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# **Coercive Control Dynamics And Their Impact On Family Offense And Custody Matters**

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**Friday, September 16, 2016**

**Albany Marriott**

***CLE Course Materials and NotePad<sup>®</sup>***

***Complete course materials distributed in electronic format online in  
advance of the program.***

**Sponsored by the**

**New York State Bar Association and the Committee on Legal Aid**

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# Lawyer Assistance Program 800.255.0569



## Q. What is LAP?

- A.** The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

## Q. What services does LAP provide?

- A.** Services are **free** and include:
- Early identification of impairment
  - Intervention and motivation to seek help
  - Assessment, evaluation and development of an appropriate treatment plan
  - Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
  - Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
  - Information and consultation for those (family, firm, and judges) concerned about an attorney
  - Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

## Q. Are LAP services confidential?

- A.** Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

### Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

## Q. How do I access LAP services?

- A.** LAP services are accessed voluntarily by calling 800.255.0569 or connecting to our website [www.nysba.org/lap](http://www.nysba.org/lap)

## Q. What can I expect when I contact LAP?

- A.** You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

## Q. Can I expect resolution of my problem?

- A.** The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

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## Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls?  
Am I keeping up with correspondence?
6. Have my sleeping and eating habits changed?
7. Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?
8. Does my family have a history of alcoholism, substance abuse or depression?
9. Do I drink or take drugs to deal with my problems?
10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?
11. Is gambling making me careless of my financial responsibilities?
12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There Is Hope

**CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT**

The sooner the better!

**Patricia Spataro, LAP Director**

**1.800.255.0569**

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# New York State Bar Association

## FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

**You MUST turn in this form at the end of the  
program for your MCLE credit.**

**Coercive Control Dynamics in Family Offense and Custody Matters  
September 16, 2016 | New York State Bar Association's Committee on  
Legal Aid, Albany Marriott, Albany, NY**

Name:

(Please print)

I certify that I was present for the entire presentation of this

program Signature:

Date:

**Speaking Credit:** In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.



# NEW YORK STATE BAR ASSOCIATION

## Live Program Evaluation (Attending In Person)

Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name:

Program Code:

Program Location:

Program Date:

1. What is your overall evaluation of this program? Please include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments \_\_\_\_\_

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
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**Additional comments (CONTENT)**

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**Additional comments (ABILITY)**

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3. Please rate the program materials and include any additional comments.

☐ Excellent   ☐ Good   ☐ Fair   ☐ Poor

**Additional comments**

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4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.

☐ Yes – Expanded   ☐ Yes – Shortened   ☐ No – Fine as is

**Additional comments**

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5. Please rate the following aspects of the program: **REGISTRATION; ORGANIZATION; ADMINISTRATION; MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
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**Additional comments**

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6. How did you learn about this program?

☐ Ad in legal publication   ☐ NYSBA web site   ☐ Brochure or Postcard  
☐ Social Media (Facebook / Google)   ☐ Email   ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

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NEWYORK STATE BAR ASSOCIATION

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# **Coercive Control Dynamics in Family Offense and Custody Matters**

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**Coercive Control Dynamics and their Impact on Family Offense and Custody Matters**  
**1 MCLE credit in Skills for both experienced and newly-admitted attorneys**  
**September 16<sup>th</sup>, 1:30 PM - 2:45 PM**

This panel will focus on the non-physical methods abusers use to control their victims, such as financial abuse, litigation abuse and other such forms of control. The panel will discuss how to present these issues to a court and ways to overcome hurdles to presenting such evidence to a court.

**I. Overview**

- a. Domestic Violence v. Coercive Control
- b. Elements
  - 1. Financial/economic abuse
  - 2. Sexual abuse
- c. Special issues and populations and heightened opportunity for coercive control
  - 1. Immigration
  - 2. Substance abuse
  - 3. Mental illness
  - 4. LGBT
- d. Impact on children

**II. Family Court Legal Context**

- a. Family offenses
  - 1. Family Court Act, Article 8
  - 2. Specific offenses and case law examples
    - i. Coercion 2nd
    - ii. Aggravated harassment 2nd
    - iii. Criminal mischief 4th
    - iv. Sexual misconduct, sexual abuse

- v. Identity theft

- b. Custody

1. Family Court Act
2. Best interests factors
3. Case law

### III. Evidence Gathering and Admissibility

- a. Releases
- b. Subpoenas
- c. Business Records Certifications
- d. Discovery
- e. Electronic evidence
  1. Emails
  2. Text messages
  3. Social media

### IV. Litigation Skills

- a. Direct examination of a party
  1. Crafting the narrative
  2. Witness preparation
- b. Cross examination of a party
  1. Impeachment materials
  2. Getting the batterer to reveal their controlling attitude
- c. Expert cross-examination
  1. Role of the Forensic Evaluator

2. Problems with forensic evaluations in cases of coercive control
3. Preparing your client for forensic evaluation
4. Cross-examination of forensic evaluator
5. Hiring a DV/Coercive Control Expert



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# **Coercive Control Dynamics in Family Offense and Custody Matters**

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## **Biographies**



## Panelist Biographies

### Bryn Lovejoy-Grinnell

Bryn Lovejoy-Grinnell is a senior attorney at the Frank H. Hiscock Legal Aid Society in Syracuse specializing in the representation of domestic violence survivors. She is also the President-Elect of the Central New York Women's Bar Association, having previously served as Pro Bono Projects Director. Ms. Lovejoy-Grinnell has trained on family law, matrimonial law, and the intersection of real estate and matrimonial and family law. Before law school, Ms. Lovejoy-Grinnell was a domestic violence advocate at the Advocacy Center in Ithaca. She graduated from Harvard University and Cornell Law School.

### Amanda Norejko

Amanda Norejko is the Director of the Matrimonial and Economic Justice Project and Victoria J. Mastrobuono Economic Justice Fellow at the Center for Battered Women's Legal Services at Sanctuary for Families. She is an attorney specializing in representation of domestic violence and trafficking survivors. Ms. Norejko supervises a team of staff and pro bono attorneys in family and matrimonial, housing, and public benefits matters. She engages in legislative and policy advocacy aimed at combating violence against women and promoting women's economic empowerment on the local, state, national, and international levels. Ms. Norejko serves as a Senior Policy Advisor and UN Representative for the international NGO, Coalition Against Trafficking in Women. She is a member of several bar associations and serves on the Board of Directors of the New York State Coalition Against Domestic Violence as well as the New York Women's Bar Association. She has been an active participant in the New York State Anti-Trafficking Coalition, the Maintenance Standards Coalition, and the Lawyers Committee Against Domestic Violence, which awarded her with the *In the Trenches Award* in 2014. In 2016, City & State recognized Ms. Norejko's work with its *Above & Beyond* award Honoring Women of Public and Civic Mind. She is a 2001 graduate of New York University School of Law, which presented her with an Alumni Association award in 2011.



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Penal Law  
Part THREE Specific Offenses  
Title H Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation  
Article 135 Kidnapping, Coercion and Related Offenses

**Go to the New York Code Archive Directory**

*NY CLS Penal § 135.60 (2016)*

**§ 135.60. Coercion in the second degree**

A person is guilty of coercion in the second degree when he *or she* compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he *or she* has a legal right to engage, *or compels or induces a person to join a group, organization or criminal enterprise which such latter person has a right to abstain from joining*, by means of instilling in him *or her* a fear that, if the demand is not complied with, the actor or another will:

1. Cause physical injury to a person; or
2. Cause damage to property; or
3. Engage in other conduct constituting a crime; or
4. Accuse some person of a crime or cause criminal charges to be instituted against him *or her*; or
5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
8. Use or abuse his *or her* position as a public servant by performing some act within or related to his *or her* official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his *or her* health, safety, business, calling, career, financial condition, reputation or personal relationships.

Coercion in the second degree is a class A misdemeanor.

**Forms**





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Domestic Relations Law  
Article 13 Provisions Applicable to More Than One Type of Matrimonial Action

**Go to the New York Code Archive Directory**

*NY CLS Dom Rel § 240 (2016)*

**§ 240. Custody and child support; orders of protection**

1. (a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section. Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section *and state on the record how such findings, facts and circumstances factored into the direction*. If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child, *and shall state on the record how such findings were factored into the determination*. An order directing the payment of child support shall contain the social security numbers of the named parties. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction shall make provision for child support out of the property of either or both parents. The court shall make its award for child support pursuant to subdivision one-b of this section. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction as it applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to part eight of article ten of the family court act and sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person having care and custody, or temporary care and custody, of the child. Notwithstanding any other provision of law, any written ap-

plication or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of public assistance and care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section fifty-two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party. Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law. Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.



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Family Court Act  
Article 8 Family Offenses Proceedings  
Part 1 Jurisdiction

**Go to the New York Code Archive Directory**

*NY CLS Family Ct Act § 812 (2015)*

**§ 812. Procedures for family offense proceedings**

**1. Jurisdiction.** The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of *section 130.60 of the penal law*, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree <1>, an attempted assault, <2> *identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree or coercion in the second degree as set forth in subdivisions one, two and three of section 135.60 of the penal law* between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to *section 30.00 of the penal law*, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

- (a) persons related by consanguinity or affinity;
- (b) persons legally married to one another;
- (c) persons formerly married to one another *regardless of whether they still reside in the same household*; <1>
- (d) persons who have a child in common *regardless of whether such persons have been married or have lived together at any time* <1>; *and*
- (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the dura-



tion of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

**2. Information to petitioner or complainant.** The chief administrator of the courts shall designate the appropriate persons, including, but not limited to district attorneys, criminal and family court clerks, corporation counsels, county attorneys, victims assistance unit staff, probation officers, warrant officers, sheriffs, police officers or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this article, before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, including but not limited to the following:

(a) That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts;

(b) That a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end the family disruption and obtain protection. Referrals for counseling, or counseling services, are available through probation for this purpose;

(c) That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;

(d) That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or family court petition, not at the time of arrest, or request for arrest, if any;

(e) [Repealed]

(f) That an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding; provided, however, that the arrest of an alleged offender shall be made under the circumstances described in subdivision four of *section 140.10 of the criminal procedure law*;

(g) That notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section.

**3. Official responsibility.** No official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.

**4. Official forms.** The chief administrator of the courts shall prescribe an appropriate form to implement subdivision two of this section.

**5. Notice.** Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the family court act and the domestic relations law. Such notice shall be available in English and Spanish and, if necessary, shall be delivered orally and shall include but not be limited to the following statement:

"If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct con-

stituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime."

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with the provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law. Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the family court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.





Sharon Friederwitzer, Appellant, v. Elliot Friederwitzer, Respondent

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

55 N.Y.2d 89; 432 N.E.2d 765; 447 N.Y.S.2d 893; 1982 N.Y. LEXIS 3071

January 4, 1982, Argued  
February 16, 1982, Decided

**PRIOR HISTORY:** Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 13, 1981, which, by a divided court, (1) modified, and, as modified, affirmed an order of the Supreme Court at Special Term (Vincent R. Balletta, J.), entered in Nassau County, modifying the judgment of divorce by inserting directions that defendant shall have custody and control of the infant issue of the marriage and that plaintiff shall have visitation rights, and (2) remitted the matter to the Supreme Court to determine the visitation rights of the plaintiff. The modification consisted of deleting so much of the order as specified the visiting rights of the plaintiff.

An uncontested divorce was awarded plaintiff wife by judgment dated July 24, 1979. The separation agreement entered into by them provided that as to the two children of the marriage the husband and wife would have joint custody with the children residing with the wife and reasonable visitation rights to the husband. It provided further that the terms of the agreement would survive a judgment of divorce "without merging, other than child support which shall merge in said decree." The judgment of divorce provided that the parties have joint custody of the children, the father to have visitation as provided in the separation agreement, and that the agreement should survive and not merge in the judgment. It also contained a retention of jurisdiction provision required by Appellate Division rule. Less than a year after the original judgment, the father moved for modification of the judgment of divorce so as to award him sole custody of the children. The Trial Judge found that the mother, while not unfit, was less fit to have custody than the father because her own best interests and social life appeared to be of "paramount concern to her, to the total exclusion of the best interests of her children". He predicated that conclusion on the mother having frequently left her then 11- and 8-year-old girls alone in the

apartment until late at night when she went out for the evening even though the children informed her that they were afraid to stay alone, and on the mother's profession of raising the children in the tenets of Orthodox Judaism while at the same time flagrantly violating those tenets.

The Court of Appeals affirmed the order of the Appellate Division, holding, in an opinion by Judge Meyer, that extraordinary circumstances are not a *sine qua non* of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties, and the standard ultimately to be applied remains the best interests of the children.

*Friederwitzer v Friederwitzer*, 81 AD2d 605.

**DISPOSITION:** Order affirmed.

## HEADNOTES

### Parent and Child -- Custody -- Modification of Custody Award

Extraordinary circumstances are not a *sine qua non* of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties; this is also true with respect to a judgment governed by an Appellate Division rule containing a retention of jurisdiction provision. No agreement of the parties can bind the court to a disposition other than that which a weighing of all the factors involved shows to be in the child's best interest, and the standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary; accordingly, where the separation agreement, which sur-



55 N.Y.2d 89, \*, 432 N.E.2d 765, \*\*;  
447 N.Y.S.2d 893, \*\*\*; 1982 N.Y. LEXIS 3071

vived and did not merge in the judgment of divorce, provided that the parents would have joint custody and the father moved, less than a year after the original judgment, for modification so as to award him sole custody, it was not error to award sole custody to the father, inasmuch as it was found that the mother, while not unfit, was less fit to have custody than the father because her own best interests and social life appeared to be of paramount concern to her, to the total exclusion of the best interests of her children.

**COUNSEL:** *Carl D. Bernstein* for appellant. I. There were no extraordinary changes in circumstances which justified a switch in custody to the father. (*Matter of Nehra v Uhlar*, 43 NY2d 242; *Corradino v Corradino*, 48 NY2d 894; *La Veglia v La Veglia*, 54 AD2d 727; *Matter of Austin v Austin*, 65 AD2d 903; *Matter of Heller v Bartman*, 65 AD2d 876; *McLaughlin v McLaughlin*, 71 AD2d 738; *Martin v Martin*, 74 AD2d 419.) II. The wishes of an 11-year-old child are of little weight in determining custody. (*Matter of Calder v Woolverton*, 50 AD2d 587, 39 NY2d 1042; *Pino v Pino*, 57 AD2d 919.) III. There has been no showing that the mother was in any sense unfit or that the father was more fit.

