hearing had occurred where an unrepresented, illiterate defendant appeared at the district attorney's office and agreed to a protection order.¹¹¹ The defendant did not appear before the judge and no hearing had ever been scheduled. No protection order petition had ever been filed prior to defendant's agreement to a protection order. Accordingly, based on these facts, the existence of a state protection order could not provide the basis for a violation of the federal Gun Control Act provision that prohibits firearm possession during pendency of a protection order.

¹¹⁰ 18 U.S.C. § 921(a)(32).

¹¹¹ [U.S. v. Spruill, 292 F.3d 207 \(5th Cir. 2002\).](#)

Even when defendant did not appear at the final order hearing, if defendant had notice and opportunity to be heard, defendant is subject to federal firearms disability.

Protection order entered by agreement

The Fifth Circuit distinguished *Spruill* when it decided ***United States v. Banks***, holding that a protection order entered by agreement of the parties did support the subsequent Gun Control Act prosecution of the defendant for unlawful possession of a firearm while subject to a domestic violence protection order.¹¹² The Fifth Circuit found that an agreed protection order can form the basis for prosecution where a hearing on a domestic violence order was set for a particular time and place, the defendant received notice of it, the defendant appeared in court with an attorney, the judge was present and ready to hear the case, the court had evidence before it that domestic violence had occurred, and the court gave the defendant an opportunity to be heard.¹¹³

In ***United States v. Lippman***, the Eighth Circuit Court of Appeals held that an unrepresented defendant who stipulated before the judge to the entry of a protection order had adequate notice and opportunity to be heard to support a subsequent conviction for unlawful firearms possession under the Gun Control Act.¹¹⁴

Ex parte order, extended at defendant's request

Notice of an ex parte order, combined with waived opportunity to participate, satisfies the hearing requirement. The Sixth Circuit also examined the "hearing" requirement in ***United States v. Calor*** and held that an ex parte emergency protection order that was served on a defendant and extended at the request of the defendant's counsel satisfied the "hearing" requirement necessary to support a subsequent conviction for unlawful firearms possession under the Gun Control Act.¹¹⁵ The Sixth Circuit held that the notice requirement was met when the defendant received service of an ex parte emergency protection order, and the opportunity to participate requirement was met when, at defendant's request, the hearing on a final order was continued.

These factors formed the basis for the defendant's prosecution under the Gun Control Act's provision that outlaws gun possession while subject to a protection order. The defendant requested review of the Sixth Circuit's decision from the United States Supreme Court, which denied certiorari.¹¹⁶

¹¹² [U.S. v. Banks, 339 F.3d 267 \(5th Cir. 2003\)](#).

¹¹³ *Id.* at 272.

¹¹⁴ [U.S. v. Lippman, 369 F.3d 1039 \(8th Cir. 2004\)](#); reh'g denied, 2004 U.S. App. LEXIS 15634 (2004); cert. denied, 543 U.S. 1080 (2005).

¹¹⁵ [U.S. v. Calor, 340 F.3d 428 \(6th Cir. 2003\)](#), cert. denied, 541 U.S. 1041 (2004).

¹¹⁶ See *Id.*

Preliminary and formal arraignment leading to no contact order – “actual notice”

An arraignment hearing is a proceeding at which the defendant receives actual notice and an opportunity to participate; actual notice should not be interpreted to mean advanced notice, **United States v. Young**.¹¹⁷ In *Young*, a Washington state judge entered a Domestic Violence No Contact (DVNC) order as part of Young’s preliminary and formal arraignments on felony harassment charges resulting from Young’s assault of his intimate partner. The DVNC order directed Young to stay away from the victim, and warned Young in writing that firearms possession while subject to the DVNC was a violation of federal law. A few weeks later, Young violated the DVNC and was arrested. Following the arrest, police searched Young and found a .22 caliber pistol in his pocket. Young admitted that he owned the gun.

Subsequently, federal Gun Control Act charges were filed against him. A jury convicted Young, but the federal trial judge set aside the verdict, finding that Young did not have sufficient notice prior to the entry of the DVNC. On appeal, the defendant argued that actual notice requires advance notice. The Ninth Circuit court held that section 922(g)(8) of the Gun Control Act says actual notice, and that is all that the law requires. At his preliminary hearing, the defendant received actual notice, an attorney was appointed for him, and his arraignment was scheduled. In addition, the opportunity to participate is all that is needed. If a defendant has the opportunity to participate in the proceeding but chooses not to, section 922(g)(8) is satisfied.

Failure to appear at a hearing

If the defendant has notice of the hearing but fails to appear and a final order is entered, a subsequent prosecution for firearms possession is not foreclosed, found the court in **United States v. Bunnell**.¹¹⁸ Bunnell, a National Guard instructor, made comments to another guardsman about killing his ex-wife while firing a machine gun during a training exercise. The other guardsman was aware that Bunnell owned an assault weapon, and that Bunnell planned to live in an apartment where a domestic violence homicide had been committed. The other guardsman notified the police. Under police questioning, Bunnell admitted that he owned the assault weapon and offered to turn it over to the police. Bunnell and the police traveled to his apartment where the police retrieved the assault weapon, ammunition and the protection order obtained by Bunnell’s ex-wife.

Notice of an ex parte order, combined with waived opportunity to participate, satisfies the hearing requirement.

At the trial court level, Bunnell filed a motion to dismiss, claiming that the underlying protection order was constitutionally invalid because it was entered at a hearing that he did not attend and at

¹¹⁷ See [U.S. v. Young, 458 F.3d 998 \(9th Cir. 2006\)](#).

¹¹⁸ [U.S. v. Bunnell, 106 F. Supp.2d 60 \(D.Me. 2000\)](#), *aff’d*, [280 F.3d 46 \(1st Cir. 2002\)](#).

which he was not represented by counsel. The trial court rejected this claim, observing that all that is required is “notice” and opportunity to participate.

After the jury convicted Bunnell of unlawfully possessing a firearm while subject to a protection order, he was sentenced to 31 months in prison. On appeal, the First Circuit affirmed, noting that the protection order was issued after notice and opportunity to be heard, and the order also notified Bunnell that possession of firearms while subject to the order would be a crime.¹¹⁹

Federal Prohibition Operates In Addition to PFA Order Restriction

The federal firearms prohibitions operate in addition to any state restrictions on firearms use. The federal firearms prohibitions stay in effect until the termination of the PFA or other protection order.¹²⁰ Following the entry of a qualifying PFA or other qualifying protection order, a defendant who knowingly possesses a firearm would be subject to prosecution under the federal law.¹²¹ The qualifying PFA or other protection order does not need to prohibit possession of firearms for the federal disability to apply.¹²²

Restrictions on Firearms Transfers to Defendant

It is also a federal crime to sell or transfer a firearm or ammunition to a person when the seller knows or has reasonable cause to believe that the buyer is subject to a qualifying PFA or other protection order.¹²³ Therefore, the defendant’s friends, family members, or any other person who knowingly make firearms available to the defendant after a qualifying PFA or other protection order are subject to federal prosecution.

Service Weapons Exemptions to Firearms Prohibitions Following PFA Order

The Gun Control Act provides a limited exemption to the firearms prohibitions that ensue from a qualifying PFA or other protection order for certain respondents/defendants. PFA defendants who are law enforcement officers; armed forces personnel; other local, state and federal employees and who are required to use weapons as part of their official duties may be exempt from the prohibition in limited circumstances.¹²⁴ This service weapon exemption applies only to firearms received or

¹¹⁹ *Id.*

¹²⁰ See 18 U.S.C. § 922(g).

¹²¹ For prosecution to occur under this section of the Gun Control Act, 18 U.S.C. 922(g)(9), the federal government is not required to prove that the defendant knew that possessing a firearm was illegal. The government need only prove that the defendant knowingly possessed a firearm. See, e.g., *U.S. v. Mitchell*, 209 F.3d 319 (4th Cir. 2000), *cert. denied* 531 U.S. 849 (2000); *U.S. v. Beavers*, 206 F.3d 706 (6th Cir. 2000), *cert. denied* 629 U.S. 1121 (2000).

¹²² When a PFA order directs firearms surrender, a PFA defendant who possesses a gun(s) during the pendency of the PFA order is subject to state and federal criminal prosecution. See Section F.1.b, If PFA defendant subsequently obtain/possesses firearms during PFA order.

¹²³ See 18 U.S.C. § 922(d)(8).

¹²⁴ 18 U.S.C. § 925(a)(1).

possessed by the individual soldier, police officer, etc., for use in performing official duties on behalf of federal, state or local agencies, and the exemption does not apply to personal firearms.¹²⁵

FEDERAL FIREARMS RESTRICTIONS FOLLOWING A DOMESTIC VIOLENCE CONVICTION

Background

Federal law firearms prohibitions

The Gun Control Act forbids firearms possession by persons who have been convicted of a crime punishable by imprisonment for one year or more.¹²⁶ A 1996 amendment to the Gun Control Act added the firearms prohibition for persons who have been convicted of misdemeanor crimes involving domestic violence.¹²⁷ This firearms prohibition is for life and does not include the service weapon exemption for law enforcement and military personnel.

Domestic Violence Misdemeanor Crimes

Pennsylvania's gun law mirrors federal gun law in prohibiting gun ownership and possession by certain persons convicted of misdemeanors involving domestic violence.¹²⁸ Pennsylvania law does not designate crimes as "domestic violence" crimes; however, provided the relationship requirement is met, certain misdemeanor crimes disqualify a defendant from gun ownership or possession. For the prohibition to apply, the offense must qualify as a misdemeanor under state or federal law and must contain the element of use or attempted use of physical force or the threatened use of a deadly weapon.¹²⁹ The requirements of due process must also be met; specifically, the perpetrator must have been represented by counsel (or have knowingly/intelligently waived right to counsel). If entitled to a jury trial, the perpetrator must have received a jury trial or knowingly/intelligently waived jury trial rights.¹³⁰

Relationship requirement

For the domestic violence misdemeanor prohibition to apply, the relationship requirement must be met. The perpetrator must have one of the following relationships with the victim: (1) the perpetrator is a current or former spouse, parent or guardian of the victim; or (2) the perpetrator shares a child in common with the victim; or (3) the perpetrator is cohabiting or has cohabited with the victim as a

¹²⁵ *Id.*

¹²⁶ 18 U.S.C. § 922(g)(9), (n).

¹²⁷ See 18 U.S.C. § 922(g)(9).

¹²⁸ 18 PA. C.S. § 6105(c)(9).

¹²⁹ 18 U.S.C. § 921(33)(A).

¹³⁰ 18 U.S.C. § 921(33)(B)(i).

spouse, parent, or guardian, or (4) the perpetrator is similarly situated to a spouse, parent or guardian of the victim.¹³¹

Relationship does not need to be an element of the crime

In 2009 the United States Supreme Court examined the claim that, in order for a crime to qualify as a “misdemeanor crime of domestic violence,” it must be designated as such. The Court’s decision in **United States v. Hayes** held that a “misdemeanor crime of domestic violence” does not require a domestic relationship as an element to the underlying crime.¹³²

In Hayes, the police responded to a domestic violence call at the home of Randy Edward Hayes. With Hayes’ consent, the police searched the home and discovered a rifle. On further investigation, the police found that Hayes possessed several other firearms. Hayes was charged with three counts of possessing firearms after being convicted of a “misdemeanor crime of domestic violence.”¹³³ Hayes’ underlying offense was a 1994 conviction for battery against his then-wife, in violation of West Virginia law.

Hayes argued that the battery conviction under West Virginia law did not qualify as an offense under the federal misdemeanor crime of domestic violence prohibition because the offense did not contain the element of a domestic relationship.¹³⁴ The federal District Court rejected Hayes’ argument and denied his motion to dismiss the indictment. The Fourth Circuit reversed the decision and held that under section 922(g)(9) the underlying offense must have as an element of the crime a domestic relationship between the offender and the victim. The United States appealed the Fourth Circuit’s decision.

The term “misdemeanor crime of domestic violence” is defined as an offense that:

- (i) is a misdemeanor under Federal, State, or Tribal law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.¹³⁵

The Supreme Court held that the domestic relationship need not be a defining element of the underlying offense, although it must be established beyond a reasonable doubt in a firearms possession prosecution under section 922(g)(9). The Supreme Court based its holding on the legislative intent as well as the grammatical structure in section 922(g)(9). The intent of the

¹³¹ See 18 U.S.C. at § 921(33)(A).

¹³² [United States v. Hayes, 129 S. Ct. 1079 \(2009\).](#)

¹³³ 18 U.S.C. §§ 922(g)(9), 924(a)(2) (Penalties.)

¹³⁴ 18 U.S.C. § 922(g)(9).

¹³⁵ 18 U.S.C. § 921(a)(33)(A).

legislature in enacting this section, known as the Lautenberg Amendment, was to keep firearms away from abusers. Although there were laws prohibiting the possession of firearms to certain persons, such laws did not include abusers because many abusers are not charged with or convicted of felonies.

In construing section 922(g)(9), Congress used a generic use-of-force statute because many states did not have criminal statutes that specifically proscribed domestic violence. The Supreme Court reasoned that “we find it highly improbable that Congress meant to extend 18 U.S.C. § 922(g)(9)’s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship as element of the offense.”¹³⁶

In its decision, the Supreme Court stated, “The text, context, purpose, and what little there is of drafting history all point in the same direction: Congress defined “misdemeanor crime of domestic violence” to include an offense “committed by” a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.”¹³⁷

Misdemeanor conviction involving bodily injury

In ***United States v. Castleman***, Castleman moved to dismiss his indictment for possession of firearms by anyone convicted of a “misdemeanor crime of domestic violence.”¹³⁸ Castleman pleaded guilty to having “intentionally or knowingly cause[d] bodily injury to” the mother of his child. Subsequently, he was caught selling guns on the black market, which led to a charge under the federal Gun Control Act, 18 U.S.C. § 922(g)(9). He argued that his previous conviction did not count as a “misdemeanor of domestic violence,” because it did not involve use or attempt of physical force. The 6th Circuit held that the degree of physical force required by § 921(a)(33)(A)(ii) is the same as the definition of “violent felony” in § 924(e)(2)(B)(i). The 6th Circuit applied the U. S. Supreme Court decision in ***Johnson v. United States*** and determined that Castleman could not have been convicted for conduct that did not involve behavior that would be described as violent.¹³⁹

The U. S. Supreme Court reasoned that, as domestic violence perpetrators are routinely charged under assault/battery laws, it makes sense that Congress would have defined a “misdemeanor crime of domestic violence” to include a common law battery conviction. Also, the word violence connotes a substantial degree of force, except when used in the context of domestic violence. Domestic violence includes a range of behaviors that outside of the domestic violence arena would not constitute violence per se. The Supreme Court distinguished the ruling in Johnson from the current case in Castleman. The Johnson case looked at the definition of physical force in the context of determining whether or not the defendant’s crime would have classified him as an “armed career criminal” for purposes of the Armed Career Criminal Act. The Supreme Court noted that Castleman

¹³⁶ *Hayes*, 129 S. Ct. at 1087-88.

¹³⁷ *Id.* at 1089.

¹³⁸ [U. S. v. Castleman, 134 S. Ct. 1405 \(2014\).](#)

¹³⁹ *Johnson v. United States*, 559 U.S. 133 (2010).

plead guilty to a crime that involved “bodily injury” and that “bodily injury” must result from some form of “physical force.”

Reckless endangerment/ disorderly conduct conviction

In **Wolak v. Pennsylvania State Police**, Wolak was denied a gun permit.¹⁴⁰ The basis for the denial stemmed from an incident in which Wolak discharged his shotgun indoors in the direction of his estranged wife. The incident occurred at 2:30 a.m. after Wolak had consumed several beers. Police charged Wolak with attempted homicide, aggravated assault, and reckless endangerment.

At the preliminary hearing, the magisterial district judge dismissed all charges except for the reckless endangerment charge, and Wolak subsequently pleaded guilty to disorderly conduct.

Two years later, Wolak tried to obtain a license to carry a firearm. Denials by the county sheriff and an administrative law judge in the Pennsylvania Attorney General’s office led to Wolak’s Commonwealth Court appeal. The Commonwealth Court examined the elements of the disorderly conduct crime and Wolak’s conviction and found that certain elements of the disorderly conduct conviction met the federal definition and other elements did not, so it examined the state court record to see whether the conviction record encompassed the missing elements.

The Commonwealth Court examined the evidence submitted by the Pennsylvania State Police and Wolak’s testimony before the Attorney General’s administrative law judge, and found that during his guilty plea colloquy, Wolak admitted that he was pleading guilty to firing the shotgun towards his estranged wife. The Commonwealth Court determined that the state police had met its burden confirming that Wolak had been convicted of a misdemeanor crime of domestic violence, denied Wolak’s appeal and affirmed the administrative law judge’s order denying Wolak a license to carry a firearm.

Proof of Relationship

The relationship requirement was at issue in **D’Alessandro v. Pennsylvania State Police**.¹⁴¹ D’Alessandro pleaded guilty to simple assault after striking his girlfriend, knocking her to the floor, and causing her to become unconscious. Several years later, D’Alessandro applied for a license to carry a firearm, which was denied because of his simple assault conviction. On appeal, D’Alessandro claimed that he should not be considered a prohibited individual under 18 U.S.C. § 922(g)(8) because the relationship requirement had not been proved. As part of its evidence in opposing D’Alessandro’s request for a license to carry, the state police introduced evidence, including a police report, stating that D’Alessandro had “hit the victim, his live-in girlfriend.” In addition, the police report also listed the same address for D’Alessandro and the victim.

¹⁴⁰ Wolak v. Pa. State Police, 898 A.2d 1176 (Pa. Commw. 2006).

¹⁴¹ [D’Alessandro v. Pa. State Police, 937 A.2d 404 \(Pa. 2007\).](#)

Only a “conviction” triggers the federal firearms disability. Successful completion of an Accelerated Rehabilitative Disposition (ARD) program is not a “conviction.”

Because the federal statute requires more than just a dating relationship between sexual or intimate partners, and requires cohabitation, D'Alessandro challenged the denial of his request for a gun permit. He claimed that the evidence was inadequate: that the police report referring to the victim as “his live-in girlfriend” and listing the same address for himself and his girlfriend was inadmissible hearsay and accordingly the evidence was insufficient. On appeal, the Pennsylvania Supreme Court found that the disputed evidence in police report was admissible and substantial evidence supported a denial of a license to carry firearms.

Conviction Triggers Disability

Only a conviction triggers the federal firearms disability. Pursuant to federal regulations, it is state law that governs the determination whether adjudication counts as a conviction leading to the federal firearm prohibition.¹⁴² Where the perpetrator has been admitted into an alternative delayed adjudication program, such as Accelerated Rehabilitative Disposition (A.R.D.)¹⁴³ and successfully completes this program, a conviction has not occurred and the federal firearms conviction prohibition does not apply.

No Service Weapon Exemption

Under federal law, military personnel and law enforcement officers convicted of a misdemeanor domestic violence crime do not receive the same service weapon exemption made available to perpetrators who are subject only to a PFA or other protection order. Consequently, law enforcement or military personnel who are convicted of a qualifying domestic violence misdemeanor crime are subject to the same prohibitions as other convicted domestic violence misdemeanants. This includes the lifetime prohibition against firearms possession, including those firearms intended for official duties.¹⁴⁴

Knowing Transfer to Disqualified Individuals Is a Crime

A person is subject to federal prosecution when the transferor sells or transfers firearms to a prohibited individual while knowing, or having reasonable cause to know, that the firearms recipient is prohibited from possession or transfer as a result of a domestic violence misdemeanor conviction.¹⁴⁵

¹⁴² 27 C.F.R. § 178.11.

¹⁴³ See PA. R. CRIM. P. 300-320; *Commw. v. Krall*, 434 A.2d 99 (Pa. Super. 1981).

¹⁴⁴ 18 U.S.C. § 925(a)(1).

¹⁴⁵ 18 U.S.C. § 921(33).

Judicial Notice Obligations for Domestic Violence Firearms Prohibitions

To comply with the Violence Against Women Act (VAWA), domestic violence offenders must be notified of federal firearms prohibitions. VAWA requires that each state's judicial policy and practice include notification to domestic violence offenders about the federal firearms prohibitions.¹⁴⁶

Prohibitions under 18 U.S.C. § 922(g)(8)–Qualifying Protection Order

Specifically, domestic violence offenders and PFA defendants must be notified that it is unlawful for a person who is subject to a qualified protection order to possess a firearm or ammunition.¹⁴⁷ Pennsylvania meets this requirement by including a notice in the form PFA order.

18 U.S.C. § 922(g)(9)–Misdemeanor Crime of Domestic Violence

Under VAWA, the judicial policy and practice must also include notice to domestic violence offenders that it is unlawful for a person convicted of a “misdemeanor crime of domestic violence” to possess a firearm.¹⁴⁸ Pennsylvania law does not designate specific crimes as domestic violence crimes. As discussed above, however, the United States Supreme Court's decision in **United States v. Hayes** held that a “misdemeanor crime of domestic violence” does not require a domestic relationship as an element in order for the misdemeanor crime to trigger the prohibition.¹⁴⁹ Therefore, Pennsylvania courts must notify defendants charged with misdemeanor crimes involving domestic violence of the federal firearms prohibitions.¹⁵⁰

To comply with VAWA, domestic violence offenders must be notified of federal firearms prohibitions.

Notice for Those Convicted of a Misdemeanor Crime of Domestic Violence

Because of the VAWA requirements, judges and district attorneys in each county must notify defendants of 18 U.S.C. § 922(g)(9) if the misdemeanor crime for which they are charged is committed against an intimate partner. Either the court or the district attorney's office engaging in a colloquy at or before the preliminary hearing stage of the criminal process typically achieves this. The defendant should also be informed of the firearms prohibitions and conditions throughout the criminal process and again once a conviction has been obtained or a guilty plea has been entered.

¹⁴⁶ 42 U.S.C. § 3796gg-4(e)(1)(A).

¹⁴⁷ 18 U.S.C. § 922(g)(8).

¹⁴⁸ 18 U.S.C. § 922(g)(9).

¹⁴⁹ [U.S. v. Hayes, 129 S.Ct. 1099 \(2009\).](#)

¹⁵⁰ *Id.*

FEDERAL FIREARMS RESTRICTIONS UPHELD IN DOMESTIC VIOLENCE CASES

Despite efforts by defendants to overturn the firearms restrictions imposed by the recent expansions of the Gun Control Act, courts have upheld these firearms restrictions.¹⁵¹

Second Amendment Challenges

In 2008, the United States Supreme Court in ***District of Columbia v. Heller*** found that the Second Amendment provided an individual right to possess a firearm and to use firearms for traditionally lawful purposes.¹⁵² However, the court observed that the right was not unlimited.¹⁵³

Prior to *Heller*, the Fifth Circuit Court of Appeals in ***United States v. Emerson*** held that the federal Gun Control Act provision prohibiting firearms possession after a qualifying domestic violence order is a permissible imposition on an individual's Second Amendment right.¹⁵⁴ The *Emerson* holding was in line with *Heller*, as it held that the Second Amendment established an individual right to possess and bear firearms and, thus, is likely to still apply to uphold the constitutionality of the federal firearms prohibition even after *Heller*.

Commerce Clause and Tenth Amendment Challenges

Defendants have attempted to challenge the part of the federal Gun Control Act that applies a firearms disability to respondents/defendants subject to a protection order. They have unsuccessfully used a variety of challenges, including Commerce Clause and Tenth Amendment constitutional challenges, claiming that the Gun Control Act provisions unlawfully interfere with state proceedings.¹⁵⁵

Due Process and Notice Arguments

Defendants have also repeatedly and unsuccessfully challenged both the domestic violence misdemeanor and the protection order disabilities in the federal Gun Control Act, invoking the due process and notice requirements of the Fifth and Fourteenth Amendments.¹⁵⁶

¹⁵¹ See later section, State Courts Have Very Little Authority.

¹⁵² [*District of Columbia et al. v. Heller*, 128 S.Ct. 2783, 2816 \(2008\).](#)

¹⁵³ *Id.* at 2816. See Section **Error! Reference source not found.**, [Error! Reference source not found.](#)

¹⁵⁴ [*U.S. v. Emerson*, 270 F.3d 203 \(5th Cir. 2001\).](#)

¹⁵⁵ See, e.g., *Emerson*, 270 F.3d 203; *U.S. v. Napier*, 233 F.3d 394 (6th Cir. 2000); *U.S. v. Jones*, 231 F.3d 508 (9th Cir. 2000); *U.S. v. Meade*, 175 F.3d 215 (1st Cir. 1999); *U.S. v. Wilson*, 159 F.3d 280 (7th Cir. 1998).

¹⁵⁶ See, e.g., *Emerson*, 270 F.3d 203; *U.S. v. Kafka*, 222 F.3d 1129 (9th Cir. 2000), *cert. denied*, 532 U.S. 924 (2001); *U.S. v. Reddick*, 203 F.3d 767 (10th Cir. 2000); *U.S. v. Meade*, 175 F.3d 215 (1st Cir. 1999); *U.S. v. Baker*, 197 F.3d 211 (6th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000); *U.S. v. Bostic*, 168 F.3d 718 (4th Cir. 1999), *cert. denied*, 527 U.S. 1029 (1999).

Ex Post Facto Challenges

Federal courts consistently have held that the revisions to the Gun Control Act imposing a firearms disability on persons convicted of domestic violence misdemeanors are not ex post facto applications of criminal penalties. Because the revisions to the Gun Control Act only criminalize firearm possession by an individual convicted of a domestic violence misdemeanor after the effective date of the revision, no ex post facto punishment occurs, even though the individuals may have been convicted of domestic violence misdemeanors before the effective date of the amendment.¹⁵⁷

Waiver, Vagueness and Overreaching Challenges

In ***United States v. Pfeiffer***, Pfeiffer was charged with possessing a firearm after being convicted of a misdemeanor crime of domestic violence.¹⁵⁸ Pfeiffer's underlying crime involved an incident in which he struck his wife in the face because he wanted to lock their older children out of the house for being late, but she opposed the idea. Pfeiffer declined the court's offer of counsel, and pleaded guilty to simple assault after explaining to the court what he had done. Pfeiffer was aware that the conviction for simple assault precluded his ability to possess firearms because he had also been subject to a protection order requiring him to surrender guns, and the county sheriff would not return his guns at the end of the protection order because his previous misdemeanor conviction meant that, under federal law, he was prevented from legally possessing firearms. Pfeiffer also unsuccessfully tried to have his misdemeanor conviction expunged because of its effect on his ability to possess guns.

Nevertheless, Pfeiffer decided to use a gun for hunting and was charged with unlawful possession of a firearm following a misdemeanor conviction involving domestic violence. He challenged his conviction on the unlawful gun possession, arguing in part that (1) he did not knowingly and intelligently waive his right to counsel in the underlying misdemeanor crime of domestic violence, and (2) that section 922(g)(9) is unconstitutionally vague in that it does not give fair warning that firearm possession is prohibited.¹⁵⁹

Pfeiffer argued that his waiver of counsel was not knowing and intelligent because the trial court failed to inform him specifically that he would lose his right to possess firearms. The appellate court held that the validity of the waiver did not depend on the court's explanation of the consequences of a guilty plea. In addition, the trial judge had repeatedly asked the defendant if he wished counsel, but the defendant declined.

¹⁵⁷ See, e.g., *U.S. v. Mitchell*, 209 F.3d 319 (4th Cir. 2000); *U.S. v. Smith*, 171 F.3d 617 (8th Cir. 1999); *Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998); *U.S. v. Pfeiffer*, 371 F.3d 430 (8th Cir. 2004).

¹⁵⁸ [U.S. v. Pfeiffer, 371 F.3d 430 \(8th Cir. 2004\).](#)

¹⁵⁹ *Id.*

The defendant next argued that he did not receive due process under the Fifth Amendment because section 922(g)(9) does not provide warning that firearm possession is prohibited. The Circuit Court found that Pfeiffer did have knowledge that firearm possession was prohibited.¹⁶⁰

Supremacy Clause Applies to Federal Firearms Prohibitions

Although limited Pennsylvania appellate guidance exists¹⁶¹ on this particular issue, one state supreme court has held that a state trial court is without authority to modify a protection order to permit the protection order defendant to have guns for hunting because the United States Constitution's Supremacy Clause mandates that state courts apply federal law. In this case, **Weissenburger v. Iowa District Court for Warren County**, the plaintiff obtained a domestic violence protection order.¹⁶² The defendant violated that order and subsequently pleaded guilty to harassment. As part of the defendant/husband's sentence, the trial court entered a three-year criminal no-contact order that contained standard language prohibiting firearms possession.

As a result of the protection order, the defendant was subject to federal gun prohibitions. Several months after the criminal protection order was entered, the defendant requested that the order be modified or terminated to allow him to possess firearms for hunting. The trial court modified the order, continuing the no-contact provisions, but permitting defendant to possess guns. The plaintiff filed an appeal of the modified order, claiming that the trial court's modification allowing defendant's gun possession was illegal under federal law.

Finding that the laws of the United States are binding on states, and that the Supremacy Clause mandates that state courts cannot refuse to apply federal law, the Iowa Supreme Court held that the trial court had no power to authorize the protection order defendant to possess firearms in violation of federal law. The Iowa Supreme Court annulled the trial court's order.

PENALTIES FOR VIOLATING FEDERAL FIREARMS RESTRICTIONS

Penalties for violating the federal firearms restrictions include a fine of up to \$250,000 and up to 10 years in prison.¹⁶³

¹⁶⁰ *Id.*

¹⁶¹ In *Boniella v. Commonwealth*, 958 A.2d 1069 (Pa. Commw. 2008), Boniella's request for the return of a confiscated firearm following his conviction and sentence for counterfeiting was denied by the trial court. On appeal, the Commonwealth Court affirmed, finding that Boniella was federally prohibited from firearms possession and noting that because of the Supremacy Clause, the Court had to follow the federal gun law.

¹⁶² [Weissenburger v. Iowa District Court, 740 N.W.2d 431 \(Iowa 2007\).](#)

¹⁶³ 18 U.S.C. § 924(a)(2).

FEDERAL FIREARM RIGHTS RESTORATION

Restoration Under Federal Law

Although federal law applies a lifetime ban on firearm possession following a qualifying misdemeanor conviction, the law permits restoration of rights under very limited circumstances. To restore firearms possession rights, the conviction must be “expunged or set aside” or it must be an offense for which the person has been pardoned or, if the law of the jurisdiction provides for loss of civil rights for a particular offense, the individual must have had his or her civil rights restored.¹⁶⁴

State Courts Have Very Little Authority

State courts have extremely limited authority to restore firearms rights. In **Pennsylvania State Police v. Paulshock**, Pennsylvania’s Supreme Court ruled that under state law, with a very limited exception, trial judges are without authority to remove federal firearms disabilities imposed by the federal Gun Control Act.¹⁶⁵ In this case, the Supreme Court consolidated two petitions for review from the state police regarding firearm disability removal requests filed by offenders.

The Supremacy Clause of the U.S. Constitution mandates that state judges follow federal firearms law.

Each offender had old criminal records, and had sought and received trial court permission to be relieved of state and federal firearms disabilities. Subsequently, both convicted offenders attempted gun purchases and the state police records check indicated that despite the trial court orders, each convicted offender was disabled from gun possession or ownership under the provision of the Gun Control Act that provides a lifetime firearms prohibition for individuals convicted of certain crimes.¹⁶⁶

Both offenders challenged their respective gun purchase denials by the state police and the case made its way to Commonwealth Court. The Commonwealth Court held that the trial court orders relieved both state and federal firearms disabilities, and the state police petitioned the Pennsylvania Supreme Court for review.

Trial judges are generally without authority to remove federal firearms disabilities.

¹⁶⁴ 18 U.S.C. § 921(33)(B)(ii).

¹⁶⁵ [Pa. State Police v. Paulshock, 836 A.2d 110 \(Pa. 2003\).](#)

¹⁶⁶ This provision of the Gun Control Act has been amended and now contains a prohibition for sentences of one year or more. See 18 U.S.C. § 922(g)(1).

The Pennsylvania Supreme Court held that because the offenders sought relief under Pennsylvania's Uniform Firearms Act, specifically section 6105(d), the trial court could grant relief only as to the state law disability and not the federal firearms disability. To have qualifying relief for purposes of the federal firearms disability, the petitioner would have had to seek full expungement of criminal history record information pursuant to section 9122 of the Uniform Firearms Act.¹⁶⁷ A criminal conviction on a criminal history record may be expunged only under this section where (1) the subject individual reaches 70 years of age, and has been free from arrest or prosecution for 10 years following release from jail or supervision, or (2) the subject individual has been dead for 3 years.¹⁶⁸

Because neither offender pursued expungement of criminal record history information under section 9122 of the Criminal History Record Information Act, the trial court orders granting relief from the federal firearms disabilities under section 6105 of the Pennsylvania Uniform Firearms Act were insufficient to remove the federal firearms disability, and the offenders remained subject to the federal disability.¹⁶⁹

The Commonwealth Court followed Paulshock in **Pennsylvania State Police v. Pecora**, stating that a state court may not relieve a federal firearms disability unless specifically provided in the state statute.¹⁷⁰ Pecora appealed a sheriff's refusal to issue a license to carry a firearm, based on Pecora's guilty plea to three counts of income tax evasion. The state police refused to issue the approval number for the license. The trial court determined that Pecora's situation fell into an exception to the Gun Control Act and ordered the sheriff to issue the license. Pecora's pleas fell under section 922(g)(1) of the Gun Control Act. Pecora admitted to the federal disability, but argued that possession of firearms was different from a license to possess, and thus he was not disabled from acquiring a license. Following Paulshock, the court noted that it could not relieve a federal disability. The court also pointed out that it would be illogical for the General Assembly to intend a person who could not legally possess a firearm to receive a license to carry a concealed weapon.

State Statute Cannot Restore Civil Rights for Federal Firearms Purposes

Federal law, not state law, governs whether possession of a firearm violates a federal statute. In **United States v. Brailey**, the defendant claimed his civil rights had been restored under the state statute, and thus he fell into the federal statute's exception for persons convicted of misdemeanors whose civil rights had been restored.¹⁷¹ The court held that federal law controls the right to possess a firearm under federal law. The defendant had been convicted of a misdemeanor crime of domestic violence and under federal law this made possession of a firearm a federal crime. The court noted that Congress could reasonably conclude possession of weapons could increase the danger in these situations.¹⁷²

¹⁶⁷ 18 PA. C.S. § 9122.

¹⁶⁸ *Id.*; see also *Commw. v. Wolfe*, 749 A.2d 507 (Pa. Super. 2000).

¹⁶⁹ *Paulshock*, 836 A.2d at 116.

¹⁷⁰ [Pa. State Police v. Pecora, 862 A.2d 734 \(Pa. Commw. 2004\).](#)

¹⁷¹ *U.S. v. Brailey*, 408 F.3d 609 (9th Cir. 2005) (citing *Caron v. U.S.*, 524 U.S. 308 (1998)).

¹⁷² *Id.* at 612-13.

STATE AND FEDERAL FIREARMS BACKGROUND CHECK PROCEDURES

Pennsylvania Procedures

The Pennsylvania Uniform Firearms Act sets forth procedures for background checks for firearms purchases.¹⁷³ According to these procedures, when an individual attempts to purchase firearms in Pennsylvania, the retailer is required to check the customer's criminal history through the Pennsylvania State Police.¹⁷⁴ In addition to ensuring compliance with Pennsylvania's firearms law, the state police must determine an applicant's eligibility under the federal Gun Control Act.¹⁷⁵ Accordingly, because the two Acts have different requirements, there are some potential gun buyers who may pass state standards but are still prohibited from gun possession under federal law.

Appeals

Applicants denied the ability to purchase firearms can challenge the accuracy of the criminal history information upon which the decision is based. Applicants may challenge the denial first to the state police, then to the Pennsylvania Office of the Attorney General and finally to the Commonwealth Court of Pennsylvania.¹⁷⁶ The Pennsylvania Instant Check System Challenge sample form is found in Appendix G of this chapter.

In ***D'Allessandro v. Pennsylvania State Police***, the Pennsylvania Supreme Court found sufficient evidence of an intimate partner relationship in a misdemeanor crime of domestic violence where the police report described the victim as defendant's "live-in girlfriend"; the report listed the victim and defendant having the same address; and the defendant admitted at trial to a sexual relationship with the victim.¹⁷⁷ Because an intimate relationship existed, the defendant's simple assault conviction was considered a misdemeanor crime of domestic violence, making the defendant ineligible for a license to carry a firearm.

Case Law - Information Used to Evaluate Prohibitions

In ***Pennsylvania State Police v. McPherson***, McPherson applied for renewal of his firearm permit with the Bucks County Sheriff's Office.¹⁷⁸ The sheriff denied the renewal based on the state police's analysis that McPherson's disorderly conduct guilty plea and conviction constituted a domestic violence misdemeanor under the federal Gun Control Act.¹⁷⁹

¹⁷³ 18 PA. C.S. § 6101 *et seq.*

¹⁷⁴ 18 PA. C.S. § 6111(b).

¹⁷⁵ 18 PA. C.S. § 6111.1(b)(1)(i).

¹⁷⁶ 18 PA. C.S. § 6111.1(e).

¹⁷⁷ [*D'Allessandro v. Pa. State Police*, 937 A.2d 404 \(Pa. 2007\).](#)

¹⁷⁸ *Pa. State Police v. McPherson*, 831 A.2d 800 (Pa. Commw. 2003).

¹⁷⁹ *Id.* at 807.

Under Pennsylvania's Uniform Firearms Act, the sheriff in the county in which the applicant resides has the authority to issue a firearms license.¹⁸⁰ However, Pennsylvania law conferred upon the state police a mandatory role in the sheriff's investigation; the state police have the authority, and the duty, to respond to the sheriff's inquiry with a criminal history records check for the applicant, and to determine whether a misdemeanor conviction involved acts of domestic violence. McPherson's guilty plea included an admission that he pushed or shoved his wife to the ground.

The state police analyzed the misdemeanor conviction and determined that it constituted a domestic violence misdemeanor under the federal Gun Control Act. McPherson's request for renewal of his gun license was denied pursuant to this conviction.¹⁸¹ On appeal, the Commonwealth Court held that the state police's denial was proper.¹⁸²

The Commonwealth Court followed the precedent of McPherson in deciding **Wolak v. Pennsylvania State Police**.¹⁸³ Wolak appealed the administrative law judge's denial of his application for a gun permit. The basis of denial was a conviction for a misdemeanor crime of domestic violence. Wolak pleaded guilty to disorderly conduct as a result of discharging a shotgun in the direction of his wife as she was coming up a set of steps. The sheriff denied Wolak's application for a license to carry a firearm based on the disqualifying offense. The Commonwealth Court found that disorderly conduct had some components that could fit with the federal definition of a crime of domestic violence. Based on McPherson, the court looked at the state court documents of record to determine if the conviction included those components. Wolak admitted that he pleaded guilty to firing the shotgun towards his estranged wife. The court upheld the administrative law judge's denial of a permit.

In **D'Allessandro v. Pennsylvania State Police**, the Pennsylvania Supreme Court found sufficient evidence of an intimate partner relationship in a misdemeanor crime of domestic violence where the police report described the victim as defendant's "live-in girlfriend;" the report listed the victim and defendant having the same address; and the defendant admitted at trial to a sexual relationship with the victim.¹⁸⁴ Because an intimate relationship existed, the defendant's simple assault conviction was considered a misdemeanor crime of domestic violence, making the defendant ineligible for a license to carry a firearm.

Case Law - Standing to Challenge Permits/ Expungements

The Pennsylvania State Police are statutorily required, pursuant to the Uniform Firearms Act, to perform background checks regarding state and federal firearms prohibitions, and have standing to challenge a petition to remove a state firearms disability. This was the holding of the Pennsylvania

¹⁸⁰ 18 PA. C.S. § 6109(b).

¹⁸¹ Pa. State Police v. McPherson, 831 A.2d at 805-06.

¹⁸² *Id.* at 807-08; see also Hesse v. Pa. State Police, 850 A.2d 829 (Pa. Commw. 2004) (holding that conviction for the crime of reckless endangerment did not trigger the federal firearms prohibition).

¹⁸³ Wolak v. Pa. State Police, 898 A.2d 1176 (Pa. Commw. 2006).

¹⁸⁴ D'Allessandro v. Pa. State Police, 937 A.2d 404 (Pa. 2007).

Superior Court in *In re: Expungements, Pennsylvania State Police*.¹⁸⁵ In this case, a PFA defendant, whose firearms had previously been seized by the county sheriff's department, sought to have his firearms returned following the expiration of the PFA order. The trial court entered an order authorizing the sheriff to return the firearms, provided there was no legal disability preventing the PFA defendant from possessing firearms.

A background check revealed that the PFA defendant was prohibited under state law following his involuntary commitment to a mental institution. The prohibited individual sought to have the impediment removed by the trial court, which the court granted after a hearing. However, the state police did not have notice of the hearing and filed a motion for reconsideration, which the trial court ultimately denied. The state police appealed, even though the Uniform Firearms Act did not explicitly grant the state police standing to participate in a proceeding to remove a state firearms disability.

On appeal, the Superior Court reasoned that the state police did have standing, because of its responsibilities and duties under the Firearms Act, and because the state police's interest is to ensure public safety and welfare by keeping firearms away from dangerous individuals.

The National Instant Criminal Background Check System (NICS)

Mandated by the 1993 Brady Amendments to the federal Gun Control Act, the National Instant Criminal Background Check System (also referred to as NICS) is a computerized database designed to immediately identify persons who are disqualified from purchasing firearms by conducting a search of available records.¹⁸⁶ Under the Brady Amendments, all federally licensed gun dealers must obtain a criminal background check of any purchaser before completing a sale.

The firearms applicant must show the federally qualified dealer an approved form of photo identification and provide his or her name, sex, race, date of birth, and state of residence. Additional personal descriptors and unique identifiers should be used to narrow the search.

Defendant's DOB, SSN, Driver's License or VIN number in the PFA Order facilitates entry into NCIC and other state and federal registries.

In many states, the federally licensed dealer contacts the FBI to initiate an NICS background check. For some states an entity other than the FBI is designated as the Point of Contact (POC) to initiate an NICS and other background check. The POC in Pennsylvania is the Pennsylvania State Police. The state police use the NICS and their own databases to determine whether an individual is disqualified from possessing a firearm; the state police then notifies the federally licensed dealer of the results of the check.

¹⁸⁵ [In re Expungements, 938 A.2d 1075 \(Pa. Super. 2007\).](#)

¹⁸⁶ 18 U.S.C. § 922(t).

The NICS gives notice that the firearms transfer may proceed, is denied, or is delayed pending further review of matching records. Federal law requires the FBI to perform the NICS initial investigation within three business days. If no state or federal disabilities are uncovered during this time, the sale is permitted to proceed by default.¹⁸⁷

In addition to searching for criminal records of an applicant, the FBI checks to determine whether the applicant is a defendant in any protection orders. The FBI maintains a national protection order registry called the National Criminal Information Center (NCIC) Protection Order File. State protection orders, including Pennsylvania's PFA orders, are entered into the NCIC file. The FBI accesses the NCIC records as part of its NICS search.

Entry of state PFA orders into the NCIC file is critical to the national enforcement of PFA orders¹⁸⁸ and to FBI firearms transfer checks. In 2012, more than 3,000 firearms purchases went forward because of incomplete records – the FBI later found that these persons should have been prohibited from having firearms.¹⁸⁹

The NCIC requires any of the following numeric identifying information for its database:

- the defendant/respondent's date of birth;
- the defendant/respondent's Social Security number;
- the defendant/respondent's driver's license number, state, and expiration date;
- the defendant's vehicle identification number, state and expiration date.¹⁹⁰

Information entered by any Pennsylvania court pertaining to all temporary and final PFA orders are transmitted via the PFA Database (PFAD) to the state police's official repository of those orders. To make sure that all PFA orders are entered into NCIC, judges should ask defendants for their date of birth at the final order hearing. Judges who obtain any of this numeric identifying information and include it in their orders will facilitate entry of orders into state and federal registries.

¹⁸⁷ *Id.* at § 922(t)(1)(B)(ii).

¹⁸⁸ See to PA. R. Civ. P. 1905, explanatory note & standard final order form. The order has space to put in identifiers.

¹⁸⁹ Americans for Responsible Solutions and The Nat'l Domestic Violence Hotline, *Saving Women's Lives: Ending Firearms Violence Against Intimate Partners*, 18 (2014), available at http://b3cdn.net/respsol/68677b128403ecc617_bzm6b1krn.pdf, citing Michael Cooper et al., *Loopholes in Gun Laws Allow Buyers to Skirt Checks*, N.Y. TIMES, (April 10, 2013), http://www.nytimes.com/2013/04/11/us/gun-law-loopholes-let-buyers-skirt-background-checks.html?_r=0

¹⁹⁰ PA. R. Civ. P. 1905, explanatory comment.

SUMMARY - WHAT STATE COURT JUDGES MAY AND MAY NOT DO WITH REGARD TO FIREARMS

Judges may (have discretion to):

- enter a PFA order directing the relinquishment of all firearms, regardless of whether firearms were used or threatened to be used in the abuse¹⁹¹
- enter a PFA order prohibiting the defendant from acquiring or possessing weapons¹⁹²
- enter an order directing the defendant to relinquish firearms license to sheriff¹⁹³
- enter a PFA order that does not require the relinquishment of firearms or other weapons
- establish procedures and provide restrictions and conditions for the return of firearms and other weapons/licenses that the judge deems appropriate to protect the plaintiff and minor children from further abuse through use of weapons¹⁹⁴
- under limited circumstances, enter an order relieving the offender of state firearms disability¹⁹⁵
- expunge an offender's criminal history record when an offender is age 70 and has been free from arrest or prosecution for at least 10 years, or has been dead for three years (This is the only authority a state judge has to enter an order that would affect the federal firearms disability.¹⁹⁶)

Judges may not:

- enter an order with the purpose of overriding the application of the federal Gun Control Act's provisions regarding firearms disability following the entry of a qualifying protection order¹⁹⁷
- with the very limited exception discussed previously, enter an order with the purpose of overriding the application of the federal Gun Control Act's provisions regarding federal firearms disability following an offender's conviction for a misdemeanor crime involving domestic violence¹⁹⁸

¹⁹¹ 23 PA. C.S. § 6108(a)(7).

¹⁹² *Id.*

¹⁹³ 23 PA. C.S. § 6108(a)(7); *see also supra* note 17 for statutory language.

¹⁹⁴ *Id.*

¹⁹⁵ *See Paulshock*, 836 A.2d at 116.

¹⁹⁶ *See Id.*

¹⁹⁷ *See* 18 U.S.C. § 922(g)(8); *see also* *Weissenburger v. Iowa District Court*, 740 N.W.2d 431.

¹⁹⁸ *Paulshock*, 836 A.2d at 116.

- knowingly return firearms to perpetrators who are subject to federal Gun Control Act disability¹⁹⁹

OTHER RELEVANT INFORMATION

Domestic Violence and Firearms Are a Lethal Combination

Research shows that intimate partner and family assaults involving firearms are twelve times more likely to result in death than those assaults not involving firearms.²⁰⁰ Women subject to physical abuse by a current or former intimate partner who owned a firearm were five times more likely to be murdered by that partner than in cases where the abuser did not own a firearm.²⁰¹

A review of Pennsylvania's domestic violence homicides indicates that firearms are the murder weapon in more than half of domestic violence homicides. Between 2000 and 2012, 1,320 victims of domestic violence were killed in Pennsylvania; 780 of those victims were shot, an average of 59 percent.²⁰²

Firearms Increase Risks in the Home

A gun in the home significantly increases the risk that an incident of domestic violence will result in homicide.²⁰³ The Center for Gun Policy and Research cites a 1997 study that examined risk factors for violent death for women in the home. The study found that when there were one or more guns in the home, the risk of suicide among women increased nearly five times and the risk of homicide increased nearly three times. The increased risk of homicide associated with firearms was attributable to homicides at the hands of a spouse, intimate partner, or close relative.²⁰⁴

¹⁹⁹ 18 U.S.C. §§ 922(d)(8), 921(33).

²⁰⁰ See CENTER FOR GUN POLICY AND RESEARCH, FACTSHEET: INTIMATE PARTNER VIOLENCE AND FIREARMS, http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/IPV_Guns.pdf (citing Lee E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AM. MED. ASS'N 3043 (1992)).

²⁰¹ CENTER FOR GUN POLICY AND RESEARCH, FACTSHEET: INTIMATE PARTNER VIOLENCE AND FIREARMS, *supra* note **Error! Bookmark not defined.**, (citing Campbell JC, Webster DW, Koziol-McLain J, et al., *Risk Factors for Femicide Within Physically Abusive Intimate Relationships: Results from a Multi-site Case Control Study*. 93 J. AM. MED. ASS'N 1089-1097 (1992)) ("A study of women physically abused by current or former intimate partners revealed a 5-fold increased risk of the partner murdering the woman when the partner owned a firearm.").

²⁰² PA. COALITION AGAINST DOMESTIC VIOLENCE, 2012 PENNSYLVANIA DOMESTIC VIOLENCE FATALITY REPORT 3 (2013), <https://www.pcadv.org/wp-content/uploads/2012-Fatality-Report.pdf>. Annual Reports dated 1998-2012 are available at <https://www.pcadv.org/resources/fatalities/>.

²⁰³ See CENTER FOR GUN POLICY AND RESEARCH, FACTSHEET: INTIMATE PARTNER VIOLENCE AND FIREARMS, *supra* note **Error! Bookmark not defined.**

²⁰⁴ CENTER FOR GUN POLICY AND RESEARCH, FACTSHEET: INTIMATE PARTNER VIOLENCE AND FIREARMS, *supra* note **Error! Bookmark not defined.** (citing James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES OF INTERNAL MEDICINE 777-782 (1997)).

EMERGING PRACTICES: ASK, ORDER, ENFORCE

State courts cannot depend on federal law alone to provide any real protection for victims in those cases where weapons restrictions are justified. For example, the federal Gun Control Act applies only to firearms, not other weapons. The Gun Control Act does not cause surrender of firearms or other weapons or allow state law enforcement officers to seize them for safekeeping. State and local police cannot directly enforce federal firearms restrictions, but can only refer suspected violations to federal authorities. Immediate weapons confiscation and firearms prohibition on the state level are far more protective than the remote possibility of federal enforcement of the federal firearms prohibition.²⁰⁵

Federal laws are limited and comprise only one strand of the safety net intended to protect victims of domestic violence. Additional prohibitive language is needed in state and local court protective orders. When a judge inserts a weapons surrender condition in a PFA order, it allows state law enforcement agencies to enforce those PFA restrictions under state law prohibiting firearms possession.²⁰⁶ A PFA order restriction may be broader than federal law by addressing weapons other than firearms and can cause immediate surrender of weapons for safekeeping.

In the context of firearms and other weapons, it is important that a judge in a PFA case: (1) ask the plaintiff if the defendant possesses firearms and other weapons at the temporary order stage; (2) inquire at the final hearing if the defendant possesses firearms and other weapons; (3) craft an order that removes firearms and other weapons from offenders; and (4) strictly enforce that order. Judges also should examine their local system to determine precisely how firearms and other weapons are removed from defendants and retained within their county. When the system is not sufficiently responsive, the judge has the administrative authority to advocate for the necessary changes.

²⁰⁵ See Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525 (2003). In this article, a former federal prosecutor discusses the lack of prosecutions under the provisions of the federal Gun Control Act that prohibit gun possession after the entry of a qualifying protective order and after a domestic violence misdemeanor conviction. He cites a 2002 report by the Executive Office for the U.S. Attorney for the following conclusions: between 1995 and 2002, only 58 cases were filed under the Gun Control Act section prohibiting firearms possession after a protective order; during this time frame, 6,000 cases were filed involving unlawful firearms possession under the Gun Control Act. Accordingly, the cases prosecuted that involved unlawful firearms possession following a protection order represented 1 percent of the cases filed for unlawful firearms possession. The percentage of prosecutions for unlawful gun possession following misdemeanor domestic violence convictions was slightly higher, totaling 2 to 3 percent of the prosecutions. *Id.* at 530-32. According to the author, the low rate of prosecutions is alarming, considering the estimate that one million potential defendants could be charged under the statute. *Id.* at 532.

²⁰⁶ 18 PA. C.S. § 6105.

Immediate weapons confiscation ... is far more protective ... [I]nserting a weapons surrender condition in a PFA order ... allows state law enforcement agencies to enforce [firearms] restrictions...

The need to disarm abusers is urgent. Between 2001 and 2005, an average of 615,790 non-fatal violent assaults²⁰⁷ and 1,500 intimate homicides²⁰⁸ per year were committed against intimate partners in the United States. Assailants used weapons against the victims in approximately 18 percent of the non-fatal cases.²⁰⁹ Fifty-four percent of intimate homicide victims from 2001 to 2005 were killed with guns.²¹⁰ Because domestic violence incidents are potentially lethal, it is important for judges to carefully weigh the possible threat posed by firearms in every phase of every case involving domestic violence – including bail decisions, A.R.D. decisions, sentencing orders, probation decisions, custody determinations, visitation arrangements, and PFA orders.

Vigorous enforcement of court orders is especially important when the order includes restrictions on firearms. The National Center for State Courts suggests:

Despite laws designed to reduce batterers' possession of guns – either those with misdemeanor convictions for domestic violence offenses or subject to a valid order of protection – they are not self-enforcing. Enforcement of the law depends on the action of local justice agencies and the state courts.²¹¹

When issuing PFA orders, judges should keep in mind how federal and state laws work together. A PFA order restriction may be broader than federal law, by addressing weapons other than firearms, and can cause immediate surrender of weapons for safekeeping. Therefore, when a judge determines firearms restrictions are appropriate, the judge should not rely on federal law to

²⁰⁷ Shannan Catalano, U.S. Dep't of Justice, *Intimate Partner Violence in the United States (Presence of Weapons)*, (table citing Average Annual Number and Percent of Weapons Used in Nonfatal Intimate Partner Violence 2001-2005), available at <http://www.bjs.gov/content/pub/pdf/ipvus.pdf>, (last visited Dec. 18, 2013).

²⁰⁸ James Alan Fox & Marianne W. Zawitz, U.S. Dep't of Justice, *Homicide Trends in the United States (table citing the Gender and Number of Intimate Homicide Victims By Year 1976-2005)*, available at <http://www.bjs.gov/content/pub/pdf/htius.pdf>.

²⁰⁹ Shannan Catalano, U.S. Dep't of Justice, *Intimate Partner Violence in the United States (Presence of Weapons)*, ("Weapons" include firearms, sharp weapons and blunt objects).

²¹⁰ For intimate homicides and weapons used, see James Alan Fox & Marianne W. Zawitz, *supra* note **Error! Bookmark not defined.** Using figures from the table citing the Gender and Number of Intimate Homicide Victims By Year 1976 – 2005, 54 percent of intimate victims from 2001-2005 were killed with guns. Percentages for Pennsylvania firearms domestic violence homicides are similar – from 1998 through 2012, 59 percent of homicide victims were shot. See PA. COALITION AGAINST DOMESTIC VIOLENCE, 2012 PENNSYLVANIA DOMESTIC VIOLENCE FATALITY REPORT 3 (2013), <https://www.pcadv.org/wp-content/uploads/2012-Fatality-Report.pdf>. Annual Reports dated 1998-2012 are available at <https://www.pcadv.org/resources/fatalities/>.

²¹¹ Hillery Efkenman & Lynn Levey, *Firearms and Domestic Violence*, FAMILY VIOLENCE FORUM, Nat'l Ctr. for State Cts. (2002).

accomplish that priority, but should include all appropriate restrictions in the PFA order itself. Judges should also remember that, in circumstances where the federal law applies, there is no PFA or other protection order language that will prevent federal firearms prohibitions from taking effect automatically pursuant to the Federal Gun Control Act.²¹²

EMERGING PRACTICES - SEPARATION VIOLENCE MAKES FIREARMS REMOVAL A VITAL PROTECTION

According to the 2012 report, “[s]eparated females experienced the highest rate of intimate partner violence during the 18-year period” from 1993 to 2010.²¹³ The period during and immediately after separation may be the most dangerous time for a victim of domestic violence, because the defendant is receiving a clear message that he or she is losing control of his or her partner and their relationship.²¹⁴ At this time, the defendant becomes the most desperate and dangerous. Because this is often the most dangerous period for the victim, the victim’s family, friends, and others, such as law enforcement, that try to help the victim, this is an especially crucial time for courts to remove firearms from the defendant’s possession.

EMERGING PRACTICES - ADVISORY WARNINGS FOR DEFENDANTS

Pennsylvania trial courts must advise restricted parties of applicable federal firearms laws, although failure to provide notice will not prevent prosecution. Federal courts have upheld convictions for violations of federal firearms disability laws over defendants’ claims that they had no notice or actual knowledge that these laws automatically apply upon issuance of protection orders and domestic

²¹² For a thorough and well-written discussion of firearms and domestic violence that includes a discussion of state and federal firearms laws, challenges to the federal laws, the NICS background check system, state judges’ roles with respect to the federal firearms law, full faith and credit issues, and effective judicial practice, see Darren Mitchell & Susan Carbon, *Firearms and Domestic Violence – A Primer for Judges*, 39 CT. REV. 32, 32-43 (2002), available at

<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1148&context=ajacourtreview>.

²¹³ Shannan Catalano, Bureau of Justice Statistics, *Intimate Partner Violence, 1993-2010*, 6 (2012), U.S. DEP’T OF JUSTICE, available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>.

²¹⁴ Women separated from their husbands were three times more likely to be victimized by spouses than divorced women, and 25 times more likely to be victimized by spouses than a married women. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE SPECIAL REPORT, NCJ #154348, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY, 4 (August 1995), available at <http://www.bjs.gov/content/pub/pdf/FEMVIED.PDF>. This “separation violence” is reflected in long-term data. See Shannan Catalano, Bureau of Justice Statistics, *Intimate Partner Violence, 1993-2010*, (2012), U.S. DEP’T OF JUSTICE at Table 9.

violence misdemeanor criminal convictions.²¹⁵ State trial courts are urged to warn domestic violence perpetrators both verbally and in writing regarding the federal prohibition against firearms possession and ownership when perpetrators are convicted of domestic violence misdemeanors or become subject to PFA or other orders that qualify as protective orders under federal law.²¹⁶ Currently, the standard notice that accompanies PFA orders includes a specific warning that persons subject to a PFA order may be federally prohibited from possessing guns.²¹⁷

EMERGING PRACTICES - RELINQUISHMENT OF FIREARMS

The PFA Act provides options for a defendant to surrender firearms, other weapons and ammunition, if surrender was ordered in the temporary and final orders. The defendant may relinquish firearms to the sheriff; surrender the firearms, other weapons and ammunition to a licensed firearms dealer for consignment sale, transfer or safekeeping; or, transfer the firearms, other weapons and ammunition to a third party for safekeeping. The defendant must be informed of the various options and must choose which method to use for relinquishment.

Using the sheriff or a licensed firearms dealer offers some advantages for surrender of firearms, other weapons and ammunition. Both entities are qualified to secure weapons safely and will be able to provide an inventory and accounting of weapons, and can be trusted not to release weapons without a court order. In addition, the statute provides protections to the defendant with regard to firearms in the custody of the sheriff. The sheriff is directed by statute to secure custody of the firearms, and to provide the defendant with a signed and dated written receipt for the firearms, including a description of the weapon and its condition.²¹⁸ Additionally, law enforcement agencies, sheriffs and their respective employees, may be held liable to the lawful owner of the firearms for loss, damage or a substantial decrease in value that results from lack of reasonable care.²¹⁹ This section applies only to sheriffs and law enforcement agencies and the employees of each, not to licensed firearms dealers or third parties with safekeeping permits. Thus, a defendant who surrenders firearms to the sheriff is protected from loss caused by lack of due care by the firearms holder.

Defendants may find it difficult to locate a licensed firearms dealer willing to take the firearms, other weapons and ammunition within the timeframe of the PFA Act. Dealers are not required by statute to take the firearms, and many may choose to avoid participation. Providing the affidavit required by

²¹⁵ U.S. v. Hancock, 231 F.3d 557, 560 (9th Cir. 2000) *cert. denied*, 532 U.S. 989 (2001); U.S. v. Napier, 233 F.3d 394 (6th Cir. 2000); U.S. v. Beavers, 206 F.3d 706 (6th Cir. 2000) *cert. denied*, 529 U.S. 1121 (2000); U.S. v. Wilson, 159 F.3d 280 (7th Cir. 1998).

²¹⁶ U.S. v. Wilson, 159 F.3d 280 (7th Cir. 1998) (Posner, J. dissenting); see also Thomas L. Fowler, *Ignorance of the Law: Should It Excuse Violations of Certain Federal Restrictions On the Possession of Firearms?* 23 CAMPBELL L. REV. 283 (2001).

²¹⁷ PA. R. CIV. P. 1905.

²¹⁸ 23 PA. C.S. § 6108(a)(7)(ii).

²¹⁹ 23 PA. C.S. § 6119(b).

the statute and complying with the other provisions may be more burdensome than a dealer would like.²²⁰ That said, however, a licensed firearms dealer will likely be cognizant of the law and subject to state and federal laws governing sale and transfer of firearms.

Perhaps the least attractive option from the victim's perspective is relinquishment to a third party for safekeeping. However, even this option provides some level of protection to the victim. First, the third party must be legally permitted to have firearms. Second, the sheriff grants the safekeeping permit to the third party only after a determination is made that the person is permitted to have firearms. Third, the sheriff, pursuant to specific statutory provisions, may revoke the safekeeping permit. Fourth, the third party safe keeper must not be a member of the defendant's household. Finally, the PFA Act establishes civil and criminal liability for a third party who intentionally or knowingly violates the order and returns the firearms to the defendant. The sheriff must inform the victim of the identity of the third party.²²¹

The PFA Act establishes civil and criminal liability for a third party who intentionally or knowingly violates the order and returns the firearms to the defendant.

Using a third party as a safe keeper also entails obtaining a safekeeping permit and appearing in the sheriff's office with the defendant to sign forms. This requirement may be more than some potential third parties are willing or able to do, and the potential liability may be a deterrent to others.

Third party safe keepers are likely to be friends or family members, have no training for this responsibility, and may not believe they are accountable to the court for firearms security. Third parties may be exposed to federal and state prosecution if they accept possession of the weapons and subsequently return them to the defendant. Any third party who transfers a firearm or ammunition to a prohibited person or provides a prohibited person access to a firearm or ammunition may be prosecuted under state or federal law.

EMERGING PRACTICES - FIREARMS RETURN PROCEDURES

A state court judge violates federal law if the judge knowingly returns firearms to a party who is subject to a federal firearms disability.²²² Therefore, for the protection of all concerned, when a PFA respondent/defendant petitions for the return of firearms at the end of a PFA order, a judge is authorized to schedule a hearing.²²³

²²⁰ See 23 PA. C.S. § 6108.2.

²²¹ 23 PA. C.S. § 6108(7)(c)(iii).

²²² 18 U.S.C. §§ 922(d)(8), 921(33); see also N.J. v. S.A., 675 A.2d 678 (N.J. Super. 1996).

²²³ 23 PA. C.S. § 6108(a)(7).

If the PFA has expired or has been dismissed, the judge has the authority²²⁴ to:

- schedule a hearing
- notify the PFA plaintiff in advance of the hearing, so that the victim can decide whether to oppose the weapons return
- direct a county official, such as the district attorney or the sheriff, to complete the appropriate background checks (PSP and NCIC)
- determine, at the hearing, whether the respondent/defendant is subject to other state or federal disabilities before permitting the return of firearms

If the defendant or a third party is petitioning for the return of firearms prior to the expiration of the PFA, it is important for the judge to know that the majority of PFA defendants will be prohibited under federal law from having or possessing firearms.

The judge has the authority to:²²⁵

- schedule a hearing to be held within 10 business days
- ensure service to the plaintiff and make the plaintiff a party
- if a third party petitions for that third party's firearms to be returned, ensure service to the plaintiff and give the plaintiff notice and an opportunity to be heard about the petition
- direct a county official, such as the district attorney or the sheriff, to complete the appropriate background checks (Pennsylvania State Police and NCIC)
- determine, at the hearing, whether the third party or respondent/defendant is subject to other state or federal disabilities before permitting the return of firearms

If the defendant is petitioning the court to modify the method of relinquishment, the judge has the authority to:²²⁶

- schedule a hearing to be held within 10 business days
- ensure service on the plaintiff and provide an opportunity for the plaintiff to be heard
- direct a county official, such as the district attorney or the sheriff, to complete the appropriate background checks (Pennsylvania State Police and NCIC)
- determine, at the hearing, whether the respondent/defendant is subject to other state or federal disabilities before permitting the return of firearms

²²⁴ 23 PA. C.S. §§ 6108.1(a), (d).

²²⁵ 23 PA. C.S. §§ 6108.1(b), (d).

²²⁶ 23 PA. C.S. § 6108.1(c), (d).

- determine that a safekeeping permit has been issued prior to ordering the return of firearms if the defendant requests relinquishment to a third party for safekeeping

A Pennsylvania State Police PICS Background Check Request form is attached as Appendix F.

EMERGING PRACTICES - PRIORITIZE VICTIM AND COMMUNITY PROTECTION

Judges can endanger victims by failing to order relinquishment of firearms and other deadly weapons by offenders or return weapons to offenders when state or federal prohibitions are extant, particularly when the court is on notice of the potential for danger. Domestic violence victims, their children, law enforcement officers, court staff, and judges are predictable targets of domestic violence perpetrators. All deserve the full measure of judicial protection allowed by law. The National Center for State Courts advises, "Local culture, combined with the lack of awareness of federal firearms regulations, can have deadly consequences for the lives of battered women and their children."²²⁷

When known dangers are ignored, communities demand system accountability. When judges bend the rules to provide perpetrators with continued access to weapons, they appear to facilitate domestic violence crimes in the eyes of increasingly aware communities.²²⁸ For example, judges miss opportunities to protect victims and their communities when they omit firearms restrictions from PFA orders, order return of firearms unlawfully and before safety is assured, fail to ensure that all appropriate law enforcement agencies are notified concerning every firearms disqualification, attempt to circumvent federal firearms law or other legal prohibitions, or approve plea bargains or diversion schemes designed to evade firearms disability laws. Given the unpredictable and sometimes lethal nature of domestic violence, protecting victims and the community must be given the highest priority.

EMERGING PRACTICES - MAKING A RECORD

The United States Supreme Court has established that the domestic relationship does not need to be an element for a crime to count as a misdemeanor crime of domestic violence.²²⁹ Nevertheless, to trigger the federal firearms prohibition, it is necessary that the qualifying relationship between the perpetrator and the victim be established beyond a reasonable doubt. Judges and prosecutors must ensure that the relationship and clear information regarding the underlying state conviction are part of the record. This information is critical for successful federal prosecution under federal firearms law.

²²⁷ See Efkenman & Levey, *Firearms and Domestic Violence*, *supra* note **Error! Bookmark not defined..**

²²⁸ JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 155-57 (1999).

²²⁹ [U.S. v. Hayes, 129 S.Ct. 1079 \(2009\).](#)

Best practice dictates that prosecutors and law enforcement provide specific details about the relationship of the parties in all offenses. It is imperative that law enforcement include information about the parties' relationship in all police reports and charging documents and that prosecutors ensure that the relationship is included on the record during any hearing.²³⁰ Judges can meet the Violence Against Woman Act notice requirements with a colloquy to misdemeanants on the record informing them that a misdemeanor crime of domestic violence triggers a federal firearms prohibition.

Making a clear and unambiguous record may support a subsequent conviction for federal firearms violation, thus holding abusers accountable and protecting victims and the community.

²³⁰ See *D'Alessandro v. Pa. State Police*, 937 A.2d 404 (Pa. 2007) (inclusion of victim's address on police report proved that she was the live-in girlfriend of defendant who had committed a misdemeanor crime of domestic violence and who therefore was ineligible to possess a firearm or license to carry a firearm pursuant to 18 U.S.C. § 922(g)(9)).

APPENDICES

A - APPLICATION FOR A PENNSYLVANIA LICENSE TO SELL FIREARMS

(Sample) (2 Pages)

SP 9-140 (2-0-00) COMMUNALITY OF PENNSYLVANIA

COUNTY OF _____

RENEWAL ☐

APPLICATION FOR A PENNSYLVANIA LICENSE TO SELL FIREARMS

FOR USE BY ISSUING AUTHORITY

SIGNATURE _____ LICENSE NUMBER _____

SALES TAX LICENSE NO. _____ FEDERAL EMPLOYEE ID NO. _____

USE AND OCCUPANCY TAX NO. _____ DATE APPLIED _____ DATE APPROVED _____

DATE REJECTED _____ REASON FOR REJECTION _____

PHOTOGRAPH IF REQUIRED

APPLICANT INFORMATION – TYPE/PRINT IN BLUE OR BLACK INK

1. LAST NAME _____ 2. JR., ETC. _____ 3. FIRST NAME _____ 4. MIDDLE NAME _____ 5. PHOTO ID/DRIVER LICENSE NO. _____ 6. STATE _____

7. DATE OF BIRTH _____ 8. SOCIAL SECURITY NUMBER _____ 9. AGE _____ 10. SEX _____ 11. RACE _____ 12. HEIGHT _____ 13. WEIGHT _____ 14. HAIR COLOR _____ 15. EYE COLOR _____

16. STREET ADDRESS _____ 17. CITY _____ 18. STATE _____ 19. ZIP CODE _____ 20. HOME TELEPHONE NO. _____

21. BUSINESS NAME _____ 22. BUSINESS TELEPHONE NO. _____ 23. FEDERAL FIREARMS LICENSE NO. _____

24. BUSINESS ADDRESS _____ 25. CITY _____ 26. STATE _____ 27. ZIP CODE _____

28. INDICATE BUSINESS OWNERSHIP (CHECK ONE)

☐ SOLE PROPRIETOR ☐ PARTNERSHIP ☐ CORPORATION ☐ OTHER _____

29. IF OWNERSHIP IS A PARTNERSHIP, CORPORATION, OR OTHER, LIST THE NAME OF ALL RESPONSIBLE PERSONS BELOW. IF ADDITIONAL SPACE IS NEEDED, ATTACH AN 8-1/2 X 11 SHEET OR PAPER TO EACH COPY OF THIS FORM.

LAST NAME	JR., ETC.	FIRST NAME	MIDDLE NAME	DATE OF BIRTH	SOCIAL SECURITY NO.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

30. HAVE YOU EVER BEEN CONVICTED OF A CRIME ENUMERATED IN SECTION 6105(b), OR DID ANY OF THE CONDITIONS UNDER 6105(b) APPLY TO YOU? (READ INFORMATION ON BACK PRIOR TO ANSWERING) ☐ YES ☐ NO

31. ARE YOU NOW CHARGED WITH, OR HAVE YOU EVER BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR? THIS IS THE MAXIMUM SENTENCE THAT YOU COULD HAVE RECEIVED, NOT THE ACTUAL SENTENCE YOU DID RECEIVE. (THIS DOES NOT INCLUDE FEDERAL OR STATE OFFENSES PERTAINING TO ANTITRUST, UNFAIR TRADE PRACTICES, RESTRAINTS OF TRADE, OR REGULATION OF BUSINESS, OR STATE OFFENSES CLASSIFIED AS MISDEMEANORS AND PUNISHABLE BY A TERM OF IMPRISONMENT NOT TO EXCEED TWO YEARS.) (READ INFORMATION ON BACK PRIOR TO ANSWERING) ☐ YES ☐ NO

32. HAVE YOU EVER BEEN ADJUDICATED A DELINQUENT FOR A CRIME ENUMERATED IN SECTION 6105, OR FOR AN OFFENSE UNDER THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT? (READ INFORMATION ON BACK PRIOR TO ANSWERING) ☐ YES ☐ NO

33. HAVE YOU EVER BEEN CONVICTED OF ANY DRUG OR CONTROLLED SUBSTANCE OFFENSE UNDER THE ACT OF APRIL 14, 1972 (P.L. 333, NO. 64) KNOWN AS THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT? ☐ YES ☐ NO

34. IN REFERENCE TO THE ABOVE QUESTIONS, HAVE YOU EVER RECEIVED A WAIVER? (REFER TO 6105(b) EXEMPTIONS. IF YES, LIST WHEN. ATTACH A PHOTOCOPY OF THE WAIVER OF APPLICATION. ☐ YES ☐ NO

35. HAVE YOU EVER BEEN INVOLUNTARILY COMMITTED TO A HEALTH CARE FACILITY FOR A MENTAL CONDITION, OR ADJUDICATED INCOMPETENT/INCAPACITATED? ☐ YES ☐ NO

36. ARE YOU AN INDIVIDUAL WHO IS A HABITUAL DRUNKARD, OR WHO IS ADDICTED TO OR AN UNLAWFUL USER OF MARIJUANA OR A STIMULANT, DEPRESSANT, OR NARCOTIC DRUG? ☐ YES ☐ NO

37. ARE YOU A UNITED STATES CITIZEN? IF NO, COUNTRY OF BIRTH _____ ☐ YES ☐ NO

COUNTRY OF CITIZENSHIP _____ IMMIGRATION IDENTIFICATION NUMBER _____

38. HAVE YOU EVER RECEIVED A DISHONORABLE DISCHARGE FROM THE UNITED STATES ARMED FORCES? ☐ YES ☐ NO

39. DO YOU POSSESS A CURRENT LICENSE, PERMIT, OR SIMILAR DOCUMENT TO SELL FIREARMS FROM THE FEDERAL GOVERNMENT? IF YES, ATTACH A PHOTOCOPY OF THE DOCUMENT TO THIS FORM. ☐ YES ☐ NO

40. I HAVE NEVER BEEN CONVICTED OF A CRIME OF VIOLENCE IN THE COMMONWEALTH OF PENNSYLVANIA OR ELSEWHERE. I AM OF SOUND MIND AND HAVE NEVER BEEN COMMITTED TO A MENTAL INSTITUTION OR MENTAL HEALTH CARE FACILITY. I HEREBY CERTIFY THAT THE STATEMENTS CONTAINED HEREIN ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT, IF I KNOWINGLY MAKE ANY FALSE STATEMENTS HEREIN, I AM SUBJECT TO PENALTIES PRESCRIBED BY LAW. BY SIGNING THIS APPLICATION, I ACKNOWLEDGE THAT IF A LICENSE IS ORANTED, I GIVE PERMISSION TO THE PENNSYLVANIA STATE POLICE, OR THEIR DESIGNEE, AND THE ISSUING AUTHORITY TO COME TO THE BUSINESS LOCATION AND INSPECT THE PREMISES, RECORDS, AND DOCUMENTS WITHOUT WARRANT, TO ENSURE COMPLIANCE WITH 37 PA. CODE § 33.1 ET SEQ. (RELATING TO ADMINISTRATIVE REGULATIONS REGARDING THE UNIFORM FIREARMS ACT). THIS CERTIFICATION IS MADE SUBJECT TO BOTH THE PENALTIES OF SECTION 4904 OF THE CRIMES CODE (18 P.S. § 4904) RELATING TO UNLAWFUL FALSIFICATION TO AUTHORITIES AND THE UNIFORM FIREARMS ACT.

SIGNATURE - APPLICANT _____ DATE OF APPLICATION _____

APPENDIX A

Section 6105(a):

Effective November 22, 1995, 18 Pa.C.S. § 6105(a) prohibits persons convicted of any of the following offenses under 18 Pa.C.S. from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania. A conviction includes a finding of guilty or the entering of a plea of guilty or nolo contendere, whether or not judgement has been imposed, as determined by the law of the jurisdiction in which the prosecution was held. The term does not include a conviction which has been expunged or overturned or for which an individual has been pardoned unless the pardon expressly provides that the individual may not possess or transport firearms.

Section 6105(b):

908	Prohibited offensive weapons.	§ 3921	Theft by unlawful taking or disposition, upon conviction of the second felony offense.
911	Corrupt organizations.	§ 3923	Theft by extortion, when the offense is accompanied by threats of violence.
912	Possession of weapon on school property.	§ 3925	Receiving stolen property, upon conviction of the second felony offense.
2502	Murder.	§ 4912	Impersonating a public servant, if the person is impersonating a law enforcement officer.
2503	Voluntary manslaughter.	4952	Intimidation of witnesses or victims.
2504	Involuntary manslaughter, if the offense is based on the reckless use of a firearm.	4953	Retaliation against witness or victim.
2702	Aggravated assault.	5121	Escape.
2703	Assault by prisoner.	5122	Weapons or implements for escape.
2704	Assault by life prisoner.	5501(3)	Riot, if the offense relates to a firearm or other deadly weapon.
2709.1	Stalking.	5515	Prohibiting of paramilitary training.
2716	Weapons of mass destruction.	5516	Facsimile weapons of mass destruction.
2901	Kidnapping.	6110.1	Possession of firearm by minor.
2902	Unlawful restraint.	6301	Corruption of minors.
2910	Luring a child into a motor vehicle.	6302	Sale or lease of weapons and explosives.
3121	Rape.		
3123	Involuntary deviate sexual intercourse.		Any offense equivalent to any of the above-enumerated offenses under the prior laws of this Commonwealth, or any offense equivalent to any of the above-enumerated offenses under the statutes of any other state or of the United States.
3125	Aggravated indecent assault.		
3301	Arson and related offenses.		
3302	Causing or risking catastrophe.		
3502	Burglary.		
3503	Criminal trespass, if the offense is graded a felony of the second degree or higher.		
3701	Robbery.		
3702	Robbery of motor vehicle.		

Section 6105(c):

Effective November 22, 1995, 18 Pa.C.S. § 6105(c) also prohibits the following persons from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania.

ARE YOU A PERSON WHO:

1. is a fugitive from justice; or
2. has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years; or
3. has been convicted of driving under the influence of alcohol or controlled substance as provided in 75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) or the former 75 Pa.C.S. § 3731, on three or more separate occasions within a five-year period. For the purposes of this paragraph only, the prohibition of section 6105(a) shall only apply to transfers or purchases of firearms after the third conviction; or
4. has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303, or 304 of the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act; or
5. being an alien, is illegally or unlawfully in the United States; or
6. is the subject of an active protection from abuse order issued pursuant to 23 Pa.C.S. § 6108 (relating to relief), which order provides for the relinquishment of firearms during the period of time the order is in effect. This prohibition shall terminate upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the relinquishment of firearms; or
7. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 (relating to adjudication) or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense under 18 Pa.C.S. Sections 2502, 2503, 2702, 2703, 2704, 2901, 3121, 3123, 3301, 3502, 3701, and 3923; or
8. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense enumerated in 18 Pa.C.S. § 6105(b) with the exception of those crimes set forth in paragraph 7. This prohibition shall terminate 15 years after the last applicable delinquent adjudication or upon the person reaching the age of 30, whichever is earlier.
9. is prohibited from possessing or acquiring a firearm under 18 U.S.C. § 922(g)(9) (relating to unlawful acts) who has been convicted in any court of a misdemeanor crime of domestic violence by a person in any of the following relationships: (i) the current or former spouse, parent or guardian of the victim; (ii) a person with whom the victim shares a child in common; (iii) a person who cohabits with or has cohabited with the victim as a spouse, parent or guardian; or (iv) a person similarly situated to a spouse, parent or guardian of the victim: then the relationship need not be an element of the offense to meet the requirements of this paragraph. /6105(c)(9) shall

B - APPLICATION FOR A PENNSYLVANIA LICENSE TO CARRY FIREARMS

(Sample) (2 Pages)

SP 4-127 (5-2006) COMMONWEALTH OF PENNSYLVANIA

COUNTY OF _____ RENEWAL ☐

APPLICATION FOR A PENNSYLVANIA LICENSE TO CARRY FIREARMS

FOR USE BY ISSUING AUTHORITY

SIGNATURE _____ LICENSE NUMBER _____

DATE APPLIED ____/____/____ DATE APPROVED ____/____/____ PICS APPROVAL NUMBER _____

DATE REJECTED ____/____/____ REASON FOR REJECTION _____

PHOTOGRAPH IF REQUIRED

APPLICANT INFORMATION - TYPE/PRINT IN BLUE OR BLACK INK

1. LAST NAME	2. JR., ETC.	3. FIRST NAME	4. MIDDLE NAME	5. PHOTO ID-DRIVER LICENSE NO.	6. STATE
7. DATE OF BIRTH	8. SOCIAL SECURITY NUMBER	9. AGE	10. SEX	11. RACE	12. HEIGHT
13. WEIGHT	14. HAIR COLOR	15. EYE COLOR	16. STREET ADDRESS	17. CITY	18. STATE
19. ZIP CODE	20. HOME TELEPHONE NO.	21. EMPLOYER/BUSINESS NAME	22. WORK TELEPHONE NO.	23. OCCUPATION	24. ADDRESS
25. CITY	26. STATE	27. ZIP CODE	28. REASON FOR A LICENSE TO CARRY FIREARMS:	29. PLACE OF BIRTH	
<input type="checkbox"/> SELF-DEFENSE <input type="checkbox"/> EMPLOYMENT <input type="checkbox"/> HUNTING & FISHING <input type="checkbox"/> TARGET SHOOTING <input type="checkbox"/> GUN COLLECTING <input type="checkbox"/> OTHER _____					
30. TWO REFERENCES - NOT FAMILY MEMBERS					
NAME		ADDRESS		TELEPHONE NO.	
NAME		ADDRESS		TELEPHONE NO.	

APPLICANTS ARE DETERMINED TO BE ELIGIBLE FOR LICENSURE BASED UPON CRITERIA SET FORTH WITHIN THE PENNSYLVANIA UNIFORM FIREARMS ACT (18 PA.C.S. CHAPTER 61) SECTIONS 6104 DEALING WITH INDIVIDUALS NOT TO POSSESS FIREARMS AND SECTION 6109 DEALING WITH THE ISSUANCE OF A LICENSE TO CARRY FIREARMS. REFERENCE THE REVERSE SIDE OF THIS FORM WHERE INDICATED.

31. HAVE YOU EVER BEEN CONVICTED OF A CRIME ENUMERATED IN SECTION 6105(b), OR DO ANY OF THE CONDITIONS UNDER 6105(c) APPLY TO YOU? (READ INFORMATION ON BACK PRIOR TO ANSWERING) ☐ YES ☐ NO

32. ARE YOU NOW CHARGED WITH, OR HAVE YOU EVER BEEN CONVICTED OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR? THIS IS THE MAXIMUM SENTENCE THAT YOU "COULD HAVE RECEIVED," NOT THE ACTUAL SENTENCE YOU DID RECEIVE. (THIS DOES NOT INCLUDE FEDERAL OR STATE OFFENSES PERTAINING TO ANTITRUST, UNFAIR TRADE PRACTICES, RESTRAINTS OF TRADE, OR REGULATION OF BUSINESS, OR STATE OFFENSES CLASSIFIED AS MISDEMEANORS AND PUNISHABLE BY A TERM OF IMPRISONMENT NOT TO EXCEED TWO YEARS.) (READ INFORMATION ON BACK PRIOR TO ANSWERING) ☐ YES ☐ NO

33. HAVE YOU EVER BEEN ADJUDICATED A DELINQUENT FOR A CRIME ENUMERATED IN SECTION 6105, OR FOR AN OFFENSE UNDER THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT? (READ INFORMATION ON BACK PRIOR TO ANSWERING) ☐ YES ☐ NO

34. HAVE YOU EVER BEEN CONVICTED OF ANY DRUG OR CONTROLLED SUBSTANCE OFFENSE UNDER THE ACT OF APRIL 14, 1972 (P.L. 233, NO. 16) KNOWN AS THE CONTROLLED SUBSTANCE, DRUG, DEVICE AND COSMETIC ACT? (ALL DRUG-RELATED CONVICTIONS WILL PROHIBIT LICENSING, UNDER SECTION 6109 RELATING TO LICENSES) ☐ YES ☐ NO

35. HAVE YOU EVER BEEN INVOLUNTARILY COMMITTED TO A HEALTH CARE FACILITY FOR A MENTAL CONDITION, OR ADJUDICATED INCOMPETENT/INCAPACITATED? ☐ YES ☐ NO

36. ARE YOU AN INDIVIDUAL WHO IS A HABITUAL DRUNKARD, OR WHO IS ADDICTED TO OR AN UNLAWFUL USER OF MARIJUANA OR A STIMULANT, DEPRESSANT, OR NARCOTIC DRUG? ☐ YES ☐ NO

37. IS YOUR CHARACTER AND REPUTATION SUCH THAT YOU WOULD BE LIKELY TO ACT IN A MANNER DANGEROUS TO PUBLIC SAFETY? ☐ YES ☐ NO

38. ARE YOU A UNITED STATES CITIZEN? IF NO, COUNTRY OF BIRTH _____
COUNTRY OF CITIZENSHIP _____ IMMIGRATION IDENTIFICATION NUMBER _____ ☐ YES ☐ NO
(Applications for non-U.S. Citizens must be provided to the Pennsylvania State Police along with a copy of the License to Carry.)