*Stanley Lehrer* for respondent. I. The court found sufficient grounds to justify transferring custody from the mother to the father. (*Matter of Barkley v Barkley*, 60 AD2d 954, 45 NY2d 936; *Braiman v Braiman*, 44 NY2d 584.) II. The totality of the circumstances justified the custodial change. (*Matter of Nehra v Uhlar*, 43 NY2d 242; *Corradino v Corradino*, 48 NY2d 894; *Matter of Nierenberg v Nierenberg*, 36 NY2d 850; *Opferbeck v Opferbeck*, 57 AD2d 1074; *Papernik v Papernik*, 55 AD2d 846; *Mantell v Mantell*, 45 AD2d 918; *Matter of D'Alessandro v Parisi*, 60 AD2d 897.) III. The wishes of Lisa Friederwitzer, 11 years and 9 months old at the time of the trial, should be accorded consideration. (*Martin v Martin*, 308 NY 136; *Pact v Pact*, 70 Misc 2d 100; *Matter of Barry v Glynn*, 59 Misc 2d 75.) IV. The trial court was in the best position to fully evaluate the facts. The best interests of the children will not now be served by another uprooting. (*Matter of Gloria S. v Richard B.*, 80 AD2d 72.)

**JUDGES:** Meyer, J. Chief Judge Cooke and Judges Jasen, Gabrielli, Wachtler and Fuchsberg concur; Judge Jones taking no part.

**OPINION BY: MEYER**

**OPINION**

[\*91] [\*\*766] [\*\*\*894] **OPINION OF THE COURT**

Extraordinary circumstances are not a *sine qua non* of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties, without contest, and without merging the agreement in the judgment. The more particularly is this so with respect to a judgment governed as is the judgment in this case by rule 699.9 of the Appellate Division, Second Department (22 NYCRR 699.9), pursuant to which the trial court expressly "retains jurisdiction \* \* \* for the purpose" to the extent permitted by law, "of making such further decree with respect to \* \* \* custody \* \* \* as it finds appropriate under the circumstances existing at the time application for that purpose is made to it" (22 NYCRR 699.9 [b], Approved Forms For Matrimonial Judgments, J13). The order of the Appellate Division affirming Special Term's order changing custody to the father should, therefore, be affirmed, without costs.

The parties were married in 1968. An uncontested divorce was awarded plaintiff wife after inquest, by judgment dated July 24, 1979. The separation agreement entered [\*92] into by them provided that as to the two children of the marriage, Lisa and Nicole, the husband and wife would have joint custody \* with the children residing with the wife and reasonable visitation rights to the husband. It provided further that the terms of the agreement would survive a judgment of divorce "without merging, other than child support which shall merge in said decree." The judgment of divorce provided that the parties have joint custody of the children, the father to have visitation as provided in the separation agreement, and that the agreement should survive and not merge in the judgment. It also contained the retention of jurisdiction provision (Approved Forms, J13) required by Appellate Division rule.

\* While physical custody was not to be shared under the agreement, it required consultation between the parties on all matters pertaining to the health, welfare, education and upbringing of the children.

In September, 1979, the mother, who had been living with the children on Long Island close to the residence of the father, moved with the children to an apartment on East 93rd Street in Manhattan. Both parties and the children have been reared as Orthodox Jews, strictly observing both the Sabbath and the dietary laws. The children, who had attended a yeshiva on Long Island, were transferred to a yeshiva in Manhattan. Less than a year after the original judgment, in April, 1980, the father [\*\*767] [\*\*\*895] moved for modification of the judgment of divorce so as to award him sole custody of his daughters. The mother cross-moved for sole custody. After a trial during which the mother, father and



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both children testified, the Trial Judge found the father to be "a loving and caring person \* \* \* well qualified as a fit parent." He found that the mother, while not unfit, was less fit to have custody than the father because her own best interests and social life appeared to be of "paramount concern to her, to the total exclusion of the best interests of her children." He predicated that conclusion on the mother having frequently left her then 11- and 8-year-old girls alone in the apartment until late at night when she went out for the evening even though the children informed her that they were afraid to stay alone, and on the mother's profession of raising the children in the tenets of Orthodox Judaism while at the same time flagrantly violating those tenets by permitting a male [\*93] friend to stay in the apartment and share her bed to the knowledge of the children, by failing, except rarely, to take the children to Sabbath services, and by permitting the male friend to violate the Sabbath by turning on the television, all of which confused the children and was contrary to their religious beliefs and detrimental to their religious feeling. Noting the older daughter's strong desire to live with her father and the younger child's wish to continue living with her mother but not to be separated from her sister, the Trial Judge acknowledged that the wishes of the children was an element to be considered, but held it controlled in this instance by the overriding considerations above detailed. He therefore modified the judgment to award custody of both children to the father.

The Appellate Division by a divided court modified in a respect not material to our determination and affirmed Special Term's order. The majority found the Trial Judge's conclusion that custody in defendant would serve the best interests of the children to be supported by the evidence. The dissenter, interpreting our decisions in *Corradino v Corradino* (48 NY2d 894) and *Matter of Nehra v Uhlar* (43 NY2d 242) as holding that custody "pursuant to an agreement should not be transferred absent extraordinary circumstances" (81 AD2d, p 606) of which he found no evidence in the record, voted to reverse and deny the father's motion. The mother's appeal to us presents the question of law whether extraordinary circumstances are required as the dissent suggested. We affirm.

The only absolute in the law governing custody of children is that there are no absolutes. The Legislature has so declared in directing that custody be determined by the circumstances of the case and of the parties and the best interests of the child, but then adding "In all cases there shall be no prima facie right to the custody of the child in either parent" (*Domestic Relations Law*, § 240; see, also, § 70). Because the section speaks to modification as well as to an original matrimonial judgment, "all cases" must be read as including both. That,

of course, does not mean that custody may be changed without regard to the circumstances considered by the court when the earlier award was made but rather that no one factor, including the [\*94] existence of the earlier decree or agreement, is determinative of whether there should, in the exercise of sound judicial discretion, be a change in custody.

Indeed, in *Matter of Nehra v Uhlar* (43 NY2d 242, *supra*), we were at pains to point out many of the factors to be considered and the order of their priority. Thus, we noted that "Paramount in child custody cases, of course, is the ultimate best interest of the child" (p 248), that stability is important but the disruption of change is not necessarily determinative (pp 248, 250), that the desires of the child are to be considered, but can be manipulated and may not be in the child's best interests (p 249), that self-help through abduction by the noncustodial parent must be deterred but [\*\*768] [\*\*\*896] even that "must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child" (p 250), that the relative fitness of the respective parents as well as length of time the present custody had continued are also to be considered (pp 250-251), that "Priority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement" (p 251), whereas of lesser priority will be the abduction, elopement or other defiance of legal process as well as the preferences of the child (*id.*).

The priority which is accorded the first award of custody, whether contained in court order or voluntary agreement, results not from the policy considerations involved in *res judicata* (which permits change in custody decrees when warranted by the circumstances, *Kunker v Kunker*, 230 App Div 641, 645; cf. *Matter of Bachman v Mejias*, 1 NY2d 575, 581; *Goldman v Goldman*, 282 NY 296, 304; see Restatement, Judgments 2d [Tent Draft No. 3], § 74, Comment d; and [Tent Draft No. 5], § 61, Comment f, illustration 11), so much as from the conceptions that stability in a child's life is in the child's best interests and that the prior determination reflects a considered and experienced judgment concerning all of the factors involved ( *Martin v Martin*, 74 AD2d 419, 427). But the weight to be given the prior award necessarily depends upon whether it results from the Trial Judge's judgment after consideration of all [\*95] relevant evidence introduced during a plenary trial or, as here, finds its way into the judgment through agreement of the parties proven as part of a proceeding in which custody was not contested and no evidence contradictory of the agreement's custody provision has been presented. No agreement of the parties can bind the court to a disposition other than that which a weighing of all of the factors involved shows to be in the child's best interest (

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*People ex rel. Wasserberger v Wasserberger*, 42 AD2d 93, 95, affd on opn below 34 NY2d 660). Nor is an agreement so contradictory of considered judgment as to determine custody solely upon the basis of the wishes of the young children involved a "weighty factor" for consideration ( *Martin v Martin*, 74 AD2d 419, 426, *supra*). Thus, *Nehra's* phrase "absence of extraordinary circumstances" is to be read as "absence of countervailing circumstances" on consideration of the totality of circumstances, "not that some particular, sudden or unusual event has occurred since the prior award. The standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary.

An additional reason for so holding in the instant case exists in rule 699.9 of the Appellate Division, Second Department, to which the decree in the instant case is subject. Custody decrees remain subject to modification because the governing statute so provides ( *Goldman v Goldman*, 282 NY 296, 304, *supra*; *Domestic Relations Law*, § 240; Siegel, 1964 Practice Commentary, McKinney's Cons Laws of NY, Book 14, *Domestic Relations Law*, § 240, 1981-1982 Pocket Part, p 165; Ann., 73 ALR2d 1444). Rule 699.9 expressly states that "as to support, custody and visitation, no such [separation] agreement or stipulation is binding" ( 22 NYCRR 699.9 [f] [4]) and requires, as earlier noted, that the judgment contain the provision (*id.*, Approved Forms, J13) that the court retains jurisdiction for the purpose of making such further custody decree "as it finds appropriate under the circumstances existing at the time application for that

purpose is made to it" (italics supplied). Such a modification is, as already noted, permitted by law when authorized by the totality of [\*96] circumstances, including the existence of the prior decree. Moreover, the language of the rule makes indelibly clear that it is the circumstances [\*\*\*897] existing at the time of the application for [\*\*769] change that governs whether a change should be made, whether or not any of them can be characterized as extraordinary. This, of course, does not mean that a matrimonial court in the Second Department has the authority to change custody simply because change is requested, but that it has the discretion to do so when the totality of circumstances, including the existence of the prior award, warrants its doing so in the best interests of the child.

It thus appears that the standard applied by the courts below was not legally incorrect. Moreover, the record supports the determination of the courts below that the change of custody was warranted by the lesser concern of the mother for the emotional well-being of her children than for her own life style demonstrated after the original award was made, particularly in light of the short period of time it had been in existence when the application for modification was made and the fact that the custody provisions of the divorce judgment were based on the agreement of the parties rather than plenary consideration by the trial court.

For the foregoing reasons, the order of the Appellate Division should be affirmed, without costs.

Order affirmed.



**Donald Eschbach, Appellant, v. Rita Eschbach, Respondent**

**[NO NUMBER IN ORIGINAL]**

**Court of Appeals of New York**

**56 N.Y.2d 167; 436 N.E.2d 1260; 451 N.Y.S.2d 658; 1982 N.Y. LEXIS 3326**

**March 29, 1982, Argued**

**May 13, 1982, Decided**

**PRIOR HISTORY:** Appeal from so much of an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered August 10, 1981, as modified, on the law and the facts, and, as modified, affirmed a judgment of the Supreme Court at Special Term (Morrie Slifkin, J.), entered in Westchester County, awarding custody of the parties' three infant children to plaintiff. The modification consisted of substituting a provision granting exclusive custody only of the parties' two older children to plaintiff.

Plaintiff father sought custody of his three daughters, who resided with defendant mother pursuant to the terms of a stipulation between the parties, which was incorporated in their judgment of divorce. The relationship between the two older girls and their mother has deteriorated since the time of the parties' divorce and the older girls expressed a strong desire to live with their father. Although the youngest child, Laura, did not express such a preference in favor of one parent, she did express a strong desire to remain with her sisters. The trial court made no specific finding that defendant was an unfit mother for Laura, but it implicitly found that defendant is the less fit parent. The court awarded custody of the three girls to plaintiff. The Appellate Division agreed that the antagonistic relationship of the older children with their mother and their preference for living with their father required a change in custody for the older girls. However, with respect to Laura, the Appellate Division modified the Supreme Court judgment and ordered that she remain with her mother. On this appeal, the question is limited to which parent should have custody of Laura, defendant not having appealed from that part of the Appellate Division order affirming the award of custody of the older children to plaintiff.

The Court of Appeals reversed the Appellate Division order and reinstated the Supreme Court judgment,

holding, in an opinion by Judge Jasen, that the trial court properly found that under the totality of the circumstances, Laura's best interests required changing custody of the child from her mother to her father.

*Eschbach v Eschbach*, 83 AD2d 845.

**DISPOSITION:** Order reversed, etc.

#### **HEADNOTES**

##### **Parent and Child -- Custody -- Placement with Siblings**

The trial court's determination that, under the totality of the circumstances, it is in the best interests of the youngest child of the parties to change the custody of the child from defendant mother to plaintiff father, along with her two older sisters, conforms with the weight of the evidence and, accordingly, said judgment is reinstated; although the youngest child did not express the definite preference for living with her father that the older girls did, she expressed a strong desire to remain with her sisters, and, while the trial court made no specific finding that defendant was an unfit mother for the child, a finding that defendant is the less fit parent is implicit in its order to change custody and is supported by the record.

**COUNSEL:** *Herbert J. Malach* and *Robert G. Schneider* for appellant. 1. The trial court had sufficient evidence to transfer custody of Laura to the father and that finding should not have been disturbed. (*Matter of Darlene T.*, 28 NY2d 391; *Matter of Ray A. M.*, 37 NY2d 619; *Matter of Jewish Child Care Assn. of N. Y.*, 5 NY2d 222; *People ex rel. Portnoy v Strasser*, 303 NY 539; *Bunim v Bunim*, 298 NY 391; *Matter of Ebert v Ebert*, 38 NY2d 700; *Matter of Irene O.*, 38 NY2d 776; *Bistany v Bistany*, 66 AD2d 1026; *Kessler v Kessler*, 10 NY2d 445; *Aber-*



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*bach v Aberbach*, 33 NY2d 592.) II. It was error for the court below to separate Laura from her two sisters and this was clearly not in Laura's best interests. (*Matter of Ebert v Ebert*, 38 NY2d 700; *Obey v Degling*, 37 NY2d 768; *Bistany v Bistany*, 66 AD2d 1026; *Aberbach v Aberbach*, 33 NY2d 592; *Lucey v Lucey*, 60 AD2d 757.) III. The decision of the trial court specifically found the mother to be unfit and less fit than the father which would warrant a change of custody of Laura. (*People ex rel. Sibley v Sheppard*, 54 NY2d 320; *Aberbach v Aberbach*, 33 NY2d 592; *Martin v Martin*, 74 AD2d 419; *Kuleszo v Kuleszo*, 59 AD2d 1059; *Matter of Goho v Goho*, 59 AD2d 1045.)

*Edward D. Loughman, Jr.*, for respondent. I. In contrast to appellant's distortion of the record, not a shred of evidence shows respondent to be an unfit mother of Laura. (*Matter of Henson*, 77 Misc 2d 694; *Sandman v Sandman*, 64 AD2d 698; *Porges v Porges*, 63 AD2d 712; *People ex rel. Repetti v Repetti*, 50 AD2d 913; *Matter of Darlene T.*, 28 NY2d 391; *Bunim v Bunim*, 298 NY 391; *Matter of Ray A. M.*, 37 NY2d 619; *Matter of Susanne U. NN v Rudolf OO*, 57 AD2d 653, *affd sub nom. Matter of Nehra v Uhlar*, 43 NY2d 242.) II., Appellant's failure to prove Mrs. Eschbach an unfit mother of Laura required continuation of custody in her mother. (*Matter of Nehra v Uhlar*, 43 NY2d 242; *Corradino v Corradino*, 48 NY2d 894; *Sandman v Sandman*, 64 AD2d 698; *Porges v Porges*, 63 AD2d 712; *Mullins v Mullins*, 76 AD2d 914; *Bistany v Bistany*, 66 AD2d 1026; *People ex rel. Selbert v Selbert*, 60 AD2d 692; *People ex rel. Repetti v Repetti*, 50 AD2d 913; *Obey v Degling*, 37 NY2d 768.)