39. HAVE YOU EVER RECEIVED A DISHONORABLE DISCHARGE FROM THE UNITED STATES ARMED FORCES? ☐ YES ☐ NO

40. OTHER THAN PENNSYLVANIA, DO YOU POSSESS A CURRENT LICENSE, PERMIT, OR SIMILAR DOCUMENT TO CARRY A FIREARM ISSUED FROM ANOTHER STATE? IF YES, ATTACH A PHOTOCOPY OF THE DOCUMENT TO THIS FORM. ☐ YES ☐ NO

41. I have never been convicted of a crime that prohibits me from possessing or acquiring a firearm under Federal or State law. I am of sound mind and have never been committed to a mental institution or mental health care facility. I hereby certify that the statements contained herein are true and correct to the best of my knowledge and belief. I understand that if I knowingly make any false statements herein, I am subject to penalties prescribed by law. I authorize the sheriff, or his designee, or, in the case of first class cities, the chief or head of the police department, or his designee, to inspect only those records or documents relevant to information required for this application. If I am issued a license and knowingly become ineligible to legally possess or acquire firearms, I will promptly notify the sheriff of the county in which I reside or, if I reside in a city of the first class, the chief of police of that city. This certification is made subject to both the penalties of section 4904 of the Crimes Code (18 Pa.C.S. 4904) relating to unsworn falsifications to authorities and the Uniform Firearms Act.

Section 6105(a): Effective November 22, 1995, 18 Pa.C.S. § 6105(a) prohibits persons convicted of any of the following offenses under 18 Pa.C.S. from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania. A conviction includes a finding of guilty or the entering of a plea of guilty or nolo contendere, whether or not judgement has been imposed, as determined by the law of the jurisdiction in which the prosecution was held. The term does not include a conviction which has been expunged or overturned or for which an individual has been pardoned unless the pardon expressly provides that the individual may not possess or transport firearms.			
Section 6105(b):			
§ 908	Prohibited offensive weapons.	§ 3921	Theft by unlawful taking or disposition, upon conviction of the second felony offense.
§ 912	Corrupt organizations.	§ 3923	Theft by extortion, when the offense is accompanied by threats of violence.
2502	Possession of weapon on school property.	§ 3925	Receiving stolen property, upon conviction of the second felony offense.
2503	Murder.	§ 4912	Impersonating a public servant, if the person is impersonating a law enforcement officer.
2504	Voluntary manslaughter.	§ 4952	Intimidation of witnesses or victims.
	Involuntary manslaughter, if the offense is based on the reckless use of a firearm.	§ 4953	Retaliation against witness or victim.
2702	Aggravated assault.	§ 5121	Escape.
2703	Assault by prisoner.	§ 5122	Weapons or implements for escape.
2704	Assault by life prisoner.	§ 5501(3)	Riot, if the offense relates to a firearm or other deadly weapon.
2709.1	Stalking.	§ 5515	Prohibiting of paramilitary training.
2716	Weapons of mass destruction.	§ 5516	Facsimile weapons of mass destruction.
2901	Kidnapping.	§ 5110.1	Possession of firearm by minor.
2902	Unlawful restraint.	§ 6301	Corruption of minors.
2910	Luring a child into a motor vehicle.	§ 6302	Sale or lease of weapons and explosives.
3121	Rape.	Any offense equivalent to any of the above-enumerated offenses under the prior laws of this Commonwealth, or any offense equivalent to any of the above-enumerated offenses under the statutes of any other state or of the United States.	
3123	Involuntary deviate sexual intercourse.		
3125	Aggravated indecent assault.		
3301	Arson and related offenses.		
3302	Causing or risking catastrophe.		
3502	Burglary.		
3503	Criminal trespass, if the offense is graded a felony of the second degree or higher.		
3701	Robbery.		
3702	Robbery of motor vehicle.		
Section 6105(c): Effective November 22, 1995, 18 Pa.C.S. § 6105(c) also prohibits the following persons from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania.			
ARE YOU A PERSON WHO:			
1. is a fugitive from justice; or			
2. has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years; or			
3. has been convicted of driving under the influence of alcohol or controlled substance as provided in 75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) or the former 75 Pa.C.S. § 3731, on three or more separate occasions within a five-year period. For the purposes of this paragraph only, the prohibition of Section 6105(a) shall only apply to transfers or purchases of firearms after the third conviction; or			
4. has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303, or 304 of the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act; or			
5. being an alien, is illegally or unlawfully in the United States; or			
6. is the subject of an active protection from abuse order issued pursuant to 23 Pa.C.S. § 6108 (relating to relief), which order provides for the relinquishment of firearms during the period of time the order is in effect. This prohibition shall terminate upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the relinquishment of firearms; or			
7. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 (relating to adjudication) or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense under 18 Pa.C.S. sections 2502, 2503, 2702, 2703, 2704, 2901, 3121, 3123, 3301, 3502, 3701, and 3923; or			
8. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense enumerated in 18 Pa.C.S. § 6105(b) with the exception of those crimes set forth in paragraph 7. This prohibition shall terminate 15 years after the last applicable delinquent adjudication or upon the person reaching the age of 30, whichever is earlier.			
9. is prohibited from possessing or acquiring a firearm under 18 U.S.C. § 922(g)(9) (relating to unlawful acts) who has been convicted in any court of a misdemeanor crime of domestic violence by a person in any of the following relationships: (i) the current or former spouse, parent or guardian of the victim; (ii) a person with whom the victim shares a child in common; (iii) a person who cohabits with or has cohabited with the victim as a spouse, parent or guardian; or (iv) a person similarly situated to a spouse, parent, or guardian of the victim; then the relationship need not be an element of the offense to meet the requirements of this paragraph. (6105(c)(9) shall take effect 5/9/06)			

C - PENNSYLVANIA LICENSE TO CARRY FIREARMS

(Sample) (1 Page)

SP 4-129 (8-2006) PENNSYLVANIA LICENSE TO CARRY FIREARMS Original - applicant 1 st copy - PSP 2 nd copy - issuing authority		<input type="checkbox"/> NEW <input type="checkbox"/> RENEW <input type="checkbox"/> DUPL./CORRECTION		NO. 00-0000000		
1. NAME (LAST)		(FIRST)		(MIDDLE)		
				(JR., ETC.)		
2. ADDRESS						
PHOTO OPTIONAL	3. POINT OF CONTACT PHONE NUMBER 1-877-884-3802 (FOR LAW ENFORCEMENT USE ONLY)		4. DATE ISSUED		5. DATE EXPIRES	
	6. REASON TO CARRY		7. DOB		8. HGT	
	9. WGT		10. EYES			
	11. HAIR		12. SEX		13. RACE	
	14. U.S. CITIZEN <input type="checkbox"/> YES <input type="checkbox"/> NO		15. COUNTRY OF CITIZENSHIP			
	16. IMMIGRATION ID NUMBER (IF APP)		17. SIGNATURE OF LICENSEE			
18. SIGNATURE OF ISSUING AUTHORITY		19. SHERIFF OR CHIEF OF POLICE OF:				

D - AFFIDAVIT FOR RELINQUISHMENT OF FIREARMS

(Sample) (2 Pages)

[illegible]

APPENDIX D

18. I do solemnly swear (or affirm) that the firearm(s), other weapon(s), or ammunition listed if sold or transferred will be sold or lawfully transferred in compliance with 18 Pa.C.S. Chapter 61 (relating to firearms and other dangerous articles).

In addition, it is my responsibility to provide to the sheriff an affidavit relinquishing firearms, other weapons, or ammunition to a dealer within the time frame specified in the order for relinquishment. Failure to comply will result in the sheriff providing immediate notice to the court, plaintiff, and appropriate law enforcement agencies and may result in a criminal investigation and possible prosecution of misdemeanor charges of the first degree.

By signing below I hereby certify that I am the lawful owner of the firearm(s), other weapon(s), or ammunition listed in this affidavit.

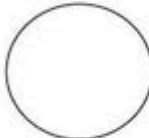
I hereby certify that the foregoing statements and the information contained in this affidavit are correct. This certification is made subject to the penalties set forth in 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signature of Defendant (in ink): _____ Date: _____

Taken, sworn, and subscribed before me, this

_____ day of _____, _____

(day) (month) (year)

Notary 

FOR SHERIFF'S USE ONLY		
19. Sheriff's Name or Designee:	20. County	21. Sheriff's Signature/Designee and Date:
22. Relinquishment Accepted: <input type="checkbox"/> YES <input type="checkbox"/> NO	23. Sheriff's Signature/Designee and Date:	
24. Relinquishment Rejected: <input type="checkbox"/> YES <input type="checkbox"/> NO	25. Reason for Rejection:	26. Sheriff's Signature/Designee and Date:
27. Date of Return (if applicable)	28. Approval No. (if app.)	29. Sheriff's Signature or Designee

E - AFFIDAVIT OF SAFEKEEPING PERMIT FOR RELINQUISHMENT OF FIREARMS

(Sample) (3 Pages)

DP-4-302 (D-0100)

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE
AFFIDAVIT OF SAFEKEEPING PERMIT FOR RELINQUISHMENT OF FIREARMS**

THIRD PARTY RECIPIENT INFORMATION

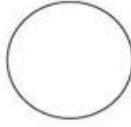
1. Name (Last, First, MI)	2. Date of Birth	3. Social Security No.	4. Photo ID/Driver License No.
5. Street Address <i>(The sheriff must be notified within 7 days of any change in address.)</i>		6. City and State	7. Zip Code
8. Have you ever been convicted of a crime enumerated in section 6105(b), or do any of the conditions under 6105 (c) apply to you? <i>(Read entire list of enumerated prohibiting offenses prior to answering this question.)</i>			<input type="checkbox"/> YES <input type="checkbox"/> NO
9. Are you now charged with, or have you ever been convicted of a crime punishable by imprisonment for a term exceeding one year? This is the maximum sentence that you "could have received," not the actual sentence you did receive. (This does not include Federal or state offenses pertaining to antitrust, unfair trade practices, restraints of trade, or regulation of business; or state offenses classified as misdemeanors and punishable by a term of imprisonment not to exceed two years.) <i>(Read entire list of enumerated prohibiting offenses prior to answering this question.)</i>			<input type="checkbox"/> YES <input type="checkbox"/> NO
10. Are you currently subject to an active protection from abuse order?			<input type="checkbox"/> YES <input type="checkbox"/> NO
11. Has the named defendant ever been the subject of a protection from abuse order issued on your behalf?			<input type="checkbox"/> YES <input type="checkbox"/> NO
<p>12. Acknowledgment</p> <p>A person who has accepted possession of a firearm, other weapon or ammunition pursuant to 23 Pa.C.S. § 6108.3 commits a misdemeanor of the first degree if he intentionally or knowingly returns a firearm, other weapon or ammunition to a defendant or allows a defendant to have access to the firearm, other weapon or ammunition. No firearms, weapons, or ammunition as listed in this form and relinquished to me for safekeeping will be returned to the defendant until such time as the sheriff accepts return of the safekeeping permit. I understand that if I knowingly return or allow named defendant to have access to the firearms, other weapons, or ammunition prior to the sheriff accepting return of the safekeeping permit or issuance of a court order which provides for allowing the defendant to take possession of the firearm, other weapon or ammunition that was relinquished to me that I commit a misdemeanor of the first degree. In addition to any penalties prescribed in 23 Pa.C.S. Chapter 61 or 18 Pa.C.S. Chapter 61, I may be civilly liable to any person for any damages caused and shall be liable to any person for punitive damages in an amount not to exceed \$5,000.</p> <p>I understand that all firearms, other weapons, and ammunition relinquished to me for safekeeping will be stored using a locking device (relating to firearms) or in a secure location to which the defendant does not have access.</p> <p>I do solemnly swear (or affirm) that the facts that I have set forth in this form are true and correct to the best of my knowledge, information and belief. This verification is made subject to both the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. 4904) relating to unsworn falsification to authorities and the Uniform Firearms Act. I also understand that the making of any false written statement or the exhibiting of any false misrepresented identification with respect to this application is a crime punishable as a felony.</p>			

Signature of Third Party Recipient (in ink): _____ Date: _____

Taken, sworn, and subscribed before me, this

____ day of _____, _____

(day) (month) (year)

Notary 

PROTECTION ORDER INFORMATION				
13. Name (Last, First, MI)	14. County Court of Jurisdiction	15. Case No.	16. Iss. Date of Order	17. Exp. Date of Order

DEFENDANT INFORMATION			
18. Name of Defendant (Last, First, MI)	19. Date of Birth	20. Social Security No.	21. Photo ID/Driver License No.
22. Street Address	23. City and State		24. Zip Code

25. Acknowledgment
A person who is the subject of an active protection from abuse order issued pursuant to 23 Pa.C.S. § 6108, which provides for the relinquishment of firearms during the period of time the order is in effect and which order prohibits the defendant from possessing a firearm. The defendant shall decide in what manner he will relinquish his firearms, weapons, or ammunition. Relinquishment may be made to the sheriff, a third party for safekeeping, or to a licensed firearm dealer upon completion of the required forms. (Lending or giving of firearms is prohibited unless otherwise specified in 18 Pa.C.S. § 6115(b) Exception.) This prohibition shall terminate upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the relinquishment of firearms.

It is the responsibility of the defendant to provide the sheriff with an affidavit relinquishing firearms, other weapons or ammunition within the time frame specified in the order for relinquishment. Failure to comply will result in the sheriff providing immediate notice to the court, plaintiff, and appropriate law enforcement agencies, and may result in a criminal investigation and possible prosecution of misdemeanor charges of the first degree.

I do solemnly swear (or affirm) that I am the lawful owner of the firearm(s), other weapon(s), or ammunition listed in this affidavit and will abide by its terms.

Signature of Defendant (in ink): _____ Date: _____

Taken, sworn, and subscribed before me, this



Notary

_____ day of _____, _____

(day) (month) (year)

26. FIREARM(S), WEAPON(S), AMMUNITION LISTING					
Description/Make	Model	Caliber or Gauge	Barrel Length	Serial Number	Comments

For additional firearms attach a separate sheet that is signed by the defendant, sheriff or designee, and the responsible third party recipient.

FOR SHERIFF'S USE ONLY (Note: Return of handguns to a defendant will require a PICS background check and approval number.)		
27. Sheriff's Name or Designee:	28. County	29. Sheriff's Signature or Designee
30. Safekeeping Accepted: <input type="checkbox"/> YES <input type="checkbox"/> NO	31. PICS Approval No:	32. Sheriff's Signature or Designee and Date:
33. Safekeeping Rejected: <input type="checkbox"/> YES <input type="checkbox"/> NO	34. Reason for Rejection:	35. Sheriff's Signature or Designee and Date:
36. Safekeeping Revoked: <input type="checkbox"/> YES <input type="checkbox"/> NO	37. Reason for Revocation:	38. Sheriff's Signature or Designee and Date:
39. Date Weapons Returned:	40. PICS Approval No:	41. Sheriff's Signature or Designee:

ENUMERATED PROHIBITING OFFENSES

Section 6105(a):

Effective November 22, 1995, 18 Pa.C.S. § 6105(a) prohibits persons convicted of any of the following offenses under 18 Pa.C.S. from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania. A conviction includes a finding of guilty or the entering of a plea of guilty or *nolo contendere*, whether or not judgement has been imposed, as determined by the law of the jurisdiction in which the prosecution was held. The term does not include a conviction which has been expunged or overturned or for which an individual has been pardoned unless the pardon expressly provides that the individual may not possess or transport firearms.

Section 6105(b):

§ 908 Prohibited offensive weapons.	§ 3503 Criminal trespass, if the offense is graded a felony of the second degree or higher.
§ 911 Corrupt organizations.	§ 3701 Robbery.
§ 912 Possession of weapon on school property.	§ 3702 Robbery of motor vehicle.
§ 2502 Murder.	§ 3921 Theft by unlawful taking or disposition, upon conviction of the second felony offense.
§ 2503 Voluntary manslaughter.	§ 3923 Theft by extortion, when the offense is accompanied by threats of violence.
§ 2504 Involuntary manslaughter, if the offense is based on the reckless use of a firearm.	§ 3925 Receiving stolen property, upon conviction of the second felony offense.
§ 2702 Aggravated assault.	§ 4912 Impersonating a public servant, if the person is impersonating a law enforcement officer.
§ 2703 Assault by prisoner.	§ 4952 Intimidation of witnesses or victims.
§ 2704 Assault by life prisoner.	§ 4953 Retaliation against witness or victim.
§ 2709.1 Stalking.	§ 5121 Escape.
§ 2716 Weapons of mass destruction.	§ 5122 Weapons or implements for escape.
§ 2901 Kidnapping.	§ 5501(3) Riot, if the offense relates to a firearm or other deadly weapon.
§ 2902 Unlawful restraint.	§ 5515 Prohibiting of paramilitary training.
§ 2910 Luring a child into a motor vehicle.	§ 5516 Facsimile weapons of mass destruction.
§ 3121 Rape.	§ 6110.1 Possession of firearm by minor.
§ 3123 Involuntary deviate sexual intercourse.	§ 6301 Corruption of minors.
§ 3125 Aggravated indecent assault.	§ 6302 Sale or lease of weapons and explosives.
§ 3301 Arson and related offenses.	Any offense equivalent to any of the above-enumerated offenses under the prior laws of this Commonwealth, or any offense equivalent to any of the above-enumerated offenses under the statutes of any other state or of the United States.
§ 3302 Causing or risking catastrophe.	
§ 3502 Burglary.	

Section 6105(c):

Effective November 22, 1995, 18 Pa.C.S. § 6105(c) also prohibits the following persons from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania.

ARE YOU A PERSON WHO:


1. is a fugitive from justice; or
2. was convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years; or
3. was convicted of driving under the influence of alcohol or controlled substance as provided in 75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) or the former 75 Pa.C.S. § 3731, on three or more separate occasions within a five-year period. For the purposes of this paragraph only, the prohibition of section 6105 (a) shall only apply to transfers or purchases of firearms after the third conviction; or
4. has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303, or 304 of the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act; or
5. being an alien, is illegally or unlawfully in the United States; or
6. is the subject of an active protection from abuse order issued pursuant to 23 Pa.C.S. § 6108 (relating to relief), which order provides for the relinquishment of firearms during the period of time the order is in effect. This prohibition shall terminate upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the relinquishment of firearms; or
7. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 (relating to adjudication) or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense under 18 Pa.C.S. sections 2502, 2503, 2702, 2703, 2704, 2901, 3121, 3123, 3301, 3502, 3701, and 3923; or
8. was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense enumerated in 18 Pa.C.S. § 6105(b) with the exception of those crimes set forth in paragraph 7. This prohibition shall terminate 15 years after the last applicable delinquent adjudication or upon the person reaching the age of 30, whichever is earlier.
9. is prohibited from possessing or acquiring a firearm under 18 U.S.C. § 922(g)(9) (relating to unlawful acts) who has been convicted in any court of a misdemeanor crime of domestic violence by a person in any of the following relationships: (i) the current or former spouse, parent or guardian of the victim; (ii) a person with whom the victim shares a child in common; (iii) a person who cohabits with or has cohabited with the victim as a spouse, parent or guardian; or (iv) a person similarly situated to a spouse, parent or guardian of the victim; then the relationship need not be an element of the offense to meet the requirements of this paragraph. (6105(c)(9) shall take effect 5/9/06)

(18 U.S.C. § 922 (g)(8) prohibits persons subject to a court order that restrains them from harassing, stalking, or threatening an intimate partner or child of an intimate partner.)

F - PICS BACKGROUND CHECK REQUEST

(Sample) (1 Page)

SP 4-300 (D-0000)



PENNSYLVANIA STATE POLICE
FIREARMS DIVISION
 1800 ELMERTON AVENUE
 HARRISBURG, PA 17110
 Phone: 717-705-8843
 Fax: 717-705-2308

PSP FIREARMS DIVISION USE ONLY

PICS Transaction Number

PICS Operator

Completion Date

Individual Contacted

☐ PROHIBITED

Telephone ☐

Scope Message ☐

Fax ☐

Mail ☐

PICS BACKGROUND CHECK REQUEST

(It is strongly recommended that you fax this form to 717-705-2308 to receive a timely response.)

TYPE: FIREARM RETURN ☐ SAFEKEEPING ☐

DATE:

TO: PICS Operations Section, Firearms Division, Bureau of Records and Identification

FROM:

Requesting officer/sheriff's full name and rank		Location	
Contact telephone number	Incident number	Property record number	
Station ORI	CLEAN Terminal Identification Number	County Code	

SUBJECT'S INFORMATION:

Last name	First name	Middle	Jr., etc.				
Date of birth	Social Security Number	OLN number (when available)					
Street Address		City	State	Zip Code			

If a court order was issued regarding the return of firearms, please include a copy of the court order with this request.

Including this cover sheet, you should receive a total of ____ pages with this fax.

Confidentiality Note: The documents accompanying this facsimile contain information that is confidential and privileged and is intended only for the use of the addressee designated above. If you are not the intended recipient, you are hereby notified that disclosure copying, distribution, or taking of any action in reliance on the contents of this telecopy information is strictly prohibited. If you receive this facsimile in error, please notify the Pennsylvania State Police, Bureau of Records and Identification, at 717-705-4006 and return the original message to our offices by mail.

G - PENNSYLVANIA INSTANT CHECK SYSTEM CHALLENGE

(Sample) (4 Pages)

SP 4-197 (5-2006)

PENNSYLVANIA STATE POLICE PENNSYLVANIA INSTANT CHECK SYSTEM CHALLENGE

Any challenge to a decision made by the Pennsylvania Instant Check System (PICS) concerning a background check must be completed and submitted within 30 days to the **Pennsylvania State Police, Firearms Division-PICS Challenge Unit, 1800 Elmerton Avenue, Harrisburg, Pennsylvania 17110**. Only background checks processed through the PICS that were NOT approved will be processed by the Pennsylvania State Police Challenge Unit.

Please type or print clearly with blue or black ink. **ALL CHALLENGES SUBMITTED MUST BE LEGIBLE AND SIGNED AND DATED ON PAGE 4 BY THE APPLICANT OR THEY WILL BE RETURNED.** The Pennsylvania State Police will respond in writing within 5 business days of receipt of this form. Please include copies of any information you may have regarding dispositions on old arrest records, etc., which would be helpful in expediting the processing of your file.

PART I: REASON FOR CHALLENGE REQUEST

Check the appropriate box that indicates the type of background check:

Purchase/Transfer ☐ License to Carry ☐ Firearm Return ☐ LEOSA ☐

PART II: DATE AND LOCATION OF BACKGROUND CHECK

Date background check completed:
Location of Firearm Dealer/County of Sheriff/Police Dept.:
If the address for the above is unknown or check was completed at a gun show, please provide the firearm dealer's name and the location of the gun show:

PART III: CHALLENGER'S INFORMATION

Name: (Last)	(First)	(Middle)
Address:		
City & State:		Zip Code:
Date of Birth:	Social Security No: - -	
Place of Birth:		
Driver's License/Operator's Number:		State:
State-Issued Non-Driver's Identification Card Number (if non-driver):		
State:		
Sex: M <input type="checkbox"/> F <input type="checkbox"/>	Race:	Maiden Name and/or Aliases:
Height:	Weight:	Hair Color:
Eye Color:		
Scars/Marks/Tattoos:		
Have you ever been arrested in Pennsylvania? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Were you ever arrested in another state? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Were you ever arrested while in the military? <input type="checkbox"/> Yes <input type="checkbox"/> No		
If yes to any of the above, where?		
Did this arrest(s) result in a conviction?		
Were you ever adjudicated incompetent or involuntarily committed? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Are you the subject of a current protection from abuse order? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Telephone Numbers where you may be contacted:		
Home: - -	Work: - -	Cell: - -

CHALLENGE PROCESS INFORMATION

The Pennsylvania Instant Check System (PICS) is required to check state and federal databases in order to determine an individual's eligibility to acquire a firearm or license to carry a firearm. The following are prohibitions which at the time of the background check would disqualify an individual from acquiring a firearm or license to carry a firearm. I certify that none of the prohibitions which are listed below apply:

1. Conviction of a crime enumerated in 18 Pa.C.S. section 6105(b), or any of the conditions of section 6105(c), of the Uniform Firearms Act. (See page 3 for specific information.)
2. Charged with or convicted of a crime punishable by imprisonment for a term exceeding one year, not including offenses pertaining to antitrust, unfair trade practices, restraints of trade, or regulation of business; or state offenses classified as misdemeanors and punishable by a term of imprisonment not to exceed two years.
3. Conviction of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as the Controlled Substance, Drug, Device and Cosmetic Act.
4. Adjudicated delinquent, within the past ten years, for a crime enumerated in 18 Pa.C.S. section 6105 of the Uniform Firearms Act, or for an offense under the Controlled Substance, Drug, Device and Cosmetic Act.
5. Discharged from the Armed Forces of the United States under dishonorable conditions.
6. Under indictment or information in any court for a crime for which the judge could imprison you for more than one year. An information is a formal accusation of a crime made by a prosecuting attorney. An indictment is a formal accusation of a crime presented to the court by a grand jury.
7. Renounced citizenship in the United States.
8. Subject of a court order restraining you from harassing, stalking, or threatening an intimate partner or child of such partner.
9. Convicted in any court of a misdemeanor crime of domestic violence. This includes any misdemeanor conviction involving the use or attempted use of physical force committed by a current or former spouse, parent or guardian of the victim, or by a person with a similar relationship with the victim.
10. Addicted to or an unlawful user of marijuana or a stimulant, depressant, or narcotic drug.

Section 6105(a):

Effective November 22, 1995, 18 Pa.C.S. § 6105(a) prohibits persons convicted of any of the following offenses under 18 Pa.C.S. from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania. A conviction includes a finding of guilty or the entering of a plea of guilty or nolo contendere, whether or not judgement has been imposed, as determined by the law of the jurisdiction in which the prosecution was held. The term does not include a conviction which has been expunged or overturned or for which an individual has been pardoned unless the pardon expressly provides that the individual may not possess or transport firearms.

Section 6105(b):

908	Prohibited offensive weapons.		§ 3921	Theft by unlawful taking or disposition, upon conviction of the second felony offense.
911	Corrupt organizations.			
912	Possession of weapon on school property.	§ 3923		Theft by extortion, when the offense is accompanied by threats of violence.
2502	Murder.		§ 3925	Receiving stolen property, upon conviction of the second felony offense.
2503	Voluntary manslaughter.		§ 4912	Impersonating a public servant, if the person is impersonating a law enforcement officer.
2504	Involuntary manslaughter, if the offense is based on the reckless use of a firearm.		4952	Intimidation of witnesses or victims.
2702	Aggravated assault.		4953	Retaliation against witness or victim.
2703	Assault by prisoner.		5121	Escape.
2704	Assault by life prisoner.		5122	Weapons or implements for escape.
2709.1	Stalking.		5501(3)	Riot, if the offense relates to a firearm or other deadly weapon.
2716	Weapons of mass destruction.		5515	Prohibiting of paramilitary training.
2901	Kidnapping.		5516	Facsimile weapons of mass destruction.
2902	Unlawful restraint.		6110.1	Possession of firearm by minor.
2910	Luring a child into a motor vehicle.		6301	Corruption of minors.
3121	Rape.		6302	Sale or lease of weapons and explosives.
3123	Involuntary deviate sexual intercourse.			
3125	Aggravated indecent assault.			
3301	Arson and related offenses.			
3302	Causing or risking catastrophe.			
3502	Burglary.			
3503	Criminal trespass, if the offense is graded a felony of the second degree or higher.			
3701	Robbery.			
3702	Robbery of motor vehicle.			

Any offense equivalent to any of the above-enumerated offenses under the prior laws of this Commonwealth, or any offense equivalent to any of the above-enumerated offenses under the statutes of any other state or of the United States.

Section 6105(c):

Effective November 22, 1995, 18 Pa.C.S. § 6105(c) also prohibits the following persons from possessing, using, controlling, transferring, manufacturing, or obtaining a license to possess, use, control, transfer, or manufacture a firearm in the Commonwealth of Pennsylvania.

ARE YOU A PERSON WHO:

- is a fugitive from justice; or
- has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years; or
- has been convicted of driving under the influence of alcohol or controlled substance as provided in 75 Pa.C.S. § 3802 (relating to driving under influence of alcohol or controlled substance) or the former 75 Pa.C.S. § 3731, on three or more separate occasions within a five-year period. For the purposes of this paragraph only, the prohibition of section 6105(a) shall only apply to transfers or purchases of firearms after the third conviction; or
- has been adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303, or 304 of the provisions of the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act; or
- being an alien, is illegally or unlawfully in the United States; or
- is the subject of an active protection from abuse order issued pursuant to 23 Pa.C.S. § 6108 (relating to relief), which order provides for the relinquishment of firearms during the period of time the order is in effect. This prohibition shall terminate upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the relinquishment of firearms; or
- was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 (relating to adjudication) or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense under 18 Pa.C.S. sections 2502, 2503, 2702, 2703, 2704, 2901, 3121, 3123, 3301, 3502, 3701, and 3923; or
- was adjudicated delinquent by a court pursuant to 42 Pa.C.S. § 6341 or under any equivalent Federal statute or statute of any other state as a result of conduct which if committed by an adult would constitute an offense enumerated in 18 Pa.C.S. § 6105(b) with the exception of those crimes set forth in paragraph 7. This prohibition shall terminate 15 years after the last applicable delinquent adjudication or upon the person reaching the age of 30, whichever is earlier.
- is prohibited from possessing or acquiring a firearm under 18 U.S.C. § 922(g)(9) (relating to unlawful acts) who has been convicted in any court of a misdemeanor crime of domestic violence by a person in any of the following relationships: (i) the current or former spouse, parent or guardian of the victim; (ii) a person with whom the victim shares a child in common; (iii) a person who cohabits with or has cohabited with the victim as a spouse, parent or guardian; or (iv) a person similarly situated to a spouse, parent or guardian of the victim; then the relationship need not be an element of the offense to meet the requirements of this paragraph. (6105(c)(9) shall take effect 5/9/06)

SELF CERTIFICATION

I hereby confirm that I have read ALL information contained in the Pennsylvania Instant Check System Challenge, Form SP 4-197, carefully and I certify that none of the prohibitions which are listed within this form apply.

I understand that if I knowingly make any false statements herein, I am subject to penalties prescribed by law. This certification/acknowledgment is made subject to both the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. § 4904, relating to unsworn falsification to authorities), a misdemeanor of the third degree, subject to not more than one year of imprisonment and/or a fine not exceeding \$2,500; and the Uniform Firearms Act, which is a felony of the third degree, subject to not more than 7 years imprisonment and/or a fine not exceeding \$15,000.

I hereby authorize the Pennsylvania State Police to receive any documents, including mental health documents, as well as physician's determination relating to commitment, necessary to make a determination with regard to this challenge. I waive any rights to confidentiality in these documents by signing this certificate.

DATE _____ SIGNATURE _____

NOTE: All challenges submitted must be signed, dated, and complete. Pages 1 through 4 must be submitted for a challenge to be considered complete. Any challenge received that is not filled out completely, signed, and dated will be returned.

The following information refers to situations most often misunderstood regarding denials.

1. Federal law prohibits a person who is under indictment for, or has been convicted of a crime that would be punishable by a term of imprisonment exceeding one year, or state misdemeanors punishable by a term of imprisonment exceeding two years (under current PA law, any offense graded as an M-1 or higher would be prohibiting). The key issue here is the maximum penalty you could have received for the crime, not the actual penalty that you received.
2. There are no time limits on old arrest records. If you have an old conviction for a charge that would be prohibiting, it will still prohibit you regardless of whether the record is 1 year old or 50 years old.
3. Many times an individual will hit on an old military record regarding AWOL or desertion. In most cases, all that is needed to clear this up is a copy of the individual's honorable discharge. Also, military records often do not contain offense disposition information. If a copy of the official case disposition and a copy of the honorable discharge are provided, this may expedite research of the challenge.

H - COURT NOTIFICATION OF PROHIBITING OFFENSE

(Sample) (1 Page)

SP 4-381 (5-2006)

COMMONWEALTH OF PENNSYLVANIA

COURT NOTIFICATION OF PROHIBITING OFFENSE

In accordance with 18 Pa.C.S. section 6109(i.1)(1), Upon conviction of a person for a crime specified in 18 Pa.C.S. section 6105(a) or (b) or upon conviction of a person for a crime punishable by imprisonment exceeding one year or upon a determination that the conduct of a person meets the criteria specified in section 6105(c)(1), (2), (3), (5), (6) or (9), the court shall determine if the defendant has a license to carry firearms issued pursuant to this section.

If the defendant has such a license, the court shall notify the sheriff of the county in which that person resides. Notification shall be transmitted by the judge within seven days of the conviction or determination.

(Please type or print clearly with a black or blue ballpoint ink pen.)

DEFENDANT INFORMATION

Name (Last, First, MI):		Date of Birth:	Social Security No:	
Street Address:	City:	State:	Zip Code:	
SID No:		Court Docket No:		

CONVICTION INFORMATION

Title/Section Subsection	Description	Grade	Disposition	Date of Conviction

LICENSE TO CARRY (LTC) INFORMATION

Date LTC Issued:	County License Issued:		
County Sheriff Notified:	Date of Notification:	Means of Notification:	
Submitted by (court):		Name of Responsible Judge/Person:	

FOR SHERIFF'S USE ONLY

License No.	Revocation Date:	Receipt of License:	Date PSP Notified:
Comments:			

I - NOTIFICATION OF MENTAL HEALTH COMMITMENT

(Sample) (1 Page)

COMMONWEALTH OF PENNSYLVANIA			
NOTIFICATION OF MENTAL HEALTH COMMITMENT			
<p>In accordance with 18 Pa.C.S. 6111.1(f)(1)(i), judges of the courts of common pleas shall notify the Pennsylvania State Police (PSP) of the identity of any individual who has been adjudicated as an incompetent or as a mental defective or who has been involuntarily committed to a mental institution under the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act, or who has been involuntarily treated as described in section 6105(c)(4) (relating to persons not to possess, use, manufacture, control, sell or transfer firearms) or as described in 18 U.S.C. §922(g)(4) (relating to unlawful acts) and its implementing Federal regulations. This notification shall be transmitted by the judge to the PSP within SEVEN days of the adjudication, commitment, or treatment, at the address below.</p> <p>The Pennsylvania Uniform Firearms Act, 18 Pa.C.S. 6105(c)(4) specifies that it shall be unlawful for any person adjudicated as an incompetent or who has been involuntarily committed to a mental institution for inpatient care and treatment under Section 302, 303, or 304 of the Mental Health Procedures Act of July 9, 1976 (P.L. 817, No. 143) to possess, use, manufacture, control, sell or transfer firearms. This would include adjudication of incapacity pursuant to 20 Pa.C.S.A. 5501. Pursuant to the Pennsylvania Mental Health Procedures Act, Section 109, notification shall be transmitted to the PSP by the judge, mental health review officer, or county mental health and mental retardation administrator within SEVEN days of the adjudication, commitment or treatment by first class mail to the Pennsylvania State Police, Attention: PICS Unit, 1800 Elmerton Avenue, Harrisburg, PA 17110. A copy of this form must also be forwarded to the sheriff of the county in which this person resides in accordance with 18 Pa.C.S. § 6109(l.1)(2). The envelope should be marked "CONFIDENTIAL - ATTENTION FIREARMS."</p>			
Place an "X" in type of Involuntary Commitment (302, 303, 304), Adjudicated Incapacitated, etc. Please type or print clearly.			
INVOLUNTARY COMMITMENT	302	303	304
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	<input checked="" type="checkbox"/> ADJUDICATED INCAPACITATED/ INCOMPETENT		
	<input type="checkbox"/> OTHER _____		
DATE OF COMMITMENT OR ADJUDICATED INCAPACITATED, ETC. _____			
COUNTY OF COMMITMENT OR ADJUDICATION _____			
INDIVIDUAL INFORMATION - INDIVIDUAL INVOLUNTARILY COMMITTED OR ADJUDICATED INCAPACITATED, ETC.			
LAST NAME _____		FIRST _____	MIDDLE _____
JR., ETC. _____	MAIDEN NAME _____	ALIAS _____	
DATE OF BIRTH _____	SSN _____	SEX _____	RACE _____
(Optional, but will help prevent misidentification)			
HEIGHT _____	WEIGHT _____	HAIR _____	EYES _____
ADDRESS _____			
Name of Physician Certifying Necessity of Involuntary Commitment _____ (Print Name)			
Hospital/Facility Providing Treatment/Address _____			
.....			
NOTIFICATION BY (Please print name, address, area code, and telephone number of agency or county court.)			
MH/MR Administrator/Review Officer _____		Telephone _____	
Address _____			
303-304 Commitments require the Judge/Review Officer name authorizing the commitment, case number, & order date.			
Name of Judge/Review Officer _____ (Print Name)			
Court Case Number _____		Date of Court Order _____	
SIGNATURE OF NOTIFYING OFFICIAL _____ Date _____			
.....			
NOTIFICATION OF PHYSICIAN'S DETERMINATION THAT NO SEVERE MENTAL DISABILITY EXISTS			
The physician shall provide signed confirmation of the lack of severe mental disability following the initial examination under Section 302(b) of the Mental Health Procedures Act and pursuant to the Pennsylvania Uniform Firearms Act, Section 6111.1 (g)(3). Notice shall be transmitted by physician to the Pennsylvania State Police through the county Mental Health and Mental Retardation Administrator or Mental Health Review Officer.			
Name of Physician (Print Name) _____			
Signature of Physician _____		Date _____	
PRIVACY ACT NOTICE: Solicitation of this information is authorized under Title 18 Pa.C.S. §6111.1, and Title 50 P.S. § 7109. Disclosure of your social security number is voluntary. Your social security number, if provided, may be used to verify your identity and prevent misidentification. All information supplied, including your social security number, is confidential and not subject to public disclosure.			

CHAPTER VII: CUSTODY

TABLE OF CONTENTS

CHAPTER GOALS.....	5
GENERAL CUSTODY PROCEDURE	5
Initiation of a Custody Claim	5
Pro Se Parties Must File Entry of Appearance Form	5
Prompt Disposition	5
Special Relief	6
Alternative Hearing Procedures for Partial Custody Actions.....	6
No Mediation Permitted When Domestic Violence Is Alleged	6
UNDERSTANDING CUSTODY TERMS.....	6
CUSTODY JURISDICTION AND DOMESTIC VIOLENCE ISSUES.....	7
Different Jurisdictional Laws	7
Uniform Child Custody Jurisdiction Act (UCCJA).....	7
Parental Kidnapping Prevention Act (PKPA)	8
The Hague Convention.....	8
Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).....	8
The UCCJEA Contains Protections for Domestic Violence Victims	8
The UCCJEA – Home State is Prioritized	9
Home County Jurisdiction in Pennsylvania	9
Jurisdiction Under the UCCJEA	9
Initial Child Custody Jurisdiction.....	9
Exclusive Continuing Jurisdiction	10
Jurisdiction to Modify Order	10
Temporary Emergency Jurisdiction in Domestic Violence Cases	11
Communication Between Courts Required in Emergency Jurisdiction Cases	12

Notice and Opportunity To Be Heard	13
Simultaneous Proceedings, Stays of Proceedings	13
Declining Jurisdiction – Inconvenient Forum	13
Declining Jurisdiction – Unclean Hands	15
Information To Be Provided to Court	16
Requiring Appearance	16
Enforcement – Duty To Enforce	16
Enforcement – New Enforcement Mechanisms	17
FACTORS TO CONSIDER WHEN AWARDING CUSTODY: SAFETY IS PRIORITIZED	18
Trial Courts Must Consider All Factors, but Must Prioritize Safety	18
Past or present abuse must be considered	19
Actions to protect a child may not be construed against a protective parent.....	20
Safety Conditions Must Be Included If There Is a Continued Risk of Harm	20
Child Safety Is Paramount	20
MANDATORY CONSIDERATION OF CRIMINAL CONVICTIONS AND PENDING CHARGES.....	22
Court Must Consider Convictions	22
Consideration of Criminal Convictions Does Not Apply to Requests for Prison Visits	22
Court Must Consider Pending Charges	23
Custody Litigants Must Provide Criminal or Abuse History Verification Form.....	23
GENERAL CUSTODY REQUIREMENTS.....	23
Primary Custody Determinations To Be Made By Judge.....	23
Court Must Ensure Complete Record and Clear Decision-Making	24
Judge Has Discretion to Interview Child(ren).....	24
Guardian Ad Litem (GAL).....	24
GAL Appointment.....	24
Guardian Ad Litem Duties	25
GAL Testimony	26
Delegation of Authority	26
Court Cannot Convert Custody to Dependency	26

LIMITATIONS ON PARENTAL AND THIRD-PARTY ACCESS	27
Limitations on Parental Access	27
General Rights of Third-Parties.....	27
Grandparent Rights	28
Partial custody	28
Primary physical and legal custody	28
Abusers Try to Subvert “No-Contact” Via Grandparents	29
RELOCATION	29
Relocation May Help Avoid Abuse.....	29
Defining Relocation	29
Case Illustration: Significant Impairment.....	29
Relocation Factors	30
Case Illustration: Best Interests of the Child.....	30
Procedural Requirements for Relocation	31
Due Process Evidentiary Hearing Required	32
Relocation Cases Involving Domestic Violence	32
MODIFICATION OF CHILD CUSTODY ORDERS	33
Modification, Generally	33
Child Custody During Military Deployment	33
Modification by Non-Deployed Parent.....	33
Temporary Modification by Deployed Servicemember	33
OTHER RELEVANT INFORMATION	34
Risks to Children Posed by Abusers	34
Risk of physical or sexual abuse of the child by the abuser	34
Risk of exposure to threats or acts of violence toward their mother	34
Exposure to post-separation threats or assaults on the protective parent can impede children's emotional healing.	34
Risk of impoverishment	35
Raising Abuse in Custody Case Is Dangerous for Victim Parent.....	35
EMERGING PRACTICES - CUSTODY PROCEEDINGS AS A TACTIC OF COERCIVE CONTROL	36
EMERGING PRACTICES – RECOMMENDED CUSTODY CONDITIONS IN DOMESTIC VIOLENCE CASES...	37

Pennsylvania Law	37
NCJFCJ Recommendations	37
Use Specific Terms	38
EMERGING PRACTICES – DOMESTIC VIOLENCE IN CUSTODY CASES – PRETRIAL MATTERS.....	38
Mediation Is Not Appropriate Where Domestic Violence Is Alleged	38
Ensure that the Court’s Pretrial Practices Promote Safety	39
EMERGING PRACTICES – USING DOMESTIC VIOLENCE-EDUCATED PROFESSIONALS	39
EMERGING PRACTICES – SELECTED EVIDENCE ISSUES IN DOMESTIC VIOLENCE CUSTODY CASES	40
Emphasis on the “Friendly Parent” is Inappropriate in Domestic Violence Cases	40
Domestic Violence Cases are Not “High Conflict”	42
Child Abuse Allegations	42
Reliability of abuse allegations	42
Parental Alienation Syndrome (PAS) is discredited	43
Experts Oppose Use of PAS.....	44
Abusers Are Not Fit Custodians	45
Mutual Allegations of Abuse	45
EMERGING PRACTICES – CONSIDERING SAFETY IN CUSTODY DECISIONS	46
EMERGING PRACTICES – SUPERVISED PHYSICAL CUSTODY	47
APPENDECIES	49
A - SAMPLE CUSTODY/PARTIAL CUSTODY TERMS	49
B - SAMPLE CRIMINAL RECORD / ABUSE HISTORY VERIFICATION	53
C - SAMPLE NOTICE OF RELOCATION.....	57

CHAPTER GOALS

The goals of this chapter are to provide an overview of custody law and to assist courts in developing an understanding of how domestic violence affects custody cases. Special jurisdictional requirements, mandated consideration of domestic violence, and trial and pretrial procedures are reviewed. Information regarding the effects of domestic violence on children, evidence issues, and safety is provided.

GENERAL CUSTODY PROCEDURE

Initiation of a Custody Claim

Custody cases are initiated as an independent action¹ or as part of a divorce proceeding.² Any action in custody initiated after Jan. 24, 2011, is determined pursuant to Act 112, even if the existing custody order was entered prior to the effective date of Act 112.³ For instance, if one parent petitions the court to modify a custody order that was initially entered in 2010, the modification will be evaluated based on the factors enumerated in Act 112, which prioritize child safety.

If a custody petition was filed prior to the effective date of Act 112, but the evidentiary hearing was held after the effective date of Act 112, the new factors will still apply.⁴

Pro Se Parties Must File Entry of Appearance Form

Pro se parties in custody proceedings are required to file an Entry of Appearance Form with the court.⁵ The form must declare that the party is self-represented and will proceed in the case without an attorney. Every self-represented party must give a copy of the form to the other party or that party's attorney. The rule requires the Entry of Appearance form to provide the following information:

- an address where the party agrees to receive copies of court documents; the party is not required to use a home address
- a phone number where the party can be reached
- the name and address of any attorney who previously worked on the case

If any of the information changes, the self-represented party must update the court and other parties with the new information.

Prompt Disposition

Custody matters have prompt disposition requirements:⁶

¹ PA. R. CIV. P. 1915.3.

² PA. R. CIV. P. 1920.32.

³ See *E.D. v. M.P.*, 33 A.3d 73 (Pa. Super. 2011) (finding that Father's request was filed after Act 112's effective date and, thus, was subject to the enumerated relocation factors in 23 PA. C.S. § 5337).

⁴ *C.R.F. v. S.E.F.*, 45 A.3d 441 (Pa. Super. 2012).

⁵ PA. R. CIV. P. 1930.8.

⁶ PA. R. CIV. P. 1915.4.

- 45 days for first contact with court (contact may include judicial conference, conciliation, or parenting class seminar)
- 180 days for scheduling custody trial
- 90 days for commencing trial after scheduling order
- 15 days for decision after trial

Special Relief

Courts may grant special relief in custody matters, which may include, but is not limited to:

- temporary custody, partial custody, or legal custody
- the issuance of process directing that a child or person having physical custody of a child be brought before the court
- a directive requiring a person to post a bond to appear with the child or to comply with a court order⁷

Alternative Hearing Procedures for Partial Custody Actions

After the parties' initial contact with the court, a party may move the court for a hearing before a judge rather than a hearing officer, in an action for partial custody when:

- there are complex questions of law, fact, or both; or
- if both parties certify to the court that there are serious allegations affecting the child's welfare.⁸

No Mediation Permitted When Domestic Violence Is Alleged

No mediation is permitted when there are allegations of domestic violence.⁹ Specifically, the rules provide that the court may not order mediation "if a party or a child of either party has been the subject of domestic violence or child abuse either during the pendency of the action or within 24 months preceding the filing of the action."¹⁰

UNDERSTANDING CUSTODY TERMS

There are different types and degrees of child custody. The right to make decisions regarding the child may be divided between the parties or awarded to only one person. Physical possession of the child may be shared by the parties or awarded to only one person. Also, in some circumstances, the court may limit a party to visiting with the child, supervised by a third party, without taking actual physical possession of the child.

Legal custody is the right to make major decisions on behalf of the child. Legal custodial decisions include, but are not limited to, decisions regarding the child's education, religion, and medical treatment.¹¹

⁷ See PA. R. CIV. P. 1915.13.

⁸ PA. R. CIV. P. 1915.4-1(b).

⁹ See PA. R. CIV. P. 1940.3(b), 1940.6(a)(4).

¹⁰ PA. R. CIV. P. 1940.3(b).

¹¹ 23 PA. C.S. § 5322.

- *Sole legal custody* is the exclusive right of one party to make decisions regarding the child.
- *Shared legal custody* is the shared right of more than one party to make decisions regarding the child.

Physical custody is the actual physical possession and control of the child.¹²

- *Sole physical custody* is the exclusive right of one party to have the actual possession of the child.
- *Primary physical custody* is the right of one party to have actual possession of the child for the majority of the time.
- *Shared physical custody* is the right of more than one party to have actual possession of the child, with each party having significant periods of physical custodial time with the child.
- *Partial physical custody* is the right of one party to have actual possession of the child for less than a majority of the time.
- *Supervised physical custody* is the right of one party to visit with the child in the presence of a third party.¹³ This means that the party may spend time with the child, but the child remains in the actual physical control of another person.

Courts may make an award of custody that combines any of the above types of legal and physical custody, provided the award is in accordance with its findings regarding the best interest of the child.¹⁴ Courts must require parents who have been convicted of or are charged with certain crimes to undergo a court evaluation and may require additional counseling before permitting custody of any kind.¹⁵

CUSTODY JURISDICTION AND DOMESTIC VIOLENCE ISSUES

Different Jurisdictional Laws

Prior to determining the best interest of a child in any custody case, a court must first determine whether it has jurisdiction to hear the custody case. Historically, there were differing laws involving custody jurisdiction when the parties lived in different counties within Pennsylvania, and when the parties lived in Pennsylvania and another state.

Uniform Child Custody Jurisdiction Act (UCCJA)

The UCCJA¹⁶ is an early version of model legislation that was designed to resolve jurisdictional conflicts in custody cases. Pennsylvania enacted the UCCJA in 1977, and followed the UCCJA until it adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in 2004.

¹² *Id.*

¹³ *Id.*

¹⁴ 23 PA. C.S. § 5323(a)

¹⁵ 23 PA. C.S. §§ 5329, 5330.

¹⁶ 23 PA. C.S. § 5341 *et. seq.*

Parental Kidnapping Prevention Act (PKPA)

In 1980, the federal government enacted the PKPA¹⁷ to address the interstate custody problems that continued to exist after the adoption of the UCCJA. The PKPA required state courts to enforce and not modify sister state custody and visitation orders that were entered in compliance with the provisions of the PKPA.¹⁸

The Hague Convention

The Hague Convention on the Civil Aspects of Child Abduction (Hague Convention) is an international convention designed to address child-kidnapping issues. The main purpose of the Hague Convention is to protect children from wrongful international removals or retentions by parents. The United States ratified the Hague Convention in 1988.

Although state and federal courts have concurrent jurisdiction to hear Hague Convention cases,¹⁹ the Convention requires only the return of a wrongfully removed child. A Hague proceeding may not be used to litigate the substantive merits of a custody dispute.²⁰

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

Both the PKPA and the UCCJA were enacted prior to many state and federal domestic violence laws. In 1997, the group charged with drafting model uniform laws, the National Conference of Commissioners on Uniform Laws, revised the UCCJA. It remedied some of the inconsistency in interpretation by the state courts, clarified modification jurisdiction, brought the UCCJA into conformity with the PKPA and federal Violence Against Women Act (VAWA) requirements, and added a remedial process for enforcement. This revision, the Uniform Child Custody Jurisdiction and Enforcement Act,²¹ provides better guidance for courts regarding interstate jurisdictional principles in child custody cases involving domestic violence. As of this writing, the UCCJEA has been adopted in Pennsylvania and all other states except Massachusetts.²²

In Pennsylvania, the UCCJEA applies on an interstate AND an intrastate basis.

The UCCJEA Contains Protections for Domestic Violence Victims

Special jurisdictional procedures for cases involving domestic violence allegations are woven throughout the UCCJEA. Therefore, an overview of the UCCJEA is provided along with the domestic violence protections found in the statute.

¹⁷ 28 U.S.C. § 1738(A).

¹⁸ 28 U.S.C. § 1738(A)(a).

¹⁹ 42 U.S.C. § 11603(a).

²⁰ See Article 19 of the Hague Convention and the International Child Abduction Remedies Act, 42 U.S.C. § 11601(b)(4).

²¹ UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997). Pennsylvania's version of the UCCJEA is found at 23 PA. C.S. § 5401 *et. seq.*

²² Pennsylvania's version of the UCCJEA became effective Aug. 15, 2004. A bill authorizing the UCCJEA's adoption is pending in the Massachusetts legislature as of June 2015. Uniform Law Commission, The Nat'l Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction and Enforcement Act, <http://www.uniformlaws.org/Act.aspx?title=Child+Custody+Jurisdiction+and+Enforcement+Act>.

The UCCJEA – Home State is Prioritized

Pennsylvania's UCCJEA defines home state as follows:

"Home state." The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child six months of age or younger, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.²³

The UCCJEA generally grants priority to home state jurisdiction.²⁴

Home County Jurisdiction in Pennsylvania

Pennsylvania's version of the UCCJEA applies on an intrastate basis. Accordingly, it applies to custody jurisdictional questions on a county-by-county basis.²⁵ So, in addition to establishing "home state" jurisdiction, the UCCJEA establishes "home county" jurisdiction.

Jurisdiction Under the UCCJEA

The jurisdictional provisions of the UCCJEA apply to a range of proceedings in which custody or visitation is at issue. These include initial child custody jurisdiction, exclusive continuing jurisdiction, modification jurisdiction, and emergency jurisdiction.

Under the UCCJEA, merely having physical presence or personal jurisdiction over party or child insufficient for jurisdiction.

Initial Child Custody Jurisdiction

Provisions addressing initial child custody jurisdiction provide:

- (a) General rule. – Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth has jurisdiction to make an initial child custody determination only if:
 - 1) this Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;
 - 2) a court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this Commonwealth is the more appropriate forum under section 5427 (relating to inconvenient forum) or 5428 (relating to jurisdiction declined by reason of conduct), and: (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant

²³ 23 PA. C.S. § 5402.

²⁴ 23 PA. C.S. § 5421.

²⁵ 23 PA. C.S. § 5471.

connection with this Commonwealth other than mere physical presence; and (ii) substantial evidence is available in this Commonwealth concerning the child's care, protection, training and personal relationships;

- 3) all courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this Commonwealth is the more appropriate forum to determine the custody of the child under section 5427 or 5428; or
- 4) no court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2) or (3).²⁶

This section of the statute also requires that the initial child custody provision is the exclusive jurisdictional basis for making a child custody determination.²⁷

In addition, the physical presence or personal jurisdiction over a party or child is not necessary or sufficient to make a child custody determination.²⁸

Exclusive Continuing Jurisdiction

Under Pennsylvania's UCCJEA, when a court has properly made an initial child custody determination or properly made a modification determination, that court has exclusive continuing jurisdiction until one of two circumstances occurs. The exclusive jurisdiction provisions are found in section 5422 of chapter 23, domestic relations.

(b.) General rule.— Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth which has made a child custody determination consistent with section 5421 (relating to initial child custody jurisdiction) or section 5423 (relating to jurisdiction to modify determination) has exclusive, continuing jurisdiction over the determination until:

- 1) a court of this Commonwealth 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 Commonwealth and that substantial evidence is no longer available in this Commonwealth concerning the child's care, protection, training and personal relationships; or
- 2) a court of this Commonwealth 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 Commonwealth.

Under Pennsylvania's UCCJEA, a court may modify its own order only if it had jurisdiction to make an initial determination.²⁹

Jurisdiction to Modify Order

Under the UCCJEA, with the exception of temporary emergency jurisdiction, jurisdiction for a court to modify another state's existing order is quite limited.

²⁶ 23 PA. C.S. § 5421.

²⁷ 23 PA. C.S. § 5421(b).

²⁸ 23 PA. C.S. § 5421(c).

²⁹ 23 PA. C.S. § 5422(b).

Section 5423 provides the following:

- (c.) Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth may not modify a child custody determination made by a court of another state unless a court of this Commonwealth has jurisdiction to make an initial determination under section 5421(a)(1) or (2) (relating to initial child custody jurisdiction) and: (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under section 5422 (relating to exclusive, continuing jurisdiction) or that a court of this Commonwealth would be a more convenient forum under section 5427 (relating to inconvenient forum); or (2) a court of this Commonwealth 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.³⁰

Temporary Emergency Jurisdiction in Domestic Violence Cases

Under the UCCJEA, Pennsylvania courts now have temporary emergency jurisdiction in situations involving domestic violence. The court has jurisdiction when a child has been abandoned or when emergency protection is necessary because a child, or the sibling or parent of the child, has been subjected to or is threatened with mistreatment or abuse. Accordingly, a Pennsylvania PFA court has jurisdiction and authority to affect another state's custody order on a temporary basis, if necessary to protect a child or parent who is abused.

Pennsylvania's temporary emergency jurisdiction provision states:

³⁰ 23 PA. C.S. § 5423.

- (a.) General rule.— A court of this Commonwealth has temporary emergency jurisdiction if the child is present in this Commonwealth and the child has been abandoned or it is necessary in an emergency to protect the child because the child or a sibling or parent of the child is subjected to or threatened with mistreatment or abuse.
- (b.) No previous custody determination or proceeding.— If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under sections 5421 (relating to initial child custody jurisdiction) through 5423 (relating to jurisdiction to modify determination), a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under sections 5421 through 5423. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under sections 5421 through 5423, a child custody determination made under this section becomes a final determination if it so provides and this Commonwealth becomes the home state of the child.
- (c.) Previous custody determination or proceeding.— If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under sections 5421 through 5423, any order issued by a court of this Commonwealth under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections 5421 through 5423. The order issued in this Commonwealth remains in effect until an order is obtained from the other state within the period specified or the period expires.³¹

A Pennsylvania PFA court has jurisdiction and authority to affect another state's custody order on a temporary basis, if necessary to protect child or parent who is abused.

Communication Between Courts Required in Emergency Jurisdiction Cases

Under the UCCJEA, courts may exercise emergency jurisdiction and make temporary orders even if a proceeding has been commenced elsewhere. The Act mandates immediate judicial communication with the other court to resolve the emergency, to protect the safety of the victim and child(ren), and determine how long a temporary order should remain in effect. Section 5424(d) provides:

³¹ 23 PA. C.S. § 5424.

- (d.) Mandatory communication between courts.— A court of this Commonwealth which has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in or a child custody determination has been made by a court of a state having jurisdiction under sections 5421 through 5423, shall immediately communicate with the other court. A court of this Commonwealth which is exercising jurisdiction pursuant to sections 5421 through 5423, 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.³²

In addressing the communication requirement, many courts choose to put all communication proceedings on the record and have sworn testimony from the other state's court. The court gives notice of these communications to the parties.

Notice and Opportunity To Be Heard

For the temporary emergency custody order to be enforceable pursuant to the UCCJEA and PKPA, notice and opportunity to be heard must be given.³³

Simultaneous Proceedings, Stays of Proceedings

Except in instances involving emergency jurisdiction, the UCCJEA generally provides that a court must decline jurisdiction if, at the time of the custody proceeding, there is already another proceeding concerning child custody that is in conformance with the UCCJEA, unless the other proceeding has been terminated or stayed because the Pennsylvania court is a more convenient forum.³⁴

Declining Jurisdiction – Inconvenient Forum

Under the UCCJEA, a court with initial jurisdiction; exclusive, continuing jurisdiction; or modification jurisdiction may decline to exercise jurisdiction on two grounds: inconvenient forum and unjustifiable conduct.

The court shall allow parties to submit information and shall consider... whether domestic violence has occurred... and which state could best protect the parties and child.

Under the inconvenient forum provisions of the UCCJEA, the court may consider several factors and determine that another court is better able to decide custody. These factors include whether domestic violence has occurred, whether it is likely to continue, and which state could best protect the victim and child(ren):

³² 23 PA. C.S. § 5424(d).

³³ 23 PA. C.S. § 5425(a), (b).

³⁴ 23 PA. C.S. § 5426.

- (a) General rule.— A court of this Commonwealth which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.
- (b) Factors.— Before determining whether it is an inconvenient forum, a court of this Commonwealth shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
 - 1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
 - 2) the length of time the child has resided outside this Commonwealth;
 - 3) the distance between the court in this Commonwealth and the court in the state that would assume jurisdiction;
 - 4) the relative financial circumstances of the parties;
 - 5) any agreement of the parties as to which state should assume jurisdiction;
 - 6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
 - 7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
 - 8) the familiarity of the court of each state with the facts and issues in the pending litigation.
- (c) Stay.— If a court of this Commonwealth determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.
- (d) Jurisdiction declined.—A court of this Commonwealth may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.³⁵

A custody case should not automatically be dismissed where a parent violates a joint custody order by fleeing with a child to escape domestic violence.

³⁵ 23 PA. C.S. § 5427.

Declining Jurisdiction – Unclean Hands

The UCCJEA requires a court to decline jurisdiction if jurisdiction was created by the unjustifiable conduct of the plaintiff.

The model UCCJEA addresses how this section of the UCCJEA operates in domestic violence situations. The official comment to this section of the UCCJEA explains that if a parent flees with a child to escape domestic violence and in the process violates a joint custody order, the domestic violence victim's custody case should not automatically be dismissed. Instead, the comment suggests that the court inquire whether the flight was justified under the circumstances. Section 5428 states:

- (a) General rule.— Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction) or by other laws of this Commonwealth, if a court of this Commonwealth has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:
 - 1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
 - 2) a court of the state otherwise having jurisdiction under sections 5421 (relating to initial child custody jurisdiction) through 5423 (relating to jurisdiction to modify determination) determines that this Commonwealth is a more appropriate forum under section 5427 (relating to inconvenient forum); or
 - 3) no court of any other state would have jurisdiction under the criteria specified in sections 5421 through 5423.
- (b) Jurisdiction declined; remedy.— If a court of this Commonwealth declines to exercise its jurisdiction pursuant to subsection (a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under sections 5421 through 5423.
- (c.) Jurisdiction declined, expenses.— If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a), it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses and child care during the course of the proceedings unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs or expenses against this Commonwealth unless authorized by law other than this chapter.³⁶

The UCCJEA requires the parties to inform the court about other proceedings, including PFA proceedings.

³⁶ 23 PA. C.S. § 5428.

Information To Be Provided to Court³⁷

Subject to certain confidentiality provisions,³⁸ parties are required to provide information in custody pleadings regarding the child's whereabouts, where and with whom the child has resided previously, and whether there is other litigation, including litigation involving domestic violence, termination of parental rights, and adoption proceedings. If the information is not furnished, the court may stay the proceedings. This requirement means that parties must provide the court with information about other proceedings, including other Protection From Abuse proceedings within Pennsylvania and other states' protection order proceedings outside of Pennsylvania.³⁹

Requiring Appearance

Pennsylvania's version of the UCCJEA has specific provisions for compelling the appearance of parties and children, for orders to address the safety of the parties and children, and for reasonable travel expense reimbursement by the other party. Section 5430 states:

- (a) General rule.— In a child custody proceeding in this Commonwealth, the court may order a party to the proceeding who is in this Commonwealth to appear before the court in person with or without the child. The court may order any person who is in this Commonwealth and who has physical custody or control of the child to appear in person with the child.
- (b) Party outside this Commonwealth.— If a party to a child custody proceeding whose presence is desired by the court is outside this Commonwealth, the court may order that a notice given pursuant to section 5408 (relating to notice to persons outside Commonwealth) include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.
- (c) Personal safety.— The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.
- (d) Expenses.— If a party to a child custody proceeding who is outside this Commonwealth is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.⁴⁰

Enforcement – Duty To Enforce

The UCCJEA requires state courts to recognize and enforce another state's valid child custody determinations. However, the UCCJEA provides that a custody order is enforceable under the UCCJEA only if the issuing court exercised jurisdiction in conformity with the UCCJEA.⁴¹

³⁷ 23 PA. C.S. § 5429.

³⁸ 23 PA. C.S. § 5429(e).

³⁹ 23 PA. C.S. § 5429.

⁴⁰ 23 PA. C.S. § 5430.

⁴¹ 23 PA. C.S. § 5443(a).

Enforcement – New Enforcement Mechanisms

In addition to establishing a duty to enforce other states' custody and visitation orders, the UCCJEA provides five enforcement mechanisms. These include:

- registration of another state's child custody determination⁴²
- expedited enforcement of custody determinations⁴³
- temporary visitation orders⁴⁴
- warrants to take physical custody⁴⁵
- provisions regarding enforcement involving prosecutors and law enforcement⁴⁶

These special enforcement mechanisms are intended to supplement enforcement procedures already available under Pennsylvania law.⁴⁷

⁴² 23 PA. C.S. §§ 5445, 5446.

⁴³ 23 PA. C.S. § 5448.

⁴⁴ 23 PA. C.S. § 5444.

⁴⁵ 23 PA. C.S. § 5451.

⁴⁶ 23 PA. C.S. §§ 5455, 5456, 5457.

⁴⁷ 23 PA. C.S. § 5443(b).

FACTORS TO CONSIDER WHEN AWARDING CUSTODY: SAFETY IS PRIORITIZED

Trial Courts Must Consider All Factors, but Must Prioritize Safety

Pennsylvania law requires the trial court to consider a multitude of factors that are relevant to the child's best interest.⁴⁸ In most custody cases, courts must consider "[a]ll of the factors listed in section 5328(a),"⁴⁹ but must give "weighted consideration" to those factors that "affect the safety of the child."⁵⁰

The plain language of section 5328(a) requires that the 16 enumerated factors be considered when the court is determining a child's best interests when making an award of custody. However, during a custody modification, the modification provision does not refer to the 16 factors. Therefore, in cases where the court is not deciding physical or legal custody⁵¹ but adjudicating a subsidiary issues, it is not bound to address the 16 statutory factors in determining a child's best interest.

⁴⁸ 23 PA. C.S. § 5328(a)(1) – (16). The factors include:

- (1) Which party is likely to encourage and permit frequent and continuing contact between the child and another party
- (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
- (2.1) Information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).
- (3) The parental duties performed by each party on behalf of the child.
- (4) The need for stability and continuity on the child's education, family life and community life.
- (5) The availability of extended family.
- (6) The child's sibling relationships.
- (7) The well-reasoned preference of the child, based on the child's maturity and judgment.
- (8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
- (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.
- (10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
- (11) The proximity of the residences of the parties.
- (12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
- (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another.
A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
- (14) The history of drug or alcohol abuse of a party or member of a party's household.
- (15) The mental and physical condition of a party or member of a party's household.
- (16) Any other relevant factor.

Id.

⁴⁹ See *J.R.M. v. J.E.A.*, 33 A.3d 647 (Pa. Super. 2011) (emphasis omitted) (finding that a trial court erred as a matter of law when it failed to consider "[a]ll of the factors" enumerated in the statute (emphasis in original)).

⁵⁰ *Id.*

⁵¹ [M.O. v. J.T.R.](#), 85 A.23d 1058 (Pa. Super. 2014).

It is an abuse of discretion for the trial court to fail to assess and evaluate allegations of abuse.

Past or present abuse must be considered

The trial court is required to consider the past or present abuse of a party or a member of the party's household. The law also directs the court to determine whether the abuse presents a continued risk of harm to either the child or the abused party. If so, the court must decide which party is able to adequately protect and safeguard the child.

The amended custody statute adopts the definition of abuse from the Protection From Abuse Act. However, a party does not need to have a Protection From Abuse order for the court to consider the alleged abuse. Abuse towards a child or a parent in the household greatly affects a child's safety and, thus, must be given weighted consideration over other factors. It is an abuse of discretion for the trial court to fail to assess and evaluate allegations of abuse.

Case Illustration: Consideration of Abuse

The case of **Costello v. Costello**⁵² involved a grandmother and an abusive father. The Pennsylvania Superior Court vacated the trial court order and remanded the case where the trial court record and opinion did not contain sufficient evidence regarding the father's abusive behavior, including the circumstances surrounding a PFA order entered against the father and his history of drug and alcohol problems.

The Superior Court observed:

Our review of the testimony indicates an inadequate record with regard to the PFA order. Specifically, Father testified that the PFA order was a result of him spitting on his sister. The trial court pursued Father's explanation with this inquiry: "Did this incident have anything to do with Kevin[?]?... Was he involved? Was he injured by you or anything like that?" Father responded "no." There was no further testimony on the subject of the PFA. Additionally, the fact that Father had a PFA order entered against him was not mentioned in the trial court's opinion. Similarly, the record contains scant information with regard to Father's drug and alcohol treatment programs. Details were not provided. In fact, Father alleged that he had been "clean" for some time, yet also admitted to having a drink the week before the hearing. The trial court has not provided this court with a record upon which a custody award, albeit a partial custody award, could properly be based. We, therefore, remand for a full hearing to consider the circumstances underlying the PFA order, and for a more complete inquiry into Father's drug and alcohol problems and/or treatment.⁵³

Costello was decided pursuant to section 5303(a) of the former custody law. However, the former custody law required the court only to consider "present and past violent or abusive conduct."⁵⁴ The new law requires the court to consider abuse and give weighted consideration to evidence that affects the safety of the child. To

⁵² Costello v. Costello, 666 A.2d 1096 (Pa. Super. 1995).

⁵³ *Id.* at 1098-99.

⁵⁴ *Id.* (citing 23 PA. C.S. § 5303(a) (repealed 2011)).

properly comply with the requirements of section 5328(a)(2), in light of the court’s decision in Costello, the trial court must carefully evaluate any abuse or abusive conduct by a party or household member.

Whether the child witnessed or was present for the alleged abuse is irrelevant, because any abuse by a party or household member has significant bearing on the child’s safety and wellbeing.⁵⁵

Actions to protect a child may not be construed against a protective parent

The custody law expressly addresses actions of a protective party or parent in two of the 16 best interest factors. Factor eight (8) provides that when an abused party or parent takes reasonable steps necessary to protect a child, the actions may not be construed as an attempt to turn the child against the other parent.⁵⁶ Factor thirteen (13) directs that such actions are not evidence of a protective parent’s unwillingness or inability to cooperate with the other party.⁵⁷ To the contrary, actions taken to protect a child are to be given weighted consideration in favor of the protective parent, who is attempting to promote the child’s safety.⁵⁸

The law explicitly prohibits the court from construing such efforts against the protective parent. As explained by the National Council of Juvenile and Family Court Judges, “Abuse cases may have high-conflict characteristics, but they require a different set of considerations in order to promote safety for the at-risk parent and child.”⁵⁹ When parties appear to be in high conflict with one another, courts must dig beneath the surface to ensure that what may appear as high conflict is not, in fact, an attempt of one parent to protect a child from further harm.

See [Appendix A for the Sample Custody and Partial Custody Terms](#).

Safety Conditions Must Be Included If There Is a Continued Risk of Harm

Where the court finds that there is a continued risk of harm to either a child or an abused party, the court must include safety conditions in any award of custody.⁶⁰

The Pennsylvania Rules of Civil Procedure provide a non-exclusion list of safety conditions that a court may include in its order. Those examples include supervised physical custody, supervised custody exchange, telephone- or computer-facilitated contact with the child, no direct contact between the parties, third-party contact for cancellations, third-party transportation and designating a secure, neutral location for a child’s passport.⁶¹

Child Safety Is Paramount

Case Illustration: **M.O. v. F.W.** illustrates prioritization of child safety and inclusion of safety provisions.⁶² In this case, the father appealed from an order granting the mother sole legal and primary physical custody and limiting the father to supervised physical custody.

⁵⁵ U.S. Dep’t of Justice, Office of Justice Programs, *National Survey of Children’s Exposure to Violence* (2009), NCJ 227744, available at <https://www.ncjrs.gov/pdffiles1/ojdp/227744.pdf>.

⁵⁶ 23 PA. C.S. § 5328(a)(8).

⁵⁷ 23 PA. C.S. § 5328(a)(13).

⁵⁸ *Id.*

⁵⁹ NAT’L COUNCIL OF JUVENILE & FAM. CT. JUDGES, A JUDICIAL GUIDE TO SAFETY IN CUSTODY CASES § 2.5 (2008) [hereinafter NCJFCJ GUIDE TO CHILD SAFETY], available at <http://www.ncjfcj.org/resource-library/publications/judicial-guide-child-safety-custody-cases>.

⁶⁰ 23 PA. C.S. § 5323(e).

⁶¹ PA. R. CIV. P. 1915.10, explanatory comment – 2013.

⁶² **M.O. v. F.W.**, 42 A.3d 1068 (Pa. Super. 2012).

Custody litigation in this case began even before the child was born. Initially, after receiving a custody evaluation report, the parties agreed to share legal custody and granted the mother primary physical custody. Two years later, the father filed a petition for a PFA order against the mother and her boyfriend, alleging physical and sexual abuse of the child, and a petition to modify the custody order.

The mother filed for contempt of the child custody order, alleging that the father's allegations were false and that he had the child repeatedly evaluated and examined without her knowledge or consent. Over the course of the proceeding, which took several months, it was revealed that the father stripped and examined the child every time she visited. He also subjected child to repeated invasive medical examinations and frequent visits to the police station, without ever uncovering a shred of evidence to substantiate his suspicions.

Before the combined hearing, the trial court issued a temporary order suspending the father's physical custody time with the child until after the hearing. In issuing the temporary order, the Court explained that it did not want to allow the father to "have [the] child stripped every time she comes from mother's house and examined. ...I want [the child] protected." The court feared that further visits to the father, prior to a full and careful review of the notes and reports filed in the case, would harm the child.

The trial court held a hearing on the issues and concluded that the father's allegations were completely unfounded and that the father had "manufactured" the evidence to gain custody. The court limited the father to supervised visits to protect the child from further invasive doctor visits and physical examinations:

[T]hat Father, in fact, manufactured the evidence in order to gain custody and control over his daughter without interference from or consultation with Mother [and] that this heinous attempt to wrest custody from Mother and, in effect, terminate her relationship with her daughter, is so detrimental to the child's welfare that the court was left no option but to limit his contact with his daughter so as to prevent any further attempt to poison her mind.⁶³

On appeal, the trial court's temporary order suspending the father's custody and final order limiting Father to supervised physical custody was upheld.

As to the temporary order, the Superior Court explained:

Based on Father's history of subjecting Child to numerous invasive and degrading physical examinations, in addition to having her strip every time he received custody of her from Mother, the parameters of the trial court's temporary custody order [were] more than reasonable ...

In fact, it bewilders this Court that Father would even contest the order, which was imposed for a mere 10 days, when evidence showed that none of the examinations resulted in a finding of abuse by Mother. If anything, it would seem that these intrusive episodes, at the behest of Father, were significantly detrimental both emotionally and physically to Child.⁶⁴

The final order was also upheld based on the trial court's "thorough[] and cogent[]" review of the child's best interests. The Superior Court went on to commend the trial court for its decision, explaining: "This manipulation of the court system cannot be allowed or encouraged."⁶⁵

Refer to the section on [Child Abuse Allegations](#) for more information about allegations of child abuse in child custody cases.

⁶³ *Id.*

⁶⁴ *Id.* at 1073.

⁶⁵ *Id.* at 1072.

MANDATORY CONSIDERATION OF CRIMINAL CONVICTIONS AND PENDING CHARGES

Court Must Consider Convictions

Where a parent has been convicted of or has pleaded guilty or no contest to certain crimes, including violation of a protection order, unlawful restraint, terroristic threats, sexual assault, rape, incest, indecent exposure, or sexual abuse of children,⁶⁶ the court must perform an evaluation of that criminal conduct prior to making any order of custody to determine whether the party or household member poses a threat of harm to the child or whether additional counseling is necessary.⁶⁷ This initial evaluation is to be conducted by “the judge, conference officer or other appointed individual.”⁶⁸ It is not to be conducted by a mental health professional.⁶⁹

After the court-conducted evaluation, the court may order additional counseling requirements prior to making any award of custody for the party with a conviction for a crime enumerated in the custody statute.⁷⁰

Additional counseling must be conducted by a qualified professional who specializes in treating the type of offense committed by the offending party or household member.⁷¹ Moreover, the court may include a requirement for the offending party or household member to attend a rehabilitation program designed to address issues of physical and sexual abuse, domestic violence, the psychology of the offender, and the effects of abuse on the victim.⁷² The court may require subsequent evaluations to determine whether the offending party has been rehabilitated.⁷³

Consideration of Criminal Convictions Does Not Apply to Requests for Prison Visits

In a recent Pennsylvania Supreme Court decision, the former law requiring an evaluation and counseling prior to any award of custody was found to not apply in cases where the convicted parent is currently incarcerated and requesting visits at the prison.⁷⁴ Because of the similarities with the current law and the former law regarding a parent with criminal convictions, it is likely that this limitation will also apply to the new provision. The Pennsylvania Supreme Court in *D.R.C. v. J.A.Z.* found that “it would serve no significant ameliorative purpose to mandate counseling for every incarcerated offending parent for the limited and closely scrutinized contacts associated with prison visits.”⁷⁵

⁶⁶ 23 PA. C.S. § 5329(a). For a full list of the criminal convictions and charges that must be subject to an evaluation by the court prior to any award of custody, see 23 PA. C.S. § 5329(a). When a parent was convicted of murdering the other parent of the child, the court is prohibited from ordering any form of custody, “unless the child is of suitable age and consents to the order.” 23 PA. C.S. § 5329(b).

⁶⁷ 23 PA. C.S. § 5329(c) (as amended 2012).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See [Ramer v. Ramer, 914 A.2d 894 \(Pa. Super. 2006\)](#) (holding that trial court’s reliance on a clinical psychologist’s opinion was inappropriate where the psychologist was not specially trained in working with sex offenders and, therefore, was not a qualified expert capable of determining whether Father – a sex offender – posed a risk of harm to the children).

⁷² 23 PA. C.S. § 5329(d).

⁷³ 23 PA. C.S. § 5329(e).

⁷⁴ [D.R.C. v. J.A.Z., 31 A.3d 677 \(Pa. 2011\).](#)

⁷⁵ *Id.* at 686-87.

While this decision found that counseling was not necessary for prison visit requests, the court is still required to consider any relevant best interest factor prior to awarding such visits.⁷⁶ Moreover, if circumstances change, and the convicted parent is no longer incarcerated, the parent may petition for modification of any resultant order and, at that time, may again raise the issue of prior convictions.⁷⁷

Court Must Consider Pending Charges

If a party or a household member is currently facing charges, or was previously charged with certain enumerated crimes, the non-offending party may move for a temporary custody order or modification of an existing custody order.⁷⁸

The enumerated charges that must be considered are identical to the enumerated criminal convictions that must be considered by the court.

These crimes include violation of a protection order, unlawful restraint, terroristic threats, sexual assault, rape, incest, indecent exposure, or sexual abuse of children.⁷⁹ When evaluating a party's request for temporary custody or modification of an existing custody order based on an opposing party's pending or prior criminal charges, the court **must consider whether the parent who has been charged with the offense poses a risk of physical, emotional, or psychological harm to the child.**⁸⁰

Custody Litigants Must Provide Criminal or Abuse History Verification Form

A petitioner must file and serve a Criminal or Abuse History Verification Form with any complaint in custody or petition for modification in custody.⁸¹ The petitioner must also serve a blank form on all parties to the action. While the respondents are not required to file any responsive pleading, they must file a verification form regarding any criminal or abuse history of the respondent and anyone living in the respondent's household prior to the initial in-person contact with the court, but not later than 30 days after service of the complaint or petition.⁸²

GENERAL CUSTODY REQUIREMENTS

Primary Custody Determinations To Be Made By Judge

The trial court judge, sitting without a jury, hears custody matters. A master can hear claims for partial custody; however, the court must hear primary custody claims when there is no agreement between the parties.⁸³

⁷⁶ *Id.*

⁷⁷ See 23 PA. C.S. §§ 5329, 5338.

⁷⁸ 23 PA. C.S. § 5330(a).

⁷⁹ 23 PA. C.S. § 5330(a) (cross-referencing 23 PA. C.S. § 5329(a)).

⁸⁰ 23 PA. C.S. § 5330(b).

⁸¹ PA. R. CIV. P. 1915.3-2(a). See [Appendices](#) for sample form.

⁸² *Id.*

⁸³ 23 PA. C.S. § 3321; *VanDine v. Gyuriska*, 713 A.2d 1104 (Pa. 1998), (holding that, pursuant to section 3321, special masters are prohibited from presiding over issues of primary physical custody).

Court Must Ensure Complete Record and Clear Decision-Making

In a child custody case, the trial court must create a full and complete record. In order to determine the best interest and general welfare of the child(ren), it is the duty of the trial judge to make the fullest possible inquiry.⁸⁴ The court is required to state the reasons for its decision either on the record in open court, in a written opinion, or in its order.⁸⁵ When there is an appeal, in addition to a complete record, the trial court judge must provide a comprehensive opinion, containing a thorough analysis of the record and specific reasons for the court's ultimate decision.⁸⁶

Judge Has Discretion to Interview Child(ren)

Pennsylvania Rule of Civil Procedure 1915.11 permits the court to interrogate a child, whether or not the child is the subject of the action.

- (b) The court may interrogate a child, whether or not the subject of the action, in open court or in chambers. The interrogation shall be conducted in the presence of the attorneys and, if permitted by the court, the parties. The attorneys shall have the right to interrogate the child under the supervision of the court. The interrogation shall be part of the record.⁸⁷

If the judge decides to interview a child (who is the subject of the action), the court must issue an order requiring the child to appear at the hearing or conference.⁸⁸ Rule 1915.11(c) specifies that a child is not required to appear absent a court order.

Guardian Ad Litem (GAL)

The use of guardians ad litem is regulated both by statutory provisions in 23 Pa. C.S. § 5334 and by Rule of Civil Procedure 1915.11-2. The 2013 Rule suspends certain provisions of the statute, as discussed below.

GAL Appointment

A GAL may be appointed upon petition of the parties, or a motion of the court.⁸⁹ Before appointing a GAL, the court must make a finding that the GAL is necessary to assist it in determining the child's best interest.⁹⁰

⁸⁴ Cox v. Cox, 388 A.2d 1082 (Pa. Super. 1978).

⁸⁵ 23 PA. C.S. § 5323(d).

⁸⁶ In re Arnold, 428 A.2d 627 (Pa. Super. 1981).

⁸⁷ R.Civ.P. 1915.11(b).

⁸⁸ R.Civ.P. 1915.11(c). For information for judges on conducting interviews appropriate to the child's age and level of development, see ABA CENTER ON CHILDREN & THE LAW, A JUDGE'S GUIDE: MAKING CHILD CENTERED DECISIONS IN CUSTODY CASES (2008), [hereinafter ABA MAKING CHILD CENTERED DECISIONS] http://apps.americanbar.org/legalservices/probono/childcustody/judges_guide.pdf (last visited Nov. 30, 2015). The Pennsylvania Bar Association produces a video, *The Judicial Interview of the Child (in Custody Cases)*. The video briefly discusses abuse cases approximately 7 minutes into the video. Pa. Bar Association, Family Law Section, 2014, <https://www.youtube.com/watch?v=xRZDfzige7Y>.

⁸⁹ R.Civ.P. 1915.11-2(a).

⁹⁰ *Id.*

A GAL must be a licensed attorney or licensed mental health professional. If an attorney, the GAL may not also act as the child's counsel.⁹¹

Rule 1915.21 provides the form to order the appointment of a GAL pursuant to Rule 1915.11-2.⁹²

Courts are required to appoint a guardian ad litem in cases where a party has made substantial allegations of abuse of the child⁹³ and

- the child does not have counsel⁹⁴ or
- the court determines that it cannot otherwise obtain information relevant to the abuse.⁹⁵

In *C.W. v. K.A.W.*, the trial court appointed a guardian ad litem, noting the “obvious lack of communication between the parents and their extreme hostility” as the basis for such an appointment.⁹⁶ The court explained that, “[s]ince both parties and the trial court are focused on the child’s best interest, it appears that the appointment of a guardian ad litem would not be proper absent extraordinary circumstances.”⁹⁷ The court concluded that the parties’ “bitterness” did not rise to the level of extraordinary circumstances needed for an appointment of a guardian ad litem.⁹⁸ This case was decided prior to the new custody law allowing judges to appoint a guardian ad litem at their discretion; however, it remains applicable because it provides some basic parameters for appropriate use of discretion for such an appointment.

The court may order all or some of the costs of appointing a GAL to be paid by either or both parties.⁹⁹

Guardian Ad Litem Duties

In performing his or her duties, the guardian ad litem is required to meet regularly with the child¹⁰⁰ and investigate facts necessary to present to the court.¹⁰¹ The GAL’s investigation must be conducted by reviewing relevant records and interviewing potential witnesses, such as parents, teachers and other caretakers.¹⁰²

Even though the statute requires the guardian ad litem to be given access to relevant records, confidential information and records are protected from automatic disclosure,¹⁰³ including but not limited to:

- the address of a victim of abuse

⁹¹ Rule 1915.11-2 suspends the statutory provision that GALs act both for the child’s legal and “best” interests, recognizing that these could conflict. See sample form at <http://www.pacode.com/secure/data/231/chapter1915/s1915.21.html>

⁹² R.Civ.P. 1915.21, <http://www.pacode.com/secure/data/231/chapter1915/s1915.21.html>

⁹³ 23 PA. C.S. § 5334(c).

⁹⁴ 23 PA. C.S. § 5334(c)(1).

⁹⁵ 23 PA. C.S. § 5334(c)(2); see also *C.W. v. K.A.W.*, 774 A.2d 745 (Pa. Super. 2001) (holding that appointment of a guardian ad litem is not proper absent extraordinary circumstances).

⁹⁶ *C.W. v. K.A.W.*, 774 A.2d 745, 749 (Pa. Super. 2001).

⁹⁷ *Id.* at n.3.

⁹⁸ *Id.*

⁹⁹ R.Civ.P. 1915.11-2(b). This rule supersedes 23 PA. C.S. § 5334(e) authorizing the court to order “a party” to pay all or part of the costs.

¹⁰⁰ The requirement for a guardian ad litem to meet with the child, and the frequency with which these meetings are to take place, is dependent on the child’s age and maturity. 23 PA. C.S. § 5334(b)(1).

¹⁰¹ 23 PA. C.S. § 5334(b)(1), (4).

¹⁰² 23 PA. C.S. § 5334(b)(2), (4), (5).

¹⁰³ 23 PA. C.S. §§ 5334(2), 5336(b)-(c); see also 23 PA. C.S. § 6116.

- certain health records
- confidential information between a victim of abuse and an abuse counselor

Prior to release, the court must determine whether confidential information may be disclosed.

Recommendations of the GAL shall be made to the court in a written report,¹⁰⁴ and should include any recommendations for services that might be necessary to address a child's needs and safety.¹⁰⁵ Any report prepared by the guardian ad litem must be provided to each party and the court no later than 20 days prior to the hearing.¹⁰⁶ At the hearing, the court will determine the report's admissibility.¹⁰⁷

GAL Testimony

Guardians ad litem are required to submit a written report,¹⁰⁸ attend all proceedings¹⁰⁹ and may be called to testify.¹¹⁰ The Rule further provides that the GAL may be cross-examined if called to testify.¹¹¹ In addition, the court is required to determine whether any report developed by the GAL is admissible at the time of the hearing.¹¹²

The parameters set forth in the rules regarding a GAL's report are consistent with precedent from the Pennsylvania Superior Court, which held that "[a] child custody litigant has a due process right to in-court examination of the author of reports adverse to the litigants."¹¹³ Preserving the due process rights of custody litigants must be balanced against the assistance a GAL can provide to the court.

Delegation of Authority

When a guardian ad litem is appointed, the court - not the GAL - is the ultimate decision-maker regarding the child's best interest.¹¹⁴ The role of the trial judge is to determine best interest of the child based on the evidence presented.¹¹⁵ It is a "gross" abuse of discretion to abdicate the judge's role to the GAL.¹¹⁶

Court Cannot Convert Custody to Dependency

A custody court cannot rule on matters not before it. It is erroneous for a court to sua sponte declare children to be dependent under the Juvenile Act where the parties are before the court for the sole purpose of determining custody.¹¹⁷ Due process requires that litigants receive notice of the issues before the court and an opportunity to

¹⁰⁴ PA. R. CIV. P. 1915.11-2(c).

¹⁰⁵ 23 PA. C.S. § 5334(b)(6).

¹⁰⁶ PA. R. CIV. P. 1915.11-2(c).

¹⁰⁷ *Id.*

¹⁰⁸ 23 PA. C.S. § 5334(b)(6); PA. R. CIV. P. 1915.11-2(c).

¹⁰⁹ 23 PA. C.S. § 5334(b)(3); PA. R. CIV. P. 1915.11-2(c).

¹¹⁰ PA. R. CIV. P. 1915.11-2(c); The statutory provision in section 5334(d) prohibiting GAL testimony except under limited circumstances was suspended by Rule 1915.11-2 in 2013.

¹¹¹ PA. R. CIV. P. 1915.11-2(c).

¹¹² *Id.*

¹¹³ *Cyran v. Cyran*, 566 A.2d 878 (Pa. Super. 1989) (citing *Robinson v. Robinson*, 478 A.2d 800 (Pa. 1984)).

¹¹⁴ *C.W. v. K.A.W.*, 774 A.2d 745 (Pa. Super. 2001) at 749.

¹¹⁵ *Id.* ("The trial court may not delegate its judicial powers.").

¹¹⁶ *Id.* at 750.

¹¹⁷ *In re A.L.*, 779 A.2d 1172 (Pa. Super. 2001).

present their case in relation to those issues.¹¹⁸ In addition, custody cases utilize a preponderance of the evidence standard, while dependency cases require a clear and convincing standard of proof.¹¹⁹

LIMITATIONS ON PARENTAL AND THIRD-PARTY ACCESS

Limitations on Parental Access

If the court finds that there is a risk of harm to the child or to an abused party, the court is required to include safety provisions in any custody order that allows an abusive party to have access to the child. Safety provisions may include supervised physical custody or may otherwise limit an abusive parent's access to the child or an abused party during custodial transfers.

Sometimes the court may find it necessary, for the child's protection, to restrict or eliminate a parent's time with a child. When evidence shows that a parent has a severe mental or moral deficiency and, thus, is unfit to associate with his or her children, the court may find that it is not in the child's best interest to allow the parent the right to see them.¹²⁰

See [Appendix A for the Sample Custody and Partial Custody Terms](#).

In *Hughes v. Hughes*, visitation with the parties' child was denied to a father who inflicted a long pattern of abuse on his wife. The abuse culminated in the father shooting her in the shoulder while she held their toddler. The father sought visitation with the child, claiming that he was drunk at the time, and that the shooting incident was the only time he endangered the boy directly. The trial court found the father unfit for visitation and the Superior Court affirmed, stating:

[Father's] act of shooting the child's mother while the child was in her arms is sufficient to manifest a reckless and wanton lack of concern for the child's welfare. Furthermore, his constant course of abuse directed at the child's mother confirms his moral deficiency.¹²¹

General Rights of Third-Parties

These parties have standing to seek physical or legal custody:

- a third party who stands in loco parentis to the child¹²²
- a grandparent or great-grandparent who is not in loco parentis to the child and whose relationship with the child meets certain conditions¹²³

¹¹⁸ [Brooks-Gall v. Gall, 840 A.2d 993, 997 \(Pa. Super. 2003\)](#), citing *In re M.B.*, 514 A.2d 599 (Pa. Super. 1986).

¹¹⁹ *Id.*

¹²⁰ See, e.g., [Hughes v. Hughes, 463 A.2d 478, 479 \(Pa. Super. 1983\)](#); [Green v. Sneeringer, 635 A.2d 1074 \(Pa. Super. 1993\)](#) (holding that father possessed a moral deficiency constituting a grave threat to the child based on father's premeditated killing of the mother of his infant child); [In re C.B., 861 A.2d 287 \(Pa. Super. 2004\)](#).

¹²¹ *Hughes*, 463 A.2d at 479.

¹²² 23 PA. C.S. § 5324(2).

¹²³ 23 PA. C.S. § 5324(3).

However, when a custody action is between a parent and a third party, there is a presumption that custody will be awarded to the parent.¹²⁴ The presumption may be rebutted by clear and convincing evidence.¹²⁵

Grandparent Rights

Partial custody

Grandparents and great-grandparents have standing to seek partial physical or supervised physical custody in three instances:

- when one parent is deceased;¹²⁶
- when the parents are separated for six months or more or have commenced and proceeded with an action in divorce;¹²⁷
- when the child lived with the grandparents for a year or more, and is removed from the home by the parents.¹²⁸

Primary physical and legal custody

A grandparent or great-grandparent also has standing to bring a petition for primary physical and legal custody of a grandchild if the following conditions are met:

- The relationship between the child and grandparent began with the consent of the parent or court order;
- The grandparent is willing to assume responsibility for the child; and
- One of the following conditions are also met:
 - the child is dependent under 42 Pa. C.S. Ch. 63 (juvenile matters);
 - the child is substantially at-risk due to a parent's abuse, neglect, drug or alcohol abuse, or incapacity; or
 - the child has resided with the grandparent for a year or more, and is removed from the home by the parents.¹²⁹

Confidential information, such as the address of a victim of abuse, is not required to be included in a relocation notice.

¹²⁴ 23 PA. C.S. § 5327(b).

¹²⁵ *Id.*

¹²⁶ 23 PA. C.S. § 5325(1).

¹²⁷ 23 PA. C.S. § 5325(2).

¹²⁸ 23 PA. C.S. § 5325(3). Brief, temporary absences of the child from the residence of a grandparent or great-grandparent are not considered against the 12-month requirement. *Id.*

¹²⁹ 23 PA. C.S. § 5324.

Abusers Try to Subvert “No-Contact” Via Grandparents

Sometimes, an abusive parent who has been prohibited from contacting the parties’ children will seek contact with the children via his or her parents.¹³⁰ Courts should consider the domestic violence history of a family even in situations involving grandparents’ partial custody.

RELOCATION

Relocation May Help Avoid Abuse

In our mobile society, custody cases increasingly involve a relocating custodial parent. In custody cases involving domestic violence, a victim may wish to relocate to a geographic area with supportive friends or family. Sometimes a victim wishes to move from the area to preserve safety for the victim and the parties’ children. If the abusive partner uses custodial access as an opportunity to harass or attempt to control the other parent, there may be even greater motivation on the part of the victim to move away.

Defining Relocation

Act 112’s relocation requirements, explained in depth below, apply to “any proposed relocation.”¹³¹ Relocation is defined as “A change in residence of the child which significantly impairs the ability of a non-relocating party to exercise custodial rights.” Presumably, if a parent’s move does not significantly impair the other parent’s custodial rights, the requirements in Act 112 do not apply.

Case Illustration: Significant Impairment

In *C.M.K. v. K.E.M.*, the trial court found that a mother’s move approximately one hour from her current location would significantly impair the father’s custodial rights, even though the mother’s proposed modified custodial schedule would significantly increase the time and quality of the father’s custodial time.¹³² Alternatively, the trial court found that the mother tacitly conceded that her move constituted a relocation when she filed notice and a petition for relocation with the court.

On review, the Superior Court upheld the trial court’s decision “solely on the ground that the proposed relocation threatened significant impairment of Father’s ability to exercise his custodial rights.”¹³³ The Superior Court agreed that, if the mother were to move, the father would be less able to regularly participate in the child’s sporting activities, meetings with teachers and school authorities, and medical appointments.

The Superior Court disagreed that the mother’s petition constituted a tacit concession that her move constituted a relocation: “Contrary to the conclusion reached by the trial court, Mother’s request for a hearing

¹³⁰ See [Hughes v. Hughes, 463 A.2d 478 \(Pa. Super. 1983\)](#). In *Hughes v. Hughes*, the paternal grandmother sought visitation with the child after the father was jailed for abusing the mother. The trial court found that the paternal grandmother had shown little interest in the child prior to father’s incarceration, and stated its belief that grandmother was seeking visitation merely to facilitate father’s contact with the child. The Superior Court affirmed the trial court’s denial of paternal grandmother’s request for visitation.

¹³¹ 23 PA. C.S. § 5337(a).

¹³² [C.M.K. v. K.E.M., 45 A.3d 417 \(Pa. Super. 2012\).](#)

¹³³ *Id.* at 422.

on her petition neither foreclosed litigation on the issue of relocation nor did it raise a presumption that her proposed move constituted relocation.”¹³⁴

Because the court concluded that the move constituted a significant impairment to the father’s custodial rights, the court moved on to determine whether the relocation was in the child’s best interests, based on the factors enumerated in the statute.

Relocation Factors

A party proposing relocation has the burden of demonstrating to the court that the relocation will serve the best interest of the child.¹³⁵ In determining whether the party has met this burden, the court must consider 10 factors, giving weighted consideration to the factors affecting the child’s safety.¹³⁶

Refer to the section on [Factors to Consider When Awarding Custody: Safety is Prioritized](#) for more information about how safety factors into a determination of the child’s best interest.

Case Illustration: Best Interests of the Child

In *C.M.K. v. K.E.M.*, the Superior Court upheld the trial court’s holding that a mother did not meet her burden of showing that her proposed relocation – approximately one hour from her current location – was in the child’s best interests.¹³⁷

On review, the Superior Court found that the trial court’s decision was not an abuse of discretion. The mother presented evidence that her relocation would bring the child closer to her extended family and would provide

¹³⁴ *Id.* at 426.

¹³⁵ 23 PA. C.S. § 5337(i).

¹³⁶ 23 PA. C.S. § 5337(h); *see also* [E.D. v. M.P.](#), 33 A.3d 73 (Pa. Super. 2011) (holding that all relocation requests filed after Jan. 22, 2012, are subject to full analysis of the enumerated relocation factors set forth in section 5337). The factors that must be considered include:

- (1) The nature, quality, extent of involvement and duration of the child’s relationship with the party proposing to relocate and with the non-relocating party, siblings and other significant persons in the child’s life.
- (2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child’s life.
- (3) The feasibility of preserving the relationship between the non-relocating party and the child through suitable custody arrangements . . .
- (4) The child’s preference, taking into consideration the age and maturity of the child.
- (5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.
- (6) Whether the relocation will enhance the general quality of life for the party seeking relocation . . .
- (7) Whether the relocation will enhance the general quality of life for the child . . .
- (8) The reasons and motivation of each party seeking or opposing relocation.
- (9) The present and past abuse by a party or member of the party’s household and whether there is a continued risk of harm to the child or an abused party.
- (10) Any other factor affecting the best interest of the child.

23 PA. C.S. § 5337(h).

¹³⁷ *C.M.K. v. K.E.M.*, 45 A.3d 417 (Pa. Super. 2012).

her with the opportunity to advance her career as an insurance agent. The mother also raised the father's past abuse.¹³⁸

However, the trial court reasoned that the child's ties to their current location were significant – including the child's frequent contact with paternal grandparents. Also, the court found that the mother's reconciliation with the father after the abuse, and her acknowledgement that she did not fear for the child's safety in the father's presence, mitigated the risk of harm to the child. Ultimately, the trial court held that "the move would have a negative impact on Child's emotional development and on his bond with Father and other relatives and friends." The court found that this outweighed the evidence supporting the relocation.

Refer to the section on [Risks to Children Posed by Abusers](#) for more information about the impact of domestic violence on children.

Procedural Requirements for Relocation

When a parent or third party with custodial rights seeks to relocate, they must provide notice to other parties with custodial rights.¹³⁹ The form of notice must give details about the proposed move, including the address, phone number, school district, date of proposed move, and proposed custody modification.¹⁴⁰ The party is not required to provide notice of any information that is confidential pursuant to section 5336.¹⁴¹ Confidential information includes, in relevant part, the address or protected contact information of a victim of abuse.¹⁴² The Rules of Civil Procedure include a suggested form for the relocation notice that allows parties at risk of harm to easily protect his or her information from disclosure.¹⁴³

The relocating party is also required to provide other parties with a counter-affidavit that they can use to object to the proposed relocation.¹⁴⁴ The opposing party must file this affidavit with the court within 30 days if he or she objects to the proposed relocation. If no objection is made, the court may approve the proposed relocation and attendant custody modification if it finds that the relocation is in the child's best interest, giving weighted consideration to the child's safety.¹⁴⁵

The court can impose significant penalties if a relocating party fails to comply with the notice requirements prior to relocating.¹⁴⁶ However, the court is required to mitigate any penalty for failure to provide notice if the failure to provide notice was – in whole or in part – because of abuse.¹⁴⁷

¹³⁸ *Id.* at 428-29.

¹³⁹ 23 PA. C.S. § 5337(c). The statute requires notification no later than sixty (60) days before relocation or, if the relocating party did not reasonably know of the relocation in time to provide notice, within ten (10) days of when the party learns of the relocation. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 23 PA. C.S. § 5336(b)-(c).

¹⁴² *Id.* The relocating party may petition the court to protect other sensitive information from disclosure. Section 5336(c).

¹⁴³ PA. R. CIV. P. 1915.17. See [Sample Notice of Relocation](#).

¹⁴⁴ 23 PA. C.S. § 5337(c)(3)(x), (d). The statute provides a form for the counter-affidavit. *Id.*

¹⁴⁵ 23 PA. C.S. § 5337(f).

¹⁴⁶ 23 PA. C.S. § 5337(j). Penalties for failure to provide notice include using the failure to notify as a factor in a relocation determination, transferring custody of the child to the other party, or charging contempt and imposing sanctions. *Id.*

¹⁴⁷ 23 PA. C.S. § 5337(k).

Due Process Evidentiary Hearing Required

If a party objects to a proposed relocation, the court must conduct a full, expedited evidentiary hearing to consider whether the relocation will serve the child's best interest.¹⁴⁸ Even if no objection is made, the court may conduct a full, expedited evidentiary hearing sua sponte.

Relocation Cases Involving Domestic Violence

As of this publication date, there have been no appellate cases addressing relocation of an abused party under the new custody law. However, the appellate courts have approved relocation requests when the relocating party is the victim of domestic violence. The Superior Court has consistently considered domestic violence as part of its analysis regarding a parent's good faith in requesting to move.

In **Billhime v. Billhime**, the parties were parents to twin boys, who were born while the parents lived in Florida.¹⁴⁹ The mother was employed part-time as an actress; the father was trained as a radiology technician, but his employment was unsteady. The parties moved to Pennsylvania, where they had a history of separating and reconciling; the separations coincided with the mother's allegations of physical violence by her husband.

After their final separation, the mother filed a PFA petition, alleging physical abuse by the father. He denied the allegations, but stipulated to stay away from the marital home for 18 months. As during the marriage, the mother provided primary care for the parties' children.

The mother filed for custody and for permission to relocate with the children to Florida. She testified that she wished to return to the extensive support network that she had in Florida, including her friends, family, and church community. The mother also procured steady employment with a flexible schedule and health benefits. The father opposed the move, and the trial court agreed with the father and denied the mother's emergency petition to relocate. On appeal, the Superior Court reversed.

The trial court doubted the integrity of the mother's motives for the move and questioned her allegations of physical abuse in the PFA petition. The Superior Court, in reversing the trial court's denial of the move, reviewed the evidence and found that the mother's motives appeared legitimate. The mother was motivated by a desire to "exercise legitimate autonomy over her life and to live close to her family."¹⁵⁰ The mother also proposed realistic substitute visitation alternatives for the father.

In **Landis v. Landis**, the Superior Court also reversed the trial court's denial of a relocation request.¹⁵¹ In this case, the mother sought to relocate from one town in Pennsylvania to another Pennsylvania town 300 miles away. The trial court denied the mother's requested move, despite receiving evidence regarding a PFA order, a finding of indirect criminal contempt, and pending criminal charges for possession of marijuana and illegal weapons against the father. The trial court determined that although the father's behavior was such that the mother should be awarded primary legal custody, her desired move would interfere with the father's opportunity to bond with the child during his partial custody time.

The Superior Court reversed, finding that the PFA order, the indirect criminal contempt conviction, the illegal weapons criminal charges, the mother's offer of better employment, and the extensive family connections (both mother's and father's) in the area near the mother's new home, should not have been subverted by the trial

¹⁴⁸ 23 PA. C.S. § 5337(g), (i).

¹⁴⁹ [Billhime v. Billhime, 869 A.2d 1031 \(Pa. Super. 2005\).](#)

¹⁵⁰ *Id.* at 1039.

¹⁵¹ [Landis v. Landis, 869 A.2d 1003 \(Pa. Super. 2005\).](#)

court to the goal of maintaining the father's shared physical custody rights. The Superior Court reversed and remanded, directing that the relocation be permitted.

MODIFICATION OF CHILD CUSTODY ORDERS

Modification, Generally

Section 5338 provides that a custody order may be modified "upon petition" where the court finds that modification would "serve the best interest of the child."¹⁵² A change in circumstances is not required to petition for modification.

Child Custody During Military Deployment

Modification by Non-Deployed Parent

If a non-deployed parent files for modification of a custody order, and the deployed parent is unable to appear because of their deployment, the court may not order a modification based solely on the service member's failure to appear.¹⁵³

Temporary Modification by Deployed Servicemember

A parent with custodial rights who has received notice of deployment for military duty may petition the court for a temporary order assigning the deployed parent's custodial rights to another family member.¹⁵⁴ The petition must include a proposed revised custody schedule and must be joined by the family member(s) to whom the rights would be assigned.

In issuing a temporary order, the court must determine whether it is in the best interest of the child to allow an alternative family member to exercise custody in the deployed parent's absence.¹⁵⁵ The absence may not be considered as a factor against the deployed parent in assessing the child's best interest.¹⁵⁶ The court may adopt the deployed parent's proposed custody modifications or may order its own modification, but it is expressly prohibited from entering a temporary order for a family member that exceeds the custody rights granted to the service member in the existing custody order.¹⁵⁷

When the parent returns from deployment, "the custody order that was in effect immediately preceding the date of the deployment of the eligible service member is reinstated."¹⁵⁸

¹⁵² 23 PA. C.S. § 5338.

¹⁵³ 51 PA. C.S. § 4901(d) (amended 2012).

¹⁵⁴ 23 PA. C.S. § 5338 (related to modification of custody order); 51 PA. C.S. § 4109 (relating to child custody proceedings during military deployment).

¹⁵⁵ 51 PA. C.S. § 4109(A.1).

¹⁵⁶ 51 PA. C.S. § 4109(C).

¹⁵⁷ 51 PA. C.S. § 4109(A.1)(2).

¹⁵⁸ 51 PA. C.S. § 4109(B).

OTHER RELEVANT INFORMATION

Risks to Children Posed by Abusers

Risk of physical or sexual abuse of the child by the abuser

Men who abuse their partners often abuse their children. Multiple studies demonstrate the “dramatically elevated rate” of physical and or sexual abuse.¹⁵⁹ This risk may increase, post-separation, as a result of retaliatory behavior by the abuser and the victim’s inability to monitor the abuser’s parenting.¹⁶⁰ According to the National Council of Juvenile and Family Court Judges, “Abuse of the children, or threatened abuse, is a powerful tool of control. . . . This means that children are at risk, post-separation, even if they were never directly abused by the abusive parent previously.”¹⁶¹

Risk of exposure to threats or acts of violence toward their mother

Children often witness a large percentage of physical and sexual assaults on their parents and can describe such assaults to investigators in great detail.¹⁶² Children also are at risk for physical injury during such incidents, either accidentally or because they attempt to intervene. The risks associated with being abused and witnessing abuse of their protective parent, the domestic violence victim, may have drastic long-term consequences for children. Children who witness abuse of their mothers in the home are at greater risk for alcohol and drug use, criminal behavior, acting out sexually, running away from home, and suicide.¹⁶³ Children who suffer abuse have an increased risk for physical aggression, antisocial behavior, depression, and parent-child relational problems.¹⁶⁴

Exposure to post-separation threats or assaults on the protective parent can impede children’s emotional healing.

Verbal abuse and physical and sexual assaults on domestic violence victims frequently occur after the parties separate. Children also witness this abuse.¹⁶⁵

¹⁵⁹ Lundy Bancroft and Jay G. Silverman, *Assessing Risk to Children from Batterers* 3 (2002), available at <https://vawnet.org/material/assessing-risk-children-batterers>. See also, AMERICAN PSYCHOLOGICAL ASS’N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 40 (1996); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L. Q. 273 (1995).

¹⁶⁰ Bancroft & Silverman, *Id.*

¹⁶¹ NAT’L COUNCIL OF JUVENILE & FAM. CT. JUDGES, A JUDICIAL GUIDE TO SAFETY IN CUSTODY CASES § 2.5 (2008) at 6.

¹⁶² ABA CENTER ON CHILDREN & THE LAW, A JUDGE’S GUIDE: MAKING CHILD CENTERED DECISIONS IN CUSTODY CASES (2008), (citing LOUIS BROWN ET AL., STOP DOMESTIC VIOLENCE: AN ACTION PLAN FOR SAVING LIVES 110 (1997)).

¹⁶³ *Id.* at 112-115.

¹⁶⁴ *Id.*; see also Lundy Bancroft and Jay G. Silverman, *Assessing Risk to Children from Batterers* 2 (2002).

¹⁶⁵ Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1, 113 (1996). Many abusive fathers manipulate the children to continue control over their mother, especially after separation. Five percent of abusive fathers make threats during visitation to kill the mother, 3 percent threaten to kidnap their children, and 25 percent threaten to hurt their children.

Risk of impoverishment

Abusers practice financial manipulation during marriage, and this does not cease after separation. Prolonged and expensive litigation – often over custody – is typical. Statistics show that an abusive parent is twice as likely to seek sole custody of the children than is a nonviolent parent.¹⁶⁶ This strategy offers many advantages to the abuser. It threatens the victim with loss of custody, maintains continuing control of the victim through litigation, depletes the victim's financial resources with legal expenses, and gains leverage for further financial concessions in court.¹⁶⁷

Raising Abuse in Custody Case Is Dangerous for Victim Parent

Studies show that it is risky for the victim parent to raise allegations of child abuse or domestic violence in a custody case. Courts and others appear to be more accepting of an abused parent's separation from the abusive parent and subsequent custody action if the abused parent moved at the insistence of a third party, like Child Protective Services. When an abused parent separates from the abuser without first seeking the assistance of third parties like Child Protective Services or the police, the allegations of abuse are met with skepticism and additional scrutiny.

In fact, raising allegations of abuse in a custody proceeding heightens the likelihood that the victim will lose the custody litigation.¹⁶⁸

¹⁶⁶ AMERICAN PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 40 (1996).

¹⁶⁷ For example, one study indicated that women reduced their requests for resources during negotiations when they were afraid they might lose custody. ABA CENTER ON CHILDREN & THE LAW, A JUDGE'S GUIDE: MAKING CHILD CENTERED DECISIONS IN CUSTODY CASES 106-107 (2008).

¹⁶⁸ DENNIS SACCUZZO ET AL., MANDATORY CUSTODY MEDIATION: EMPIRICAL EVIDENCE OF INCREASED RISK FOR DOMESTIC VIOLENCE VICTIMS AND THEIR CHILDREN (April 2003), NCJ 195422, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/195422.pdf>.

Researchers of California's pretrial mandatory custody resolution process found that raising allegations of domestic violence adversely affected mothers in the custody process. Although the California pretrial custody resolution process is described as mediation, the officer is required to make a report and recommendations for physical and legal custody to the court in the event of an unsuccessful mediation. Accordingly, California's mediation system is more like Pennsylvania's custody conference system.

Investigators found the following results:

- the court followed mediator/custody officer recommendation in 60 percent of the cases;
- custody officers recommended joint legal custody more often in domestic violence than non-domestic violence cases;
- sole legal custody in the mother was recommended less in domestic violence cases; and
- primary physical custody recommendations for fathers who were domestic violence perpetrators significantly outnumbered primary physical custody recommendations for non-domestic violence perpetrating fathers.

Id. at 4, 21, 23. Reviewing officers' recommendations for supervised visitation, the researchers found that when domestic violence occurred during child exchanges, the officer was less likely to order supervised visitation than in non-domestic violence cases. *Id.* at 35. The researchers observed:

Our findings on supervised visitation are consistent with a general pattern observed throughout our analyses: *The presence of domestic violence does not increase protections for the victim, whether child or parent.* In fact at best, victims get a comparable level of protection; at worst, they get less protection.

Id. (emphasis in original).

Research indicates that in custody cases involving domestic violence, the abuser successfully convinces authorities that the victim is unfit or undeserving of custody in approximately 70 percent of challenged cases.¹⁶⁹

EMERGING PRACTICES - CUSTODY PROCEEDINGS AS A TACTIC OF COERCIVE CONTROL

The National Council of Juvenile and Family Court Judges explains:

A parent who uses tactics of coercive control may find litigation to be an effective means of controlling the other parent. ... *Very often, abusive parents make multiple appearances seeking to undo orders that they perceive to be unfavorable to them, even in the absence of any change in circumstances between hearings.*¹⁷⁰

When one party files excessive motions in a child custody case, or repeatedly asks the court to modify its custody order, this behavior may indicate that the perpetrator is using the court system to exert continued control over the victim parent – both emotionally and financially.

NCJFCJ suggests several ways the court may curtail the misuse of custody proceedings as a means to exercise further coercive control:¹⁷¹

- Order the parent bringing excessive motions to pay the attorneys fees and costs of the other parent.
- Order the parent who files frivolous motions to reimburse lost wages and other expenses of the other parent.
- Excuse the at-risk parent from appearing at the hearing or permit the at-risk parent to appear by telephone.
- Order that no court appearances may be scheduled without your prior approval.
- Keep in place any orders you have made that enhance the safety of the at-risk parent or child.
- Require compliance with your orders unless there has been a significant change in circumstances.
- Prohibit contact between the parents, including during visitation exchanges.
- Keep all protections in place, including no contact with the child, if that term was part of your original order, absent strong evidence of change and compliance.
- Deny requests for excessive or unnecessary delay.

¹⁶⁹ AMERICAN JUDGES ASSOC., DOMESTIC VIOLENCE & THE COURTROOM: UNDERSTANDING THE PROBLEM...KNOWING THE VICTIM, *available at* <http://aja.ncsc.dni.us/domviol/booklet.html>.

¹⁷⁰ NAT'L COUNCIL OF JUVENILE & FAM. CT. JUDGES, A JUDICIAL GUIDE TO SAFETY IN CUSTODY CASES § 8.6 (2008) at 22-24.

¹⁷¹ *Id.*

EMERGING PRACTICES – RECOMMENDED CUSTODY CONDITIONS IN DOMESTIC VIOLENCE CASES

Pennsylvania Law

Pennsylvania law provides that, in order to prevent further abuse, a court is required to impose conditions on a custody award as necessary to ensure the safety of the party and the child during the exercise of custodial rights.¹⁷²

See [Appendix A for the Sample Custody and Partial Custody Terms](#) for sample safety provisions, such as supervised physical custody and third-party transfer. These sample provisions are also included in Pennsylvania Rule of Civil Procedure 1915.10, 2011 Comment.

NCJFCJ Recommendations

The National Council of Juvenile and Family Court Judges (NCJFCJ) recommends the following conditions of visitation in cases involving domestic and family violence:¹⁷³

- Do not require or encourage contact between the parties.
- Order visitation in a location physically separate from the abused party (whether supervised or unsupervised).
- Require transfer of children between the parents in the presence of a third party and in a protected setting (e.g., police station or visitation center).
- Start with short, daytime visits in a public place, and increase length only if things are going well.
- Include “no alcohol or drug” provisions for the visiting parent, and direction as to the immediate consequences of violation (e.g., other parent should call the police).
- Place limits on overnight visitation.
- Require the perpetrator to successfully complete a batterer’s intervention program, drug/alcohol program, or parenting education program before being allowed visitation.
- Require a bond from the batterer to ensure the child’s safe return.
- Build in automatic return dates for court to review how the order is working.
- Do not order the victim into counseling with the perpetrator as a precondition of custody, or visitation.

For a sample Third Party Affidavit of Acceptance and Accountability for Supervision, please see Chapter IV: PFA and Custody, Appendix A.

¹⁷² 23 PA. C.S. § 5323(e); *see also* 23 PA. C.S. § 6108(a)(4).

¹⁷³ NCJFCJ, FAMILY VIOLENCE: A MODEL STATE CODE 34 (1994).

Use Specific Terms

The court is required to specify the reasons for their award either on the record, in open court, or in a written opinion.¹⁷⁴ Moreover, the court is required to specify the terms of any custody award with sufficient specificity to allow law enforcement authorities to enforce the order.¹⁷⁵

Vague clauses such as “reasonable access” or “as agreed” are not effective because these terms leave room for continued dispute and, as a result, often enable an abusive party to continue harassing, intimidating, or abusing the other parent or party. For instance, courts should never order custodial access “as may be agreed upon by the parties” in cases involving domestic violence. The opportunity to agree in the future may allow an abuser to attempt to violate a stay-away order by claiming that the custody agreement permitted his or her contact. The vague arrangements may also require subsequent custody negotiations and confrontations between the parents that may lead to further violence, often in front of the children.

EMERGING PRACTICES – DOMESTIC VIOLENCE IN CUSTODY CASES – PRETRIAL MATTERS

With crowded judicial dockets evident in most counties, the court typically needs and uses a pretrial process designed to encourage settlement and eliminate the necessity of a full custody trial. Because the dynamics of families where domestic violence is involved are dissimilar to nonviolent family situations,¹⁷⁶ courts need to make certain that the pretrial processes they use do not increase risk of harm to those most vulnerable to violence and abuse.

Mediation Is Not Appropriate Where Domestic Violence Is Alleged

Pennsylvania Rules of Civil Procedure prohibit mediation in situations involving domestic violence.¹⁷⁷ However, in custody matters, many courts use conciliation or custody conferences to attempt reaching an amicable resolution to the custody dispute early in the process. Mediation/conciliation/settlement conferences all presume that the parties are on equal footing and are capable of negotiating an arm’s-length agreement. These settlement tools are particularly inappropriate in the context of domestic violence, where the abusing partner maintains power and control, and the battered partner is intimidated.¹⁷⁸

Most custody settlement vehicles also presume that parties are represented by counsel and understand the conciliation/settlement process. This assumption is erroneous where domestic violence has occurred. Typically, the abusing partner also has financial control, leaving the abused partner without funds to hire counsel.

¹⁷⁴ 23 PA. C.S. § 5323(d).

¹⁷⁵ 23 PA. C.S. § 5323(f).

¹⁷⁶ For an article that compares and contrasts the core precepts of family and domestic violence jurisprudence, see Andrea Farney & Roberta Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law Into Family Court Practice*, 54 JUV. & FAM. CT. J. 35-55 (2003).

¹⁷⁷ PA. R. CIV. P. 1940.3(b).

¹⁷⁸ NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ FAMILY VIOLENCE PROJECT 28 (1990).

Ensure that the Court's Pretrial Practices Promote Safety

If the court uses conciliation, custody conferences, or mediation as part of its custody pretrial process, and the abused individual has agreed to participate, the NCJFCJ recommends the following procedures:¹⁷⁹

- Conduct separate sessions with each party with the same conference officer on separate days or at very different times within one day, so that the parties are not in the waiting room together.
- For everyone's physical safety, use a site with metal detectors or silent alarm systems and have a bailiff in the waiting room and available to escort the abused party to a car or bus stop.
- Allow a support person to accompany the abused party to conferences and to participate, unless the conference officer concludes that participation disrupts the process.
- Review agreements to ensure that they contain provisions designed to protect children and the abused party from further violence (i.e., minimal contact between parents, third-party supervision if risk of child-snatching, child abuse, or children witnessing abuse).
- Require that attorneys review agreements before they are signed. (If a party is unrepresented, encourage him or her to consult with a family law attorney for one session; encourage members of the bar to donate short, one-time consultation sessions.)
- When mediation is rejected, ensure that a viable alternative is available to prevent delays in determining custody.
- Stipulate as to facts and circumstances on which the parties relied to reach an accord (e.g., economics, living arrangements, employment status).
- Put all agreements in writing and make them part of the court record. This facilitates full understanding by all parties and leads to better enforcement.
- Question parties who appear to have reached agreement to ensure they understand and have agreed to its terms.
- Specify the length of time during which the conference officer will be working with the parties. If resolution is not occurring promptly, either party should be allowed to request a hearing before the court.

EMERGING PRACTICES – USING DOMESTIC VIOLENCE-EDUCATED PROFESSIONALS

Professionals used by the court to address custody pretrial issues should have received comprehensive training on domestic violence so that they understand its dynamics and effect on the parties.

¹⁷⁹ FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE & CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM 4-4, 4-5 (1995).

Typically, attorneys, social workers, psychologists, psychiatrists, and other professionals used by the court have had minimal or no training in domestic violence matters.¹⁸⁰ Because domestic violence presents unique circumstances and vastly changes typical family dynamics, decision-makers who are uneducated about domestic violence can do great harm to the victim and the parties' children.¹⁸¹ Accordingly, the NCJFCJ recommends the following procedures when other professionals are involved in the custody determination process:¹⁸²

- Ensure that professionals referred by the court have received comprehensive training on domestic violence, including how to develop safety plans.
- Periodically evaluate the viewpoints of these professionals to ensure that they do not harbor misconceptions about domestic violence that would impede their ability to be fair and impartial.
- Ensure that professionals working with custody cases have adequate procedures in place for identifying and screening for domestic violence and for conducting risk assessment in these cases.
- Encourage professionals to include development of safety plans as a routine step in working with domestic violence victims.
- Require offices where parties meet with professionals to be adequately secured.
- Provide for the professional to meet individually with the battered party and the perpetrator.
- Ensure that parties are referred to professionals who meet the linguistic and cultural needs of the litigants.

EMERGING PRACTICES – SELECTED EVIDENCE ISSUES IN DOMESTIC VIOLENCE CUSTODY CASES

Emphasis on the “Friendly Parent” is Inappropriate in Domestic Violence Cases

Domestic violence presents a lose-lose situation for victims and their children. Staying and leaving both present substantial safety risks. By remaining in the home, the victim risks losing in a dependency proceeding for “failure to protect” the children. By leaving the home and insisting on provisions for the child’s protection, the victim risks losing custody in family court. It has been estimated that, nationally, approximately 70 percent of contested custody cases that involve a history of domestic violence result in a favorable custody award to the abuser.¹⁸³ There is a clash between the statutory emphasis on encouraging the child’s relationship with both parents by rewarding the parent who appears to be facilitating a relationship with the other parent, and the

¹⁸⁰ AMERICAN PSYCHOLOGICAL ASS’N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 13-14 (1996); *see also*, ABA CENTER ON CHILDREN & THE LAW, A JUDGE’S GUIDE: MAKING CHILD CENTERED DECISIONS IN CUSTODY CASES 116 (2008).

¹⁸¹ CLARE DALTON, ET AL., NCJFCJ & THE STATE JUSTICE INST., NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE 9-11, 16-19 (2004), *available at* <http://www.ncjfcj.org/resource-library/publications/navigating-custody-and-visitation>.

¹⁸² NAT’L JUDICIAL INST. ON DOMESTIC VIOLENCE, NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & FAMILY VIOLENCE PREVENTION FUND, ENHANCING SKILLS IN DOMESTIC VIOLENCE CASES 4-6 (1999).

¹⁸³ AM. JUDGES ASSOC., DOMESTIC VIOLENCE & THE COURTROOM: UNDERSTANDING THE PROBLEM...KNOWING THE VICTIM, *available at* <http://aja.ncsc.dni.us/domviol/page5.html>.

domestic violence law and policy that support parents who insist on proper protection and the separation of the abusive parent and child. The American Psychological Association summarizes the problem:

Child custody and visitation disputes appear to occur more frequently where there is a history of domestic violence. Family courts often do not consider the history of violence between parents in making custody and visitation decisions. In this context, the non-violent parent may be at a disadvantage, and *behavior that would seem reasonable as a protection from abuse may be misinterpreted as a sign of instability.*¹⁸⁴

Laws in some jurisdictions favored the so-called “friendly parent” who appeared to be willing to facilitate contact with the other parent, giving more weight to factors that considered a parent’s willingness to cooperate with one another over considerations of abuse and the protective efforts of one parent.¹⁸⁵ As a result, courts often awarded custody to batterers because it misinterpreted efforts of a protective parent to keep a child safe as efforts to thwart the child’s relationship with the abusive parent.¹⁸⁶

Significant changes were made to Pennsylvania’s custody law in January 2011 that address the impossible dilemma that victims of abuse face when attempting to safeguard their child. The changes require courts to view safety as the paramount concern in every child custody case.¹⁸⁷ Courts are now required to give weighted consideration to factors that involve a child’s safety, and are specifically prohibited from considering a protective parent’s reasonable efforts to keep a child safe against the protective parent.¹⁸⁸ Courts must also consider the past and present abuse of a party or member of the party’s household, as well as which party can provide the child adequate safeguards.

When assigning weight to factors involving child safety, courts should remember that safety of the child often equates to safety of an abused party. Men who abuse their partners often abuse their children. Researchers say children are at dramatically increased risk of physical and sexual abuse from men who batter their intimate partners.¹⁸⁹

¹⁸⁴ AMERICAN PSYCHOLOGICAL ASS’N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 100 (1996).

¹⁸⁵ See Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 137 (2002); Jeffrey L. Edelson, *The Overlap Between Child Maltreatment and Woman Abuse* (1999), available at <https://vawnet.org/material/overlap-between-child-maltreatment-and-woman-abuse>; Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 113 (1996); Joan Zorza, “Friendly Parent” Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921 (1992); Kim Susser, *Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children*, 27 FORDHAM URB. L.J. 875 (2000); Stephen E. Doyne et al., *Custody Disputes Involving Dispute Violence: Making Children’s Needs a Priority*, JUV. & FAM. CT. J. 1 (1999); Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court*, 37 FAM. & CONCILIATION CTS. REV. 273 (1999).

¹⁸⁶ Lundy Bancroft and Jay G. Silverman, *Assessing Risk to Children from Batterers* 3 (2002); Jeffrey L. Edelson, *The Overlap Between Child Maltreatment and Woman Abuse* 7 (1999).

¹⁸⁷ 23 PA. C.S. § 5328(a) (requiring the court to give “weighted consideration to those factors which affect the safety of the child.”).

¹⁸⁸ 23 PA. C.S. § 5328(a)(2), (8).

¹⁸⁹ Lundy Bancroft and Jay G. Silverman, *Assessing Risk to Children from Batterers* 3 (2002).

Domestic Violence Cases are Not “High Conflict”

Sometimes courts and court personnel confuse domestic violence with so-called ‘high conflict divorce.’ They conclude that the abused party/protective parent is acting in a retaliatory manner toward the abusive parent, and punish the protective parent. As one writer observed:

Mediators, guardians ad litem, custody evaluators, and judges confusing abuse with conflict may also conclude that parents who oppose shared parenting are acting vindictively and subordinating the interests of their children to their own rather than expressing their legitimate anxieties about their own and their children’s ongoing safety.¹⁹⁰

But it is important to distinguish between high conflict custody cases and custody cases involving domestic violence. The National Council of Juvenile and Family Court Judges warn: “Abuse cases may have high-conflict characteristics, but they require a different set of considerations in order to promote safety for the at-risk parent and child.”¹⁹¹ High conflict implies that the parties are on equal footing, and are lashing out at the other parent. But in cases involving domestic violence, the parties are not on equal footing: one party is exerting or attempting to exert control over the other party.

The law specifically provides: “A party’s effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.”¹⁹²

Child Abuse Allegations

Allegations of child physical and sexual abuse also arise in the context of child custody litigation where domestic violence is present. Multiple studies indicate that children are at dramatically increased risk of physical and sexual abuse from men who batter their intimate partners.¹⁹³ However, when child physical or sexual abuse allegations are raised in the context of a custody case, courts will sometimes penalize the parent who makes the allegations of abuse and award custody to the abusive parent.¹⁹⁴

Reliability of abuse allegations

These surprising outcomes can be attributed to two developments. First, there is the often held – but absolutely incorrect – belief that a sexual abuse allegation made in the context of a divorce or custody case is likely to be false. The American Psychological Association’s Family Violence Report explains that reports of child physical and sexual abuse are commonly discounted when made during a custody dispute, but that to the contrary, “research shows that such charges are as reliable during custody disputes as at other times.”¹⁹⁵

¹⁹⁰ Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court*, 37 FAM. & CONCILIATION CTS. REV. 277 (1999).

¹⁹¹ NAT’L COUNCIL OF JUVENILE & FAM. CT. JUDGES, A JUDICIAL GUIDE TO SAFETY IN CUSTODY CASES § 2.5 (2008); see also Susan Carbon et al., *High Conflict Divorce, Violence & Abuse: Implications for Custody and Visitation Decisions*, 2003 JUV. FAM. CT. J. 11 (2003).

¹⁹² 23 PA. C.S. § 5328(a)(13).

¹⁹³ Lundy Bancroft and Jay G. Silverman, *Assessing Risk to Children from Batterers* 3 (2002).

¹⁹⁴ See DENNIS SACCUZZO ET AL., MANDATORY CUSTODY MEDIATION: EMPIRICAL EVIDENCE OF INCREASED RISK FOR DOMESTIC VIOLENCE VICTIMS AND THEIR CHILDREN (April 2003), *supra* note 168 (regarding California custody officers and the risks of raising domestic violence allegations in custody); see also, Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court*, 37 FAM. & CONCILIATION CTS. REV. 277 (1999).

¹⁹⁵ AMERICAN PSYCHOLOGICAL ASS’N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 101 (1996).

Researchers and other experts with the American Psychological Association report that false allegations of abuse are not more likely to arise in custody cases, yet court personnel sometimes assume abuse allegations that are raised in the context of a custody case are false. According to one treatise on child sexual abuse:

We must guard against our own unconscious motives for participating in this bias. We must recognize that it is much easier and more in accordance with our images of the world to regard a mother as crazy or hysterical than to recognize an otherwise seemingly rational and caring father as capable of the behaviors described. Beyond that, such a view may serve to reinforce our own denial of what we, like most people, would rather not see.¹⁹⁶

Parental Alienation Syndrome (PAS) is discredited

The second factor responsible for the startling outcome of abusers winning custody cases is that courts are giving deference to a dangerous, discredited theory known as “Parental Alienation Syndrome” (PAS). This nonexistent, discredited syndrome provides that when children display fear of one parent, report abuse by that parent, and exhibit symptoms of trauma, the real culprit is the other parent, who “programmed” or “brainwashed” the child into acting in this fashion.

PAS was discussed and popularized by Richard Gardner in the 1980s and ’90s. But the theory is not recognized by the American Psychological Association and has been extensively criticized by the legal community and mental health scholars for lacking scientific validity and reliability.¹⁹⁷

Domestic violence victims, often for safety purposes, actively attempt to minimize contact with the abuser. To punish them for doing so by giving favorable custody treatment to the abuser is counterproductive and can be dangerous.

The Diagnostic and Statistical Manual of Mental Disorders (DSM-5), or in any earlier version, also does not recognize PAS. Child psychologists and child psychiatrists routinely use the DSM-5 in clinical practice. Including only disorders that have been subjected to extensive peer review, the introduction to the Fourth Edition states that “the utility and credibility of DSM-IV requires that it focus on clinical, research, and educational purposes and be supported by an extensive empirical foundation.”¹⁹⁸ Despite discovering the “syndrome” in 1985, Gardner never submitted PAS for inclusion.

Gardner’s recommended response to PAS was for the court to award primary custody to the PAS “victim” and severely limit the custodial rights of the parent who allegedly brainwashed the child into wanting no interaction with that parent.

Clearly, a parent who employs this theory seeks to divert the focus of judicial inquiry away from misbehavior that can destroy a child’s affection for that parent, e.g., violence, threats, nonsupport, and manipulation.

¹⁹⁶ KEE MACFARLANE & JILL WATERMAN, SEXUAL ABUSE OF YOUNG CHILDREN 149 (1986).

¹⁹⁷ See, e.g., Am. Psych. Ass’n, Press Release, Statement on Parental Alienation Syndrome (2008), available at <http://www.apa.org/news/press/releases/2008/01/pas-syndrome.aspx> (while not taking any official position, the APA released a press statement explaining that “[a]n APA 1996 Presidential Task Force on Violence and the Family noted the lack of data to support so-called ‘parental alienation syndrome,’ and raised concern about the term’s use.”); J.S. Meier, A Historical Perspective on Parental Alienation Syndrome and Parent Alienation, 136 J. CHILD CUSTODY 232 (2009).

¹⁹⁸ AM. PSYCHIATRIC ASS’N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV (4th ed., 1994).

Instead, a claim of PAS blames the nonviolent parent for allegedly disparaging the violent parent to the children, thus causing the child's hostility toward the other parent.

Experts Oppose Use of PAS

The American Psychological Association's Family Violence Task Force denigrates (dismisses?) the use of PAS in custody cases: "Although there are no data to support the phenomenon called parental alienation syndrome, in which mothers are blamed for interfering with their children's attachment to their fathers, the term is still used by some evaluators and courts to discount children's fears in hostile and psychologically abusive situations."¹⁹⁹

The American Bar Association's Judges' Guide for custody cases also warns against the acceptance of PAS to explain a child's estrangement from or fear of a parent:

Related to the Friendly Parent Provision is the controversial issue of Parental Alienation Syndrome. Under this theory, a parent who "bad mouths" another parent in front of the child, or "brain washes" the child to turn against the other parent, is considered to be not acting in the child's best interests. This theory is highly controversial and has been rejected by many courts as bad science. In domestic violence cases, it can be dangerous. Domestic violence victims, often for the safety of the children and themselves, take active steps to minimize contact and relationships with the abuser. To punish them for doing so, by giving favorable custody or visitation treatment to the abuser, is counterproductive and can be dangerous.²⁰⁰

A nonexistent, discredited syndrome, PAS is not recognized in any edition of the Diagnostic and Statistical Manual of Mental Disorders routinely used by psychologists.

In 1998, when Pennsylvania's Supreme Court adopted the Pennsylvania Rule of Evidence addressing expert testimony, it reiterated its desire to use the Frye standard for determining admissibility of proffered scientific evidence. The Frye standard, first announced in **Frye v. United States**, requires scientific evidence to have "general acceptance" in the relevant scientific community.²⁰¹

While the federal courts have since adopted a new standard,²⁰² the Pennsylvania Supreme Court continues to follow the rule articulated in Frye.²⁰³ Although there are currently no appellate cases applying the Frye standard to PAS, it would appear that experts testifying in a child custody proceeding cannot draw their conclusions from PAS because it is not accepted in the scientific community.²⁰⁴

¹⁹⁹ AMERICAN PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 40 (1996).

²⁰⁰ ABA CENTER ON CHILDREN & THE LAW, A JUDGE'S GUIDE: MAKING CHILD CENTERED DECISIONS IN CUSTODY CASES 116-17 (2008).

²⁰¹ Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

²⁰² See Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).

²⁰³ Grady v. Frito-Lay, 839 A.2d 1038 (Pa. 2003); see also PA. R. EVID. 702, cmt.

²⁰⁴ The NCJFCJ also recommends that testimony regarding PAS should be ruled inadmissible under the Frye standard. See CLARE DALTON, ET AL., NCJFCJ & THE STATE JUSTICE INST., NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE'S GUIDE 19 (2004).

According to the National Council of Juvenile and Family Court Judges (NCJFCJ), “Any testimony that a party to a custody case suffers from the syndrome or ‘parental alienation’ should ... be ruled inadmissible and stricken from the evaluation report.”²⁰⁵

For more information about Frye and scientific evidence, please see Chapter II: Evidence.

Abusers Are Not Fit Custodians

According to the American Bar Association, an abuser’s conduct necessarily impairs his or her ability to parent:

First, the abuser has ignored the child’s interests by harming the child’s other parent. Second, the pattern of control and domination common to abusers often continues after physical separation of the abuser and victim. Third, abusers are highly likely to use children in their care, or attempt to gain custody of their children, as a means of controlling their former spouse or partner.²⁰⁶

The abusing parent’s need to control the victim overshadows his or her ability to provide security, serve as a role model, and protect the child from harm.²⁰⁷ An abusive parent’s behavior can hurt children in a variety of ways. Children may witness the abuser’s violent behavior and perceive it as normal and acceptable.²⁰⁸ They may learn gender roles and stereotypes based on dominance and subordination and incorporate these roles in their lives.²⁰⁹ Abusers may use children as pawns to continue the pattern of coercion and control.²¹⁰ The abuser may belittle the abused parent in front of the children.²¹¹ The abuser may direct violence toward the children, particularly after separation from the victim.²¹² The long-term trauma and anxiety associated with living with a violent family member can render children increasingly more susceptible to feelings of insecurity, self-loathing and isolation.²¹³

As stated earlier, there is also a high degree of congruence between partner abuse and child abuse. Moreover, many battering partners will begin to abuse the parties’ children following separation, when the other parent is not present and the abusing parent must assume greater child-rearing responsibilities, often for the first time.

Mutual Allegations of Abuse

Sometimes courts will hear mutual allegations of abuse in the context of a custody case. Rather than allowing the mutual abuse allegations to cancel each other out, courts should investigate further to discern whether a party acted in self-defense or to protect children. According to the American Law Institute, acting in reasonable self-defense or to protect another does not constitute domestic violence.²¹⁴

²⁰⁵ NAT’L COUNCIL OF JUVENILE & FAM. CT. JUDGES, A JUDICIAL GUIDE TO SAFETY IN CUSTODY CASES § 3.3 (2008) at 12.

²⁰⁶ ABA CENTER ON CHILDREN & THE LAW, A JUDGE’S GUIDE: MAKING CHILD CENTERED DECISIONS IN CUSTODY CASES (2008) at 115 (citing Howard Davidson, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, ABA REPORT TO THE PRESIDENT OF THE ABA 13 (1994)).

²⁰⁷ PETER JAFFE ET AL., CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 30-31 (2003).

²⁰⁸ *Id.* at 30.

²⁰⁹ Lundy Bancroft, *The Parenting of Men Who Batter*, 39 CT. REV. 44, 46 (2003).

²¹⁰ *Id.* at 47.

²¹¹ *Id.*

²¹² *Id.* at 45, 47.

²¹³ *Id.* at 46.

²¹⁴ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 258 (2002).

EMERGING PRACTICES – CONSIDERING SAFETY IN CUSTODY DECISIONS

Nearly every family law institute or judicial association encourages judges to seriously consider the effect of domestic violence on a family and enter orders for custody, partial custody, and legal custody accordingly.

The American Law Institute (ALI), in *Principles of the Law of Family Dissolution: Analysis and Recommendations*, observed the following about domestic violence in its section on parenting plan criteria:

The court is obligated to recognize all forms of domestic violence, and may not disregard evidence of it whatever its severity. It should take this evidence seriously, and not assume that most allegations of violence are exaggerated or unfounded. At the same time, the limits it imposes must be appropriate to the circumstances, taking into account the severity and frequency of the physical harm or threats. In ordering a measure designed to protect a child or a child's parent, ... courts should recognize that abusers often use access to the child as a way to continue abusive behavior against a parent. Protection of the safety and welfare of an abused parent is consistent with the primary objective of furthering the safety and welfare of the child.²¹⁵

Courts are required to include safety provisions in every order of custody where the child or an abused parent is at risk of future harm.²¹⁶ Inclusion of safety provisions is essential to protect against serious and severe abuse during custody exchanges and visits.

As reported by the American Bar Association's Commission on Domestic Violence:

Visitation orders that do not consider safety issues provide abusers with opportunities to continue control and abuse of the victim and children. An abuser may threaten or actually abduct children during visitation in order to force the victim to return to the relationship. An abuser may also harass a victim by constantly arguing about visitation issues such as the time and place of exchange, or manipulate the victim by being late or early for visitation exchanges. Visitation orders lacking specificity also provide abusers the opportunity to have continuing contact with the victim in court by re-litigating the terms of the order again and again.²¹⁷

Sometimes, supervised physical custody provided by a neutral third party enhances safety. The law provides that supervised physical custody must be provided by an agency or adult designated by the court or agreed upon by the parties.²¹⁸ The ABA recommends avoiding family member supervision, because it may place the family member at risk of violence or manipulation by the abuser.²¹⁹ In addition, family members are more likely to tolerate inappropriate conduct or violations of the order by the abuser.²²⁰

Judges who order supervised physical custody may find that some abusers do not visit at all after their efforts to gain access to their former partner using custody as a pretext have been thwarted.

²¹⁵ *Id.* at 258 (emphasis added).

²¹⁶ 23 PA. C.S. § 5323(e).

²¹⁷ ABA Comm'n on Domestic Violence, *Visitation and Domestic Violence Policy* OOA109A (2000).

²¹⁸ 23 PA. C.S. 5322(a).

²¹⁹ ABA COMM'N ON DOMESTIC VIOLENCE, *supra* note 217.

²²⁰ See *S.H. v. B.L.H.*, 572 A.2d 730 (Pa. Super. 1990) (affirming the trial court's modification of a custody order terminating a father's overnight visits and assigning a member of the mother's family and a daycare provider as supervisors for the father's limited, supervised visitation with the children. The court found that the father had sexually abused the parties' 5-year-old daughter during contact supervised by the father's family members).

See a Third-Party Affidavit of Acceptance and Accountability for Supervision, in Chapter IV: PFA and Custody, Appendix A.

EMERGING PRACTICES – SUPERVISED PHYSICAL CUSTODY

Custodial access may be denied when it is likely to endanger a child’s physical or emotional health. In Pennsylvania, a court can order that custodial access be denied when the court determines that it is in the best interest of the child.²²¹

In many instances, the court wants to address safety needs and to permit a potentially abusive parent to have access to the parties’ child. In these instances, it is best to limit the abuser’s award to supervised physical custody.

The National Council for Juvenile and Family Court Judges has an excellent resource for supervised child access and exchange. To access this information, go to: <https://safehavenonline.org>

There are two different types of supervised physical custody monitors: (1) supervised visitation centers, which may be made available by places of worship, community groups, or child protective services, and which may charge a fee, and (2) friends and family members.

Typically, neutral third-party supervisors are preferred, but are not always available.

The ABA recommends judges to consider the following when a family member or friend will be a supervisor:

1. Is the individual neutral?
 - Will the individual report adequately and honestly about the visiting parent’s behavior?
 - Is there animosity between the supervisor and visiting parent?
 - Is the supervisor afraid of the visiting parent?
2. Can the supervisor protect the child?
3. Is the individual adequately mature to supervise?
4. Will the supervisor be present during the entire visit?²²²
5. Is the supervisor available and willing to supervise?²²³

An individual acting as third-party supervisor should sign an affidavit specifying visitation terms and conditions.

²²¹ 23 PA. C.S. § 5328.

²²² See S.H. v. B.L.H., 572 A.2d 730 (Pa. Super. 1990).

²²³ ABA CENTER ON CHILDREN & THE LAW, A JUDGE’S GUIDE: MAKING CHILD CENTERED DECISIONS IN CUSTODY CASES 102-104 (2008).

If the third-party supervisor must be a friend or family member, the friend or family member should sign an affidavit that specifies the visitation terms and conditions and requires the affiant to notify the court if the third party can no longer act as supervisor.

For a sample Third Party Affidavit of Acceptance and Accountability for Supervision, please see Chapter IV: PFA and Custody, Appendix A.

APPENDECIES

A - SAMPLE CUSTODY/PARTIAL CUSTODY TERMS

SAMPLE CUSTODY/PARTIAL CUSTODY TERMS

CAPTION

AND NOW, this ____ day of _____, 20____, upon consideration of [the Protection From Abuse Petition] [the Petition For Special Relief] [the Complaint For Custody] filed by _____, and finding that [abuse/serious abuse] has been perpetrated by _____ against _____, the following order is entered:

1. Legal Custody.

_____ has primary legal custody OR _____ and _____ have shared legal custody; however, _____ has authority to decide routine matters, and must consult with _____ only with regard to unusual medical or education matters.

2. Primary Physical Custody.

_____ has primary physical custody.

3. Partial Physical Custody.

_____ has partial physical custody as set forth below:

OR

4. Supervised Physical Custody.

_____ has supervised physical custody to be supervised by _____, who has signed an affidavit agreeing to be supervisor and who will supervise all physical custodial time for _____ as set forth below:

- a. Physical custodial time shall occur at [specific location].
- b. Physical custodial time shall be from the hours of _____ to _____ on [specify day of week].
- c. Defendant must comply with the terms regarding arrival time/departure time and no alcohol or drugs provisions.

OR

5. Supervised Physical Custody Facility.

APPENDIX A

_____ has supervised physical custodial time in [secure visitation facility] as set forth below:

OR

6. Telephone Communications Only.

_____ has no personal visitation, but has telephone communications only as set forth below:

OR

7. Physical Custodial Time Suspended.

_____’s physical custodial rights with regard to [name(s) of child(ren)] are suspended until further order of court.

8. Custody Exchange Location.

Custody exchanges shall occur at [police station] [supervised physical custody location] [neutral public place, i.e., fast food restaurant, mall]. Defendant shall arrive fifteen (15) minutes prior to scheduled visitation, park in a prominent area, and enter the building. After exchange of child(ren) has occurred, Defendant must wait for fifteen (15) minutes after Plaintiff departs the area. Under no circumstance may Defendant follow Plaintiff.

9. Neutral Party At Exchange.

Each party may bring a neutral third person to the custody exchange location, if desired.

10. Third Party To Provide Transportation.

Pursuant to the Affidavit, [name of third-party supervisor] has agreed to [provide transportation to and from custody exchange location] [supervise all of Defendant’s visitation/partial custody/contact] with [name(s) of child(ren)].

11. Prohibition Against Abusive Third Person’s Presence.

Under no circumstance shall [name of other abusive party] be present during Defendant’s [partial custody/visitation] periods.

12. No Contact – Third Party For Cancellations.

- a. [If “No Contact” order is in place prohibiting Defendant from contacting Plaintiff]

If Defendant is unable to have [partial physical custody/ supervised physical custody] as scheduled, Defendant shall contact [name of third party] at least two (2) hours prior to scheduled time. If Defendant fails to appear for scheduled visit, the next visit is forfeited.

AND

- b. [If “No Contact” order is in place prohibiting Defendant from contacting Plaintiff]

If the children are unable to participate in [partial physical custody/supervised physical custody] with Defendant, Plaintiff shall contact [name of third party] at least two (2) hours prior to scheduled time, and provide to [name of third party] three potential make-up dates for [name of third party] to advise Defendant in order to permit Defendant to choose one make-up partial custody/visitation period.

13. No Removal

APPENDIX A

Unless prior written consent is given by Plaintiff, during Defendant's partial custody/supervised physical custody period with [name(s) of child(ren)] Defendant is prohibited from leaving [_____ County] OR [the Commonwealth of Pennsylvania].

14. Passports For Children.

Plaintiff is the only parent authorized to possess or maintain passport(s) for [name(s) of child(ren)].

15. Transportation Costs.

Each parent shall provide transportation to the custody exchange site, and absorb the cost of this transportation.

16. Batterer's Intervention and Drug and Alcohol Counseling Required.

Defendant must successfully complete [name of Batterer's Intervention Program] and [name of Drug and Alcohol Treatment Program] in order to seek any additional visitation/partial custody.

17. Previous Order Superseded.

The [custody order] [written agreement] between the parties dated _____ is specifically superseded by this order.

18. [If appropriate, insert usual custody/partial custody times and language:]

- Alternating weekends – times to start, end
- One night per week (number of hours or overnight)
- Alternating holidays – Christmas in two parts, alternating
- Mother's Day with Mom, Father's Day with Dad
- Mom's birthday with Mom, Dad's birthday with Dad
- Child's birthday – special telephone contact or visit depending on situation

BY THE COURT,

APPENDIX A

_____, J.

B - SAMPLE CRIMINAL RECORD / ABUSE HISTORY VERIFICATION

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA

FAMILY COURT - CIVIL DIVISION

_____,
 Plaintiff : No.
 vs. :
 _____, : CIVIL ACTION – CUSTODY
 Defendant :

SAMPLE CRIMINAL RECORD / ABUSE HISTORY VERIFICATION

I, _____, hereby swear or affirm, subject to penalties of law including 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, that:

1. Unless indicated by my checking the box next to a crime below, neither I nor any other member of my household has been convicted or pleaded guilty or pleaded no contest or was adjudicated delinquent where the record is publicly available pursuant to the Juvenile Act, 42 Pa.C.S. §6307, to any of the following crimes in Pennsylvania or a substantially equivalent crime in any other jurisdiction, including pending charges:

Check all that apply	Crime (or related crime)	Self	Other household member	Date of conviction, guilty plea, no contest plea or pending charges	Sentence
<input type="checkbox"/>	18 Pa.C.S. Ch. 25 (relating to homicide)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §2702 (relating to aggravated assault)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §2706 (relating to terroristic threats)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §2709.1 (relating to stalking)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §2901 (relating to kidnapping)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §2902 (relating to unlawful restraint)	<input type="checkbox"/>	<input type="checkbox"/>		

APPENDIX B

Check all that apply	Crime (or related crime)	Self	Other house-hold member	Date of conviction, guilty plea, no contest plea or pending charges	Sentence
<input type="checkbox"/>	18 Pa.C.S. §2903 (relating to false imprisonment)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §2910 (relating to luring a child into a motor vehicle or structure)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3121 (relating to rape)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3122.1 (relating to statutory sexual assault)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3123 (relating to involuntary deviate sexual intercourse)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3124.1 (relating to sexual assault)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3125 (relating to aggravated indecent assault)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3126 (relating to indecent assault)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3127 (relating to indecent exposure)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3129 (relating to sexual intercourse with animal)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3130 (relating to conduct relating to sex offenders)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §3301 (relating to arson and related offenses)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §4302 (relating to incest)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §4303 (relating to concealing death of child)	<input type="checkbox"/>	<input type="checkbox"/>		

APPENDIX B

Check all that apply	Crime (or related crime)	Self	Other household member	Date of conviction, guilty plea, no contest plea or pending charges	Sentence
<input type="checkbox"/>	18 Pa.C.S. §4304 (relating to endangering welfare of children)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §4305 (relating to dealing in infant children)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §5902(b) (relating to prostitution and related offenses)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §5903 (c) or (d) (relating to obscene and other sexual materials and performances)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §6301 (relating to corruption of minors)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §6312 (relating to sexual abuse of children)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §6318 (relating to unlawful contact with minor)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	18 Pa.C.S. §6320 (relating to sexual exploitation of children)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	23 Pa.C.S. §6114 (relating to contempt for violation of protection order or agreement)	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	Driving under the influence of drugs or alcohol	<input type="checkbox"/>	<input type="checkbox"/>		
<input type="checkbox"/>	Manufacture, sale, delivery, holding, offering for sale or possession of any controlled substance or other drug or device	<input type="checkbox"/>	<input type="checkbox"/>		

2. Unless indicated by my checking the box next to a crime below, neither I nor any other member of my household has a history of violent or abusive conduct including the following:

APPENDIX B

Check all that apply	Crime	Self	Other household member	Date
<input type="checkbox"/>	A finding of abuse by a Children & Youth Agency or similar agency in Pennsylvania or similar statute in another jurisdiction	<input type="checkbox"/>	<input type="checkbox"/>	
<input type="checkbox"/>	Abusive conduct as defined under the Protection From Abuse Act (PFA) in Pennsylvania or similar statute in another jurisdiction	<input type="checkbox"/>	<input type="checkbox"/>	
<input type="checkbox"/>	Other:	<input type="checkbox"/>	<input type="checkbox"/>	

3. Please list any evaluation, counseling or other treatment received following conviction or finding of abuse:

4. If any conviction above applies to a household member, not a party, state that person's name, date of birth and relationship to the child.

5. If you are aware that the other party or members of the other party's household have a criminal/abuse history, please explain:

I verify that the information above is true and correct to the best of my knowledge, information or belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signature

Printed Name

C - SAMPLE NOTICE OF RELOCATION

Download a brochure for parties subject to custody orders who wish to move with their children about notice and hearing procedures at

CAPTION

SAMPLE NOTICE OF RELOCATION

You, _____, are hereby notified that _____ [party proposing relocation] proposes to relocate with the following children _____

_____.

To object to the proposed relocation, you must complete the attached counter-affidavit and serve it on the other party by certified mail, return receipt requested, addressee only, or pursuant to Pa.R.C.P. No. 1930.4 within 30 days of receipt of this notice. If there is an existing child custody case, you also must file the counter-affidavit with the court. If you do not object to the proposed relocation within 30 days, the party proposing relocation has the right to relocate and may petition the court to approve the proposed relocation and modify any effective custody orders or agreements. FAILURE TO OBJECT WITHIN 30 DAYS WILL PREVENT YOU FROM OBJECTING TO THE RELOCATION ABSENT EXIGENT CIRCUMSTANCES.

Address of proposed new residence:

_____.

☐ Check here if the address is confidential pursuant to 23 Pa.C.S. §5336(b).

Mailing address of intended new residence (if not the same as above)

_____.

☐ Check here if the address is confidential pursuant to 23 Pa.C.S. §5336(b).

Names and ages of the individuals in the new residence, including individuals who intend to live at the new residence:

Name	Age
------	-----

☐ Check here if the address is confidential pursuant to 23 Pa.C.S. §5336(b) or (c).

Home telephone number of new residence: _____

☐ Check here if the address is confidential pursuant to 23 Pa.C.S. §5336(b) or (c).

Name of the new school district and school the child(ren) will attend after relocation:

☐ Check here if the address is confidential pursuant to 23 Pa.C.S. §5336(b) or (c).

Date of the proposed relocation: _____

☐ Check here if the address is confidential pursuant to 23 Pa.C.S. §5336(b) or (c).

Reasons for proposed relocation:

☐ Check here if the address is confidential pursuant to 23 Pa.C.S. §5336(b) or (c).

Proposed modification of custody schedule following relocation:

Other information:

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

CHAPTER VIII: DOMESTIC VIOLENCE CRIMES

TABLE OF CONTENTS

CHAPTER GOALS.....	4
PENNSYLVANIA DOES NOT HAVE A DESIGNATED DOMESTIC VIOLENCE CRIME	4
CRIMES AGAINST INDIVIDUALS	4
Simple Assault.....	4
Attempt to inflict injury sufficient	5
Physical menace – pointing a gun.....	5
Aggravated Assault.....	6
Attempted aggravated assault must include intent	6
Factors for evaluating intent.....	6
Intent shown, but no injury	7
Infliction of serious bodily injury	7
Recklessly Endangering.....	7
Striking child with shoe, cold water immersion	8
Terroristic Threats	8
Kidnapping.....	9
Substantial distance is one that isolates victim	10
Parent may be convicted of kidnapping	11
Harassment.....	11
Stalking.....	12
Strangulation	13
SEXUAL CRIMES AND RELATED OFFENSES	15
Civil Relief in Sexual Assault Cases.....	15
Protection From Abuse Orders	15
Protection From Sexual Violence or Intimidation Orders	15
Rape	16
Marital rape	16
Intercourse by forcible compulsion	16
Defendant’s previous brutalization of victim relevant in rape case.....	17
Rape statute is gender-neutral	17
Statutory rape	18
Statutory sexual assault	18

Involuntary Deviate Sexual Intercourse	18
Aggravated Indecent Assault.....	20
Digital penetration	20
Allegations of taint in sexual assault claims by children.....	20
CRIMES INVOLVING PROPERTY.....	21
Arson	21
Burglary	22
Sufficient evidence of felonious intent.....	23
Entering own house in violation of PFA.....	23
Criminal Trespass	24
Criminal Mischief.....	25
Cruelty to Animals	25
CRIMES AGAINST THE FAMILY	26
Endangering Welfare of Children.....	26
Interference With Custody of Children	27
DEFENSES RAISED IN DOMESTIC VIOLENCE CASES	28
Self-Defense	28
Voluntary Intoxication	28
Mutual Battering	28
Corporal Punishment.....	29
MISCELLANEOUS PROVISIONS	29
Firearms Violation	29
Bail	30
Pennsylvania Constitution	30
Pennsylvania Crimes Code	30
Pennsylvania Rules of Criminal Procedure	31
Criminal Protective Orders.....	31
Crime Victims Act	31
Victim Impact Statements.....	32

OTHER RELEVANT INFORMATION	33
Effectiveness of Criminal Justice System Response.....	33
Decrease in Domestic Violence Homicides	33
EMERGING PRACTICES – PROMOTING SAFETY IN BAIL DETERMINATIONS	34
EMERGING PRACTICES – PROMOTING SAFETY BY CAREFULLY SCRUTINIZING ACCELERATED REHABILITATIVE DISPOSITION REQUESTS	35
Why Victims Sometimes Want Accelerated Rehabilitative Disposition	36
Why Victims May Oppose Accelerated Rehabilitative Disposition.....	36
EMERGING PRACTICES – PROMOTING SAFETY IN SENTENCING DECISIONS	36
Pre-Sentencing Reports Provide Valuable Context for Sentencing Decisions.....	36
Restitution Aids Victim Recovery.....	37
Special Conditions Protect and Rehabilitate.....	37
Sentencing Recommendations	38
Additional Penalties as Warranted	39
EMERGING PRACTICES – PROMOTING SAFETY USING VICTIM-WITNESS PROGRAMS	39
EMERGING PRACTICES – PROMOTING SAFETY BY PROTECTING VICTIM CONFIDENTIALITY	40
Domestic Violence Advocate/ Counselor Confidentiality	40
Absolute privilege extends to records and oral testimony.....	41
Sexual Assault Counselor Confidentiality	41
EMERGING PRACTICES – PROMOTING JUSTICE BY RECOGNIZING VICTIM RIGHTS	42

CHAPTER GOALS

The purpose of this chapter is to provide an overview of crimes that involve domestic violence. In Pennsylvania, there is no specifically designated domestic violence crime; rather, domestic violence incidents are addressed separately under Pennsylvania's Crimes Code in categories such as crimes against individuals, sexual crimes, property crimes, crimes against the family, and miscellaneous crimes. Cases interpreting the statutes and procedural requirements are discussed, and practical tips for judges handling these issues are provided.

PENNSYLVANIA DOES NOT HAVE A DESIGNATED DOMESTIC VIOLENCE CRIME

The Commonwealth of Pennsylvania does not have a separate crime for domestic violence. Pennsylvania's Crimes Code, however, encompasses almost every act of domestic violence, and affords trial courts the opportunity to address a broad range of domestic violence situations without diminishing the severity of the offense.

CRIMES AGAINST INDIVIDUALS

Simple Assault

Typically, simple assault charges are filed when bodily injury is inflicted on a domestic violence victim. However, bodily injury is not a required prerequisite for filing charges in all subsections of the statute. The law penalizes a perpetrator's attempts to place victims in fear of imminent serious bodily injury, in addition to attempts to cause bodily injury.

Simple assault

(a) Offense defined.— A person is guilty of assault if he:¹

- 1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
- 2) negligently causes bodily injury to another with a deadly weapon;
- 3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
- 4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.

(b) Grading.— Simple assault is a misdemeanor of the second degree unless committed:

- 1) in a fight or scuffle entered into by mutual consent, in which case it is a misdemeanor of the third degree; or

¹ (a) Offense defined. — Except as provided under section 2702 (relating to aggravated assault), a person is guilty of assault . . . 18 PA. C.S. § 2701.

- 2) against a child under 12 years of age by an adult 18 years of age or older, in which case it is a misdemeanor of the first degree.²

Bodily injury is defined as the "impairment of physical condition or substantial pain."³

Attempt to inflict injury sufficient

Normally, to obtain a conviction for simple assault under section (a)(1), the Commonwealth is required to demonstrate beyond a reasonable doubt that defendant intentionally inflicted "bodily injury" upon the victim.⁴ However, bodily injury need not be established if the charged offense involves an attempt. The Superior Court in **Commonwealth v. Klein** held that an attempt to inflict bodily injury is sufficient to support a conviction.⁵ The Klein court noted, "Intent may be shown by circumstances which reasonably suggest that a defendant intended to cause bodily injury."⁶ In **Commonwealth v. Matthews**, the defendant shoved a loaded firearm into the throat of an unsuspecting motorist and repeatedly threatened to kill him.⁷ While the defendant did no actual physical harm to the victim, the Superior Court ruled that the defendant possessed the intent to inflict serious bodily injury.⁸

Physical menace – pointing a gun

One of the most common forms of assault charges filed in domestic violence situations involves simple assault by physical menace under section (a)(3). The elements that must be proven to convict are as follows: (1) intentionally placing another in fear of imminent serious bodily injury, (2) through the use of menacing or frightening activity.⁹

Pointing a gun at another person can constitute simple assault as an attempt by physical menace to put another in fear of imminent serious bodily injury.

In **Commonwealth v. Reynolds**, the defendant pointed a gun at the victim.¹⁰ The court found that the act of pointing a gun at another person can constitute simple assault as an attempt by physical menace to put another in fear of imminent serious bodily injury.¹¹

Physical menace – circumstantial evidence

² *Id.*

³ See 18 PA. C.S. § 2301.

⁴ [Commw. v. Torres, 766 A.2d 342 \(Pa. Super. 2001\).](#)

⁵ [Commw. v. Klein, 795 A.2d 424, 428 \(Pa. Super. 2002\)](#) (citing *Commw. v. Richardson*, 636 A.2d 1195, 1196 (Pa. Super. 1994)).

⁶ *Id.*; see also *Commw. v. Marti*, 779 A.2d 1177 (Pa. Super. 2001); *Commw. v. Polston*, 616 A.2d 669 (Pa. Super. 1992).

⁷ [Commw. v. Matthews, 870 A.2d 924 \(Pa. Super. 2005\).](#)

⁸ *Id.*

⁹ [Commw. v. Reynolds, 835 A.2d 720 \(Pa. Super. 2003\).](#)

¹⁰ *Id.*

¹¹ *Reynolds*, 835 A. 2d at 726 (citing *In re Maloney*, 636 A.2d 671, 674 (Pa. Super. 1994) (concluding that simple assault under section 2701(a)(3) was established where a driver pointed a gun at another driver and said, "Get the f*** out of here.")).

In *Commonwealth v. Hudgens*, the wielding of a sword coupled with threatening behavior constituted assault by physical menace.¹² In cases involving physical menace, a perpetrator's intent can be proven by circumstantial evidence and may be inferred from his conduct under the attendant circumstances.¹³

Aggravated Assault

Aggravated assault charges are normally filed in response to an increased level of physical violence or threat of violence above that which is criminalized under the simple assault statute. Aggravated assault also includes, in large measure, acts normally prohibited under simple assault, but committed against a protected class of individuals (e.g., law enforcement personnel, caseworkers, teachers) in the performance of their duties. This section will focus only on those portions of the aggravated assault statute that routinely arise in domestic violence situations.

Aggravated assault (selected provisions)

- (a) Offense defined.— A person is guilty of aggravated assault if he:
 - 1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
 - 2) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;
- (b) Grading.— Aggravated assault under subsection (a)(1), (2) and (9) is a felony of the first degree. Aggravated assault under subsection (a)(3), (4), (5), (6), (7) and (8) is a felony of the second degree.¹⁴

Attempted aggravated assault must include intent

The Superior Court decision in *Commonwealth v. Gruff* provides a thorough survey of the parameters of aggravated assault and the issues involved with proving its elements.¹⁵ The court explained that, for aggravated assault purposes, an "attempt" is found where the accused, with the required specific intent, acts in a manner which constitutes a substantial step toward perpetrating a serious bodily injury upon another.¹⁶ The court emphasized that the attempt must be accompanied by the requisite intent.

Factors for evaluating intent

Under section (a)(1) of the aggravated assault statute, the intent underlying the attempt must be to cause serious bodily injury to another. In *Commonwealth v. Alexander*, the Pennsylvania Supreme Court made clear that an attempt under section (a)(1) requires a showing of some act, albeit not one causing serious bodily injury, but one that is accompanied by an intent to inflict serious bodily injury.¹⁷ Where the actual injury inflicted does

¹² [Commw. v. Hudgens, 582 A.2d 1352 \(Pa. Super. 1990\).](#)

¹³ See *Commw. v. Little*, 614 A.2d 1146 (Pa. Super. 1992).

¹⁴ 18 Pa. C.S. § 2702.

¹⁵ [Commw. v. Gruff, 822 A.2d 773 \(Pa. Super. 2003\).](#)

¹⁶ *Gruff*, 822 A.2d at 776 (citing *Commw. v. Galindes*, 786 A.2d 1004, 1009 (Pa. Super. 2001)).

¹⁷ [Commw. v. Alexander, 383 A.2d 887, 889 \(Pa. 1978\).](#)

not constitute serious bodily injury, the charge of aggravated assault can be supported only if the actual injury was accompanied by the intent to inflict serious bodily injury.¹⁸

In *Alexander*, the defendant punched the victim once in the head and then walked away. No serious bodily injury occurred. The court concluded that the intent to cause serious bodily injury was not inherent in that act alone and listed several factors to consider in determining whether the intent to inflict serious bodily injury was present. Those factors included evidence of a significant difference in size or strength with the victim, the defendant's use of a weapon or implement to aid his attack, and his statements before, during or after the attack that might indicate his intent to inflict further injury on the victim.¹⁹

Intent shown, but no injury

Aggravated assault under section (a)(1) can be found merely with proof of intent without serious bodily injury. In ***Commonwealth v. Lopez***, the defendant fired eight bullets at the front door of his girlfriend's empty residence.²⁰ The Court held that a prima facie case of aggravated assault could be established since the accused possessed the requisite intent to cause serious bodily injury. The law simply requires distinct evidence establishing the perpetrator's intent to cause serious bodily before a conviction for attempt will be sustained. Even in the case where no injury is inflicted, an attempt under (a)(1) can be established if the requisite intent is present.²¹

Similarly, attempts to cause only bodily injury, but done using a deadly weapon, will sustain a conviction under section (a)(4) of the statute.²² Likewise, a situation where the injury incurred only meets the criteria for bodily injury, but where the act of causing the injury is accompanied by a deadly weapon, is proscribed under this section.

Infliction of serious bodily injury

Section (a)(1) also includes the actual infliction of serious bodily injury on a victim, be it intentionally, knowingly, or by recklessness that involves circumstances manifesting extreme indifference to the value of human life. In ***Commonwealth v. Nichols***, the court sustained the aggravated assault conviction where, after being hit by the defendant with a bat, the victim's jaw was wired shut for six weeks.²³ The court also found that the aggravated assault conviction could be sustained because the defendant acted recklessly under circumstances manifesting extreme indifference to the value of human life when the defendant hit the victim in the jaw with a baseball bat.²⁴

Recklessly Endangering

Reckless endangering is a lesser-included offense of aggravated assault that proscribes reckless conduct that creates a danger of death or serious bodily injury to others. It is often charged in conjunction with aggravated assault but stands apart because neither the infliction of injuries nor the attempt to do so is necessary to support a conviction. Reckless conduct that creates the risk of death or serious bodily injury is the focus of the statute.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ [*Commw. v. Lopez*, 654 A.2d 1150 \(Pa. Super. 1995\).](#)

²¹ *Id.* at 1154; see also [*Commw. v. Rosado*, 684 A.2d 605, 608 \(Pa. Super. 1996\).](#)

²² *Lopez*, 654 A.2d at 1153-54.

²³ [*Commw. v. Nichols*, 692 A.2d 181 \(Pa. Super. 1997\).](#)

²⁴ *Id.* at 185.

Recklessly endangering another person.—

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.²⁵

In order to establish the crime of recklessly endangering another person, prosecutors must establish: (1) a mens rea of recklessness, (2) an actus reus, (3) causation, and (4) the achievement of a particular result, namely danger to another person of death or serious bodily injury.²⁶ The mens rea for recklessly endangering another person is a conscious disregard of a known risk of death or great bodily harm to another person.²⁷

Striking child with shoe, cold water immersion

Acts of commission or omission by parents toward their children may create substantial risk of death or great bodily harm so as to allow the conviction of parents for recklessly endangering another person. In

Commonwealth v. Rochon, the court upheld a reckless endangering conviction where the defendant struck her 17-month-old son with a shoe after he soiled his diaper and then immersed him in water sufficiently cold to cause hypothermia.²⁸ The Rochon court found that the defendant's conduct recklessly endangered her son's life.²⁹ As noted earlier, the linchpin in recklessly endangering is reckless conduct that creates a risk of death or great bodily harm.

Terroristic Threats

The terroristic threats statute seeks to prevent harm created by the psychological distress that follows from an invasion of another's sense of personal security.³⁰ The Pennsylvania terroristic threats statute provides as follows:³¹

"Terroristic threats" must somehow make their way to the victim; direct communication between defendant and victim is not required.

Terroristic threats

- (a) Offense defined.— A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:
- 1) commit any crime of violence with intent to terrorize another;
 - 2) cause evacuation of a building, place of assembly or facility of public transportation; or
 - 3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

²⁵ 18 PA. C.S. § 2705.

²⁶ *Reynolds*, 835 A.2d at 727.

²⁷ *Commw. v. Hopkins*, 747 A.2d 910, 916 (Pa. Super. 2000).

²⁸ *Commw. v. Rochon*, 581 A.2d 239 (Pa. Super. 1990).

²⁹ *Id.*

³⁰ *Reynolds*, 835 A.2d at 720.

³¹ 18 PA. C.S. § 2706 (emphasis added).

- (b) Restitution.— A person convicted of violating this section shall, in addition to any other sentence imposed or restitution ordered under 42 Pa. C.S. § 9721(c) (relating to sentencing generally), be sentenced to pay restitution in an amount equal to the cost of the evacuation, including, but not limited to, fire and police response; emergency medical service or emergency preparedness response; and transportation of an individual from the building, place of assembly or facility.
- (c) Preservation of private remedies.— No judgment or order of restitution shall debar a person, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment.
- (d) Grading.— An offense under subsection (a) constitutes a misdemeanor of the first degree unless the threat causes the occupants of the building, place of assembly or facility of public transportation to be diverted from their normal or customary operations, in which case the offense constitutes a felony of the third degree.
- (e) Definition.— As used in this section, the term "communicates" means, conveys in person or by written or electronic means, including telephone, electronic mail, Internet, facsimile, telex and similar transmissions.

When threats are made with the intent to terrorize the victim, the threat becomes criminal in nature.³² The fact that anger is involved is no defense. However, the terroristic threats statute is not meant to penalize mere spur-of-the-moment threats that result from anger.³³

To establish the offense of terroristic threats, the Commonwealth must prove that (1) the defendant made a threat to commit a crime of violence, and (2) the threat was communicated with the intent to terrorize another or with reckless disregard for the risk of causing terror.³⁴ Neither the ability to carry out the threat, nor a belief by the person threatened that it will be carried out is an essential element of the crime.³⁵ Further, direct communication of the threat between the defendant and the victim is not a required element of the crime.³⁶ All that is necessary is that the threat somehow makes its way to the victim.

Kidnapping

The Pennsylvania kidnapping statute embodies the traditional notion of kidnapping (snatching a person by force) as well as a less recognized alternative – confinement by force, threat, or deception. In domestic violence-related kidnapping cases, perpetrators may use the kidnapping of children or intimate partners to thwart efforts by the partner to withdraw from the relationship. The statute reads as follows:³⁷

Kidnapping (selected provisions)

³² *Id.*

³³ *Reynolds*, 835 A.2d at 730.

³⁴ *Id.*

³⁵ *Commw. v. Fenton*, 750 A.2d 863 (Pa. Super. 2000).

³⁶ *Commw. v. Kelley*, 664 A.2d 123 (Pa. Super. 1995).

³⁷ 18 PA. C.S. § 2901 (emphasis added).