**JUDGES:** Jasen, J. Chief Judge Cooke and Judges Gabrielli, Jones, Wachtler, Fuchsberg and Meyer concur.

#### OPINION BY: JASEN

#### OPINION

[\*169] [\*\*1261] [\*\*\*659] **OPINION OF THE COURT**

The question to be resolved on this appeal is whether custody of the youngest child of the parties herein should be changed, along with that of her two older sisters, from her mother to her father.

Plaintiff, Donald Eschbach, and defendant, Rita Eschbach, were married on November 23, 1963. Donald Eschbach was granted a divorce on May 28, 1979 on the basis of the couple having lived separate and apart pursuant to a separation agreement for one year. (*Domestic Relations Law*, § 170, *subd* [5].) Custody of the three daughters of the marriage was granted to their mother pursuant to an oral stipulation of the parties entered in the minutes of the court at the inquest hearing

held on January 16, 1979. The stipulation, which also provided visitation rights for the children's father, was incorporated but not merged in the judgment of divorce.

[\*\*\*660] Events over the course of the next year indicated a progressive deterioration in the mother's relationship with her daughters. On several occasions, the two older girls, Karen and Ellen, ran away from defendant's home, either to their father's residence or to friends' homes. The record also reveals [\*\*1262] that the mother refused to allow the girls to participate in extracurricular activities at school and imposed severe limitations on what activities they could [\*170] participate in and with whom they were allowed to associate. Concerned that the children were being raised in an unhealthy atmosphere which was affecting their emotional and psychological development, the father commenced this action seeking a modification of the judgment of divorce to the extent of awarding him custody of his three daughters.

The trial court took testimony from both parents, representatives of the school, and the two older daughters. Although the youngest daughter, Laura, did not testify, she was interviewed by the court *in camera*, and a transcript of that proceeding is included in the record before us. Additionally, a report was prepared for the court by a probation officer who had interviewed the parties.

The trial court found that the mother's unreasonable demands and restrictions were jeopardizing the older daughters' emotional and intellectual development and that there was a total breakdown of communication between the older children and their mother. Furthermore, the court found that the strong preference to live with their father expressed by these children, who were age 16 and 14 at the time of the hearing, should be given consideration.

Although Laura, who was 10 at the time of the hearing, had not expressed a similarly strong preference to live with her father rather than her mother, the court recognized her strong desire to remain with her sisters. After considering all the factors presented, the court found that her best interests would be served by continuing her close relationship with her sisters and that a change of custody to her father was necessary under these circumstances.

On appeal, the Appellate Division agreed that "the antagonism [of the older] children \* \* \* toward defendant and their strong preference to live with plaintiff" (83 AD2d 845, 846) required a change in custody for Karen and Ellen. That court, however, modified the judgment and ordered that Laura's custody remain with the mother because there was "nothing to suggest that defendant has been anything but a fit parent toward her." (*Id.*)

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On this appeal, the father seeks custody of Laura. The mother has not sought a further appeal from that part of the order which affirmed the judgment awarding custody [\*171] of Karen and Ellen to the plaintiff. The question on this appeal is thus limited to which parent should have custody of Laura. We agree with the trial court that Laura's best interests require a change in her custody from her mother to her father.

Any court in considering questions of child custody must make every effort to determine "what is for the best interest of the child, and what will best promote its welfare and happiness". (*Domestic Relations Law*, § 70; *Matter of Ebert v Ebert*, 38 NY2d 700, 702; *Obey v Degling*, 37 NY2d 768, 769; *Matter of Lincoln v Lincoln*, 24 NY2d 270; *Bistany v Bistany*, 66 AD2d 1026; *Sandman v Sandman*, 64 AD2d 698, mot for lv to app den 46 NY2d 705; *Matter of Saunders v Saunders*, 60 AD2d 701.) As we have recently stated, there are no absolutes in making these determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child. (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 93-95.)

Where the parties have entered into an agreement as to which parent should [\*\*\*661] have custody, we have stated that "[priority], not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded" to that agreement. (*Matter of Nehra v Uhlar*, 43 NY2d 242, 251.) This priority is afforded the first determination of custody in the belief [\*\*1263] the stability this policy will assure in the child's life is in the child's best interests. (*Friederwitzer v Friederwitzer*, *supra*, at p 94; *Corradino v Corradino*, 48 NY2d 894; *Matter of Nehra v Uhlar*, *supra*; *Obey v Degling*, *supra*; *Dintruff v McGreevy*, 34 NY2d 887; *Aberbach v Aberbach*, 33 NY2d 592; *People ex rel. Selbert v Selbert*, 60 AD2d 692.) But as this court noted in *Friederwitzer*, "[no] agreement of the parties can bind the court to a disposition other than that which a weighing of all the factors involved shows to be in the child's best interests (*People ex rel. Wasserberger v Wasserberger*, 42 AD2d 93, 95, affd on opn below 34 NY2d 660)." (*Friederwitzer v Friederwitzer*, *supra*, at p 95.) Thus, an agreement between the parties is but one factor to be weighed by the court in deciding whether a change of custody is warranted.

[\*172] The weight to be given the existence of a prior agreement depends on whether the prior disposition resulted from a full hearing by a trial court or was merely incorporated in the court's judgment pursuant to an uncontested stipulation. (*Friederwitzer v Friederwitzer*, *supra*, at pp 94-95.) This is particularly true where, as in this case, the rules of the court require that the decree specify that "as to support, custody and visitation, no such agreement or stipulation is binding" (22 NYCRR

699.9 [ff] [4]) and that the court retains jurisdiction for the purpose of making such further custody decree "as it finds appropriate under the circumstances existing at the time application for that purpose is made to it". (22 NYCRR 699.9, Approved Forms, J13.) Since the court was not bound by the existence of the prior agreement, it has the discretion to order custody changed "when the totality of circumstances, including the existence of the prior award, warrants its doing so in the best interests of the child." (*Friederwitzer v Friederwitzer*, *supra*, at p 96.)

Primary among those circumstances to be considered is the quality of the home environment and the parental guidance the custodial parent provides for the child. (*Matter of Ebert v Ebert*, 38 NY2d 700, 702, *supra*; *Bistany v Bistany*, 66 AD2d 1026, *supra*; *Sandman v Sandman*, 64 AD2d 698, mot for lv to app den 46 NY2d 705, *supra*; *Matter of Saunders v Saunders*, 60 AD2d 701, *supra*.) While concerns such as the financial status and the ability of each parent to provide for the child should not be overlooked by the court, an equally valid concern is the ability of each parent to provide for the child's emotional and intellectual development. (*Sandman v Sandman*, *supra*; *Porges v Porges*, 63 AD2d 712; *Matter of Saunders v Saunders*, *supra*.)

In determining whether the custodial parent can continue to provide for the child's various needs, the court must be cognizant of the individual needs of each child. It is, of course, entirely possible that a circumstance such as a total breakdown in communication between a parent and child that would require a change in custody would be applicable only as to the best interests of one of several children. (*Bistany v Bistany*, *supra*; *Sandman v Sandman*, [\*173] *supra*; *Porges v Porges*, *supra*.) To this end, it is important for the court to consider the desires of each child. But again, this is but one factor to be considered; as with the other factors, the child's desires should not be considered determinative. (*Matter of Ebert v Ebert*, *supra*, at p 702; [\*\*\*662] *Obey v Degling*, 37 NY2d 768, 770, *supra*; *Dintruff v McGreevy*, 34 NY2d 887, 888, *supra*; *Sandman v Sandman*, *supra*.) While not determinative, the child's expressed preference is some indication of what is in the child's best interests. Of course, in weighing this factor, the court must consider the age and maturity of the child and the potential [\*\*1264] for influence having been exerted on the child. (*See, e.g., Obey v Degling*, *supra*, at p 770; *Dintruff v McGreevy*, *supra*, at p 888.)

Finally, this court has long recognized that it is often in the child's best interests to continue to live with his siblings. While this, too, is not an absolute, the stability and companionship to be gained from keeping the children together is an important factor for the court to consider. "Close familial relationships are much to be en-



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couraged." (*Matter of Ebert v Ebert*, *supra*, at p 704.) "Young brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful." (*Obey v Degling*, *supra*, at p 771; *Matter of Gunderud v Gunderud*, 75 AD2d 691; *Bistany v Bistany*, *supra*.)

The weighing of these various factors requires an evaluation of the testimony, character and sincerity of all the parties involved in this type of dispute. Generally, such an evaluation can best be made by the trial court which has direct access to the parties and can supplement that information with whatever professionally prepared reports are necessary. "In matters of this character 'the findings of the nisi prius court must be accorded the greatest respect' (*Matter of Irene O.*, 38 NY2d 776, 777)" (*Matter of Ebert v Ebert*, *supra*, at p 703; *Bistany v Bistany*, *supra*). Appellate courts should be reluctant to substitute their own evaluation of these subjective factors for that of the nisi prius court (*People ex rel. Portnoy v Strasser*, 303 NY 539, 542; *Bistany v Bistany*, *supra*), and if they do, should articulate [\*174] the reasons for so doing. Similarly, the existence or absence of any one factor cannot be determinative on appellate review since the court is to consider the totality of the circumstances. (*Friederwitzer v Friederwitzer*, 55 NY2d 89, *supra*.)

Turning then to the facts of this case, we hold that the determination of the trial court that the totality of the circumstances warrants awarding custody of Laura to her father conforms to the weight of the evidence. The rec-

ord indicates that although the mother is not an unfit parent for Laura, she is, under all the circumstances present here, the less fit parent. Thus, the trial court was not bound by the stipulation of the parties, but was free to, and indeed required to, review the totality of the circumstances to determine what would be in Laura's best interests. In doing so, the Trial Judge weighed the testimony of all the parties, including Laura, and considered the testimony of school officials and reports from a probation officer appointed by the court. The court made no specific finding that defendant was an unfit mother for Laura, but a finding that the mother was the less fit parent is implicit in its order to change custody and is supported by the record. Additionally, the trial court, while noting Laura's ambivalence as to which parent she would prefer to live with, gave significant weight to her strong desire to remain with her older sisters. The record indicates that all relevant factors, including the mother's ability to cope with raising children as they approach maturity and the father's desire to provide a fuller and more enriched environment for his daughters were considered. It is abundantly clear from the record that the trial court, in this case, made a careful and studied review of all the relevant factors. As the determination of the nisi prius court, we [\*\*\*663] believe this holding should be accorded great deference on review.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the judgment of Supreme Court, Westchester County, reinstated.

Order reversed, etc.



Arthur W. Braiman, Appellant, v. Sharon Braiman, Respondent

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

44 N.Y.2d 584; 378 N.E.2d 1019; 407 N.Y.S.2d 449; 1978 N.Y. LEXIS 2050

May 1, 1978, Argued  
June 8, 1978, Decided

**PRIOR HISTORY:** Appeal from so much of an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 13, 1978, as (1) reversed, on the law and the facts, an order of the Supreme Court at Special Term (Joseph Giudice, J.), entered in Dutchess County, awarding custody of two children to the petitioner father, and (2) awarded custody of the children to the parties jointly.

Upon the breakdown of the parties' marriage in 1974, custody of the children was, under a separation agreement, given to the respondent mother. That agreement survived a judgment of divorce entered in favor of the father in January, 1975. In April, 1976, when the father, who had remarried, learned that respondent, his former wife, was contemplating leaving the jurisdiction, the present proceeding for change of custody based on respondent's alleged unfitness was begun. The hearing before Special Term, which included the testimony of physicians, psychiatrists, teachers and neighbors, was fraught with contradictions. Concluding that the children had fared poorly with their mother, Special Term awarded custody to the father. The Appellate Division reversed, expressly crediting the testimony in favor of respondent, and awarded joint custody.

The Court of Appeals reversed and ordered a new hearing. In an opinion by Chief Judge Breitel, the court held that joint custody is insupportable when the parents are severely antagonistic and embattled, that, on the two-year-old hearing record, plagued with hopelessly conflicting testimony, it would be improvident to choose between the contradictory findings of the courts below, and that a new hearing was required.

*Braiman v Braiman*, 61 AD2d 995.

**DISPOSITION:** Order, insofar as appealed from, reversed, etc.

#### HEADNOTES

##### Parent and Child -- Joint Custody

1. To entrust the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical custody, is insupportable when the parents are severely antagonistic and embattled. When the conflicts and contradictions of the testimony presented at the hearing are so severe as to go to the heart of the matter making it impossible to resolve them without assessments of credibility, a new hearing is required.

##### Parent and Child -- Joint Custody

2. The authority to entrust custody of a child to both parents jointly has been inferred from the provisions of *section 240 of the Domestic Relations Law* that neither parent has a prima facie right to custody and that the court is to give such direction as, in its discretion, justice requires, having regard to the circumstances and the best interests of the child. Joint custody reposes in both parents a shared responsibility for and control of a child's upbringing and may or may not include an arrangement for alternating physical custody and it is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a civilized fashion; as a court-ordered arrangement imposed upon already embattled and embittered parents, it can only enhance familial chaos.

**COUNSEL:** *Norman Bard, Anthony M. Barraco and Sandra Krevitsky* for appellant. I. In the 23 months that have elapsed since the custody hearing, the children have resided with their father; the mother has sold the children's former residence and her present whereabouts are



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currently unknown; and she is presently undergoing psychiatric therapy. These are sufficient changes of circumstances to warrant a new hearing to ascertain the present status of the parties and to determine what is in the best interests of the children under these changed circumstances. (*Matter of Bennett v Jeffreys*, 40 NY2d 543; *People ex rel. Cusano v Leone*, 43 NY2d 665; *Matter of Gomez v Lozado*, 40 NY2d 839; *Matter of Darlene T.*, 28 NY2d 391; *People ex rel. Wessell v New York Foundling Hosp.*, 34 AD2d 947, 36 AD2d 936; *Sweeney v Sweeney*, 39 AD2d 561; *Pino v Pino*, 57 AD2d 919; *Fleishman v Walters*, 40 AD2d 622; *Matter of Robertson v Robertson*, 54 AD2d 1081.) II. Special Term's determination, made after hearing eight days of hopelessly conflicting testimony, is entitled to great weight and should be reinstated. (*Matter of Ray A. M.*, 37 NY2d 619; *Maule v Kaufman*, 33 NY2d 58; *Schine v Schine*, 31 NY2d 113; *Boyd v Boyd*, 252 NY 422; *Matter of Irene O.*, 38 NY2d 776; *Matter of Ebert v Ebert*, 38 NY2d 700; *Ingalls v Ingalls*, 58 AD2d 1039; *People ex rel. Therese W. v Harold J. D.*, 53 AD2d 620; *Matter of Harrison v Harrison*, 54 AD2d 906.)