- (a) Offense defined.— A person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions:
- 1) To hold for ransom or reward, or as a shield or hostage.
 - 2) To facilitate commission of any felony or flight thereafter.
 - 3) To inflict bodily injury on or to terrorize the victim or another.
 - 4) To interfere with the performance by public officials of any governmental or political function.
- (b) Grading.— Kidnapping is a felony of the first degree. A removal or confinement is unlawful within the meaning of this section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 years or an incapacitated person, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

Substantial distance is one that isolates victim

One question that arises in kidnapping cases involves the meaning of “substantial distance.” The court in *In re T.G.* held that a “substantial distance” is one that isolates and exposes the victim to increased risk of harm.³⁸ When the movement places the victim in a completely different environmental setting, removed from the security of familiar surroundings, the statutory definition of kidnapping is met.³⁹ Hence, in *Commonwealth v. Hughes*, the removal of the victim a distance of two miles was sufficient.⁴⁰ In *Commonwealth v. Campbell*, abducting a 4-year-old child several blocks was sufficient to support a conviction.⁴¹

Defendant’s status as the victim’s parent does not preclude a conviction for kidnapping.

Kidnapping in its less-recognized alternative is the forcible confinement of another in a place of isolation for a substantial period, with the intention to inflict bodily injury or terror.⁴² In *In re T.G.*, the defendant took the young victim from public view, placed the victim inside the defendant's residence, closed the door, and refused entry to the victim's playmate. After 20 minutes, the defendant took the victim to his front porch, but would not let the victim leave. The victim's mother was in sight, but the defendant refused to release the victim until police arrived. The victim was afraid and crying. The court found that the defendant had confined the victim for a substantial period of time in a place of isolation and upheld the conviction.⁴³

³⁸ [In re T.G., 836 A.2d 1003 \(Pa. Super. 2003\).](#)

³⁹ *Id.* at 1006.

⁴⁰ [Commw. v. Hughes, 399 A.2d 694 \(Pa. Super. 1979\).](#)

⁴¹ [Commw. v. Campbell, 509 A.2d 394 \(Pa. Super. 1986\).](#)

⁴² *Commw. v. Tolbert*, 670 A.2d 1172 (Pa. Super. 1995).

⁴³ *In re T.G.*, 836 A.2d at 1009.

Parent may be convicted of kidnapping

A parent may be convicted of kidnapping his or her own child. In *Commonwealth v. Rivera*, the court held that a defendant's status as the victim's biological father does not preclude a conviction for kidnapping.⁴⁴ In this case, the father had a history of abusing the mother.

After a particularly severe beating, the mother separated from the father, pressed criminal charges for the assault, and obtained a PFA limiting the father's access to the parties' 2-year-old child to supervised visitation. After assaulting and strangling the mother, the father broke into the child's daycare provider's facility and abducted the child. Afterwards, he repeatedly called the mother, threatening to harm the child if she did not meet with him. The father's kidnapping conviction was affirmed by the Superior Court.⁴⁵

Harassment

Harassment carries the two lowest offense grades, third-degree misdemeanor and summary offense. The most relevant portions of the statute relating to harassment involving domestic violence are as follows:⁴⁶

Harassment (selected provisions)

(a) Offense defined.— A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

- 1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same;
- 2) follows the other person in or about a public place or places;
- 3) engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose;
- 4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures;
- 5) communicates repeatedly in an anonymous manner;
- 6) communicates repeatedly at extremely inconvenient hours; or
- 7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6).

(c) Grading.—

- 1) An offense under subsection (a)(1), (2) or (3) shall constitute a summary offense.
- 2) (i) An offense under subsection (a)(4), (5), (6) or (7) shall constitute a misdemeanor of the third degree.

⁴⁴ [*Commw. v. Rivera*, 828 A.2d 1094 \(Pa. Super. 2003\)](#).

⁴⁵ *Id.* at 1099-1101.

⁴⁶ 18 PA. C.S. § 2709.

(f) Definitions.— As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Communicates." Conveys a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.

"Course of conduct." A pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. Acts indicating a course of conduct that occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.

For more information about harassment offenses, including cases, please see Chapter IX: Stalking.

Stalking

The offense of stalking was expanded in 2002 to specifically address stalking through technology and to further enhance penalties for stalking of a family or household member.⁴⁷ Prior to the 2002 amendments, the crime of stalking was codified with the harassment in section 2709.

Stalking (selected provisions)⁴⁸

(a) Offense defined.— A person commits the crime of stalking when the person either:

- 1) engages in a course of conduct or repeatedly commits acts toward another person, including following the person without proper authority, under circumstances which demonstrate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person; or
- 2) engages in a course of conduct or repeatedly communicates to another person under circumstances which demonstrate or communicate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person.

(c) Grading.

- 1) Except as otherwise provided for in paragraph (2), a first offense under this section shall constitute a misdemeanor of the first degree.
- 2) A second or subsequent offense under this section or a first offense under subsection (a) if the person has been previously convicted of a crime of violence involving the same victim, family or household member, including, but not limited to, a violation of section 2701 (relating to simple assault), 2702 (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2901 (relating to kidnapping), 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), an order issued under section 4954 (relating to protective orders) or an order issued under 23 Pa.C.S. § 6108 (relating to relief) shall constitute a felony of the third degree.

⁴⁷ 18 PA. C.S. § 2709.1; see 2002 Pa. Laws 218.

⁴⁸ 18 PA. C.S. § 2709.1.

(f) Definitions.— As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Communicates." To convey a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.

"Course of conduct." A pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. The term includes lewd, lascivious, threatening or obscene words, language, drawings, caricatures or actions, conveyed in person or anonymously. Acts indicating a course of conduct that occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.

"Emotional distress." A temporary or permanent state of mental anguish.

"Family or household member." Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.⁴⁹

Pennsylvania's current stalking statute, section 2709.1, expands on section 2709 (harassment).⁵⁰ Before section 2709.1 was adopted in 2002, the crime of stalking fell within the harassment statute at section 2709.⁵¹ The prohibition on stalking remained substantially the same, with some additions. Therefore, stalking cases interpreted under section 2709 remain relevant to the interpretation of stalking under section 2709.1. For case examples and more information about stalking, please see Chapter IX: Stalking.

Strangulation

The strangulation statute, enacted in 2016, recognizes that strangulation is one of the most lethal forms of domestic violence for victims.⁵²

Strangulation

(a) Offense defined.— A person commits the offense of strangulation if the person knowingly or intentionally impedes the breathing or circulation of the blood of another person by:

- 1) Applying pressure to the throat or neck; or
- 2) Blocking the nose and mouth of the person.

⁴⁹ 18 PA. C.S. § 2709.1.

⁵⁰ 18 PA. C.S. §§ 2709, 2709.1.

⁵¹ 18 PA. C.S. §§ 2709, 2709.1; *see* 2002 Pa. Laws 218.

⁵² 18 PA. C.S. § 2718.

- (b) Physical injury.- Infliction of a physical injury to a victim shall not be an element of the offense. The lack of physical injury to a victim shall not be a defense in a prosecution under this section.
- (c) Affirmative defense._ It shall be an affirmative defense to charge under this section that the victim consented to the defendant's actions as provided under section 311 (relating to consent).
- (d) Grading.-
- 1) Except as provided in paragraph (2) or (3), a violation of this section shall constitute a misdemeanor of the second degree.
 - 2) A violation of this section shall constitute a felony of the second degree if committed:
 - 2.1) Against a family or household member as defined in 23 Pa.C.S. §6102 (relating to definitions);
 - 2.2) By a caretaker against a care-dependent person; or
 - 2.3) In conjunction with sexual violence as defined in 42 Pa.C.S. §62A03 (relating to definitions) or conduct constituting a crime under 18 Pa.C.S. §2709.1 (relating to stalking) or Ch. 30 Subch. B (relating to prosecution of human trafficking).
 - 3) A violation of this section shall constitute a felony of the first degree if:
 - 3.1) at the time of the commission of the offense, the defendant is subject to an active protection from abuse order under 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or a sexual violence or intimidation protection order under 42 Pa.C.S. Ch. 62A (relating to protection of victims of sexual violence or intimidation) that covers the victim;
 - 3.2) the defendant uses an instrument of crime as defined in section 907 (relating to possessing instruments of crime) in commission of the offense under this section; or
 - 3.3) the defendant has previously been convicted of an offense under paragraph (2) or a substantially similar offense in another jurisdiction.⁵³

⁵³ See 18 PA. C.S. § 2718(3) for the definitions of Care-dependent person, Caretaker, Legal entity and Private care residence. Learn more about strangulation and Pennsylvania law at <https://www.pcadv.org/policy-center/pennsylvania-laws/strangulation-law/>.

SEXUAL CRIMES AND RELATED OFFENSES

Civil Relief in Sexual Assault Cases

Protection From Abuse Orders

Rape is often an integral part of domestic violence.⁵⁴ However, because sexual assault is only rarely included in a victim's protection order petition,⁵⁵ it may not come to the judge's attention. Judges have discretion to request information that could reveal any pattern of systemic abusive behaviors, to include sexual assault.⁵⁶ A full picture of the abuse is relevant to risk of re-assault in PFA cases as well as bail and sentencing decisions in criminal cases.

Protection From Sexual Violence or Intimidation Orders

Sexual assault victims who do not have the family or household relationship required by the PFA Act may seek civil relief through the Protection for Victims of Sexual Violence and Intimidation Act of 2015.⁵⁷ This relief is available regardless of whether the victim seeks criminal prosecution.

Although closely modeled on the PFA Act, there are no firearms relinquishment provisions in the PSVI Act. These no-contact orders can remain in effect for up to three years and are entered into the PFA Database (PFAD).

Protection From Intimidation (PFI) orders are available only for minors who are being intimidated by an adult who is neither a family member nor a past or present dating or intimate partner.

The PSVI Statute defines "Intimidation" as:

Conduct constituting a crime under either of the following provisions between persons who are not family or household members:

18 Pa.C.S. § 2709(a)(4), (5), (6) or (7) (relating to harassment) where the conduct is committed by a person 18 years of age or older against a person under 18 years of age.

18 Pa.C.S. § 2709.1 (relating to stalking) where the conduct is committed by a person 18 years of age or older against a person under 18 years of age.

42 Pa. C.S. § 62A03

⁵⁴ A national survey cited by the American Bar Association Commission on Domestic & Sexual Violence estimates that 34 percent of women are victims of sexual coercion by an intimate partner or husband. Kathleen C. Basile, *Prevalence of Wife Rape and Other Intimate Partner Sexual Coercion in a Nationally Representative Sample of Women*, 17 *Violence and Victims* 511 (2002).

⁵⁵ A U.S. Department of Justice special report citing several state studies indicates that, "If there is physical abuse in domestic violence, studies suggest that there is probably sexual abuse as well." Andrew R. Klein, Nat'l Institutes of Justice Special Report, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* 2 (2009).

⁵⁶ *Id.* at 3.

⁵⁷ Pa. C.S. § 62A01 - 62A20 (2015). See JACK PANELLA, PENNSYLVANIA CRIMES OF SEXUAL VIOLENCE BENCHBOOK, PENNSYLVANIA COALITION AGAINST RAPE AND ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS 19 (2015) at <http://www.pcar.org/resource/pennsylvania-sexual-violence-benchbook>.

The PSVI Act refers to parts of the Pennsylvania Crimes Code for the definitions of harassment and stalking.⁵⁸ Under the Act, minors are potentially eligible for an order protecting them from an adult who is stalking or harassing them. An adult must petition for the order on the minor's behalf.

Rape

Rape (selected provisions)

- (a) Offense defined.— A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:
 - 1) By forcible compulsion.
 - 2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.
 - 3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.
 - 4) Where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.
 - 5) (Who suffers from a mental disability which renders the complainant incapable of consent.
- (c) Rape of a child.— A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.
- (d) Rape of a child with serious bodily injury.— A person commits the offense of rape of a child resulting in serious bodily injury, a felony of the first degree, when the person violates this section and the complainant is under 13 years of age and suffers serious bodily injury in the course of the offense.⁵⁹

Marital rape

The existence of a marital relationship with a victim is irrelevant when determining whether a particular sexual offense occurred.⁶⁰

Intercourse by forcible compulsion

The essence of the criminal act of rape under sections (a)(1) and (a)(2) is involuntary submission to sexual intercourse by force or the threat of force.⁶¹ One of the requirements for rape is penetration, however slight;

⁵⁸ Harassment – 18 Pa.C.S. § 2709(a)(4), (5), (6) or (7). Stalking – 18 Pa.C.S. § 2709.1.

⁵⁹ 18 PA. C.S. § 3121.

⁶⁰ Before 1995, men who raped their wives could not be charged with the crime of “rape.” In recognition of this fact, the Pennsylvania legislature rewrote the rape statute to do away with the spousal exception to the crime. Such men could be charged with the crime of “spousal sexual assault,” a crime that carried a lesser criminal penalty than rape. See 18 PA. C.S. § 3128 (repealed 1995).

⁶¹ See *Commw. v. Karkaria*, 625 A.2d 1167 (Pa. 1993).

however, there is no requirement that penetration reach the vagina.⁶² The force necessary to support a conviction for rape need only be such as to establish lack of consent and to induce a woman to submit without additional resistance.⁶³ A rape victim need not actively resist her assailant if such resistance is reasonably believed to be futile or dangerous.⁶⁴

Force can also include moral, psychological, or intellectual force. The determination of whether moral, psychological, or intellectual force exists in a given case to support a conviction is to be made in light of the totality of the circumstances. Important factors to be considered include: the respective ages of the victim and defendant, the respective mental and physical conditions of the victim and defendant, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which defendant may have been in a position of authority, domination, or custodial control over the victim, and whether the victim was under duress.⁶⁵

Defendant's previous brutalization of victim relevant in rape case

Forcible compulsion and threat of forcible compulsion may be demonstrated by the defendant's past brutality toward the victim. In ***Commonwealth v. Richter***, the defendant visited his ex-wife's home to show her pictures of their son's Holy Communion.⁶⁶ During the visit, the defendant made sexual advances toward his ex-wife, which she rebuffed, telling the defendant that she did not want to have sex with him and feared sexual intercourse would harm her unborn child. The defendant grabbed the victim from behind, pinned her against a table, pulled off her pants and raped her. Although the victim verbally resisted, she did not physically resist.

The victim testified that she did not physically resist because she knew, based on past experiences, that the defendant was capable of hurting both her and her unborn child. She then described two previous occasions where the defendant had brutally raped her. During one attack, the defendant rammed a brush covered with plumber's glue into her vagina. During the other attack, the defendant punched her in the mouth, breaking numerous teeth. Both of the prior attacks resulted in her hospitalization.

The Superior Court held that the evidence of defendant's prior brutality toward the victim was sufficient to establish forcible compulsion or the threat of forcible compulsion. It also held that evidence of the prior rapes was relevant and admissible to show the victim's state of mind in failing to physically resist the defendant's advances.⁶⁷

Rape statute is gender-neutral

The rape statute is gender-neutral toward victims of sexual assault and encompasses sexual assaults committed by males against males.⁶⁸

⁶² *Commw. v. Poindexter*, 646 A.2d 1211 (Pa. Super. 1994).

⁶³ *Commw. v. Williams*, 439 A.2d 765 (Pa. Super. 1982).

⁶⁴ *Commw. v. Montgomery*, 687 A.2d 1131 (Pa. Super. 1996).

⁶⁵ *Commw. v. Ruppert*, 579 A.2d 966 (Pa. Super. 1990).

⁶⁶ [*Commw. v. Richter*, 676 A.2d 1232 \(Pa. Super. 1996\)](#), *aff'd* 711 A.2d 464 (Pa. 1998).

⁶⁷ *Id.* at 1235.

⁶⁸ *Commw. v. Frank*, 640 A.2d 904 (Pa. Super. 1994).

A rape victim need not actively resist if s/he reasonably believes such resistance to be futile or dangerous.

Statutory rape

Sexual intercourse with a child younger than 13 years old is automatically considered rape, is a first-degree felony, and may result in a sentence of up to 40 years' imprisonment.⁶⁹ Sexual intercourse with a child younger than 13 that causes serious bodily injury is a first-degree felony and carries a maximum sentence of life imprisonment.⁷⁰

Statutory sexual assault

Intercourse between a minor 15 years or younger with a person who is four years older or more is sufficient for a charge of statutory sexual assault.⁷¹ However, the minor will have the ability to consent to intercourse where the parties are married. The Pennsylvania Supreme Court upheld this statute's constitutionality, finding that it served the legitimate purpose of protecting minors younger than 16 from older teenage or adult sexual aggressors.⁷²

Involuntary Deviate Sexual Intercourse

In Pennsylvania, the crime of involuntary deviant sexual intercourse is essentially a restatement of the crime of rape with one notable exception: the definition of the sexual activity involved. The crime of rape embodies sexual intercourse in its commonly recognized definition, whereas involuntary deviant sexual intercourse proscribes certain oral and anal sexual activities. The definition of deviate sexual intercourse is broader than merely sexual intercourse; otherwise, the language in both statutes is similar.

Involuntary deviate sexual intercourse (selected provisions)

- (a) Offense defined.— A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:
- 1) by forcible compulsion;
 - 2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
 - 3) who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;
 - 4) where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
 - 5) who suffers from a mental disability which renders him or her incapable of consent;

⁶⁹ 18 PA. C.S. § 3121(c).

⁷⁰ 18 PA. C.S. § 3121(d), (e)(2).

⁷¹ 18 PA. C.S. § 3122.1

⁷² *Commw. v. Albert*, 758 A.2d 1149 (Pa. 2000).

- 6) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

For "forcible compulsion," prosecution must establish defendant's use of physical force, threat of physical force, or psychological coercion.

- (b) Involuntary deviate sexual intercourse with a child.— A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.
- (c) Involuntary deviate sexual intercourse with a child with serious bodily injury.— A person commits an offense under this section with a child resulting in serious bodily injury, a felony of the first degree, when the person violates this section and the complainant is less than 13 years of age and the complainant suffers serious bodily injury in the course of the offense.
- (e) Definition.— As used in this section, the term "forcible compulsion" includes, but is not limited to, compulsion resulting in another person's death, whether the death occurred before, during or after the sexual intercourse.⁷³

Deviate sexual intercourse is defined in another part of the criminal code.

Deviate sexual intercourse.

Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.⁷⁴

The crime of involuntary deviate sexual intercourse is committed when a person forces another person by actual physical compulsion or threats thereof to engage in acts of anal or oral intercourse.⁷⁵ It also occurs when an individual engages in deviate sexual intercourse with another person: (1) who is less than 13 years old;⁷⁶ or (2) when the individual engages in deviate sexual intercourse with a person who is less than 16 years of age while the perpetrator is four or more years older than the victim.⁷⁷

To prove the "forcible compulsion" component of involuntary deviate sexual intercourse by forcible compulsion, the Commonwealth is required to establish beyond a reasonable doubt that the defendant used either physical force, the threat of physical force, or psychological coercion.⁷⁸

⁷³ 18 PA. C.S. § 3123.

⁷⁴ 18 PA. C.S. § 3101.

⁷⁵ *Commw. v. Perrin*, 398 A.2d 1007 (Pa. 1979).

⁷⁶ 18 PA. C.S. § 3123(b).

⁷⁷ 18 PA. C.S. § 3123(a)(7); *see also In re J.R.*, 648 A.2d 28 (Pa. Super. 1994).

⁷⁸ *Commw. v. Brown*, 727 A.2d 541 (Pa. 1999).

Aggravated Indecent Assault

The crime of aggravated indecent assault is distinguished from the other sexual offenses chiefly in the method of penetration employed with the victim. As a result, it is mainly used to charge digital penetration of the victim's genitals or anus.

Aggravated indecent assault (selected provisions)

- (a) Offenses defined.— Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault, a felony of the second degree, if:
- 1) the person does so without the complainant's consent;
 - 2) the person does so by forcible compulsion;
 - 3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
 - 4) the complainant is less than 13 years of age; or
 - 5) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.⁷⁹

Digital penetration

The court in ***Commonwealth v. Kelley*** held that digital penetration is the type of conduct that falls within the parameters of aggravated indecent assault.⁸⁰

Allegations of taint in sexual assault claims by children

"Taint" is the implantation of false memories or the distortion of actual memories through improper and suggestive interview techniques.⁸¹ When a child accuses a family member of sexually abusing him or her, the defendant often claims that the child's testimony was tainted by another person's influence.⁸²

In ***Commonwealth v. Delbridge***, the Pennsylvania Supreme Court evaluated defendant father's claims of taint following his aggravated indecent assault conviction for sexually abusing his two young children.⁸³

The party alleging taint bears the burden of: (1) presenting some evidence of taint at the competency hearing before exploration of taint is considered; and (2) overcoming the child's presumption of competency by clear and convincing evidence.⁸⁴

⁷⁹ 18 PA. C.S. § 3125.

⁸⁰ [Commw. v. Kelley, 801 A.2d 551 \(Pa. 2002\).](#)

⁸¹ [Commw. v. Delbridge, 855 A.2d 27, 30 \(Pa. 2003\).](#)

⁸² See, e.g., *Commw. v. Hunzer*, 868 A.2d 498 (Pa. Super. 2005).

⁸³ [Commw. v. Delbridge, 859 A.2d 1254 \(Pa. 2004\).](#)

⁸⁴ *Id.* at 1256.

The Supreme Court remanded the case to the trial court for an additional competency hearing where the defendant could present evidence of taint. On remand, the trial court again found the children to be competent, and that the defendant failed to demonstrate the presence of taint. Accordingly, the trial court found that the defendant failed to meet the burden that his children's allegations were compromised by taint.⁸⁵ The Supreme Court reviewed the trial court's decision and affirmed.⁸⁶

For more information on child competency hearings and taint allegations, please see Chapter II: Evidence.

CRIMES INVOLVING PROPERTY

Arson

According to the statute's official comment, "this section...updates the law of arson by distinguishing between arson endangering life and arson endangering property only, with the emphasis on the degree of danger to life and property rather than on the burning as such."⁸⁷ The perpetrator's ownership interest in the property is irrelevant. Perpetrators of domestic violence have used arson to intimidate or retaliate against their victims.⁸⁸

Arson and related offenses (selected provisions):

(a) Arson endangering persons.—

- 1) A person commits a felony of the first degree if he intentionally starts a fire or causes an explosion, or if he aids, counsels, pays or agrees to pay another to cause a fire or explosion, whether on his own property or on that of another, and if:
 - 1.1) he thereby recklessly places another person in danger of death or bodily injury, including but not limited to a firefighter, police officer or other person actively engaged in fighting the fire; or
 - 1.2) he commits the act with the purpose of destroying or damaging an inhabited building or occupied structure of another.
- 2) A person who commits arson endangering persons is guilty of murder of the second degree if the fire or explosion causes the death of any person, including but not limited to a firefighter, police officer or other person actively engaged in fighting the fire, and is guilty of murder of the first degree if the fire or explosion causes the death of any person and was set with the purpose of causing the death of another person.

⁸⁵ *Id.* at 1259.

⁸⁶ *Id.* at 1260-61.

⁸⁷ 18 PA. C.S. § 3301, official cmt. (1972).

⁸⁸ *See, e.g.,* *Commw. v. John*, 596 A.2d 834 (Pa. Super. 1991) (A husband set fire to the bingo hall where his estranged wife was playing bingo in retaliation for her refusal to spend the evening drinking with him); *Commw. v. Rainey*, 363 A.2d 1148 (Pa. Super. 1976) (History of domestic violence; a husband threatened to burn property and kill his wife and children); *Commw. v. Terry*, 394 A.2d 466 (Pa. 1978) (A defendant argued with his estranged girlfriend and told her he was going to get her. When she refused to resume their relationship, the defendant burned the house that adjoined girlfriend's house that night, and firebombed the girlfriend's house two days later).

- (c) Arson endangering property.— A person commits a felony of the second degree if he intentionally starts a fire or causes an explosion, whether on his own property or that of another, or if he aids, counsels, pays or agrees to pay another to cause a fire or explosion, and if:
- 1) he commits the act with intent of destroying or damaging a building or unoccupied structure of another;
 - 2) he thereby recklessly places an inhabited building or occupied structure of another in danger of damage or destruction; or
 - 3) he commits the act with intent of destroying or damaging any property, whether his own or of another, to collect insurance for such loss.
- 3.1) Definitions.— As used in this section the following words and phrases shall have the meanings given to them in this subsection:
- 3.1.1) "Occupied structure." Any structure, vehicle or place adapted for overnight accommodation of persons or for carrying on business therein, whether or not a person is actually present. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.
- 3.1.2) "Property of another." A building or other property, whether real or personal, in which a person other than the actor has an interest which the actor has no authority to defeat or impair, even though the actor may also have an interest in the building or property.

An arson defendant's malice and state of mind toward his wife was evidenced by the fact that he threatened his son as his estranged family fled the fire.

To convict a person of arson, the prosecution must establish beyond a reasonable doubt that there was a fire, the fire was maliciously set, and the defendant was the guilty party.⁸⁹ Additionally, under section (a)(1), it must be proven that the perpetrator either (1) recklessly placed another in danger of death or bodily injury, or (2) intended to damage or destroy an inhabited building or structure.

For example, an arson defendant's malice and state of mind toward his wife was evidenced by the fact that he had threatened his son with a knife as his estranged family fled from the fire.⁹⁰

Burglary

The essence of the crime of burglary is breaking into a building or occupied structure with the intent to commit a crime therein. What makes burglary such a serious offense is not simply the act of breaking and entering, which often deprives victims of their sense of security, but the combination of entry and the intent to commit a further breach of the peace inside.

⁸⁹ Commw. v. Hardcastle, 546 A.2d 1101 (Pa. 1988).

⁹⁰ Commw. v. John, 596 A.2d 834 (Pa. Super. 1991).

Burglary (selected provisions):

- (a) Offense defined.— A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.
- (b) Defense.— It is a defense to prosecution for burglary that the building or structure was abandoned.
- (d) Multiple convictions.— A person may not be convicted both for burglary and for the offense which it was his intent to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.⁹¹

"Burglary" is defined as unauthorized entry with intent to commit a crime after entry.⁹² The intent to commit the crime cannot be assumed when there is only forced or unauthorized entry; the circumstances must also indicate felonious intent.

Sufficient evidence of felonious intent

In ***Commonwealth v. Magnum***, sufficient evidence of felonious intent was presented to support the conviction of a defendant for burglary where he broke into his former girlfriend's house through a locked garage.⁹³ When the defendant encountered his former girlfriend and her current boyfriend, the perpetrator pulled a knife from his coat pocket, threatened and told the boyfriend to get out of "his" house even though he was neither a current resident of the house nor its owner. When the perpetrator cornered his former girlfriend in the basement, he told her that "he really should f* * * her up for what she did to him."⁹⁴

Entering own house in violation of a PFA order can support burglary conviction.

Entering own house in violation of PFA

A crime is committed when a person enters a residence where the person is excluded by a PFA. In ***Commonwealth v. Majeed***, the Pennsylvania Supreme Court held that an individual may be convicted of burglary upon entering his or her own home in violation of a Protection From Abuse order.⁹⁵ In this case, the defendant entered into a PFA agreement stipulating that he was to stay away from the home. Five days later, the defendant grabbed his stepdaughter at a nearby bus stop, kicked in the door of the home, forced the stepdaughter inside, and assaulted her. The defendant was convicted of burglary and assault.

⁹¹ 18 Pa. C.S. § 3502.

⁹² *Commw. v. Alston*, 651 A.2d 1092 (Pa. 1994).

⁹³ [*Commw. v. Magnum*, 654 A.2d 1146 \(Pa. Super. 1995\).](#)

⁹⁴ *Id.* at 1147-48.

⁹⁵ [*Commw. v. Majeed*, 694 A.2d 336 \(Pa. 1997\).](#)

A defendant may be convicted of both burglary and the offense that he intended to commit after entry if the additional offense constitutes a felony of the first or second degree.⁹⁶ In those situations, the crimes do not merge for sentencing purposes.

Criminal Trespass

The purpose of the criminal trespass statute is to prevent unlawful intrusion onto real property and to prevent unlawful breaches of peace relating to realty.⁹⁷ In domestic violence situations where evidence is deficient as to the intent of a perpetrator upon entering the premises, criminal trespass is the appropriate charge. There are two distinct crimes of criminal trespass, the more serious of which is trespass in a building or occupied structure and the less serious of which is defiant trespass.⁹⁸

Criminal trespass (selected provisions)

(a) Buildings and occupied structures.—

- 1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he:
 - 1.1) enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure or separately secured or occupied portion thereof; or
 - 1.2) breaks into any building or occupied structure or separately secured or occupied portion thereof.
- 2) As used in this subsection:

"Breaks into." To gain entry by force, breaking, intimidation, unauthorized opening of locks, or through an opening not designed for human access.⁹⁹

Entering or remaining in a place, while knowing one is not permitted, supports a criminal trespass conviction.

The crime of criminal trespass involves either entering or remaining in a place, while knowing that one is not licensed or privileged to do so.¹⁰⁰

In ***Commonwealth v. Woods***, the perpetrator was charged with criminal trespass, among other crimes, when he went to his estranged wife's residence carrying a loaded gun, beat on the door to gain entry, and fired the weapon.¹⁰¹

The defendant appealed from the criminal trespass conviction, asserting that the evidence was insufficient to show that he knew he was not licensed or privileged to enter the home. The court referred to the estrangement and the fact that the parties were living apart to uphold his conviction.

⁹⁶ Commw. v. Simpson, 462 A.2d 821 (Pa. Super. 1983).

⁹⁷ Commw. v. White, 492 A.2d 32 (Pa. Super. 1985).

⁹⁸ Commw. v. Cannon, 443 A.2d 322 (Pa. Super. 1982).

⁹⁹ 18 Pa. C.S. § 3503.

¹⁰⁰ Commw. v. Walker, 559 A.2d 579 (Pa. Super. 1989).

¹⁰¹ Commw. v. Woods, 638 A.2d 1013 (Pa. Super. 1994).

Criminal Mischief

A frequent act of intimidation following separation is the performance of acts of vandalism by the perpetrator on property belonging to the victim. The criminal mischief statute addresses the destruction of property (real or personal) belonging to another individual.

Criminal mischief (selected provisions):

(a) Offense defined.— A person is guilty of criminal mischief if he:

- 1) damages tangible property of another intentionally, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in section 3302(a) of this title (relating to causing or risking catastrophe);
- 2) intentionally or recklessly tampers with tangible property of another so as to endanger person or property;
- 3) intentionally or recklessly causes another to suffer pecuniary loss by deception or threat; or
- 4) intentionally defaces or otherwise damages tangible public property or tangible property of another with graffiti by use of any aerosol spray-paint can, broad-tipped indelible marker or similar marking device; or
- 5) intentionally damages real or personal property of another.¹⁰²

In a prosecution for malicious mischief, malicious intent toward the owner, real or constructive, of the property injured, must always be proven.¹⁰³ That requirement prevents accidental destruction to property from being considered a criminal offense. Additionally, a perpetrator cannot be convicted of malicious mischief where he holds title to the property injured.¹⁰⁴ Hence, the destruction of property owned jointly between the perpetrator and the victim would not support a conviction.

The defendant in *Commonwealth v. Giddings* damaged the victim's door with a screwdriver attempting to gain entry, which was sufficient to support a conviction for criminal mischief.¹⁰⁵

Cruelty to Animals

The offense of cruelty to animals is included in this section of domestic violence-related crimes because abusers may use violence towards pets to intimidate or retaliate against victims.¹⁰⁶

Cruelty to animals (selected provisions):

- 1) A person commits a misdemeanor of the second degree if he willfully and maliciously:

¹⁰² 18 PA. C.S. § 3304.

¹⁰³ *Commw. v. Shaffer*, 32 Pa. Super. 375 (1907).

¹⁰⁴ *Id.* at 380.

¹⁰⁵ *Commw. v. Giddings*, 686 A.2d 6 (Pa. Super. 1996); but see *Commw. v. Clark*, 746 A.2d 1128 (overturning *Giddings* on unrelated issue addressing the ability to appeal a conviction when a sentencing court does not impose a penalty).

¹⁰⁶ A study of women seeking shelter at a safe house showed that 71% of those having pets affirmed that their partner had threatened, hurt, or killed their companion animals. AMERICAN HUMANE ASSOC., *Facts about Animal Abuse & Domestic Violence*, <http://www.americanhumane.org/interaction/support-the-bond/fact-sheets/animal-abuse-domestic-violence.html> (last visited June 23, 2015).

- 1.1) Kills, maims or disfigures any domestic animal of another person or any domestic fowl of another person.
- 1.2) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any domestic animal of another person or domestic fowl of another person.¹⁰⁷

To sustain a conviction for domestic animal cruelty under this section, the Commonwealth must prove that the animal belonged to a person other than the perpetrator.¹⁰⁸

Pennsylvania's animal cruelty statute also provides that it is a felony of the third degree to willfully and maliciously kill or disfigure any dog or cat regardless of ownership:

- 2) A person commits a misdemeanor of the first degree if he willfully and maliciously:
 - 2.1) Kills, maims, mutilates, tortures or disfigures any dog or cat, whether belonging to himself or otherwise.
 - 2.2) Administers poison to or exposes any poisonous substance with the intent to administer such poison to any dog or cat, whether belonging to himself or otherwise.¹⁰⁹

CRIMES AGAINST THE FAMILY

Endangering Welfare of Children

The "endangering welfare of children" statute attempts to prohibit a broad range of conduct in order to safeguard the welfare and security of children.¹¹⁰ Courts have traditionally held that standards of common sense in the community should be considered when interpreting the language of this statute.¹¹¹

Endangering welfare of children

(a) Offense defined.--

- 1) A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.
- 2) A person commits an offense if the person, in an official capacity, prevents or interferes with the making of a report of suspected child abuse under 23 Pa.C.S. Ch. 63 (relating to child protective services).
- 3) As used in this subsection, the term "person supervising the welfare of a child" means a person other than a parent or guardian that provides care, education, training or control of a child.

¹⁰⁷ 18 PA. C.S. § 5511.

¹⁰⁸ *Commw. v. Tapper*, 675 A.2d 740 (Pa. Super. 1996).

¹⁰⁹ 18 PA. C.S. § 5111(a)(2.1)(i).

¹¹⁰ *Commw. v. Brown*, 721 A.2d 1105 (Pa. Super. 1998).

¹¹¹ *Id.* at 1106-07.

- (b) Grading.--An offense under this section constitutes a misdemeanor of the first degree. However, where there is a course of conduct of endangering the welfare of a child, the offense constitutes a felony of the third degree.¹¹²

To support a conviction for endangering the welfare of a child, the Commonwealth must establish each of the following elements: (1) the accused is aware of his or her duty to protect the child; (2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and (3) the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.¹¹³

In *Commonwealth v. Passarelli*, the court found there was sufficient evidence to convict the father of endangering the welfare of a child.¹¹⁴ The child had been entrusted to the father when the mother went on errands, and when the mother returned, there were injuries that occurred from either shaking or blunt impact. Because it was an isolated incident, the father's crime was graded a misdemeanor of the first degree.¹¹⁵

Nonetheless, in situations where the abuse or neglect is ongoing, evidence of a course of conduct can support a conviction of felony endangering the welfare of a child.¹¹⁶ The statute defining the offense of third-degree felony endangerment of children is designed to punish a parent who, over days, weeks, or months, abuses his children, such as repeatedly beating them or depriving them of food.¹¹⁷

Interference With Custody of Children

Although parents, coupled with the proper intent, can be guilty of kidnapping their children, the legislature enacted "interference with custody of children" to address the problem of individuals snatching children as part of a custody dispute. The statute also enumerates several defenses in an attempt to prevent the statute from being misused against persons with legitimate concerns for the safety and welfare of their child.

Interference with custody of children:

- (a) Offense defined.— A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so.
- (b) Defenses.— It is a defense that:
- 1) the actor believed that his action was necessary to preserve the child from danger to its welfare; or
 - 2) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child; or

¹¹² 18 PA. C.S. § 4304.

¹¹³ *Commw. v. Wallace*, 817 A.2d 485 (Pa. Super. 2002).

¹¹⁴ *Commw. v. Passarelli*, 789 A.2d 708 (Pa. Super. 2001), *aff'd*, 825 A.2d 628 (Pa. 2003) (*overruled* in *Commw. v. Spruill*, 80 A.3d 453 (2013) related to the legality of sentencing.)

¹¹⁵ *Id.*

¹¹⁶ See *Commw. v. Popow*, 844 A.2d 13 (Pa. Super. 2004).

¹¹⁷ *Id.* at 17.

- 3) the actor is the child's parent or guardian or other lawful custodian and is not acting contrary to an order entered by a court of competent jurisdiction.¹¹⁸

Read more in Chapter VII: Custody

In *Commonwealth v. Stewart*, the defendant's conviction for interference with custody of children and criminal conspiracy was upheld where the defendant was aware of the order awarding primary custody of child to the child's mother some time prior to the defendant's leaving the state with the child.¹¹⁹

While the statute proscribing interference with child custody was enacted with a focus toward parental kidnapping, courts have extended the purview of the statute to protect children from unlawful taking by individuals who were not necessarily their parents, custodians or guardians. Moreover, the wording of the statute clearly supported the extension of its scope to actors other than parents.¹²⁰

DEFENSES RAISED IN DOMESTIC VIOLENCE CASES

The most frequent defenses offered by perpetrators of domestic violence include self-defense, intoxication, "mutual battering" and the parental privilege of administering corporal punishment on their children.

Self-Defense

In *Commonwealth v. Torres*, the Supreme Court reiterated that self-defense is an acceptable defense to assault charges.¹²¹ When a defendant raises a self-defense claim, the prosecution bears the burden of disproving the defense beyond a reasonable doubt.¹²²

Voluntary Intoxication

Voluntary intoxication does not provide similar justification. The court, in *Esmond v. Liscio* stated that, "While voluntary intoxication might so cloud the mind as to deprive it of power of premeditation and deliberation, it would not prevent formation of general intent necessary for the commission of assault."¹²³

Mutual Battering

Domestic violence perpetrators also may attempt to raise a false "mutual battering" defense. In assault cases, the defense is typically offered as a fight entered into by mutual consent under the auspices of 18 Pa. C.S. § 2701(b)(1) (relating to grading of assault).

Domestic violence perpetrators sometimes claim that the victim instigated or willingly entered into the altercation, to shift the blame for the perpetrator's behavior to the victim.¹²⁴

¹¹⁸ 18 Pa. C.S. § 2904.

¹¹⁹ *Commw. v. Stewart*, 544 A.2d 1384 (Pa. Super. 1988).

¹²⁰ *Commw. v. McClintock*, 639 A.2d 1222 (Pa. Super. 1994).

¹²¹ *Commw. v. Torres*, 766 A.2d 342 (Pa. 2001).

¹²² *Id.* at 344.

¹²³ *Esmond v. Liscio*, 224 A.2d 793 (Pa. Super. 1966).

¹²⁴ See, e.g., *Commw. v. Showalter*, 332 A.2d 456 (1974).

Corporal Punishment

Parents charged with assaulting their children may attempt to justify their assault as permissible corporal punishment. Criminal law generally recognizes parents' rights to use corporal punishment when raising their children.¹²⁵ However, at some point permissible corporal punishment ceases and becomes malicious abuse. Therefore, in a prosecution of a parent for assaulting a child, it is necessary to establish the particular state of mind of the parent administering punishment to determine whether the corporal punishment was permissible. In *Commonwealth v. Kramer*, the father beat each of his children 50 times with a stick, bruising the children in the process and causing significant pain.¹²⁶ Testimony disclosed a history of beatings by the father. Letters written by the father from jail demonstrated his animosity toward his children.¹²⁷ The court upheld the father's assault conviction.¹²⁸

MISCELLANEOUS PROVISIONS

Firearms Violation

The clear purpose of the statutory prohibition against certain persons possessing firearms is to protect the public from convicted criminals who possess firearms, regardless of whether the previous crimes were actually violent or the barrel of the firearm was a certain length.¹²⁹ There are currently no reported decisions interpreting the section of the statute that prohibits gun possession while an individual is subject to a Protection From Abuse order.

Persons not to possess, use, manufacture, control, sell or transfer firearms (selected provisions):

(a) Offense defined.—

- 1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.
- 2) A person who is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm under paragraph (1) or subsection (b) or (c) shall have a reasonable period of time, not to exceed 60 days from the date of the imposition of the disability under this subsection, in which to sell or transfer that person's firearms to another eligible person who is not a member of the prohibited person's household.

This paragraph shall not apply to any person whose disability is imposed pursuant to subsection (c)(6).

¹²⁵ See, e.g., *Commw. v. Kramer*, 371 A.2d 1008 (Pa. Super. 1977); *Guerrieri v. Tyson*, 24 A.2d 468 (Pa. Super. 1942).

¹²⁶ *Kramer*, 371 A.2d 1008.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Commw. v. Gillespie*, 821 A.2d 1221 (Pa. 2003).

(c) Other persons.—In addition to any person who has been convicted of any offense listed under subsection (b), the following persons shall be subject to the prohibition of subsection (a):

- 1) A person who is the subject of an active protection from abuse order issued pursuant to 23 Pa. C.S. § 6108 (relating to relief), which order provided for the confiscation of firearms during the period of time the order is in effect. This prohibition shall terminate upon the expiration or vacation of an active protection from abuse order or portion thereof relating to the confiscation of firearms.¹³⁰

Bail

After criminal charges are brought, the defendant is entitled to a bail determination. In criminal cases involving domestic violence, trial judges and magisterial district judges must incorporate appropriate safety considerations at every level, including bail. Bail provisions relevant to domestic violence cases are found in three sources: The Constitution, Pennsylvania's Crimes Code and Rules of Criminal Procedure.

Pennsylvania Constitution

The Pennsylvania Constitution provides, in pertinent part, the following:

All prisoners shall be bailable by sufficient sureties ... unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great.¹³¹

Pennsylvania Crimes Code

Pennsylvania's Crimes Code contains special provisions for probable cause arrests and bail in domestic violence cases. These provisions allow police to arrest without a warrant where the officer has probable cause to believe the defendant committed certain enumerated crimes against a family member or intimate partner.¹³² The bail provisions incorporate specific protections authorizing the court to protect domestic violence victims, as follows:

Probable cause arrests in domestic violence cases (selected provisions):

(c) Bail.—

- 1) A defendant arrested pursuant to this section shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay. In no case shall the arresting officer release the defendant from custody rather than taking the defendant before the issuing authority.
- 2) In determining whether to admit the defendant to bail, the issuing authority shall consider whether the defendant poses a threat of danger to the victim. If the issuing authority makes such a determination, it shall require as a condition of bail that the defendant shall refrain from entering the residence or household of the victim and the victim's place of employment and shall refrain from committing any further criminal conduct against the victim and shall so notify the defendant thereof at the time the defendant is admitted to bail. Such condition

¹³⁰ 18 PA. C.S. § 6105.

¹³¹ PA. CONST. art. I, § 14

¹³² 18 PA. C.S. § 2711(a).

shall expire at the time of the preliminary hearing or upon the entry or the denial of the protection of abuse order by the court, whichever occurs first. A violation of this condition may be punishable by the revocation of any form of pretrial release or the forfeiture of bail and the issuance of a bench warrant for the defendant's arrest or remanding him to custody or a modification of the terms of the bail. The defendant shall be provided a hearing on this matter.¹³³

Pennsylvania Rules of Criminal Procedure

In every case where bail release is ordered, defendants are prohibited from intimidating or retaliating against victims or witnesses and from engaging in any criminal activity.¹³⁴

In addition, the court has the authority to impose additional conditions to ensure the defendant's compliance,¹³⁵ including restricting the defendant's travel or imposing a condition that the defendant must stay away from certain individuals.¹³⁶ In some counties, the criminal information sheet in cases involving domestic violence is specially marked with a large red "D.V." stamp so that the trial court or magisterial district judge can consider making specific victim safety conditions a part of bail or probation orders.

Criminal Protective Orders

Criminal trial courts are authorized, after a hearing, to enter criminal protective orders directing the defendant or any other person to refrain from stalking or harassing the victim, maintain a set distance from the victim, or to have no contact or communication with the victim.¹³⁷ The evidentiary standard for entry of a criminal protective order is rather low, and can be based on substantial evidence that may include hearsay or the prosecutor's declaration that a witness or victim has been intimidated or is likely to be intimidated.¹³⁸ If the order is violated, the court may revoke a defendant's pretrial release in any form, whether the criminal protective order violation was committed by the defendant or was caused or encouraged to have been committed by the defendant.¹³⁹

After a hearing, criminal court may enter a protective order prohibiting defendant or others from contacting, stalking, or harassing victim.

Crime Victims Act

Pennsylvania's [Crime Victims Act](#)¹⁴⁰ requires that victims of crime be given access to certain information, such as notice of proceedings, dispositions, releases and escapes; be advised of the right to be accompanied at

¹³³ 18 PA. C.S. § 2711.

¹³⁴ PA. R. CRIM. P. 526(A)(4), (5).

¹³⁵ PA. R. CRIM. P. 526(B).

¹³⁶ PA. R. CRIM. P. 527(A)(2), (3), official cmt. (2001).

¹³⁷ 18 PA. C.S. § 4954.

¹³⁸ *Id.*

¹³⁹ 18 PA. C.S. § 4955.

¹⁴⁰ Crime Victims Act, Act of Nov. 24, 1998, P.L. 882, No. 111, available at <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1998/0/0111..HTM>

proceedings; and be given the opportunity to offer prior comment on sentencing, including the submission of a written and oral victim impact statement.¹⁴¹

The prosecutor's office is required to provide the opportunity to offer prior comment on disposition, sentencing and release, and notice of actual release. It is mandated to assist victims in filing financial assistance claims.¹⁴² State and local law enforcement agencies must give victims notice of their right to file a crime victim's compensation claim, notice of arrest of the suspect, and notice of an inmate's escape from custody.¹⁴³ The Pennsylvania Department of Corrections or local correctional institution is also required to give notice of an escape to the crime victim.¹⁴⁴

The Act provided for victims compensation. [Pennsylvania's Victims Compensation Assistance Program](#) (VCAP) is designed to compensate qualified crime victims for some financial losses incurred as a result of a crime and to encourage victims to cooperate with officials prosecuting the crime.¹⁴⁵ VCAP benefits include payment of medical expenses, reimbursement for counseling fees, compensation for loss of earnings or support, funeral expenses, travel expenses, childcare reimbursement for court appearances, medical appointments or relocation, home healthcare expenses, replacement services, relocation expenses, crime scene cleanup, forensic rape examinations, and attorneys fees.¹⁴⁶ Most often, victim-witness advocates assist victims in filing claims, although domestic violence advocates, sexual assault advocates and attorneys can assist victims in filing claims. Victims may also file claims on their own directly with the VCAP.¹⁴⁷

Victim Impact Statements

The Act requires that crime victims be given an opportunity to submit a written and oral statement detailing effects of the crime on the victim and the victim's family.¹⁴⁸ Other statutes also provide the victim access and opportunity to comment. Specifically, the court must allow a victim to attend the trial of the offender. The victim may not be excluded from trial on the basis that they may make a victim impact statement at the sentencing phase.¹⁴⁹ In homicide cases, at the sentencing hearing, the Commonwealth is authorized to introduce evidence concerning the victim and the impact that the victim's death has had on the victim's family.¹⁵⁰ Victim impact testimony is neither an aggravating nor a mitigating circumstance.¹⁵¹ The court is required to instruct the jury that if they (jury) find at least one aggravating circumstance and one mitigating circumstance, they must consider evidence presented about the victim and the impact of the murder on the victim's family in weighing the circumstances.¹⁵²

¹⁴¹ 18 P.S. § 11.201.

¹⁴² 18 P.S. § 11.213.

¹⁴³ See 18 P.S. § 11.212.

¹⁴⁴ 18 P.S. § 11.214.

¹⁴⁵ 18 P.S. §§ 11.103, .707.

¹⁴⁶ See 18 P.S. §§ 11.103, .703, .707.

¹⁴⁷ See Pa. Commission on Crime & Delinquency, Victims Compensation, [http://www.pccd.pa.gov/Victim-Services/Pages/Victims-Compensation-Assistance-Program-\(VCAP\).aspx](http://www.pccd.pa.gov/Victim-Services/Pages/Victims-Compensation-Assistance-Program-(VCAP).aspx) (last visited Sept. 15, 2015).

¹⁴⁸ 18 P.S. § 11.201(5).

¹⁴⁹ 42 PA. C.S. § 9738.

¹⁵⁰ 42 PA. C.S. § 9711(a)(2).

¹⁵¹ *Id.*

¹⁵² 42 PA. C.S. § 9711(c)(2).

OTHER RELEVANT INFORMATION

Effectiveness of Criminal Justice System Response

In the 1970s and early 1980s, when domestic violence began to be recognized as a serious social problem, an emphasis was placed on the criminal justice response to domestic violence – particularly on encouraging police to arrest domestic violence perpetrators.

The changes wrought by domestic violence laws, police and prosecution policies, and local victim services have led to increased domestic violence reporting and arrests. A study using the National Crime Victim Survey for the years 1992 to 1998 found that over half of criminal domestic violence incidents were reported to police. Victims made 70 percent of police notifications and third parties made 30 percent. Of those violent incidents reported to the police, about one-third resulted in arrest.¹⁵³

Arrest can be key, according to an FBI report: “A 92 to 96 percent increase in the likelihood of prosecution and a 76 to 80 percent rise in conviction rates result from the arrest of a domestic violence suspect.”¹⁵⁴ Many prosecutors’ offices have adopted new approaches to handling domestic violence cases. These include establishing specialized domestic violence prosecution units, developing victim support programs, and implementing aggressive prosecution policies. These new approaches appear to lead to increased prosecutions and convictions, although results are mixed.¹⁵⁵

Decrease in Domestic Violence Homicides

Between 1993 and 2007, the total number of homicide victims in the U.S. fell 31 percent, according to national reports.¹⁵⁶ Homicide victims killed by intimate partners fell 29 percent. Still, females were killed by intimate partners at twice the rate of males.¹⁵⁷ Females made up 70 percent of victims killed by an intimate partner in 2007, “a proportion,” according to a federal justice department report, “that has changed very little since 1993.”¹⁵⁸

¹⁵³ LAURA DUGAN, NCJRS DOC. NO. 196854, DOMESTIC VIOLENCE POLICY: EXPLORING IMPACTS ON INFORMING POLICE, ARRESTING THE OFFENDER, AND DETERRING DOMESTIC VIOLENCE, FINAL REPORT 28 (2002), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/196854.pdf>. See also, Andrew R. Klein, Nat’l Institutes of Justice Special Report, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* at 5 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222321.pdf>, citing Shannan Catalano, *Intimate Partner Violence in the United States*. U.S. Dep’t of Justice, Bureau of Justice Statistics, December 2007.

¹⁵⁴ Eric L. Nelson, *Investigating Domestic Violence: Raising Prosecution and Conviction Rates*, FBI LAW ENFORCEMENT BULLETIN (2013) at <https://leb.fbi.gov/2013/december/investigating-domestic-violence-raising-prosecution-and-conviction-rates>.

¹⁵⁵ See, e.g., Andrew R. Klein, Nat’l Institutes of Justice Special Report, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* at 36-52 (2009) (Prosecution Responses); Barbara E. Smith & Robert C. Davis, *An Evaluation of Efforts to Implement No-Drop Policies: Two Central Values in Conflict* (2004) available at <http://www.ncjrs.gov/pdffiles1/nij/199719.pdf>; Laura Dugan, Daniel Nagin, Richard Rosenfeld, *The Effects of State and Local Domestic Violence Policy on Intimate Partner Homicide*, NCJ 199711 (2004), available at <http://www.ncjrs.gov/pdffiles1/nij/199711.pdf>.

¹⁵⁶ Shannan Catalano et al., BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: FEMALE VICTIMS OF VIOLENCE (2009) at 2-4, available at <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *Id.* at 3.

EMERGING PRACTICES – PROMOTING SAFETY IN BAIL DETERMINATIONS

After criminal charges are brought against a domestic violence perpetrator, the judicial determination of bail is a critical early opportunity for courts to ensure the protection of victims. By attaching protective conditions to a perpetrator’s pretrial release, magisterial district judges and trial courts can prevent future violence and reduce the likelihood of further breaches of the peace.

In 1998, Article I, Section 14 of the Pennsylvania Constitution was amended to read: “All prisoners shall be bailable by sufficient sureties, unless ... no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community ...” This constitutional amendment could be used to deny bail to a violent domestic violence defendant. At a minimum, this amendment prioritizes the consideration of victim and public safety when setting bail.

The Pennsylvania Rules of Criminal Procedure grant courts the authority to set any conditions necessary to implement the requirements that defendants refrain from intimidating victims or engage in additional criminal behavior, including bail conditions that are intended to guarantee the safety of victims.¹⁵⁹

Pennsylvania’s Crimes Code and Rules of Criminal Procedure represent an explicit direction that courts consider the safety of victims of domestic violence in setting bail and order specific conditions of bail that are protective in nature. Under the law, such conditions include not entering the victim’s residence or place of employment.¹⁶⁰

According to the National Council of Juvenile and Family Court Judges (NCJFCJ), the safety of victims and other family members should be one of the court’s utmost concerns during the pretrial phase, including during bail proceedings. In a bail proceeding, the court should consider the nature of the offense, the victim’s injuries, the defendant’s prior criminal history, and whether children are victims or witnesses.¹⁶¹

In addition, judges are encouraged not to release dangerous defendants.¹⁶² Several studies of prior arrests indicate that abusers with “just one prior arrest . . . for any crime (not just domestic violence)” are more likely to reabuse than those never arrested.¹⁶³

Handle an abuser who has a prior record for any crime as a high-risk domestic violence offender for safer order, bail and sentencing provisions.

A leading criminal justice researcher summarizes:

Judges should understand that if an abuser has a prior record for any crime, he is a high-risk domestic violence offender, not a low-risk “first” offender. Judges should demand access to prior

¹⁵⁹ PA. R. CRIM. P. 526(B), 527(A)(2)-(3).

¹⁶⁰ 18 PA. C.S. § 2711(c)(2).

¹⁶¹ NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ FAMILY VIOLENCE PROJECT 17 (1990), available at <http://www.ncjfcj.org/resource-library/publications/family-violence-improving-court-practice>.

¹⁶² *Id.*

¹⁶³ Andrew R. Klein, Nat’l Institutes of Justice Special Report, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* 22 (2009) (emphasis in original) (A multistate study of more than 3,000 police arrests found that offenders with a prior arrest record for any offense were more than seven times more likely to be rearrested than those without prior records.)

criminal and abuse histories before fashioning civil orders, making pretrial release decisions, or sentencing abusers.¹⁶⁴

Seemingly unrelated nonviolent offenses such as drunk driving or drug possession¹⁶⁵ and fleeing the scene of domestic violence¹⁶⁶ could also be risk markers for reabuse.

If the defendant is released on bail, the victim should be given prior notification of the release, and judges are encouraged to impose special conditions of release, including confiscation of weapons, “No Contact” orders, allowing the victim to remain in the family home to the exclusion of the defendant, and adequate financial support for the victim and children.¹⁶⁷

EMERGING PRACTICES – PROMOTING SAFETY BY CAREFULLY SCRUTINIZING ACCELERATED REHABILITATIVE DISPOSITION REQUESTS

It is important for judges to very carefully scrutinize requests for Accelerated Rehabilitative Disposition (A.R.D.) in domestic violence cases. According to the NCJFCJ, diversion and alternative dispositions like A.R.D. are “frequently inappropriate” in domestic violence cases and “send a message to both the victim and the offender that the crime is less serious than comparable crimes against non-family members.”¹⁶⁸ Judges are encouraged to discern whether the alternative disposition is in the interest of justice and not simply a device for docket management or unsuitable use of diversion.¹⁶⁹

Generally, in Pennsylvania, first-time offenders of lesser criminal charges may apply for admission to the A.R.D. program. A defendant who successfully completes the program avoids a conviction for the charged offense.

Every county has its own standards regarding which crimes would qualify for admission into A.R.D. and which would not, but most crimes graded as misdemeanors will qualify. Some counties do have prohibitions where crimes of violence are concerned, but that decision is left for the district attorney in each individual jurisdiction.

Technically speaking, a defendant's admission into an A.R.D. program is not a matter of right, but rather a privilege.¹⁷⁰ The decision to submit a case for A.R.D. placement is in the sole discretion of the district attorney.¹⁷¹ If a defendant is denied admission to the program, the reasons for doing so must relate to the protection of society or to the likelihood of the candidate's successful rehabilitation.¹⁷²

Judges may set conditions for entry into the A.R.D. program that are similar to those conditions that could be set if probation was imposed after conviction.¹⁷³

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 24.

¹⁶⁶ *Id.* at 25.

¹⁶⁷ NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ FAMILY VIOLENCE PROJECT 17 (1990),

¹⁶⁸ *Id.* at 18.

¹⁶⁹ *Id.*

¹⁷⁰ *Commw. v. Hyde*, 594 A.2d 703 (Pa. Super. 1991).

¹⁷¹ *Commw. v. Paul*, 557 A.2d 357 (Pa. Super. 1989).

¹⁷² *Commw. v. Ebert*, 535 A.2d 178 (Pa. Super. 1987).

¹⁷³ PA. R. CRIM. P. 316.

Why Victims Sometimes Want Accelerated Rehabilitative Disposition

Some victims of domestic violence may find the existence of an A.R.D. program helpful, because in many cases the victim remains dependent on the financial resources provided by the perpetrator. A system that appropriately addresses the perpetrator's underlying problems with violence and control, but allows for the avoidance of a conviction or jail time and the loss of household income, can be helpful to the needs of some domestic violence victims.

Why Victims May Oppose Accelerated Rehabilitative Disposition

On the other hand, some victims, knowing their batterer very well and properly assessing the level of danger, want and need the criminal justice system to hold the perpetrator accountable for his or her crimes. For some domestic violence perpetrators, a conviction followed by a sentence that includes supervised probation is a better intervention by the criminal justice system and is one that may provide greater safety for the victim. The Crime Victims Act provides that victims be given the opportunity to attend proceedings and to comment on dropping charges, case diversion and sentencing.¹⁷⁴ Accordingly, it is important that prosecutors and courts seek input from the victim regarding whether the defendant is an appropriate A.R.D. candidate or whether further intervention by the criminal justice system is necessary.

In addition, if, after careful judicial scrutiny, A.R.D. is selected as the path for the offender the court should ensure that the offender recognizes that acceptance into an A.R.D. program does not endorse the offender's abusive behavior.¹⁷⁵

EMERGING PRACTICES – PROMOTING SAFETY IN SENTENCING DECISIONS

The Crime Victims Act requires that victims have an opportunity to offer comment on the sentence of the defendant and to include submission of a written and oral victim impact statement. The court is directed to consider the victim impact statement in disposition or sentencing.¹⁷⁶

Section 9721(b) provides the general standards to be used by courts when sentencing a perpetrator for a criminal offense.¹⁷⁷ The provision states, in pertinent part, “the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim [emphasis added] and on the community, and the rehabilitative needs of the defendant.” Hence, it is critical that judges prioritize considerations like stopping the violence, holding the perpetrator accountable, and protecting victims when sentencing defendants.

Pre-Sentencing Reports Provide Valuable Context for Sentencing Decisions

The National Council of Juvenile and Family Court Judges suggests that, in domestic violence cases, judges may need a pre-sentence report, regardless whether the offense is a felony, misdemeanor, or protection order violation, and recommends that judges insist on the following information prior to sentencing:

¹⁷⁴ 18 P.S. §§ 11.201(3)-(5.2); *see also* PA. R. CRIM. P. 311-313.

¹⁷⁵ Alternative disposition programs like A.R.D. are considered by the National Council of Juvenile and Family Court Judges as “frequently inappropriate, and send a message to both the victim and perpetrator that the crime is less serious than comparable crimes against non-family members.” NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ FAMILY VIOLENCE PROJECT 18 (1990).

¹⁷⁶ 18 P.S. § 11.201(5).

¹⁷⁷ 42 PA. C.S. § 9721(b).

- information on the perpetrator’s criminal history
- impact of the violence on the victim and the victim’s desires as to the disposition
- history of abusive behavior (judge should look for multiple victims or escalation of violence)
- drug, alcohol, and mental health evaluations
- history of prior court contacts with the family
- information about children and others living within the home¹⁷⁸

In some Pennsylvania counties, the criminal information sheet in cases involving domestic violence is specially marked so that the court can be advised of domestic violence issues when the defendant is pleading guilty. One court uses a rubber stamp that marks “D.V.” in two-inch-high red letters on the criminal information sheet. In these instances, the court will insist that a Pre-Sentence Investigation Report is completed so that the court can consider the domestic violence implications in imposing sentence.

Usually, domestic violence victims have the same concerns at sentencing that they would have were the perpetrator seeking admission to the A.R.D. program. The law requires the court to take victim concerns into consideration when determining the type of sentence to be imposed, the length of the sentence and any conditions of sentence that are placed upon the defendant.¹⁷⁹

Restitution Aids Victim Recovery

At sentencing, the court is required to order restitution where the victim suffered personal injury as a result of the crime, without regard to the defendant’s financial resources.¹⁸⁰ Additionally, section 9721(c) mandates that every defendant be ordered “to compensate the victim of his criminal conduct for the damage or injury that he sustained.”¹⁸¹ The imposition of such a requirement in all sentences seeks to do as much as possible to help victims recover from the injuries and losses they sustained.¹⁸²

Special Conditions Protect and Rehabilitate

A victim of domestic violence who wishes to maintain a personal relationship with the perpetrator can nevertheless be afforded some measure of protection through specific conditions of the defendant’s sentence. The following list represents an example of some of the conditions courts can impose to rehabilitate perpetrators and help safeguard victims of domestic violence:

(c) Specific conditions.— The court may as a condition of its order require the defendant:

- 1) To meet his family responsibilities.
- 2) To devote himself to a specific occupation or employment.

¹⁷⁸ NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES’ FAMILY VIOLENCE PROJECT 19 (1990).

¹⁷⁹ 18 P.S. § 11.201(5).

¹⁸⁰ 18 PA. C.S. § 1106(a)-(c).

¹⁸¹ 42 PA. C.S. § 9721(c).

¹⁸² For more information about the court’s obligations regarding restitution and prioritization of claims, see 18 PA. C.S. § 1106.

- 2.1) To participate in a public or nonprofit community service program unless the defendant was convicted of murder, rape, aggravated assault, arson, theft by extortion, terroristic threats, robbery or kidnapping.
- 3) To undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose.
- 4) To pursue a prescribed secular course of study or vocational training.
- 5) To attend or reside in a facility established for the instruction, recreation, or residence of persons on probation.
- 6) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons.
- 7) To have in his possession no firearm or other dangerous weapon unless granted written permission.
- 8) To make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby.
- 9) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or employment.
- 10) To report as directed to the court or the probation officer and to permit the probation officer to visit his home.
- 11) To pay such fine as has been imposed.
- 12) To participate in drug or alcohol treatment programs.
- 13) To satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of defendant's liberty or incompatible with his freedom of conscience.
- 14) To remain within the premises of his residence during the hours designated by the court.¹⁸³

Sentencing Recommendations

According to the National Council of Juvenile and Family Court Judges, sentencing in every case involving domestic violence should be structured to achieve all of the following:

- holding the perpetrator accountable
- ordering perpetrator involvement in activities specifically designed to reduce future violence
- requiring, where appropriate, drug and alcohol treatment, mandating successful completion of treatment, and providing for mandatory testing
- providing for formal supervision and monitoring of compliance¹⁸⁴

¹⁸³ 42 PA. C.S. § 9754(c).

¹⁸⁴ *Id.* at 20.

Following incarceration, intense supervision may be especially helpful when the perpetrator is convicted of stalking.¹⁸⁵ Unsupervised bench probation is not appropriate or effective. In addition to offender accountability, formal supervision provides a measure of protection for a victim who will have an officer of the court to turn to in the event of subsequent threats or assaults.¹⁸⁶

Additional Penalties as Warranted

Under circumstances involving use of a dangerous weapon, presence of children, elderly, pregnant, youthful, or disabled victims, sexual assault, serious injuries requiring hospitalization, or threats of serious bodily injury or death, enhanced sentences may be necessary.¹⁸⁷

Finally, the National Council of Juvenile and Family Court Judges recommends that judges take repeat domestic violence crimes and violations seriously, by ordering additional penalties for repeat offenders. Additional sanctions may include, among others: fines, a greater length of incarceration, additional time on supervised probation, and victim restitution.¹⁸⁸

EMERGING PRACTICES – PROMOTING SAFETY USING VICTIM-WITNESS PROGRAMS

Victim-witness programs have been instituted in every Pennsylvania county to offer victims and witnesses services to help protect their safety, keep them informed of case developments as they occur, provide support and crisis intervention, and ensure the voices of victims are heard.

Victim-witness programs routinely provide information to victims about what is happening in their individual cases, how the court system works, the status of a defendant's bail, as well as information regarding available social services designed to help the victims deal with the trauma and hardships resulting from being a crime victim. Victim-witness programs provide a secure area during court proceedings for victims and witnesses.

Victim-witness programs also perform the notice and assistance duties assigned to prosecutors' and probation offices under the Crime Victims Act.¹⁸⁹ Victim-witness staff provide a valuable link between prosecutors and victims whose circumstances need to be taken into consideration when decisions like conditions of bail, evidentiary matters that affect victims' privacy, and sentencing are taken before the courts.

¹⁸⁵ See Stalking Resource Ctr., *Using Probation and Parole to Stop Stalkers* (2003), available at [http://www.victimsofcrime.org/docs/Information Clearinghouse/Using Probation and Parole to Stop Stalkers.pdf?sfvrsn=0](http://www.victimsofcrime.org/docs/Information%20Clearinghouse/Using%20Probation%20and%20Parole%20to%20Stop%20Stalkers.pdf?sfvrsn=0).

¹⁸⁶ NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES' FAMILY VIOLENCE PROJECT 20 (1990).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 21.

¹⁸⁹ For more information about the responsibilities of prosecutors' and probation offices under the Crime Victims Act, please see 18 P.S. §§ 11.213 and 11.216, <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1998/0/0111..HTM>

EMERGING PRACTICES – PROMOTING SAFETY BY PROTECTING VICTIM CONFIDENTIALITY

Another area of victim protection involves statutes providing protecting victim confidentiality. There are statutory confidentiality protections for victims of domestic violence and sexual assault.

Domestic violence and sexual assault counselor privileges are absolute, and apply to oral communications and records created during the course of confidential relationships.

Domestic Violence Advocate/ Counselor Confidentiality

The legislature recognized the need for confidentiality of communications between domestic violence victims and advocates, and enacted provisions in the PFA Act creating a statutory privilege for these communications.

Section 6116 protects the communications between victims and domestic violence counselors/advocates and states:

Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a co-participant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim. Neither the domestic violence counselor/advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance.¹⁹⁰

The PFA Statute broadly defines the “confidential communications” covered by the domestic violence counselor privilege:

All information, whether written or spoken, transmitted between a victim and a domestic violence counselor or advocate in the course of the relationship. The term includes information received or given by the domestic violence counselor or advocate in the course of the relationship, as well as advice, reports, statistical data, memoranda or working papers, records or the like, given or made in the course of the relationship.¹⁹¹

For purposes of the confidentiality protections, the statutory definition of “victim” also includes persons who have a significant relationship with the victim, and who seek assistance from the domestic violence advocate:

A person who is physically or sexually abused by a family or household member. For purposes of section 6116 (relating to confidentiality), a victim is a person against whom abuse is committed who consults a domestic violence counselor or advocate for the purpose of securing advice, counseling or assistance. The term shall also include persons who have a significant relationship

¹⁹⁰ 23 PA. C.S. § 6116. Chapter 63 requires that domestic violence advocates report child abuse when the domestic violence counselor/advocate has reasonable cause to suspect that a child is a victim of child abuse under certain circumstances. 23 PA. C.S. § 6311.

¹⁹¹ 23 PA. C.S. § 6102(a).

with the victim and who seek advice, counseling or assistance from a domestic violence counselor or advocate regarding abuse of the victim.¹⁹²

The statute defines “domestic violence program” as:

A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims which include, but are not limited to, crisis hotline; safe homes or shelters; community education; counseling systems intervention and interface; transportation, information and referral; and victim assistance.¹⁹³

Absolute privilege extends to records and oral testimony

The domestic violence counselor/advocate privilege is absolute and extends to records as well as to oral testimony.¹⁹⁴ Domestic violence counselor/advocate is defined as an individual who is engaged in a domestic violence program, the primary purpose of which is the rendering of counseling or assistance to victims of domestic violence, who has undergone 40 hours of training.¹⁹⁵

Sexual Assault Counselor Confidentiality

One of the most sensitive areas of victim confidentiality involves crimes of sexual violence. Pennsylvania’s legislature granted victims an absolute privilege of confidentiality over information passed to rape crisis counselors.

The sexual assault confidentiality statute provides, in pertinent part:

(a) Definitions.— As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Rape crisis center." Any office, institution or center offering assistance to victims of sexual abuse and their families through crisis intervention, medical and legal accompaniment and follow-up counseling.

"Sexual assault counselor." A person who is engaged in any office, institution or center defined as a rape crisis center under this section, who has undergone 40 hours of sexual assault training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.

"Victim." A person who consults a sexual assault counselor for the purpose of securing advice, counseling or assistance concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who seek advice, counseling or assistance from a sexual assault counselor concerning a mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault of a victim.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *V.B.T. v. Family Servs. of Western Pa.*, 705 A.2d 1325 (Pa. Super. 1998), *aff'd* by 728 A.2d 953 (Pa. 1999); see also *Commw. v. Wilson*, 602 A.2d 1290 (Pa. 1992) (explaining the importance of extending privilege for all communications, including the full contents of documents and/or records, that were created in the course of a privileged relationship).

¹⁹⁵ 23 PA. C.S. § 6102.

"Confidential communication." All information, oral or written, transmitted between a victim of sexual assault and a sexual assault counselor in the course of their relationship, including, but not limited to, any advice, reports, statistical data, memoranda, working papers, records or the like, given or made during that relationship.

(b) Privilege.—

- 1) No sexual assault counselor may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.¹⁹⁶

The above privilege prevents sexual assault counselors from disclosing confidential communications made to them by victims of sex-related crimes. The privilege is absolute and applies both to oral communications and to records created during the course of the confidential relationship.¹⁹⁷ It is critical that judges be aware of these confidentiality protections.

EMERGING PRACTICES – PROMOTING JUSTICE BY RECOGNIZING VICTIM RIGHTS

Although the prime focus of the criminal justice system is on the criminal acts of a perpetrator and the punishment for those acts, Pennsylvania's legislature and courts have become increasingly aware of the need to give victims a voice in the system. Pennsylvania's legislature enacted the Crime Victims Act and directed that all crime victims "be treated with dignity, respect, courtesy and sensitivity."¹⁹⁸ Whether through victim input at bail or sentencing proceedings or whether by considering the privacy needs of victims throughout the trial process, courts can play a major role in promoting the recognition of victim's rights.

In addition to the statutory protections in the Crime Victims Act discussed earlier in this chapter, the Pennsylvania Supreme Court has recognized the valuable contributions that victims make to the administration of justice. Several Rules of Criminal Procedure include victim notice and involvement provisions.

In A.R.D. proceedings, Pennsylvania Rule of Criminal Procedure 311 requires that victims be given notice of any and all hearings. Rule 312 provides victims with the right to attend said hearing. Rule 313 provides that victims shall have the right to voice their opinions before the Court prior to any determination on whether a defendant is accepted into the A.R.D. program.

Even where the Commonwealth and the perpetrator enter into an agreement to dismiss charges, the court is obligated under Rule 586(3) to ensure that losses suffered by the victim are guaranteed payment under the agreement.

Once a perpetrator is convicted, Pennsylvania Rule of Criminal Procedure 702 affords a victim an additional assurance that the victim's concerns will be heard in the form of a victim impact statement. The rule requires that such a statement be made part of any pre-sentence report ordered by the court.

The goal of reducing domestic violence is well served by mandating that the domestic violence victim's voice be heard in the criminal justice system. The victim knows the abuser best. Courts are greatly assisted by the

¹⁹⁶ 42 PA. C.S. § 5945.1.

¹⁹⁷ See *Commw. v. Wilson*, 602 A.2d 1290 (Pa. 1992).

¹⁹⁸ See 18 P.S. § 11.210(a).

additional insight that victims can offer. Victim involvement also serves to empower some victims in their efforts to overcome the trauma of domestic violence. Because ending domestic violence is an important goal in society and addressing domestic violence is an important goal of the criminal justice system, every effort to assist victims in seeking safety and being heard is beneficial.

CHAPTER IX: STALKING

TABLE OF CONTENTS

CHAPTER GOALS.....	3
HARASSMENT CRIMES.....	3
Harassment.....	3
Statutory Definition of Harassment.....	3
Elements of Harassment	4
Shoving, hitting, kicking constitute harassment.....	4
Course of conduct with intent to alarm, annoy, or harass constitutes harassment	4
Lewd or obscene communications constitutes harassment	4
Anonymous or inconvenient hour calls constitutes harassment	4
Following the victim constitutes harassment.....	5
STALKING CRIMES	5
Stalking.....	5
Statutory Definition of Stalking.....	5
Elements of Stalking	6
Course of Conduct.....	6
Stalking includes, but is not limited to, following a person.....	6
Repeated, unwanted communications prohibited.....	6
Stalking Cases.....	7
Prior bad acts may be admissible as elements of stalking crime	7
Civil PFA order as evidence of course of conduct.....	8
Stalking actions in other jurisdictions as course of conduct.....	8
Separate stalking instances may occur over a short period	9
GRADING, COUNTS, AND SENTENCING IN STALKING AND HARASSMENT CASES	9
Grading of Harassment Cases.....	9
Grading of Stalking Cases.....	10
Each Act Counts as a Charge After Second Incident Occurs	11
VENUE FOR STALKING OFFENSE PROSECUTIONS	11

STALKING AND HARASSMENT IN PFA CASES	12
Stalking as Abuse.....	12
Stalking as Prohibited Behavior.....	12
PFA Stalking Case Law.....	12
Repeated calls and e-mails	12
Repeated calls, threats against others.....	12
Course of Conduct.....	13
FEDERAL STALKING LAWS.....	13
Stalking Involving Interstate/Foreign Travel.....	14
Stalking Using Mail, Electronic or Commercial Means.....	14
Stalking and Interstate Violations of Protection Orders	15
OTHER RELEVANT INFORMATION	15
Stalking is Prevalent in Abusive Relationships.....	15
Stalking is Mostly Perpetrated by Intimate Partners.....	15
Intimate Partner Stalkers are More Dangerous.....	16
Relationship Between Intimate Stalking and Physical, Sexual and Emotional Abuse	17
Stalking Behavior is Intended to Intimidate Victims.....	17
Technology-Aided Stalking.....	18
Cyberstalking.....	19
Stalking Using the Civil Court Process	19
Stalking Is Under-Reported	19
The Aftermath of Stalking is Long-Lasting	19
EMERGING PRACTICES – JUSTICE SYSTEM SEES ONLY THE TIP OF THE STALKING ICEBERG.....	20
EMERGING PRACTICES – TREAT THREATS AS ACTS OF VIOLENCE	20
EMERGING PRACTICES – ANTI-STALKING PFA ORDERS	21
EMERGING PRACTICES – DISCOURAGE RECIDIVISM WITH STRONG AND SWIFT ENFORCEMENT – INCLUDING CRIMINAL PROSECUTION	21

CHAPTER GOALS

Stalking and harassment are under-reported criminal activities frequently associated with domestic violence. In addition to being a crime, stalking behavior meets the definition of abuse under the PFA Act; stalking alone can support a PFA order. This chapter reviews civil and criminal stalking and harassment statutes and case law. Relevant information about stalking is provided, including its prevalence, dangerousness, and the use of technology-aided stalking.

HARASSMENT CRIMES

Harassment

Harassment and stalking are separate but related offenses. Statutorily, harassment used to be a lesser-included offense of stalking; it is now a separate offense. While both statutes address stalking-related behavior, they differ in the amount of activity required and the intent necessary.

Statutory Definition of Harassment

According to the Pennsylvania Crimes Code, harassment is defined as follows:

A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

- 1) strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same
- 2) follows the other person in or about a public place or places
- 3) engages in a course of conduct or repeatedly commits acts that serve no legitimate purpose
- 4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures
- 5) communicates repeatedly in an anonymous manner
- 6) communicates repeatedly at extremely inconvenient hours; or
- 7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6)¹

“Communicates” and “Course of Conduct” for the harassment crime are defined as follows:

Communicates: Conveys a message **without intent of legitimate communication** or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.²

Course of conduct: A pattern of actions composed of **more than one act over a period of time, however short**, evidencing a continuity of conduct. Acts indicating a course of conduct, which

¹ 18 PA. C.S. § 2709(a).

² *Id.* (emphasis added.)

occur in more than one jurisdiction, may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.³

Elements of Harassment

Shoving, hitting, kicking constitute harassment

A harassment conviction may be sustained if the Commonwealth establishes that the perpetrator strikes, shoves, kicks or otherwise subjects the victim to physical contact, or attempts or threatens to do the same, with the intent to harass, annoy, or alarm the victim. In **Commonwealth v. Kirwan**, the court found that the defendant's picking up his wife and throwing her to the ground was sufficient proof of physical contact and the requisite intent to sustain a harassment conviction.⁴

Course of conduct with intent to alarm, annoy, or harass constitutes harassment

The harassment statute bans a "course of conduct" that is carried out by the perpetrator, which has no legitimate purpose, is done with the intent to harass, annoy, and alarm the victim and which would alarm or seriously annoy the average individual.⁵ For example, in **Commw. v. Barzyk**, the Superior Court upheld the harassment conviction of a man who played an audiotape of pig noises at a high volume whenever his ex-wife visited the man's neighbor.⁶ The man constantly ridiculed his ex-wife whenever she passed by his home to pick up their daughter at a bus stop and the defendant frequently telephoned the victim and made pig noises. The court held that the defendant's behavior constituted a "course of conduct" prohibited under the statute.⁷

Repeated inconvenient phone calls and insulting noises intended to annoy constitute harassment.

Lewd or obscene communications constitutes harassment

The harassment statute prohibits communications that contain lewd or obscene language that are used to harass, annoy, and alarm victims.

Anonymous or inconvenient hour calls constitutes harassment

The harassment statute proscribes anonymous communications and late-hour communications designed to harass a victim. For example, a string of 2 a.m. telephone calls from a husband to his estranged wife or a pattern of one party hanging up when the other party answers the telephone would justify a conviction under these provisions.

³ 18 PA. C.S. § 2709(f) (emphasis added).

⁴ [Commw. v. Kirwan, 847 A.2d 61 \(Pa. Super. 2004\).](#)

⁵ See [Commw. v. Evans, 445 A.2d 1255 \(Pa. Super. 1982\).](#)

⁶ [Commw. v. Barzyk, 692 A.2d 211 \(Pa. Super. 1997\).](#)

⁷ *Id.* at 214-215.

Following the victim constitutes harassment

The harassment statute prohibits the following of another person in or about public places. This section should not be confused with section 2709.1, stalking.⁸ While both statutes address stalking-related behavior, the two statutes differ in the amount of activity necessary to justify a conviction, the intent required, and the grading of the offenses. More specifically, a violation of the harassment statute may occur with a single “following” incident, whereas the stalking statute requires a “course of conduct.” The harassment statute requires the intent to harass, annoy, or alarm. The stalking statute requires the intent to place the victim in reasonable fear of bodily injury or to cause substantial emotional distress to the victim. Finally, stalking offenses carry far greater penalties than harassment offenses, because stalking offenses carry a higher grading.

STALKING CRIMES

Stalking

Pennsylvania’s stalking statute is an expanded version of the stalking provisions previously contained in the harassment statute. The language of the new statute simply expands on the prior stalking provisions of 18 Pa. C.S. § 2709. Therefore, the cases interpreting the previous statute remain relevant.

Statutory Definition of Stalking

According to the Pennsylvania Crimes Code:

A person commits the crime of stalking when the person either:

- 1) engages in a course of conduct or repeatedly commits acts toward another person, including following the person without proper authority, under circumstances which demonstrate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person; or
- 2) engages in a course of conduct or repeatedly communicates to another person under circumstances which demonstrate or communicate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person.⁹

The stalking statute contains the following definitions:

Communicates: To convey a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.

Course of conduct: A pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. The term includes lewd, lascivious, threatening or obscene words, language, drawings, caricatures or actions, either in person or anonymously. Acts indicating a course of conduct that occurs in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct.

⁸ 18 PA. C.S. § 2709.1.

⁹ 18 PA. C.S. § 2709.1(a).

Family or household member: Spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.¹⁰

The second of two related, but separate events triggers stalking course of conduct, ... each is a certifiable stalking count.

Elements of Stalking

Course of Conduct

The stalking statute proscribes a course of conduct, including following a person without authority, with the intent to place the victim in fear of bodily injury or to cause the victim substantial emotional distress. Because this section requires a course of conduct, the first incident of a perpetrator following a victim or undertaking some other act would not give rise to a stalking violation. Instead, the first incident would be actionable as a harassment violation under section 2709.¹¹ Since “course of conduct” has been generally regarded as two or more acts, once a perpetrator commits a second act that qualifies under the statute, a stalking violation has occurred.¹²

Stalking includes, but is not limited to, following a person

The stalking definition clarifies that the prohibited behavior is not limited to simply following a victim. Any behavior that is accompanied by the requisite intent can be used to justify a stalking violation. For example, repeatedly appearing at a victim’s home may constitute stalking.¹³

Repeated, unwanted communications prohibited

Under the stalking statute, a “course of conduct” is a pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. Course of conduct includes: lewd, lascivious, threatening or obscene words, drawings, caricatures or actions either in person or anonymously.¹⁴ The Pennsylvania Superior Court has determined that, for the purposes of the stalking statute, a course of conduct is established by two related but separate events and the elements of stalking are not established until the occurrence of a second prohibited act.¹⁵ After that second act, each act of stalking, including the first, is a certifiable count, capable of sustaining a separate conviction and sentence. Each act constituting the course of

¹⁰ 18 PA. C.S. § 2709.1(f). The definition of family or household member is included in the stalking statute, because the statute incorporates higher grading offenses following a crime of violence against the same victim, family, or household member.

¹¹ 18 PA. C.S. § 2709.

¹² When the second act occurs, each act, including the first, is capable of sustaining a separate stalking charge and verdict. See [Commw. v. Leach, 729 A.2d 608 \(Pa. Super. 1999\)](#).

¹³ See, e.g., [Commw. v. Roefaro, 691 A.2d 472 \(Pa. Super. 1997\)](#) (stalking conviction upheld where defendant repeatedly left gifts and notes for the victim at her sister’s house).

¹⁴ 18 PA. C.S. § 2709(f).

¹⁵ [Commw. v. Leach, 729 A.2d 608 \(Pa. Super. 1999\)](#).

conduct leading to arrest and trial is not merely cumulative evidence of stalking but stalking in and of itself. Therefore, a defendant can be charged, convicted, and sentenced for each act.¹⁶

Stalking Cases

Prior bad acts may be admissible as elements of stalking crime

Although evidence of prior bad acts is generally not admissible if offered merely to show bad character or a propensity for committing bad acts, an exception to this rule exists in those instances where the evidence is relevant for some other legitimate purpose and not designed generally to prejudice the defendant by showing him to be a person of bad character. In stalking cases, prior bad acts are usually elements of the crime of stalking and such evidence can be admitted.

For example, in ***Commonwealth v. Davis***, as part of the evidence in the defendant's stalking trial, the court allowed testimony from a police officer that he had filed criminal charges against Davis for reckless driving that targeted the stalking victims.¹⁷

Trial testimony indicated that the defendant, Davis, had engaged in domestic violence against Kelly Kraycar (is it OK to use the defendant's first name but not the perpetrator's?) for many years. The parties were also engaged in a bitter and protracted custody dispute. After years of threats, "following" behavior, and Davis' attempt to run over Kraycar, her new husband and daughter with his car, the Kraycars filed stalking charges. During the stalking trial, the jury heard from Ms. Kraycar that she had separated from Davis three years earlier, because he was very physically and mentally abusive. She testified that after the separation the abuse escalated; Davis frequently telephoned her, calling her names, cursing at her, threatening to break her legs, and threatening to kill her. Even though Kraycar moved several times, obtaining an unlisted telephone number on each occasion, Davis obtained her new number and located her repeatedly. Ms. Kraycar eventually decided to disconnect the telephone and live without phone service to prevent Davis from repeatedly contacting her and issuing death threats. Davis and Kraycar had two children; the children each testified that Davis abused them when they refused to provide information regarding Kraycar's address.

Ms. Kraycar and her new husband, Keith Kraycar, testified that they repeatedly found signs near their vehicle and home that an unidentified person had been there. They observed Davis' car parked outside their home on many occasions. The Kraycars moved seven times in two years, seeking to avoid Davis.

Ultimately, Davis committed acts that led to criminal charges. The Kraycars were walking their baby in a stroller and Davis drove by three times in succession. The first time, Davis laughed and held up his middle finger at them; the second time Davis spat at them. On the third pass, Davis swerved the car toward them, hit the gas hard and came at the Kraycars very quickly. The Kraycars jumped out of the way.¹⁸

Evidence of prior bad acts may be admissible as an element of stalking.

¹⁶ *Id.*

¹⁷ [Commw. v. Davis, 737 A.2d. 792 \(Pa. Super. 1999\).](#)

¹⁸ *Id.*

The Kraycars reported Davis' behavior to the police, who filed reckless driving charges against Davis. The Kraycars also filed a stalking complaint. At the stalking trial, the police officer who filed the reckless driving charge against Davis for the swerving incident testified about the reckless driving charge. Davis was convicted of stalking and appealed, claiming that the police officer's testimony regarding the reckless driving charge was unfairly prejudicial in the stalking case. Observing that the trial court properly instructed the jury that they did not need to pay any attention to the charge relating to Davis' reckless driving, but that they should pay attention to the events that occurred that day, the Pennsylvania Superior Court held that the information regarding the reckless driving incident was properly presented before the jury and its admission in the stalking case was not unduly prejudicial.¹⁹

Civil PFA order as evidence of course of conduct

A civil PFA order can also be evidence of part of the course of conduct necessary to sustain a stalking conviction. For example, in ***Commonwealth v. Urrutia***, the defendant, Urrutia, had been involved in a long-term relationship with Denise Thompson.²⁰ (again, is it permissible to use the victim's full name but not the perpetrator's?) The parties had two children, and subsequently separated. Following the separation, the trial court granted Thompson's request for a PFA. On at least two occasions thereafter, Urrutia came to Thompson's home and exhibited violent behavior, and in one instance, injured a neighbor's child. Urrutia again came to Thompson's home, becoming violent and threatening to kill her. Urrutia fled when the police arrived, but returned later when he believed the police had gone. In fact, the police had merely circled the block and arrested Urrutia after he again exhibited explosive behavior.

The Superior Court observed that the purpose of Pennsylvania's stalking law was to provide increased protection against certain types of predatory behavior, and noted that "stalking often is a precursor to increased violence and even homicide."²¹ The court also reviewed stalking conduct as the basis for the issuance of a civil PFA order with warrantless arrest if probable cause exists. "The legislative scheme, both civil and criminal, was an attempt to interrupt as early as possible the escalating cycle of violence."²²

Stalking actions in other jurisdictions as course of conduct

Stalking actions in other states followed by an act in Pennsylvania may constitute part of the course of conduct necessary to support a stalking charge in Pennsylvania, as in ***Commonwealth v. Guisto***.²³ In Guisto, after following his ex-wife for six years in Connecticut, Maine, and New Hampshire, the defendant arrived uninvited at her apartment in Pennsylvania. The defendant threatened his ex-wife to gain access into her home and, once inside, raped her.

Course of conduct can include stalking in other states together with stalking in Pennsylvania.

¹⁹ *Id.* at 797-98.

²⁰ [*Commw. v. Urrutia*, 653 A.2d 706 \(Pa. Super. 1995\).](#)

²¹ *Id.* at 707.

²² *Id.*

²³ [*Commw. v. Guisto*, 810 A.2d 123 \(Pa. Super. 2002\).](#)

Two incidences “over a period of time, however short,” may constitute stalking course of conduct.

In addition to other charges, the defendant was charged with stalking. The trial court dismissed this stalking charge, reasoning that it did not have jurisdiction over the defendant’s out-of-state activities that constituted part of the course of conduct necessary for a stalking charge.

The Superior Court reversed, holding that acts committed out of state could be used in conjunction with the act occurring in Pennsylvania as evidence of the course of conduct necessary to sustain a stalking charge in Pennsylvania.²⁴

Separate stalking instances may occur over a short period

Two instances of stalking may occur over a brief period of time. For example, in **Commw. v. Johnson**, the defendant threatened the victim, who was his former intimate partner, and she obtained a PFA order.²⁵ Months later, the defendant followed the victim and her mother home from work one day and made obscene gestures from his car. The victims went to the police station, made a report, and returned home. Upon arriving home, the victim saw the defendant fleeing from her dwelling, and she saw his car parked outside. The defendant claimed that these two actions were part of one continuous event, and did not constitute a course of conduct. The lower court found defendant guilty of stalking. The Superior Court affirmed the conviction, finding that the defendant’s actions constituted a course of conduct.²⁶ The court found that the two events occurred on the day the defendant followed the victim; each was distinct in nature (in a vehicle and on foot) and in time (before and after the report at the police station).²⁷

GRADING, COUNTS, AND SENTENCING IN STALKING AND HARASSMENT CASES

Grading of Harassment Cases

Harassment may be a summary offense or a third-degree misdemeanor, depending on the nature of the harassing activity. The harassment crime is graded a summary offense when a defendant, with the intent of harassing, annoying, or alarming another, engages in a course of conduct, follows another person, or strikes, shoves, kicks or subjects another to physical contact or attempts to strike, shove or kick another.²⁸ The harassment is graded a third-degree misdemeanor when the harassing activity involves: communicating to or about another person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures; communicating repeatedly in an anonymous manner; communicating repeatedly at inconvenient hours; or communicating repeatedly in some other way.²⁹ Furthermore, the statute provides that the grading will be

²⁴ *Id.*

²⁵ [Commw. v. Johnson, 768 A.2d 1177 \(Pa. Super. 2001\)](#), reversed on other grounds, 828 A.2d 1009 (Pa. 2003).

²⁶ *Id.*

²⁷ *Id.*

²⁸ 18 PA. C.S. § 2709(a)(1)-(3), (c)(1).

²⁹ 18 PA. C.S. § 2709(a)(4)-(7), (c)(1).

enhance by one degree if the perpetrator has previously violated an order for protection under the PFA Act involving the same victim, family or household member.³⁰

Grading of Stalking Cases

Stalking can be graded as a misdemeanor of the first degree or a felony of the third degree. A first stalking offense constitutes a misdemeanor of the first degree, unless the defendant was previously convicted of a crime of violence involving the same victim, family, or household member.³¹

Repetitiveness of stalking demonstrates defendant's obsession and heightens victim's fear, ... [which] often reveals escalation of violence. ... Separate counts and sentencing for each act are justified.

In ***Commonwealth v. Bortz***, the Pennsylvania Supreme Court found that a first-time offender under the stalking statute could be charged with a felony of the third degree, because of a prior violation of a PFA order.³² Lori Nester (full name of victim) terminated her romantic relationship with Bortz and he began to threaten her. Nester obtained a PFA order against Bortz and he was subsequently convicted of indirect criminal contempt for violations of the protection order that included phone calls and delivering love letters to Nester.³³ Bortz was charged with one count of stalking graded as a third-degree felony, among other charges, after he confessed to ringing Nester's doorbell and spraying a white foamy substance on her car.³⁴ A jury convicted Bortz on all counts and he was sentenced to serve 15 to 84 months in prison on the stalking conviction. Bortz challenged the grading of his stalking charge, asserting that his conviction for violating the PFA order did not constitute a "crime of violence" contemplated by the stalking statute, because his violation involved sending love letters and no violent acts.³⁵ The Supreme Court upheld the conviction and found that the statutory language was clear and free from ambiguity and specifically enumerated the violation of a PFA order as a "crime of violence."³⁶

A third-degree felony grading shall apply for:

- a second stalking offense
- a stalking offense following a conviction for a crime of violence against the same victim, family, or household member
- a stalking offense following a protective or PFA order³⁷

³⁰ 18 PA. C.S. § 2709(c)(3).

³¹ 18 PA. C.S. § 2709.1(c)(1).

³² [*Commw. v. Bortz*, 909 A.2d 1221 \(Pa. 2006\)](#).

³³ *Id.* at 1222.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1223.

³⁷ 18 PA. C.S. § 2709.1(c)(2).

Each Act Counts as a Charge After Second Incident Occurs

Each event in the stalking “course of conduct” may support a separate stalking charge. Standing alone, the first event in the “course of conduct” does not constitute stalking; a second event must occur. However, once the second event occurs, the first and second incidents are each considered separate stalking incidences.

After the second act occurs, each act of stalking, including the first, is a certifiable count, capable of sustaining a separate conviction and sentence. In ***Commonwealth v. Leach***, following the entry of a PFA order against him, the defendant vandalized the victim’s vehicle on nine separate occasions over five months.³⁸ One incident was caught on surveillance videotape. The defendant was found guilty of nine counts of stalking. In addition, the court found him guilty of contempt for violation of the PFA order and for nine counts of criminal mischief. Leach was sentenced to serve two and one-half, to five years in prison followed by eight years of probation.

On appeal, Leach argued that his nine separate acts of vandalism constituted only one act of stalking, and that, accordingly, his sentence was excessive. The Pennsylvania Superior court rejected this argument, finding that after the second necessary act occurs, the first, the second, and any additional acts are part of the course of conduct and are, by definition, stalking. Each act forms the basis for an independent charge, conviction, and sentence. The court found that Leach was properly convicted of the nine acts of stalking, observing:

Each time a stalker commits an act, as part of an established course of conduct, under circumstances demonstrating an intent to place the victim in fear of bodily injury or to cause the victim substantial emotional distress, the fear and emotional distress increases. (sic) The repetitiveness of stalking acts is indicative of the defendant’s unrelenting obsession with the victim and often reveals an escalation of violence. For these reasons, it is essential that each stalking act, which is included in an established course of conduct, be a separate offense, punishable with an individual sentence.³⁹

VENUE FOR STALKING OFFENSE PROSECUTIONS

The venue for prosecuting a stalking offense lies in either the jurisdiction where a communication is initiated or the jurisdiction where it is ultimately received.⁴⁰ In addition, acts constituting a course of conduct that occur in more than one jurisdiction may be used in any of the jurisdictions as evidence of a continuing course of conduct.⁴¹

Evidence of acts performed in other jurisdictions may be used as evidence of a continuing pattern or course of conduct. A perpetrator who stalks a victim in another state before engaging in an act of stalking in Pennsylvania can immediately be prosecuted for stalking, because the prior acts committed elsewhere are admissible to form the requisite course of conduct to support a conviction. The police and victim do not have to wait for a second incident in Pennsylvania before filing stalking charges.⁴²

³⁸ [*Commw. v. Leach*, 729 A.2d 608 \(Pa. Super. 1999\).](#)

³⁹ *Id.* at 612-13.

⁴⁰ 18 PA. C.S. § 2709.1(b)(1).

⁴¹ 18 PA. C.S. § 2709.1(b)(2).

⁴² See [*Commw. v. Giusto*, 810 A.2d 123 \(Pa. Super. 2002\).](#)

STALKING AND HARASSMENT IN PFA CASES

Stalking as Abuse

The PFA Act defines stalking as a form of abuse that, alone, can establish a basis for a PFA order, and distinguishes the stalking activity necessary to support a PFA order from criminal stalking behavior. Stalking, as defined in the PFA Act, is:

Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, without proper authority, under circumstances that place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).⁴³

Stalking alone can support a PFA order.

Stalking as Prohibited Behavior

The relief section of the PFA Act allows a judge to direct a defendant to refrain from stalking or harassing the plaintiff and other designated persons.⁴⁴

PFA Stalking Case Law

There are few reported PFA cases involving stalking.

Repeated calls and e-mails

Repeated calls and threatening e-mails can support a PFA order. In **R.G. v. T.D.**, a case involving college students, the plaintiff claimed that the defendant, her former boyfriend, made repeated unwanted phone calls, sent e-mails, and informed the plaintiff that she was the object of his obsessive-compulsive disorder.⁴⁵ One of the e-mail messages included the statement, “You are not answering me, you’ll die.”⁴⁶ The plaintiff testified that she adamantly insisted that the defendant stop contacting her, yet he refused, and his increasingly hostile messages scared her. The trial court entered a PFA order and the defendant appealed.

On appeal, the Superior Court affirmed the trial court, holding that defendant’s repeated acts placed plaintiff in reasonable fear of bodily injury.⁴⁷

Repeated calls, threats against others

Where repeated calls and threats toward others do not cause fear, a PFA order may not be sustained. In **D.H. v. B.O.**, the plaintiff alleged that the defendant, his former homosexual lover and roommate, left several disturbing

⁴³ 23 PA. C.S. § 6102 (a)(5).

⁴⁴ 23 PA. C.S. § 6108(a)(9).

⁴⁵ [R.G. v. T.D.](#), 672 A.2d 341 (Pa. Super. 1996).

⁴⁶ *Id.* at 342.

⁴⁷ *Id.* at 342.

voicemail messages at work while the plaintiff was away on vacation.⁴⁸ The plaintiff terminated his relationship with the defendant, who then telephoned the plaintiff 13 times over the next five days. The plaintiff characterized these phone calls as the defendant's effort to repair the relationship. The plaintiff did not testify about being in fear of the defendant, even though the defendant threatened to strangle the plaintiff's boss, and to expose potentially damaging financial information about the plaintiff's employer.

The trial court entered the PFA order, but on appeal, the Superior Court reversed, citing the plaintiff's lack of fear of the defendant and the defendant's lack of threats toward the plaintiff.⁴⁹

Course of Conduct

Where the plaintiff provided ample testimony of the defendant's course of conduct that caused her reasonable fear of bodily injury, the Superior Court upheld the entry of a PFA order.⁵⁰ In ***Mescanti v. Mescanti***, the trial court entered a PFA order on behalf of a wife against her husband. She testified that the defendant had instigated fights; prevented her from leaving; awakened her from sleep, so that she hadn't slept without interruption in months; hacked her email; gone through her pockets, purse, car and cell phone logs; followed her when she was out with friends; and wrote her letters that he loved her, didn't want to lose her and that he could not live without her. After arguments, he would disappear into the parties' basement where she would hear the sound of a gun cocking.⁵¹

FEDERAL STALKING LAWS

In addition to violating state criminal law, some stalking cases can be federally prosecuted.⁵² Domestic Violence and Stalking are found in sections 2261 through 2266 of Title 18 of the U.S. Code:

- 2261. Interstate domestic violence
- 2261A. Interstate stalking
- 2262. Interstate violation of protection order
- 2263. Pretrial release of defendant
- 2264. Restitution
- 2265. Full faith and credit given to protection orders
- 2265A. Repeat offenders
- 2266. Definitions

⁴⁸ [D.H. v. B.O., 734 A.2d 409 \(Pa. Super. 1999\).](#)

⁴⁹ *Id.* at 411-12.

⁵⁰ [Mescanti v. Mescanti, 956 A.2d 1017 \(Pa. Super. 2008\).](#)

⁵¹ *Id.*

⁵² Definitions of terms used in the federal stalking statutes are found at 18 U.S.C. § 2266.

Stalking Involving Interstate/Foreign Travel

The federal crime of interstate stalking makes it illegal for a perpetrator to cross state or federal lines with the intent to kill, injure, harass, intimidate, or place under surveillance⁵³ . . . another person and, in the course of such travel:

- engage in contact that would place that person in reasonable fear of death or serious bodily injury to themselves, a spouse, intimate partner, or other member of the person's immediate family,⁵⁴ or
- engage in contact that would cause substantial emotional distress to that person or a spouse, intimate partner, or other member of that person's immediate family,⁵⁵ or
- commit or try to commit a violent crime that causes bodily injury or death⁵⁶

If the perpetrator commits the crimes in this section in violation of any civil or criminal protection order, the perpetrator "shall be punished by imprisonment for not less than one year."⁵⁷

The statute outlines escalating penalties for use of a dangerous weapon, infliction of serious bodily injury, permanent disfigurement or life-threatening bodily injury, or death.⁵⁸

This crime does not include stranger stalking or violence, but it does cover both violence and stalking committed against an intimate partner, spouse or dating partner.⁵⁹

Stalking Using Mail, Electronic or Commercial Means

The interstate stalking law also prohibits using mail, Internet, electronic or commercial means to:

- place that person in reasonable fear of death or serious bodily injury to themselves, a spouse, intimate partner, or other member of the person's immediate family,⁶⁰ or
- cause substantial emotional distress to that person or a spouse, intimate partner, or other member of that person's immediate family⁶¹

This crime does not require a relationship between the perpetrator and victim, so it *covers both stranger stalking and intimate partner stalking*.⁶²

⁵³ "...place under surveillance with the intent to kill, injure, harass or intimidate another person. . . ." 18 U.S.C. § 2261A(1)(A). (emphasis added)

⁵⁴ 18 U.S.C. § 2261A(1)(A).

⁵⁵ 18 U.S.C. § 2261A(1)(B).

⁵⁶ 18 U.S.C. § 2261.

⁵⁷ "Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year." 18 U.S.C. § 2261(b)(6).

⁵⁸ 18 U.S.C. § 2261(b).

⁵⁹ *Id.*

⁶⁰ 18 U.S.C. § 2261A(2)(A).

⁶¹ 18 U.S.C. § 2261A(2)(B).

⁶² 18 U.S.C. § 2261A.

Stalking and Interstate Violations of Protection Orders

Another federal action prohibits the interstate violation of a protective order during the course of interstate travel.⁶³ Section 2262 includes no contact, no abuse, no harassment and stay-away provisions of any protection order, whether issued against an *intimate partner under state domestic violence law*, or a *stranger under state stalking law*.

VAWA Full Faith and Credit requires courts to honor all valid protection orders issued by another state or tribal court.

Full faith and credit provisions of the Violence Against Women Act require all courts and Indian tribes to honor all valid protection orders issued by any other state or tribal court.⁶⁴

OTHER RELEVANT INFORMATION

Stalking is Prevalent in Abusive Relationships

A national survey from the Centers for Disease Control and Prevention found that approximately 1 in 6 women and 1 in 19 men in the U.S. have been stalked in their lifetime.⁶⁵ This aggregate number includes stalkers who are intimate partners, acquaintances, strangers, family members and authority figures.

However, the data reveal gendered patterns to stalking victimization. Women are significantly more likely to be stalked by an intimate partner — a spouse, former spouse, cohabitant, or date.⁶⁶ Perpetrators of stalking against men are equally likely to be acquaintances or intimate partners.⁶⁷

Stalking is Mostly Perpetrated by Intimate Partners

Stalking is prevalent in current relationships that are abusive.⁶⁸ Nationally, approximately 1 in 10 women and 1 in 50 men have experienced stalking by an intimate partner.⁶⁹

⁶³ 18 U.S.C. § 2262.

⁶⁴ 18 U.S.C. § 2265.

⁶⁵ Michelle C. Black et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2011) at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

⁶⁶ Two-thirds of the female victims of stalking reported stalking by a current or former intimate partner. Katrina Baum et al., *Stalking Victimization in the United States*, Bureau of Justice Statistics, 2009, at <https://www.victimsofcrime.org/docs/src/baum-k-catalano-s-rand-m-rose-k-2009.pdf?sfvrsn=0>.

⁶⁷ Michelle C. Black et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2011).

⁶⁸ Studies that reviewed partner stalking during abusive relationships estimated that rates could be as high as 90 percent. T.K. Logan, *Research on Intimate Partner Stalking: Putting the Pieces Together*, University of Kentucky, 4 (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/245387.pdf>.

⁶⁹ Michelle C. Black et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention 30- 31 (2011).

In addition, several studies suggest that abusers increase the intensity or frequency of stalking behaviors during separation, which may also increase the risk of violence.⁷⁰

Intimate Partner Stalkers are More Dangerous

Studies generally concur that intimate stalkers are the most dangerous of all stalking perpetrators.⁷¹ According to a 2010 review of the field of research on partner stalking, intimate stalkers are statistically more likely to:

- re-offend than non-intimate partner stalkers – and more quickly⁷²
- be insulting, interfering, threatening and violent than non-intimate stalkers⁷³
- use a weapon⁷⁴
- escalate in frequency and intensity than non-intimate stalkers⁷⁵
- use the widest range of stalking tactics as they know “know their partners' greatest weaknesses, concerns, fears and secrets as well as details about their work, friends, family, customary routines, and hangouts.”⁷⁶
- use proxy stalkers⁷⁷ (including friends and family)

Stalking victims have good reason to take threats from intimate partner stalkers seriously. In a study of stalking and the criminal justice response, more than half of intimate stalkers had been arrested for prior domestic violence.⁷⁸ Half of the stalking victims reported prior physical attacks.⁷⁹ And almost half of the intimate stalkers continued to stalk their victims in defiance of a court no contact or protective order.⁸⁰

⁷⁰ T.K. Logan, *Research on Intimate Partner Stalking: Putting the Pieces Together*, University of Kentucky, 4 (2010), citing numerous studies. The reviewer cited study findings that the stalking may make separating more difficult due to a variety of reasons, including safety concerns and that victims stalked by violent partners made more attempts to separate.

⁷¹ Andrew Klein et al., *Executive Summary: A Statewide Study of Stalking and Its Criminal Justice Response*, 19 (2009), NCJ 228354, Advocates for Human Potential, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228354.pdf>.

⁷² Kris Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based Upon A Large Sample of North American Stalkers*, 51 J. FORENSIC SCIENCE 151 (2005) available at <https://www.victimsofcrime.org/docs/default-source/src/mohandie-k-meloy-r-green-mcgowan-m-williams-j-2005.pdf?sfvrsn=2>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ T.K. Logan, *Research on Intimate Partner Stalking: Putting the Pieces Together*, University of Kentucky, 5 (2010). Nat'l Inst. of Justice, *Intimate Partner Stalking: Comparing the Danger Posed by Partner Stalkers Versus Non-Partner Stalkers*, <http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/Pages/partner-nonpartner.aspx>, citing multiple studies (last visited Nov. 30, 2015).

⁷⁷ Logan, *id.* at 5.

⁷⁸ Andrew Klein et al., *Executive Summary: A Statewide Study of Stalking and Its Criminal Justice Response*, 48 (2009), NCJ 228354.

⁷⁹ *Id.*

⁸⁰ *Id.* Other research suggests that 35 percent to 39 percent of intimate stalkers continue after being served a protection order.

A strong link between intimate partner femicide and stalking behaviors has been documented.⁸¹ Research suggests that between 69 and 90 percent of women whose abusers killed or tried to kill them were stalked while in the relationship.⁸²

One team of researchers stated boldly:

Stalking is revealed to be a correlate of lethal and near lethal violence against women and, coupled with physical assault, is significantly associated with murder and attempted murder. Stalking must be considered a risk factor for both femicide and attempted femicide and abused women should be so advised.⁸³

Relationship Between Intimate Stalking and Physical, Sexual and Emotional Abuse

There is compelling evidence of the link between stalking and other forms of violence. Intimate stalkers injure their partners.

- 81 percent of women are also physically assaulted⁸⁴
- 31 percent of women are also sexually assaulted⁸⁵

Intimate stalkers more often use controlling and emotionally abusive behavior.⁸⁶ Such behaviors include: jealousy and possessiveness, isolating behaviors, insistence on constantly knowing victim whereabouts, preventing victim from knowing about or having access to family income, and preventing victim from working outside the home.⁸⁷

In fact, the Centers for Disease Control and Prevention reports that approximately 38 percent of Pennsylvania women have experienced rape, physical violence or stalking by an intimate partner over their lifetimes.⁸⁸

Stalking Behavior is Intended to Intimidate Victims

Victims of stalking, both men and women, reported that their stalker's behavior made them afraid for themselves or others, even when the stalker did not make overt threats.⁸⁹ Unlike many other criminal offenses, stalking is distinguished by *recurrence and persistence*. Victims asserted that controlling them, keeping them in

⁸¹ Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300 (1999).

⁸² *Id.*, National Institute of Justice, *Intimate Partner Stalking: Duration and Trajectory*, Office of Justice Programs at <http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/Pages/duration.aspx> (last visited Nov. 30, 2015) citing Pam Willson, et al., *Severity of Violence Against Women by Intimate Partners and Associated Use of Alcohol and/or Illicit Drugs by the Perpetrator*, 15 J. INTERPERSONAL VIOLENCE 996 (2000)..

⁸³ Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300 (1999).

⁸⁴ Patricia Tjaden and Nancy Thoennes, Nat'l Institute of Justice and Centers for Disease Control & Prevention, *Stalking in America: Findings From The National Violence Against Women Survey* 1, 8 (1998).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 9.

⁸⁸ Nat'l Center for Injury Prevention & Control, Ctrs. For Disease Control & Prevention, *National Intimate Partner and Sexual Violence Survey Summary Report 2010*, 2, available at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

⁸⁹ Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization - National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 MORBIDITY AND MORTALITY WEEKLY REPORT, Centers for Disease Control and Prevention (2014).

the relationship and scaring them, were the primary aims of their stalkers.⁹⁰ Unlike most other crime victims, stalking victims are subjected to a pattern of behaviors, which may or may not constitute crimes, over an extended period of time.

Technology-Aided Stalking

Computer and telephone technology have provided new opportunities for stalkers. Stalkers use e-mail, the Internet, chat rooms, Web sites, cell phones, tiny digital and video cameras, and global positioning systems to stalk their victims – something few could have foreseen years ago, when stalking statutes were first enacted.

Stalkers may use high-tech tools to frighten and control victims: e-mail, Internet, cell phones, miniature cameras and GPS tracking.

Abusers are using wireless technologies to aid their efforts to track and control their intimate partners' activities through high-tech eavesdropping, home monitoring, and tracking the movements and locations of the victims. A nationwide survey⁹¹ revealed that survivors asked for help with issues such as:

- intimidation and threats via cell phones, text messages and emails
- unauthorized access to their online accounts (email, social media, instant messaging, etc.)
- being tricked by abusers pretending to be someone else (via email, phone calls, text messaging or social media)
- being tracked through GPS (via a cell phone or GPS device)
- removing pictures or video of the victim posted online without the victim's consent
- accessing a victim's computer or monitoring their online activities
- misusing listening devices to eavesdrop on victim's conversations or activities
- using public information gathered online to stalk victims
- spoofing caller ID so that the victim thinks that someone else is calling⁹²

Abusers also use high-tech eavesdropping in their stalking efforts. In *H.E.S. v. J.C.S.*, the husband's hidden placement of a tiny microchip video surveillance camera and microphone in a picture in his wife's bedroom constituted stalking behavior that supported a protective order.⁹³

⁹⁰ *Id.*

⁹¹ Victim services providers were surveyed about survivors' reported experiences of technology abuse. National Network to End Domestic Violence, *Technology Abuse: Experiences of Survivors and Victim Services Agencies* (2014) at https://nnedv.org/latest_update/technology-abuse-experiences-of-survivors-and-victim-service-agencies/.

⁹² *Id.*

⁹³ *H.E.S. v. J.C.S.*, 815 A.2d 405, 416-18 (2003).

Cyberstalking

Cyberstalking, generally, is the use of the Internet, e-mail, or other electronic communication devices to stalk another person. Cyberstalking shares important characteristics with offline stalking in that cyberstalkers are similarly motivated by a desire to control the victim.

In many cases, cyberstalking begins when a victim attempts to terminate the relationship with an intimate partner. One cyberstalker retaliated against a woman who had rejected his romantic advances by impersonating her in various Internet chat rooms and bulletin boards where he posted, along with her telephone number and address, messages that she fantasized about being raped. In response, on at least six occasions, men came to her door offering to act on her rape fantasy offer. The cyberstalker was caught and pleaded guilty to one count of stalking and three counts of solicitation of sexual assault.⁹⁴

The anonymity of the Internet makes it easier for cyberstalkers to conceal their true identity by using different Internet Service Providers and by adopting screen aliases. Experienced cyberstalkers may use anonymous e-mailers that make it very difficult to determine the true source of the e-mail.

Stalking Using the Civil Court Process

Cases involving intimate partner stalkers are more complicated if the stalker and victim share children. In these situations, persons who engage in stalking behavior may attempt to use legitimate court processes, such as custody proceedings, to maintain contact, intimidation, and control over the victim. Such an individual may vehemently oppose custody exchange facilitated by a third party, may argue against custody exchange in a neutral location, or may file repeatedly for different custody or visitation arrangements.⁹⁵

Stalking Is Under-Reported

The prospect of being stalked – pursued, spied upon, threatened – is so unnerving that most people might assume it is always reported to law enforcement authorities. Surprisingly, many stalking victims do not inform authorities about such crimes.

In a nationwide study:

[O]nly 55 percent of women victims and 48 percent of men victims reported the stalking to the police. The three reasons most often cited by those who did not report were that it was not a police matter, that the police couldn't do anything, or that the victims were afraid of reprisals by the stalker.⁹⁶

The Aftermath of Stalking is Long-Lasting

Victims report that they were stalked, on average, for one to two years, but that the consequences continued much longer.⁹⁷ Targets of stalking are forced to change their lifestyle – take extra safety precautions, change

⁹⁴ *Id.*

⁹⁵ Paul Mullen & Michelle Pathe, *Stalking*, 29 CRIME & JUSTICE 273, 291 (2002).

⁹⁶ Clare Dalton & Elizabeth M. Schneider, *Stalking and Domestic Violence*, BATTERED WOMEN AND THE LAW 665, 668 (2001); see also Patricia Tjaden and Nancy Thoennes, Nat'l Institute of Justice and Centers for Disease Control & Prevention, *Stalking in America: Findings From The National Violence Against Women Survey* 9-10 (1998).

⁹⁷ Patricia Tjaden and Nancy Thoennes, Nat'l Institute of Justice and Centers for Disease Control & Prevention, *Stalking in America: Findings From The National Violence Against Women Survey* 11-12 (1998); see also Paul Mullen & Michelle Pathe, *Stalking*, 29 CRIME & JUSTICE 273, 296-298 (2002).

addresses, and even choose to carry a weapon in the hope of self-protection.⁹⁸ One-third of victims report they sought psychological treatment as a result of being stalked.⁹⁹ One study noted “deleterious effects on the victim’s psychological and social functioning in virtually all cases. Increased anxiety, sleep disturbance, significant depression, and suicidal ruminations were common, with the majority of victims having symptoms of a post-traumatic stress disorder.”¹⁰⁰

Victims cited police involvement and their own relocation as reasons the stalker desisted.¹⁰¹ Female victims often reported that stalking did not cease until their stalker entered into a new relationship.¹⁰²

EMERGING PRACTICES – JUSTICE SYSTEM SEES ONLY THE TIP OF THE STALKING ICEBERG

For reasons discussed above – privacy, fear of reprisal, and lack of faith in law enforcement – victims are reluctant to report stalking to the police.¹⁰³ Of the reports filed, only 25 percent of victims said that their case was prosecuted.¹⁰⁴ Of those stalkers who are prosecuted, only half are convicted, and about two-thirds of those convicted are sentenced to jail.¹⁰⁵

To encourage safety, judges must understand and not minimize the prevalence, likelihood, and effect of stalking behavior. Civil protection order enforcement is particularly important.

According to a U.S. Department of Justice study, about half of the women who filed stalking reports said that their situation improved as a result of their decision to report the stalking and they were satisfied with police and court responses. However, researchers also observed that:

The response of the judicial system does not always live up to the victim’s expectations, as lawyers, magistrates, and judges who are ignorant of stalking issues and who trivialize the stalker’s actions confront victims. This has led to calls for comprehensive training . . . in the special needs of the victims of prior intimate stalking.¹⁰⁶

EMERGING PRACTICES – TREAT THREATS AS ACTS OF VIOLENCE

Verbal or written threats of harm may precede a stalking attack. Although the majority of stalkers who threaten do not subsequently commit violence, those who do assault have usually issued prior warnings.¹⁰⁷ Threats by stalkers should be taken seriously. One research team that has studied the correlation between threats and attacks suggests that:

⁹⁸ *Id.* at 13.

⁹⁹ *Id.* at 2, 11.

¹⁰⁰ Paul Mullen & Michelle Pathe, *Stalking*, 29 CRIME & JUSTICE 278 (2002).

¹⁰¹ Patricia Tjaden and Nancy Thoennes, Nat’l Institute of Justice and Centers for Disease Control & Prevention, *Stalking in America: Findings From The National Violence Against Women Survey* 11-13 (1998).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Paul Mullen & Michelle Pathe, *Stalking*, 29 CRIME & JUSTICE 292 (2002).

¹⁰⁷ *Id.* at 303.

[T]hreats should be regarded as promises. Like many promises, not all are fulfilled, but, nevertheless, they should be accepted as a commitment to future action until proved otherwise. Most stalkers who assault give warnings of their intentions by threatening. Threats in the stalking context should always be taken seriously. Quite apart from being a warning, *threats are, in and of themselves, acts of violence issued to frighten and intimidate.*¹⁰⁸

EMERGING PRACTICES – ANTI-STALKING PFA ORDERS

In addition to stay-away and do not stalk conditions in bail and probation or parole orders, courts may issue anti-stalking protection orders pursuant to Pennsylvania’s PFA Act, which allows the court to issue an order “[d]irecting the defendant to refrain from stalking or harassing the plaintiff and other designated persons as defined in 18 Pa. C.S. § 2709 (relating to harassment and stalking).”¹⁰⁹

EMERGING PRACTICES – DISCOURAGE RECIDIVISM WITH STRONG AND SWIFT ENFORCEMENT – INCLUDING CRIMINAL PROSECUTION

Prior history of stalking is associated with future stalking behavior. However, several studies suggest that the majority of intimate partner stalkers discontinue their stalking behavior after a civil protective order is obtained against them.¹¹⁰

Strong and swift enforcement of the PFA order may convince abusers that stalking is not “worth it.” Further, jailing a stalker for violations, even for the short sentence permitted under PFA indirect criminal contempt,¹¹¹ may give the victim enough time to take further steps to protect herself or himself. Abusers who stalk in violation of protective orders are likely to violate more often and be more violent.¹¹²

Criminal prosecution may be more effective against stalkers in addition to civil court protections.¹¹³

Victims should also understand that restraining orders are a civil remedy that rarely attract prison sentences and pit the victim against the accused. ... Victims may be better advised to pursue criminal charges against their stalker, invoking anti-stalking laws or other charges such as theft, assault, or threats. This approach defuses some of the fervor encountered in victim-initiated civil interventions, as the charges are brought by the state. It may also reduce demands on the victim in the court process, including face-to-face contacts between victim and defendant. Prosecution under anti-stalking laws offers greater flexibility in sentencing and more serious penalties than do civil approaches. Legal sanctions raise the stakes sufficiently high for a substantial number of stalkers to abandon their quest.¹¹⁴

¹⁰⁸ *Id.* at 305 (emphasis added).

¹⁰⁹ 23 PA. C.S. § 6108(a)(9) (2003).

¹¹⁰ T.K. Logan, *Research on Intimate Partner Stalking: Putting the Pieces Together*, University of Kentucky, 9 (2010), internal citations omitted.

¹¹¹ See 23 PA. C.S. § 6114(b).

¹¹² T.K. Logan, *Research on Intimate Partner Stalking: Putting the Pieces Together*, University of Kentucky, 8 (2010), internal citations omitted.

¹¹³ See Paul Mullen & Michelle Pathe, *Stalking*, 29 CRIME & JUSTICE 311 (2002).

¹¹⁴ *Id.*

CHAPTER X: ENFORCEMENT

TABLE OF CONTENTS

CHAPTER GOALS.....	4
THREE DIFFERENT TYPES OF CONTEMPT	4
Civil Contempt.....	4
Direct Criminal Contempt	4
Indirect Criminal Contempt.....	5
CIVIL OR CRIMINAL – DOMINANT PURPOSE OF PROCEEDINGS DETERMINES	5
SCOPE.....	5
CIVIL CONTEMPT – ELEMENTS AND PROCEDURE.....	5
Elements of Civil Contempt	5
Procedural Requirements for Civil Contempt	6
DIRECT CRIMINAL CONTEMPT – ELEMENTS AND PROCEDURE	6
Elements of Direct Criminal Contempt.....	6
Procedural Requirements for Direct Criminal Contempt	7
INDIRECT CRIMINAL CONTEMPT – ELEMENTS AND PROCEDURE.....	7
Elements of Indirect Criminal Contempt	7
Procedural Requirements for Indirect Criminal Contempt	7
SPECIFIC ENFORCEMENT PROVISIONS PROVIDED BY THE PFA ACT	8
Arrest for Violation of an Order.....	8
Private Criminal Complaints for Violation of an Order or Agreement	8
Contempt for Violation of Order or Agreement.....	9
Right to Counsel, No Right to Jury Trial.....	9

Sentencing for PFA Indirect Criminal Contempt Adjudications	9
Sentence.....	9
Notice of Release	10
PFA Indirect Criminal Contempt Cases	10
Consent-based orders.....	10
No jury trial for PFA contempt.....	10
Courts may extend PFA civil order in indirect criminal contempt proceedings	10
PFA Indirect Criminal Contempt and Other Criminal Charges	11
Indirect Criminal Contempt and Other Offenses – Double Jeopardy Cases.....	11
Assault charge as a lesser included offense of PFA contempt	11
Separate elements analysis	11
PFA Provisions Regarding Civil Contempt.....	12
PFA CONTEMPT ENFORCEMENT NOT AVAILABLE AGAINST PLAINTIFF/PETITIONER	13
ENFORCEMENT AVAILABLE UNDER CRIMINAL CODE	13
Authorization to Arrest vs. Mandatory Arrest	13
Bail Conditions Addressing Protection	13
Violation of Protective Bail Conditions	14
Criminal Protective Orders.....	14
Violation of Criminal Protective Order	14
FULL FAITH AND CREDIT AND ENFORCEMENT	15
OTHER RELEVANT INFORMATION	16
Recidivism Issues in Domestic Violence Cases	16
Substance Abuse and Domestic Violence	17
Offender (Batterers’) Intervention Programs	17
Evaluating Offender Intervention Programs.....	17
EMERGING PRACTICES – IMPLEMENTING OFFENDER ACCOUNTABILITY	19
More Supervision of Offenders Lowers Recidivism.....	19
Sentencing	19
Increase Penalties for Repeat Offenders	19

EMERGING PRACTICES – ENFORCING CUSTODY RELIEF.....	20
Separation Violence and Custody Access	20
When the court must refuse or limit custodial access	20
When the court may refuse or limit custodial access	20
What the court must do if there is an existing custody order.....	20
PFA custody relief temporarily overrides existing custody orders	20
EMERGING PRACTICES – ENFORCING SUPPORT RELIEF.....	21
Necessity of Support Relief Enforcement	21
Civil Contempt for Enforcement of Support Relief	22
EMERGING PRACTICES – FULL FAITH AND CREDIT ENFORCEMENT TIPS.....	23
EMERGING PRACTICES – GENERAL ENFORCEMENT TIPS	23
Detailed, Specific, Quickly-Enforced Orders	23
PFA Enforcement Available Against PFA Defendant Only.....	24
Enforcement Deters Abuse	24

CHAPTER GOALS

The purpose of this chapter is to provide an overview of enforcement procedures available to judges in domestic violence cases, including Protection From Abuse orders. Pennsylvania's legislature provided for swift enforcement of PFA orders by granting enhanced enforcement procedures and contempt powers to the courts. Both civil and criminal contempt sanctions are available to the judiciary when an order is violated. Distinct substantive and procedural differences exist between the two. Contempt proceedings do not preclude prosecution of the abuser for crimes committed contemporaneously with PFA violations.

Contempt procedures, a vital tool for deterring abuse, are reviewed. Enforcement practices and statistics are included. The "Emerging Practices" section addresses the protection and security of children in the context of domestic violence, full faith and credit, support enforcement, and the importance of specificity in PFA orders, among other issues.

THREE DIFFERENT TYPES OF CONTEMPT

There are three different kinds of contempt: civil contempt, direct criminal contempt, and indirect criminal contempt. There are different procedures and punishments associated with each type.¹

Civil Contempt

Civil contempt is contemptuous conduct where the contemnor disobeys a court order and the court imposes sanctions to force the contemnor to comply with its order. Typically, the act ordered is for the benefit of a private party. In some instances, the court's contempt order will include compensation to the complainant for losses sustained.² Civil contempt is coercive in nature and includes a condition upon which the contemnor may purge himself. In civil contempt, the contemnor has the "key to the jailhouse door."³

A civil contempt proceeding is remedial in nature ... criminal contempt punishes intentional misbehavior in court (direct) or outside the court's presence (indirect).

Direct Criminal Contempt

Direct criminal contempt is contemptuous conduct that occurs in the presence of the court and interferes with the administration of justice. Criminal contempt proceedings are punitive in nature and are used when the court seeks to punish the contemnor for misconduct.⁴ Punishment for direct criminal contempt may be inflicted summarily.⁵

¹ [Bruzzi v. Bruzzi, 481 A.2d 648, 651 \(Pa. Super. 1984\).](#)

² [Wood v. Geisenheimer-Shaulis, 827 A.2d 1204 \(Pa. Super. 2003\).](#)

³ *Bruzzi* at 651.

⁴ *Id.*

⁵ *Knaus v. Knaus, 127 A.2d 669, 671 (Pa. 1956); see also, 42 PA. C.S. §§ 4132 – 4139.*

Indirect Criminal Contempt

Indirect criminal contempt is contemptuous conduct where the contemnor violates a court order or decree outside of the court.⁶ Indirect criminal contempt proceedings are punitive in nature and are used to punish the contemnor for past acts of misbehavior.⁷

CIVIL OR CRIMINAL – DOMINANT PURPOSE OF PROCEEDINGS DETERMINES

The dominant purpose of a contempt proceeding determines whether it is a civil or criminal contempt proceeding.⁸ If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, the appropriate proceeding is a direct or indirect criminal contempt proceeding.⁹ If the dominant purpose is to provide the contemnor with the opportunity to comply with the court's order and to coerce this compliance, the proceeding is typically one of civil contempt.¹⁰

SCOPE OF REVIEW FOR CONTEMPT ORDERS

The review of a contempt order is narrow in scope. The appellate court will overturn the trial court's decision only if there has been an abuse of discretion.¹¹

CIVIL CONTEMPT – ELEMENTS AND PROCEDURE

Elements of Civil Contempt

A civil contempt proceeding is remedial. Judicial sanctions are employed to coerce the defendant into compliance with the court's order and, in some instances, to compensate the complaining party for its losses.¹²

In civil contempt cases, the complaining party has the burden of proving non-compliance with the court order by a preponderance of evidence. To be punished for civil contempt, a party must have violated a court order. The order that forms the basis of the contempt process in civil proceedings must be definitely and strictly construed. Any ambiguity or omission in the order forming the basis for the civil contempt proceeding must be construed in favor of the defendant. Where the order is contradictory or the specific terms of the order have not been violated, there is no contempt.¹³

⁶ *Commw. v. Baker*, 722 A.2d 718 (Pa. Super. 1998) (*en banc*), *aff'd*, 766 A.2d 328 (Pa. 2001).

⁷ *Cipolla v. Cipolla*, 398 A.2d 1053 (Pa. Super. 1979).

⁸ *Brocker v. Brocker*, 241 A.2d 336, 340 (Pa. 1968), *cert. denied*, 393 U.S. 1081 (1969).

⁹ *Commw. v. Marcone*, 410 A.2d 759 (Pa. 1980); *Commw. v. Allen*, 481 A.2d 648 (Pa. Super. 1983); *Bruzzi v. Bruzzi*, 481 A.2d 648, 651 (Pa. Super. 1984).

¹⁰ *Bruzzi v. Bruzzi*, 481 A.2d 648, 651 (Pa. Super. 1984).

¹¹ *Garr v. Peters*, 773 A.2d 183, 189 (Pa. Super. 2001).

¹² [C.R. by Dunn v. Travelers, 626 A.2d 588, 592 \(Pa. Super. 1993\)](#) (citations omitted); *see also*, *Woods v. Peckich*, 344 A.2d 828, 832 (Pa. Super. 1975).

¹³ *C.R. by Dunn v. Travelers*, 626 A.2d 588, 592 (Pa. Super. 1993), 626 A.2d at 592; *see also*, *Wood v. Geisenhemer-Shaulis*, 827 A.2d at 1207, 1208.

Procedural Requirements for Civil Contempt

To hold a person in civil contempt, a court generally follows a five-step process: (1) a rule to show cause why an attachment should not issue, (2) an answer and hearing, (3) a rule absolute, (4) a hearing on the contempt citation, and (5) an adjudication.¹⁴

The rule to show cause compels a party to file a responsive pleading to show cause why the party should not be held in contempt. A rule absolute may be granted after a hearing or if the other party doesn't respond to a rule to show cause.

The multi-step contempt procedure is not mandatory in every case.¹⁵ Fulfillment of all five factors is not mandated. When the contempt proceedings are predicated on a violation of a court order that followed a full hearing, due process requires no more than notice of the violations alleged and the opportunity for explanation and defense.¹⁶

After a finding of civil contempt, the court may send the contemnor to jail, provided the order includes an opportunity for the contemnor to purge the contempt and avoid jail. In addition to a provision in the order allowing the defendant to purge the contempt, a court may require the defendant to pay the aggrieved party for any attorneys' fees or other disbursements necessitated by the contemnor's noncompliance.¹⁷

DIRECT CRIMINAL CONTEMPT – ELEMENTS AND PROCEDURE

Elements of Direct Criminal Contempt

A trial court is empowered, under 42 Pa. C.S. § 4132(3), to punish as direct criminal contempt the misbehavior of any person that takes place in the presence of the court. "To sustain a conviction for direct criminal contempt under this provision, there must be proof beyond a reasonable doubt (1) of misconduct, (2) in the presence of the court, (3) committed with the intent to obstruct the proceedings, (4) that obstructs the administration of justice."¹⁸

The trial court has the authority to cite and punish summarily anyone who, in open court, intentionally obstructs the proceedings. The court may impose summary punishment, either by sentence or fine, so as to vindicate the dignity or authority of court.¹⁹ Summary contempt, however, is an extreme remedy and trial courts are directed to use less severe remedies, such as civil contempt, before imposing summary punishment.²⁰

For example, in **Commw. v. Reid**, summary punishment was appropriate where the defendant argued with the judge and proceeded to disrobe during trial. Summary punishment was not appropriate where an attorney overslept and was one hour late on the seventh day of a criminal trial where there was no indication of intentional disobedience to the court.²¹

¹⁴ Wood v. Geisenhemer-Shaulis, 827 A.2d at 1207, 1208, citing Schnabel Assocs. v. Bldg. & Const. Trades Council of Philadelphia & Vinity, AFL-CIO, 487 A.2d 1327, 1333 (Pa. Super. 1985).

¹⁵ *Id.*; see also, PA. R. CIV. P. 206.4 *et seq.*, regarding Rule to Show Cause contents and procedures.

¹⁶ Diamond v. Diamond, 792 A.2d 597, 601 (Pa. Super. 2002).

¹⁷ Mrozek v. James, 780 A.2d 670, 674 (Pa. Super. 2001).

¹⁸ Williams v. Williams, 721 A.2d 1072, 1073 (Pa. 1998).

¹⁹ [Commw. v. Reid, 431 A.2d 218 \(Pa. 1981\).](#)

²⁰ Commw. v. Washington, 353 A.2d 806 (Pa. 1976).

²¹ In re James, 453 A.2d 1033 (Pa. 1982).

Procedural Requirements for Direct Criminal Contempt

Summary contempt proceedings permit the court to eliminate the traditional procedures required at trial for other offenses. When the court finds direct contempt, formal notices, hearings, and arguments are not required.²² Following an outburst or other contemptuous behavior, the court may dictate a description of what occurred to the court reporter. The recitation should be done in the defendant's presence and the defendant should be given an opportunity to refute the court's version of the events on the record.²³ The contemnor has the right to counsel.²⁴ The maximum sentence that a court may impose summarily is six months.²⁵

INDIRECT CRIMINAL CONTEMPT – ELEMENTS AND PROCEDURE

Elements of Indirect Criminal Contempt

A charge of indirect criminal contempt consists of a claim that a violation of an order occurred outside the presence of the court. To establish a claim of indirect criminal contempt, the evidence must be sufficient to establish the following elements:

- the order must be definite, clear, specific, and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited
- the contemnor must have had notice of the specific order or decree
- the act constituting the violation must have been volitional
- the contemnor must have acted with wrongful intent²⁶

Procedural Requirements for Indirect Criminal Contempt

Indirect criminal contempt is a crime and is punishable by fine, imprisonment, or both. The general procedural safeguards required for a person charged with indirect criminal contempt include: the right to bail, the right to be notified of the specific accusations against him or her, a reasonable time to prepare a defense, assistance of counsel and the right to demand a speedy and public trial before a jury.²⁷ However, the right to a jury trial does not apply to contempt hearings in Protection From Abuse cases subject to 23 Pa. C.S.A. § 6114.²⁸

For more information on sentencing, please see the section on [Sentencing for PFA Indirect Criminal Contempt Adjudications](#).

²² Commw. v. Marcone, 410 A.2d 759 (Pa. 1980).

²³ Commw. v. Africa, 353 A.2d 855 (Pa. 1976).

²⁴ Commw. v. Crawford, 352 A.2d 52 (Pa. 1976).

²⁵ Taylor v. Hayes, 418 U.S. 488 (1974).

²⁶ Commw. v. Baker, 722 A.2d 718 (Pa. Super. 1998) (*en banc*), *aff'd*, 766 A.2d 328 (Pa. 2001).

²⁷ 42 PA. C.S. § 4136(a); *see also*, 18 PA. C.S. § 2711(c).

²⁸ 42 PA. C.S. § 4136(a)(3)(ii).

SPECIFIC ENFORCEMENT PROVISIONS PROVIDED BY THE PFA ACT

Once a PFA order is entered, a number of different mechanisms can invoke the contempt process. These include: a police arrest followed by charges of indirect criminal contempt, plaintiff-initiated enforcement by filing a private criminal complaint, and plaintiff-initiated enforcement by filing a complaint for civil contempt.

Arrest for Violation of an Order

According to the PFA Act, a police officer shall arrest a defendant for violating certain provisions of a PFA order.²⁹ An arrest for a violation of a PFA order or a foreign protective order may be without warrant upon probable cause, whether or not the violation was committed in the presence of a police officer, where the defendant has violated a provision of an order consistent with section 6108(a)(1) (relating to refraining from abuse), (2) and (3) (relating to possession of residence), (4) (relating to custody), (6) (relating to no contact), (7) (relating to relinquishment of weapons) or (9) (relating to stalking or harassment).³⁰

Following an arrest, the PFA Act requires the police to take the defendant to the court in the judicial district where the contempt is alleged to have occurred. The defendant is to be afforded a preliminary arraignment without unnecessary delay.³¹ If an incarcerated PFA defendant is released on bail at anytime, the victim has a right to receive notice of release.³²

When a charge of indirect criminal contempt is filed, a hearing must be scheduled within 10 days. Unlike the PFA due process hearing, which must be held within 10 days after the issuance of the temporary order, it is acceptable if the contempt hearing is scheduled, but not held, within 10 days of a contempt charge.³³ The contempt hearing and any adjudication do not preclude a hearing on other criminal charges underlying the contempt. Likewise, a hearing and adjudication on other criminal charges do not preclude a hearing on a charge of indirect criminal contempt.³⁴ Double jeopardy issues may arise in some instances. For more information, see the section on [Indirect Criminal Contempt and Other Offenses – Double Jeopardy Cases](#).

The arrest enforcement provisions are not to be construed in any way as limiting the court's other powers for emergency relief provided in the PFA Act.³⁵

Private Criminal Complaints for Violation of an Order or Agreement

A *plaintiff* may file a private criminal complaint against a defendant, alleging indirect criminal contempt for a violation of *any* non-economic provision of a PFA order, court approved consent agreement, or a foreign protection order.³⁶ The plaintiff may file with the court, the office of the district attorney, or the magisterial district judge in the jurisdiction or county where the violation occurred, except in a city of the first class.³⁷

²⁹ 23 PA. C.S. § 6113.

³⁰ 23 PA. C.S. § 6113(a).

³¹ 23 PA. C.S. § 6113(c) and (d).

³² 18 PA. C.S. § 11.201(9).

³³ 23 PA. C.S. § 6113(f). If the hearing is scheduled but not held within 10 days, this is acceptable. [Commw. v. Ortiz, 802 A.2d 617 \(Pa. Super. 2002\)](#), *aff'd*, 825 A.2d 629 (Pa. 2003).

³⁴ *Id.*

³⁵ 23 PA. C.S. § 6113(e).

³⁶ 23 PA. C.S. § 6113.1.

³⁷ 23 PA. C.S. § 6113.1(a). In cities of the first class, plaintiffs may file only with the family division of the court of common pleas or with the office of the district attorney.

Pennsylvania has specific rules for the filing of criminal complaints. Every complaint must contain certain information, whether the affiant to the complaint is a police officer or other law enforcement officer, or a private citizen.³⁸ When the affiant is not a police officer or other law enforcement officer, the complaint must be submitted to the district attorney, who must approve or disapprove the complaint “without unreasonable delay.”³⁹ If the district attorney approves the complaint, the attorney shall indicate approval on the form and submit it for issuance. If the district attorney disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant.⁴⁰ Thereafter, the affiant may petition the common pleas court for a review of the district attorney’s denial.⁴¹ The procedure for filing and service of a private criminal complaint is to be established by local rule.⁴²

PFA plaintiff may file a private criminal complaint against a defendant for violating non-economic provisions, and may petition the court for review if a DA disapproves the complaint.

Contempt for Violation of Order or Agreement

The PFA Act grants the court jurisdiction over indirect criminal contempt charges for violations of a PFA order or a foreign protective order in the county where the violation occurred.⁴³ Minors who are charged with indirect criminal contempt must be considered to have committed an alleged delinquent act as that term is defined in the Juvenile Code⁴⁴ and must be treated accordingly.⁴⁵

Right to Counsel, No Right to Jury Trial

The defendant does not have the right to a jury trial on PFA indirect criminal contempt charges, but is entitled to be represented by counsel.⁴⁶ Where the contemnor is indigent, the risk of imprisonment engendered by contempt proceedings requires the court to appoint counsel.⁴⁷

Sentencing for PFA Indirect Criminal Contempt Adjudications

Sentence

A sentence for an act of indirect criminal contempt of a PFA order may include imprisonment up to six months or a fine of not less than \$300 nor more than \$1,000, or both, and may include other relief.⁴⁸

³⁸ PA. R. CRIM. P. 504.

³⁹ PA. R. CRIM. P. 506(A).

⁴⁰ PA. R. CRIM. P. 505(B)(1)-(2).

⁴¹ *Id.*

⁴² 23 PA. C.S. § 6113(b).

⁴³ 23 PA. C.S. § 6114(A.1).

⁴⁴ 42 PA. C.S. § 6301 *et seq.*

⁴⁵ 23 PA. C.S. § 6114(A.2); *see also* Varner v. Holley, 854 A.2d 520 (Pa. Super. 2004), which holds that a minor who is the defendant in a PFA case must have an opportunity to confer with and receive advice from a guardian.

⁴⁶ 23 PA. C.S. § 6114(b).

⁴⁷ Commw. v. Crawford, 352 A.2d 52 (Pa. 1976); PA. R. CRIM. P. 122.

⁴⁸ 23 PA. C.S. § 6114(b).

The court may sentence an individual convicted of indirect criminal contempt for violating a PFA order to the maximum six-month sentence for a first-time violation.⁴⁹ In addition, a contempt complaint, adjudication, and sentence may be processed for each act of contempt committed by the perpetrator. In *Leonard v. Smith*, the Superior Court affirmed the trial court's sentence of 18 months against the defendant for several consolidated violations of a PFA order. The Superior Court observed that the contempt sentence was expressly authorized by the PFA Act, "which provides for a six-month term of imprisonment for each contempt of a PFA order."⁵⁰

Notice of Release

If the defendant is sentenced to incarceration, the PFA Act directs the appropriate releasing authority to use all reasonable means to notify the victim in advance of the release of the offender, including releases for work, furlough, medical leave, community service, discharge, escape, and recapture.⁵¹

PFA Indirect Criminal Contempt Cases

Consent-based orders

In *Commw. v. Nelson* the Superior Court held that consent-based protective orders are valid and enforceable by indirect criminal contempt proceedings, despite the fact that the consent-based orders are not accompanied by an admission of abuse.⁵²

No jury trial for PFA contempt

The Superior Court in *Eichenlaub v. Eichenlaub* held that the trial court properly denied a defendant's motion for a jury trial involving a charge of indirect criminal contempt incurred by the defendant for beating his wife.⁵³ Because the statute did not authorize a penalty of more than six months imprisonment, it did not violate the defendant's right to a jury trial.

Courts may extend PFA civil order in indirect criminal contempt proceedings

In *Commw. v. Snell*, the Superior Court made it clear that while punishing the contemnor is the primary goal of an indirect criminal contempt proceeding under the PFA Act, the intent of the proceeding is also the prevention of further abuse. Upholding the trial court's extension of the PFA order during the contempt proceeding, the superior court observed that the plain language of the PFA Act grants the court discretion to include "other relief" in a sentence for contempt. The court also referred to the provision of the PFA Act that permits extension of a PFA order, when a court finds that defendant engaged in a pattern or practice that indicates continued risk of harm to the plaintiff or the minor child.⁵⁴

⁴⁹ *Wagner v. Wagner*, 564 A.2d 162 (Pa. Super. 1989).

⁵⁰ *Leonard v. Smith*, 684 A.2d 622, 626 (Pa. Super. 1996).

⁵¹ 23 PA. C.S. § 6114(c). Notification requirements also apply in certain criminal cases. See the [Crime Victims Act](#).

⁵² *Commw. v. Nelson*, 690 A.2d 728 (Pa. Super. 1997).

⁵³ *Eichenlaub v. Eichenlaub*, 490 A.2d 918 (Pa. Super. 1985).

⁵⁴ *Commw. v. Snell*, 737 A.2d 1232 (Pa. Super. 1999). The court has broad powers in fashioning remedial relief and extending court orders if a petition is filed during the pendency of a PFA order. The court enjoys continuing jurisdiction to grant relief, even if the order would have expired during the pendency of the hearing on the petition. See *Kuhlmeier v. Kuhlmeier*, 817 A.2d 1127 (Pa. Super. 2003).

PFA Indirect Criminal Contempt and Other Criminal Charges

Disposition of the charge of indirect criminal contempt does not preclude the prosecution of other criminal charges associated with the incident giving rise to the contempt, nor does disposition of other criminal charges preclude prosecution of indirect criminal contempt associated with the criminal conduct giving rise to the charges.⁵⁵ Courts, however, must give consideration to the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution:

The court must examine the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with the elements of the subsequently charged criminal offenses. If the two are the same, or if one is a lesser-included offense than the other, double jeopardy attaches and the subsequent criminal prosecution is barred... rather than compare the general elements of contempt of court, the court compares the elements of the offense actually deemed to have been violated in that contempt proceeding against the elements of the substantive criminal offenses.⁵⁶

Indirect Criminal Contempt and Other Offenses – Double Jeopardy Cases

Assault charge as a lesser included offense of PFA contempt

An assault charge is a lesser-included offense of a PFA criminal contempt. In ***Commw. v. Decker***, the defendant violated a PFA order by verbally harassing his wife, slapping her face, and shoving her against a doorframe with such force that she struck her head.⁵⁷

The defendant was first found in indirect criminal contempt. Subsequently, the defendant was charged with simple assault for the same episode of abuse. The defendant claimed that the Double Jeopardy Clause of the Fifth Amendment barred the subsequent charges arising from the same abusive episode.

The trial court held that double jeopardy was not a bar. The Pennsylvania Superior Court reversed, finding that although the PFA criminal contempt offense contained one element that the simple assault offense did not – the willful violation of a PFA order – the offense of simple assault did not contain any elements not included in the PFA criminal contempt. Simple assault was a lesser-included offense of the PFA criminal contempt, therefore the subsequent prosecution for the assault charge was barred by the Double Jeopardy Clause.⁵⁸

Separate elements analysis

The Pennsylvania Supreme Court in ***Commw. v. Yerby*** clarified the criminal contempt/criminal charges double jeopardy analysis for courts. In this case, the PFA order prohibited the defendant from “striking, threatening, abusing or harassing” his former girlfriend. Following the order, the defendant shot at the victim and held a gun to her head, threatening to kill her. During this same episode, the defendant knocked a child from the victim’s arms, struck the victim with a gun, and strangled her. The defendant forced the victim into his car and again threatened to kill her. The victim escaped.

The defendant was convicted of indirect criminal contempt of the PFA order, and was also charged with terroristic threats and other crimes. The defendant sought to dismiss the criminal charges, arguing that double

⁵⁵ 23 Pa. C.S. § 6114(d).

⁵⁶ [*Commw. v. Yerby*, 679 A.2d 217, 221-222 \(Pa. 1996\).](#)

⁵⁷ [*Commw. v. Decker*, 664 A.2d 1028, 1031 \(Pa. Super. 1995\).](#)

⁵⁸ *Id.*

jeopardy barred the prosecution. The trial court denied the defendant's motion, and ultimately a jury convicted the defendant.

The defendant appealed the terroristic threats conviction and argued that the Double Jeopardy Clause barred his subsequent prosecution. The Superior Court affirmed the conviction. On further appeal, the Pennsylvania Supreme Court discussed the "same elements" analysis and stated:

[W]e must look at the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with elements of the subsequently charged criminal offenses. If they are the same, or if one is a lesser included offense of the other, double jeopardy attaches and the subsequent prosecution is barred. The focus, then, is on the offense(s) for which the defendant was actually held in contempt.⁵⁹

Affirming the defendant's terroristic threats conviction, the Pennsylvania Supreme Court held that the elements of the terroristic threats crime were not included in the PFA order that the defendant violated; the PFA order prohibited the defendant from "threatening" the victim, but did not prohibit the defendant from committing the crime of terroristic threats.⁶⁰

PFA Provisions Regarding Civil Contempt

A PFA plaintiff may file a petition for civil contempt alleging that the defendant has violated a PFA order or a foreign protection order.⁶¹ If the court finds a violation occurred, the court could, either pursuant to a petition for civil contempt or on its own accord, hold the defendant in civil contempt and constrain him or her in accordance with the law.⁶²

PFA Act allows courts to enter contempt orders for PFA violations against the defendant only, not against the plaintiff.

A sentence under the PFA Act for civil contempt may include imprisonment until the defendant complies with provisions in the order or consent agreement or demonstrates intent to do so.

Under the PFA Act,

- the term of imprisonment for contempt may not exceed six months⁶³
- in a criminal contempt proceeding, the defendant is entitled to be represented by counsel, but does not have a right to a jury trial⁶⁴

⁵⁹ *Yerby*, A.2d at 221.

⁶⁰ *Id.* at 223.

⁶¹ 23 PA. C.S. § 6114.1(a).

⁶² 23 PA. C.S. § 6114.1(b).

⁶³ 23 PA. C.S. § 6114.1(c).

⁶⁴ 23 PA. C.S. § 6114.1(d).

PFA CONTEMPT ENFORCEMENT NOT AVAILABLE AGAINST PLAINTIFF/PETITIONER

Violations of a PFA order are subject to contempt. However, courts may only enter PFA indirect criminal or civil contempt orders against the defendant/respondent in the underlying PFA action. The plain language of the PFA Act is clear that PFA contempt proceedings may not be brought against the plaintiff in the underlying PFA action.⁶⁵

ENFORCEMENT AVAILABLE UNDER CRIMINAL CODE

Authorization to Arrest vs. Mandatory Arrest

Despite the absence of a PFA order, a police officer is authorized to make a warrantless arrest when there is probable cause to believe the defendant has assaulted, threatened, stalked, or recklessly endangered a family or household member, even if the offense did not take place in the presence of the officer.⁶⁶ The arrest may be made only after the police officer observes recent physical injury to the victim or other corroborative evidence.⁶⁷

When an individual has a PFA order, the mandatory arrest provisions under the PFA Act apply.⁶⁸

In *Commw. v. Smith* the Superior Court held that Section 2711 of the Crimes Code does not create a new class of criminal offenses; rather, it provides for the immediate arrest of a person whom the officer has probable cause to believe has committed one or more of the listed offenses.⁶⁹

Bail Conditions Addressing Protection

In determining whether to grant bail, the issuing authority must consider whether the defendant poses a threat of danger to the victim.⁷⁰ If such a determination is made, the issuing authority shall require, as a condition of bail, that the defendant refrain from entering the residence or household of the victim and the victim's place of employment, and refrain from committing any further acts of criminal conduct against the victim.⁷¹ This bail condition expires at the time of the preliminary hearing or upon the entry or the denial of a PFA order by the court, whichever occurs first.⁷²

In addition, the Pennsylvania Constitution allows the issuing authority to refuse bail where there is evident proof or great presumption that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community.⁷³

⁶⁵ 23 PA. C.S. § 6113(a), § 6114(a). The PFA Act is also clear that a mutual order may not be issued against a PFA plaintiff unless the defendant had also filed and timely served on the plaintiff with defendant's own PFA petition. See 23 PA. C.S. § 6108(c); [Heard v. Heard, 614 A.2d 255 \(Pa. Super. 1992\)](#); [McKelvey v. McKelvey, 771 A.2d 63 \(Pa. Super. 2001\)](#).

⁶⁶ 18 PA. C.S. § 2711(a).

⁶⁷ *Id.*

⁶⁸ 23 PA. C.S. § 6113(a).

⁶⁹ [Commw. v. Smith, 552 A.2d 292 \(Pa. Super. 1988\)](#).

⁷⁰ 18 PA. C.S. § 2711(c)(1).

⁷¹ 18 PA. C.S. § 2711(c)(2).

⁷² *Id.*

⁷³ PA. CONST. art. I, § 14.

Other bail provisions that may be helpful in criminal cases involving domestic violence include the provision prohibiting witness intimidation,⁷⁴ and provisions that allow the issuing authority to impose “any other appropriate conditions designed to ensure the defendant’s ... compliance with the conditions of the bail bond.”⁷⁵

In addition to the aforementioned protective bail conditions, the [Crime Victims Act](#) requires that the victim be given access to information regarding the grant or denial of bail to an adult.⁷⁶ In addition, in a personal injury crime, the prosecutor must provide notice to the victim of the offender’s release from a state or local correction facility.⁷⁷ Where a PFA defendant is jailed for violation of the PFA order or for a personal injury crime against a victim protected by a PFA order, the local correctional authority is to provide notice to the victim of defendant’s release on bail.⁷⁸

Violation of Protective Bail Conditions

The defendant must be given notice and a hearing on alleged bail violations. A violation of a protective bail condition may be punishable by the revocation of any form of pretrial release, the forfeiture of bail and the issuance of a bench warrant for the defendant’s arrest, a modification of the terms of the bail, or by remanding defendant to custody.⁷⁹

Criminal Protective Orders

After a hearing, a court has the authority to issue a protective order in a criminal case. The protective order may be issued based on substantial evidence, which may include hearsay or the declaration of the prosecutor that a witness or victim has been intimidated or is reasonably likely to be intimidated.⁸⁰ The court may order that the defendant or other person not harass or stalk the victim or witness,⁸¹ maintain a prescribed geographical distance from the victim or witness,⁸² and have no communication with the victim or witness, except through an attorney.⁸³

Violation of Criminal Protective Order

A person who violates a criminal protective order may be punished in the following ways: (1) by being charged with a substantive crime if applicable;⁸⁴ (2) by contempt, however, any person held in contempt is entitled to credit for any punishment imposed therein against a sentence imposed on conviction of the substantive offense, and any conviction or acquittal for any substantive offense 10 (ten) shall be a bar to subsequent punishment for contempt arising out of the same act;⁸⁵ (3) by revocation of any form of pretrial release; or (4) by the forfeiture of bail and the issuance of a bench warrant for the defendant’s arrest or remanding defendant into custody.⁸⁶

⁷⁴ PA. R. CRIM. P. 526(A)(4).

⁷⁵ PA. R. CRIM. P. 527(A)(3); *see also*, PA. R. CRIM. P. 526(B).

⁷⁶ 18 P.S. §11.201(2).

⁷⁷ 18 P.S. § 11.213(f).

⁷⁸ 18 P.S. § 11.201(9) and 11.214(b).

⁷⁹ *Id.*

⁸⁰ 18 PA. C.S. § 4954.

⁸¹ 18 PA. C.S. § 4954(1), (2).

⁸² 18 PA. C.S. § 4954(3).

⁸³ 18 PA. C.S. § 4954(4).

⁸⁴ 18 PA. C.S. § 4955(1).

⁸⁵ 18 PA. C.S. § 4955(1)(i), (ii).

⁸⁶ 18 PA. C.S. § 4955(3).

For violation of a criminal protective order, police may arrest the person without witnessing the violation.⁸⁷ Following an arrest for violation of a criminal protective order, the defendant is to be taken before the court that issued the order for arraignment.⁸⁸ Any pretrial release of the defendant must include a condition prohibiting the defendant from intimidating or retaliating against a victim/witness or from causing the intimidation of or retaliation against a victim/witness.⁸⁹

FULL FAITH AND CREDIT AND ENFORCEMENT

Every state and many tribal jurisdictions have enacted statutes that provide protection orders for victims of abuse.⁹⁰ The federal Violence Against Women Act's full faith and credit provision mandates that Pennsylvania courts recognize and enforce valid foreign protection orders.⁹¹ Pennsylvania's Protection From Abuse Act, likewise, requires courts to enforce valid foreign protection orders.⁹² Although a protected person may file a certified copy of a foreign protection order with the local prothonotary, such a filing is not required for the order to be enforced.⁹³

A protection order from another jurisdiction must be enforced if it meets the following requirements: (1) the issuing court must have provided the respondent reasonable notice and the opportunity to be heard; (2) the issuing court must have had personal and subject matter jurisdiction to issue the protective order; and, (3) the order must not have expired.⁹⁴

VAWA defines "protection order" as follows:

'[P]rotection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or child custody order issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.⁹⁵

18 U.S. Code § 2266 - Definitions

Although VAWA's definition of "protection order" excludes "a support or child custody order issued pursuant to State divorce or child custody laws," the exclusion does *not* apply to support and custody relief granted under

⁸⁷ 18 PA. C.S. § 4955(b).

⁸⁸ 18 PA. C.S. § 4955(c).

⁸⁹ 18 PA. C.S. § 4956(a).

⁹⁰ A violation of another jurisdiction's protection order in Pennsylvania may be subject to federal criminal prosecution. For instance, VAWA makes it a federal crime for a person to travel between states with the intent to violate a protection order. See 18 U.S.C. § 2262(a)(1).

⁹¹ 18 U.S.C. § 2265.

⁹² 23 PA. C.S. § 6104(a).

⁹³ 23 PA. C.S. § 6104(d)(3).

⁹⁴ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FULL FAITH AND CREDIT: A PASSPORT TO SAFETY, A JUDGE'S GUIDE 5 (2011), available at <http://www.ncjfcj.org/sites/default/files/a-passport-to-safety.pdf>

⁹⁵ 18 U.S.C. § 2266(5).

state protective order statutes.⁹⁶ Therefore, Pennsylvania courts may enforce the custody and support relief provisions in a foreign protection order in the same manner as they would be enforced in Pennsylvania.

Mutual orders of protection are fully enforceable against the defendant/respondent.⁹⁷ Foreign mutual order provisions against the plaintiff/petitioner are not entitled to full faith and credit if *no cross or counter petition, complaint, or other written pleading was filed* seeking the protection order, or if such a petition was filed but the foreign court did not make specific findings that each party was entitled to such an order.⁹⁸

A Pennsylvania court must enforce the terms of a valid foreign protective order. This includes cases in which the PFA Act contains no authority to enter a foreign order's terms, as in cases where the category of protected persons is not eligible for relief in Pennsylvania or the foreign order has a longer duration than allowed under the PFA Act.⁹⁹ The array of sanctions and penalties that may be imposed by a Pennsylvania court to enforce a foreign order are the same as those available pursuant to violations of protection orders issued under Pennsylvania law.¹⁰⁰ These sanctions may differ from those that would have been available in the foreign jurisdiction.¹⁰¹

OTHER RELEVANT INFORMATION

Recidivism Issues in Domestic Violence Cases

Although it is true that some individuals who behave violently will do so only once, or rarely, defendants before the court typically have established records of criminal and violent behavior, and are likely to reoffend. Interviews with victims typically report more than 50 percent reabuse, higher rates of reoffense than those reflected in police calls/filings in the justice system.¹⁰² According to a U.S. Department of Justice research review, a "hard core of approximately one-third of abusers will reabuse in the short run, and more will reabuse in the long run."

A prior arrest, warrant or probation for any crime (not just domestic violence) is an accurate predictor that a defendant is likely to abuse again.¹⁰³ A National Institute of Justice research review concludes that prosecutors and judges should treat a defendant with any criminal record as a high-risk domestic violence offender, even if this is the defendant's first domestic violence-related offense. Judges have broad authority to safeguard current

⁹⁶ *Id.*

⁹⁷ See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FULL FAITH AND CREDIT: A PASSPORT TO SAFETY, A JUDGE'S GUIDE 2 (2011).

⁹⁸ 23 PA. C.S. § 6104(c)(1), (2).

⁹⁹ *Id.* Generally speaking, in the case of foreign protective orders, the issuing jurisdiction decides who is protected and the types of protection, including duration of the order. The enforcing jurisdiction must enforce the foreign protective order as it would enforce a Pennsylvania protective order with similar terms or conditions. For example, New Jersey courts are authorized to issue protection orders for an indefinite period of time, "until further order of court." Pennsylvania courts may issue orders only for up to three years. A Pennsylvania court following the full faith and credit provisions would have to enforce the New Jersey order for the indefinite period of time, even though Pennsylvania law authorizes orders only for three years.

¹⁰⁰ 18 U.S.C. § 2265(a).

¹⁰¹ See, e.g., *People v. Hadley*, 172 Misc. 2d 697; 658 N.Y.S. 2d 814 (1997).

¹⁰² ANDREW R. KLEIN, U.S. DEP'T OF JUSTICE, DOC. NO. 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 20 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

¹⁰³ *Id.* at 22.

(and future) victims of an abuser by tailoring criminal and civil orders to the defendant's history and the victim's circumstances.

Substance Abuse and Domestic Violence

Although alcohol and substance abuse are correlated with domestic violence and are frequently used as an excuse for a perpetrator's violent behavior toward intimates, they do not cause domestic violence.¹⁰⁴ However, treatment for alcohol or substance abuse may facilitate a defendant being better able to engage in programs designed to address a defendant's violent and controlling behavior. For domestic violence perpetrators who also abuse drugs or alcohol, a program designed to address the battering, violent and controlling behavior and substance abuse issues together worked better than stand-alone drug and alcohol and batterer's intervention programs.¹⁰⁵ Few of these programs have been developed.

Offender (Batterers') Intervention Programs

Programs for domestic violence perpetrators vary in settings, elements, methods, and interventions. Couples counseling or anger management courses are not recommended; these approaches either explicitly or implicitly hold the victim responsible for the abuse.¹⁰⁶

The goal of offender intervention programs is safety for victims and the community – cessation of current and prevention of future abuse. Accountability for the abuser is also a vital goal. Therefore, offender programs hold the most promise when program efforts are combined with coordinated community efforts.¹⁰⁷ Looking at multiple studies from disparate jurisdictions, one researcher summarized:

Batterer programs, in and of themselves, are not likely to protect most victims or new intimate partners of referred abusers from further harm from higher risk abusers. Consequently, if mandated or utilized, batterer intervention programs should be supplemented by other measures to assure victim safety from these abusers.¹⁰⁸

Evaluating Offender Intervention Programs

Judges and domestic violence task forces may evaluate local offender programs using the following best practice recommendations:

¹⁰⁴ Larry Bennet and Patricia Bland, *Substance Abuse and Intimate Partner Violence*, VAWnet.org National Online Resource Center on Violence Against Women (2008), available at http://www.vawnet.org/summary.php?doc_id=1324&find_type=web_desc_AR

¹⁰⁵ *Id.* See also Nat'l Institute of Justice & American Bar Association, *Legal Interventions in Family Violence: Research Findings and Policy Implications* (July 1998) available at <https://www.ncjrs.gov/pdffiles/171666.pdf> citing John S. Goldkamp et al., *The Role of Drug and Alcohol Abuse in Domestic Violence and Its Treatment: Dade County's Domestic Violence Court Experiment*, (1994).

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Best Practices for Batterers' Intervention Programs*, The Advocates for Human Rights, http://www.stopvaw.org/best_practices_for_batterers_intervention_programs; see also Lundy Bancroft, *Assessing and Monitoring Programs for Men Who Abuse Women*, (2007), <http://www.lundybancroft.com/articles/assessing-and-monitoring-programs-for-men-who-abuse-women>.

¹⁰⁸ ANDREW R. KLEIN, U.S. DEP'T OF JUSTICE, DOC. NO. 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 65 (2009).

- How long is the program? Longer programs may be more effective at deterring abuse due to a “suppression effect” whether or not abusers actually attend.¹⁰⁹
- Is the program more intense in frequency and content in the first few weeks, so that the batterer is educated, supervised and monitored for noncompliance during the time of greatest need and motivation?¹¹⁰
- Does the program systematically monitor the offender’s behavior and compliance?¹¹¹
- Does screening for severe alcohol and psychological problems happen immediately? The program should refer for treatment to avoid conflicting goals.¹¹²
- Does the program regularly evaluate the lethality of the offender?¹¹³
- Does the program have clear, written policies on what will happen if the batterer commits new offenses, misses a meeting, or threatens to harm a current or past partner?¹¹⁴
- Does the program refer the victim to the local domestic violence program? (Or is the person who is contacting the offender’s victim a trained domestic violence advocate?) Does the program give the victim a checklist to help assess the batterer’s changing behavior and encourage the victim to call with questions or concerns?¹¹⁵
- When a batterer completes or is terminated from a program, does the program provide the victim with a written record of the abusive behaviors admitted to by the offender? This may prove important in future court actions, such as custody, visitation, or another protective order. Offenders should not be told that information would be kept confidential.¹¹⁶
- Is the program culturally compatible to diverse offenders, including same-sex partners?¹¹⁷
- Does the program cooperate with state agencies supporting and protecting children and family? Child abuse prevention must be addressed, as well as the effect of abuse upon child witnesses.¹¹⁸

In addition, monitoring the offender’s attendance through court hearings or probation supervision has been found to increase attendance and completion.¹¹⁹

¹⁰⁹ *Id.* at 65 - 66.

¹¹⁰ *Best Practices for Batterers’ Intervention Programs*, The Advocates for Human Rights.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ ANDREW R. KLEIN, U.S. DEP’T OF JUSTICE, DOC. NO. 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 69-70 (2009).

EMERGING PRACTICES – IMPLEMENTING OFFENDER ACCOUNTABILITY

More Supervision of Offenders Lowers Recidivism

The imposition of criminal penalties may lower recidivism rates. Research is not yet conclusive; however, recent studies appear to indicate that defendants who experience more stages of intervention and supervision - such as arrest arraignment, conviction, and post-conviction supervision - had lower recidivism rates than defendants who experienced fewer stages of supervision.¹²⁰

Sentencing

The National Council of Juvenile and Family Court Judges recommends that every sentence in a family violence case should:

- hold the offender accountable
- order the offender into activities specifically designed to reduce future violence
- require an alcohol and drug evaluation where appropriate, mandate successful completion of treatment, and provide for mandatory chemical testing
- provide formal supervision and monitoring of compliance¹²¹

Simply convicting abusers may not reduce the risk of reabuse. More intrusive sentences, including incarceration, for repeat abusers and those with prior criminal histories may significantly deter reabuse.¹²²

Increase Penalties for Repeat Offenders

The National Council of Juvenile and Family Court Judges recommends that all repeat violations of family violence orders result in substantial additional sanctions or penalties for the offender.¹²³ According to the Recommendations:

[O]ffenders will violate court orders and diversion agreements with impunity if they believe nothing will happen to them. Law enforcement officers, district attorneys, and probation officers are strongly encouraged to arrest and return to court any family violence offender who violates either a civil or criminal court order. The message must be very clear that repeat violence will not be tolerated. Judges can do their part in this scheme by taking the cases seriously and by always ordering some sort of additional penalty for those found guilty of the violation.¹²⁴

¹²⁰ Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention, System Involvement, and Criminal Recidivism*, 13 J. FAMILY VIOLENCE, 263, 273-77 (1998).

¹²¹ NCJFCJ, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES' FAMILY VIOLENCE PROJECT 20 (1990).

¹²² ANDREW R. KLEIN, U.S. DEP'T OF JUSTICE, DOC. NO. 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 20 (2009).

¹²³ *Id.* at 21.

¹²⁴ *Id.*

EMERGING PRACTICES – ENFORCING CUSTODY RELIEF

Separation Violence and Custody Access

Issues of child custody create violence flashpoints for victims separating themselves from abusive partners. Following a separation, abuse inflicted by violent partners is often more severe than violence during cohabitation. This escalated violence targets the abused partner and may involve the children as the abuser seeks to reconcile with or punish the abused partner.¹²⁵ Most often, post-separation access to the victim occurs during child custody interactions. In PFA cases, trial courts have the opportunity to provide protections for both victims and their children during any custodial access. These protections will work best if they are vigorously enforced.

Section 6108 of the PFA Act allows a trial court to award temporary custody of, and temporary visitation rights to, minor children after considering the violent history or risk of flight of the defendant.¹²⁶

When the court must refuse or limit custodial access

Under the statute, the court must refuse to grant custodial rights or unsupervised visitation if it finds, pursuant to a hearing, that the defendant inflicted abuse on the child or that the defendant has been convicted of the crime of interfering with the custody of children.¹²⁷ The court may award the defendant supervised visitation with a third party who signs an affidavit of accountability related to visitation oversight.¹²⁸

When the court may refuse or limit custodial access

If the court determines that the defendant inflicted serious abuse on the plaintiff or child, or poses a risk of abuse toward the plaintiff or child, the court may award supervised visitation at a secure visitation facility or deny visitation completely.¹²⁹

What the court must do if there is an existing custody order

If the plaintiff petitions for a temporary order ex parte and the defendant has partial, shared or full custody of the minor child by order of court or written agreement, the court may not change custody unless it finds that the defendant is likely to inflict abuse upon the children or to remove the children from the jurisdiction.¹³⁰ Further, in order to prevent abuse during the exercise of custodial rights, the court must consider and may impose conditions on an award of custody to assure the safety of the plaintiff and child.¹³¹

PFA custody relief temporarily overrides existing custody orders

Custody relief in a PFA order will temporarily override an existing custody order. In *Dye for McCoy v. McCoy* the Superior Court held that if the terms of an existing custody order conflict with a PFA order, the court may alter

¹²⁵ ABA CENTER ON CHILDREN & THE LAW, A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 112, 115 (2001).

¹²⁶ 23 PA. C.S. § 6109(4).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

the custody order.¹³² The court also stated that a custody order may not supersede a PFA order. The proper procedure is to seek modification of the PFA order.

When a trial court considers modifying a pre-existing child custody order at a PFA proceeding, the defendant must be afforded due process of law. In *Shandra v. Williams* the Superior Court held that the trial court erred when it modified a pre-existing child custody order following a PFA hearing when the parties were not permitted to introduce evidence regarding the best interests of the child.¹³³ The court recognized the custody relief provisions set forth in the PFA Act, yet emphasized that the overriding concern of the court must be the best interests and welfare of the child.

Therefore, when the court is in a position to enter a protection order that is inconsistent with an existing custody order, the court must do the following:

- entertain evidence regarding the abuse as required in 6108(a)(4) of the PFA Act¹³⁴
- if the relief being considered is inconsistent with the existing custody order, the court must give the defendant notice and an opportunity to present evidence that addresses how the suggested relief will affect the best interests of the child
- the best interests evidence may be heard at the same hearing as long as the defendant had notice that such evidence would be considered
- the court may also schedule a subsequent hearing on the issue of best interests of the child

Criminal or civil contempt proceedings may implement enforcement of custody relief ordered by the court in a PFA order.¹³⁵ Section 6113 of the PFA Act allows for the warrantless arrest of the defendant for violating a temporary custody provision contained in a PFA order.

The victim is authorized under Section 6113.1 to file a private criminal complaint alleging indirect criminal contempt of a custody provision of the PFA order by the defendant. The victim is also entitled to file a petition for civil contempt or modification based on the defendant's violation of the provisions in a PFA order. In addition to the consequences of a contempt discussed earlier, an additional judicial response to a violation of the custody provisions contained in a PFA order is to modify the custody award therein to further protect the victim and the child from potential harm.

EMERGING PRACTICES – ENFORCING SUPPORT RELIEF

Necessity of Support Relief Enforcement

Aside from fear, lack of financial resources may be the single most common reason why abuse victims remain with or return to an abuser. When a court orders and enforces financial support immediately, the court enables the victim to move towards independence from the abuser. The PFA Act allows a trial court, following a hearing in accordance with Section 6108(a), to direct the defendant: (1) to pay financial support to those persons whom the defendant owes a duty of support; (2) to provide health coverage for the children and spouse, if applicable,

¹³² [Dye for McCoy v. McCoy, 621 A.2d 144 \(Pa. Super. 1993\).](#)

¹³³ [Shandra v. Williams, 819 A.2d 87 \(Pa. Super. 2003\).](#)

¹³⁴ 23 PA. C.S. § 6108(a)(4).

¹³⁵ 23 PA. C.S. § 4346 gives courts contempt powers for noncompliance with visitation or partial custody orders. *See also, Fatemi v. Fatemi, 537 A.2d 840 (Pa. Super. 1988).*

pursuant to sections 4324 (relating to inclusion of medical support) and 4326 (relating to mandatory inclusion of child medical support); (3) to pay all the unreimbursed medical expenses of a spouse or minor child of the defendant to a provider or to the plaintiff when the plaintiff has paid for the medical treatment; and (4) to make or continue to make rent or mortgage payments on the residence of the plaintiff to the extent that the defendant has a duty to support the plaintiff or other dependent household members.¹³⁶ The PFA support order is temporary, and the PFA plaintiff beneficiary must file a complaint for support within two weeks of the date of the issuance of the protection order or the temporary support order becomes void.¹³⁷

Civil Contempt for Enforcement of Support Relief

Enforcement of a financial support provision contained in a Protection From Abuse order is achieved through civil contempt. A civil contempt proceeding may be initiated by the victim or by the court of its own accord pursuant to Section 6114.1 of the PFA Act. This section also authorizes the court to sentence the defendant to imprisonment until the terms of the support order are fulfilled.¹³⁸ In no case may the term of imprisonment last more than six months.¹³⁹ The defendant is entitled to representation by counsel, but does not have the right to a jury trial.¹⁴⁰

For support matters generally, the court may hold a person in civil contempt for noncompliance of a support order pursuant to 23 Pa. C.S.A. § 4345. The PFA Act also requires the domestic relations office to enforce any support award in a PFA order where the plaintiff files a complaint for support.¹⁴¹

Following the PFA hearing and resulting support order, a victim must file a complaint for support within two weeks with the domestic relations office.¹⁴² The order issued as a result of a domestic relations proceeding will, in most instances, contain an income-withholding requirement directed to the defendant's employer. PFA defendants frequently fail to make support payments to victims, despite the PFA order, until the monies are withheld from their paycheck following the domestic relations hearing.