Joan Goldberg for respondent. I. The change of custody at Special Term was contrary to the facts and to the law and the court below correctly reversed that decision. (*Dintruff v McGreevy*, 42 AD2d 809, 34 NY2d 887; *Matter of Wout v Wout*, 32 AD2d 709; *Matter of Rodolfo "CC" v Susan "CC"*, 37 AD2d 657; *Mantell v Mantell*, 45 AD2d 918; *People ex rel. Hinckley v Hinckley*, 31 AD2d 740; *Nierenberg v Nierenberg*, 43 AD2d 717; *Matter of Metz v Morley*, 29 AD2d 462; *Matter of Lang v Lang*, 9 AD2d 401, 7 NY2d 885; *Matter of Kevin M. JJ v Alice A. JJ*, 50 AD2d 959; *Aberbach v Aberbach*, 33 NY2d 592.) II. The decision of the court below ordering split custody should be reversed. (*Perotti v Perotti*, 78 Misc 2d 131; *Woicik v Woicik*, 66 Misc 2d 357; *Ross v Ross*, 4 Misc 2d 399.) III. Petitioner-appellant's argument that a new hearing is now required is totally devoid of merit. (*Matter of Darlene T.*, 28 NY2d 391; *People ex rel. Cusano v Leone*, 43 NY2d 665; *People ex rel. Wessell v New York Foundling Hosp.*, 36 AD2d 936; *Matter of Bennett v Jeffreys*, 40 NY2d 543; *Sweeney v Sweeney*, 39 AD2d 561; *Pino v Pino*, 57 AD2d 919.) IV. The decision at Special Term is not entitled to any weight at all. (*Bunim v Bunim*, 298 NY 391; *Matter of Ray A. M.*, 37 NY2d 619.) V. Counsel fees should be awarded for services rendered at Special Term in the court below and in the Court of Appeals. (*Sloan v Sloan*, 286 App Div 1102; *Schulsinger v Schulsinger*, 9 AD2d 909; *Parker v Parker*, 269 App Div 717; *Miraldi v Miraldi*, 37 AD2d 842; *Anonymous v Anonymous*, 47 AD2d 613; *Carlo v Carlo*, 30 AD2d 530; *Martin v Martin*, 28 AD2d 897.)

**JUDGES:** Chief Judge Breitel. Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur.

**OPINION BY:** BREITEL

**OPINION**

[\*586] [\*1019] [\*\*\*449] **OPINION OF THE COURT**

In a proceeding, described as one to modify a judgment of [\*587] divorce obtained by the husband, petitioner father seeks custody of his two sons, now aged six and seven-and-a-half. Until this proceeding, respondent mother had custody under a separation agreement which survived a judgment of divorce. Special Term, Supreme Court, awarded custody to the father, but a unanimous Appellate Division reversed, and awarded custody to the parents jointly. The father appeals.

At issue is whether the custody of children of tender years may be entrusted, jointly, to parents persistently and severely embattled.

The order of the Appellate Division, *insofar as appealed from*, should be reversed, and a new hearing held with utmost expedition. Entrusting the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical custody, is insupportable when parents are severely antagonistic and embattled. On the two-year-old hearing record before this court, plagued as it is with hopelessly conflicting testimony on vital facts and issues, it would be improvident to choose between the contradictory findings of the courts below. Consequently a new hearing is required.

Petitioner father, a successful lawyer, married respondent in 1967. The eldest of their three children, a daughter, was born to the mother before she met petitioner, but was later adopted by him. Although he initially sought custody of his adopted daughter, the father did not appeal from Special Term's award of her custody to the mother. Hence, only custody of the parties' two young sons remains contested.

The preliminary facts are not disputed. Upon the marital breakdown in late 1974, custody of the three children was, under a separation agreement, given to the mother. That agreement survived a judgment of divorce entered in favor of the father in January, 1975. It was not until April, 1976, when the father, who had since remarried, learned that his former wife was contemplating leaving the jurisdiction, that this proceeding for change of custody based on the mother's alleged unfitness was begun. [\*\*\*450] Pending a hearing at Special Term, the sons were temporarily placed with their father.



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The picture that developed is a mass of hopelessly conflicting unpleasant cross-accusations. [\*\*1020] Petitioner views himself as a devoted and responsible father. In the former wife's eyes, however, he is a gambler, an unethical person, and an inattentive [\*588] and physically abusive father. The mother, who remarried shortly after this proceeding was brought, describes herself as a homebody. In contrast, the father, buttressed by witnesses, characterizes her as a promiscuous barfly who, while entertaining a series of paramours in the children's home, neglected the children.

An extensive investigation by the County Department of Probation was inconclusive. Noting the number of vital contradictions, the probation officer made no recommendation for custody of the sons. She concluded only that both parents seemed to love and be genuinely concerned with the children, and that, due to the mother's contemplated relocation, the father would probably supply a more stable environment.

The eight-day hearing before Special Term, which included testimony of physicians, psychiatrists, teachers, and neighbors, was similarly fraught with contradictions. The testimony of the medical experts provides but one example among many. The father's experts testified that in April, 1976, when change of custody was first sought, the then four year old was badly bruised and the then five year old was suffering from a nervous skin disorder. One physician even filed a report of child abuse. The boys' pediatrician, on the other hand, stated that he had never seen signs of child abuse and that the five year old's rash could not have been caused by anxiety. The authorities, moreover, ultimately determined that the child abuse report was unfounded.

There is more. The father's alleged physical abuse of the children, his asserted delinquency in support payments, the mother's purported neglect of the home, and her alleged promiscuous consorting with intermittent paramours are but four of numerous areas in which the testimony is flatly contradicted.

Concluding that the sons fared poorly with their mother, Special Term, in an elaborated opinion, awarded their custody to the father. The Appellate Division, in an even more elaborate writing, reversed, expressly crediting the testimony in favor of the mother and citing the rule that modification of a custody agreement reached by the parties requires a change in circumstances, especially with respect to fitness (see *Matter of Ebert v Ebert*, 38 NY2d 700, 703). Custody was awarded to the parents jointly, the sons to spend weekdays with the mother and weekends with the father.

To date, the order of the Appellate Division having been [\*589] stayed, the sons remain with the father. Despite court order to the contrary, he has not permitted

the mother visitation. For reasons unrevealed by the record, the whereabouts of the mother are now undisclosed.

Under section 240 of the *Domestic Relations Law*, neither parent has a "prima facie right" to custody. Instead, the court is to "give such direction \* \* \* as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child". It is from this language that the authority to entrust custody of a child to both parents "jointly" has been inferred (see, e.g., *Dodd v Dodd*, 93 Misc 2d 641, 644-645; *Perotti v Perotti*, 78 Misc 2d 131, 132).

"Joint", or, as it is sometimes called "divided", custody reposes in both parents a shared responsibility for and control of a child's upbringing (see Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 Cal L Rev 978, 1009-1010; compare 1 Lindey, *Separation Agreements* [\*\*\*451] and *Ante-Nuptial Contracts* [rev ed], pp 14-60 to 14-61; see, generally, "Split", "Divided", or "Alternate" Custody of Children, Ann., 92 ALR2d 695). It may or may not include an arrangement for alternating physical custody (compare *Schack v Schack*, NYLJ, Aug 21, 1974, p 15, col 8, p 17, col 1, with *Perotti v Perotti*, 78 Misc 2d 131, 134, *supra*).

On the wisdom of joint custody the authorities are divided (see *Dodd v Dodd*, 93 Misc 2d 641, 645-647, *supra*, for a collection of authorities and an analysis of competing concerns; Bodenheimer, pp 1009-1010). Of course, other considerations notwithstanding, children are entitled to the love, companionship, and concern of both parents. So, too, a joint award affords the otherwise noncustodial parent psychological support which can be translated into a healthy environment for the child.

But, that there is no perfect solution to the divided family does not mean that the court should not recognize the division in fact of the family. Children need a home base. Particularly where alternating physical custody is directed, such custody could, and would generally, further the insecurity and resultant pain frequently experienced by the young victims of shattered families (see Foster & Freed, *Law and the Family* -- New York, § 29:6A [1978 Supp]).

It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, [\*590] amicable parents behaving in mature civilized fashion (see, e.g., *Dodd v Dodd*, 93 Misc 2d 641, 646-647, *supra*; Bodenheimer, pp 1010-1011). As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing

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one another of serious vices and wrongs, it can only enhance familial chaos.

More than four years since their separation, the parents are evidently still unable to manage their common problems with their children, let alone trust each other. Instead, they continue to find fault and accuse. They have failed to work out between themselves even a limited visitation with the children. To expect them to exercise the responsibility entailed in sharing their children's physical custody at this time seems beyond rational hope. It would, moreover, take more than reasonable self-restraint to shield the children, as they go from house to house, from the ill feelings, hatred, and disrespect each parent harbors towards the other.

That the mother's whereabouts are undisclosed, and that she is admittedly desirous of moving out of the jurisdiction, suggests still further complications. The physical custody arrangement ordered by the Appellate Division contemplates reasonable geographical proximity. Under the instant circumstances, alternating physical custody is, even as a matter of logistics alone, unrealistic.

That the joint custody may not stand, however, does not resolve the issue. This court, even if it were possible on the hopelessly conflicted record, does not make new findings of fact. Instead, the court reviews the record and chooses only between the findings of the courts below. (See *CPLR 5501, subd [b]*; 7 Weinstein-Korn-Miller, *NY Civ Prac, par 5501.16.*) The conflicts and contradictions in this record, however, are so severe and so go to the heart of the matter that it is impossible to resolve them without assessments of credibility. Either or both of the parents with their retinues of contradictory lay and expert witnesses have presented such extremes of proof that further inquiry in depth is required to resolve the issues. While litigation rarely provides issues of fact free from serious contradiction, the state of this particular record makes resolution, at this stage, hopeless.

An added difficulty is that two years have elapsed since the hearing at Special Term. During that period, the boys have lived with their father; they have been prevented from seeing [\*591] their mother; and the mother has evidently found it necessary to conceal her whereabouts.

[\*\*\*452] However imperative it otherwise would be for this court to end the proceeding, in light of all that has occurred and the critical inconsistencies in the record, a new but expedited hearing is required. Both Special Term and the Appellate Division in deciding and writing upon this case detailed their reasons. Read together the opinions dramatically reflect the sharp contradictions between the proof presented by the parties. Read separately, each supports the conclusion [\*\*1022] reached because each emphasizes the testimony of the separate retinues of witnesses. On appellate review, the present record is incapable of sustaining a plausible resolution.

Of course, whatever the ultimate disposition, it must be, as it has always been, in the best interest of the children (see, e.g., *Domestic Relations Law, § 240*; *Finlay v Finlay*, 240 NY 429, 433-434 [Cardozo, J.]). Yet, at this point on this record, it is impossible to discern where those interests lie. Even the undoubtedly objective probation officer could make no recommendation for the sons. The trial court, therefore, may wish to consider appointing a qualified guardian ad litem for the children, who would be charged with the responsibility of close investigation and exploration of the truth on the issues and perhaps even of recommending by way of report alternative resolutions for the court to consider (see *CPLR 1202*; cf. *Barry E. v Ingraham*, 43 NY2d 87, 95).

There are no painless solutions. In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never carried out. At least, that is what the present record shows. A new record may offer a better, if still imperfect, solution.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed, without costs, and a new hearing ordered. Pending such hearing the custody of the children should remain as provided by Special Term of Supreme Court in its order of July 6, 1976.





**In the Matter of Kenneth Moreno, Respondent, v. Maria Cruz, Appellant. (Index No. V-9793/99)**

**2004-03428**

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT**

*24 A.D.3d 780; 806 N.Y.S.2d 702; 2005 N.Y. App. Div. LEXIS 14885; 2005 NY Slip Op 10133*

**December 27, 2005, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1]

Appeal denied by *Moreno v. Cruz*, 6 NY3d 712, 849 NE2d 970, 816 NYS2d 747, 2006 N.Y. LEXIS 1223 (N.Y., May 2, 2006)

**HEADNOTES**

Parent and Child--Custody.--Best interests of child were served by granting father custody; evidence of mother's acts of domestic violence demonstrated that she possessed character which was ill-suited to difficult task of providing her young child with moral and intellectual guidance.

**COUNSEL:** Salvatore C. Adamo, New York, N.Y., for appellant.

Cheryl S. Solomon, Brooklyn, N.Y., for respondent.

Carol Sherman, Brooklyn, N.Y. (Barbara H. Dildine of counsel), Law Guardian for the child.

**JUDGES:** BARRY A. COZIER, J.P., GABRIEL M. KRAUSMAN, PETER B. SKELOS, ROBERT J. LUNN, JJ. COZIER, J.P., KRAUSMAN, SKELOS and LUNN, JJ., concur.

**OPINION**

[\*780] [\*\*703] In a child custody proceeding pursuant to *Family Court Act* article 6, [\*781] the mother appeals from an order of the Family Court, Kings County (Adams, J.), dated March 18, 2004, which, after a hearing, awarded permanent custody of the subject

child to the father and established a visitation schedule for her.

Ordered that the order is affirmed, without costs or disbursements.

Among the relevant factors to be considered in making a proper custody award are: "the parental guidance the custodial parent provides for the child; the ability of each parent to provide for the child's emotional and intellectual development; the [\*\*\*2] financial status and ability of each parent to provide for the child; [and] the overall relative fitness of the parties" (*Matter of Rosiana C. v Pierre S.*, 191 AD2d 432, 434, 594 NYS2d 316 [1993]; see *Young v Young*, 212 AD2d 114, 117-118, 628 NYS2d 957 [1995]). Moreover, where, as here, domestic violence is alleged, "the court must consider the effect of such domestic violence upon the best interests of the child" (*Domestic Relations Law* § 240 [1]; see *Matter of Wissink v Wissink*, 301 AD2d 36, 39-40, 749 NYS2d 550 [2002]).

Upon weighing the appropriate factors (see *Matter of Wissink v Wissink*, *supra*; *Matter of Rosiana C. v Pierre S.*, *supra*), the Family Court correctly determined that the best interests of the child would be served by granting the father custody. Although the mother denied certain allegations of her violent behavior and verbal abuse directed at the father and her daughter, the Family Court resolved the conflicting testimony in favor of the father, and on this record there is no basis to disturb the court's credibility determination (see *Matter of Anonymous*, 20 AD3d 562, 799 NYS2d 264 [2005]). Evidence of the mother's [\*\*\*3] acts of domestic violence demonstrates that she possesses a character which is ill-suited to the difficult task of providing her young

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child with moral and intellectual guidance (*see Matter of  
Irwin v Schmidt*, 236 AD2d 401, 402, 653 NYS2d 627  
[1997]; *Matter of Acevedo v Acevedo*, 200 AD2d 567,

568, 606 NYS2d 307 [1994]; *Vogel v Vogel*, 149 AD2d  
501, 502, 539 NYS2d 982 [1989]). Cozier, J.P.,  
Krausman, Skelos and Lunn, JJ., concur.