It is not uncommon for it to take 20 days or more to get a hearing before a domestic relations officer. After that hearing, it may be more than a month before the perpetrator's employer receives and processes the withholding provision of the support order.¹⁴³ It is, therefore, critical that the court in the PFA case order and enforce an immediate payment of support to the victim and children and/or order the defendant to make mortgage/rent payments.

For more information about spousal and child support in domestic violence cases, please see Chapter V: Child and Spousal Support.

¹³⁶ 23 PA. C.S. § 6108(a)(5).

¹³⁷ *Id.*

¹³⁸ 23 PA. C.S. § 6114.1(b), (c).

¹³⁹ 23 PA. C.S. § 6114.1(c).

¹⁴⁰ 23 PA. C.S. § 6114.1(d).

¹⁴¹ 23 PA. C.S. § 6108(f).

¹⁴² 23 PA. C.S. § 6108(a)(5).

¹⁴³ The rules regarding enforcement of Actions for Support are found in the Pennsylvania Rules of Civil Procedure, Rules 1910.20 – 1910.26.

EMERGING PRACTICES – FULL FAITH AND CREDIT ENFORCEMENT TIPS

Considering the full faith and credit requirements under VAWA, Pennsylvania courts can make their PFA orders easier to enforce in other jurisdictions by doing the following:

- provide the court's telephone number and the Pennsylvania State Police telephone number
- use clear, specific and concise language in a legible order
- state in the order that the respondent had notice of the proceeding and the opportunity to be heard
- conform PFA custodial awards with the federal Parental Kidnapping Prevention Act¹⁴⁴ and the Commonwealth's Uniform Child Custody Jurisdiction and Enforcement Act¹⁴⁵
- cite the statutory authority upon which the court's decision is based
- state the duration of the order and its expiration date
- orally and in writing inform the parties that the order is enforceable in all 50 states, U.S. territories, tribal lands, and the District of Columbia
- specify that the order be entitled to full faith and credit under VAWA
- provide the protected parties certified copies of the order and advise them to keep one with them at all times
- state that violation of the order, in addition to any state or tribal sanctions, may also subject the respondent/defendant to federal prosecution
- at the request of the enforcing court, confer with the enforcing judge or court personnel to clear up any ambiguities, verify validity, establish the status of service, etc. ¹⁴⁶

EMERGING PRACTICES – GENERAL ENFORCEMENT TIPS

Detailed, Specific, Quickly-Enforced Orders

Deterrence is generally more potent when an expedited punishment or coercion shortly follows an infraction.¹⁴⁷ In addition to the practices suggested throughout this chapter, generally in a Protection From Abuse case, the trial court may wish to consider enforcement issues when first drafting an order. Granting PFA relief that is highly detailed and time-specific allows the contempt power of the court to be implemented most effectively.

For some victims, the contempt process offers practical advantages over the traditional criminal process.¹⁴⁸ For example, the indirect criminal contempt route is faster than the criminal charge process.

¹⁴⁴ 18 U.S.C. § 1204 – International parental kidnapping.

¹⁴⁵ 23 Pa. C.S. § 5401 et seq.

¹⁴⁶ See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FULL FAITH AND CREDIT: A PASSPORT TO SAFETY, A JUDGE'S GUIDE (2011).

¹⁴⁷ *Id.*

¹⁴⁸ David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanction to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1199 (1995).

PFA Enforcement Available Against PFA Defendant Only

It is also relevant to note that while victims are provided enforcement options, the PFA Act does not authorize the use of any contempt or criminal charges against the victim/petitioner for non-compliance with a PFA order. For example, if a petitioner fails to comply with the terms of a custody provision set forth in a PFA order, the respondent/perpetrator may not seek PFA indirect criminal contempt sanctions against the petitioner.¹⁴⁹

Enforcement Deters Abuse

Research demonstrates that abusers stop battering intimate partners when they perceive that penalties for further violence will be both certain and harsh.¹⁵⁰ Where courts respond to domestic violence as serious criminal conduct and impose sanctions accordingly, courts deter or incapacitate abusers.

¹⁴⁹ See 23 PA. C.S. §§ 6113.1, 6114.1.

¹⁵⁰ ANDREW R. KLEIN, U.S. DEP'T OF JUSTICE, DOC. NO. 225722, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 51-53 (2009). See also Barbara J. Hart, *Safety and Accountability, the Underpinnings of a Just Justice System* 10, citing D.C. Carmody & K.R. Williams, *Wife Assault and Perceptions of Sanctions*, 2 VIOLENCE AND VICTIMS, (1987).

CHAPTER XI: PRO SE PROCESS

TABLE OF CONTENTS

CHAPTER GOALS.....	3
CONSTITUTIONAL ACCESS TO COURTS.....	3
United States Constitution	3
Pennsylvania Constitution	3
GUIDANCE FROM THE CANONS OF ETHICS FOR JUDGES HANDLING CASES INVOLVING <i>PRO SE</i> LITIGANTS	3
WHAT THE PFA STATUTE REQUIRES.....	4
GENEROUS INTERPRETATION OF PLEADINGS IS REQUIRED	4
United States Supreme Court	4
Pennsylvania Appellate Courts.....	4
RULES OF CIVIL PROCEDURE REQUIREMENTS	5
PLEADINGS IN PFA CASES	5
NON-LAWYER ASSISTANCE AND UNAUTHORIZED PRACTICE OF LAW (UPL)	6
Background	6
Pennsylvania’s Unauthorized Practice of Law Statute.....	6
Cases Interpreting Unauthorized Practice of Law	7
Bar Association Opinions	7
Domestic Violence Counselor/Advocates Assisting <i>Pro Se</i> Litigants.....	8
Court Personnel Assisting <i>Pro Se</i> Litigants.....	8
Legal Information vs. Legal Advice.....	9
HOW JUDGES HANDLE PRO SE LITIGANTS IN THE COURTROOM	10

Generally	10
Judges May Question Witnesses	10
Cases Regarding Witness Examination by Court	10
Underdeveloped vs. Undeveloped Evidence	11
OTHER RELEVANT INFORMATION	11
Civil Legal Needs of Poor and Low-Income Households Exceed Available Legal Aid	11
Increasing Numbers of <i>Pro Se</i> Litigants	12
Surge in <i>pro se</i> litigation	12
Ignoring <i>pro se</i> litigants will not make them go away	12
Emerging Practices – Court Personnel May Provide Information	12
EMERGING PRACTICES – THE COURT MAY PROVIDE LEGAL INFORMATION TO LITIGANTS PRIOR TO THE HEARING	13
EMERGING PRACTICES – IN-COURT ASSISTANCE OF PRO SE LITIGANTS BY JUDGES	13
EMERGING PRACTICES – POST-HEARING ASSISTANCE	14
APPENDICES.....	15
A – ENTRY OF APPEARANCE AS A SELF-REPRESENTED PARTY	15
B - PROTECTION FROM ABUSE ACT INFORMATION SHEET	17
C – NO-CONTACT ORDER INFORMATION SHEET	21
D - INFORMATION ON THE UNAUTHORIZED PRACTICE OF LAW FOR PENNSYLVANIA COURT PERSONNEL.....	24
E - CATEGORIES OF PERMISSIBLE AND IMPERMISSIBLE ASSISTANCE BY COURT PERSONNEL/DOMESTIC VIOLENCE ADVOCATES IN PFA MATTERS	27
F - JUDICIAL IN-COURT PROCEDURES FOR CASES INVOLVING PRO SE LITIGANTS.....	29

CHAPTER GOALS

Litigants are increasingly representing themselves in domestic violence and other family law cases. The goals of this chapter are: (1) to identify substantive and procedural issues faced by judges who handle cases involving pro se litigants; (2) to delineate the level of assistance that may be provided to unrepresented litigants by non-lawyers; and (3) to provide practical information and tools for use by judges and other court personnel in cases involving pro se litigants.

CONSTITUTIONAL ACCESS TO COURTS

United States Constitution

In *Faretta v. California*,¹ the U.S. Supreme Court recognized a Sixth Amendment right of self-representation in a criminal matter. This Sixth Amendment right of self-representation applied to state court criminal proceedings through the Fourteenth Amendment.

The right to self-representation in civil trial court proceedings appears to be universally accepted.²

Pennsylvania Constitution

The Pennsylvania Constitution provides a right for pro se litigants to be heard in our courts. Article I, Section 11 provides:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.³

GUIDANCE FROM THE CANONS OF ETHICS FOR JUDGES HANDLING CASES INVOLVING PRO SE LITIGANTS

By their very nature, domestic violence proceedings involve serious situations, bringing litigants' emotions to the surface. These proceedings can challenge the dignity of the court. Pro se cases may require judges to balance competing requirements under the judicial canons of ethics. For instance, Canon 2 requires impartiality on the part of the judge,⁴ and Canon 2.6 requires, inter alia, that the judge provide "each person a full right to be heard

¹ [*Faretta v. California*, 422 U.S. 806 \(1975\).](#)

² See generally Appointment of Counsel for Indigent Husband or Wife in Action For Divorce or Separation, 85 A.L.R. 3d. 983 and cases cited therein. Although a civil litigant may appear *pro se* at the trial court level, there is generally no commensurate right to self-representation in civil appellate proceedings. See, e.g., U.S. v. Bailey, No. 99-6250, 2000 U.S. App. LEXIS 5126, 2000 WL 309296 (10th Cir. 2000). Interestingly, Pennsylvania appellate courts have accepted and resolved appeals brought by pro-se litigants in civil cases. See, e.g., Hill v. Thorne, 635 A.2d 186 (Pa. Super. 1993) (reversing a trial court's dismissal of the *pro se* litigant's complaint for malpractice).

³ PA. CONST. art. I, § 11.

⁴ Canon 2. Judges should avoid impropriety and the appearance of impropriety in all their activities – Judges should respect and comply with the law and conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

PA. CODE OF JUDICIAL CONDUCT, Canon 2.

according to the law.”⁵ The question is often posed as to whether the judge is a passive receiver of information to be provided by the litigants, or whether the judge is required to take a more active role and draw out the information in order to ensure access to justice.

Because self-represented litigants are increasingly common in family and domestic violence court, there has been a shift in understanding what access to justice requires from judges and court staff who deal with pro se litigants. Rather than take a hands-off approach, judges have had to adapt their courtroom approach and techniques to maintain fairness where one or both parties are unrepresented.

According to the State Justice Institute of the American Judicature Society, the increase in the number of self-represented litigants requires the shift to a more hands-on approach.⁶ The report also observes:

Under the code of judicial conduct, no reasonable question is raised about a judge’s impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a self-represented litigant acting in good faith the opportunity to have his or her case fairly heard — and, therefore, a judge should do so.⁷

WHAT THE PFA STATUTE REQUIRES

Pennsylvania’s PFA statute requires courts to provide the plaintiff with:

- simplified forms and clerical assistance in English and Spanish to help with the writing and filing of the petition for a protection order for an individual not represented by counsel⁸
- written and oral referrals, in English and Spanish, to the local domestic violence program, to the local legal services office, and to the county bar association’s lawyer referral service⁹

GENEROUS INTERPRETATION OF PLEADINGS IS REQUIRED

United States Supreme Court

The Supreme Court has said that in the context of a motion to dismiss, a pro se litigant has a right to have his or her complaint interpreted liberally.¹⁰

Pennsylvania Appellate Courts

Citing the Pennsylvania Constitution’s guarantee of the right to be heard in the courts, the Pennsylvania Superior Court reversed the trial court’s dismissal of a pro se complainant’s legal malpractice complaint. The trial court

⁵ PA. CODE OF JUDICIAL CONDUCT, Canon 2.6.

⁶ Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, State Justice Institute, AM. JUDICATURE SOCIETY, 1 (2005), available at http://www.ncsc.org/~media/files/pdf/topics/center_for_judicial_ethics/publications/judicial-ethics-and-self-represented-litigants.ashx.

⁷ *Id.*

⁸ 23 PA. C.S. § 6105(h)(1).

⁹ 23 PA. C.S. § 6106(h)(2). In addition to the forms and clerical assistance required by the statute, the court may wish to provide, for practical reasons, additional information about the PFA Act to *pro se* litigants. See [Appendix B, PFA Act Information Sheet](#) and [Appendix C, No-Contact Order Information Sheet](#).

¹⁰ *Haines v. Kerner*, 404 U.S. 519 (1972).

had dismissed on grounds of improper service and for failure to state a claim. The Superior Court reviewed the complaint and, even though the complaint was not perfectly drafted, found that the complaint contained sufficient information to support a legal malpractice claim.¹¹

RULES OF CIVIL PROCEDURE REQUIREMENTS

Pennsylvania's Rules of Civil Procedure require all pro se parties in custody, divorce, support, PFA and paternity proceedings to file an Entry of Appearance form with the court. The Entry of Appearance form must declare that the party is self-represented and will proceed in the case without an attorney.

The Rule requires the Entry of Appearance form to provide the following information:

- An address where the party agrees to receive copies of court documents. *Note: The party is not required to use a home address.
- A phone number where the party can be reached.
- The name and address of any attorney who previously worked on the case.¹²

Every pro se party must give a copy of the Entry of Appearance form to the other party or to the other party's attorney. If any of the information changes, the pro se party must update the court and other parties with the new information. For victims of domestic violence, disclosing personally identifying information and serving a copy of that information on the perpetrator may place the victim at further risk of harm. Courts should consider adopting a local rule that would mitigate these risks by allowing service by mail and providing an option for pro se litigants to protect their confidential address and telephone.

A sample Pro Se Entry of Appearance Form that provides for a victim's confidentiality needs is attached as Appendix A.

PLEADINGS IN PFA CASES

There is no requirement of specific pleading in a PFA complaint; the plaintiff may testify about incidences of abuse outside of the pleadings. In *Snyder v. Snyder*, the Pennsylvania Superior Court upheld the trial court's admission and consideration of the pro se victim's testimony regarding incidences of abuse that were not included in her PFA complaint.¹³ The defendant husband objected to the admission of the testimony, claiming that the plaintiff should have been limited to testifying about the specific instances of abuse listed in her PFA complaint. The Superior Court noted that the plaintiff was pro se, and found that a requirement of specific pleading would frustrate the preventive purpose and expeditious nature of the Act and place an impracticable burden on the plaintiff.¹⁴

Courts have the authority to hold a hearing, even where an inartfully drafted PFA complaint may not contain a prima facie allegation of abuse. In *Weir v. Weir*, the victim filed a pro se PFA complaint against her husband.¹⁵ In her complaint, she alleged that, in order to frighten her, her husband drove a vehicle in which she was a

¹¹ Hill v. Thorne, 635 A.2d 186 (Pa. Super. 1993).

¹² Pa. R.C.P. 1012.

¹³ [Snyder v. Snyder, 629 A.2d 977 \(Pa. Super. 1993\).](#)

¹⁴ *Id.* at 982.

¹⁵ [Weir v. Weir, 631 A.2d 650 \(Pa. Super. 1993\).](#)

passenger down winding back roads at an excessive rate of speed. She also claimed that when she got out of the vehicle, he used the vehicle to pin her against a bridge abutment.¹⁶

A PFA plaintiff may testify about incidences of abuse outside of the pleading...there is no requirement of specific pleading in a PFA

After a hearing in which the trial court entered an order in wife's favor, the husband appealed, alleging, inter alia, that his wife's complaint did not set forth a prima facie case of abuse and that the court lacked jurisdiction to hear a PFA case where the PFA petition did not contain a prima facie allegation of abuse.

The Superior Court rejected the husband's arguments, finding that his wife's petition set forth adequate information to establish a prima facie allegation of abuse. In addition, the court declined to hold generally that a court has no authority to hold a hearing where the PFA petition may not contain a prima facie allegation of abuse:

[Husband's] arguments ignore the fact that PFAA petitions are often initiated pro se. To dismiss inartfully drafted petitions which may not, on their face, be couched in the precise definitional terms set forth in the statute would eviscerate the purpose and goals of the PFAA, which is to provide spouses, household members, intimate partners, and children with immediate temporary protection from abuse.¹⁷

NON-LAWYER ASSISTANCE AND UNAUTHORIZED PRACTICE OF LAW (UPL)

Background

Because of the increasing number of pro se litigants, court personnel are frequently called upon to provide legal information to pro se litigants.

As indicated previously, under the PFA Act courts are required to provide forms and clerical assistance in English and Spanish to help with the writing and filing of petitions for protection orders.¹⁸

If the court personnel provide more information than forms and clerical assistance, does this assistance constitute the practice of law? What about the assistance provided by domestic violence legal advocates?

Pennsylvania's Unauthorized Practice of Law Statute

The statutory definition for the unauthorized practice of law (UPL) states in pertinent part as follows:

General rule.— ...[a]ny person including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law, shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law in any jurisdiction, without being an attorney at law ... commits

¹⁶ *Id.* at 654.

¹⁷ *Id.*

¹⁸ 23 PA. C.S. § 6106(h)(1).

a misdemeanor of the third degree upon a first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.¹⁹

In addition to criminal prosecution, the unauthorized practice of law may be enjoined in the Court of Common Pleas, and the party obtaining the injunction may be awarded reasonable costs and expenses, including attorney's fees.²⁰

Performing clerical work is not UPL, provided clerk does not interpret law or apply law to facts.

Cases Interpreting Unauthorized Practice of Law

Cases interpreting the unauthorized practice of law are very fact specific and do not provide an exact definition of the unauthorized practice of law. As has been observed by the Pennsylvania Supreme Court, "an attempt to formulate a precise definition ... would be more likely to invite criticism than to achieve clarity."²¹

Some guidelines have been established. For example, when an individual appears before a court or tribunal, examines and cross-examines witnesses, and presents arguments, these activities would be considered the practice of law.²² The drafting of wills and trusts by a non-lawyer constitutes the unauthorized practice of law.²³ The drafting of certain contracts and the preparation of articles of incorporation or merger by a non-lawyer constitute the unauthorized practice of law.²⁴

The court has held that the preparation of a liquor license application is a clerical action and not the unauthorized practice of the law.²⁵ However, the court warned that this clerical function must not be accompanied by an interpretation of the law, or by applying the law to the particular facts of the applicant, so that the individual performing the service does not give the impression that the individual is giving legal advice.

There are no reported cases involving court personnel or domestic violence advocates who assist unrepresented litigants.

Bar Association Opinions

The formal opinions of the Pennsylvania Bar Association's Unauthorized Practice of Law Committee do not include opinions on assistance to self-represented litigants by court personnel and/or domestic violence counselor/advocates.²⁶ However, the Unauthorized Practice of Law Committee Manual does include a report regarding the Allegheny Bar Association's actions challenging the practices of Legal Advocates for Women (LAW), a non-profit organization funded by the City of Pittsburgh and staffed by non-attorney advocates. LAW volunteers assisted individuals at support and custody proceedings and filed exceptions to support orders. Business cards used by LAW volunteers contained the term "legal advocates." The Allegheny UPL Committee

¹⁹ 42 Pa. C.S. § 2524.

²⁰ 42 Pa. C.S. § 2524(c).

²¹ Shortz v. Farrell, 193 A.2d 20, 21 (Pa. 1937).

²² *Id.*

²³ *In re Fleming's Estate*, 32 Pa. D. & C. 245 (1938), *aff'd*, 5 A.2d 599 (Pa. Super. 1939).

²⁴ Blair et al. v. Motor Carriers Svc. Bureau, 40 Pa. D. & C. 413 (1939).

²⁵ Walker v. Kahn, 31 Pa. D. & C. 620 (1938).

²⁶ Unauthorized Practice of Law Committee, Pa. Bar Ass'n, *Manual Concerning the Unauthorized Practice of Law* (2002).

opposed this practice because it believed the term misled LAW clients into thinking they were receiving legal representation. A consent decree required LAW to discontinue the use of the initials LAW, to stop speaking to lawyers or opposing parties at counseling sessions, to provide no legal advice to clients, to not sit at counsel table, and to change its business card to delete the term “legal advocates.”²⁷

Domestic Violence Counselor/Advocates Assisting Pro Se Litigants

Although a domestic violence advocate is not authorized to act as an attorney for the litigant, the advocate is statutorily permitted to engage in some activities engaged in by attorneys, such as attending court with the litigant, and expecting that communications with the litigant are privileged. Pennsylvania’s PFA Act expressly permits domestic violence counselor/advocates to accompany parties to any “legal proceeding or hearing” involving the PFA Act.²⁸ Communications between advocates and a party are privileged and expressly protected by the PFA Act.²⁹ Domestic violence counselor/advocates cannot examine or cross-examine witnesses or negotiate with an attorney on behalf of the pro se litigant.

In some Pennsylvania counties, domestic violence counselor/advocates assist the court with its obligation to provide forms and clerical assistance to pro se PFA litigants.

Domestic violence counselors/advocates are expressly permitted to accompany parties to any legal proceeding involving the PFA Act.

Court Personnel Assisting Pro Se Litigants

Typically, Pennsylvania courts look to various court administrative personnel to provide forms and clerical assistance to pro se PFA litigants.³⁰ Depending on the county, one or more of the following persons are designated to provide this assistance: clerks in the prothonotary’s office, personnel in the court administrator’s office, a judge’s law clerk, or the judge’s administrative assistant. While it is clear that providing forms and writing or typing the litigant’s statement is not the unauthorized practice of law,³¹ there is no clear guidance regarding the level of additional assistance that is permitted.

In a 1995 Judges’ Journal article, John Greacen examined the phrase “legal advice,” and concluded that the term had no “inherent meaning.”³² He also observed that, when court staff are preoccupied with the meaning of the phrase “legal advice” and hide behind it for fear of engaging in UPL, courts are less able to provide adequate and fair public service.

Although he did not offer an actual definition for the phrase “legal advice,” Greacen outlined some principles for use by court personnel when answering questions from the public, which include the following:

- Court personnel have an obligation to explain court processes and procedures to litigants, the media and other interested citizens.

²⁷ *Id.* at 58.

²⁸ 23 PA. C.S. § 6111 (amended in 1990 to explicitly provide for counselor/advocate accompaniment).

²⁹ 23 PA. C.S. § 6116.

³⁰ 23 PA. C.S. § 6106(h).

³¹ 23 PA. C.S. § 6106(h)(i).

³² John M. Greacen, *No Legal Advice From Court Personnel, What Does That Mean?* THE JUDGES’ J., 10-15 (Winter 1995).

- Court personnel have an obligation to inform litigants and potential litigants about how to bring their problems before the court for resolution.
- Court staff cannot advise litigants whether to bring their problems before the court, or what remedies to seek.
- Court personnel must remember the absolute duty of impartiality. They must never give advice or information to one person that they would not give to an opponent.³³

Court systems in several states, including Michigan, New Mexico, California, Florida, and Arizona, have either adopted Greacen's guidelines or designed their own guidelines using his as a basis.³⁴

As part of the clerical assistance offered, court personnel may be permitted to correct misspellings in the pro se litigant's draft complaint without running afoul of Pennsylvania's UPL law. Providing information, such as correct spelling, within the knowledge of laypersons is not legal advice.

In addition, if, as a result of their work in the position, court personnel and domestic violence advocates are aware of PFA procedures in the courthouse, or where in the courthouse a pro se litigant can find a copy of the PFA Act or cases interpreting the Act, providing this information would not constitute legal advice. Applying the law to the facts of the individual pro se litigant's case and advising the litigant regarding how to proceed would constitute the unauthorized practice of law. Court personnel and domestic violence advocates may provide legal information, but not legal advice.³⁵

See Information on the [Unauthorized Practice of Law for Pennsylvania Court Personnel \(Appendix D\)](#) and the [Categories of Permissible and Impermissible Assistance by Court Personnel/Domestic Violence Advocates in PFA Matters \(Appendix E\)](#).

Legal Information vs. Legal Advice

Domestic violence counselor/advocates and court personnel may provide legal information but not legal advice to pro se litigants.

Legal information is general information applicable to a class of litigants rather than a specific litigant. Legal information requires a domestic violence advocate or a court employee to have knowledge of non-confidential case information, court processes, or generally known legal concepts and practices. With legal information, the information provided is not likely to substantially affect the legal outcome for the person being assisted.³⁶

Legal advice interprets the law or recommends a specific course of conduct in an actual case or proceeding. Legal advice applies the law to the individual litigant's facts and circumstances. To provide legal advice, the

³³ *Id.*

³⁴ John M. Greacen, *Legal Information vs. Legal Advice – Developments During the Last Five Years*, 84 JUDICATURE 198 (2001), available at <http://isc.idaho.gov/judicialedu/clerks/Grecean Article on Legal Advice.pdf>

³⁵ Dauphin County Bar Ass'n v. Mazzacaro, 351 A.2d 229 (Pa. 1976) (involving a licensed independent insurance claims adjuster who sought to negotiate settlements for injured claimants against their tortfeasors). The Pennsylvania Supreme Court has observed that there are times when it is clearly within the ability of laypersons to appreciate the legal problems and consequences in a given situation. *Id.* It has held that where a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for. *Id.*

³⁶ Stephen Foulk, Inst. for Crt. Mngmt. *Developing Court Guidelines for Assisting Self-Represented Litigants in New York*, 90-91 (2001).

individual must have knowledge of the law and legal principles beyond familiarity with court requirements and procedures. Legal advice is also likely to substantially affect the legal outcome for the person being assisted.³⁷

It would be acceptable for domestic violence advocates and for court personnel to provide a PFA fact sheet to all pro se litigants with information regarding the PFA Act, courthouse procedure, expected attire, general information regarding how to address the court, and witness examination and cross-examination. It would not be acceptable for court personnel or domestic violence advocates to advise self-represented litigants about the legal issues in their case.

The Pennsylvania Rules of Evidence allow judges to call witnesses and ask questions.

HOW JUDGES HANDLE PRO SE LITIGANTS IN THE COURTROOM

Generally

When one or both of the parties are self-represented, the litigants may not produce all of the information or testimony that the judge may need in order to make a decision. Provided that the judge is seeking only to obtain information, and provided the court's action does not unduly prejudice the other party, the judge is permitted to question witnesses and ask questions.

Judges May Question Witnesses

The Pennsylvania Rules of Evidence allow a judge to call witnesses and ask questions:

- (a) *Calling.* Consistent with its function as an impartial arbiter, the court, with notice to the parties, may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
- (b) *Examining.* Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness.
- (c) *Objections.* A party may object to the court's calling or examining a witness when given notice that the witness will be called or when the witness is examined. When requested to do so, the court must give the objecting party an opportunity to make objections out of the presence of the jury.³⁸

Cases Regarding Witness Examination by Court

Generally, cases where civil trial judges are challenged for examining witnesses involve jury trials. When a jury is involved, witness examination by the judge is permitted, provided that the judge's examination did not suggest that the judge was biased in favor of one party over the other, or had an opinion regarding the witness'

³⁷ *Id.*

³⁸ PA. R. EVID. 614

testimony.³⁹ Judges are permitted to ask questions of witnesses to clarify testimony or to fully develop the facts.⁴⁰

In bench trial proceedings, the trial judge is also permitted to question witnesses. There are some reported cases regarding judges examining witnesses when one of the parties is a pro se litigant. For example, in 2003, a Louisiana law firm filed against its former client for unpaid fees resulting from a divorce action.⁴¹ At trial, the defendant represented herself. After the defendant took the stand on her own behalf, the trial court conducted the direct examination of the pro se defendant regarding the legal fees dispute. The appellate court held that the trial court in a non-jury case has authority to question the witness where the facts are confused, undeveloped or misleading.

In a 1997 case, an Ohio construction dispute where the plaintiffs appeared pro se, the trial court's examination of the witnesses was upheld on appeal.⁴² The appellate court found that in this bench trial, the trial court judge merely assisted the parties through the trial with explanations of how a trial was procedurally conducted. In addition, questions asked by the judge were merely to assist the judge, as trier of fact, in making a correct and impartial decision.

Underdeveloped vs. Undeveloped Evidence

A review of the above rule and cases suggests that judges may assist in drawing out a litigant's underdeveloped evidence as opposed to seeking out undeveloped theories or evidence. Judges are permitted to facilitate a pro se party's presentation of the case by asking for additional information that is consistent with the party's case strategy. Judges may not devise or revise the pro se litigant's case strategy. For example, if a litigant attempted to introduce a photograph into evidence without the proper foundation, the judge could ask questions designed to elicit adequate support for admission, but a judge may not suggest what other evidence the plaintiff should present.⁴³

OTHER RELEVANT INFORMATION

Civil Legal Needs of Poor and Low-Income Households Exceed Available Legal Aid

The American Bar Association reports that 47 percent of low-income households experience a legal problem each year. That equates to approximately 712,000 Pennsylvanians who are in need of civil legal representation each year.⁴⁴ One in seven Pennsylvanians are eligible for free civil legal assistance.⁴⁵ Pennsylvania legal aid intake workers turn away 50 percent of applicants due to lack of resources – and still many others in Pennsylvania do not apply.⁴⁶ Only 1 in 5 low-income individuals who experience a legal problem are able to access assistance.⁴⁷ Nationally, there is only one civil legal aid attorney per 6,861 low-income individuals, but there is one private

³⁹ See generally *Manner or Extent of Trial Judge's Examination of Witnesses in Civil Cases*, 6 A.L.R. 4th 951.

⁴⁰ See, e.g., *Pratt v. Stein*, 444 A.2d 674 (Pa. Super. 1982).

⁴¹ *Salley & Salley v. Stoll*, 864 So.2d 698 (La. Ct. App. 2003).

⁴² *Paulding-Putnum Coop. v. Kuhlman*, 117 Ohio App. 3d 156 (1997).

⁴³ See *Albrecht et al., Judicial Techniques for Cases Involving Self-Represented Litigants*, THE JUDGES' JOURNAL, 44 (2003).

⁴⁴ PA. IOLTA, RESULTS OF THE PENNSYLVANIA ACCESS TO JUSTICE ACT: A REPORT ON THE FILING-FEE SURCHARGE LAW FY 2004-2008, 2 (2009), available at <http://www.pabar.org/pdf/Report.pdf>

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

civil attorney for every 525 individuals in the general population.⁴⁸ This means that, nationally, there are more than 10 times the number of private civil attorneys providing legal assistance to middle- to high-income individuals as there are legal aid attorneys serving the poor.

Increasing Numbers of *Pro Se* Litigants

Surge in *pro se* litigation

There is a surge in *pro se* litigation, particularly in family courts. A report funded by the National Center for State Courts and State Justice Institute indicates that “a very high percentage of family law cases now involve at least one self-represented litigant – ranging from 60-90 percent of all such cases.”⁴⁹

Ignoring *pro se* litigants will not make them go away

Although some judges and attorneys resist any proposals to assist *pro se* litigants for fear that such assistance will encourage *pro se* litigation,⁵⁰ there is little empirical support for this belief.⁵¹ According to the Conference of State Court Administrators (COSCA):

The self-represented population is a permanent fixture in our justice system; it will not simply go away because the courts decline to devise appropriate responses or provide assistance.⁵²

COSCA asserts that if courts make available more, rather than less, information about exactly what is entailed in pursuing an action, prospective litigants who have the financial ability to do so may be persuaded to engage an attorney to represent them.⁵³

Emerging Practices – Court Personnel May Provide Information

At the initial stage of litigation, *pro se* litigants need information about the court, its procedures, and available services. Especially appropriate for litigants in domestic violence cases would be brochures or information sheets regarding the PFA Act.

The Conference of State Court Administrators recommends that courts “affirmatively seek to remove the specter of [UPL] as a disincentive to court staff providing appropriate assistance.”⁵⁴ Court clerks are frequently the first point of contact for self-represented domestic violence litigants, and, as such, benefit from receiving formal training on the PFA Act and how to interact with self-represented litigants. Critical preparation focuses on:

- Training on the extent to which clerks are permitted to provide legal information

⁴⁸ LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP: THE CURRENT UNMET CIVIL LEGAL NEED OF LOW-INCOME AMERICANS (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

⁴⁹ NAT’L CTR. FOR STATE CRTS, THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT, (2005), <http://lawworks1.com/publicfiles/PDF's/FutureOfProSe.pdf> (last visited Nov. 30, 2015).

⁵⁰ Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 45 (2002).

⁵¹ *Id.*

⁵² CONFERENCE OF STATE CT. ADMINISTRATORS, POSITION PAPER ON SELF-REPRESENTED LITIGATION (2000).

⁵³ *Id.*

⁵⁴ *Id.*

- Written guidelines and policies for court staff, with information about what level of assistance would constitute the unauthorized practice of law
- Some courts are implementing programs addressing the needs of pro se litigants. For example, some counties are in the process of establishing self-help centers. Others have established or improved lawyer referral and pro bono representation programs.

[Sample PFA Act information sheet \(Appendix B\)](#)

[Information on the Unauthorized Practice of Law for Pennsylvania Court Personnel \(Appendix D\)](#)

[Categories of Permissible and Impermissible Assistance by Court Personnel/ Domestic Violence Advocates in PFA Matters \(Appendix E\)](#)

EMERGING PRACTICES – THE COURT MAY PROVIDE LEGAL INFORMATION TO LITIGANTS PRIOR TO THE HEARING

The National Center for State Courts (NCSC) recommends that judges provide pro se litigants procedural and substantive guidelines before the hearing, including what the parties will have to prove to obtain the relief that they are seeking.⁵⁵ Judges may wish to include such a written list of elements that must be proved to obtain relief in a package to be sent along with notice of the hearing. In addition, some courts assist pro se litigants by providing written instructions regarding courtroom protocols such as where each party sits in the courtroom, the order of testimony from parties, and types of acceptable evidence.⁵⁶ Courtroom behavioral requirements are included as well: no gum, stand to address the judge, stand when the judge enters and exits the courtroom, and proper attire.

EMERGING PRACTICES – IN-COURT ASSISTANCE OF PRO SE LITIGANTS BY JUDGES

Judges often struggle with the appropriate level of assistance to provide to pro se litigants who appear in court. The NCSC recommends that judges:

- Provide substantive and procedural guidelines orally at the beginning of in-court proceedings, including an explanation of likely judicial involvement and its consistency with neutrality.
- Structure the hearing around the likely elements, and if both parties are pro se, swear in the parties at the beginning of the hearing,
- To the extent that it is practical, appropriate, and legal, relax formal evidentiary requirements to permit parties to introduce all evidence that they believe is relevant.

⁵⁵ NAT'L CTR. FOR STATE CRTS, THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT, (2005).

⁵⁶ Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, THE JUDGES' JOURNAL, 16-23, 42-48 (2003).

When judges give general instructions in advance to both parties, they set the tone for the hearing and minimize the likelihood that their instructions can be perceived as favoring one party.

- Ask further relevant questions of the parties as necessary to support an informed and just decision.
- Be alert to the imbalances of power between the parties that may affect the parties' ability to present their point of view.
- Explain the judge's decision verbally in court, including necessary steps to seek review of the decision or to request modification of the decision in the future.
- Check that the parties understand the judge's decision.⁵⁷

When judges give general instructions in advance to both parties, they set the tone for the hearing, and also minimize the likelihood that their instructions can be perceived as favoring one party.⁵⁸

Suggested Instructions for the Court to read at the beginning of each PFA final order hearing can be found in [Appendix F, Judicial In-Court Procedures for Cases Involving Pro Se Litigants](#).

EMERGING PRACTICES – POST-HEARING ASSISTANCE

It is best if the case is decided and the order prepared immediately upon conclusion of the hearing so that the parties may take a copy of the order with them when they leave the courthouse. In addition, it is important for the litigants to have contact information for resources available to them to facilitate compliance with the order. For example, if a respondent were directed to attend drug and alcohol counseling, contact information for the drug and alcohol programs would be practical. The court should also explain to the parties, verbally and in writing, the meaning of the provisions in a PFA order, particularly the "No-Contact" provisions.

[Sample "No-Contact" Instructions for Defendants \(Appendix C\)](#)

⁵⁷ NAT'L CTR. FOR STATE CRTS, THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT, (2005).

⁵⁸ Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, THE JUDGES' JOURNAL, 16-23, 42-48 (2003)..

APPENDICES

A – ENTRY OF APPEARANCE AS A SELF-REPRESENTED PARTY

[CAPTION]

Entry of Appearance as a Self-Represented Party

1. I am the ☐ Plaintiff ☐ Defendant in the above-captioned case.

2. I intend to represent myself in ☐ custody, ☐ divorce, ☐ support, ☐ protection from abuse, ☐ paternity.

3. Check only one box in Question 3

☐ This is a new case and I am representing myself. I have decided not to hire an attorney to represent me.
OR

☐ This is not a new case and I am representing myself. I have decided not to hire an attorney to represent me.
OR

☐ This is not a new case.

_____(Name of Attorney) previously represented me in this case. I have decided not to be represented by that attorney and direct the Prothonotary to remove that attorney as my counsel of record in this case. I have provided a copy of this form to that attorney listed above at the following address:

That attorney has acknowledged his/her withdrawal from this case by signing this form.

_____, Esq.

(Attorney signature)

4. ☐ I am entering my appearance as a self-represented party _____(Your Signature)

5. I understand that I need to provide a street address or P.O. Box for the purpose of receiving all future pleadings and other legal notices. I further understand that this does not need to be my home address. My address for the purpose of receiving all future pleadings and other legal notices is:

APPENDIX A

I understand that this address will be the only address to which notices and pleadings in this case will be sent and that I am responsible to check the mail at this address so I do not miss important deadlines or proceedings.

☐ **I am not providing my address because I reside at a confidential location** protected by the Protection From Abuse Act, 23 Pa. C.S. § 6112 and/or the Address Confidentiality Program, 23 Pa. C.S. § 6701-6713, and/or the Child Custody Act, 23 Pa. C.S. § 5336(b).

6. My telephone number where I can be reached is _____.

☐ **I am not providing my telephone number because it is confidential** pursuant to the Protection From Abuse Act, 23 Pa. C.S. § 6112 and/or the Child Custody Act, 23 Pa. C.S. § 5336(c).

7. I UNDERSTAND I MUST FILE A NEW FORM EVERY TIME MY ADDRESS OR TELEPHONE NUMBER CHANGES.

8. I understand that I must ensure that a copy of this form is served on all other attorneys or other self-represented parties at the following addresses as listed below: (Use reverse side if you need more space)

Name _____ Address _____

Name _____ Address _____

9. I verify that the statements made in this Entry of Appearance as a Self-Represented Party are true and correct. I understand that if I make false statements herein, that I am subject to the criminal penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities that could result in a fine and/or prison term.

Date

(Your Signature)

B - PROTECTION FROM ABUSE ACT INFORMATION SHEET

Special Note: This information sheet is not a replacement for an attorney trained in the law who can represent you in an abuse case. This sheet is intended to inform and not to advise. It is based on Pennsylvania law. The statements are general, and individual facts in a given case may alter their application or involve other laws not referred to here. This information sheet is based on copyrighted information provided by the Pennsylvania Bar Association at <http://www.pabar.org/clips/protectionfromabuse.pdf>.

HOW CAN I FIND A LAWYER?

Many people choose to be represented by a lawyer in PFA cases. Call the Pennsylvania Bar Association Lawyer Referral Service at 800-692-7375, or 717-238-6715. Most counties provide this service locally. Check your Yellow Pages under "attorneys" for more details. In addition, please contact your local legal services office to see if it provides legal representation to domestic violence victims seeking Protection From Abuse orders.

ABUSE – HOW TO GET PROTECTION

If you have been threatened or assaulted, contact your local police department. If you need to file for a protection order and the courthouse is closed or a judge is not available, papers may be filed before a Magisterial District Judge or Municipal Court Judge.

Domestic violence services are offered in every county in Pennsylvania. These services are confidential and include crisis hotlines, safety planning, shelters and legal advocacy. Your local domestic violence hotline is available 24 hours a day, and a counselor may be able to help you seek a protection order.

WHAT IS ABUSE?

Under the Protection From Abuse Act, abuse is defined as any of the following:

1. Attempting to, or intentionally or recklessly causing bodily injury, serious bodily injury, rape, spousal sexual assault or involuntary deviate sexual intercourse with or without a deadly weapon;
2. Placing another in reasonable fear of imminent serious bodily injury;
3. False imprisonment, as defined under the crimes code;
4. Physically or sexually abusing minor children; or
5. Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, under circumstances which place the person in reasonable fear of bodily injury.

The Act does not cover emotional abuse.

WHO CAN FILE FOR PROTECTION UNDER THE ACT?

You can file for protection if the person who has threatened or is trying to harm you is:

1. or was your spouse;
2. or was living with you in a common-law marriage or as your boyfriend/girlfriend;
3. the parent of your child;
4. your child;
5. or was a sexual or intimate partner;
6. your parent; or
7. related to you by blood or marriage.

APPENDIX B

8. An adult or emancipated minor can file for a protection order. If the abused person is a minor, then a parent, adult household member or guardian ad litem can file on behalf of the child.

HOW AND WHERE CAN I FILE FOR A PROTECTION ORDER?

Filing procedures are different in every county. Please contact your county courthouse, domestic violence program or legal services office for more information on the filing procedures in your county. Filing a Protection From Abuse petition does not require a prepaid fee.

HOW DO I RECEIVE A TEMPORARY PROTECTION ORDER AFTER FILING A PETITION FOR PROTECTION FROM ABUSE?

After filing a petition for protection from abuse, a judge will review the case to determine if a temporary protection order should be granted. The judge's decision at the temporary order proceeding is based only on one person's statement – the person who is claiming to be abused. If the judge believes that abuse has occurred, he or she will issue a temporary protection order and schedule a final order hearing that should be held within 10 business days.

HOW IS THE ABUSER NOTIFIED OF THE TEMPORARY PROTECTION FROM ABUSE ORDER?

The abuser must be served with notice of the temporary protection order and the final order hearing date. Generally, the sheriff's department or a local law enforcement agency will serve the court order on the abuser. Once the abuser is served, he or she can be arrested for violating the terms of the court order.

WHAT IS THE DIFFERENCE BETWEEN A TEMPORARY AND A FINAL PROTECTION ORDER?

Temporary order:

- Sets forth temporary restrictions against the abuser meant to immediately protect the person(s) filing for protection.
- Only the person ("party") seeking protection and witnesses (if any) for that person give statements.
- Sets the hearing date for the final order hearing.
- Expires after 10 days, unless extended.

Final order:

- Sets forth restrictions against the abuser meant to protect the person(s) filing for protection for as long as the order lasts.
- At the hearing, both people ("parties") provide evidence, and witnesses for both can testify.
- Can be for a period of up to three years, unless extended.

HOW DO I GET A FINAL PROTECTION ORDER?

A final protection order can be granted in two ways, either after a hearing or by an agreement between both parties. If there is a final order hearing, both the person claiming to be abused and the alleged abuser are given a chance to tell the judge their side of the case and provide evidence. The judge can grant the final protection order, or deny the final order request and dismiss the protection order case.

APPENDIX B

The person seeking protection and the abuser can also have a final protection order entered by agreement. The parties can give the judge a written agreement before or at the time of their final order hearing. The parties can also appear before the judge at the scheduled time of the hearing and tell the judge the terms of their agreement on the record.

The judge may issue the final protection order for up to three years.

WHAT PROTECTION CAN THE COURT ORDER?

The court may grant any protection order or approve any agreement meant to bring an end to the abuse.

A Protection From Abuse order may include some or all of the following:

1. direct the abuser not to abuse, threaten, harass or stalk you or your minor children (temporary or final order);
2. direct the abuser to stay away from the house or apartment where you live, even if that is also the abuser's home (temporary or final order);
3. direct the abuser to stay away from your school or where you work (temporary or final order);
4. direct the abuser to refrain from harassing you, your friends or your relatives (temporary or final order);
5. prohibit the abuser from having any guns or gun permits (temporary or final order);
6. award you temporary custody of your children, and depending on the degree of abuse, award visitation or supervised visitation or deny visitation to the abuser (temporary or final order);
7. grant you temporary support for yourself and for the abuser's children (final order only);
8. direct the abuser to pay you for losses resulting from the abuse. These could include, for example, medical bills, lost wages, relocation expenses, and attorney's fees ((temporary or final order);
9. grant any other relief or terms necessary to bring an end to the abuse. Sometimes this relief will include requiring the abuser to attend a domestic violence program (temporary or final order);

WHAT HELP IS AVAILABLE AT NIGHT, ON WEEKENDS OR WHEN THE COURTHOUSE IS CLOSED?

In case of an emergency, or if you have been threatened or assaulted, contact your local police department. If you are in immediate and present danger of abuse, a petition for protection from abuse may be filed with a Magisterial District Judge, or in Philadelphia, before a Municipal Court Judge. If the hearing officer believes that you are in immediate danger, he or she can grant you an emergency Protection From Abuse order. The hearing officer will then advise you on what procedures must be followed to obtain a final Protection From Abuse order.

I AM AFRAID OF MY ABUSER AND AM IN HIDING. CAN I FILE FOR PROTECTION AND KEEP MY ADDRESS A SECRET?

The addresses of domestic violence agencies and shelters are protected by law. In addition, if you request address confidentiality, and a judge can decide that you are in danger and direct police, social service agencies, and school districts to keep your address and telephone number confidential. For information about programs related to confidentiality, please see the end of this information sheet.

IS MY PROTECTION ORDER ENFORCEABLE IN ANOTHER COUNTY?

Yes. The Pennsylvania State Police maintains a registry of all Protection From Abuse orders issued in the Commonwealth. A court will enforce a valid protection order that is issued in another county and recorded in the Pennsylvania State Police Registry.

APPENDIX B

IS ANOTHER STATE'S FINAL PROTECTION ORDER ENFORCEABLE IN PENNSYLVANIA? IS A PENNSYLVANIA PROTECTION ORDER ENFORCEABLE IN ANOTHER STATE?

Yes, if it is a final order issued after the abuser received notice of the hearing and had the opportunity to be involved in that hearing, even if the abuser failed to appear or the order was entered based on an agreement.

WHAT IF THE ABUSER VIOLATES THE ORDER?

If the abuser violates any terms of the order ("provisions") designed primarily for your safety, such as provisions that keep the abuser from your home, provisions regarding child custody and provisions that specify no abuse, no contact, no harassment, or no stalking, you should immediately call the police and report the violation. A police officer can arrest the abuser without having witnessed the abuse. If the abuser used or threatened you with any weapons during past abuse, or while violating the order, the officer must take all those weapons after the arrest.

An abuser can be charged with "contempt of a protection order" for violating the order. An abuser found in contempt after a hearing can be sentenced to up to six months in jail and fined up to \$1,000. The abuser can also face other criminal charges.

You can also file a private complaint for enforcement of the Protection From Abuse order.

If the abuser violates support provisions of the order, such as child or spousal support, contact the local domestic relations office. If the abuser fails to comply with provisions that require that your losses be repaid, or certain other provisions, you may file a civil contempt complaint.

WHAT IF I WANT TO CHANGE THE ORDER?

Because the order is a legal document, only a judge can change restrictions or terms in the order; the parties themselves cannot make different arrangements. If you want to change the order, you must file a petition with the court asking that the order be changed or "modified."

WHAT IF I WANT TO LIVE WITH THE ABUSER AFTER RECEIVING A FINAL PROTECTION ORDER?

Any provision that an abuser must not abuse the victim(s) remains in effect even if the parties are living together. However, if you choose to live with the abuser after receiving an order excluding the abuser from your home, you should file papers with the court asking it to change the order to read that the abuser may live with you, but still must not abuse you or other people named in the order.

CAN THE FINAL PROTECTION ORDER BE EXTENDED?

There are two reasons for the judge to choose to extend a final order. If you can show that, after the final order, the abuser continued the abuse, or, if the abuser engaged in a pattern that indicates continued risk of harm, the judge may extend the final order. In any case, you must file the petition for an extension before the end of the original order.

The judge may also extend the final protection order as part of a contempt proceeding.

DOMESTIC VIOLENCE PROGRAMS

Domestic violence services are offered in every county in Pennsylvania. These include crisis hotlines, safety planning, safe homes or shelters, legal advocacy, community education, counseling, systems intervention, transportation, as well as information and referral services. A domestic violence counselor may be available to

APPENDIX B

help an abused person seek a protection order. Your local domestic violence hotline is available 24 hours a day, and all services are confidential. For more information, consult the blue pages of your local phone book, or call 1-800-799-SAFE for contact information.

Pennsylvania's Office of the Victim Advocate operates an **Address Confidentiality Program** (ACP) that provides program participants with a substitute address and a free confidential mail forwarding service. This program is for victims of sexual assault, stalking, or domestic violence. Participation in this program requires victims to move to a location unknown to their perpetrator. The ACP is not a victim protection program but can be an important part of safety planning for some victims. To learn more about the Address Confidentiality Program, please visit <http://www.paacp.pa.gov/> or call the Office of the Victim Advocate at 1(800) 563-6399. To apply, please contact your local domestic violence, sexual assault, or victim witness program.

The following is the Pennsylvania Bar Association's copyright notice: COPYRIGHT: All rights reserved. All the content of this Web Site posted by The Pennsylvania Bar Association is copyrighted and may be reproduced in any form including digital and print for any non-commercial purpose so long as this notice remains visible and attached hereto

C – NO-CONTACT ORDER INFORMATION SHEET

Form for defendants subject to a "No-Contact" provision in a PFA order⁵⁹

NO-CONTACT Order Information Sheet

The Protection From Abuse order is a judge's order – a court order, NOT an order between the people involved in the Protection From Abuse case. Only a judge can change the order. The person who requested the order CANNOT say that the order is terminated or that the other person may resume contact. Please read the order carefully. If you are the subject of a Protection From Abuse order, you are the "defendant," and if it says no contact, you are required to stay away from the "plaintiff."

NO CONTACT includes:

- You cannot live with the person listed in the order.
- No physical contact – You must stay away from the person and any children included in the order.
- No phone calls
- No letters, no e-mails, no faxes
- No flowers, no boxes of candy, no presents of any kind
- No messages through friends, relatives, neighbors, clergy/religious leaders, or acquaintances
- No contacting the person in any other way

IMPORTANT THINGS TO KNOW:

⁵⁹ Derived from materials developed by the Judicial Oversight Demonstration Initiative at Dorchester Court, Boston, MA.

APPENDIX C

A Protection From Abuse order is a civil order, but **a violation of the Protection From Abuse order may result in a civil or criminal contempt.** A contempt conviction is punishable by up to six months in jail for each violation. An arrest and conviction can result in a fine up to \$1,000, probation, or incarceration.

The law requires police to arrest the person restricted by the Protection From Abuse order if police arrive and the person is present in violation of a Protection From Abuse order that has a no-contact provision in it.

Criminal charges will be issued by the police or by the district attorney if there are any violations reported, including phone calls, of a Protection From Abuse order that has a no-contact provision in it.

If the person that requested the order wants to change or vacate the order, she or he can come to court (court address) _____, between the times _____, and ask the judge to make the changes or to terminate the order. **The order can be changed or terminated only by a JUDGE!**

**WHAT YOU CAN DO TO AVOID PROBLEMS
when you are the defendant:**

- *Avoid places where you know the person goes.*
 - *Leave a building, restaurant, store, or place if you realize that the person is there.*
 - *Hang up the phone immediately if the person calls you.*
 - *Do not send letters, e-mails, faxes, or gifts to the person, or respond to letters, emails, faxes, or gifts from the person.*
 - *Avoid contact with the person's family, friends, and neighbors.*
 - *Do not get into arguments or confrontations with the person's family or friends. Walk away!*
 - *If the person comes to your house, DO NOT open the door.*
-

“WHAT DO I DO IF I SEE THE PLAINTIFF” and there is a Protection From Abuse Order? It is YOUR responsibility to avoid her or him, in any circumstance.

1. If you see the plaintiff walking towards you on the street, cross the street, and go in a different direction.
2. If you are eating dinner in a restaurant when the plaintiff walks in, YOU need to avoid any contact. Get up, pay the bill, and leave, without making the plaintiff aware of your presence or speaking.
3. If you are in the cinema waiting to see a movie and the plaintiff walks in; get up and leave.
4. The plaintiff calls and says to come over for dinner for Valentine's Day, or just to “work things out.” DO NOT GO. You should have hung up before all that information was given to you. But, if not, do not make the situation worse. Do not violate the order by talking to the plaintiff.
5. If you can repeat what the plaintiff said during a phone call, YOU have violated the order. You should have hung up as soon as you recognized the person's voice.
6. If you receive an e-mail from the plaintiff and respond to it, YOU have violated the order. You should not send or respond to faxes or e-mails from the person.
7. If you are told that the Protection From Abuse order has been changed or vacated and you can have contact, first check with the court that issued the order. The telephone number for the

APPENDIX C

court office is on the Protection From Abuse order. Unless and until court personnel confirm that the order has been changed or vacated, or you see a court paper confirming that information, do not have any contact with the plaintiff.

D - INFORMATION ON THE UNAUTHORIZED PRACTICE OF LAW FOR PENNSYLVANIA COURT PERSONNEL

1. What is the unauthorized practice of law (UPL)?

The Pennsylvania statute dealing with the unauthorized practice of law is found at title 42, section 2524 of the Pennsylvania Consolidated Statutes,⁶⁰ which states in pertinent part:

[A]ny person ... who within this Commonwealth shall practice law, or hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner to convey the impression that he is a practitioner of the law ... without being an attorney ...

In addition, Pennsylvania civil courts have ruled that certain practices constitute UPL. The courts have not articulated a precise definition of UPL and have indicated that it would be difficult to do so.⁶¹ Most decisions are made case by case. For example, in *Dauphin County Bar Ass'n v. Mazzacaro*, a layperson pursued damage claims for tort claimants and was prohibited by the court from continuing to do so.⁶² The court in this case observed that there are times when a matter is clearly within the understanding of a layperson to appreciate legal problems and consequences, but “where a judgment requires abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for.”⁶³

2. What kinds of activity will be considered UPL?

You may be charged with UPL if you:

- hold yourself out as entitled to practice law; or
- through advertisement convey in any manner that you are able and competent to practice law.

3. What are the possible legal consequences if I engage in UPL?

The statute provides that any person who is not licensed to practice law commits a misdemeanor of the third degree upon the first violation. The statute also provides that a second or subsequent violation will be considered a misdemeanor of the first degree. In addition, a civil court may issue an injunction against a party engaging in UPL, and may assess costs and expenses, including attorney’s fees, against the enjoined party.

4. What happens when a person is accused of UPL?

In Pennsylvania, an informal complaint, usually by letter, is made to the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association. This Committee has the stated purpose of resolving complaints without resorting to litigation.

If the Committee investigates and determines that the unauthorized practice of law has occurred, it will give notice to the offending party or entity to discontinue the practice. The Committee will attempt to obtain a written statement from the person or entity that the unlawful practice will stop. If this is done, in most

⁶⁰ 42 PA. C.S. § 2524 (2001).

⁶¹ See *Shortz v. Farrell*, 327 Pa. 81 (1937).

⁶² *Dauphin County Bar Ass’n v. Mazzacaro*, 465 A.2d 229 (Pa. 1976).

⁶³ *Mazzacaro*, 465 A.2d at 233.

APPENDIX D

instances the matter is closed. However, if the case is particularly egregious, or if the person refuses to stop the practice, a criminal action or a civil complaint seeking injunction may be filed.

5. How often are legal actions taken to stop UPL?

In Pennsylvania, there are no reported criminal cases in which an individual is charged with UPL. There are reported civil cases, although they typically involve disbarred attorneys who continue to practice, claims adjusters who negotiate settlements, title agents handling real estate matters, non-lawyers practicing estate planning, and non-lawyers who attempt to appear in court on behalf of another person.

To our knowledge, no one in Pennsylvania has ever litigated a UPL claim against a court clerk or domestic violence advocate.

6. I don't hold myself out as an attorney but I inform litigants and potential litigants about PFA process in the courthouse. Is this UPL?

No. Although the term “practice law” is not defined in the statute and there are no cases that provide clear guidance, answering general questions about process in your courthouse is legal information, not legal advice.

7. I don't hold myself out as an attorney, but my job is to assist PFA litigants in completing forms. Is this UPL?

No. You are permitted to give forms and clerical assistance to potential PFA litigants – in fact, the court is obligated to do so under Pennsylvania Law, title 23, section 6106(h) of the Pennsylvania Consolidated Statutes Annotated.⁶⁴ Under this part of the statute, the court is directed to provide forms and clerical assistance, in English and Spanish, to help unrepresented individuals with the writing and filing of the petition for a protection order.

You may advise the litigant about PFA law generally, or give the litigant documents containing general PFA information. This is legal information. You may not suggest whether a particular PFA litigant has a valid claim, or the type of relief the litigant should seek. This would be legal advice.

8. What is the difference between providing “legal information” and providing “legal advice”?

Even judges and lawyers have difficulty defining the meaning of “legal advice.” Most experts believe that the term “legal advice” has no inherent meaning and because of the large increase in the number of *pro se* litigants seeking help from courthouse staff across the country, there is a desire to encourage court clerks to provide useful information to *pro se* litigants while, at the same time, to allay the fears of clerks about UPL. There are studies researching the way various courts and court administrators explain the differences between legal information and legal advice.

Non-lawyer courthouse employees are encouraged to provide “legal information.” “Legal information” has been defined as:

The written or oral statement by a court employee that (1) describes court facilities and procedures, legal terminology, or possible permissible courses of conduct for litigants, (2) provides general information applicable to a class of litigants rather than only to the specific litigant being assisted, (3) requires the court employee only to have knowledge of non-confidential court processes and generally-

⁶⁴ 23 PA. C.S. § 6106(h).

APPENDIX D

known legal concepts and practices, or (4) is not likely to substantially affect the legal outcomes that may result for the litigant being assisted.⁶⁵

Non-lawyer courthouse employees are prohibited from giving “legal advice.” “Legal advice” has been defined as:

The written or oral statement by a court employee that (1) interprets the law or recommends a specific course of litigant conduct in an actual or potential legal proceeding, (2) applies the law to the individual litigant’s specific factual circumstances, (3) requires the court employee to have knowledge of the law and legal principles beyond familiarity with court requirements and procedures, and (4) is likely to affect the legal outcomes that may result for the litigant being assisted.⁶⁶

9. What other general guidelines should I follow to avoid UPL concerns?

Remember to avoid a claim of bias by providing the same information to all potential PFA litigants.

⁶⁵ Pennsylvania cases have not provided definitions for legal information and legal advice. Other states have addressed the need for an understanding of the meaning of legal information and legal advice in providing training for their court employees. The New York Supreme Court has suggested specific definitions for the meaning of “legal information” and “legal advice.” These definitions can be found at Foulk, *supra* note 36, at 90.

⁶⁶ *Id.*

E - CATEGORIES OF PERMISSIBLE AND IMPERMISSIBLE ASSISTANCE BY COURT PERSONNEL/DOMESTIC VIOLENCE ADVOCATES IN PFA MATTERS

Categories of Permissible and Impermissible Assistance by Court Personnel/Domestic Violence Advocates in PFA Matters

Can Provide:	Cannot Provide:
<p><i>Legal Information</i> (as we have defined)</p> <p>Example: “The following are definitions of abuse found in the law.”</p>	<p><i>Legal Advice</i> (as we have defined)</p> <p>Example: “The judge will not sign an order for this petition. The abuse allegations are not strong enough.”</p>
<p><i>General</i> Description of Court Rules and Procedures</p> <p>Example: “After we receive the PFA petition, I take it to the judge and he will review it. He looks at PFA petitions at 10:30 am and 2:30 pm each day.”</p>	<p>Application of Rules and Procedures to a Litigant’s <i>Specific</i> Situation</p> <p>Example: “For your situation, with the judge assigned to PFA court today, I would suggest that you ask for a special relief hearing for custody rather than include custody in your PFA petition.”</p>
<p>List of <i>Options</i> Available to Litigants</p> <p>Example: “Here is the PFA statute, which lists relief available.”</p>	<p><i>Opinions</i> as to Which Option to Choose</p> <p>Example: “For your situation, I suggest that you ask for a no-contact order, but not exclusive possession.”</p>
<p><i>Description</i> of What Has Occurred in the Litigant’s Case</p> <p>Example: “The temporary order was signed last Tuesday and was served last Thursday.”</p>	<p><i>Prediction</i> of What Will Occur</p> <p>Example: “I am certain that the judge will award you exclusive possession of the home.”</p>
<p><i>Cites (or copies)</i> of Statutes, Court Rules, and Ordinances</p> <p>Example: “Here is a copy of the Purdon’s containing the PFA Act and case annotations.”</p>	<p><i>Research</i> into Statutes, Court Rules, or Ordinances</p> <p>Example: “The <i>Dye v. McCoy</i> case applies to your custody request.”</p>
<p>Description of <i>Public</i> Court Operations and Roles of Court Personnel</p> <p>Example: “The judge’s law clerk assists the judge in researching and drafting opinions.”</p>	<p>Description of <i>Confidential or Internal</i> Court Operations and Roles of Personnel</p> <p>Example; “The judge’s law clerk is working on the opinion in your case right now. Here is her number for you to call.”</p>
<p><i>General Referrals</i> to Other Offices or Persons</p>	<p>Subjective or <i>Biased Referrals</i> to Others</p> <p>Example: “Don’t go to that law firm for your divorce; they are all crooks.”</p>

APPENDIX E

Example: "The DA's office can help you with your request for a contempt proceeding. Their office is two doors down, ask for Karen."	
<i>Forms, Instructions, and Clerical Assistance</i> Example: "Here is a PFA form for you to complete. Please take your time and be thorough. When you are done, I will type it into the system for you."	Helping Party <i>Select Specific</i> Information or Relief to Include in the Petition Example: "Don't include that incident of abuse; it is too old."

F - JUDICIAL IN-COURT PROCEDURES FOR CASES INVOLVING *PRO SE* LITIGANTS

NOTE: This procedures list is derived from the “Proposed Protocol for Use by Minnesota Judges with Pro Se Litigants,” which was developed by the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges.⁶⁷

1. Confirm that the party is not represented, is not an attorney, understands that he or she may be represented by counsel, and has chosen to proceed without counsel.
2. Explain the process, that you will hear from both sides in the case, and that the moving party – the Plaintiff – goes first, followed by the Defendant.
 - Explain that you will try to give each side enough time and opportunity to tell his or her side of the case, but that the case must proceed in the order indicated.
 - Advise the parties not to interrupt when the other party is speaking.
 - Direct each party to wait until the person finishes the question before answering and
 - Direct each person asking questions to wait until the person finishes answering before asking the next question.
3. Explain the elements that must be proven for a PFA order to be entered. Review the definition of abuse and the relationship requirements.
4. Explain that the moving party has the burden of presenting evidence to sustain the relief sought.
5. Explain the kind of evidence that may be presented: testimony from the parties and testimony from witnesses and exhibits.
 - Explain that everyone who testifies will first be placed under oath.
 - Also explain the procedure for exhibits: that each is given an exhibit number and marked by the court reporter; that a copy of each should be given to the other party for review; and that the exhibit must be identified and described by a witness.
 - The exhibit may be offered to the court; and the opposing party can look at the exhibit and advise the court whether there is any reason why the judge should not consider the exhibit.
6. Explain the limits on the kind of evidence that can be admitted and considered by the court; explain that sometimes a party may start to present evidence that is not admissible, and the court will stop the testimony. Explain the meaning of hearsay and irrelevant evidence.
7. Explain that you may ask questions to make sure that you understand the information and to be certain that you have enough information to make a decision.
8. Ask both parties whether they understand the process. Your questions should be general in nature, such as, “Tell me why you want an order of protection. If there was more than one incident of abuse, start with the most recent incident and tell me what happened, who was there, and when and where it happened.”
9. As is required by the PFA Act, non-attorney domestic violence counselor/advocates may accompany a domestic violence litigant to court, but may not question witnesses or argue on behalf of the litigant.

⁶⁷ Albrecht, *supra* note 56, at 18.

CHAPTER XII: MINORS AND DOMESTIC VIOLENCE

TABLE OF CONTENTS

CHAPTER GOALS.....	3
Minors as Perpetrators of Domestic Violence	3
Minors as Victims of Domestic Violence	3
Adolescent Relationship Abuse	3
PROTECTION FROM ABUSE (PFA) ACT REQUIREMENTS	4
Jurisdiction Requirements.....	4
Definition of Family or Household Member	4
Definition of Abuse	4
PFA Process Procedural Requirements.....	7
Minors as PFA Plaintiffs	7
Minors as PFA Defendants.....	7
PFA Settlement Agreements.....	8
Relief Under the PFA Act.....	8
When a Minor Perpetrates Domestic Violence Against Another Minor	8
When an Adult Perpetrates Domestic Violence Against a Minor.....	8
When a Minor Child Perpetrates Domestic Violence Against a Parent.....	9
PFA Order Enforcement	9
When the PFA defendant is a juvenile.....	9
MINORS AS PERPETRATORS OF DOMESTIC VIOLENCE – JUVENILE ACT REQUIREMENTS.....	10
Jurisdictional Definitions.....	10
Arrest and Initiation of Proceedings	11
Arrest for crimes without a warrant	11
Juvenile court intake	11
Intake options	11
Right to Counsel	12
VICTIM RIGHTS IN JUVENILE DELINQUENCY PROCEEDINGS	13
Drug or Alcohol Dependent Minors Who Perpetrate Domestic Violence	14

EMERGING PRACTICES.....	14
Emerging Practices – Targeted Relief in PFA Orders.....	14
When a Minor Seeks PFA Relief Against a Parent	14
When a Parent Seeks PFA Relief Against a Minor Defendant	15
Emerging Practices –Encouraging Victim Involvement in Juvenile Proceedings	16
Emerging Practices – Substance Abuse Treatment for Minor Perpetrators of Domestic Violence	16
Emerging Practices – Screening Service Providers and Selecting Appropriate Domestic Violence Intervention and Rehabilitation Strategies.....	17
Emerging Practices – Specialized Juvenile Court Programs.....	18

CHAPTER GOALS

The goal of this chapter is to provide courts with substantive legal and statistical data that the court may use to address domestic violence by or against a minor. Minors are often involved as perpetrators or victims of domestic violence and are likely to continue that pattern of behavior into adulthood.¹ Addressing the issue by employing best practices, courts can have a significant impact on juvenile offenders and victims.

Minors as Perpetrators of Domestic Violence

Until recent years, violence by a minor toward a parent has largely been viewed as a problem within the family. However, research demonstrates that domestic assaults by juvenile offenders are a larger problem that has a substantial impact on society. According to data from the FBI's National Incident-Based Reporting System, 1 out of every 12 offenders that come to the attention of law enforcement for domestic violence offenses was younger than 18.² Further, 1 in every 4 assaults by a juvenile is against a member of the juvenile's family, a person who lives in the juvenile's home, or an individual with whom the juvenile has an intimate relationship.³ A minor's violence or abuse toward a family or household member may result in the entry of a Protection From Abuse (PFA) order and may constitute a "delinquent act" that is prosecuted under the Juvenile Act.⁴ This chapter provides an overview of various laws in both the family and juvenile court systems and procedural requirements for dealing with minors who commit acts of domestic violence. Practical ways that the court can intervene to prevent the juvenile from carrying over violent behavior into adulthood are also discussed.

Minors as Victims of Domestic Violence

Many laws seek to protect minors who are domestic violence victims, including minors abused by a parent or guardian. The PFA Act explicitly addresses violence or the risk of violence against children. (See [Chapter IV: PFA and Custody](#)). There are also special custody considerations relevant to children who are abused or who are at risk for abuse. (See [Chapter VII: Custody](#)).

To better equip justice system professionals and judges to address the unique needs of minors who are victimized by domestic violence, this chapter provides an overview of PFA Act protections for minor victims of domestic violence.

Adolescent Relationship Abuse

Teen dating abuse, abuse by or against a minor intimate partner, is a distinct issue that warrants unique considerations. The legal requirements explained in this chapter are applicable to teen dating abuse cases. However, the overall approach that the court takes in teen dating abuse cases may be different from the approach taken for minors who perpetrate or are victimized by domestic violence within their family. Teen dating abuse is addressed in [Chapter XIII: Adolescent Relationship Abuse](#), and covers the unique challenges to responding and addressing violations.

¹ Priscilla Offenbauer & Alice Buchalter, Federal Research Division, *Teen Dating Violence: A Literature Review and Annotated Bibliography*, 23 (2011), NCJ235368, (citations omitted), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/235368.pdf>.

² Howard N. Snyder & Carl McCurley, *Domestic Assaults by Juvenile Offenders*, JUV. JUSTICE BULL., 1 (2008), available at <https://www.ncjrs.gov/pdffiles1/ojdp/219180.pdf>.

³ *Id.*

⁴ 42 PA. C.S. § 6301 *et seq.*

PROTECTION FROM ABUSE (PFA) ACT REQUIREMENTS

In PFA Act proceedings, minors seeking protection, as well as those named as defendants, present unique legal and procedural challenges for trial court judges. This section addresses the PFA Act and the jurisdiction and procedure requirements, relief provisions, and enforcement issues that apply when minors are involved in a PFA case.

Jurisdiction Requirements

As in all PFA proceedings, a court has substantive jurisdiction if the parties are family or household members and the defendant commits an act of abuse as defined by the PFA Act. Pennsylvania courts have jurisdiction to enter PFA orders when a parent abuses a child or when a child abuses a parent. In addition, relationships between other family members, guardians, caretakers, or unrelated household members may be included in the category of family or household members.

Definition of Family or Household Member

The PFA Act defines “family or household member” as:

Spouses, or persons who have been spouses, persons living as spouses or who have lived as spouses, *parents and children, other persons related by consanguinity or affinity*, current or former sexual or intimate partners or persons who share biological parenthood.⁵

In relevant part, the definition includes parents and children as well as persons related by consanguinity or affinity. On occasion, trial court judges are asked to enter a PFA order on behalf of a child who is not related to the abuser biologically or by marriage. Pennsylvania’s PFA Act has been interpreted to include these types of relationships. In ***Commonwealth v. Walsh***, the Superior Court examined the PFA Act’s inclusion of a relationship by “affinity.”⁶ In this case, the trial court upheld the entry of a PFA order on behalf of a minor against her mother’s live-in paramour based on the circumstances of the relationship. The victim lived with the defendant for 13 years, was treated by him as a stepdaughter, and had two half-siblings as a result of her mother and defendant’s relationship.⁷ The Superior Court agreed with the trial court, finding that the dictionary definition of “affinity” included persons “related by marriage or by *ties other than those of blood*.”⁸

Definition of Abuse

The PFA Act definition of abuse covers acts between family or household members. These acts include:

- Attempting to cause or intentionally, knowingly, or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault, or incest with or without a deadly weapon
- Placing another in reasonable fear of imminent serious bodily injury
- Infliction of false imprisonment
- Physically or sexually abusing minor children, including such terms as defined in Ch. 63 (relating to child protective services)

⁵ 23 PA. C.S. § 6102(a) (emphasis added).

⁶ [Commonwealth v. Walsh, 36 A.3d 613 \(Pa. Super. 2012\)](#).

⁷ *Id.*

⁸ *Id.* at 618 (emphasis added).

- Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances that place the person in reasonable fear of bodily injury⁹

In relevant part, the definition covers physical or sexual abuse of minor children. Placing a child in fear of serious bodily injury also rises to the level of abuse under the PFA Act.

Abuse in the PFA Act is Broader than Abuse in Child Protective Services and Criminal Law

The definition of child abuse in the PFA Act includes and incorporates the definitions of child and sexual abuse set forth in the child protective services law,¹⁰ but does not limit the PFA Act's definition of child abuse to abuse as defined by child protective services law.¹¹ Therefore, the child abuse protections of the PFA Act apply even when the abuse against a child is not as serious as the abuse that would result in an indicated report or the removal of a child from the home under child protective services law. The level of violence against the child need not rise to criminal culpability for the PFA Act to apply.¹² A founded or indicated report of child abuse is not necessary to issue a PFA order.

Final PFA Order May Trigger Founded Report Under CPS Law

Effective Dec. 31, 2014, changes were made to the CPS law, including changes to the definition of a founded report as it relates (pertains?) to final PFA orders. Under certain circumstances, a founded report may now be generated by a final PFA order entered on behalf of a child.

For a final PFA order to trigger the entry of a founded report under the CPS law, all of the following criteria must be met:

- Only one individual is charged with abuse in the protection from abuse action
- Only that individual defends against the charge
- The adjudication involves the same factual circumstances involved in the allegation of child abuse
- The protection from abuse adjudication finds that child abuse occurred.¹³

Entry of a founded report of child abuse will occur only if there is a hearing. Final PFA orders entered on behalf of children by agreement of the parties will not trigger a founded report under the CPS law. A founded report of child abuse against a defendant resulting from a final PFA order will list that individual's name as a perpetrator of child abuse on the statewide child abuse registry.

Discipline May Rise to the Level of Abuse

The Superior Court reviewed various PFA cases involving minors as victims. Many times the parent claimed that the behavior was not abuse as defined in the PFA Act, but rather discipline or corporal punishment of the child. The following cases demonstrate the fine line between abuse and discipline.

Courts Look to Child's Fear, Not Physical Injury or Criminal Culpability

In **DeHaas v. DeHaas**, the defendant held her child down in the bathtub and splashed water onto the child's face, causing the child to choke and be in fear.¹⁴ The trial court held that even though the child suffered no

⁹ 23 PA. C.S. § 6102(a)(1) – (5).

¹⁰ 23 PA. C.S. § 6102(a)(4).

¹¹ 23 PA. C.S. § 6102(a), referring to 23 PA. C.S. § 6303(a).

¹² See *Viruet ex rel. Velasquez v. Cancel*, 727 A.2d 591 (Pa. Super. 1999).

¹³ 23 Pa.C.S. § 6303(a).

¹⁴ [DeHaas v. DeHaas, 708 A.2d 100 \(Pa. Super. 1998\).](#)

physical harm, the child's fear was adequate to support entry of an order.¹⁵ The Superior Court affirmed. The court found that abuse need not rise to the level of criminal activity, nor does it require infliction of actual physical injury.¹⁶

Excessive, Reckless Corporal Punishment is Abuse

When a child is injured as a result of excessive or reckless corporal punishment, a PFA order may be entered. In **Miller v. Walker**, plaintiff filed a PFA petition on behalf of her minor children, alleging that the defendant – the children's father – spanked their son with a board, causing bruises on the child's leg.¹⁷ The son testified that his father hit him with a board on the leg and grabbed his arm, causing bruises. The daughter testified that she heard her brother crying after their father took a board into her brother's room. Photographs of the bruises also were introduced. The trial court entered a PFA order and the Superior Court affirmed, holding that "[c]orporal punishment inflicted recklessly or in an enraged manner may result in bodily injury, supporting issuance of a PFA order."¹⁸

In **B.T.W. ex rel T.L. v. P.J.L.**, the defendant caused injuries to the child when she smacked and struck the child with a belt multiple times because the child failed to help at home.¹⁹ The trial court granted the PFA order and defendant appealed, claiming that her conduct did not cause bodily harm and constituted punishment and discipline rather than abuse. The Superior Court affirmed the trial court and found that the evidence was sufficient to demonstrate that the child had been physically abused, suffering bodily injury in the process, and had been placed in fear of serious bodily injury.²⁰ Both actions – physical abuse and fear of serious bodily injury – were sufficient to meet the PFA Act's definition of abuse.

Corporal Punishment That Does Not Cause Bruising or Fear Is Not Abuse

In **Ferri v. Ferri**, the Superior Court reversed a trial court order entering a PFA order on behalf of a six-year-old child whose mother had slapped her.²¹ The slap did not leave a bruise, and there was no testimony at the trial court level that the child was in imminent fear of bodily injury. A similar outcome was reached in **Chronister v. Brenneman**, where a father administered corporal punishment by hitting his 16-year-old daughter with a strap across the buttocks after she admitted to lying to him.²² The Superior Court held this act did not constitute abuse; there was no evidence that the strapping resulted in anything more than a temporary painful condition, and the strapping did not leave bruises.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ [Miller v. Walker, 665 A.2d 1252 \(Pa. Super. 1995\).](#)

¹⁸ *Id.* at 1258.

¹⁹ [B.T.W. ex rel T.L. v. P.J.L. 956 A.2d 1014 \(Pa. Super. 2008\).](#)

²⁰ *Id.*

²¹ [Ferri v. Ferri, 854 A.2d 600 \(Pa. Super. 2004\).](#)

²² [Chronister v. Brenneman, 742 A.2d 190 \(Pa. Super. 1999\).](#)

PFA Process Procedural Requirements

Minors as PFA Plaintiffs

A Minor May Not Initiate a PFA Proceeding on His or Her Own Behalf

In Pennsylvania, a minor is not permitted to bring a PFA action on his or her own unless the child is emancipated.²³ The Act permits a parent, adult household member, or guardian to pursue a PFA action on behalf of an unemancipated minor.²⁴

Selection of a Guardian

If a minor chooses to pursue a PFA action using a guardian, the minor may select the guardian.²⁵ However, the court may – for good cause – remove the guardian selected by the minor.²⁶

A parent or guardian must represent a minor in PFA proceedings, and be present for approval of a minor's settlement agreements.

Definition of Guardian

Pursuant to the Pennsylvania Rules of Civil Procedure, “guardian” means the person representing the interest of the minor or juvenile in the action, whether as (a) the guardian of the minor appointed by a court, (b) a person in the nature of the “next friend” selected to represent the minor, or (c) a *guardian ad litem* specifically appointed by the court in which the action is pending.²⁷

Minors as PFA Defendants

When a PFA defendant is a minor, the action may be commenced in the same manner that an action is commenced against an adult. A PFA petitioner does not need to identify the juvenile defendant’s parent or guardian to initiate a PFA order against a minor defendant.²⁸ However, in order for a trial to proceed, the minor defendant must have a parent or guardian involved to manage the case.²⁹

In ***Varner v. Holley***,³⁰ the Superior Court confirmed that minor PFA defendants are required to have a parent or guardian present to supervise and manage the PFA litigation on the minor’s behalf. The teen defendant in *Varner* had neither a parent nor a guardian appear on his behalf in the PFA action. Instead, the teen was guided only by his probation officer. For this reason, the Superior Court determined that the PFA consent agreement was invalid and could not support the entry of an indirect criminal contempt conviction against the defendant.³¹

²³ 23 PA. C.S. § 6101(a).

²⁴ 23 PA. C.S. § 6101(a).

²⁵ PA. R.C.P. 2031(a).

²⁶ PA. R.C.P. 2031(a) and 2033.

²⁷ PA. R.C.P. 2026.

²⁸ PA. R.C.P. 2028(c) and Note.

²⁹ PA. R.C.P. 2034.

³⁰ [*Varner v. Holley*, 854 A.2d 520 \(Pa. Super. 2004\).](#)

³¹ *Id.* at 524.

As a practical matter, if the court is aware that the defendant is a minor at the time of an *ex parte*, temporary order proceeding, the judge may want to add language to the temporary order directing the minor to bring a parent or guardian to the final order hearing.

PFA Settlement Agreements

A parent or guardian must be present for approval of any settlement agreements entered into on the juvenile's behalf.³²

Relief Under the PFA Act

When a Minor Perpetrates Domestic Violence Against Another Minor

When a minor seeks a PFA order and relief against another minor, the relief sought or the solution to eliminating the dangerous condition may be different from the typical relief sought in PFA cases involving adult litigants. The PFA Act gives the courts broad discretion in ordering types of relief, and provides that a court “may grant any protection order or approve any consent agreement to bring about the cessation of abuse.”³³

For more information about appropriate relief in teen dating abuse cases, see [Chapter XIII: Adolescent Relationship Abuse](#).

When an Adult Perpetrates Domestic Violence Against a Minor

If the adult perpetrating domestic violence against a child is the child's parent, the court has authority to:

- Change custody, modify, or eliminate partial custody
- Order that contact with the child be supervised (either by a third party or a visitation center)
- Eliminate that adult's contact with the child for the duration of the order

For more information about this type of relief, please see [Chapter IV: PFA and Custody](#).

In addition to custody changes, the court also has authority to order no abuse or no contact at school or daycare. Under the “any other relief” provision, the court may order parenting classes, batterers' intervention program participation, and drug or alcohol treatment.

The court may not convert a PFA proceeding into a dependency proceeding.

Even though the court's PFA relief authority is broad, a court may not convert a PFA proceeding into a child dependency proceeding. Each type of proceeding is separate and distinct and requires notice and opportunity to be heard.³⁴

³² PA. R.C.P. 2039(a); *see also Varner*, 854 A.2d at 524.

³³ 23 PA. C.S. § 6108(a) (emphasis added).

³⁴ [Brooks-Gall v. Gall, 840 A.2d 993 \(2003\)](#). This case is described in [Chapter IV: PFA and Custody](#).

When a Minor Child Perpetrates Domestic Violence Against a Parent

When a minor perpetrates domestic violence against a parent, the parent may want to request relief that allows the child to remain in the home. Courts have the authority to enter “in house” or “no abuse” orders. If requested by the plaintiff, the court may create particular relief under the “any other relief” provision, such as drug and alcohol intervention, counseling, monitoring, or participation in batterers’ intervention courses.

For more information about choosing an appropriate batterers’ intervention course or other treatment for juvenile offenders, see the following sections:

[0 - Emerging Practices – Substance Abuse Treatment for Minor Perpetrators of Domestic Violence](#)

[0 - Emerging Practices – Screening Service Providers and Selecting Appropriate Domestic Violence Intervention and Rehabilitation Strategies](#)

[0 - Emerging Practices – Specialized Juvenile Court Programs](#)

Although a PFA action may not be converted to a Juvenile Act proceeding,³⁵ a parent may independently request services from the county’s children and youth agency, and may consider a voluntary placement of the child pursuant to the Juvenile Act.

In addition to PFA relief, a child who habitually disobeys reasonable parental commands and is ungovernable and in need of care, treatment or supervision may be found to be dependent under the Juvenile Act. The juvenile court may hear dependency matters in accordance with the Juvenile Act,³⁶ and the Pennsylvania Rules of Juvenile Court Procedure.³⁷ The Office of Children and Families in the Courts developed the [Pennsylvania Dependency Benchbook](#) to provide judges with information about dependency and guidelines to work with dependent children and their families.³⁸

If the parents ask for placement of the minor, the court may be involved through a dependency action. The court may order the minor into shelter care or other placement alternatives. The *Dependency Benchbook* provides a checklist and benchcards for dependency proceedings. The court may facilitate family group decision making to engage family groups in crafting and implementing plans that support the safety, stability and well-being of the minor child.³⁹

PFA Order Enforcement

When the PFA defendant is a juvenile

Where a minor PFA defendant violates safety provisions in the order to not abuse, stalk or contact protected parties; to stay out of certain residences or locations; or to refrain from possessing firearms or other weapons, the minor defendant may be arrested by police and charged with indirect criminal contempt as well as any other crimes committed during the incident.⁴⁰ Even where police have not made an arrest, the plaintiff may file a

³⁵ *Brooks-Gall*, 840 A.2d 993.

³⁶ 42 PA. C.S. § 6301 *et seq.*

³⁷ Pennsylvania Rules of Juvenile Court Procedure, Rule 1100 through Rule 1800.

³⁸ OFFICE OF CHILDREN AND FAMILIES IN THE COURTS, PENNSYLVANIA DEPENDENCY BENCHBOOK (2010), *available at* <https://ocfcpacourts.us/judges-legal-professionals/benchbook-3rd-edition/>; *see also* OFFICE OF CHILDREN AND FAMILIES IN THE COURTS, PENNSYLVANIA DEPENDENCY BENCHBOOK RESOURCE COMPANION (2011), *available at* <https://ocfcpacourts.us/judges-legal-professionals/benchbook-resource-companion-2/>. The *Resource Companion* provides information for how to address domestic violence.

³⁹ *Id.* at 159.

⁴⁰ 23 PA. C.S. § 6113(a).

private indirect criminal contempt complaint⁴¹ or a civil contempt complaint.⁴² When a minor PFA defendant violates other non-safety or economic provisions of a PFA order, the PFA plaintiff may seek enforcement through the civil contempt process.⁴³

If a minor defendant is charged with indirect criminal contempt for violating a PFA order, the minor shall be considered to have committed a delinquent act, and must be treated in accordance with the requirements of the Juvenile Act.⁴⁴

MINORS AS PERPETRATORS OF DOMESTIC VIOLENCE – JUVENILE ACT REQUIREMENTS

Pennsylvania's Juvenile Act mandates balanced attention on the part of the justice system to community protection, accountability for offenses and juvenile competency development.⁴⁵ It focuses on repairing the harm done to victims, and requires offenders to assume responsibility to repair that harm.

There are currently no reported Juvenile Act cases involving domestic violence.