In the Matter of David Wissink, Respondent, v. Jane Wissink, Appellant. (Docket No. V 123/00)

2000-07743

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

301 A.D.2d 36; 749 N.Y.S.2d 550; 2002 N.Y. App. Div. LEXIS 10623

February 22, 2002, Submitted  
November 4, 2002, Decided

**SUBSEQUENT HISTORY:** [\*\*\*1] Case Name  
Amended November 8, 2002.

**PRIOR HISTORY:** Appeal in a child custody proceeding pursuant to *Family Court Act article 6* from so much of an order of the Family Court, Orange County (Andrew P. Bivona, J.), entered July 11, 2000, as granted the father's petition for custody.

**HEADNOTES**

Parent and Child - Custody - Consideration of Domestic Violence

In a custody dispute involving a teenaged girl who has expressed a clear preference to live with petitioner father, who has a history of domestic violence directed at respondent mother but has never directly mistreated his daughter, Family Court erred in awarding custody to petitioner without first ordering comprehensive psychological evaluations to ensure that the award of custody was truly in the child's best interest. Domestic violence is a factor which the court must consider among others in awarding custody or visitation (*Domestic Relations Law* § 240 [1]). Under the circumstances, Family Court's "consideration" of the effect of domestic violence upon the best interest of the child was inadequate, especially in view of overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury. The court should have ordered a comprehensive psychological evaluation that would likely have included a clinical evaluation, psychological testing, and review of records and information from collateral sources. Furthermore, the court also erred in limit-

ing respondent's inquiry regarding petitioner's failure to comply with child support obligations and in finding financial consideration "not relevant at all" to the custody proceeding. Family Court was required to consider the parties' support obligations and their compliance with court orders and to evaluate each party's ability to support the child.

**COUNSEL:** Laurie T. McDermott, Sugar Loaf, for appellant.

Mark Diamond, New York City, *Law Guardian* for infant.

**JUDGES:** ANITA R. FLORIO, J.P., SONDR A MILLER, LEO F. MCGINITY, THOMAS A. ADAMS, JJ. Florio, J.P., McGinity and Adams, JJ., concur.

**OPINION BY:** Sondra Miller

**OPINION**

[\*37]

[\*\*550] S. Miller, J.

This appeal presents a vexing custody dispute over a teenaged girl who has expressed a clear preference to live with her father. While both parents are seemingly fit custodians, the father has a history of domestic violence directed at the mother; yet he has never posed a direct threat to the child. Because of this circumstance, we hold that the Family Court erred in awarding custody to the father without first ordering comprehensive psychological evaluations to ensure that this award of custody was truly in the [\*\*\*2] child's best interest.



The child in controversy, Andrea, born June 21, 1986, is the biological child of the mother and father; the mother also has a daughter, Karin, by a prior marriage. The parties have had a tumultuous relationship marked by numerous episodes of heated arguments, physical violence, police intervention and Family Court orders of protection. It is apparent that when it comes to his dealings with the mother, the father is a batterer whose temper gets the better of him. When it comes to Andrea, however, the father is the favored parent; he has never directly mistreated Andrea.

The parties have lived apart at various times during their marriage, and separated most recently in 1999 following yet [\*\*551] another physical altercation. The mother commenced a family offense proceeding and a proceeding for custody of Andrea. The father cross-petitioned for custody. The Family Court assigned a law guardian and ordered a mental health study which was clearly deficient. A hearing was held at which the parties, Karin, and other witnesses testified, and the court examined Andrea in camera; she downplayed the father's culpability and expressed her clear preference for living with him.

[\*\*\*3] The order appealed from awarded custody to the father. In separate orders, the Family Court dismissed the mother's custody petition and sustained the mother's family offense petitions, directing, *inter alia*, that the father enter and complete a [\*38] domestic violence program. We now reverse the order awarding custody to the father and remit for a new custody hearing following an in-depth forensic examination of the parties and child.

Andrea's preference for her father and her closely bonded relationship to him were confirmed by her law guardian and the "mental health professional" social worker who interviewed her. Indeed, putting aside the established fact of his abusive conduct toward her mother, Andrea's father appears a truly model parent. He is significantly involved in her school work and her extracurricular activities. They enjoy many pleasurable activities, including movies, shopping, building a barn, and horseback riding. He provides her with material benefits--a television set, clothing, a horse, a trip to Europe. He is loving and affectionate. She is his "princess," his "best girl." In contrast, Andrea's mother has not been significantly involved in her school work or her [\*\*\*4] extracurricular activities, and Andrea does not enjoy her company or their relationship.

Were it not for the documented history of domestic violence confirmed by the court after a hearing, we would have unanimously affirmed the Family Court's award of custody to the father in accordance with Andrea's expressed preference and the evidence documenting

their positive relationship. However, the fact of domestic violence should have been considered more than superficially, particularly in this case where Andrea expressed her unequivocal preference for the abuser, while denying the very existence of the domestic violence that the court found she witnessed.

The record is replete with incidents of domestic violence reported by the mother, and by evidence supporting her testimony. The earliest incident that the mother reported was perpetrated when Andrea was merely an infant in 1986. In a fit of anger the father hit and kicked the mother and pulled out chunks of her hair. In the course of the attack she heard him say, "Oh well, she's going to die." On Super Bowl Sunday in 1995, he attacked her, throwing her on the floor, kicking, hitting, and choking her. She sustained marks on her neck [\*\*\*5] and a sore throat causing pain while speaking and inhibiting her ability to swallow.

In March 1995, she obtained an order of protection from the Village Court of Montgomery. In the fall of that year the father allegedly held a knife, approximately 8 to 10 inches long, to the mother's throat while Andrea, then nine, sat on her lap. In February 1996, the mother again obtained an order of protection from the Village Court of Montgomery.

[\*39] In 1997, the father attacked the mother, hit and kicked her, resulting in her obtaining a permanent order of protection from the Orange County Family Court. The severity of her injuries are documented by a photograph, entered in evidence, showing [\*\*552] a large black and blue bruise on her left hip.

In June 1999, the mother left the marital home with Andrea and moved into a shelter where they remained for five days. Upon their return home the father blocked her car in the driveway, yelled at the mother and punched her.

On June 24, 1999, a few days after her return from the shelter, during a dispute over tax returns, the father tried to wrest papers the mother held in her teeth by squeezing her face in his hands, leaving marks and even enlisting the assistance [\*\*\*6] of Andrea; he allegedly directed the child to "hold [the mother's] nose so she can't breathe."

On December 20, 1999, while Andrea was at home, the father attacked the mother, choking her. She had marks on her neck for days.

The latter two incidents were the subjects of the mother's most recent family offense petition, which the court sustained. In doing so, the Family Court also noted that a final order of protection had been entered in 1997, stating "based upon the proceeding [of 1997] as well as the succeeding [incidents] ... Mr. Wissink is

guilty of incidents of domestic violence occurring on June 24, [1999] and December 20, [1999]."

*Domestic Relations Law § 240 (1)* provides that in any action concerning custody or visitation where domestic violence is alleged, "the court must consider" the effect of such domestic violence upon the best interest of the child, together with other factors and circumstances as the court deems relevant in making an award of custody. In this case the Family Court did not entirely ignore that legislative mandate, and specifically noted that it had considered the effect of domestic violence in rendering its custody [\*\*\*7] determination. However, the "consideration" afforded the effect of domestic violence in this case was, in our view, sorely inadequate.

The court-ordered mental health evaluation consisted of the social worker's interview of Andrea on two occasions (about 45 minutes each) and each parent once (about one hour each). These interviews resulted in the social worker's clearly foreseeable conclusion that Andrea was far more comfortable and involved with her father than her mother, that she did not relate well to her mother, and that she preferred living with her father.

[\*40] In a case such as this, where the record reveals years of domestic violence, which is denied by the child who witnessed it, and the child has expressed her preference to live with the abuser, the court should have ordered a comprehensive psychological evaluation. Such an evaluation would likely include a clinical evaluation, psychological testing, and review of records and information from collateral sources. The forensic evaluator would be concerned with such issues as the nature of the psychopathology of the abuser and of the victim; whether the child might be in danger of becoming a future victim, or a witness to the [\*\*\*8] abuse of some other victim; the child's developmental needs given the fact that she has lived in the polluted environment of domestic violence all of her life and the remedial efforts that should be undertaken in regard to all parties concerned.

The devastating consequences of domestic violence have been recognized by our courts, by law enforcement, and by society as a whole. The effect of such violence on children exposed to it has also been established. There is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury.

[\*\*553] Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded (*see People v Malone*, 180 Misc 2d 744, 747, 693 N.Y.S.2d 390, citing Frazee, Noel and Brenneke, *Violence Against Women, Law and Litigation* § 1:40, at 1-43--1-44 [Clark Boardman Callaghan 1997]).

In many states a rebuttable presumption that perpetrators of domestic violence should not be eligible for legal or physical custody has been accepted and the courts of those states are required to specify [\*\*\*9] why custody should be granted to an offender and how such an order is in the best interest of the child (*see Philip M. Stahl, Complex Issues in Child Custody Evaluations*, at 36 [Sage 1999]). We in New York have not gone that far, but the Legislature, in enacting *Domestic Relations Law § 240*, has recognized that domestic violence is a factor which the court must consider among others in awarding custody or visitation.

Moreover, the court also erred in limiting the mother's inquiry regarding the father's failure to comply with child support obligations and in finding financial consideration "not relevant at all" to the custody proceeding. The Family Court was required to consider the parties' support obligations and their [\*41] compliance with court orders (*Domestic Relations Law § 240 [1] [a] [4]*) and to evaluate each party's ability to support the child (*see Eschbach v Eschbach*, 56 NY2d 167, 172, 451 N.Y.S.2d 658, 436 N.E.2d 1260). If, as the mother alleged, the father violated the child support order, and if he terminated the telephone and electrical services in the marital residence after he had been ordered to [\*\*\*10] stay away pursuant to an order of protection, these facts would clearly be relevant to the court's custody determination.

Only after considering the complex nature of the issues and the relative merits and deficiencies of the alternatives can the court attempt to determine the difficult issue of the best interest of the child in a case such as this.

For the above reasons we thus reverse the custody order and direct a new custody hearing to be conducted after completion of a comprehensive psychological evaluation of the parties and the child. However, we stay Andrea's return to her mother, permitting her continued residence with her father, pending a final custody determination.

We note that the foregoing is without prejudice to the mother renewing her petition for custody, which was dismissed by an order from which no appeal was taken.

Florio, J.P., McGinity and Adams, JJ., concur.

Ordered that the order is reversed insofar as appealed from, on the law and as a matter of discretion in the interest of justice, without costs or disbursements, the petition is denied, and the matter is remitted to the Family Court, Orange County, for further proceedings in accordance herewith; [\*\*\*11] and it is further,

Ordered that pending the final custody determination, the father shall have temporary custody of the child,



301 A.D.2d 36, \*; 749 N.Y.S.2d 550, \*\*;  
2002 N.Y. App. Div. LEXIS 10623, \*\*\*

Andrea, with visitation to the mother pursuant to the terms of the order appealed from.



## **Preparing a Client for an Interview with a Forensic Evaluator,**

### **I. Role of the Forensic Evaluator**

- A Forensic Evaluator is a mental health professional appointed by the court in custody/visitation matters to evaluate the allegations, the parties and collateral sources. They can be a social worker, a psychologist, or a psychiatrist depending on the needs and issues of the parties, the facts of the case and the order of the court.
- Choose wisely because the report that they will submit to the court is detailed and extensive. The report is usually submitted into evidence at trial and is frequently given great weight by the judge.
- A Forensic investigates and evaluates the parties in a custody case and *can be* a necessary part of a custody trial to help the judge determine the best interests of the child (BIC).
- There has been a major debate over the past few years (see Tim Tippins), about whether the forensic *can or should make a recommendation on best interests*, which is a legal standard and not based on any “special” knowledge that the forensic has that the judge doesn’t have too. The judge is the trier of fact and has the ultimate power to make a decision about custody if the case doesn’t settle. The judge does not have to accept the conclusions of the forensic evaluator in his or her decision.
- The court issues a forensic order. The order that the judge issues states what issues the judge wants the forensic evaluation to address; the judge may request that the forensic make a recommendation about best interests. You can argue that the forensic should NOT make such BIC recommendation, based on the Tippins theory, but you may lose.
- Despite the debate, most judges still value the forensics’ opinions and give the reports considerable weight.
- The forensic report can play a role in settling a case and play a significant role in the case’s outcome. It is important to explain this to the client.
- Forensics are NOT the clients’ therapists. Explain this to your client and remind them that everything they say will go into the report and that they should answer the questions they are asked and not volunteer extra, irrelevant information to the evaluator.
- Forensics will make judgments about the client and her ability to parent. Who is the better emotional/psychological parent? They usually ask questions about how the client was disciplined as a child, if they were ever abused, if they’ve been in a violent relationship in the past. \*\*See topics covered below.
- Forensics may address clients a manner that the client experiences as rude and judgmental. Often, forensics will test the parties by “pushing their buttons” and asking them to respond to accusations made by the other party or a collateral source. It is important that clients remain calm and do not react to such questioning in a way that might reflect badly on them. You should warn the client IN ADVANCE that these interview techniques

might be used and discuss how they will handle such a situation if it arises.

- Because of the weight that judges give to the report, the forensic can often help settle a case, especially if the judge wanted a BIC recommendation. The decision to settle or go to trial must be made after careful analysis of the forensic report and the other evidence likely to be presented at trial. If the forensic did a good, complete, job and spoke with the parties many times and collateral resources, read the pleadings and reports given to them, used the appropriate psychological tests and scales for evaluating the raw data, and did not miss any major issues (like DV!), it may be more difficult to challenge the report at trial. However, a forensic report that is negative to your client may still be discredited through rigorous cross-examination and possibly by calling your own expert to reveal its deficiencies. Consult with your colleagues, weigh your trial evidence carefully, and consider best and worst case scenarios when advising your client on settlement terms versus taking the case to trial.
- At trial, the forensic report is usually admitted into evidence. Any of the attorneys may call the forensic as their witness, or there may be a stipulation that the forensic is the court's witness and that all attorneys may cross examine him/her.

#### **IV. Subjects That May Be Addressed During an Interview with Forensic**

##### **A. Life and Family History**

1. Help your client create a clear, consistent, chronological life story including home life, family, school, romantic relationships, children, mental and physical health.
2. Make sure to get copies or subpoena therapists notes, and hospital records if any. Because a subpoena may have to be served on all parties pursuant to the CPLR, it may be best to get records using a release.
3. Get a copy of your client's journal if the client has one

##### **B. The Domestic Violence**

1. Work with your client so that she understands domestic violence is not her fault-she is not alone-she cannot prevent it-she cannot control her batterer's behavior. It is important that she realizes that DV is not part of a healthy, normal relationship. She should convey to the forensic that she realizes this now.
  - a. It was not just "fighting." She should not minimize the domestic violence by mischaracterizing it as mutual fighting.
  - b. Explain the Power and Control Wheel. One of my clients keeps it on her refrigerator so she can be reminded of abusive behaviors.