This chapter includes an overview of the Juvenile Act statutory law and procedure that apply when juveniles commit crimes that may involve domestic violence. For a thorough review of Juvenile Act requirements and practical suggestions about juvenile delinquency proceedings, please see the Pennsylvania Juvenile Court Judges' Commission's [Pennsylvania Juvenile Delinquency Benchbook](http://www.jcjc.pa.gov/Publications/Pages/JuvenileDelinquencyBenchbook.aspx).⁴⁶

Jurisdictional Definitions

A "delinquent child" is a child 10 years or older whom the court has found to have committed a delinquent act *and* to be in need of treatment, supervision or rehabilitation.⁴⁷

A "delinquent act" is an act designated as a crime under state or federal law, or an act constituting indirect criminal contempt of a PFA order.⁴⁸ The Juvenile Act excludes five categories of crimes from the definition of "delinquent act" for juvenile court jurisdiction purposes.

Excluded are:

- Murder
- Certain offenses involving the use of a deadly weapon if committed by a child 15 years or older⁴⁹
- Certain repeat offenses⁵⁰
- Offenses committed by a juvenile previously found guilty of another crime or crimes

⁴¹ 23 PA. C.S. § 6113.1.

⁴² 23 PA. C.S. § 6114.1: "A plaintiff may file a petition for civil contempt with the issuing court alleging that the defendant has violated any provision of an order..." (emphasis added).

⁴³ 23 PA. C.S. §§ 6113, 6114.1.

⁴⁴ 23 PA. C.S. § 6114(a.2).

⁴⁵ 42 PA. C.S. § 6352(a).

⁴⁶ JUVENILE COURT JUDGES' COMM'N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK (2003), *available at* <http://www.jcjc.pa.gov/Publications/Pages/JuvenileDelinquencyBenchbook.aspx>.

⁴⁷ 42 PA. C.S. § 6302 (emphasis added).

⁴⁸ 23 PA. C.S. § 6114(a.2).

⁴⁹ These crimes are: rape, involuntary deviate sexual intercourse, aggravated assault, aggravated indecent assault, felony robbery, robbery of a motor vehicle, kidnapping, voluntary manslaughter, attempted murder, or attempt or conspiracy to commit any of the offenses listed above. 42 PA. C.S. § 6302.

⁵⁰ *see id.*

- Summary offenses, unless the juvenile has failed to comply with the sentence imposed⁵¹

Arrest and Initiation of Proceedings

Arrest for crimes without a warrant

During an arrest of a juvenile for simple assault, aggravated assault, reckless endangerment, terroristic threats or manslaughter against a family or household member, a police officer may make a warrantless arrest when the officer has reasonable cause to believe the defendant has committed certain crimes against a family or household member.⁵² The arrest may be made even if the offense did not take place in the presence of the officer.⁵³ Police are authorized to take a juvenile into custody following an arrest.⁵⁴ Following the arrest, the officer must seize all weapons used by the defendant in the commission of the offense.⁵⁵

Incriminating statements by the minor in informal adjustment may not be used in subsequent juvenile or criminal proceedings.

Juvenile court intake

Upon referral of the juvenile by law enforcement to juvenile court, the intake officer decides whether the alleged criminal activity should become the subject of formal court action. In deciding whether to file a delinquency petition, the juvenile court officer first determines whether the complaint is legally sufficient and, if so, whether a background investigation (including interviews with the juvenile, his or her parents, and information from the victim(s)) indicates that the case should be referred for informal adjustment or sent for formal juvenile court processing.⁵⁶ If a minor is admitted to secure detention, a juvenile petition must be filed within 24 hours or the next court business day.⁵⁷

Intake options

Based on the information gathered, the juvenile intake officer may recommend one of the following: warning and dismissal; informal adjustment; consent decree or formal juvenile delinquency petition and adjudication.

Warning and Dismissal

This option is usually reserved for minor offenses, where the juvenile has no prior record or pattern of offending, where the family provides adequate supervision, where the juvenile doesn't need or is not already receiving services, and where the victim does not want to pursue the matter.

⁵¹ 42 PA. C.S. § 6302.

⁵² The definition of "family or household member" refers to the relationship definition in the PFA Act.

⁵³ 18 PA. C.S. § 2711(a).

⁵⁴ 42 PA. C.S. § 6324(i).

⁵⁵ 18 PA. C.S. § 2711(b).

⁵⁶ 42 PA. C.S. § 6331.

⁵⁷ 42 PA. C.S. § 6331.

Informal Adjustment

Informal adjustments resolve delinquency allegations without the use of a juvenile delinquency petition. Informal adjustment is permitted when it is in the public's and the juvenile's best interests, and when the minor and his or her parents voluntarily agree to the adjustment.⁵⁸ When considering an informal adjustment regarding a crime involving personal injury or burglary, the juvenile intake officer must give notice to the victim or victims and allow them the opportunity to submit prior comment.⁵⁹ Informal adjustment may be used only where the juvenile admits to the offense, where no detention is required, and where the time period for supervision does not exceed six months (or, if extended by court order, nine months.)⁶⁰ Incriminating statements made by a juvenile in the informal adjustment process may not be used against the juvenile in any subsequent juvenile or criminal case.⁶¹ Terms and conditions of informal adjustment may include fees (including supervision fees), costs, and restitution.⁶²

Consent Decree

After a juvenile petition is filed, the court may suspend the proceedings and enter a consent decree. This disposition requires the parties involved and the district attorney to agree to the entry of the decree.⁶³ Terms of the consent decree may include payment of costs, fees or restitution; provisions for protection of the community; accountability for the offenses committed; and competency development for the minor.⁶⁴

Formal Juvenile Delinquency Petition and Adjudication

Formal handling of the juvenile case is recommended by the Juvenile Court Judges' Commission where the minor denies the allegation or requests a hearing; where the officer determines services are needed for the juvenile and the juvenile and his or her family refuse to accept the services. The seriousness of the charges, threat posed, and nature and extent of harm to the victim also may dictate formal processing.⁶⁵

Right to Counsel

Juveniles are entitled to representation at every stage of a delinquency proceeding. The court shall appoint counsel for any juvenile without financial resources or otherwise unable to employ counsel.⁶⁶ A juvenile over 14 years old may waive the right to counsel in certain proceedings,⁶⁷ but the court must inform the juvenile of the right to counsel at every stage of the proceeding.⁶⁸

To grant the waiver of counsel, the court must determine that the waiver is knowingly, intelligently and voluntarily made after having conducted a colloquy with the child on the record.⁶⁹ It is recommended that, at a minimum, the court ask questions to determine whether the juvenile's waiver is knowing, intelligent, and voluntary. The court may ask whether the party understands the following:

⁵⁸ 42 PA. C.S. § 6323(b).

⁵⁹ 18 P.S. §§ 11.201(4) and 11.216(b).

⁶⁰ 42 PA. C.S. §§ 6323(b)(3), 6323(c), and 6323(d).

⁶¹ 42 PA. C.S. § 6323(e).

⁶² 42 PA. C.S. § 6323(f).

⁶³ 42 PA. C.S. § 6340.

⁶⁴ 42 PA. C.S. § 6430(c.1).

⁶⁵ JUVENILE COURT JUDGES' COMM'N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK 40 (2003).

⁶⁶ 42 PA. C.S. § 6337.

⁶⁷ 42 PA. C.S. § 6337.1(b)(3).

⁶⁸ 42 PA. C.S. § 6337.1(b)(5).

⁶⁹ 42 PA. C.S. § 6337.1(b)(3).

- the right to be represented by counsel
- the nature of the dependency allegations and the elements of each of those allegations
- that dispositions and placements may be imposed by the court, including foster care placement and adoption
- that if he or she waives the right to counsel, he or she will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules
- that counsel may be better suited to defend the dependency allegations
- that the party has many rights that, if not timely asserted, may be lost permanently; and if errors occur and are not timely objected to, or otherwise timely raised by the party, the ability to correct these errors may be lost permanently⁷⁰

VICTIM RIGHTS IN JUVENILE DELINQUENCY PROCEEDINGS

Pennsylvania's [Crime Victims Act](#) provides for victims to receive supportive services and information about criminal proceedings, including juvenile proceedings.⁷¹ The act also provides for victim input and attendance at juvenile hearings.

Specifically, the act requires that victims be given these rights regarding juvenile proceedings:

- to be notified of significant actions and proceedings pertaining to their cases, including:
 - access to information regarding whether the juvenile defendant was detained or released following arrest and whether a juvenile delinquency petition has been filed
 - immediate notification if a juvenile escapes from a detention or shelter care facility before adjudication and of any subsequent re-apprehension⁷²
- to be accompanied at all juvenile proceedings by a family member, victim advocate or other support person⁷³
- where the case includes personal injury or burglary, to submit prior comment to the prosecutor or juvenile probation officer regarding any potential reduction or dropping of any charge or changing any plea, or diversion of any case, including informal adjustment or consent decree⁷⁴
- to have an opportunity to comment on the delinquent juvenile's disposition, including submission of written and oral victim impact statements detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. the written statement must be included in any predisposition report submitted to the court⁷⁵
- to have victim impact statements considered by the court in determining juvenile disposition⁷⁶
- to have the opportunity to submit written comment or present oral testimony at a disposition review hearing and to have the comment or testimony be considered by the court reviewing a juvenile disposition⁷⁷
- to be restored, to the extent possible, to the pre-crime economic status through the provision of restitution, compensation and expeditious return of property that is seized as evidence in the case⁷⁸

⁷⁰ PA. R.J.C.P. Rule 1152(D).

⁷¹ 18 P.S. § 11.101 *et seq.*, available at <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1998/0/0111..HTM>.

⁷² 18 P.S. § 11.201(2).

⁷³ 18 P.S. § 11.201(3).

⁷⁴ 18 P.S. § 11.201(4).

⁷⁵ 18 P.S. § 11.201(5).

⁷⁶ 18 P.S. § 11.201(5).

⁷⁷ 18 P.S. § 11.201(5.2).

⁷⁸ 18 P.S. § 11.201(6).

- upon the request of a victim of a personal injury crime, when a juvenile is ordered to residential placement, shelter facility or detention center, to:
 - receive prior notice of date of release, including temporary leave or home pass
 - be provided with immediate notice of escape, including failure to return from care or home pass, and immediate notice of re-apprehension
 - be provided with immediate notice of transfer from a placement plan facility and to have the opportunity to object in writing prior to the transfer or release⁷⁹
- to be notified of the details of the final disposition of a juvenile case⁸⁰

Drug or Alcohol Dependent Minors Who Perpetrate Domestic Violence

As part of its Drug and Alcohol Abuse Control Act,⁸¹ Pennsylvania's legislature enacted a provision designed to assist parents in obtaining treatment for minors afflicted with drug or alcohol dependency.⁸² A minor's parent or guardian may petition the court to order the involuntary commitment of the minor child to a drug and alcohol treatment program. Upon petition, the court must appoint counsel for the minor and order the minor to undergo a drug and alcohol assessment performed by a psychiatrist, a licensed psychologist with specific drug and alcohol assessment training, or a certified addiction counselor.⁸³ Following a hearing in which assessment results and recommendations are provided, the court may order an involuntary treatment commitment of up to 45 days if *both* of the following apply:

- The court finds by clear and convincing evidence that the minor is both drug dependent and incapable of or unwilling to accept voluntary treatment
- The court finds that the minor will benefit from involuntary treatment⁸⁴

The court must hold a review hearing during the minor's commitment to determine whether further treatment is necessary. If the court determines further treatment is needed, the court may continue the commitment for additional periods of service not to exceed 45 days. The law also authorizes additional review and recommitment proceedings.⁸⁵

EMERGING PRACTICES

Emerging Practices – Targeted Relief in PFA Orders

When a Minor Seeks PFA Relief Against a Parent

When a minor seeks relief against a parent, the court may order any appropriate relief sought by the plaintiff. The minor's guardian, pursuant to the Pennsylvania Rules of Civil Procedure, supervises and manages the case on behalf of the minor and may help to fashion an appropriate request for relief. The guardian may be, but is not required to be, the non-offending parent.

⁷⁹ 18 P.S. § 11.201(8.1).

⁸⁰ 18 P.S. § 11.201(12).

⁸¹ 71 P.S. § 1690.101

⁸² See 71 P.S. § 1690.112a.

⁸³ 71 P.S. § 1690.112a(b).

⁸⁴ 71 P.S. § 1690.112a(c).

⁸⁵ 71 P.S. § 1690.112a(d).

The court has authority to alter and amend existing custody orders or agreements, to order supervised visitation by a third party or at a visitation center, or to suspend or terminate visitation. For more information about custody relief in PFA cases, see [Chapter IV: PFA and Custody](#).

The minor can also request that the parental defendant be ordered to attend drug or alcohol and batterers' intervention counseling, return or repair personal items removed or damaged by the parent, and reimburse damages sustained by the minor as a result of the parent's abuse.⁸⁶

It is important that the court consider an order issuing the following additional relief at the request of the minor plaintiff:

- Prohibiting abuse and removing firearms where appropriate, but not evicting the parent
- Ordering the defendant parent to attend parenting classes
- Excluding the parent from the home and granting temporary legal and physical custody to the non-offending parent
- Scheduling a compliance hearing to determine whether the court should take further protective action

When a Parent Seeks PFA Relief Against a Minor Defendant

When a parent is requesting a PFA order against a child, the court should ensure that a guardian is assisting the minor defendant.

Parents seeking help from the PFA court in dealing with an abusive child are often emotionally distraught and ambivalent about having to seek court assistance. A parent will often seek the least relief necessary to provide for safety while allowing the child to remain at home. A parent may ask the court to enter a "do not abuse" or "no harassment" provision, and also seek counseling and supporting services for the child under the "any other relief" provision.

If, on the contrary, the parent is seeking to have the child excluded from the home, it is important for the court to discern whether there is another appropriate place for the child to reside (e.g., with another family member). If there is no other available home for the child, in addition to granting relief, the court may suggest that the plaintiff contact the local children and youth agency to discuss placement of the child pursuant to the Juvenile Act.⁸⁷ If a minor who has been abusing a parent is also addicted to drugs or alcohol, and is unwilling to obtain treatment, the parent may wish to petition the court for commitment of the child to drug and alcohol treatment.⁸⁸

Upon the plaintiff's request, it is important that the court consider the following relief:

- An order may be entered granting temporary physical custody or guardianship to a third party
- An order may be entered prohibiting abuse and contact as deemed necessary and appropriate
- An order may be entered directing the guardian of the minor defendant to secure social services as deemed necessary
- The court may require a compliance hearing to determine whether the aforementioned arrangements are effective in promoting the safety of the plaintiff

In addition to the PFA Act, the Juvenile Act may provide relief. A child who habitually disobeys reasonable parental commands and is ungovernable and in need of care, treatment or supervision may be found to be

⁸⁶ See *Gerace v. Gerace*, 631 A.2d 1360 (Pa. Super. 1993). This case involved an enforcement proceeding directing the PFA defendant's stepfather to return the plaintiff's personal items that were stored at the defendant's residence. Although the plaintiff was not identified as a minor by the court, the court referred to the fact that plaintiff resided at the defendant's mother's residence before entering college.

⁸⁷ The court may find, however, that the county children and youth agency may not be a willing resource for the family in situations involving voluntary placement of older teenagers.

⁸⁸ For more information about commitment proceedings for drug- or alcohol-dependent juveniles, see the sections herein on [Drug or Alcohol Dependent Minors Who Perpetrate Domestic Violence](#) and [Emerging Practices – Substance Abuse Treatment for Minor Perpetrators of Domestic Violence](#).

dependent under the Juvenile Act. The juvenile court may hear dependency matters in accordance with the Juvenile Act⁸⁹ and the Pennsylvania Rules of Juvenile Court Procedure.⁹⁰

If the parents ask for placement of the minor, the court may be involved through a dependency action. The court may order the minor into shelter care or other placement alternatives. The *Pennsylvania Dependency Benchbook* provides a checklist and benchcards for proceedings throughout the dependency process.⁹¹ The court may facilitate family group decision-making to engage family groups in crafting and implementing plans that support the safety, stability and well-being of the minor child.⁹²

Emerging Practices –Encouraging Victim Involvement in Juvenile Proceedings

Although the Crime Victims Act places primary responsibility on prosecutors and probation officers for soliciting victim input and participation in juvenile cases, the court has the opportunity to enforce these requirements and protect victims' rights.

In its *Pennsylvania Juvenile Delinquency Benchbook*, the Juvenile Court Judges' Commission suggests that judges request information about victim thoughts or concerns regarding proposed consent decrees or plea arrangements, and insists that the victim impact statement be included in each predisposition report.⁹³ The Commission also encourages judges to solicit full victim participation in hearings by acknowledging the victim's presence in the courtroom and explaining the court's methods and procedures and the principles behind them. Judges are also encouraged, at the close of the fact-finding part of an adjudication proceeding, to describe the disposition process, to solicit victim input orally and to gather additional details regarding written victim impact statements.⁹⁴

After fact-finding, judges may describe the disposition process, solicit victim input, and gather details regarding victim impact statements.

Emerging Practices – Substance Abuse Treatment for Minor Perpetrators of Domestic Violence

Although alcohol and substance abuse correlate with domestic violence and are often given as excuses for violent behavior, they do not cause domestic violence.⁹⁵ However, treatment for alcohol or substance abuse may help engage a minor in programs designed to address underlying violent behavior.

It is important that courts very carefully evaluate whether a drug or alcohol commitment will help a child who, in addition to using drugs or alcohol, is battering a parent. The Juvenile Court Judges' Commission urges caution for judges considering a drug or alcohol commitment, stating, "unnecessary treatment of casual or experimenting teenage drug or alcohol users tends to make matters worse, not better."⁹⁶

⁸⁹ Juvenile Act, 42 PA. C.S. § 6301 et seq.

⁹⁰ Pennsylvania Rules of Juvenile Court Procedure, Rules 1100 through 1800.

⁹¹ See OFFICE OF CHILDREN AND FAMILIES IN THE COURTS, PENNSYLVANIA DEPENDENCY BENCHBOOK (2010).

⁹² *Id.* at 159.

⁹³ JUVENILE COURT JUDGES' COMM'N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK 95-6 (2003).

⁹⁴ *Id.* at 96.

⁹⁵ Nat'l Coalition Against Domestic Violence, *Domestic Violence and Substance Abuse* (2014), http://www.ncadv.org/images/Substance_Abuse.pdf (last visited Nov. 30, 2015).

⁹⁶ JUVENILE COURT JUDGES' COMM'N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK 123 (2003).

Emerging Practices – Screening Service Providers and Selecting Appropriate Domestic Violence Intervention and Rehabilitation Strategies

The Juvenile Court Judges' Commission encourages judges to become familiar with rehabilitative services available for juveniles and to learn from dispositional successes and failures. The Commission also suggests that judges take the lead in disposition program planning and development.⁹⁷ There is little research regarding treatment programs for juveniles who are perpetrators of domestic violence. One reason is the lack of public recognition of teen domestic violence as a problem separate and distinct from generalized teen violence.⁹⁸

Batterers' counseling may be most effective in combination with frequent contact with courts, prosecution and probation.

Juvenile batterer intervention programs have only recently emerged, and there is little available research regarding their effectiveness at reducing recidivism. Such programs use a psycho-educational format, offer various methods to reeducate young men about their relationships and use of violence, and typically meet weekly for one to two hours. These juvenile intervention groups also typically include discussions of healthy and unhealthy relationships, sex-role stereotyping, coping with anger and rejection, the effect of alcohol and drug use, and sometimes incorporate family involvement.⁹⁹

Courts should not equate anger management with batterers' intervention programs. Anger management programs are directed at assisting a generally angry or out-of-control individual to gain control over angry outbursts. Perpetrators of domestic violence selectively and deliberately use violence and coercive tactics to intimidate, dominate and control an intimate partner. Programs promoting anger management techniques are therefore inappropriate for perpetrators of domestic violence.¹⁰⁰

Neither the court system nor victims should rely too heavily on current batterers' intervention programs. Researchers warn: The stakes for women's safety are simply too high to rely on batterer intervention programs without stronger empirical evidence that they work.¹⁰¹ If a juvenile court judge is considering a batterers' intervention group as a rehabilitative option for a teen perpetrator of domestic violence, it is important that the judge not rely solely on the batterers' group for rehabilitation.

Batterers' intervention services may be most effective when combined with other justice system interventions. In one study, more offender involvement with prosecution, probation and counseling was related to less recidivism.¹⁰²

⁹⁷ *Id.* at 114.

⁹⁸ Dean Peacock & Emily Rothman, VAWnet.org, *Working With Young Men Who Batter: Current Strategies and New Directions*, 3-4 (2001), <https://vawnet.org/material/working-young-men-who-batter>.

⁹⁹ Peacock & Rothman, *id.* at 3-6.

¹⁰⁰ See Edward Gondolf & David Russell, *The Case Against Anger Control for Batterers*, 92, 2-5 (1986).

¹⁰¹ *Id.* at 26.

¹⁰² See Daniel Saunders & Richard Hamill, U.S. Dep't of Justice, *Abuse Against Women: Synthesis of Research on Offender Intervention*, 20 (2003), NCJ 201222, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201222.pdf> citing Christopher Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. OF FAMILY VIOLENCE 263-284 (1998).

Frequent court reviews also appear to assist in treatment compliance.¹⁰³ Further studies eventually will help identify and refine which types of batterers' programs and other interventions work best.¹⁰⁴

Emerging Practices – Specialized Juvenile Court Programs

The court system must provide appropriate intervention and programming that can rehabilitate an adolescent domestic violence offender. It is important to intervene early with court system responses designed to deter and rehabilitate the offender.

The National Center for State Courts studied specialized juvenile domestic and family violence court programs in three California counties.¹⁰⁵ The study examined the effects of certain kinds of interventions (zero tolerance approach, extensive conditions and no formal protocol). The court-based intervention programs included an intake assessment process, specialized prosecution and defense, a dedicated docket, intensive supervision, offender programs and victim services. In all counties, the court placed extensive probation conditions on the offender. In evaluating the data, the National Center for State Courts concluded that the court-based intervention programs had a significant deterrent effect on first-time offenders. Within six months, recidivism rates were significantly lower in counties with court-based intervention (three percent) than counties without a court-based intervention program (16 percent).

In all, this research illustrates that early, repeated, and coordinated intervention – at all stages of the family and juvenile court systems – can and does have an impact on the cycle of violence. Changing our approach to addressing juvenile offenders and victims of domestic violence may hold the key to transforming the reality of domestic violence in our communities.

¹⁰³ Edward Gondolf, *Batterer Programs: What We Know and Need to Know*, 14 J. INTERPERSONAL VIOLENCE 41-61 (1997), cited in Saunders & Hamill, U.S. Dep't of Justice, *Juvenile Domestic and Family Violence: The Effects of Court-Based Intervention Programs on Recidivism* 9 (2006), NCJ 216612, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/216614.pdf>.

¹⁰⁴ See SHELLY JACKSON ET AL., U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *BATTERER INTERVENTION PROGRAMS: WHERE DO WE GO FROM HERE?* NIJ SPECIAL REPORT, 27 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/195079.pdf>.

CHAPTER XIII: ADOLESCENT RELATIONSHIP ABUSE

TABLE OF CONTENTS

CHAPTER GOALS.....	3
TEEN DATING VIOLENCE INTERESTS WITH JUVENILE, FAMILY, AND CRIMINAL COURTS.....	3
What is Teen Dating Violence?	3
Justice System Involvement is Effective for Perpetrators and Victims	4
PROTECTION FROM ABUSE ACT APPLIES TO TEEN LITIGANTS	4
Substantive Jurisdiction is Required	5
PFA Act “Family or Household Member” Includes Dating Partners	5
Abuse Must Meet the PFA Act Definition	6
Additional Procedural Requirements Apply to Teen PFA Cases	7
Adult Plaintiff Must File on Behalf of Teen Victim.....	7
Teen Defendants Must Have a Parent or Guardian Manage the PFA Case.....	8
Settlement Agreements Require Parental Approval	9
Court Has Discretion to Craft Teen-Focused Relief.....	9
PFA Protection from a Teen Perpetrator	9
PFA Protection from an Adult Perpetrator	11
Enforcement Goals Are Safety for Victim, Accountability and Rehabilitation for Defendant	11
Enforcement Against Protected Party	11
Enforcement Against a Teen Defendant Proceeds Under Juvenile Act	11
Enforcement Against an Adult Defendant Includes Criminal Contempt.....	13
Some Juvenile Records are Not Available to the Public.....	14
Records of Civil PFA Proceedings and Orders Generally Available	14
Records of PFA Order Violations are Protected.....	14
Minors’ PFA Orders Entered Into PFAD, But Not Violations.....	15
Modifications and Extensions Require Close Coordination With Prothonotary	15
When Violated, PFA Order Can Be Extended at Juvenile Proceeding	15
PFA Parties May Petition to Modify.....	15
SCHOOL DISTRICTS ARE MANDATED TO ADDRESS TEEN DATING VIOLENCE	16
Title IX – Requirements For Schools Receiving Federal Funds.....	16
School Dating Violence Policy – Pennsylvania Model.....	16

OTHER RELEVANT INFORMATION	17
Dating Abuse Starts in Adolescence.....	17
Adolescent Dating Abuse Carries Into Adult Relationships.....	17
Dating Abuse Has Serious Health Ramifications for Victims	18
Dating Abuse is Under-Reported	18
Dating Abuse Can Be Fatal	18
Perpetrators’ Use of Technology to Abuse, Stalk, and Harass is Pervasive in Teen Relationships	19
Early and Effective Court Intervention Lowers Dating Abuse Recidivism.....	20
Exposure to Domestic Violence in the Home is Correlated with Future Victimization and/or Perpetration	20
EMERGING PRACTICES.....	21
Expand Options for Disposition and Rehabilitative Services.....	21
Anger Management Programs Do Not Address Abusive Behaviors.....	22
Juvenile Offenders Can Benefit From Intense Supervision	22
Juvenile Domestic Violence Courts Include Services for Offenders, Victims	22
Judges Can Look for Signs of Dating Abuse in Cases Involving Teens	23
The Judge as Community Leader	24
REFER TEEN VICTIMS TO DOMESTIC VIOLENCE PROGRAMS.....	24

CHAPTER GOALS

The goal of this chapter is to provide substantive and related statistical information about how teen dating violence is addressed in juvenile court, family court and Protection From Abuse cases. PFA relief provisions, juvenile probation procedures and related cases are reviewed.

TEEN DATING VIOLENCE INTERESTS WITH JUVENILE, FAMILY, AND CRIMINAL COURTS

What is Teen Dating Violence?

Teen dating violence is commonly defined as a “pattern of abusive behaviors – usually a series of abusive behaviors over a course of time – used to exert power and control over a dating partner.”¹

The Centers for Disease Control and Prevention defines teen dating violence as a type of intimate partner abuse that occurs between two people in a close relationship. The nature of the violence may be physical, emotional or sexual and may include the following:

- Physical abuse includes behaviors such as pinching, hitting, shoving or kicking
- Psychological/emotional abuse includes threatening a partner, harming his or her sense of self-worth, name-calling, shaming, bullying, embarrassing on purpose, or keeping him or her away from family or friends
- Sexual abuse includes forcing a partner to engage in a sexual act when he or she does not or cannot consent
- Stalking includes a pattern of harassment or threats that is unwanted and cause fear in the victim²

The definition that experts use to describe dating abuse is broader than the definition of abuse in Pennsylvania’s Protection From Abuse Act³ or the statutory definitions of criminal behavior in Pennsylvania. However, judges and other justice system professionals should be aware of, and knowledgeable about, all facets of teen dating violence to better identify patterns that lead to more severe dating violence offenses.

A note about terminology:

The terms *teen dating violence* and *teen dating abuse* are often used interchangeably. Some experts believe the term teen dating violence inappropriately limits the definition to physical violence and excludes other forms of highly problematic coercive control such as emotional abuse and stalking. Courts should recognize all forms of coercive control, even those forms that do not fit within the PFA Act’s definition of abuse, as they may indicate a larger pattern of abuse or course of conduct that could rise to the level of abuse in the PFA Act.⁴ And, even if

¹ Break The Cycle, *Working with Teen Victims of Dating Violence: What Every Court Should Know Before Working With Teen Victims of Dating Violence*, <http://www.breakthecycle.org/sites/default/files/Courts.pdf> Break the Cycle is a national nonprofit organization that addresses teen dating violence. Its mission is to empower youth to end domestic violence. Break the Cycle focuses on prevention education, public awareness, training and support, and policy and advocacy.

² Ctrs. for Disease Control & Prevention, *Understanding Teen Dating Violence Factsheet* (2016), <https://www.cdc.gov/violenceprevention/pdf/teen-dating-violence-factsheet-a.pdf>.

³ 23 PA. C.S. § 6102(a).

⁴ *Id.*

the behavior does not rise to that level, recognition of other forms of abuse may help the court to identify juvenile victims and offenders who are in need of additional services.

In this chapter, the terms *teen dating violence*, *teen dating abuse* and *adolescent relationship abuse* may be used interchangeably. These terms are used to reflect the terminologies of the primary sources cited and to explain the range of physical, emotional, or sexual abuse that may be experienced in a teen dating relationship.

Justice System Involvement is Effective for Perpetrators and Victims

Teen dating violence is pervasive: The Centers for Disease Control and Prevention reports that approximately 1 in 5 women and 1 in 7 men who had experienced rape, physical violence or stalking by an intimate partner *first experienced the violence between the ages of 11 and 17*.⁵ Further data revealed that the frequency and severity of abuse between adult intimate partners increased over time when abuse began in adolescence.⁶ Thus, early intervention is a key component to breaking the cycle of intimate partner violence.

Justice system involvement in teen dating abuse cases, including the arrest and prosecution of juvenile offenders for behavior that rises to the level of a punishable offense, offers an important opportunity for early intervention. Appropriate intervention by the justice system helps to modify the teen abuser's behavior while sending a message about the seriousness of dating abuse. A recent study found that court-based intervention for juvenile abuse offenders was especially effective for first-time offenders whose behavior had not yet become entrenched.⁷

Early justice system intervention also provides teen victims with potentially life-saving information and connects them with essential services, such as safety planning, counseling, and other support.⁸ Data show that teenage victims of dating abuse are more likely than their non-abused peers to smoke, use drugs, engage in risky dieting or sexual behaviors and attempt or consider suicide.⁹ Thus, connecting teen victims to services is often essential to ensuring that teens receive the support necessary to help them overcome these risks.

PROTECTION FROM ABUSE ACT APPLIES TO TEEN LITIGANTS

In PFA Act proceedings, teens seeking protection, as well as those named as defendants, present unique legal and procedural challenges. This section explains how the PFA Act's procedural requirements, relief provisions, enforcement issues, record retention and modifications apply to teen litigants.

For more information about PFA proceedings generally, see [Chapter III: The Protection From Abuse Act](#).

⁵ CTDS. FOR DISEASE CONTROL & PREVENTION, DIVISION OF VIOLENCE PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING AND INTIMATE PARTNER VIOLENCE VICTIMIZATION - NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES 2011 (2014), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e.

⁶ Am. Bar Ass'n, Nat'l Teen Dating Abuse Prevention Initiative, *Teen Dating Abuse Facts* (2006) (citing S.L. Feld & M.A. Strauss, *Escalation and Desistance of Wife Assault in Marriage*, 27 CRIMINOLOGY 141-161 (1989)).

⁷ Brenda Uekert et al., U.S. Dep't of Justice, *Juvenile Domestic and Family Violence: The Effects of Court-Based Intervention Programs on Recidivism* 9 (Dec. 2006), NCJ 216612, *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/216614.pdf>

⁸ *Id.*

⁹ Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 J. AM. MEDICAL ASS'N. 572 (2001), *available at* <http://jama.ama-assn.org/cgi/reprint/286/5/572>.

Substantive Jurisdiction is Required

To establish substantive jurisdiction, the PFA Act requires that (1) the plaintiff and defendant meet the Act’s “family or household member” relationship requirement, and (2) the defendant commit an enumerated act of abuse against the plaintiff.¹⁰ As detailed below, dating relationships are covered in this threshold relationship requirement – even when the plaintiff and defendant are not sexually active or have only been on a few dates.

PFA Act “Family or Household Member” Includes Dating Partners

The PFA Act defines “family or household members” as spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood.¹¹

Pennsylvania courts have jurisdiction to enter a PFA order regardless of whether the litigants had sex, their sexual orientation, or the length of time they were dating.

Most often, teens seeking a PFA order are categorized as “current or former sexual or intimate partners.”¹² The Act does not require that the relationship involve sexual intercourse to be covered under the Act – the statute requires only the parties to have had a “sexual or intimate” relationship.¹³ Thus, in accordance with the statute, and case law discussed below, Pennsylvania courts have jurisdiction to enter a PFA order when the litigants’ relationship is merely a dating relationship – regardless of whether the litigants had sex, their sexual orientation, or the length of time they were dating.¹⁴

Dating Relationship Meets PFA Relationship Requirement

In ***R.G. v. T.D.***, the Pennsylvania Superior Court interpreted the term “intimate partner” to include a dating relationship.¹⁵ In this case, the parties were college students. The plaintiff sought a PFA order against her former boyfriend after he repeatedly called her and sent her threatening email messages. At trial, the defendant made no objection to the plaintiff’s description of him as her former boyfriend. After a PFA order was entered, the defendant appealed, claiming that the requisite relationship had not been established. The Pennsylvania Superior Court affirmed the trial court’s decision to enter a PFA order, because a relationship between “intimate partners” was established between the parties, which allowed the plaintiff to seek protection under the PFA statute.

The Pennsylvania Superior Court reaffirmed its position that a dating relationship qualifies as an “intimate partner” relationship under the PFA Act in ***Varner v. Holley***.¹⁶ In this case, the plaintiff and the defendant were minors. The plaintiff alleged that the defendant, her former boyfriend, harassed her and threatened to kill her current boyfriend. After a PFA order was entered, the defendant was held in contempt and appealed. The

¹⁰ 23 PA. C.S. §§ 6106(a) and 6108(a).

¹¹ 23 PA. C.S. § 6102 (defining family or household member).

¹² *Id.*

¹³ *Id.* (emphasis added).

¹⁴ 23 PA. C.S. § 6102.

¹⁵ [R.G. v. T.D., 672 A.2d 341 \(Pa. Super. 1996\).](#)

¹⁶ [Varner v. Holley, 854 A.2d 520 \(Pa. Super. 2004\).](#)

Superior Court stated that a minor can be a PFA defendant and that a dating relationship meets the relationship requirement of the PFA Act, citing *R.G. v. T.D.*¹⁷

Length of Relationship is Irrelevant

In *Evans v. Braun*, the Pennsylvania Superior Court found that even a short dating relationship met the relationship requirement, because the parties “mutually chose” to enter a “dating relationship” that involved a “romantic bond,” albeit very short-lived.¹⁸

In *Evans*, the plaintiff and the defendant were co-workers who ventured into a short-lived dating relationship. After their first date, the defendant came to the plaintiff’s home uninvited. The plaintiff was upset by this unexpected visit and asked him for space. Several months later, the parties reconciled and attended a play together. On the way to the play, the defendant told the plaintiff that he was carrying a gun. Afterward, the defendant displayed the gun and told the plaintiff “it could put a very big hole in her.” After an argument later that month, the defendant exposed the gun tucked in his waistband and told the plaintiff to remember that he had a gun and was not afraid to use it. The plaintiff fled to a nearby restaurant, feeling threatened, intimidated and afraid.

After a hearing and the court’s entry of a final PFA order, the defendant appealed, claiming that the plaintiff had no standing for a PFA order, because their relationship was not covered under the PFA Act. The Pennsylvania Superior Court affirmed the trial court’s decision to grant the PFA order, concluding that the plaintiff presented sufficient evidence to establish a relationship covered under the PFA Act.

Age of Dating Partners is Irrelevant

The age of the litigants in *R.G. v. T.D.*, *Varner v. Holley*, and *Evans v. Braun* was not a factor in the court’s determination as to whether the PFA Act applied to dating relationships. In each of these cases, the court looked only to the factors establishing that a relationship did, indeed, exist. Regardless of age, a litigant is entitled to relief under the PFA Act if the relationship can be categorized as a dating relationship.

Abuse Must Meet the PFA Act Definition

The second component for substantive jurisdiction requires the defendant to commit an act of abuse toward the plaintiff, as defined by the PFA Act.¹⁹ Under the Act, “abuse” is defined as “the occurrence of one or more of the following acts:”

- Attempting to cause or intentionally, knowingly, or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault, or incest with or without a deadly weapon
- Placing another in reasonable fear of imminent serious bodily injury
- False imprisonment (pursuant to 18 Pa. C.S. § 2903)
- Physically or sexually abusing children (including such terms as defined in Chapter 63 relating to child protective services)

¹⁷ *Id.* at 522-523. See 672 A.2d 341 (Pa. Super. 1996).

¹⁸ [Evans v. Braun, 12 A.3d 395 \(Pa. Super. 2010\).](#)

¹⁹ 23 Pa. C.S. § 6102.

- Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances that place the person in reasonable fear of bodily injury²⁰

Course of Conduct / Repeated Acts Is Abuse

In **R.G. v. T.D.**, a defendant's unwanted phone calls, hostile e-mail messages and persistent communication with the victim after pleas to desist constituted abuse.²¹ Both the plaintiff and defendant were college students. The Superior Court found that there was sufficient evidence for the trial court to conclude that the defendant knowingly engaged in a course of conduct or repeatedly committed acts toward the victim, including following the victim without proper authority, under circumstances which placed the victim in reasonable fear of bodily injury.

Additional Procedural Requirements Apply to Teen PFA Cases

A case involving teen litigants may have additional procedural requirements that must be met in order for the case to be properly presented before the court.

For more information about the basic procedural requirements in all PFA proceedings, see [Chapter III, The PFA Act](#).

Adult Plaintiff Must File on Behalf of Teen Victim

In Pennsylvania, an unemancipated minor is not permitted to bring a PFA action independently; the Act requires a parent, adult household member, or guardian to pursue a PFA action on behalf of a minor.²²

Judges may want to elicit testimony to determine why the teen is resistant. If the relationship and abuse requirements are met, entry of an order may be appropriate even if the teen resists.

Because a parent or guardian must petition for the PFA order on behalf of an unemancipated minor, the parent or guardian (petitioner) must be present at the hearing.²³

In cases where the petitioner seeks PFA protection for the teen, but the teen does not want the order, the judge may want to elicit testimony to determine why the teen is resistant. If the relationship and abuse requirements are met, entry of an order may be appropriate even if the teen resists.²⁴

²⁰ 23 PA. C.S. §§ 6102(a)(1) – (5).

²¹ [R.G. v. T.D., 672 A.2d 341, 342 \(1996\)](#).

²² 23 PA. C.S. § 6106(a).

²³ See PA. R.C.P. 2027.

²⁴ See *Commonwealth v. Brumbaugh*, 932 A.2d 108 (Pa. Super. 2007). (The relationship between the teen victim and defendant did not end even with the entry of the PFA order. The defendant violated the no-contact protection order when he attended a party with her, even though it was at her request.)

Selection of a Guardian

If a minor wishes to pursue a PFA action using a guardian, the minor may select the guardian.²⁵ However, the court may – for good cause – remove the guardian selected by the minor.²⁶

Definition of Guardian

Pursuant to the Pennsylvania Rules of Civil Procedure, generally, “guardian” means the person representing the interest of the minor in the action, whether as:

- The guardian of the minor appointed by any court of competent jurisdiction.
- A person in the nature of the “next friend” selected to represent the minor in an act.
- A guardian ad litem specifically appointed by the court in which the action is pending.²⁷

Teen Defendants Must Have a Parent or Guardian Manage the PFA Case

When a PFA defendant is a teen, the action may be commenced in the same manner that an action is commenced against an adult. A juvenile does not need to be represented by a parent or guardian in order to be sued.²⁸ However, in order for a trial to proceed, the minor defendant must have a parent or guardian manage the case.²⁹

Judges may add language to temporary PFA orders, directing minor defendants to bring a parent or guardian to the final order hearing.

In **Varner v. Holley**, the Superior Court confirmed that teen PFA defendants are required to have a parent or guardian present to supervise and manage the PFA litigation on the teen’s behalf.³⁰ The teen defendant in **Varner** had neither; his probation officer guided the teen defendant in the PFA action. For this reason, the Superior Court determined that the PFA consent agreement was invalid and, accordingly, could not support the entry of an indirect criminal contempt conviction against the defendant.³¹

If the court is aware at the time of the *ex parte* proceeding that the defendant is a minor, the judge may add additional language to the temporary order directing that the minor bring a parent or guardian to the final order hearing.³²

²⁵ PA. R.C.P. 2031(a).

²⁶ PA. R.C.P. 2031(a) and 2033.

²⁷ PA. R.C.P. 2026.

²⁸ PA. R.C.P. 2028(c) & note.

²⁹ PA. R.C.P. 2027 and 2034.

³⁰ [Varner v. Holley, 854 A.2d 520 \(Pa. Super. 2004\).](#)

³¹ *Id.* at 524.

³² See PA. R.C.P. 2034.

Settlement Agreements Require Parental Approval

A parent or guardian must be present for approval of any settlement agreements entered into on the juvenile's behalf.³³

Court Has Discretion to Craft Teen-Focused Relief

When a case involves teen dating violence, either by an adult or teen perpetrator against a teen plaintiff, the court has discretion to explore alternative forms of relief that will meet the unique circumstances that teens face, such as mandatory school attendance, bus rides, after-school activities, and lack of mobility.³⁴ Teens are also more vulnerable to technology-based abuse, which is instantaneous, endlessly repeatable and transmittable, and sometimes impossible to trace or erase.³⁵

PFA Protection from a Teen Perpetrator

PFA cases involving unemancipated minors may call for relief different from the types granted in adult PFA cases. The basic PFA relief provisions, such as prohibiting the defendant from contacting, abusing, stalking and harassing the plaintiff, are likely to be requested.³⁶ However, courts can explore other options for relief that are more appropriate for teens. In the event that teen dating partners also share parenthood of a minor child, relief may include custody or child support provisions.³⁷

Courts have substantial discretion in ordering appropriate relief. The Act provides that a court “may grant any protection order or approve any consent agreement to bring about the cessation of abuse, and ... any other appropriate relief sought by the plaintiff.”³⁸ These relief provisions provide courts wide latitude to craft effective relief that will translate to the realities of a teen's daily life.

For instance, the court may want to consider how the PFA will be effective in a school environment where students are routinely on the same or campus or in the same building. A PFA order may specifically address school buildings, school transportation and after-school activities.³⁹ For example, the no-contact provision may direct the defendant not to have contact with the plaintiff anywhere he or she may be found, through a third party, or by any electronic means.⁴⁰ The court also may prohibit the defendant from stalking and harassing the plaintiff and the plaintiff's parents, siblings, or close friends.⁴¹

³³ PA. R.C.P. 2039(a); *see also Varner*, 852 A.2d at 523.

³⁴ 23 PA. C.S. § 6108(a)(10).

³⁵ *See the section herein on [Perpetrators' Use of Technology to Abuse, Stalk, and Harass Is Pervasive in Teen Relationships](#).*

³⁶ 23 PA. C.S. § 6108(a)(1)(6) & (9).

³⁷ 23 PA. C.S. § 6108(a)(4).

³⁸ 23 PA. C.S. §§ 6108(a), (a)(10) (emphasis added).

³⁹ 23 PA. C.S. §§ 6108(a)(6) and (8).

⁴⁰ 23 PA. C.S. § 6108(a)(6).

⁴¹ 23 PA. C.S. § 6108(a)(9).

Under section 6108(a)(10), the court is permitted to grant any other appropriate relief. Examples include:

- Direct the defendant to attend counseling or a batterers' intervention program⁴²
- Direct the defendant to return plaintiff's personal items
- Direct the defendant to destroy any and all copies of pictures, tapes, recordings, or digital copies of the plaintiff that are sexual in nature
- Direct the defendant to have no contact of any kind with the victim, including contact:
 - Through third parties
 - By email, cell phone, text, instant message, blogs, community forums or other electronic means
 - Through all social networking sites such as Facebook, Twitter, or Instagram
 - Through other electronic means or technologies
- Grant protections that relate to the victim's place of employment
- Direct that the school or educational institution receives a copy of the PFA order⁴³
- Direct the defendant to request the school do the following:
 - Move the defendant's locker to an area away from the victim or to an area that is more easily monitored by school personnel
 - Inform classroom instructors of the PFA order and ask them to assist in its implementation when possible
 - Inform the victim when the defendant is absent from school
 - Move the defendant's lunch period to a time that does not overlap with the victim's lunch period
 - Move the defendant to a different class not shared with the victim
 - Limit the defendant's access to hall passes or opportunities to roam the hallways while both students are in the school building
- Remove the defendant from school-sponsored activities in which both the victim and the defendant participate
- Issue an order that requires a court hearing after the PFA order has been in place for a certain amount of time to determine whether the PFA order's safety protections are effective.

It is important to craft relief that does not inconvenience or disrupt the victim, as doing so would penalize the victim and may discourage the victim – or others who are similarly victimized – from coming forward to seek protection. Unless otherwise requested by the plaintiff, relief granted to the plaintiff should be crafted to alter only the defendant's schedule, access to privileges, and school amenities such as lockers.

⁴² See the section herein on [Emerging Practices. Anger Management Programs Do Not Address Abusive Behaviors](#). Anger management programs are not effective in rehabilitating domestic or dating violence perpetrators. Domestic and dating violence are not evidence of poor anger management; rather, the foundation of these forms of abuse is the abuser's control over his or her victim. See Andrew Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges*, Nat'l Inst. of Just., 66 (2009), available at <http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/ch8/couples-counseling.htm>.

⁴³ Schools and other educational institutions are required to maintain an environment free of sexual harassment under Title IX, which may encompass dating violence. 20 U.S.C. § 1681. For more information about Title IX requirements, see the section herein [School Districts Are Mandated to Address Teen Dating Violence](#).

PFA Protection from an Adult Perpetrator

Teens may seek a PFA order against an adult who is perpetrating dating abuse against them.⁴⁴ A parent or guardian must file the PFA petition on behalf of an unemancipated minor.⁴⁵ A court may rely on the “any other relief” provision to tailor relief suited to the situation (see the examples listed above).

Enforcement Goals Are Safety for Victim, Accountability and Rehabilitation for Defendant

Enforcement Against Protected Party

A PFA plaintiff cannot violate his or her own order.⁴⁶ However, the court may want to emphasize that victim safety depends on avoiding contact with the defendant. In ***Commonwealth v. Brumbaugh***, a mother filed a PFA petition on behalf of her daughter.⁴⁷ The trial court entered a PFA order that prohibited contact with the defendant. While the PFA order was in effect, the daughter called the defendant and invited him to a birthday party. The defendant joined the daughter and her friends. On their way home, the police stopped the driver of the car in which they were riding as passengers. The defendant was subsequently found guilty of indirect criminal contempt for violating the no-contact provision of the PFA order. The defendant appealed, claiming that the Commonwealth’s evidence against him was insufficient. The trial court observed:

[T]he relationship between the victim and the defendant had not ended, for the victim called the defendant and asked him to join her at a birthday party. The defendant, knowing he was under a PFA order to have no contact with the victim that evening, nevertheless went to the party with her. He was not drugged, forced or threatened. His clear intent was to be in contact with her, notwithstanding the PFA order.⁴⁸

The Pennsylvania Superior Court found that the defendant’s act was “clearly volitional, knowingly made, and wrongful intent can be imputed by virtue of the substantial certainty that, by choosing to accept the victim’s invitation to travel with her in the same vehicle to a party, he would be in contact with her in violation of the PFA order.”⁴⁹

Enforcement Against a Teen Defendant Proceeds Under Juvenile Act

Enforcement of a PFA order against a teen defendant must follow the procedures and processes of the Juvenile Act and must comply with due process.

These procedures and processes are summarized below, but for a more in-depth review of Juvenile Act requirements and practical suggestions about juvenile delinquency proceedings, please see the [Pennsylvania Juvenile Delinquency Benchbook](#) published by the Pennsylvania Juvenile Court Judges Commission.⁵⁰

⁴⁴ 23 PA. C.S. § 6106(a).

⁴⁵ *Id.*

⁴⁶ 23 PA. C.S. § 6113; *Commonwealth v. Brumbaugh*, 932 A.2d 108 (Pa. Super. 2007).

⁴⁷ *Brumbaugh*, 932 A.2d 108.

⁴⁸ *Id.* at 110-111.

⁴⁹ *Id.*

⁵⁰ PA. JUV. CT. JUDGES COMM’N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK, 187 (2008), available at <http://www.jcjc.pa.gov/Publications/Pages/JuvenileDelinquencyBenchbook.aspx>.

Juvenile Act Process

The PFA Act directs that when a PFA defendant violates safety provisions in a PFA order – no abuse, exclusive possession of the domicile, custody, no contact, no firearms or other weapons, or no stalking – the minor defendant shall be arrested and charged with indirect criminal contempt.⁵¹ If the defendant has not been arrested for these non-economic PFA order violations, the plaintiff may file a private indirect criminal contempt complaint⁵² or a civil contempt complaint.⁵³

When a minor defendant is charged with indirect criminal contempt for violating a PFA order, the minor shall be considered to have committed a delinquent act and must be treated in accordance with the requirements of the Juvenile Act.⁵⁴ The Juvenile Act governs the minor’s adjudication and disposition for the PFA violation.⁵⁵

After a minor is charged with indirect criminal contempt, the law enforcement officer handling the case contacts the on-duty probation officer to determine whether placement in the juvenile detention center is authorized.⁵⁶ If the minor is placed, the next step is a detention hearing to determine if continued detention is warranted.⁵⁷

If a minor is charged with indirect criminal contempt, but placement is not authorized, the probation department’s intake unit schedules an intake conference when the charges are received. The intake department, the supervisor, and the district attorney determine whether there will be an informal adjustment, a consent decree or a formal petition. If a formal petition is filed, the minor defendant continues through the juvenile court process.⁵⁸

The next step in the court process is the adjudication hearing, which is the fact-finding hearing in the juvenile court process. If the minor is found delinquent at the adjudication hearing, the court holds a disposition hearing. At the disposition hearing, the court determines whether the minor will go to placement or be placed on probation. The judge may order the juvenile to meet certain conditions of probation, including counseling, to address domestic and dating violence or enrollment in a batterers’ intervention program to rehabilitate the minor.⁵⁹

Juveniles Have Right to Counsel

Juveniles are entitled to representation at every stage of a delinquency proceeding. The court shall appoint counsel if the juvenile is without financial resources or is otherwise unable to employ counsel.⁶⁰ A juvenile over

⁵¹ 23 PA. C.S. § 6113(a).

⁵² 23 PA. C.S. § 6113.1.

⁵³ 23 PA. C.S. § 6114.1 (emphasis added). “A plaintiff may file a petition for civil contempt with the issuing court alleging that the defendant has violated any provision of an order.” *Id.* When a teen PFA defendant violates the Act’s provisions to pay temporary child support, pay damages or comply with any other relief, the only way the PFA plaintiff may seek enforcement is through the civil contempt process. 23 PA. C.S. §§ 6113, 6114.1.

⁵⁴ 23 PA. C.S. § 6114(a.2).

⁵⁵ *Id.*

⁵⁶ 42 PA. C.S. § 6325.

⁵⁷ 42 PA. C.S. § 6332.

⁵⁸ 42 PA. C.S. § 6331, PA. JUV. CT. JUDGES COMM’N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK, §4-6 (2008).

⁵⁹ PA. JUV. CT. JUDGES COMM’N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK, §§9-1 and 9-3 (2008). 42 Pa. C.S. §§ 6351 and 6352.

⁶⁰ 42 PA. C.S. § 6337.

14 years old may waive the right to counsel in certain proceedings,⁶¹ but the court must inform the juvenile of the right to counsel at every stage of the proceeding.⁶²

To grant the waiver of counsel, the court must conduct a colloquy with the child, on the record, to determine that the waiver is knowingly, intelligently and voluntarily made.⁶³

At a minimum, the court should ask questions to elicit the following information, to determine a knowing, intelligent, and voluntary waiver of counsel:

- 1) Whether the party understands the right to be represented by counsel
- 2) Whether the party understands the nature of the dependency allegations and the elements of each of those allegations
- 3) Whether the party is aware of the dispositions and placements that may be imposed by the court, including foster care placement and adoption
- 4) Whether the party understands that if he or she waives the right to counsel, he or she will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules
- 5) Whether the party understands that counsel may be better suited to defend the dependency allegations
- 6) Whether the party understands that the party has many rights that, if not timely asserted, may be lost permanently; and if errors occur and are not timely objected to, or otherwise timely raised by the party, the ability to correct these errors may be lost permanently⁶⁴

Enforcement Against an Adult Defendant Includes Criminal Contempt

The PFA Act directs that when an adult PFA defendant violates any safety provisions of the order – do not abuse, exclusive possession of the domicile, custody, no contact, no firearms or other weapons, or no stalking – the adult defendant shall be arrested and charged with indirect criminal contempt.⁶⁵ Even where the adult

⁶¹ 42 PA. C.S. 6337.1(b)(3). Counsel may not be waived in the following proceedings:

- (i) An informal detention or shelter hearing under section 6332 (relating to informal hearing)
- (ii) A hearing to consider transfer to criminal proceedings under 6355 (relating to transfer to criminal proceedings)
- (iii) A hearing to consider evidence on the petition or accept an admission to an alleged delinquent act under 6341 (relating to adjudication)
- (iv) A hearing to consider evidence as to whether the child is in need of treatment, supervision or rehabilitation under section 6341
- (v) A disposition hearing under section 6341 or 6352 (relating to disposition of delinquent child)
- (vi) A hearing to modify or revoke probation or other disposition entered under 6352. *Id.*

⁶² 42 PA. C.S. 6337.1(b)(5).

⁶³ 42 PA. C.S. 6337.1(b)(3).

⁶⁴ PA. R.J.C.P. 1152 cmt.

⁶⁵ 23 PA. C.S. § 6113(a).

defendant has not been arrested for these non-economic violations, the plaintiff may file a private indirect criminal contempt complaint⁶⁶ or a civil contempt complaint.⁶⁷

After the arrest, the police officer or sheriff must take the adult defendant, without unnecessary delay, before the court in the judicial district where the contempt is alleged to have occurred.⁶⁸ If the court is unavailable, the police officer or sheriff is required to take the defendant to the district justice or other designated official for preliminary arraignment.⁶⁹ An adult defendant must be sentenced in accordance with section 6114 of the PFA Act.

Some Juvenile Records are Not Available to the Public

Records of Civil PFA Proceedings and Orders Generally Available

Courts generally make civil court filings, such as PFA petitions, orders, and notices, open for public inspection at the courthouse. PFA orders also are filed in the Protection From Abuse Database, the statewide registry of PFA orders. PFA orders involving minors are filed with both the prothonotary and PFAD. PFA violations by juveniles are treated somewhat differently.

Records of PFA Order Violations are Protected

The Juvenile Act protects records pertaining to PFA *violations* from unauthorized disclosure.⁷⁰ The purpose of the Juvenile Act is to provide juvenile delinquents with supervision, care and rehabilitation; hold them accountable for their actions; and enable them to become responsible and productive community members.⁷¹ For this reason, the Juvenile Act protects juvenile records. The [Pennsylvania Juvenile Delinquency Benchbook](#) explains:

Confidentiality has always been one of the core values of the juvenile court system. In order to safeguard a young person's chances of a decent future, it is often necessary to deny or restrict access to records relating to his past and sometimes even to bury that past altogether. Accordingly, Pennsylvania law strictly limits access to court files and records in delinquency proceedings as well as to law enforcement records relating to juveniles and provides procedures for the expungement of juvenile records in appropriate cases.⁷²

The Juvenile Act specifically prohibits public access to *court and law enforcement documents and records regarding the minor defendant*.⁷³ Any records from the juvenile proceeding are filed with the clerk of courts,

⁶⁶ 23 PA. C.S. § 6113.1.

⁶⁷ 23 PA. C.S. § 6114.1: "A plaintiff may file a petition for civil contempt with the issuing court alleging that the defendant has violated any provision of an order." (Emphasis added).

When an adult PFA defendant violates the Act's provisions to pay temporary child support, pay damages or comply with any other relief, the only way the PFA plaintiff may seek enforcement is through the civil contempt process. 23 PA. C.S. §§ 6113, 6114.1.

⁶⁸ 23 PA. C.S. § 6113(c).

⁶⁹ 23 PA. C.S. § 6113(c), (d).

⁷⁰ 42 PA. C.S. § 6307.

⁷¹ 42 PA. C.S. § 6301(b)(2).

⁷² PA. JUV. CT. JUDGES COMM'N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK, § 11-3 (2008), *citing* 42 PA. C.S. § 6307, 6308 and 18 PA. C.S. § 9123.

⁷³ *See* 42 PA. C.S. §§ 6307, 6308.

instead of the prothonotary, and are not available to the public.⁷⁴ The Juvenile Act also shields from disclosure any charges or contempt convictions for violating a PFA order. Contempt for violation of a PFA order is considered an “alleged delinquent act” and treated in accordance with the Juvenile Act.⁷⁵

Minors’ PFA Orders Entered Into PFAD, But Not Violations

In PFAD, PFA orders are treated differently from PFA violations. PFA orders filed on behalf of, or against, minors are entered into PFAD. However, indirect criminal complaint violations by a minor may not be entered into PFAD, because there are several categories of PFAD users, such as advocates and certain court personnel, who are not permitted to see juvenile records. The Juvenile Act establishes who can have access to juvenile records, such as law enforcement and judges. Although information about the violation is not available in PFAD, law enforcement and judges have access to these records in other databases and court files.

It is important for prothonotaries to establish a process with the court administrator to be notified of any changes made to a PFA order in a juvenile proceeding.

Modifications and Extensions Require Close Coordination With Prothonotary

When Violated, PFA Order Can Be Extended at Juvenile Proceeding

If the court finds that a minor defendant violated a PFA order, the duration of the PFA order can be extended at the juvenile proceeding.⁷⁶ The court or juvenile probation officer must notify the prothonotary to extend the PFA order both in the court’s official PFA records and in PFAD.⁷⁷

PFA Record May Not Include Information About PFA Violation

Neither the PFA file nor PFAD may include any information about the *violation* of the PFA order by the minor defendant, as the Juvenile Act protects this information from disclosure.⁷⁸

It is important for every prothonotary to establish a process with the court administrator to ensure that the prothonotary is notified of any changes made to the terms or duration of a PFA order in a juvenile proceeding. If this critical piece of information is missed, law enforcement will be working from an outdated order.

PFA Parties May Petition to Modify

A plaintiff or defendant may petition the court to change or modify a PFA order, regardless of whether the PFA order involves a minor defendant or protected party.⁷⁹ After receiving a petition to modify a PFA order, the court will schedule a date to hear the petition. If the court makes any changes to the PFA order, the prothonotary must file the new order in the court’s official PFA records and in PFAD.

⁷⁴ Pa. R.J.C.P. 166.

⁷⁵ 23 PA. C.S. § 6114(a.2).

⁷⁶ 23 PA. C.S. § 6114(b)(4).

⁷⁷ PA. R.C.P. 1901.4(c).

⁷⁸ See 42 PA. C.S. §§ 6307, 6308.

⁷⁹ 23 PA. C.S. § 6108(d) and PA. R.C.P. 1901.8(c).

SCHOOL DISTRICTS ARE MANDATED TO ADDRESS TEEN DATING VIOLENCE

Federal and state laws impose a duty on schools to – in some measure – address teen dating violence. These laws recognize the compelling need for interaction between the courts and the education system to address abuse committed by and against teens. Enhanced communications with school resource officers and administrators could ensure that PFA orders are enforced and teen victims remain safe, and ease the challenges of crafting an effective order and adjudicating teen dating violence cases.

Title IX – Requirements For Schools Receiving Federal Funds

In relevant part, Title IX of the Education Amendments of 1972 (Title IX) imposes liability on the officials of any educational program or activity receiving federal financial assistance who know or reasonably should know about – but fail to address – sexual harassment or sexual violence.⁸⁰ Title IX applies to incidents that take place at or during school, including before and after school hours, while traveling in vehicles owned or funded by the school district, and at school-sponsored or school-related events and activities.⁸¹ Dating violence may include sexual harassment and/or sexual violence. Failure of a federally funded school or educational program to address dating violence may raise liability for that school or program.⁸²

The U.S. Department of Education enforces Title IX. Complaints may be filed with the department's Office of Civil Rights or in federal court. Generally, state court judges will not hear Title IX claims, but it is helpful for them to understand how Title IX impacts a school's response to teen dating violence victims.

Title IX imposes liability on the officials of any educational program or activity receiving federal financial assistance who know or reasonably should know about but fail to address sexual harassment or sexual violence.

School Dating Violence Policy – Pennsylvania Model

In addition to Title IX requirements, a 2010 Pennsylvania law required the Pennsylvania Department of Education, through the Office for Safe Schools, to draft a model policy to assist school districts in developing their own policies on dating violence reporting and response.⁸³ This law allows school districts to incorporate teen dating violence information into the annual health curriculum for students in grades nine through twelve.

The Pennsylvania Department of Education, along with the Pennsylvania Coalition Against Domestic Violence and the Pennsylvania Coalition Against Rape, developed and published a [Model Dating Violence Policy](#). This

⁸⁰ 20 U.S.C. §§ 1681-1688. See U.S. Dep't of Educ., Office for Civil Rts., *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep't of Educ., Office for Civil Rts., *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 2001), <http://www2.ed.gov/offices/OCR/archives/shguide/index.html>.

⁸¹ U.S. Dep't of Educ., Office for Civil Rts., *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014).

⁸² See Christine N. Carlson, *Invisible Victims: Holding the Educational System Liable for Teen Dating Violence at School*, 26 HARV. WOMEN'S L.J., 352 (2003).

⁸³ 24 P.S. § 15-1553.

model policy can be found on the Pennsylvania Department of Education’s website.⁸⁴ The policy provides procedures for working with victims who have PFA orders to ensure that the PFA order is enforced.

OTHER RELEVANT INFORMATION

Dating Abuse Starts in Adolescence

The Centers for Disease Control and Prevention reports that “a majority of victims [of contact sexual violence, physical violence or stalking] experienced their first victimization before age 25 years, with a substantial proportion experiencing victimization in childhood or adolescence.”⁸⁵ Other researchers have estimated that 1 in 3 adolescent girls is a victim of interpersonal violence.⁸⁶

A study of gay, lesbian, and bisexual adolescents found that youths involved in same-sex dating are just as likely to experience dating violence as youths involved in opposite-sex dating.⁸⁷

Adolescent Dating Abuse Carries Into Adult Relationships

The frequency and severity of abuse between adult intimate partners increase when abuse began in adolescence.⁸⁸ A 2003 study of adolescent and college-age women explained that, for victims, “less severe forms of coercive and threatening behavior and aggression provide the context for the later emergence and acceptance of more severe forms of physical and sexual assault.”⁸⁹ The study found that “victims of dating violence are three times more likely to be victimized in college when compared to students who were not victimized as adolescents.”⁹⁰

Early and effective intervention is extremely important. Intervention can help to break the cycle of abuse that follows teen victims and perpetrators into adulthood by holding teen perpetrators accountable and connecting teen victims with counseling and other services.

⁸⁴ PA. DEP’T OF EDUCATION, MODEL DATING VIOLENCE POLICY (2005), available at http://www.education.pa.gov/Documents/K-12/Safe_Schools/Model_Dating_Violence_Policy.pdf.

⁸⁵ CTRS. FOR DISEASE CONTROL & PREVENTION, DIVISION OF VIOLENCE PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING AND INTIMATE PARTNER VIOLENCE VICTIMIZATION - NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES 2011 (2014), “Interpretation.”

⁸⁶ Nat’l Council on Crime & Delinquency, *Interpersonal and Physical Dating Violence Among Teens*, FOCUS 1 (Sept. 2008), available at http://www.nccdglobel.org/sites/default/files/publication_pdf/focus-dating-violence.pdf (internal cites omitted).

⁸⁷ Carolyn Tucker Halpern et al., *Prevalence of Partner Violence in Same-Sex Romantic and Sexual Relationships in a National Sample of Adolescents*, 35 J. ADOLESCENT HEALTH 124-131 (2004).

⁸⁸ Am. Bar Ass’n, Nat’l Teen Dating Violence Prevention Initiative, *Teen Dating Violence Facts* (2006) (citing S.L. Feld & M.A. Strauss, *Escalation and Desistance of Wife Assault in Marriage*, 27 CRIMINOLOGY 141-161 (1989)).

⁸⁹ Paige Hall Smith et al., *A Longitudinal Perspective on Dating Violence Among Adolescent and College-Age Women*, 93 AM. J. PUB. HEALTH 1104 (2003).

⁹⁰ *Id.*

Dating Abuse Has Serious Health Ramifications for Victims

In addition to the physical violence, teen victims of dating abuse are more likely than their non-abused peers to exhibit risky behavior that can lead to serious health problems.⁹¹ Research published by the American Medical Association shows a strong link between teen dating violence and unhealthy behaviors, such as drinking, drug use, unhealthy dieting, risky sexual behavior and suicide.⁹²

Dating Abuse is Under-Reported

A 2005 study commissioned by Liz Claiborne Inc. shows that only 33 percent of teens, who were in an abusive relationship, told anyone about the abuse.⁹³ Only 27 percent said that they would talk to a school counselor or social worker and only 25 percent would call an abuse hotline.⁹⁴

Dating Abuse Can Be Fatal

Below are a few examples that illustrate how dating abuse escalates and can become lethal after a break-up.

In Lancaster County, 17-year-old Michael Ryan Hollow shot his girlfriend, 17-year-old Mae Marie Davis, then committed suicide. Davis was still alive when they were found, but died a few hours later at the hospital. According to reports, the perpetrator was a high school dropout, in and out of rehabilitation, and had previously threatened suicide. The victim had broken up with and obtained a PFA order against him, but they reconciled shortly before the murder-suicide.⁹⁵

Shawn Bender, 19 years old, killed his 14-month-old daughter, Shavissa, and critically injured the baby's mother, Jaleesa Hall, when he rammed his car into the car in which they were riding. The murder happened in Philadelphia, shortly after Bender and Hall were scheduled to exchange custody of Shavissa. But at the exchange, an argument ensued, and Hall left with their daughter. The boyfriend of Hall's sister, 17-year-old Charles Johnson, was driving, giving Hall a ride. Bender chased the car on a busy highway and rammed it four times before the car crashed into the closed entrance of a pedestrian tunnel. The crash also killed Johnson and injured two other passengers.⁹⁶

Emily Rachel Silverstein, a 19-year-old sophomore at Gettysburg College, lost her life at the hands – literally – of her ex-boyfriend, 21-year-old Kevin Schaffer, also a Gettysburg College student. Schaffer beat, stabbed and strangled Silverstein to death. The couple had broken up three weeks before her death.⁹⁷

⁹¹ Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 J. AM. MEDICAL ASS'N 572 (2001), available at <http://jama.ama-assn.org/cgi/reprint/286/5/572>.

⁹² *Id.*

⁹³ Omnibuzz Topline Findings – Teen Relationship Abuse Research, TRU- Teenage Research Unlimited, available at <http://www.breakthecycle.org/sites/default/files/pdf/survey-lina-2005.pdf>. See also, Loveisrespect.org, Dating Abuse Statistics, available at http://www.loveisrespect.org/pdf/Dating_Abuse_Statistics.pdf

⁹⁴ *Id.*

⁹⁵ PA. COALITION AGAINST DOMESTIC VIOLENCE, 2008 DOMESTIC VIOLENCE FATALITY REPORT 16 (2008), available at <https://www.pcadv.org/resources/fatalities>.

⁹⁶ *Id.* at 19; see also 1-Year-Old Dies From Crash injuries, ABC ACTION NEWS (July 17, 2008), available at <http://abclocal.go.com/wpvi/story?section=news/local&id=6270331>. Bender was convicted of homicide and sentenced to life in prison in 2010.

⁹⁷ PA. COALITION AGAINST DOMESTIC VIOLENCE, 2009 DOMESTIC VIOLENCE FATALITY REPORT (2009), available at <https://www.pcadv.org/resources/fatalities> see also The Emily Fund, <http://www.emilyfund.org/>. Schaffer pleaded guilty in 2010 and was sentenced to at least 26 years in prison.

Perpetrators' Use of Technology to Abuse, Stalk, and Harass is Pervasive in Teen Relationships

Teen abusers commonly use technology to control, stalk, harass and intimidate their victims. A comprehensive study on teen dating violence and technology revealed some startling statistics about the prevalence of technology abuse in teen dating relationships. Of the teens surveyed who were or had previously been in a dating relationship:

- 1 in 4 reported being called names, harassed or put down by a partner through cell phones and texting.⁹⁸
- 1 in 3 reported being text-messed between 10 and 30 times per hour by a partner seeking to find out where they were, what they were doing, or whom they were with.⁹⁹
- 1 in 10 reported being threatened physically via email, instant message, text, or Internet chat by their boyfriend or girlfriend.¹⁰⁰

Sexting¹⁰¹ is also used as a means to control, humiliate, or otherwise harass a dating partner. Teen abusers often pressure and harass a partner until the images are sent, and then threaten to publicly post the pictures or send the pictures to others.¹⁰² Twelve percent of teen girls who have sent sexually suggestive messages or images say they felt “pressured” to do so.¹⁰³ Eleven percent of teens report that a partner has shared private or embarrassing pictures or videos of them.¹⁰⁴ Teens may send these sexually suggestive or nude pictures, even though there may be criminal ramifications for this act,¹⁰⁵ because they are scared of their partners.¹⁰⁶

Abusers who share intimate images to harass and humiliate others are subject to a 2014 criminal statute: *Unlawful dissemination of intimate image*.¹⁰⁷ The crime penalizes a person who posts photographs, videotapes, films or computer images of their current or former sexual or intimate partner in the nude or engaged in sexual conduct without that person’s consent with the intent to harass, annoy or alarm the other person. The penalties

⁹⁸ TRU, *Tech Abuse in Teen Relationships Study*, 8 (2007), available at <http://www.breakthecycle.org/sites/default/files/pdf/survey-lina-tech-2007.pdf>.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 9.

¹⁰¹ Sexting is defined as “the sending of sexually explicit messages or images by cellphone,” Merriam-Webster Dictionary available at <http://www.merriam-webster.com/dictionary/sexting>.

¹⁰² The Nat’l Campaign to Prevent Teen & Unplanned Pregnancy & CosmoGirl.com, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008), available at <https://powertodecide.org/what-we-do/information/resource-library/sex-and-tech-results-survey-teens-and-young-adults>. 1 in 5 teen girls and 1 in 10 younger teen girls (ages 13 to 16) have electronically sent or posted nude or semi-nude photos or videos of themselves to a dating partner. More than 1 in 3 teen girls (37 percent) have sent or posted sexually suggestive text, email or IM (instant messages). More than half of teen girls (51 percent) say pressure from a guy is a reason girls send sexy messages or images, while only 18 percent of teen boys say pressure from a girl is a reason.

¹⁰³ *Id.*

¹⁰⁴ RU, *Tech Abuse in Teen Relationships Study*, 9 (2007), available at <http://www.breakthecycle.org/sites/default/files/pdf/survey-lina-tech-2007.pdf>.

¹⁰⁵ See Pa. H.B. 815 (effective Dec. 14, 2012), 18 Pa. C.S. §§ 6312(f) and 6321. 18 Pa. C.S. §§ 6312(f) and 6321 (2012 Act 198) available at <http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2012&sessInd=0&act=198>. See also <http://www.wtae.com/article/greensburg-teens-facing-child-porn-charges-for-sexting/7440430>.

¹⁰⁶ 18 Pa. C.S. § 6321. A minor who sends a “sext” message may face charges ranging from a summary offense to a second-degree misdemeanor, depending on the age of the sender or recipient and the intent of the minor in sending or distributing the photo.

¹⁰⁷ Pa. C.S. § 3131.

for posting images without consent are a misdemeanor of the second degree if the images are of an adult and a misdemeanor in the first degree if the images are of a minor.¹⁰⁸ Thus victims have the ability to pursue criminal charges against the abuser and to seek money damages for actual losses and injury, attorney fees and court costs, and other relief necessary.¹⁰⁹

Early and Effective Court Intervention Lowers Dating Abuse Recidivism

While the judicial system's focus is rightly on protecting adolescent victims and addressing their needs, the court system must also provide appropriate intervention and programming designed to rehabilitate teen dating violence offenders. Early intervention by the court system to deter and rehabilitate offenders is critical to breaking the cycle of violence that teen perpetrators often carry into adulthood.

In guiding courts to adopt early intervention programs for teen dating violence perpetrators, the National Center for State Courts cites a study of specialized juvenile domestic and family violence court programs in three California counties.¹¹⁰ The study examined the effects of certain kinds of interventions (zero tolerance approach, extensive conditions and no formal protocol). The court-based intervention programs included an intake assessment process, specialized prosecution and defense, a dedicated docket, intensive supervision, offender programs and victim services. In all counties, the court placed extensive probation conditions on the offender. The study found that:

- Juveniles who successfully completed the probation program were less likely to recidivate.
- The specialized intervention programs had a deterrent effect on first-time offenders.¹¹¹

Thus, the study concluded, more courts need strategies to increase successful completion of court programs and probation to rehabilitate teen dating violence perpetrators, and break the cycle of abuse.

Exposure to Domestic Violence in the Home is Correlated with Future Victimization and/or Perpetration

Justice system professionals working with juveniles should realize that some offenders may have symptoms of trauma, because of childhood exposure to domestic violence. The National Survey of Children's Exposure to Violence, conducted by the Centers for Disease Control and Prevention, reports:

- 1 in 9 children were exposed to some form of family violence in the past year.
- 1 in 15 children were exposed to domestic violence between parents, or between a parent and that parent's partner.
- 1 in 4 children were exposed to at least one form of family violence during their lifetimes.¹¹²

The survey concludes that exposure to family violence is highly correlated with future victimization or perpetration of violence.¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* and 18 Pa. C.S. §3131.

¹¹⁰ Brenda Uekert et al., U.S. Dep't of Justice, *Juvenile Domestic and Family Violence: The Effects of Court-Based Intervention Programs on Recidivism* 9 (Dec. 2006).

¹¹¹ *Id.*

¹¹² Sherry Hamby et al., Ctrs. for Disease Control & Prevention, *National Survey of Children's Exposure to Violence* (Oct. 2011), <https://www.ncjrs.gov/pdffiles1/ojdp/232272.pdf>.

¹¹³ *Id.*; see also Nancy Glass et al., *Adolescent Dating Violence: Prevalence, Risk Factors, Health Outcomes, and Implications*

Teens exposed to domestic violence may become involved in the juvenile justice system as perpetrators of dating violence or as victims of dating violence who perpetrate other crimes as a result of their victimization. For example, a perpetrator of teen dating violence may force the victim to commit a juvenile offense such as underage drinking, prostitution, or drug trafficking.

Juvenile justice professionals should question offenders as to whether they were exposed to domestic violence or are victims of teen dating violence.

To better address the needs of teen victims and perpetrators, juvenile justice system professionals should ask questions to determine if a juvenile offender was exposed to domestic violence or is a victim of teen dating violence.

Approaches that acknowledge the relationship between trauma and perpetration can help break the cycle of violence. Because of the rehabilitative objective of juvenile justice, professionals must seek to:

- address any underlying trauma
- provide the juvenile with suitable resources
- hold the juvenile accountable for the offense

For more information about child exposure to domestic violence, and appropriate responses of the justice system, see [Chapter XII, Minors and Domestic Violence](#).

EMERGING PRACTICES

Expand Options for Disposition and Rehabilitative Services

The Pennsylvania Juvenile Court Judges Commission encourages judges to become familiar with rehabilitative services available for juveniles and to learn from dispositional successes and failures.¹¹⁴ The Commission also suggests that judges take the lead in disposition program planning and development.¹¹⁵

Juvenile batterers' intervention programs attempt to reeducate juveniles about healthy relationships, communication, respect, gender roles, the effects of domestic violence on children and teens, and issues of power and control.¹¹⁶

for Clinical Practice, 32 J. OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING 227, 234 (2003) (citing L.L. Dahlberg, *Youth Violence in the United States: Major Trends, Risk Factors, and Prevention Approaches*, 14 AM. J. PREVENTIVE MED. 259 (1998)) (explaining that their study of 250 urban high school students revealed that 51 percent of the students who reported experiencing dating violence also reported that they had witnessed abuse by their parent or guardian).

¹¹⁴ PA. JUV. CT. JUDGES COMM'N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHMARK, 114 (2008).

¹¹⁵ *Id.*

¹¹⁶ Kirstine Herman, Ctr. for Ct. Innovation, *Youth Dating Violence, Can a Court Help Break the Cycle?* (2004), available at <http://www.courtinnovation.org/sites/default/files/youthdatingviolence.pdf>.

Juvenile batterer intervention programs have only recently emerged, and there is little research available regarding strategies that improve their effectiveness at reducing recidivism.¹¹⁷ However, the existing research suggests that these programs can be successful when appropriately designed.¹¹⁸ In one particularly successful model, The Brooklyn (New York) Youthful Offender Domestic Violence Court partners with a local community organization, STEPS to End Family Violence, to offer a free 12-week program for teen offenders.¹¹⁹

Anger Management Programs Do Not Address Abusive Behaviors

Courts should not equate anger management with batterers' intervention programs. Anger management programs are directed at assisting a generally angry or out-of-control individual to gain control over angry outbursts. Perpetrators of dating abuse selectively and intentionally use abuse and coercive tactics, including anger, to intimidate and control an intimate partner. Programs promoting anger management techniques do not address the use of anger as a purposive strategy of abuse and, thus, are not appropriate for perpetrators of dating abuse.¹²⁰

Juvenile Offenders Can Benefit From Intense Supervision

Batterers' counseling may be most effective when combined with other justice system interventions, including frequent court contact. In a study of coordinated community response effectiveness on adult perpetrators, more offender involvement with prosecution, probation and counseling was related to less recidivism.¹²¹ Frequent court reviews also appear to assist in treatment compliance.¹²²

In all, it is important for courts to take a balanced and varied approach to rehabilitation of teen dating violence perpetrators to achieve the best result for each offender. The goals of a rehabilitative approach are to break patterns of abuse and reduce recidivism by offenders, without compromising victim safety.

Juvenile Domestic Violence Courts Include Services for Offenders, Victims

Juvenile domestic violence courts have been established in response to the increase in civil and criminal cases involving teen dating violence and family abuse initiated by teens.¹²³ These courts are sometimes called dating violence or youth violence courts. The courts focus on two areas: "ensuring accountability by addressing the behavior of the minor who is committing the abusive act(s) and ensuring safety and providing support for the

¹¹⁷ See Andrew Klein, Nat'l Inst. of Just., *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges*, Ch. 8-3: Intervention Programs (2009), available at <http://www.nij.gov/topics/crime/intimate-partner-violence/practical-implications-research/ch8/couples-counseling.htm>. One reason for the absence of research is the lack of public recognition of teen dating violence as a problem separate and distinct from generalized teen violence. Dean Peacock & Emily Rothman, *Working With Young Men Who Batter: Current Strategies and New Directions*, 3-4 (Nov. 2001), available at <https://vawnet.org/material/working-young-men-who-batter>.

¹¹⁸ Brenda Uekert et al., U.S. Dep't of Justice, *Juvenile Domestic and Family Violence: The Effects of Court-Based Intervention Programs on Recidivism* 8-10 (Dec. 2006).

¹¹⁹ Kirstine Herman, Ctr. for Ct. Innovation, *Youth Dating Violence, Can a Court Help Break the Cycle?* (2004).

¹²⁰ See Edward Gondolf & David Russell, *The Case Against Anger Control for Batterers*, 9-3 RESPONSE 2, 2-5 (1986).

¹²¹ Daniel Saunders & Richard Hamill, U.S. Dep't of Justice, *Abuse Against Women: Synthesis of Research on Offender Intervention*, 20 (2003), NCJ 201222, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201222.pdf> (citing Christopher Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. FAMILY ABUSE 263-284 (1998)).

¹²² *Id.* at 20 (citing Edward Gondolf, *Batterer Programs: What We Know and Need to Know*, 14 J. INTERPERSONAL ABUSE 41-61 (1997)).

¹²³ Judicial Branch of California, Domestic Violence/Dating/Youth Courts, <http://www.courts.ca.gov/5987.htm>.

victim.”¹²⁴ The inclusion of services for victims is part of what distinguishes domestic violence courts from other collaborative courts.

- California’s juvenile domestic violence courts feature a dedicated calendar, screening for domestic or dating violence, a non-adversarial team approach to court processing, judicial and probation supervision, targeted services and programs for the offender, and victim services.¹²⁵
- The Youthful Offender Domestic Violence Court in Brooklyn, NY, exclusively hears misdemeanor domestic violence cases involving teenagers between 16 and 19 years old.¹²⁶ This court includes a dedicated judge and courtroom staff equipped to address the unique needs that teen complainants bring to court. The court attempts to engage teenagers and provide services designed to halt the abuse by linking victims to advocacy and community services. The court also offers a free, 12-week, intensive reeducation program for teen offenders.¹²⁷

Informed judicial decision-making based on knowledge of adolescent development and relationship abuse involving teens is a crucial aspect of any specialized teen dating violence court. A single criminal court judge and a district attorney assigned to all teen dating violence cases ensures consistency, which can lead to better outcomes for both perpetrators and victims.¹²⁸

Judges Can Look for Signs of Dating Abuse in Cases Involving Teens

The American Bar Association, through its National Teen Dating Abuse Prevention Initiative, set forth *Warning Signs for Judges and Court Personnel*.

When teen victims and perpetrators are in court, judges may see the following behaviors:¹²⁹

- The victim seems extremely anxious, embarrassed and hesitant to talk about what happened to them
- When questioned, the accused male suggests that men are superior to women
- During testimony, there is evidence that one of the teens in the relationship plays an excessively protective role
- The accused verbally taunts the victim
- The accused uses race, gender, or sexual orientation slurs
- The victim appears extremely fearful of the accused
- The accused is extremely nonchalant about or disrespectful of court authority and combative towards the judge, the attorneys, other court personnel and other adults.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ New York State Unified Court System, http://www.nycourts.gov/COURTS/problem_solving/index.shtml.

¹²⁷ Ctr. for Ct. Innovation, *Youth Domestic Violence Court Overview*, available at <http://www.courtinnovation.org/project/youth-domestic-violence-court>.

¹²⁸ *Id.*

¹²⁹ Am. Bar Ass’n, Nat’l Teen Dating Violence Prevention Initiative, *Teen Dating Abuse Prevention Recommendations for Judges and Court Personnel*, 15 (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/unmet/teenabuseguide.authcheckdam.pdf>. The ABA’s prevention recommendations were drafted by teams of teenagers from across the nation, with assistance from their adult teammates, while attending the November 2004 “Teen Dating Violence Prevention Summit” in Washington, D.C.

The Judge as Community Leader

As local and justice system leaders, judges play an essential role in addressing teen dating violence in their communities. Judges can raise awareness about teen dating violence and its effects, and can affect how the court system and others can intervene and respond. Judges can share information about available resources with litigants and colleagues.

REFER TEEN VICTIMS TO DOMESTIC VIOLENCE PROGRAMS

Early intervention is the key to preventing future victimization. Connecting teen victims to domestic violence services helps them recognize and avoid patterns of abuse. Every county in Pennsylvania is served by a domestic violence center equipped with the knowledge and resources to provide such services as counseling, safety planning, and advocacy for victims of dating violence.

PCADV supports a network of 60 domestic violence programs serving all 67 counties in the commonwealth. *Anyone may refer a victim to a local domestic violence center.* These centers offer hotline support 24-hours a day, seven days a week, in addition to teen support groups and safety planning assistance. The center's advocates can also help teens and their families navigate the court system. *Domestic violence service center hotline numbers can be found on the PCADV website at <http://www.pcadv.org/Find-Help/>.*

THE NATIONAL TEEN DATING VIOLENCE HELPLINE
1-866-331-9474

ONLINE CHAT AT
[HTTP://WWW.LOVEISRESPECT.ORG/](http://www.loveisrespect.org/)

TEXT: LOVEIS TO 22522

CHAPTER XIV: THE PROTECTION OF VICTIMS OF SEXUAL VIOLENCE OR INTIMIDATION ACT

TABLE OF CONTENTS

CHAPTER GOALS.....	3
THE PURPOSE OF THE PSVI ACT	3
PSVI PROCEDURE	3
Courts to Provide Forms and Clerical Assistance	3
Jurisdiction and Venue.....	3
Jurisdiction	3
Venue	4
Three Different Types of PSVI Orders.....	4
Plaintiff Filing Fees Prohibited.....	4
Assessment of Fees and Costs Against Defendant	4
Emergency PSVI proceedings.....	4
Temporary PSVI Proceedings.....	5
Relief	5
Service	6
Juveniles as PSVI Litigants.....	6
Statewide Registry.....	6
PARTIES COVERED BY THE PSVI ACT.....	6
WHAT CONSTITUTES SEXUAL VIOLENCE UNDER THE PSVI ACT?.....	7
WHAT CONSTITUTES INTIMIDATION UNDER THE PSVI ACT?.....	7
PROVING SEXUAL VIOLENCE OR INTIMIDATION	7
PROCEDURE- FINAL PSVI HEARINGS.....	9

RELIEF AVAILABLE UNDER THE PSVI ACT	9
DURATION AND EXTENSION OF ORDERS.....	9
STATUTORY SAFETY CONSIDERATIONS IN PSVI PROCEEDINGS	10
ENFORCEMENT	10

CHAPTER XIV: THE PROTECTION OF VICTIMS OF SEXUAL VIOLENCE OR INTIMIDATION ACT

CHAPTER GOALS

The purpose of this chapter is to inform the reader about the Protection of Victims of Sexual Violence or Intimidation Act (PSVI Act), which took effect on July 1, 2015. The Act establishes the procedure for obtaining a PSVI order, defines sexual violence and intimidation, and delineates persons for whom the Act applies. Sexual violence or intimidation does not have to rise to the level of a crime to fall within the realm of the PSVI Act.