- c. DV is a part of gender inequality and oppression of women in society
  - d. Explain how many women are affected by DV and she is not alone or not feel ashamed to talk about it
2. She should know the dates and places of the domestic violence and be able to tell the story clearly.
  3. She should be able to describe the effect of the domestic violence on her and the children
  4. She should be able to explain how her religion, culture, personal relationships, financial situation or experiences caused her to make decisions regarding staying or going back to him- explaining any reconciliations is important. Why did she stay with him? Why did she go back to him? Why does she see now how important it is for her to be safe and free from harm and protect her children? Failure to protect cases are not that ancient history.
  5. She should be open about domestic violence, especially sexual violence. They are trained in these areas and have usually heard similar stories

#### **C. Current Relationship with Abuser**

1. Can she find anything redeeming to say about him?
2. Is he a good parent?
3. Can she say that she knows the children should have a relationship with him?
4. It is important to show that she is not a hostile parent. The “*friendly parent*” doctrine in case law states: court looks for the parent who is willing to enable visitation with non custodial parent and child. She *should not* say that there should not be any visitation because she will appear unreasonable and “unfriendly.” Help her think about what kind of visitation is in the **BIC** and why?
5. Help your client think about a reasonable exchange place for the pick up and drop offs for the children for visitation. Does a police precinct make sense or does that scare the children? Would a McDonald’s or a relative’s home be better and why?
6. Explain the limitations of supervised visits: that they do not last forever, that there are few free agencies available, that sometimes judges demand that a family member supervise visits. IF the supervised visits go well, then the visits will increase over time, usually at each court date.

#### **D. Best Interest of the Child Factors** (that Judge and Forensic will be looking for)

1. Primary caretaker

- a. fed/bathe children
- b. educational involvement
- c. doctors appointments
- d. religious decisions
- 2. Stability-what does stability mean?
  - a. Does one parent move around a lot
  - b. Does one parent have family support and a plan for child care if they are working
  - c. Does one parent bring several girlfriends or boyfriends to the home
  - d. Is the parent emotionally stable or have mental health issues? Are they on meds? Are they in treatment?
  - e. Does either parent have criminal history? Drugs, prostitution. How can you explain/defend it?
- 3. Who can best provide for emotional and economic needs?
  - a. how they discipline the child
  - b. structure for children, schedule, routine
  - c. who pays for children's needs/who has stable job/income
- 4. What is the quality of home environment?
  - a. toys, children have their own rooms, safety,
- 5. If you have **PROVEN** domestic violence, then this is a factor the judge must weigh in a custody determination. This goes to fitness of parent and their ability to be a role model for children.

#### **IV. Weakness of your case**

- A.** What worst abuser can say to the Judge and other parties?
  - 1. Is it true? How are you going to explain it to someone?
  - 2. **BAD FACTS:** has your client been in prostitution, does she have a criminal history, is she a current or former substance abuser, does she have a history of mental health issues, suicide attempts, or is she an undocumented immigrant?
- B.** It is important to bring it up to forensic/attorney for the child/ren first, in the interviews. Hiding important information will make the client appear untrustworthy.

#### **V. Appearance/Attitude**

- A.** First impressions mean everything!
- B.** Advise client and children to be well dressed, conservative, not sexy, not revealing or too casual
- C.** Advise client to be on time- they will note it down if the client is late-be there at least 15 minutes early to make a good impression. This shows that you are responsible and respectful to the expert, and you care about the kids and the case.
- D.** Be truthful and consistent in each interview

- E. Tell your client that their attitude should be positive and concerned about the children and their best interests. They should have a calm, concerned demeanor and *not* vent anger toward the abuser. They should not be defensive when interviewer asks difficult questions. They will draw negative inferences if the client appears hostile.
- F. Be concerned about children, focus on children, impact DV had on them
- G. Make eye contact with the interviewer
- H. Focus on the questions asked and answer each one
- I. Do not laugh or giggle; be serious with the interviewer

#### **VI. General Things to Share with the Client**

- A. Custody cases take a long time to resolve
- B. It takes emotional strength and patience
- C. The entire process is invasive, and there is no privacy
- D. Communicate to forensic-can't go with client to interviews with forensic

#### **V. Things Client Should Bring to the Interview**

- A. Copies of pleadings, orders, COIs should be sent by one of the attorneys (but see court order on forensics to see the rules on this), copied to all counsel.

The client can bring a list of collateral sources for the forensic to interview and any important documents that they have in their possession like letters or emails from abuser, a school report card or a letter from the child's therapist.

# New York State Standardized DOMESTIC INCIDENT REPORT (DIR)

(Form 3221-03/2016)

**REMEMBER:** *Whenever possible, ask complainant the DIR questions OUT of earshot and eyesight of suspect*

## TIPS FOR COMPLETION

When completing the DIR please be sure:

- To print legibly and firmly
- Wraparound cover is in place
- All copies of each page are lined up properly
- Writing is visible on all 3 copies of the form
- To complete every section of the DIR
- To hand Victim Rights Notice to the victim
- Victim understands the Victim Rights Notice
- Victim receives all pink copies at the scene

## **WHERE TO SEND DIR FORMS**

**New York City (NYC)** DIR forms are sent to NYPD and do not need to be sent directly to DCJS.

**State Police** forward DCJS copies of DIR to **Zone Headquarters**.

**All Other Agencies**, send DCJS copies of DIR to:  
NYS Division of Criminal Justice Services  
NYS Identification Bureau-DIR, 5th Floor  
80 South Swan Street  
Albany, New York 12210

**If Suspect is on Probation or Parole Supervision**, photocopy the police copy of DIR and send to the County Probation Department or the local Parole Office.

Addresses for County Probation Departments and Parole Offices can be found in the Criminal Justice Directory at: <http://criminaljustice.ny.gov>

## **HOW TO REQUEST MORE DIR FORMS**

To order additional forms send an email to:

**[dcjs.dl.dirform@dcjs.ny.gov](mailto:dcjs.dl.dirform@dcjs.ny.gov)**

When ordering forms, please provide the **agency name** and **street address** for shipment, no P.O. Boxes accepted. DIR forms come 25 forms to a pad. Please base your order on the **number of pads** needed, not the number of forms.

## **IMPORTANT HOTLINE NUMBERS**

NYS Domestic and Sexual Violence	1-800-942-6906
Child Protective Services (Public)	1-800-342-3720
CPS (Mandated Reporter)	1-800-635-1522
Adult Protective Services	1-800-342-3009 (Option 6)

Local Service

Provider Name: \_\_\_\_\_

Hotline: \_\_\_\_\_

## Quick Reference Guide

Recommended Wording

**(PRIOR DV HISTORY?)** “Has \_\_\_\_\_ ever hurt you, threatened harm to you or others, made you afraid, or forced you to do something that you didn’t want to do (prior to this incident)?”

**(VICTIM FEARFUL?)** “Are you currently concerned or in **fear** for your safety or the safety of someone else because of \_\_\_\_\_’s behavior?” (**Note:** Document specific fear and reasons for it. Fear may be an element of an offense (e.g. menacing, coercion, stalking, etc.). Also, document in statement of allegations.

**INFORM VICTIM.** “A **victim advocate can help you with SAFETY PLANNING**, an important issue to be discussed with a local service provider. On the back of a form that I will give you are some phone numbers that can assist you. **Do you need assistance with making arrangements for transportation to another location?**” **Note:** CPL 530.11(6) requires a police officer to advise a victim of local available services. )

**Officers are NOT required to arrest each person in dual complaint situations.**

**Officers must identify the PRIMARY PHYSICAL AGGRESSOR.** Consider injuries, threats of past and future harm, history of domestic violence, and self-defense responses. An ARREST DECISION shall NOT be based on the willingness of a person to testify or participate in a judicial proceeding (*refer to the Primary/Dominant Aggressor Law, (CPL 140.10 (4)(c)).*)

*Below is a list of some frequently seen offenses in domestic violence incidents.*

**REMEMBER** to CHARGE all relevant offenses and charge at the highest degree appropriate for the circumstances.

### Family Offenses

(refer to CPL articles 140 and 530.11)

**Aggravated Family Offense** (240.75; E Felony)

**Aggravated Harassment 2<sup>nd</sup>** (240.30; A Misd.)

**Assault 2<sup>nd</sup>** (120.05; D Felony)

**Assault 3<sup>rd</sup>** (120.00; A Misdemeanor)

**Attempted Assault** (110.00)

**Criminal Mischief 1<sup>st</sup>** (145.12; B Felony)

**Criminal Mischief 2<sup>nd</sup>** (145.10; D Felony)

**Criminal Mischief 3<sup>rd</sup>** (145.05; E Felony)

**Criminal Mischief 4<sup>th</sup>** (145.00; A Misdemeanor)

**Disorderly Conduct** (240.20; Violation)

**Forcible Touching** (130.52; A Misdemeanor)

**Harassment 1<sup>st</sup>** (240.25; B Misdemeanor)

**Harassment 2<sup>nd</sup>** (240.26; Violation)

**Menacing 2<sup>nd</sup>** (120.14; A Misdemeanor)

**Menacing 3<sup>rd</sup>** (120.15; B Misdemeanor)

**Reckless Endangerment 1<sup>st</sup>** (120.25; D Felony)

**Reckless Endangerment 2<sup>nd</sup>** (120.20; A Misd.)

**Sexual Abuse 2<sup>nd</sup>** (130.60(1); A Misdemeanor)

**Sexual Abuse 3<sup>rd</sup>** (130.55; B Misdemeanor)

**Sexual Misconduct** (130.20; A Misd.)

**Stalking 1<sup>st</sup>** (120.60; D Felony)

**Stalking 2<sup>nd</sup>** (120.55; E Felony)

**Stalking 3<sup>rd</sup>** (120.50; A Misdemeanor)

**Stalking 4<sup>th</sup>** (120.45; B Misdemeanor)

**Criminal Obstruction of Breathing or**

**Blood Circulation** (121.11; A Misd.)

**Strangulation 1<sup>st</sup>** (121.13; C Felony)

**Strangulation 2<sup>nd</sup>** (121.12; D Felony)

**Coercion 2<sup>nd</sup>** (135.60(1) (2) (3); A Misd.)

**Grand Larceny 3<sup>rd</sup>** (155.35; D Felony)

**Grand Larceny 4<sup>th</sup>** (155.30; E Felony)

**Identity Theft 1<sup>st</sup>** (190.80; D Felony)

**Identity Theft 2<sup>nd</sup>** (190.79; E Felony)

**Identity Theft 3<sup>rd</sup>** (190.78; A Misdemeanor)

### Often Committed Offenses

Agg. Assault Person under 11 (120.12; E Felony)

Agg. Criminal Contempt (215.52; D Felony)

Agg. Harassment 1<sup>st</sup> (240.31; E Felony)

Aggravated Cruelty to Animals (NY Agg. & M Section 353-a; Felony)

Assault 1<sup>st</sup> (120.10; B Felony)

Burglary 1<sup>st</sup> (140.30; B Felony)

“ 2<sup>nd</sup> (140.25; C Felony)

“ 3<sup>rd</sup> (140.20; D Felony)

Robbery 1<sup>st</sup> (160.15; B Felony)

“ 2<sup>nd</sup> (160.10; C Felony)

Coercion 1<sup>st</sup> (135.65; D Felony)

Criminal Contempt 1<sup>st</sup> (215.51; E Felony)

“ 2<sup>nd</sup> (215.50; A Misdemeanor)

Criminal Trespass 1<sup>st</sup> (140.17; D Felony)

“ 2<sup>nd</sup> (140.15; A Misdemeanor)

“ 3<sup>rd</sup> (140.10; B Misdemeanor)

Endangering Welfare of Child (260.10; A Misd.)

Endang. Welf. of Vulnerable Elderly Person 1<sup>st</sup> (260.34; D Felony)

Intimidating Victim or Witness 1<sup>st</sup> (215.17; B Felony)

Intimidating Victim or Witness 2<sup>nd</sup> (215.16; D Felony)

Intimidating Victim or Witness 3<sup>rd</sup> (215.15; E Felony)

Menacing 1<sup>st</sup> (120.13; E Felony)

Manslaughter 1<sup>st</sup> (125.20; B Felony)

Manslaughter 2<sup>nd</sup> (125.15; C Felony)

Murder 1<sup>st</sup> (125.27; A-I Felony)

Murder 2<sup>nd</sup> (125.25; A-I Felony)

Resisting Arrest (205.30; A Misdemeanor)

Unlawful Imprisonment 1<sup>st</sup> (135.10; E Felony)

“ 2<sup>nd</sup> (135.05; A Misd.)

### Other Possible Offenses

Aggravated Sexual Abuse 1<sup>st</sup> (130.70; B Felony)

“ 2<sup>nd</sup> (130.67; C Felony)

“ 3<sup>rd</sup> (130.66; D Felony)

“ 4<sup>th</sup> (130.65-a; E Felony)

Computer Tampering 1<sup>st</sup> (156.27; C Felony)

“ 2<sup>nd</sup> (156.26; D Felony)

“ 3<sup>rd</sup> (156.25; E Felony)

“ 4<sup>th</sup> (156.20; A Misdemeanor)

Computer Trespass (156.10; E Felony)

Criminal Possession of a Dangerous Weapon 1<sup>st</sup> (265.04; B Felony)

Criminal Possession of a Weapon 2<sup>nd</sup> (265.03; C Felony)

“ 3<sup>rd</sup> (265.02; D Felony)

“ 4<sup>th</sup> (265.01; A Misd.)

Criminal Sexual Act 1<sup>st</sup> (130.50; B Felony)

“ 2<sup>nd</sup> (130.45; D Felony)

“ 3<sup>rd</sup> (130.40; E Felony)

Criminal Tampering 1<sup>st</sup> (145.20; D Felony)

“ 2<sup>nd</sup> (145.15; A Misdemeanor)

“ 3<sup>rd</sup> (145.14; B Misdemeanor)

Criminal Use of a Firearm 1<sup>st</sup> (265.09; B Felony)

“ 2<sup>nd</sup> (265.08; A Misd.)

Criminally Negligent Homicide (125.10; E Felony)

Endang. Welf. Vulner. Elderly 2<sup>nd</sup> (260.32; E Fel)

Facil. a Sex Off. W. a Cont. Sub. (130.90; D Fel)

Kidnapping 1<sup>st</sup> (135.25; A-I Felony)

“ 2<sup>nd</sup> (135.20; B Felony)

Rape 1<sup>st</sup> (130.35; B Felony)

“ 2<sup>nd</sup> (130.30; D Felony)

“ 3<sup>rd</sup> (130.25; E Felony)

Reckless Endanger. of Property (145.25; B Misd.)

Sexual Abuse 1<sup>st</sup> (130.65; D Felony)

Tampering with a Witness 1<sup>st</sup> (215.13; B Felony)

“ 2<sup>nd</sup> (215.12; D Felony)

“ 3<sup>rd</sup> (215.11; E Felony)

“ 4<sup>th</sup> (215.10; A Misd.)