THE PURPOSE OF THE PSVI ACT

The PSVI Act finds that sexual violence is the most heinous crime against a person other than murder and that it, and intimidation, can inflict humiliation, degradation and terror on the victim.¹ Victims of sexual violence or intimidation desire safety and protection from future interactions with their offender, regardless of whether they see criminal prosecution.² The Act provides victims with a civil remedy requiring the offender to say away from them, as well as other appropriate relief.³

PSVI PROCEDURE

Courts to Provide Forms and Clerical Assistance

Pennsylvania courts are required to provide simplified PSVI forms and clerical assistance to assist unrepresented PSVI litigants with the writing and filing of PSVI petitions in both English and Spanish.⁴ Courts are also required to provide plaintiffs with written and oral referrals in both English and Spanish to local sexual assault services in the case of sexual violence and to the local legal services office and to the county bar association's lawyer referral service in the case of sexual violence or intimidation.⁵

Jurisdiction and Venue

Jurisdiction

The right of the plaintiff to relief under the PSVI Act is not affected by the defendant's absence from Pennsylvania or the defendant's non-residence in Pennsylvania provided that the court has personal jurisdiction over the defendant in accordance with Pennsylvania's long-arm statute.⁶

¹ 42 Pa.C.S. §62A02.

² Id.

³ Id.

⁴ 42 Pa.C.S. §62A05(e)(1).

⁵ 42 Pa.C.S. §62A05(e)(2).

⁶ 42 Pa.C.S. §62A05(f).

Venue

A PSVI action may be brought in a county where the plaintiff resides, either temporarily or permanently, where the plaintiff is employed, where the defendant may be served or where the sexual violence or intimidation occurred.⁷

Three Different Types of PSVI Orders

There are three different types of orders victims of sexual violence or intimidation can obtain under the PSVI Act: emergency, temporary, and final orders.

- Emergency PSVI protection orders are ex parte and typically issued on nights and weekends by magisterial or municipal court judges when the court of common pleas is unavailable.
- Temporary protection orders are also ex parte, and are issued by court of common pleas judges during regular business hours.
- Final PSVI orders are issued by the court of common pleas after the defendant is given notice and the opportunity to be heard. A final PSVI order can be entered after by agreement or after a hearing.

Plaintiff Filing Fees Prohibited

The PSVI Act prohibits courts from charging filing fees or costs to plaintiffs.⁸ No costs or fees shall be associated with the “filing, issuance, registration or service of a petition, motion, complaint, order or any other filing.”⁹ The prohibited fees include, but are not limited to, those associated with modifying, withdrawing, dismissing or certifying copies of a petition, motion, complaint, order or any other filing, as well as any judicial surcharge or computer system fee.¹⁰ Additionally, plaintiffs may not be charged “any fees or costs associated with filing a motion for reconsideration or an appeal.”¹¹

Assessment of Fees and Costs Against Defendant

When a final PSVI order is granted, fees and costs shall be assessed against the defendant.¹² The court is required to waive fees and costs upon a showing of good cause or when the court makes a finding that the defendant is not able to pay the fees and costs.¹³

Emergency PSVI proceedings

When the court is unavailable, generally after the close of business hours and on the weekends, the minor judiciary may enter an emergency PSVI order after an ex parte hearing.¹⁴ A plaintiff must file a petition and show “good cause”.¹⁵ Immediate and present danger posed by the defendant to the victim shall constitute

⁷ Pa.R.C.P. 1952.

⁸ 42 Pa.C.S. §62A05(c).

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ 42 Pa.C.S. §62A09.

¹⁵ Id.

“good cause” for an emergency PSVI order.¹⁶ An emergency PSVI order can contain the same relief provided for in a temporary order.¹⁷

An emergency PSVI order expires at the close of the next business day when the court is available. The PSVI Act directs the court to schedule hearings on orders entered as emergencies.¹⁸ The court shall review and continue in effect orders that are necessary to protect the plaintiff or another individual as appropriate, until the hearing, at which time the plaintiff may seek a temporary order from the court.¹⁹ After an emergency order is issued, and any documentation in support thereof, it shall be immediately certified to the court.²⁰ The certification to the court shall have the effect of commencing proceedings under the PSVI Act.²¹

When an emergency PSVI order is issued, the hearing officer shall provide the plaintiff instructions regarding the commencement of proceedings in the court of common pleas as well as the process for how to initiate a contempt charge should the emergency order be violated.²² The hearing officer shall also advise the plaintiff of the existence of rape crisis centers in the county or in nearby counties in the case of sexual violence and inform the plaintiff of the availability of legal assistance without cost if the plaintiff is unable to pay for them in the case of sexual violence or intimidation.²³

Temporary PSVI Proceedings

The person seeking protection under the PSVI Act must file a petition alleging the need for protection from the defendant with respect to sexual violence or intimidation.²⁴ The court shall conduct an ex parte proceeding based on the filing of a petition.²⁵ The court may enter a temporary order if it deems it necessary to protect the plaintiff or other individual, when it finds them in immediate and present danger from the defendant.²⁶ The temporary order shall remain in effect until modified or terminated by the court after notice and a hearing.²⁷

Relief

The relief a that a judge may order as part of a temporary PSVI order includes the following:

- Prohibiting the defendant from having any contact with the victim, including but not limited to, restraining the defendant from entering the victim’s residence, place of employment, business or school.
- Prohibiting indirect contact through third parties and also prohibiting direct or indirect contact with other designated persons.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id., Pa.R.C.P. 1953(b).

²² Id.

²³ Id.

²⁴ 42 Pa.C.S. §62A05(a), Pa.R.C.P. 1953(a).

²⁵ 42 Pa.C.S. §62A06(b).

²⁶ Id.

²⁷ Id.

- Any other appropriate relief sought by the plaintiff.²⁸

Service

Service of PSVI petitions, notices and orders scheduling the hearing, and temporary order,s shall be made by the sheriff or a competent adult by handing a copy to the defendant, an adult family member or person in charge at the defendant's residence, the person in charge of defendant's workplace, or defendant's agent.²⁹ Under no circumstances shall the plaintiff be obligated to serve the petition or protection order.³⁰ In the case of a minor victim of sexual violence, a copy of the petition and order shall be served upon the county agency and the Department of Human Services.³¹

Juveniles as PSVI Litigants

A parent, guardian ad litem, or adult household member may bring a PSVI claim on behalf of a minor child.³² A minor can also be named a respondent/defendant in a PSVI action and will be subject to the provisions of Juvenile Act for any violations.³³ A juvenile respondent must also be represented by a guardian to supervise and control the conduct of the action on that minor's behalf for it to be a valid.³⁴

Statewide Registry

Once a PSVI temporary or final order has been issued, or any subsequent order withdrawing, granting or dismissing a PSVI order has been issued, the prothonotary shall send, on a form prescribed by the Pennsylvania State Police, a copy of an order to the Statewide registry so that it is received within 24 hours of the entry of the order.³⁵ The registry, otherwise known as the Protection From Abuse Database (PFAD), is available at all times to law enforcement officers, dispatchers and the courts to inform them of the existence and terms of PSVI orders involving any defendant.³⁶ Emergency PSVIs are not included in the registry.

PARTIES COVERED BY THE PSVI ACT

1. Plaintiff

Under the PSVI Act, a petition may be filed by any of the following:

- an adult or emancipated minor seeking relief for themselves
- a parent, adult household member or guardian ad litem seeking relief on behalf of minor children
- a guardian of the person of an adult who has been declared incompetent seeking relief for the incompetent adult³⁷

2. Defendant

²⁸ Id.

²⁹ Pa.R.C.P. 1954, Pa.R.C.P. 1930.4(a).

³⁰ Id.

³¹ 42 Pa.C.S. §62A05(d)(5).

³² 42 Pa.C.S. §62A05(a).

³³ 42 Pa.C.S. §62A14(c).

³⁴ Pa.R.C.P. §2027.

³⁵ 42 Pa.C.S. §62A04(c)(3).

³⁶ 42 Pa.C.S. §62A04(c)(4).

³⁷ 42 Pa.C.S. §62A05(a).

A PSVI petition may be filed against a person who commits either sexual violence or intimidation against the plaintiff and is who is not a family or household member.³⁸ A “family or household member” is defined as:

- spouses or persons who have lived as spouses
- parents and children
- other persons related by consanguinity or affinity
- current or former sexual or intimate partners
- persons who share biological parenthood³⁹

WHAT CONSTITUTES SEXUAL VIOLENCE UNDER THE PSVI ACT?

Sexual violence, as defined in the PSVI Act, is conduct constituting a crime under any of the following provisions between persons who are not family or household members:

- Sex offenses⁴⁰
- Endangering the welfare of children if the offense involved sexual contact with the victim
- Corruption of minors
- Sexual abuse of children
- Unlawful contact with a minor
- Sexual exploitation of children⁴¹

WHAT CONSTITUTES INTIMIDATION UNDER THE PSVI ACT?

Intimidation, as defined under the PSVI Act, is conduct constituting a crime under either of the following provisions between persons who are not family or household members:

- Harassment where the conduct is committed by a person 18 years of age or older against a person under 18 years of age
- Stalking where the conduct is committed by a person 18 years of age or older against a person under 18 years of age⁴²
- The age of both the victim and defendant need to be considered when filing for an intimidation order, unlike a sexual violence protection order or a protection from abuse order.

PROVING SEXUAL VIOLENCE OR INTIMIDATION

To prove sexual violence or intimidation, a victim must first assert that they are a victim of sexual violence or intimidation committed by the defendant.⁴³ The victim must then prove by a preponderance of the evidence that they are at continued risk of harm from the defendant.⁴⁴

³⁸ 42 Pa.C.S. §62A03.

³⁹ Id.

⁴⁰ Excludes sexual intercourse with an animal and conduct relating to sex offenders.

⁴¹ 42 Pa.C.S. §62A03.

⁴² Id.

⁴³ 42 Pa.C.S. §62A06(1).

⁴⁴ 42 Pa.C.S. §62A06(2).

PROCEDURE- FINAL PSVI HEARINGS

The PSVI Act requires that, within 10 business days of the filing of a PSVI petition, a hearing shall be held before the court, at which time the plaintiff must prove allegations of either sexual violence or intimidation by a preponderance of the evidence.⁴⁵ The decision of the court at the final hearing may consist of only general findings of sexual violence and/or intimidation, but shall dispose of all claims for relief.⁴⁶ No motion for post-trial relief may be filed to the final order.⁴⁷

RELIEF AVAILABLE UNDER THE PSVI ACT

The PSVI Act grants courts the authority to issue an order or approve a consent agreement to protect the plaintiff, or another individual as appropriate, from the defendant.⁴⁸ An order or consent agreement may include:

- Prohibiting the defendant from having any contact with the victim, including but not limited to, restraining the defendant from entering the victim's residence, place of employment, business or school. This may include prohibiting indirect contact through third parties and also prohibiting direct or indirect contact with other designated persons.
- Granting any other appropriate relief sought by the plaintiff.⁴⁹

DURATION AND EXTENSION OF ORDERS

A PSVI order or approved consent agreement shall be for a fixed period of time not to exceed three years.⁵⁰ The court may amend its order or agreement at any time upon subsequent petition filed by either party.⁵¹ Extensions or orders may also be granted under certain circumstances. A petition for an extension must be filed where the defendant is afforded notice and a hearing is scheduled.⁵² At the hearing on the extension petition the court would need to make a finding that the extension is necessary because the defendant engaged in one or more acts or finds some other circumstances that, in the discretion of the court, demonstrate a continued risk of harm to the victim.⁵³ Extensions of orders may also be granted if a contempt of the order or petition has been filed, but the hearing has not occurred before the expiration of the protection order.⁵⁴ Under these circumstances, the order shall be extended, at a minimum, until the disposition of the contempt petition.⁵⁵

When a defendant is, or was, incarcerated and will be released from custody in the next 90 days or has been released from custody within the past 90 days, a plaintiff does not need to show that the defendant engaged in one or more acts that indicate a continued risk of harm to the victim in order to obtain an extension or

⁴⁵ 42 Pa.C.S. §62A06(a).

⁴⁶ Pa.R.C.P. 1957.

⁴⁷ Id.

⁴⁸ 42 Pa.C.S. §62A07(a).

⁴⁹ 42 Pa.C.S. §62A07.

⁵⁰ 42 Pa.C.S. §62A07(c).

⁵¹ Id.

⁵² 42 Pa.C.S. §62A0(d)(1).

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

subsequent protection order.⁵⁶ There shall be no limitation on the number of extensions that the court may grant.⁵⁷

STATUTORY SAFETY CONSIDERATIONS IN PSVI PROCEEDINGS

1. PSVI Court Protection of Victim's Location

The PSVI Act includes a provision that allows a court to protect the confidentiality of a victim's address, permanent or temporary, telephone number, and demographic information when they find that the defendant poses a continued risk of harm to the victim.⁵⁸ This provision also maintains the confidentiality of a rape crisis center's address.⁵⁹ Victims of sexual violence are also able to participate in the Address Confidentiality Program (ACP) for victims of domestic violence, sexual assault or stalking.⁶⁰

2. Sexual Assault Advocate Privilege and Court Accompaniment

Sexual assault counselors have long had confidential communications with the victims with whom they work.⁶¹ The PSVI Act reiterates their confidentiality when it states that a sexual assault counselor who is present during sexual assault counseling or advocacy shall not be competent nor permitted to testify, release records of or to otherwise disclose confidential communications made to or by the counselor by or to the victim.⁶² The only exception is when a victim of sexual assault waives the privilege in a signed writing prior to the testimony or disclosure.⁶³ The PSVI Act also authorizes a sexual assault counselor to accompany and provide assistance to a plaintiff in any legal proceeding or hearing under the Act.⁶⁴

ENFORCEMENT

The police or sheriff shall arrest a defendant, without warrant upon probable cause, when the defendant violates any relief provision found in a PSVI order.⁶⁵ An arrest for a violation of a PSVI order is mandatory, and defendants who are arrested shall be taken before the court in the judicial district where the contempt is alleged to have occurred without unnecessary delay.⁶⁶ A hearing on the alleged violation shall be scheduled within ten business days of the filing of the charge.⁶⁷

When a judge holds a defendant in indirect criminal contempt of an order, the judge can order:

- A prison term of up to six months and a fine of not less than \$300 and not more than \$1,000⁶⁸

⁵⁶ 42 Pa.C.S. §62A07(f).

⁵⁷ 42 Pa.C.S. §62A07(d)(1).

⁵⁸ 42 Pa.C.S. §62A11.

⁵⁹ Id.

⁶⁰ 23 Pa.C.S. §§6701-6713. For more information on the ACP, see [Chapter III: The PFA Act](#). Survivors apply through their local domestic violence or rape crisis program.

⁶¹ 42 Pa.C.S. §5945.1.

⁶² 42 Pa.C.S. §62A16(a)(1).

⁶³ Id.

⁶⁴ 42 Pa.C.S. §62A10. For more information on federal restrictions on electronic disclosure see [Chapter III: The PFA Act](#).

⁶⁵ 42 Pa.C.S. §62A12(a).

⁶⁶ 42 Pa.C.S. §62A12(b).

⁶⁷ 42 Pa.C.S. §62A12(e).

⁶⁸ 42 Pa.C.S. §62A14(d)(2)(i).

- Supervised probation for a term up to six month and a fine of not less than \$300 and not more than \$1,000⁶⁹
- An order for any other relief provided for in the PSVI Act⁷⁰

Upon the conviction of an indirect criminal contempt, and at the request of a plaintiff, the court shall also grant an extension of the protection order for an additional term.⁷¹ Additionally, a plaintiff may file for private criminal complaint against a defendant alleging indirect criminal contempt of an order, as well as file for a civil contempt alleging that defendant violated a provision of the order.⁷²

⁶⁹ 42 Pa.C.S. §62A14(d)(2)(ii).

⁷⁰ 42 Pa.C.S. §62A14(d)(2)(iii).

⁷¹ 42 Pa.C.S. §62A14(d)(3).

⁷² 42 Pa.C.S. §§62A13; 62A15.

CHAPTER XV: DOMESTIC VIOLENCE LETHALITY FACTORS

TABLE OF CONTENTS

CHAPTER GOALS.....	2
DOMESTIC VIOLENCE LETHALITY FACTORS	2
Threatens with Weapon.....	2
Has Access to Firearms.....	2
Threatens Homicide.....	3
Attempts Strangulation	3
Violent Jealous/Controlling Daily Activity	3
Recent Separation	4
Stalking.....	4
Unemployment	4
Threatened Suicide.....	5
Child Who Is Not Abuser’s Biological Child	5
Victim Believes Abuser Would Kill Them.....	5
SUMMARY	5

CHAPTER XV: DOMESTIC VIOLENCE LETHALITY FACTORS

CHAPTER GOALS

Research reveals that the behaviors outlined in this chapter describe abusers who are more likely to kill their intimate partners. By incorporating these lethality factors into a court's judicial decision-making, courts will be able to prioritize domestic violence cases and create orders that promote victim safety and offender accountability. The purpose of this chapter is to provide information on evidence-based lethality factors which judges can incorporate into their decision-making.

DOMESTIC VIOLENCE LETHALITY FACTORS

Threatens with Weapon

Research shows that women who are threatened or assaulted with a gun or other weapon are 20 times more likely to be murdered than other women.¹ Women who are victimized by an intimate partner with a firearm report more types of weapons are used against them during their lifetime.² Furthermore, studies suggest that abusers who possess guns tend to inflict the most severe abuse.³ Based on this research, it is critical when victims state they have been threatened with a weapon that action is taken to ensure the victim's safety, such as ordering firearms relinquishment.

Has Access to Firearms

Similar to an abuser's threats to use weapons, an abuser's access to firearms is a strong indicator of lethality. With a gun in the house, an abused woman is six times more likely than other abused women to be killed.⁴ Abusers who shot and killed intimate partners were asked whether they would have used another weapon if a gun was not available and most said no.⁵ The Centers for Disease Control and Prevention's National Violence Death Reporting System reported that of the 408 homicide suicide cases, most perpetrators were men (91 percent) and most used a gun (88 percent).⁶ Furthermore, additional research shows that in a sample of 591 cases of murder-suicides, 92 percent involved a gun.⁷ Courts should always inquire into an abuser's access to firearms, and put appropriate measures in place to protect the victim if access to firearms is available to the abuser.

¹ Campbell, Jacqueline C. et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 16 (2003). NCJ 196547. *See also*. Campbell, Jacquelyn C., et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089-1097 (2003).

² Sorenson, S. B., & Wiebe, D. J., *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412-1417 (2004).

³ Campbell, Jacqueline C. et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ JOURNAL 16 (2003). NCJ 196547.

⁴ *Id.*

⁵ *Id.*

⁶ Bernie Auchter, *Men Who Murder Their Families: What the Research Tells Us*. 266 NIJ J. (2010).

⁷ *Id.*

Threatens Homicide

Threats to kill an intimate partner greatly increase the likelihood that the victim will be murdered by the abusive intimate partner.⁸ Abused women who were threatened to be killed were 15 times more likely to be killed than other women.⁹ During interviews with attempted homicide victims of intimate partner violence, 25 percent of these victims reported that they received weekly threats, and many received graphic and explicit threats before the attempted homicide.¹⁰ Threats to kill include not only explicit death threats but also nonverbal threats such as displaying a weapon, cleaning, loading, holding a gun during an argument, firing a weapon during an argument, and threatening to shoot a pet or object that the victim cared about.¹¹ Courts should be cognizant of threats to kill an intimate partner as they can be a precursor to homicide.

Attempts Strangulation

Strangulation is one of the best predictors of a future homicide in domestic violence cases. According to a 2008 study in the *Journal of Emergency Medicine*, more than half of all domestic violence homicide victims had experienced at least one episode of attempted strangulation prior to a lethal or near-lethal violent incident.¹² This study also found that victims of prior attempted strangulation are seven times more likely to become a homicide victim.¹³ In 2016, Pennsylvania law enforcement conducted 3,754 lethality screens and identified 2,506 victims of intimate partner violence as being at high risk of being killed. Of those victims, 68 percent reported their abuser attempted to strangle them.¹⁴ Although victims of strangulation often will not have physical signs of being strangled, courts should take notice when victims state they have been strangled or “choked” as it is a predictor of future homicide.

Violent Jealous/Controlling Daily Activity

A national study found when an intimate partner is violently or constantly jealous that homicide is nine times more likely; when the partner controls the victim’s daily activities that homicide is five times more likely.¹⁵ Of the 31 intimate partner perpetrators a national researcher interviewed, 22 were categorized as extremely jealous.¹⁶ Eighteen out of the 20 attempted homicide victims, or 90 percent, said their abusers were extremely jealous.¹⁷ Although an abuser’s jealous and controlling behaviors may seem benign or simply rude, such behaviors can be indicators of a lethality risk for the victim.

⁸ J. C. Campbell, et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 *NIJ J.* 16 (2003). NCJ 196547.

⁹ *Id.*

¹⁰ David Adams, *WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS* (2007).

¹¹ E. Rothman, D. Hemenway, M. Miller, and D. Azrael, *Batterers’ Use of Guns to Threaten Intimate Partners*. 1 *J. AMER. MEDICAL WOMEN’S ASSOC.* 62-68 (2006).

¹² N. Glass, K. Laughon, J.C. Campbell, R.B. Block, Hanson, G., & P.S. Sharps, *Strangulation is an Important Risk Factor for Attempted and Completed Femicides*. 35 *J. EMERGENCY MEDICINE* 329-335 (2008).

¹³ *Id.*

¹⁴ Pennsylvania Coalition Against Domestic Violence, PCADV Lethality Dashboard, 2016 All Year, at <https://isra.hbg.psu.edu/pcadvdashboards/Home/Homicide-Dashboards>

¹⁵ See J.C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 *NIJ J.* 16 (2003).

¹⁶ See David Adams, *WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS* (2007).

¹⁷ *Id.*

Recent Separation

When a woman separates from her abusive partner, the most dangerous time for her is immediately after the separation.¹⁸ Sixty-four percent of abusers were estranged from their victims, or the victims were planning to leave the relationship, when the homicide occurred.¹⁹ Sixty percent of the attempted homicide victims were estranged or planning to leave at the time of the attempted homicide.²⁰ Women who separated from their abusive partners after cohabitation, experienced increased risk of femicide, particularly when the abuser was highly controlling.²¹ Courts should be mindful of the timeline in an intimate partner relationship and whether the victim and abuser recently separated; a recent separation can indicate lethality for a victim.

Stalking

Stalking is highly prevalent in cases of actual or attempted female homicide.²² Women who reported an intimate partner followed or spied on them were more than twice as likely to be attempted or actual homicide victims.²³ Stalking when combined with estrangement and prior abuse had a high correlation with lethality.²⁴ The strongest association was the combination of estrangement and prior abuse. However, stalking also occurred in the majority of femicides in intact marriages and relationships where there was no history of violence.²⁵

Stalking allows abusers to continue exerting power and control over victims by monitoring their daily movement and habits. Technology also allows abusers to track and control their victims in a variety of unseen ways. Claims made by victims in which they are being followed or monitored by their abusers should be taken seriously.

Unemployment

Unemployment, when combined with domestic violence, is a lethality factor as it can either be a triggering event for further violence, or it frees up an abuser to continue exerting power and control over a victim.²⁶ For example, some men had quit their jobs to have more time to monitor their partner's activities. Others were fired because they were missing work to conduct surveillance of their partners.²⁷ While unemployment is not always coincidental to murder or attempted murder, a study found nearly equal portions of killers and would-be-killers were unemployed at the time they committed their final assault.²⁸ Therefore, it is important for courts to perform multifaceted inquiries into all recent events in both the abuser's and the victim's lives as events such as a recent job loss may help to predict the likelihood of a lethal outcome.

¹⁸ J.C. Campbell, N. Glass, P.W. Sharps, K. Laughon, and T. Bloom, *Intimate Partner Violence*, 8 TRAUMA, VIOLENCE & ABUSE 246-269 (2007).

¹⁹ See David Adams, *WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS* (2007).

²⁰ *Id.*

²¹ See J.C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 16 (2003).

²² J. McFarlane, J. Campbell and K. Watson, *Intimate Partner Stalking and Femicide: Urgent Implications for Women's Safety*, (20) BEHAVIORAL SCIENCE AND THE LAW 51-68 (2002).

²³ *Id.*

²⁴ Janice Roehl et al., *Intimate Partner Violence Risk Assessment Validation Study, Final Report*, 209731 NAT'L INSTIT. JUSTICE 10 (2005).

²⁵ *Id.*

²⁶ See David Adams, *WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS* (2007).

²⁷ *Id.*

²⁸ *Id.*

Threatened Suicide

There is an increased risk of homicide when the abuser is suicidal.²⁹ In 70 percent of cases where people killed their families and then committed suicide, prior domestic violence was a factor.³⁰ It is important for the courts to inquire as to whether or not there have been any recent threats of suicide from the abuser, especially if the victim is alleging non-physical abuse.

Child Who Is Not Abuser's Biological Child

A lethality factor exists when an abuser is in an intimate relationship and the victim has a child who is not the abuser's child. The *Collateral Intimate Partner Homicide*, a study that looked at media reports of domestic violence killings, found that for female homicide victims, 16.5 percent had biological children who were not also the biological children of the perpetrator.³¹ Having a child living in the home who is not the abuser's biological child more than doubled the risk of homicide.³² A child who is not the biological child of the abuser reminds them that the victim was once with someone else and that child is a product of that relationship.³³ This dynamic further fuels an abuser's jealous and controlling behavior. Courts should be mindful of a victim's family background because it, along with a history of abuse, can predict future deadly violence by an abuser.

Victim Believes Abuser Would Kill Them

A victim's perception of future violence is one of the strongest indicators of potential lethality. Victims know their abusers best and they know the abuser's triggers, and whether or not the abusers intend to make good on threats. Women's prediction of additional assaults was the strongest single predictor of re-assault.³⁴ When researchers asked victims whether they believed their abuser had intended to kill them during the most serious assault, 90 percent of the women said yes, and 95 percent of the attempted homicide victims believed the reasons for attempting to kill them were to "to punish me."³⁵ It is important for the court to perform appropriate inquiries with victims to determine whether the victims believe they are at risk for life-threatening violence at the hands of their abusers.

SUMMARY

Domestic violence lethality factors provide an evidence-based measure by which the courts can assess a victim's risk of deadly violence at the hands of their abuser. Lethality factors can be critical in helping a court's inquiry into the recent actions and behaviors of an abuser, and in assessing risks posed to the victim. Courts can

²⁹ J.C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 16 (2003).

³⁰ J.C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from Multisite Case Control Study*, 93 AM. J. PUBLIC HEALTH 1089-1097 (2003).

³¹ Emily Meyer, Lori Post, *Collateral Intimate Partner Homicide*, SAGE OPEN, 7 (2013), available at <http://journals.sagepub.com/doi/pdf/10.1177/2158244013484235>

³² See J.C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 16 (2003).

³³ *Id.*

³⁴ See Janice Roehl et al., *Intimate Partner Violence Risk Assessment Validation Study, Final Report*, 209731 NAT'L INSTIT. JUSTICE 10 (2005).

³⁵ See David Adams, *WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS* (2007).

effectively utilize lethality factors to help them in their criminal and civil decision-making that impacts the safety of victims and their children.

CHAPTER XVI: HOUSING

TABLE OF CONTENTS

CHAPTER GOALS	2
HOUSING INSECURITY AND POVERTY ARE INTENSIFIED FOR SURVIVORS OF DOMESTIC VIOLENCE	2
LANDLORD-TENANT CASES	3
Eviction	3
Action in Ejectment.....	5
Arbitration may be Inappropriate for Victims of Domestic Violence	6
FEDERAL PROTECTIONS AGAINST HOUSING DISCRIMINATION	7
Violence Against Women Act.....	7
Who is Covered Under VAWA?	8
How is Eligibility for Protections Under VAWA Documented?	11
Other Housing Provisions Under VAWA	12
Fair Housing Act.....	13
STATE PROTECTIONS AGAINST HOUSING DISCRIMINATION	15
Pennsylvania Human Relations Act (PHRA)	15

CHAPTER GOALS

This chapter focuses on the ways domestic violence issues impact housing cases, including appeals from actions for recovery of real property first brought in magisterial district justice courts.

HOUSING INSECURITY AND POVERTY ARE INTENSIFIED FOR SURVIVORS OF DOMESTIC VIOLENCE

Studies indicate that domestic violence creates and sustains poverty for victims. Economic stress and hardship may also increase the risk of domestic violence.¹ Abusers commonly use money as a strategy to control their victims and families. Some of those strategies include controlling household finances, interfering with a victim's ability to work, and failing to make support or mortgage payments. Research of female welfare recipients in several states indicates high rates of domestic violence.² Racial, ethnic and cultural factors can also multiply the effects poverty for women of color who are domestic violence victims.³

Victims of domestic violence overwhelmingly cite financial obstacles as reasons for staying with an abuser.⁴ Legal service providers have reported hundreds of cases of domestic violence victims being evicted from housing for violence perpetrated against them.⁵ Victims are particularly vulnerable to losing housing and becoming involved in eviction cases after leaving their abusers. Many victims who do escape abusive relationships experience a lower standard of living once they leave; ending up living in poverty, depending on government assistance, or

¹ Claire M. Renzetti, *Economic Stress and Domestic Violence*, VAWNET.ORG (2009), (internal citations omitted) at <https://vawnet.org/material/economic-stress-and-domestic-violence>. See also, Jody Raphael & Richard M. Tolman, TRAPPED BY POVERTY; TRAPPED BY ABUSE, NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE 4 (1997).

² Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 44 (2005), available at http://www.researchgate.net/profile/Natalie_Sokoloff/publication/7701217_Domestic_violence_at_the_intersections_of_race_class_and_gender_challenges_and_contributions_to_understanding_violence_against_marginalized_women_in_diverse_communities/links/544106.

³ Jody Raphael & Richard M. Tolman, TRAPPED BY POVERTY; TRAPPED BY ABUSE, NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE 48 (1997). Research on male perpetrators also suggests that men who experience unemployment are at a greater risk of perpetrating domestic violence. "[C]omparing ... femicide perpetrators with other abusive men, ... unemployment was the most important demographic risk factor for acts of intimate partner femicide." Jacquelyn C. Campbell, *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM J PUBLIC HEALTH, 1089 (2003) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>.

⁴ Deborah Anderson, Daniel Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 TRAUMA, VIOLENCE AND ABUSE 163 (2003); Adrienne Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 568 (2008), available at https://www.researchgate.net/publication/5444856_Development_of_the_Scale_of_Economic_Abuse; see also 34 U.S.C. § 12471 (Congressional findings under the Violence Against Women Act.)

⁵ National Law Center on Homelessness & Poverty & National Network to End Domestic Violence, LOST HOUSING, LOST SAFETY: SURVIVORS OF DOMESTIC VIOLENCE EXPERIENCE HOUSING DENIALS AND EVICTIONS ACROSS THE COUNTRY 3 (2007), <http://www.nsvrc.org/publications/reports/lost-housing-lost-safety-survivors-domestic-violence-experience-housing-denials>.

becoming homeless.⁶ For women of color, racially discriminatory employment and housing practices compound abusers' control tactics.⁷

LANDLORD-TENANT CASES

Domestic violence victims have housing protections under the following state and federal laws:

- Pennsylvania Human Relations Act
- Violence Against Women Act
- Fair Housing Act
- Pennsylvania and United States Constitutions

Women are the overwhelming majority of victims of domestic violence, dating violence, sexual assault and stalking. Some housing protections are based in part on the premise that evicting a victim of domestic violence as a result of the violence they endured constitutes unlawful gender discrimination because domestic violence disproportionately impacts women. Protections pursuant to the Violence Against Women Act are gender neutral and apply equally to both male and female victims of domestic violence, dating violence, sexual assault and stalking. Also, some jurisdictions in Pennsylvania, such as Philadelphia, may have laws that explicitly prohibit discrimination against victims of domestic violence, protecting both men and women.⁸

Eviction

The Landlord Tenant Act applies to all public and private housing landlords and outlines lease and eviction parameters.⁹ A lease for real property that is for less than three years may be oral or written.¹⁰ A lease for real property that is for a term more than three years must be in writing and signed by the parties.¹¹

There are three reasons available for a residential eviction:

- Failure to pay rent
- Expiration of the lease
- Breach of the lease¹²

In a manufactured home, there are five reasons a landlord may evict a tenant:

- Failure to pay rent
- Violation of the rules of the mobile home park for the second (or more) time(s) in six months

⁶ Adrienne Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 568 (2008).

⁷ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REVIEW 1241, 1246 (1991), available at <http://www.jstor.org/stable/1229039>.

⁸ Philadelphia Ordinance 9-804(2)(d).

⁹ 68 P.S. §§ 250.101-250.602.

¹⁰ 68 P.S. § 250.201.

¹¹ 68 P.S. § 250.202.

¹² 68 P.S. § 250.502-1(a).

- Use of the park has changed
- Landlord closed the park¹³
- Expiration of the lease

Landlord tenant cases come before the court upon direct appeal from the magisterial district court, upon filing of a writ of certiorari, or less commonly as an original action in the court of common pleas as an action for ejectment.

Where there is a landlord tenant relationship, an action for recovery of real property is intended as an exclusive remedy. The proceeding on appeal shall be conducted *de novo*.¹⁴ A party may appeal within thirty days after the entry of a judgment of money or a judgment for the delivery of possession of real property arising out of a nonresidential lease.¹⁵ A party may appeal within ten days after the grant of a judgment for the delivery of possession of real property arising out of a residential lease.¹⁶ In both instances, the aggrieved party must file the notice of appeal and the notice of judgment with the prothonotary.¹⁷

After the appellant meets the statutory requirements, a supersedeas is issued by the prothonotary.¹⁸ If the court of common pleas determines, upon written motion or its own motion, that the averments within any of the tenant's supersedeas affidavits do not establish that the tenant meets the statutory terms and conditions, the court may terminate the supersedeas.¹⁹ Notice of the termination of the supersedeas shall be forwarded by first class mail to the attorneys of record or, if a party is unrepresented, to the party's last known address of record.²⁰ If an appeal is stricken or voluntarily terminated, any supersedeas based on it shall terminate.²¹

A party aggrieved by a judgment may file, with the prothonotary of the court of common pleas, a praecipe for a writ of certiorari claiming that the judgment should be set aside because of lack of jurisdiction over the parties or subject matter, improper venue or such gross irregularity of procedure as to make the judgment void.²² If the party aggrieved by the judgment was the plaintiff in the action before the magisterial district judge, they may file a praecipe for a writ of certiorari based only on gross irregularity of procedure.²³ If a writ of certiorari is stricken, dismissed or discontinued, any supersedeas based on it shall terminate.²⁴ If the court finds in favor of the party obtaining the writ, it shall enter an order that the judgment is set aside without prejudice to the cause of action.²⁵ If the court finds against the party obtaining the writ, it shall enter an order that the writ is dismissed.²⁶

¹³ 68 P.S. §398.3(a).

¹⁴ Pa. R.C.P.M.D.J. No. 1007(A).

¹⁵ Pa R.C.P.M.D.J. No. 1002(A).

¹⁶ *Id* at (B).

¹⁷ *Id.*

¹⁸ Pa. R.C.P.M.D.J. No. 1008(C)(5).

¹⁹ *Id.* at (C)(8).

²⁰ *Id.*

²¹ *Id.* at (D).

²² Pa. R.C.P.M.D.J. No. 1009(A).

²³ *Id.*

²⁴ Pa. R.C.P.M.D.J. No. 1013(D).

²⁵ Pa. R.C.P.M.D.J. No. 1014(A).

²⁶ *Id.* at (B).

A judgment may not be the subject of both certiorari and an appeal.²⁷ The prothonotary shall mark stricken from the record any writ of certiorari concerning a judgment that has a pending appeal, if proof of service of copies of the notice of appeal have been filed.²⁸ If the appeal is stricken or voluntarily terminated, the writ of certiorari shall be reinstated upon praecipe of the party obtaining the writ.²⁹

Action in Ejectment

An action in ejectment may be brought only in a county in which the land or a part of the land is located.³⁰ The plaintiff may state in the complaint any cause of action for rents, profits or any other damages which arise from the defendant's possession of the land.³¹ A complaint must contain a description of the land³² and shall set forth or answer an abstract of the title upon which the party relies.³³

The defendant may plead a counterclaim which arises from the same transaction or occurrence or series of transactions or occurrences from which the cause of action arose.³⁴ Where appropriate, a conditional verdict may be entered.³⁵ A judgment for possession shall be enforced by a writ of possession.³⁶ Execution shall be commenced by filing a praecipe for a writ of execution with the prothonotary of any county in which judgment has been entered.³⁷ Where the property consists of a single tract of land that lies in more than one county, the sheriff of the county in which the writ of possession issues may execute the writ in all counties.³⁸ The sheriff shall make a return upon completion of abandonment of the execution proceedings.³⁹

Execution shall be stayed as to all or any part of the property of the defendant upon:

- Written direction of the plaintiff to the sheriff;
- A showing of exemption or immunity of property from execution; or
- A showing of a right to a stay.⁴⁰

Execution may be stayed by the court upon its own motion or motion or application of any party of interest showing:

- A defect in the writ or service; or
- Any other legal or equitable ground.⁴¹

²⁷ Pa. R.C.P.M.D.J. No. 1015.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Pa. R.C.P. No. 1052.

³¹ Pa. R.C.P. No. 1055.

³² PA R.C.P. No 1054(a).

³³ *Id.* at (b).

³⁴ Pa. R.C.P. No. 1056(a).

³⁵ *Id.* at (b).

³⁶ Pa. R.C.P. No. 3160.

³⁷ Pa. R.C.P. No. 3161.1.

³⁸ Pa. R.C.P. 3163.

³⁹ Pa. R.C.P. No. 3164.

⁴⁰ Pa. R.C.P. No. 3162(a).

⁴¹ *Id.* at (b).

In an order staying execution, the court may impose terms and conditions or limit the stay to such reasonable time as it may deem appropriate.⁴² All objections by the defendant shall be raised at one time.⁴³ After the termination of a stay, execution may proceed without reissuance of the writ.⁴⁴ The court may on application of any party of interest set aside the writ or service for:

- A defect contained therein;
- Upon a showing of exemption or immunity from execution; or
- Upon any other legal or equitable ground.⁴⁵

A judgment for money shall be commenced by filing a praecipe for a writ of execution with the prothonotary of the county in which the judgment was entered.⁴⁶ Upon issuance of the writ, the prothonotary shall transmit it directly to the sheriff to whom it is directed or, upon plaintiff's request, deliver it to the plaintiff or the plaintiff's representative for transmittal.⁴⁷ The sheriff shall note on the writ the date and time it is received.⁴⁸

Arbitration may be Inappropriate for Victims of Domestic Violence

By local rule, the majority of jurisdictions in Pennsylvania automatically refer civil cases with claims below \$35,000 to arbitration panels. Landlord tenant cases are often referred to arbitration prior to a hearing whether or not there is a written agreement to arbitrate. While arbitration may save the parties time and money, and clear congested court dockets, it may also be harmful to victims of domestic violence.

Certain alternate dispute forums, such as arbitration, may be inappropriate when there is domestic violence between the parties.⁴⁹ The inappropriateness stems from the power imbalance domestic violence creates where an abuser may employ tactics of coercion and control to exploit a victim of domestic violence, particularly in a less controlled forum such as arbitration.

Courts have responded to these concerns by implementing recognized best practices, such as the following:

- physically separating the parties during the proceedings,
- preventing direct contacts,
- providing adequate separation in counsel rooms and waiting areas prior to and immediately following hearings, and
- ensuring adequate security.⁵⁰

⁴² *Id.* at (c).

⁴³ *Id.* at (e).

⁴⁴ *Id.* at (f).

⁴⁵ *Id.* at (d).

⁴⁶ Pa. R.C.P. No. 3103(a).

⁴⁷ *Id.* at (e).

⁴⁸ Pa. R.C.P. No. 3105.

⁴⁹ *Cf.* Pa. R.C.P. 1940.3, excluding mediation proceedings in cases of domestic violence.

⁵⁰ Administrative Office of Pennsylvania Courts, *Unified Judicial System of Pennsylvania Court Safety and Security Manual*, 25 (2005).

FEDERAL PROTECTIONS AGAINST HOUSING DISCRIMINATION

Violence Against Women Act

The Violence Against Women Act (VAWA) was first passed in 1994 and reauthorized in 2000, 2005, and 2013. The 2005 reauthorization added legal protections for victims of domestic violence who live in public or subsidized housing. Those protections were expanded in the 2013 reauthorization because women and families were being denied access to, or evicted from, public and subsidized housing because of their status as victims of domestic violence.⁵¹ Lack of housing options creates a serious safety risk as victims often return to abusive partners because they cannot find long-term housing.⁵²

VAWA applies to nearly all government housing programs, including:⁵³

- Public Housing
- Section 8 Housing Choice Voucher program
- Project-Based Section 8
- Supportive Housing Programs under Section 202 and 811
- Low Income Tax Credit Properties
- Rural Housing Programs
- Housing Opportunities for Persons with AIDS
- McKinney-Vento Homeless Programs
- HOME Investment Partnerships Program
- Below Market Interest Rate Program
- Section 236 Housing

VAWA prohibits all covered housing programs from discrimination based on the applicant's status as a victim of domestic violence, dating violence, sexual assault or stalking.⁵⁴ The housing provisions of VAWA have no application to private rental housing that is unsubsidized.⁵⁵

⁵¹ 34 U.S.C. § 12471(3).

⁵² 34 U.S.C. § 12471 (7).

⁵³ 34 U.S.C. § 12491(a)(3).

⁵⁴ 34 U.S.C. § 12491.

⁵⁵ While not controlling, decisional case law interpreting VAWA and administrative guidance from the U.S. Department of Housing and Urban Development may be informative to claims of discrimination based on victim status in municipalities that have ordinances protecting victims in private housing, such as Philadelphia, Philadelphia Code § 9-1108.

Who is Covered Under VAWA?

To qualify for VAWA protections, an individual must be a victim of actual or threatened domestic violence, dating violence, sexual assault or stalking.⁵⁶ These acts are defined specifically in VAWA as follows:

- (1) Domestic violence is defined as a felony or misdemeanor crime of violence committed by a:
 - Current or former spouse or intimate partner of the victim;
 - Person with whom the victim shares a child in common;
 - Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner;
 - Person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies; or
 - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.⁵⁷
- (2) Dating Violence is defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of which is determined based on a consideration of:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.⁵⁸
- (3) Sexual Assault means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.⁵⁹
- (4) Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - Fear his or her safety or the safety of others, or
 - Suffer substantial emotional distress.⁶⁰

As you can see, the definition of domestic violence under VAWA is quite similar to the definition of abuse under the Protection from Abuse Act (PFA Act), and actually incorporates the state law definitions as well. Accordingly, an individual who is the victim of “abuse” as defined by the PFA Act will be covered by VAWA.⁶¹ Similarly, VAWA's definition of sexual assault covers all sex crimes under the Pennsylvania Crimes Code.⁶²

However, VAWA has a few notable differences from state law that widen its protections considerably. For example, VAWA not only protects the victim, it also protects “affiliated individuals,” i.e., members of the victim's

⁵⁶ 34 U.S.C. § 12291.

⁵⁷ 34 U.S.C. § 12291(a)(8).

⁵⁸ 34 U.S.C. § 12291(a)(10).

⁵⁹ 34 U.S.C. § 12291(a)(30).

⁶⁰ 34 U.S.C. § 12291(a)(29).

⁶¹ 23 Pa.C.S. § 6102(a).

⁶² 18 Pa.C.S. §§ 3101-3144.

immediate (nuclear) family, and members of the victim's household other than the abuser.⁶³ Another important difference is that VAWA's definition of stalking has a much broader intent requirement. The Pennsylvania criminal definition of stalking requires the perpetrator to intend to cause fear of bodily harm or emotional distress in the victim. In contrast, stalking as defined by VAWA prohibits any conduct causing objective fear in the victim, irrespective of the defendant's intent.⁶⁴

VAWA and Housing

VAWA prohibits covered housing providers from discriminating against victims of domestic violence, dating violence, sexual assault or stalking in:

- admission,
- eviction, or
- termination of assistance.⁶⁵

VAWA states that:

An incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking shall **not** be construed as:

- a serious or repeated violation of a lease for housing assisted under a covered housing program by the victim or threatened victim of such incident; or
- good cause for terminating the assistance, tenancy, or occupancy rights to housing assisted under a covered housing program of the victim or threatened victim of such incident.⁶⁶

In addition, regulatory guidance from the U.S. Department of Housing and Urban Development (HUD) interprets VAWA to prohibit the taking of adverse action against a tenant based on an adverse factor that is a "direct result" of victimization.⁶⁷

In determining whether an adverse factor is a "direct result" of victimization, it is the victim's obligation to identify the presence of domestic violence and provide information into the circumstances.⁶⁸ The housing provider may request clarification from the survivor if needed.⁶⁹ At that point, the housing provider must then make a determination considering all circumstances that is objectively reasonable.⁷⁰ Pursuant to this framework, VAWA requires that **a covered housing provider may not deny admission or terminate or evict a tenant for reasons that are determined to have been caused as a direct result of domestic violence, dating violence, sexual assault or stalking.**

HUD's guidance to Public Housing Authorities and owners of housing providers covered under VAWA also directs that while adverse factors may appear unrelated to abuse on the surface, the presence of an adverse factor may

⁶³ 42 U.S.C. § 12491(a)(1).

⁶⁴ 34 U.S.C. § 12291(a)(30); 18 Pa.C.S. 2709.1

⁶⁵ 34 U.S.C. § 12491(b)(1).

⁶⁶ 34 U.S.C. § 12491(b)(2).

⁶⁷ 24 C.F.R. 5.2005(b)(1).

⁶⁸ HUD Notice PIH-2017-08 (HA) § 7.3 (May 19, 2017).

⁶⁹ *Id.*

⁷⁰ *Id.*

be due to an underlying experience of domestic violence, dating violence, sexual assault or stalking.⁷¹ Depending on the circumstances, HUD advises that abuse may impact victims in four common categories:

- Poor credit history
- Poor rental history
- Criminal record
- Failure to pay rent⁷²

HUD guidance provides nearly 50 examples of these categories, such as:

- Poor credit history may be a direct result of domestic violence, dating violence, sexual assault or stalking when the perpetrator's conduct results in, for example, forcing victim to obtain credit, including credit cards for the perpetrator's use.⁷³
- Poor rental history may be a direct result of domestic violence, dating violence, sexual assault or stalking when the perpetrator's conduct results in, for example, property damage.⁷⁴
- A criminal record may be a direct result of domestic violence, dating violence, sexual assault or stalking when the perpetrator's conduct results in, for example, forcing a victim to write bad checks, misuse credit, or file fraudulent tax returns.⁷⁵
- Temporary failure to pay rent may be a direct result of domestic violence, dating violence, sexual assault or stalking when the perpetrator's conduct results in, for example, the victim's injury or temporary incapacitation.⁷⁶

With respect to domestic violence related criminal activity, federally subsidized housing programs generally provide program rules and lease requirements to address criminal activity by tenants, residents, guests, and persons under the tenant's control.⁷⁷ These policies address criminal activity that is drug related, violent, or that threatens the health, safety or quiet enjoyment of other residents and staff.⁷⁸ As the discussion above makes clear, VAWA intends that criminal activity that stems from domestic violence, dating violence, sexual assault or stalking should not result in adverse action against victims and affiliated individuals other than the abuser.

Under VAWA:

No person may deny assistance, tenancy, or occupancy rights to housing assistance under a covered housing program to a tenant solely on the basis of criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking that is engaged in by a member of the household of the tenant or any guest or other person under the control of the

⁷¹ HUD Notice PIH-2017-08 (HA) § 7.2 (May 19, 2017).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 24 CFR 5.850-5.861, 966.4(l)(12)(A), 982.551(l).

⁷⁸ *Id.*

tenant, if the tenant or an affiliated individual of the tenant is the victim or threatened victim of such domestic violence, dating violence, sexual assault, or stalking.⁷⁹

Thus, VAWA supersedes other provisions that would allow or require subsidy termination or eviction for criminal activity by a tenant who is a covered victim and where the criminal conviction resulted from the abuse.⁸⁰

All that being said, VAWA expects and permits adverse action to be taken against a protected victim by a covered provider when necessary to prevent an actual and imminent threat to others.⁸¹ HUD has defined actual or imminent threat as “a physical danger that is real, would occur within an immediate timeframe, and could result in death or serious bodily harm.”⁸² The conclusion of actual and imminent threat must be supported by objective evidence.⁸³

Evaluative factors include:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The length of time before the potential harm would occur.⁸⁴

Adverse action against a tenant based on actual and imminent risk is a last resort when actions or remedies to reduce or eliminate the threat are exhausted or unavailable.⁸⁵

How is Eligibility for Protections Under VAWA Documented?

A housing provider has the ability to provide VAWA protections based solely on an individual’s statement or corroborating evidence,⁸⁶ or to request certification. A housing provider requesting certification must submit a written request to the victim.⁸⁷ The victim has 14 business days to provide the requested certification, but the victim can request extra time.⁸⁸ If the victim does not provide the documentation within the timeframe allotted, the housing provider may resume the process to evict the tenant or deny assistance.⁸⁹

The following documents can be provided for certification:

- A HUD Self-Certification Form

⁷⁹ 34 U.S.C. § 12491(b)(3)(A).

⁸⁰ The housing choice voucher program regulation for criminal activity incorporates the VAWA protection directly into the family obligation to refrain from criminal activity: “Under 24 CFR 5.2005(b)(2), criminal activity directly related to domestic violence, dating violence, sexual assault, or stalking, engaged in by a member of a tenant’s household, or any guest or other person under the tenant’s control, shall not be cause for termination of tenancy, occupancy rights, or assistance of the victim, if the tenant or an affiliated individual of the tenant, as defined in 24 CFR 5.2003, is the victim.” 24 C.F.R. 982.551(l).

⁸¹ 34 U.S.C. § 12491(b)(3)(C)(iii).

⁸² 24 C.F.R. 5.2003.

⁸³ HUD Notice PIH-2017-08 (HA) § 18 (May 19, 2017).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 34 U.S.C. § 12491(c)(1).

⁸⁷ *Id.*

⁸⁸ 34 U.S.C. § 12491(c)(2).

⁸⁹ *Id.*

- Qualified Third-Party Statement from a domestic violence advocate, medical professional or attorney
- Police or Court Record
- Alternative documentation or statement by the victim at the discretion of the owner or manager of the covered housing program⁹⁰

Any one form of documentation, including self-certification, will be sufficient to verify survivor eligibility for protections under VAWA.⁹¹ HUD regulation permits a covered provider to request a second form of documentation if, and only if, the provider has or receives conflicting information as to the victim's status.⁹²

Other Housing Provisions Under VAWA

Lease Bifurcation

Where an assisted household includes the abuser, VAWA specifically permits the lease to be severed or bifurcated to permit the abuser to be evicted or removed.⁹³ In the context of eviction, it is not clear whether the partial eviction of one single or subgroup of tenant, or occupants pursuant to a lease agreement, may be accomplished judicially through an action for recovery of real property or ejectment. Conversely, where an abuser is judicially removed from property pursuant to an order for protection, or other means, VAWA gives the owner the express authority to terminate the abuser from the tenancy and remove the abuser from the lease.⁹⁴

Emergency Transfer

VAWA provides a mechanism for victims to obtain an emergency transfer to another unit under the control of the housing provider that is "available and safe."⁹⁵ The victim determines whether a transfer unit is safe. The determination that a unit is "available" is not defined by VAWA or administratively. VAWA intends for each covered provider to develop policy and procedure to manage requests for emergency transfer under VAWA. Covered providers have discretion to set policy regarding whether the request must be written or contain a certification that the tenant is entitled to the transfer under VAWA.

A tenant entitled to protection under VAWA may transfer if:

- A sexual assault occurred on the premises within 90 days of the request; or
- the tenant reasonably believes the transfer is necessary to avoid the risk of imminent harm from further violence.⁹⁶

Participants with a portable tenant-based subsidy, most commonly through the Section 8 Housing Choice Voucher Program,⁹⁷ receive a rental assistance payment made to a private landlord. VAWA protections have become incorporated into the language of housing assistance payment (H.A.P.) contracts between the private

⁹⁰ 34 U.S.C. § 12491(c)(3).

⁹¹ *Id.*

⁹² 24 C.F.R. 5.2007(b)(2).

⁹³ 34 U.S.C. § 12491(b)(3)(B).

⁹⁴ *Id.*

⁹⁵ 34 U.S.C. § 12491(e).

⁹⁶ 34 U.S.C. § 12491(e)(1)(B).

⁹⁷ 42 U.S.C. § 1437f(o); 24 C.F.R. 982.

landlords and housing administrator. VAWA rights may also be evident and enforceable from their appearance as provisions in mandatory addendums to lease agreements between the landlord and assisted tenants. The portable nature of tenant-based subsidy programs makes them inherently amenable to emergency transfers. VAWA removes barriers to immediate transfers, such as restrictions on transfers within the first year of a lease term, and restrictions on multiple moves within a yearly period.

Confidentiality

HUD regulations impose a general, broad prohibition on housing providers against disclosure of personal information concerning tenants to third parties. With respect to domestic violence, HUD compels that any information provided to a covered provider concerning domestic violence is required to be maintained in “strict confidence.”⁹⁸ Disclosure of information of abuse to other staff is not permitted, absent a specific need, or for abuse information to be entered in any shared databases.⁹⁹

VAWA notice to tenants about their rights

Covered housing programs must notify tenants of their rights under VAWA, including the right to confidentiality.¹⁰⁰ Notice must be included in all leases and the lease addendum and must be provided in multiple languages.¹⁰¹ The notice must also be posted in a public area.¹⁰² In addition, the Pennsylvania Housing Finance Agency (PHFA) requires all Low Income Housing Tax Credit properties to have a lease addendum outlining the protections of VAWA.

Other domestic violence services

HUD requires all covered properties to provide victim assistance according to each Public Housing Authority’s annual plan. Each Public Housing Authority must include in their five-year plan a description of goals, objectives, policies, and programs they use to serve victims’ housing needs.¹⁰³

Fair Housing Act

The goal of the Fair Housing Act (FHA)¹⁰⁴ is to ensure that a person’s background does not arbitrarily restrict access to the housing or rental market. The Act, among other things, prohibits sex discrimination in housing and protects both prospective and current tenants.

The FHA prohibits such discriminatory acts as:

- Refusing to sell or rent a dwelling to any person on the basis of race, color, religion, sex, national origin, disability, or familial status.
- Discriminating in the terms, conditions or privilege of the sale or rental of a dwelling.

⁹⁸ 34 U.S.C. § 12491(c)(4); 24 C.F.R. 5.2007(c).

⁹⁹ *Id.*

¹⁰⁰ 42 U.S.C. § 14043e-11(d).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 42 U.S.C. §§ 1437c-1(a)(2) & (d)(13), and 12705(b)(1).

¹⁰⁴ 42 U.S.C. § 3601 *et seq.*

- Advertising, statements, notices or other indications of discriminatory preference.
- Representing that any dwelling is not available for inspection, sale, or rental because of race, color, religion, sex, disability, familial status, or national origin, when in fact the property is available.¹⁰⁵
- Coercing, threatening, intimidating, or interfering with a person's enjoyment or exercise of housing rights based on discriminatory reasons or retaliating against a person or organization that aids or encourages the exercise or enjoyment of fair housing rights.¹⁰⁶

HUD has stated that when a landlord's actions impact the housing of domestic violence victims, this may amount to discrimination on the basis of sex, as the majority of domestic violence victims are women.¹⁰⁷

Landlords are prohibited from intentional discrimination against women and against taking actions that predominantly affect women, **even where there is no discriminatory malice or animus by the landlord.**¹⁰⁸

Courts can find intentional discrimination either with direct evidence, such as the terms or requirements contained in a municipal ordinance, or by inference from circumstantial evidence.¹⁰⁹ Intentional discrimination is also referred to as disparate treatment. The FHA restricts practices that have an unintended but disproportionate and adverse effect on protected persons.¹¹⁰ An FHA claim may be raised as a new matter in an answer to an eviction case. The Act provides for recovery of actual and punitive damages, and attorney fees.¹¹¹

Sexual Harassment

HUD published final regulations tied to the 22nd anniversary of VAWA establishing formal legal standards for harassment complaints in housing.¹¹² Sexual harassment in housing is actionable under the Fair Housing Act.¹¹³ The new rules define two classifications of harassment: Quid pro quo and hostile environment harassment. Quid pro quo harassment, "this for that," can involve an unwelcome request by a landlord for a sexual favor that is offered in exchange for something such as an individual not having to pay their rent for that month.¹¹⁴ Hostile environment harassment does not require rights or privileges to be conditioned upon something but rather is found where unwelcome conduct, such as inappropriate comments, are so common or severe so as to interfere with a person's enjoyment or comfort in their home. The new legal standard calls for a review of the totality of circumstances to determine whether the harassment violates the fair housing law.¹¹⁵ Additionally, the new standards clarify how housing owners and managers are directly liable for the conduct of their agents and employees regardless of whether the housing owner or manager was aware of the discriminatory harassment.¹¹⁶

¹⁰⁵ 42 U.S.C. § 3604.

¹⁰⁶ 45 U.S.C. § 3617.

¹⁰⁷ Sara K. Pratt, U.S. Dep't of House. & Urban Dev., Office of Fair Housing & Equal Opp., ASSESSING CLAIMS OF HOUSING DISCRIMINATION AGAINST VICTIMS OF DOMESTIC VIOLENCE UNDER THE FHA AND VAWA 2 (2011).

¹⁰⁸ Specifically, with regard to housing discrimination, a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the FHA in a different manner than others. *Bangerter v. Orem City Corp.*, 46 F.3rd 1491, 1500 (10th Cir. 1995).

¹⁰⁹ See *Kormoczy v. HUD*, 53 F.3rd 821, 824 (7th Cir. 1995).

¹¹⁰ *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1185 (8th Cir. 1974).

¹¹¹ See 42 U.S.C. § 3613(c).

¹¹² 81 FR 63054 (September 14, 2016) ; 24 C.F.R. Part 100.

¹¹³ *Id.*

¹¹⁴ See 24 C.F.R. 100.600(a)(1).

¹¹⁵ See 24 C.F.R. 100.600(a)(2).

¹¹⁶ See 24 C.F.R. 100.7.

STATE PROTECTIONS AGAINST HOUSING DISCRIMINATION

Pennsylvania Human Relations Act (PHRA)

PHRA prohibits housing discrimination based on handicap or disability. Prohibited acts include direct, intentional discrimination against a protected group and indirect acts that have a disparate impact on a protected group.¹¹⁷

The PHRA codifies the Federal Housing Act and adds the following protected parties:

- Any person who uses a guide or support animal because of blindness, deafness or physical handicap
- A handler or trainer of support or guide animals¹¹⁸

The PHRA also adds the following prohibited acts:

- To evict or attempt to evict an occupant before the end of the term of the lease because of pregnancy or birth of a child
- Discrimination based on the use of a guide or support animal
- Discrimination or refusal to rent because the individual has a known relationship or association with an individual with a handicap or disability
- Refusal to permit, at the expense of the person with the handicap or disability, reasonable modifications as may be necessary to afford such person full enjoyment of the premises
- Refusal to make reasonable rules, policies, practices or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy the housing accommodations
- Make any inquiry, elicit any information, make or keep any record or use any form application containing questions or entries concerning a persons' status in one of the protected categories¹¹⁹

Retaliatory Evictions

In addition, the PHRA prohibits a landlord from not retaliating against a tenant who has exercised a legal right, including:

- Participating in a tenant association or assembling a tenant union¹²⁰
- Filing a complaint with a government agency about unsafe or illegal living conditions
- Exercising any legal right allowed by state or local law, such as escrow of rent due to an uninhabitable unit

There is also a presumption of retaliation if the landlords' actions occur within six months of a tenant's exercise of legal rights. Covered acts that are considered retaliatory actions include:

¹¹⁷ 43 P.S. § 952.

¹¹⁸ *Id.*

¹¹⁹ 43 P.S. § 955(h).

¹²⁰ 68 P.S. § 250.205.

- Terminating a lease or filing an eviction
- Increasing the rent
- Decreasing services or access to services, e.g., locking the laundry room

Nuisance Ordinances and Act 200

Many local communities have passed so-called “nuisance ordinances.” These ordinances take several different forms and may also be referred to as “disorderly” or “disruptive house” laws. Nuisance ordinances tend to perniciously discriminate against domestic violence victims and their children because the abusive behaviors of the perpetrator are often categorized as disruptive and disorderly. Such ordinances put victims and others at risk of harm either by evicting the victim from stable housing or deterring victims from accessing police protection or emergency assistance when needed for fear of eviction.

Common Types of Nuisance Ordinances are:

- **Tenant Fines** - This type of ordinance requires tenants to pay a fine each time the police are called to their home within a certain time period. For example, three calls or more within a 90-day period may result in a fine.
- **Landlord Abatement/Eviction** - This type of ordinance requires the landlord to evict any tenant who has a certain number of calls to the police from or about the tenants’ home within a certain period of time or risk being penalized. For example, even though a landlord may not want to evict the tenant, the ordinance may require landlords to evict or be penalized with a fine or loss of their rental license or certificate.
- **Crime-Free Zones** - “Crime-Free Rental Housing Ordinances” are designed to force eviction or deny admission of tenants who repeatedly commit crimes, such as drug dealing or gang-related crimes. Unfortunately, domestic violence victims may be included in this category of targeted tenants. An eviction notice may be received even if the tenant was the victim, not the perpetrator, of the crime and even if the perpetrator is not a resident.

However, these ordinances have faced significant resistance. In the case of *Briggs v. Norristown et al.*, the tenant/plaintiff, Lakisha Briggs, faced eviction pursuant to local ordinance 245-3, which penalized landlords if they did not evict tenants who called the police three or more times in a four-month period. After Briggs called the police on her abusive ex-boyfriend the first time, she was warned that additional calls would result in eviction. Briggs’ abuser knew this, and so he proceeded to go to her home and attack her repeatedly, culminating in his stabbing her and knocking her unconscious. After Briggs was served with eviction papers, Briggs filed suit against Norristown with the assistance of the ACLU-Women’s Rights project, and the ordinance was repealed as part of the case’s settlement.¹²¹

An additional result of the Briggs case was the passage of Act 200. Codified at 53 Pa.C.S. § 304, Act 200 shields residents, tenants, and landlords from penalties resulting from the enforcement of a nuisance ordinances so long as the authorities were assisting a victim of crime or abuse or responding to an emergency.¹²²

¹²¹ ACLU, *Briggs v. Norristown et al.* at <https://www.aclu.org/cases/briggs-v-borough-norristown-et-al>.

¹²² 53 Pa.C.S. § 304(a)(3).

Moreover, even if there was no actual emergency situation, Act 10 will still shield residents, tenants, and landlords so long as the person who called for assistance reasonably believed that that intervention or emergency assistance was:

- Necessary to prevent the perpetration or escalation of the abuse, crime or emergency; or
- Needed in response to the abuse, crime or emergency.¹²³

If a municipality enforces or attempts to improperly enforce an ordinance against a resident, tenant or landlord, that person may bring a civil action for a violation of Act 200 and seek an order from the court for any of the following remedies:

- Requiring the municipality to cease and desist the unlawful practice;
- Payment of compensatory damages, provided that the resident, tenant or landlord make reasonable efforts to mitigate damages;
- Payment of reasonable attorney fees;
- Payment of court costs; and
- Other equitable relief, including, but not limited to, reinstating a rental license or rental permit, as the court may deem appropriate.¹²⁴

Protection From Abuse: Order to Vacate

A Protection from Abuse (PFA) order may grant possession of the residence or household to one party by evicting and excluding another party.¹²⁵ Upon learning of the exclusion of a tenant through a PFA order, a landlord may respond by voluntarily bifurcating the lease. The landlord cannot evict a tenant for seeking a protection order or for excluding an abusive household member via a protection order. If the property is subsidized, the landlord must abide by the VAWA protections.

When an abuser is evicted by a protection order, concerns may remain regarding the liabilities and obligations among the parties. Although a PFA defendant may lose the right to physically occupy rental property through a PFA proceeding, they may remain liable to a landlord for rent for the unexpired lease term. Under the general rule, both tenants remain jointly and severally liable for damages. Where a tenant is displaced by a protection order, the equitable principle of “unclean hands” may inform the apportionment of liability for remaining rent liability. Courts have historically applied the doctrine of unclean hands to deny relief premised on immoral behavior.¹²⁶ In the context of domestic violence, the doctrine might inform refusal to excuse future rent liability to the abuser in relation to the remaining innocent tenant.

Act 148 of 2018 (SB 919)

Act 148/SB 919 is an amendment to Pennsylvania’s Housing Authorities Law that establishes a relocation/housing transfer process for tenants/clients of a PA Housing Authority that are the victims of

¹²³ 53 Pa.C.S. § 304(b).

¹²⁴ *Id.* at § 304(c).

¹²⁵ 23 Pa.C.S. § 6108(a)(2).

¹²⁶ *See generally Universal Builders v. Moon Motor Lodge*, 430 PA. 550, 553-555 (1968).

domestic violence. In order to qualify for the relocation/transfer, the individual must expressly request an emergency order AND

- The tenant or affiliated individual experienced domestic or sexual violence on or near the premises within ninety (90) day of the request; or
- The tenant reasonably believes that the tenant or an affiliated individual is threatened with imminent harm of domestic or sexual violence if the tenant or affiliated individual remains on the premises.¹²⁷

The tenant must also present sufficient proof of the domestic or sexual violence to qualify for the relocation. This burden can be met in several ways:

- A current order of protection under 23 Pa.C.S. Ch. 61 (relating to protection from abuse) or 42 Pa.C.S. Ch. 62A (relating to protection of victims of sexual violence or intimidation) on behalf of the tenant or an affiliated individual.
- Police reports, medical records or court documents relating to the tenant's or an affiliated individual's victimization as a result of domestic or sexual violence;
- A certification of abuse made under penalty of perjury from the victim or (if disputed) by an "attesting third party" such as law enforcement or a medical professional; OR
- Any other evidence of the conviction or other adjudication of guilt for domestic or sexual violence committed against the tenant or an affiliated individual.¹²⁸

However, if the tenant successfully meets their burden, the housing authority must:

- relocate the tenant making the request to another dwelling unit under the control of the authority or another authority;
- provide the tenant with a housing choice voucher;
- assist the tenant with identifying other housing providers which may have safe and available dwelling units; or
- assist the tenant with contacting local organizations offering assistance to victims of domestic or sexual violence.¹²⁹

¹²⁷ 2017 Pa. SB 919 § 2(a).

¹²⁸ 2017 Pa. SB 919 § 2(f).

¹²⁹ 2017 Pa. SB 919 § 2(e).

CHAPTER XVII: ANIMAL ABUSE

TABLE OF CONTENTS

CHAPTER GOALS..... 2

THE LINK BETWEEN DOMESTIC VIOLENCE AND ANIMAL ABUSE..... 2

 The Link2

 Emotional Extortion3

 Barriers to Leaving an Abusive Relationship4

LIBRE’S LAW – PENNSYLVANIA’S ANIMAL CRUELTY STATUTE 4

 History.....4

 Definitions5

 Neglect of an Animal5

 Cruelty or Aggravated Cruelty to an Animal.....6

 Tethering6

 Grading of Offenses and Remedies.....7

 Summary8

CHAPTER GOALS

There is a link between animal abuse and domestic violence. Domestic violence abusers use animal abuse as a tactic of domestic violence. They exploit the emotional relationships between victims and their pets to further exert power and control over the victim. Animal abuse is a ‘red flag’ to domestic violence occurring within a home. By putting an end to the abuse of a pet, judges can also help to stop the cycle of domestic violence in families. The purpose of this chapter is to provide information on the link between animal abuse and domestic violence, and on recent changes to Pennsylvania’s animal cruelty laws.

THE LINK BETWEEN DOMESTIC VIOLENCE AND ANIMAL ABUSE

The Link

Animal abuse is a common tactic of domestic violence.¹ Offenders kill, maim, torture, or subject victims’ animal companions to acts of bestiality.² The motivations for abusing animals often mirror those for abusing an intimate partner including discipline, retaliation, demonstration of power or omnipotence, and instillation of fear and the habit of compliance.³ The following are common tactics of domestic violence abusers when it comes to animals:

- Refusing to allow a victim to take his or her pet to the vet.
- Threatening to harm or kill the pet if the victim asserts any independence.
- Filing theft or other criminal charges if the victim leaves with the pet.
- Disappearing with, giving away, or killing a pet to take away the victim’s source of unconditional love.
- Refusing to allow the victim to spend money on pet food and/or vet care, and then blaming pet illness or injury on the victim.
- Targeting pets of family members or friends of the victim who aid in their escape.
- Harming or killing the children’s pet to intimidate them.⁴

Animal abuse is not only a tactic of domestic violence, it is also a predictor of future violence. A history of animal abuse is one of the four most significant indicators of who is at greatest risk of becoming a batterer.⁵ According to a study from the Journal of Interpersonal Violence, a child’s witnessing of animal abuse was the

¹ Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J. L. & FEMINISM 97, 100 (2001).

² Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1163, 1173 (2014).

³ Jennifer Robbins, *Note: Recognizing the Relationship Between Domestic Violence and Animal Abuse: Recommendations for Change to the Texas Legislature*, 16 TEX. J. WOMEN & L. 129, 133 (2006).

⁴ Phil Arkow, *CONNECTING THE DOTS: The LINK Between Animal Abuse and Human Violence: The LINK and Domestic Violence Animal Abuse and the Duluth Model*, PowerPoint presentation presented at the Annual Animal Law Conference in Philadelphia, PA, (August 15, 2018).

⁵ B.J. Walton-Moss et. al., *Risk factors for Intimate Partner Violence and Associated Injury Among Urban Women*, 30 J. COMMUNITY HEALTH 377 – 389 (2005).

largest predictor of future violence, with the child witness being eight times more likely to become a perpetrator.⁶ In addition, a significant portion of animal abusers are involved in other crimes.⁷ For example, a Massachusetts study found that 70 percent of animal abusers had criminal records including crimes of violence, property, drugs, or disorderly behavior.⁸ Therefore, when faced with a case of domestic violence, it is crucial for judges to inquire into the history of animal cruelty within the home.

Emotional Extortion⁹

What makes animal abuse a particularly cruel form of domestic violence is that it exploits the strong emotional bond a victim has formed with his or her animal companion. Pets provide close, familial companionship for their owners. This effect is amplified in domestic violence situations due to the forced isolation many victims experience. A victim's social isolation is a frequent aspect of domestic violence and makes the victim exceptionally reliant on their animal for emotional support and companionship.¹⁰ Offenders use the victim's pet as a form of 'emotional extortion', so that they can continue to exert power and control over a victim.¹¹ Of the 68 percent of battered women who reported violence to their animals, these women further reported that 87 percent of these incidents occurred in their presence in order to control the victim.¹² It has been noted that:

The abuse itself may foster a closer relationship between the victim and animal. As the victim's social support dwindles, mutual empathy between human and the animal grows, and feelings of guilt and responsibility for the animals suffering manifest themselves. The resultant strengthening of the bond between victim and animal may then increase the likelihood and severity of its exploitation.¹³

Furthermore, abusive partners capitalize on the shortcomings of animal abuse detection and prosecution.¹⁴ Abuse of an animal companion in front of the victim tells them, "Look what I did to your pet; I can do the same thing to you."

⁶ S. DeGue & D. DiLillo, *Is Animal Cruelty a "Red Flag" for Family Violence? Investigating Co-occurring Violence Toward Children, Partners, and Pets*, 24 J. INTERPERSONAL VIOLENCE 1036-1056 (2009).

⁷ A. Arluke & C. Luke, *Physical Cruelty Toward Animals in Massachusetts, 1975 – 1996*, 5 SOCIETY AND ANIMALS 195-204 (1997).

⁸ Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1167-1170 (2014).

⁹ Phil Arkow, *Connecting the Dots: The LINK Between Animal Abuse and Human Violence* at PBI Offices in Philadelphia, PA (August 15, 2018).

¹⁰ Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1163, 1177 (2014).

¹¹ Phil Arkow, *Connecting the Dots: The LINK Between Animal Abuse and Human Violence* at PBI Offices in Philadelphia, PA (August 15, 2018).

¹² Jane Ann Quinlisk, *Animal Abuse and Family Violence*, in CHILD ABUSE, DOMESTIC VIOLENCE AND ANIMAL ABUSE, 168 (Frank R. Ascione & Phil Arkow eds., 1999).

¹³ Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1177 (2014).

¹⁴ Olivia S. Garber, *Animal Abuse and Domestic Violence: Why the Connection Justifies Increased Protection*, 47 UNIV. MEMPHIS L.R. 359, 367-368 (2016).

Barriers to Leaving an Abusive Relationship

Animal abuse also creates a barrier to victims seeking to leave the relationship. Victims often stay in an abusive relationship out of fear for their animal companions and/or a lack of safe shelter for their animals. Women whose animals were threatened and abused were approximately seven to eight times more likely to report that the concern for their animals delayed their decision to leave.¹⁵

A victim's concern for their pet's safety is very real. Their pet may have been harmed or killed the last time they attempted to leave, or the abuser may threaten to hurt or kill their pet if they leave. Victims are acting with not only their safety in mind, but also the safety of the ones they love when they decide to stay. "Animal abuse used as a method of psychological control within a home creates an environment of submission and terror and may lead the human victim to delay or refrain from fleeing out of concern for their pet's welfare and safety."¹⁶ It is important to seriously consider any threats or attempts of animal abuse that come to the courts attention as these could be a barrier to leaving.

The lack of housing for victims' pets provide an additional barrier because victims may not have the means to house or care for their pets when fleeing an abusive relationship. Therefore, it is crucial that all pet housing or fostering options available be communicated to a victim. Local domestic violence and animal welfare programs may have options available for victims who need housing for a pet, but resources vary statewide. Whenever possible, trial court judges should be aware of any community partnerships between local animal welfare/shelter programs and domestic violence agencies that offer safe shelter and services to both human and animal victims of domestic violence.

LIBRE'S LAW – PENNSYLVANIA'S ANIMAL CRUELTY STATUTE

History

In July 2017, the Commonwealth overhauled Pennsylvania's animal abuse statutes. Act 10, also known as Libre's Law, is named for a Boston Terrier named Libre who was discovered near-death due to abuse and neglect.¹⁷ Lack of punishment under current law for Libre's abuser(s) inspired animal rights advocates to push the state to change its animal abuse laws and institute stricter penalties for those who abuse and neglect animals.¹⁸ The resulting statute, codified at 18 Pa.C.S. § 5531-5561,¹⁹ made significant changes to Pennsylvania's animal abuse laws by broadening the definitions of key terms, creating new offenses, and increasing the grading of said offenses so as to protect more animals, prohibit more conduct, and impose harsher sanctions on abusers.

¹⁵ Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1172 (2014).

¹⁶ Olivia S. Garber, *Animal Abuse and Domestic Violence: Why the Connection Justifies Increased Protection*, 47 UNIV. MEMPHIS L.R. 370 (2016).

¹⁷ Abbey Zelko, *From the 'brink of death, Libre the dog now inspires others*, YORK DAILY RECORD, Jun. 28, 2017, <https://www.ydr.com/story/life/2017/06/28/brink-death-libre-now-inspires-others/430841001/>.

¹⁸ *Id.*

¹⁹ 18 Pa. C.S. § 5531-5561

Definitions

Libre’s Law defines “domestic animal” as a dog, cat, equine animal, sheep, goat, or porcine animal.²⁰ This broad definition allows the statute to protect a variety of animals that a victim might care for or own, not just those we typically consider to be pets. For example, many victims in rural areas consider their livestock to be pets, and these animals are not immune from abuse.

Other important definition changes are the definitions of the injurious acts themselves. For example, the definition for “serious bodily injury” is “bodily injury that creates a substantial risk of death or causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.”²¹ Finally, the statute also defines torture as: any of the following acts directed toward or against an animal unless directed to be performed by a licensed doctor or veterinary medicine acting within the normal scope of practice:

- 1) Breaking, severing or severely impairing limbs.
- 2) Inflicting severe and prolonged pain from burning, crushing, or wounding.
- 3) Causing or allowing severe and prolonged pain through prolonged deprivations of food or sustenance without veterinary care.²²

Neglect of an Animal

Neglect of an animal is defined under 18 Pa. C.S. § 5532 as when a person fails to provide any of the following for each animal to which the person has a duty of care, whether belonging to himself or otherwise:

- 1) Necessary sustenance and potable water.
- 2) Access to clean and sanitary shelter and protection from the weather. The shelter must be sufficient to permit the animal to retain body heat and keep the animal dry.
- 3) Necessary veterinary care.²³

In general, a violation of 18 Pa.C.S. §5532 is a summary offense, for which proof of intent is not required.²⁴ However, if the neglect is intentional, knowing, or reckless, and causes bodily injury to the animal or places the animal at imminent risk of serious bodily injury, a violation of this section then becomes a misdemeanor of the third degree.²⁵

It is important for trial court judges to be aware of the elements of animal neglect, and also of the differences in the grading of the charge. Increased grading allows trial court judges to hold abusers accountable for neglect of an animal, but it can also mean holding the abuser accountable for their domestic violence as well. Research suggests that neglect of animals, including less veterinary attention and inadequate vaccination, is a common tactic of domestic violence.²⁶

²⁰ 18 Pa. C.S. § 5531 (7)

²¹ *Id.*

²² *Id.*

²³ 18 Pa. C.S. § 5532(a) (1-3).

²⁴ *Id.* at (b)(1).

²⁵ *Id.* at (b)(2).

²⁶ Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1174 (2014).

Cruelty or Aggravated Cruelty to an Animal

Cruelty to animals is defined under 18 Pa. C.S. § 5533 as if the person intentionally, knowingly or recklessly ill-treats, overloads, beats, abandons, or abuses an animal.²⁷ A violation of this section is a summary offense.²⁸ However, if the violation causes bodily injury to the animal or places the animal at imminent risk of serious bodily injury, a violation of this section becomes a misdemeanor of the second degree.²⁹

Under 18 Pa. C.S. § 5534 a person commits aggravated cruelty to animals if they intentionally or knowingly do any of the following:

- 1) Torture an animal, or
- 2) Violate section 5532(neglect) or 5533 (cruelty to animal) causing seriously bodily injury to the animal or the death of the animal.³⁰

The most important aspect of aggravated cruelty is that the grading of the charge is a felony of the third degree.³¹ This means that abusers can face up to seven years in prison and up to a \$15,000 fine.³² Prior to the enactment of Libre's Law, parties were only able to argue for a misdemeanor violation for a charge of aggravated cruelty.³³ This felony grading is the first felony level grading for a charge of animal abuse under Pennsylvania law.³⁴

Tethering

Another new section included in Libre's Law addresses the tethering of an unattended dog. Tethering is when a rope or chain is affixed to an animal to restrict its movement.³⁵ Pursuant to 18 Pa.C.S. §5336, the tethering of an unattended dog will presumptively constitute a violation of 18 Pa.C.S. §5332 - neglect, with exceptions. Tethering an unattended dog for less than nine hours in a 24-hour period is presumptively not a violation of §5332 provided that:

- i. The tether is of a type not commonly used for the size and breed of dog and is at least three times the length of the dog as measured from the tip of its nose to the base of its tail or 10 feet, whichever is longer.
- ii. The tether is secured to a well-fitted collar or harness by means of a swivel anchor, swivel latch or other mechanism designed to prevent the dog from becoming entangled.
- iii. The tethered dog has access to potable water and an area of shade that permits the dog to escape the direct rays of the sun.

²⁷ 18 Pa. C.S. §5533(a).

²⁸ *Id.* at (b)(1).

²⁹ *Id.* at (b)(2).

³⁰ 18 Pa. C.S. §5534(a).

³¹ *Id.* at (b).

³² 18 Pa. C.S. §106(b)(4); §1101(5).

³³ Vivek Upadhyia, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1174 (2014).

³⁴ *Id.*

³⁵ Dictionary.com, *Definition of "Tether"*, accessed Nov. 21, 2018.

- iv. The dog has not been tethered for longer than 30 minutes in temperatures above 90 or below 32-degree Fahrenheit

On the other hand, the presence of any of the following will create the presumption of a violation of §5332, regardless of how long the animal is tethered:

- i. Excessive waste or excrement in the area where the dog is tethered
- ii. Open sores or wounds on the dog's body
- iii. The use of tow or log chain, or a choke, pinch, prong, or chain collar.³⁶

Finally, there are the situations that are never considered to be a violation of §5332 regardless of the circumstances:

- 1) Tethering a dog while actively engaged in lawful hunting, exhibition, performance events or field training.
- 2) Tethering a hunting, sporting, or sledding dog breed where tethering integral to the training, conditioning or purpose of the dog.
- 3) Tethering a dog in compliance with the requirements of camping or recreational area.
- 4) Tethering a dog for a period of time, not to exceed one hour, reasonably necessary for the dog or person to complete a temporary task.³⁷

It is imperative when determining whether a specific tethering scheme is in violation of the statute that judges conduct a thorough analysis of the facts to determine whether the requirements of the statute are met. As previously noted, animal companions of domestic violence survivors are not immune from neglect at the hands of their abuser. Therefore, courts need to take cases of tethering and neglect as seriously as cruelty offenses because it is a form of animal abuse and it could also be a form of domestic violence. Stopping animal abuse, whether it be neglect or cruelty is the aim of Libre's Law. Furthermore, holding abusers accountable for animal abuse can provide safety for domestic violence victims whose abusers use animal abuse as a tactic of their domestic violence.

Grading of Offenses and Remedies

One of the most important aspects of Libre's law is the potential grading enhancement for the various offenses, thus increasing the potential penalties for animal abuse and neglect. As stated earlier, domestic violence abusers often use the lack of accountability for animal abuse as a means to perpetrate further abuse. Abusive partners capitalize on the shortcomings of animal abuse detection and prosecution.³⁸ By knowing that they will face slim consequences for their actions, they continue to abuse the victim's animal companions to exert power and control over them.³⁹ This exacerbates the abuse and its effects on the victim, and in turn, it creates a significant barrier to a victim seeking to leave an abusive relationship.⁴⁰ Knowing that the abuser will

³⁶ *Id.* at (a).

³⁷ *Id.* at (b).

³⁸ Olivia S. Garber, *Animal Abuse and Domestic Violence: Why the Connection Justifies Increased Protection*, 47 UNIV. MEMPHIS L.R. 359, 367-368 (2016).

³⁹ *Id.*

⁴⁰ Vivek Upadhy, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L. J. 1182-1183 (2014).

face little consequences for animal abuse, victims often shy away from reporting animal abuse, or stay in an abusive relationship to protect their animal companions.⁴¹ Libre's law seeks to eliminate these outcomes for both human and animal victims by increasing the penalties for acts of animal neglect and cruelty. Courts can follow through on this aim by charging animal abusers to the fullest extent of the law, and by levying the maximum penalties against those convicted. They can also provide additional protection and peace of mind by ordering forfeiture and prohibition of ownership whenever possible.

Libre's Law also provides for the forfeiture of an animal for a prohibition or limitation on an individual's ownership, possession, or custody of an animal.⁴² Forfeiture and prohibition of ownership may be ordered if an individual has been convicted of any offense within the statutory scheme.⁴³ However, if an individual has been convicted of a felony, forfeiture is mandatory.⁴⁴ By providing for the forfeiture of the animal(s) and/or a prohibition against animal ownership, Libre's law not only protects the abused animal and prevents future animal abuse, it also provides assurance to a victim of domestic violence that his or her animal will no longer be used as a tool of abuse. Accordingly, trial court judges should order forfeiture and prohibition of ownership whenever possible. It is a clear and commonsense method of providing safety and security to victimized animals, and peace of mind of their human owners.

Summary

Animal abuse and domestic violence are closely intertwined. Domestic abusers are aware that victims form strong bonds with their animal companions. They use animal abuse as a weapon of domestic violence to terrorize victims, and to exert power and control over them. In the past, offenders have faced slim consequences under the law for animal abuse. However, due to changes to Pennsylvania's animal abuse law there are increased penalties and new avenues for charging perpetrators for crimes of animal abuse. The aim of Libre's law is to stop animal abuse, and the abusers who use animal abuse as a tactic of domestic violence. With this new law courts have another tool to hold abusers accountable, and that aims to stop the cycle of violence occurring within a home.

⁴¹ *Id.*

⁴² 18 Pa. C.S. §§ 5554 and 5555.

⁴³ *Id.*

⁴⁴ 18 Pa. C.S. § 5544(b).