Unauth. Use of a Vehicle 1<sup>st</sup> (165.08; D Felony)

“ 2<sup>nd</sup> (165.06; E Felony)

“ 3<sup>rd</sup> (165.05; A Misd.)

Unlawful Surveillance 2<sup>nd</sup> (250.45; E Felony)

Incident	Agency:			A	New York State DOMESTIC INCIDENT REPORT			ORI:		Incident #			
	Reported Date (MM/DD/YYYY)		Time (24 hours)		Occurred Date (MM/DD/YYYY)		Time (24 hours)		<input type="checkbox"/> Officer Initiated <input type="checkbox"/> Radio Run <input type="checkbox"/> Walk-in		Complaint #		
									<input type="checkbox"/> ICAD (NYC)				
Address (Street No., Street Name, Bldg. No., Apt No.)								City, State, Zip					
Victim (P1)	Name (Last, First, M.I.) (Include Aliases)							DOB (MM/DD/YYYY)		Age:		<input type="checkbox"/> Female <input type="checkbox"/> Male	
	Address (Street No., Street Name, Bldg. No., Apt No.)											<input type="checkbox"/> Self-Identified:	
	City, State, Zip							Victim Phone Number:		Language:			
	How can we safely contact you? (i.e. Name, Phone, Email)							<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian <input type="checkbox"/> American Indian <input type="checkbox"/> Other		<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown <input type="checkbox"/> Other Identifier:			
Suspect (P2)	Name (Last, First, M.I.) (Include Aliases)							DOB (MM/DD/YYYY)		Age:		<input type="checkbox"/> Female <input type="checkbox"/> Male	
	Address (Street No., Street Name, Bldg. No., Apt No.)											<input type="checkbox"/> Self-Identified:	
	City, State, Zip							Suspect Phone Number:		Language:			
								<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian <input type="checkbox"/> American Indian <input type="checkbox"/> Other		<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown <input type="checkbox"/> Other Identifier:			
	Do suspect and victim live together ? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect/P2 present? <input type="checkbox"/> Yes <input type="checkbox"/> No		Was suspect injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes describe:			Possible drug or alcohol use? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect supervised? <input type="checkbox"/> Probation <input type="checkbox"/> Parole <input type="checkbox"/> Not Supervised <input type="checkbox"/> Status Unknown			
	Suspect (P2) Relationship to Victim (P1) <input type="checkbox"/> Married <input type="checkbox"/> Intimate Partner/Dating <input type="checkbox"/> Formerly Married <input type="checkbox"/> Former Intimate Partner <input type="checkbox"/> Parent of Victim (P1) <input type="checkbox"/> Child of Victim <input type="checkbox"/> Relative: <input type="checkbox"/> Other:										Do the suspect and victim have a child in common? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Victim Interview	Emotional condition of VICTIM? <input type="checkbox"/> Upset <input type="checkbox"/> Nervous <input type="checkbox"/> Crying <input type="checkbox"/> Angry <input type="checkbox"/> Other:												
	What were the first words that VICTIM said to the Responding Officers at the scene regarding the incident? _____												
	Did suspect make victim fearful? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:												
	Weapon Used? <input type="checkbox"/> Yes <input type="checkbox"/> No Gun: <input type="checkbox"/> Yes <input type="checkbox"/> No Other, describe:							Suspect Threats? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, Threats to: <input type="checkbox"/> Victim <input type="checkbox"/> Child(ren) <input type="checkbox"/> Pet <input type="checkbox"/> Commit Suicide <input type="checkbox"/> Other Describe:					
	Access to Guns? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:												
	Injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:					Strangulation? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Loss of Consciousness <input type="checkbox"/> Urination/Defecation <input type="checkbox"/> Red eyes/Petechia <input type="checkbox"/> Sore Throat <input type="checkbox"/> Breathing Changed <input type="checkbox"/> Difficulty Swallowing							
	In Pain ? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:					Visible Marks? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:							
Suspect	What did the SUSPECT say (Before and After Arrest) : _____												
	710.30 completed? <input type="checkbox"/> Yes <input type="checkbox"/> No												
Witnesses	Child/Witness (1) Name (Last, First, M.I.)		DOB:		Child/Witness(1) Address (Street No., Name, Bldg./Apt)				City, State, Zip		Phone:		
	Child/Witness (2) Name (Last, First, M.I.)		DOB:		Child/Witness(2) Address (Street No., Name, Bldg./Apt)				City, State, Zip		Phone:		
Incident Narrative	Briefly describe the circumstances of this incident:												
DIR Repository checked? <input type="checkbox"/> Yes <input type="checkbox"/> No   Order of Protection Registry checked? <input type="checkbox"/> Yes <input type="checkbox"/> No   Order of Protection in effect? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refrain <input type="checkbox"/> Stay Away													
Evid	Evidence Present? <input type="checkbox"/> Yes <input type="checkbox"/> No		Photos taken: <input type="checkbox"/> Victim Injury <input type="checkbox"/> Suspect Injury <input type="checkbox"/> Other:			Other Evidence: <input type="checkbox"/> Damaged Property <input type="checkbox"/> Videos <input type="checkbox"/> Electronic Evidence <input type="checkbox"/> Other:			Destruction of Property? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, Describe:				
Offense	Offense Committed? <input type="checkbox"/> Yes <input type="checkbox"/> No		Was suspect arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No If no, explain:			Offense 1		Law (e.g. PL)		Offense 2		Law (e.g. PL)	
POLICE COPY (Please make a copy for DA's office if appropriate)				NYS DOMESTIC AND SEXUAL VIOLENCE HOTLINE 1-800-942-6906				3221-03/2016 DCJS Copyright © 2016 by NYS DCJS					



Incident	Agency:			A	New York State DOMESTIC INCIDENT REPORT			ORI:		Incident #				
	Reported Date (MM/DD/YYYY)		Time (24 hours)	Occurred Date (MM/DD/YYYY)		Time (24 hours)	<input type="checkbox"/> Officer Initiated	<input type="checkbox"/> Radio Run	<input type="checkbox"/> Walk-in	Complaint #				
							<input type="checkbox"/> ICAD (NYC)							
Address (Street No., Street Name, Bldg. No., Apt No.)								City, State, Zip						
Victim (P1)	Name (Last, First, M.I.) (Include Aliases)							DOB (MM/DD/YYYY)	Age:	<input type="checkbox"/> Female <input type="checkbox"/> Male				
										<input type="checkbox"/> Self-Identified:				
	Address (Street No., Street Name, Bldg. No., Apt No.)							Victim Phone Number:		Language:				
	City, State, Zip							<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian <input type="checkbox"/> American Indian <input type="checkbox"/> Other		<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown <input type="checkbox"/> Other Identifier:				
Suspect (P2)	How can we safely contact you? (i.e. Name, Phone, Email)													
	Name (Last, First, M.I.) (Include Aliases)							DOB (MM/DD/YYYY)	Age:	<input type="checkbox"/> Female <input type="checkbox"/> Male				
										<input type="checkbox"/> Self-Identified:				
	Address (Street No., Street Name, Bldg. No., Apt No.)							Suspect Phone Number:		Language:				
	City, State, Zip							<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian <input type="checkbox"/> American Indian <input type="checkbox"/> Other		<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown <input type="checkbox"/> Other Identifier:				
	Do suspect and victim live together ? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect/P2 present? <input type="checkbox"/> Yes <input type="checkbox"/> No	Was suspect injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes describe:				Possible drug or alcohol use? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect supervised? <input type="checkbox"/> Probation <input type="checkbox"/> Parole <input type="checkbox"/> Not Supervised <input type="checkbox"/> Status Unknown				
Suspect (P2) Relationship to Victim (P1) <input type="checkbox"/> Married <input type="checkbox"/> Intimate Partner/Dating <input type="checkbox"/> Formerly Married <input type="checkbox"/> Former Intimate Partner <input type="checkbox"/> Parent of Victim (P1) <input type="checkbox"/> Child of Victim <input type="checkbox"/> Relative: <input type="checkbox"/> Other:									Do the suspect and victim have a child in common? <input type="checkbox"/> Yes <input type="checkbox"/> No					
Victim Interview	Emotional condition of VICTIM? <input type="checkbox"/> Upset <input type="checkbox"/> Nervous <input type="checkbox"/> Crying <input type="checkbox"/> Angry <input type="checkbox"/> Other:													
	What were the first words that VICTIM said to the Responding Officers at the scene regarding the incident?													
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	Access to Guns? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:													
Suspect	Injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:					Strangulation? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Loss of Consciousness <input type="checkbox"/> Urination/Defecation <input type="checkbox"/> Red eyes/Petechia <input type="checkbox"/> Sore Throat <input type="checkbox"/> Breathing Changed <input type="checkbox"/> Difficulty Swallowing								
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Incident Narrative	Briefly describe the circumstances of this incident:													
DIR Repository checked? <input type="checkbox"/> Yes <input type="checkbox"/> No Order of Protection Registry checked? <input type="checkbox"/> Yes <input type="checkbox"/> No Order of Protection in effect? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Refrain <input type="checkbox"/> Stay Away														
Evid	Evidence Present?	Photos taken: <input type="checkbox"/> Victim Injury <input type="checkbox"/> Suspect Injury			Other Evidence: <input type="checkbox"/> Damaged Property <input type="checkbox"/> Videos			Destruction of Property? <input type="checkbox"/> Yes <input type="checkbox"/> No						
	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Other:			<input type="checkbox"/> Electronic Evidence <input type="checkbox"/> Other:			If yes, Describe:						
Offense	Offense Committed?		Was suspect arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No		Offense 1		Law (e.g. PL)		Offense 2					
	<input type="checkbox"/> Yes <input type="checkbox"/> No		If no, explain:						Law (e.g. PL)					
NYS DIVISION OF CRIMINAL JUSTICE SERVICES COPY											NYS DOMESTIC AND SEXUAL VIOLENCE HOTLINE 1-800-942-6906		3221-03/2016 DCJS Copyright © 2016 by NYS DCJS	

Incident	Agency:			A	New York State DOMESTIC INCIDENT REPORT			Incident #						
	Reported Date (MM/DD/YYYY)		Time (24 hours)		Occurred Date (MM/DD/YYYY)		Time (24 hours)		<input type="checkbox"/> Officer Initiated	<input type="checkbox"/> Radio Run	<input type="checkbox"/> Walk-in	Complaint #		
									<input type="checkbox"/> ICAD (NYC)					
Address (Street No., Street Name, Bldg. No., Apt No.)										City, State, Zip				
Suspect (P2)	Name (Last, First, M.I.) (Include Aliases)							DOB (MM/DD/YYYY)		Age:		<input type="checkbox"/> Female <input type="checkbox"/> Male <input type="checkbox"/> Self-Identified:		
	Address (Street No., Street Name, Bldg. No., Apt No.)							Suspect Phone Number:		Language:				
	City, State, Zip							<input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> Asian <input type="checkbox"/> American Indian <input type="checkbox"/> Other		<input type="checkbox"/> Hispanic <input type="checkbox"/> Non Hispanic <input type="checkbox"/> Unknown <input type="checkbox"/> Other Identifier:				
	Do suspect and victim live together ? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect/P2 present? <input type="checkbox"/> Yes <input type="checkbox"/> No		Was suspect injured? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes describe:			Possible drug or alcohol use? <input type="checkbox"/> Yes <input type="checkbox"/> No		Suspect supervised? <input type="checkbox"/> Probation <input type="checkbox"/> Parole <input type="checkbox"/> Not Supervised <input type="checkbox"/> Status Unknown				
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Suspect	In Pain ? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, describe:													
	What did the SUSPECT say (Before and After Arrest) :													
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Evid	Evidence Present? <input type="checkbox"/> Yes <input type="checkbox"/> No		Photos taken: <input type="checkbox"/> Victim Injury <input type="checkbox"/> Suspect Injury <input type="checkbox"/> Other:				Other Evidence: <input type="checkbox"/> Damaged Property <input type="checkbox"/> Videos <input type="checkbox"/> Electronic Evidence <input type="checkbox"/> Other:				Destruction of Property? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, Describe:			
Offense	Offense Committed? <input type="checkbox"/> Yes <input type="checkbox"/> No		Was suspect arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No If no, explain:				Offense 1		Law (e.g. PL)		Offense 2		Law (e.g. PL)	
VICTIM / COMPLAINANT COPY					NYS DOMESTIC AND SEXUAL VIOLENCE HOTLINE 1-800-942-6906					3221-03/2016 DCJS Copyright © 2016 by NYS DCJS				







## **IF YOU ARE THE VICTIM OF DOMESTIC VIOLENCE, THE POLICE AND COURTS CAN HELP.**

### **What the Police Can Do:**

- \*Assist you with finding a safe place, a place away from the violence.
- \*Inform you about how the court can help protect you from the violence.
- \*Help you and your children get medical care for any injuries you received.
- \*Assist you in getting necessary belongings from your home.
- \*Provide you with copies of police reports about the violence.
- \*File a complaint in criminal court, and tell you where your local criminal and family courts are located.

### **What the Courts Can Do:**

- \*If the person who harmed you or threatened you is a relative by blood or marriage, or is someone you've had a child with, or is someone with whom you are or have had an intimate relationship, then you have the right to take your case to family court, criminal court or both.
- \*The forms you need are available from the family court and the criminal court.
- \*The courts can decide to provide a temporary order of protection for you, your children and any witnesses who may request one.
- \*The family court may appoint a lawyer to help you if the court finds that you cannot afford one.
- \*The family court may order temporary child support and temporary custody of your children.

**New York Law States:** If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you. You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection. The forms you need to obtain an order of protection are available from the family court and the local criminal court. The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers. Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime. (NYS Criminal Procedure Law, Section 530.11 (6))

#### **NEW YORK STATE**

**24 HOUR DOMESTIC AND SEXUAL  
VIOLENCE HOTLINE  
1-800-942-6906**

**English and Español, Multi-language Accessibility  
National Relay Service for Deaf or Hard of Hearing: 711**

**NEW YORK CITY (all languages)  
1-800-621-Hope (4673) or 311**

#### **COURT INFORMATION**

New York City—Criminal Court Information  
**1-646-386-4500**

To obtain court information for other areas of NYS, ask the responding officer for court numbers, consult your phone directory, or call the Domestic and Sexual Violence Hotline (1-800-942-6906)

#### **VICTIM INFORMATION AND NOTIFICATION EVERYDAY (VINE)**

Victims may receive information relating to the status and release dates of persons incarcerated in state prison or local jails in New York State. For more information on this program and how you can register, call

**1-888-VINE-4NY (1-888-846-3469) or [www.vinelink.com](http://www.vinelink.com)**

#### **STATEWIDE AUTOMATED VICTIM INFORMATION AND NOTIFICATION (SAVIN-NY)**

Victim notification program which allows domestic violence victims to register to be notified when an Order of Protection has been served

**[www.nyalert.gov](http://www.nyalert.gov)**

## **Si USTED ES VÍCTIMA DE VIOLENCIA DOMÉSTICA, PUEDEN AYUDAR LA POLICÍA Y LOS TRIBUNALES.**

### **Lo que puede hacer la policía:**

- \* Ayudarle a encontrar un lugar seguro, un lugar lejos de la violencia.
- \* Informarle cómo la corte puede ayudar a protegerle de la violencia.
- \* Ayudarle a obtener atención médica para heridas o lesiones que usted y sus hijos pudieran haber sufrido.
- \* Ayudarle a sacar de su hogar las pertenencias necesarias.
- \* Proveerle copias de informes de la policía sobre la violencia.
- \* Presentar una querrela ante el tribunal en lo penal e informarle sobre la localización del tribunal en lo penal y del tribunal de familia en su comunidad.

### **Lo que pueden hacer los tribunales:**

- \* Si la persona que le hizo daño o que lo amenazó es su pariente o familiar político, o es alguien con quien usted tuvo un hijo, alguien con quien usted tiene o ha tenido una relación íntima, entonces usted tiene el derecho de llevar el caso al tribunal de familia, en lo penal, o ambos.
- \* Puede obtener los formularios que necesita en el tribunal de familia y en el tribunal en lo penal.
- \* Los tribunales podrían proveerle una orden de protección provisional para usted, sus hijos, y cualquier testigo que así lo pida.
- \* Si el tribunal determina que usted no puede pagar los servicios de un abogado, el tribunal puede asignarle uno.
- \* El tribunal de familia puede otorgarle manutención provisional para sus hijos, así como la custodia provisional de sus hijos.

La Ley de Nueva York establece que: Si usted es víctima de violencia doméstica, puede pedirle al oficial de la policía que resguarde su seguridad y la de sus hijos. Incluso, puede pedirle que le proporcione información sobre cómo obtener una orden temporal de protección. Asimismo, puede solicitar que dicho oficial de la policía le ayude a obtener sus efectos personales esenciales y a localizar un lugar seguro, al igual que transportarle a usted y a sus hijos a dicho lugar, o ayudarle a hacer arreglos para obtener dicha transportación dentro de la jurisdicción de dicho oficial de la policía, incluyendo pero sin limitarse a transportación a un programa que provea servicios contra la violencia doméstica, la residencia de un miembro de su familia o la residencia de un amigo, o un lugar que sea igualmente seguro. Cuando la jurisdicción de dicho oficial de la policía abarca más de un condado, usted puede pedirle al oficial que le transporte o que haga arreglos para transportarle a usted y a sus hijos a un lugar seguro en el condado donde ocurrió el incidente. Si usted o sus hijos necesitan tratamiento médico, usted tiene derecho a solicitar que dicho oficial de la policía le ayude a obtener dicho tratamiento médico. Usted puede solicitar que la agencia policial le provea una copia gratis de cualquier informe del incidente. Usted tiene derecho a buscar y escoger su propio consejero legal y si usted procede a utilizar el tribunal de familia y se determina que usted no puede pagar por los servicios de un abogado, uno deberá ser designado para que le represente sin costo para usted. Usted puede pedirle al fiscal de distrito o a un oficial de la policía que radique una querrela penal. Usted también tiene derecho a presentar una petición ante el tribunal de familia cuando una ofensa de familia ha sido cometida contra usted. Usted tiene derecho a presentar dicha petición y a solicitar una orden de protección el mismo día que usted comparece en tribunales, y dicha petición debe ser vista el tribunal ese mismo día, o el próximo día en que esté en sesión. Cualquiera de los tribunales puede expedir una orden de protección una causa de una conducta que constituya una ofensa de familia, la cual puede incluir entre otras disposiciones, una orden contra el demandado o acusado que le requiera permanecer lejos de usted y de sus niños. El tribunal de familia también puede ordenar el pago temporal de manutención para sus niños y otorgarle a usted la custodia temporal de sus niños. Si el tribunal de familia no está en sesión, usted puede solicitar ayuda inmediata del tribunal en lo penal para obtener una orden de protección. Los formularios que usted necesita para obtener una orden de protección están disponibles en el tribunal de familia y en el tribunal en lo penal. Para acceso a los recursos disponibles en esta comunidad que proveen información sobre violencia doméstica, tratamiento de lesiones, y lugares seguros y refugios, llame a los siguientes números gratuitos. Es un delito radicar una querrela penal o una petición ante el tribunal de familia, a sabiendas de que dicha querrela o petición contiene alegaciones falsas. (NYS Criminal Procedure Law, Section 530.11 (6))



### **ESTADO DE NUEVA YORK LÍNEAS DIRECTAS PARA VIOLENCIA DOMÉSTICA Y SEXUAL LAS 24 HORAS**

**1-800-942-6906**

**Inglés y Español, Multi-language Accessibility  
Servicio de retransmisión nacional para sordos o con  
problemas de audición: 711**

**CIUDAD DE NUEVA YORK (todo lenguajes)  
1-800-621-Hope (4673) o 311**

### **INFORMACIÓN DEL TRIBUNAL**

La ciudad de Nueva York  
Información de el tribunal de penal del condado  
**1-646-386-4500**

Para obtener la información del tribunal para otras áreas de  
NYS, pedirle al oficial de la policía que responde los  
números del tribunal, consulte su guía de teléfonos, o llame  
el teléfono de Ayuda contra la violencia doméstica y sexual  
(número de teléfono proporcionado arriba).



### **Información y Notificación Diaria Para La Víctima (VINE)**

Las víctimas pueden recibir información relacionada con el estado y la fecha de excarcelación de personas encarceladas  
en prisiones estatales o en cárceles locales en el estado de Nueva York.

Para más información sobre este programa y como puede registrarse, llame al  
**1-888-VINE-4NY (1-888-846-3469) o [www.vinelink.com](http://www.vinelink.com)**

### **NOTIFICACIONES E INFORMACIÓN ESTATAL VÍCTIMA AUTOMATIZADO (SAVIN-NY)**

Programa de notificación de la víctima que les permite a las víctimas de violencia doméstica registrarse para ser  
Notificadas cuando una Orden judicial de protección de la familia ha sido entregada

**[www.nyalert.gov](http://www.nyalert.gov)**

# MATRIMONIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

RISK FACTOR	WHAT TO LOOK FOR IN ALLEGATIONS OR TESTIMONY	RELEVANCE/ LEGAL CONTEXT
<b>Context of Violence</b>	<ul style="list-style-type: none"> <li>Was this the first time that something like this is being alleged? If not, what happened before? How long ago? When was the first incident?</li> <li>What was the <b>worst or most serious</b> thing that happened? Has the physical violence <b>increased in frequency</b> or severity over the past year? Medical treatment needed?</li> <li>Is there a recent loss of employment?</li> <li>Is there a history of substance abuse or mental health concerns?</li> </ul>	Use of some illegal drugs (cocaine and derivatives, meth. amphetamines); increased severity and frequency of violence; and unemployment increase lethality and recidivism. DRL § 240 and DRL § 252.
<b>Criminal and Family Court History</b>	<ul style="list-style-type: none"> <li>Pending or prior <b>Orders for Protection</b></li> <li>Pending order of <b>Support</b></li> </ul>	The existence of prior OPs and criminal history is an indicator for repeat offending. Check Criminal and Family Court, OP registry and SORA. DRL § 240 1(A-1).
<b>Relationship Status</b>	<ul style="list-style-type: none"> <li>When did the relationship begin? What is the date of the marriage?</li> <li>Where does each party live? Did they live together, if so when?</li> <li>Are they <b>recently separated</b>? Is one party requesting exclusive occupancy?</li> <li>Is economic relief being requested?</li> </ul>	Separation within the past year increases lethality and recidivism. <i>Mitzner v. Mitzner</i> , 228 A.D.2d 483, 643 N.Y.S.2d 674 (2nd Dept., 1996); <i>Formato v. Formato</i> , 173 A.D.2d 274, 569 N.Y.S.2d 665 (1st Dept., 1991).
<b>Firearms/ Weapons</b>	<ul style="list-style-type: none"> <li>Does responding party have <b>access to a firearm or weapon or a license</b>?</li> <li>Is there a firearm or weapon in the home? What types? How many?</li> <li>Has the responding party used or threatened to use a weapon against the moving party?</li> </ul>	Responding party access to firearm and use or threatened use of lethal weapon increases lethality. DRL § 240 (3) (h); DRL § 252 (a).
<b>Strangulation</b>	<ul style="list-style-type: none"> <li>Has the responding party ever attempted to strangle or choke the moving party?</li> </ul>	Strangulation increases lethality. Obstruction of breathing. PL § 121.11/12/13. **
<b>Threats to Kill/Suicide</b>	<ul style="list-style-type: none"> <li>Has responding party ever threatened to or tried to kill the moving party?</li> <li>Has responding party ever threatened or attempted suicide?</li> </ul>	Threat or attempt to kill/suicide increases lethality. Harassment and Aggravated Harassment PL § 240.20/25/30/30(1). **
<b>Sexual Violence</b>	<ul style="list-style-type: none"> <li>Has responding party forced the moving party to have sex?</li> </ul>	Responding party forcing moving party to have sex is a lethality factor. Sexual misconduct, PL § 130.20/52/55/60. **
<b>Controlling Behavior</b>	<ul style="list-style-type: none"> <li>Does responding party try to control most or all of moving party's daily activities?</li> <li>Is the responding party constantly or violently <b>jealous</b>?</li> <li>Does the responding party <b>follow or spy</b> on moving party, leave threatening notes or messages, destroy personal property or make unwanted calls?</li> <li>Does one party control the finances/marital assets?</li> <li>Does the responding party denigrate the moving party's parenting?</li> </ul>	Violent jealousy and stalking behaviors are lethality factors and constitute Stalking PL § 120.45-60. ** Controlling behaviors limit moving party's access to resources. Abusive party may use children to control non-abusive parent.
<b>Stalking</b>	<ul style="list-style-type: none"> <li>Does the responding party <b>repeatedly call</b>, text, or email the moving party?</li> <li>Send unwanted gifts or other items?</li> <li>Monitor moving party's phone calls, computer use, or social media?</li> <li><b>Use technology</b>, like internet, hidden cameras or global positioning systems (GPS), to track the moving party?</li> <li>Drive by or hang out at the moving party's home, school, or work? Follow or show up wherever the moving party is?</li> </ul>	Stalking increases risk of lethality. Stalking PL § 120.45-60. **
<b>Petitioner Belief</b>	<ul style="list-style-type: none"> <li>Does the moving party believe that the responding party will re-assault or attempt to kill the moving party?</li> </ul>	Moving party belief of harm is a lethality factor. DRL § 240.3c, PL § 812(b). **
<b>Children</b>	<ul style="list-style-type: none"> <li>What is the biological relationship of the responding party and children?</li> <li>Were children present during the incident?</li> <li>Have the children witnessed violence by a party?</li> <li>Has there been direct physical or sexual abuse of the children? <b>Threats to harm children? Physical or sexual abuse of the children and threats to harm children are not risk factors but can indicate means by which a party can be controlled.</b></li> </ul>	Having a child who is not the responding party's biological child increases lethality and recidivism. Assault during pregnancy increases risk of lethality. Children present increases risk of recidivism.
<b>Safety Planning</b>	<ul style="list-style-type: none"> <li>Are there safety measures in place? Moving party service referral? Is the moving party eligible for an attorney?</li> </ul>	DRL § 240 (3) (f) authorizes lease termination.



## HOW TO USE–

# THE JUDICIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

**This Guide is to assist Supreme Court judges in identifying domestic violence risk factors and to offer legal remedies that respond to the correlating risk. This tool should not be used to determine whether there is a legal basis to issue an order of protection.**

Both DRL § 240 and § 252 have provisions concerning issuance of Orders of Protection in matrimonial cases. DRL § 240 concerns the issues of custody and child support in matrimonial actions and under DRL § 240(3) the issuance of orders of protection. DRL § 252 provides for the issuance of Orders of Protection (OP) or Temporary OPs in Supreme Court. Initial applications or modifications can be entertained in both the Supreme and Family Courts. Applications for OPs or TOPs must be in writing in the form of an Order to Show Cause or Notice of Motion (see DRL § 252(4)(8)). Ex parte relief is available with an Order to Show Cause. The Court rule (22 NYCRR 202.7[f]) that governs notice on applications for temporary relief specifically provides that the rule does not apply to Orders to Show Cause or motions requesting an Order of Protection under DRL § 240—unless otherwise ordered by the Court.

**Initial Order to Show Cause:** This tool can assist in determining the terms and conditions on the temporary order, whether to issue a TOP, a warrant for arrest (depending on the severity of the abuse claimed, i.e., visible signs of abuse, types of abuse alleged, etc.), how quickly to calendar the return hearing, and whether temporary support should be ordered.

**Pendente Lite Application:** This tool can assist in determining the type and length of an order, whether aggravating circumstances apply and which conditions are appropriate, including firearms surrender, support, or children on the order.

**Other Hearings or Disposition:** This tool can assist in modification of the type and length of an order, conditions -- firearms surrender, support, children on the order, program mandates; or adding terms and conditions after a violation hearing. Supreme Court orders can extend until the youngest child is 18.

### **Limitations of eliciting safety or risk information from petitioners in open court:**

- Safety concerns or trauma can affect the petitioner's ability to provide accurate information in open court.
- Soliciting information from petitioners in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the petitioner.

### **Provide moving parties information on risk factors and the option of consulting with confidential advocates**

- Information and access to advocates improves litigant safety and the quality of the moving party's risk assessments and, as a result, the court's own assessment of risk.

### **Cultural factors may impact litigants' understanding**

- Information and access to language services should be made available to litigants to ensure their understanding of the risk factors and the petition.
- Some of the terms on this tool may need to be explained in more detail.

### **Note that this list of risk factors is not exclusive**

- The listed factors are the ones most commonly present when the risk of serious harm or death exists.
- Additional factors exist which assist in prediction of re-assault.
- Moving parties may face and fear other risks such as homelessness, poverty, criminal charges, loss of children or family supports.

### **Remember that the level and type of risk can change over time**

- The most dangerous time period is the days to months after the responding party discovers that the moving party
  - might attempt to separate or terminate the relationship.
  - has disclosed or is attempting to disclose the abuse to others, especially violent behavior.

**This is an educational tool used to contextualize certain behaviors within the NY State Penal Code.**

These factors draw on the following evidence based risk and lethality assessment tools: Danger Assessment and DVSI-R.

\*\* Penal Law statutes are for reference. DRL § 240 and § 252 govern judicial decisions in matrimonial proceedings.\*\*

This project was supported by subgrant no. VW13562643 and subgrant no. VW14562644 awarded pursuant to a S.T.O.P. Violence Against Women Formula Grant Program administered by DCJS, the New York State administering office. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women.

# FAMILY COURT JUDICIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

RISK FACTOR	WHAT TO LOOK FOR	LEGAL CONTEXT
<b>Context of Violence</b>	<ul style="list-style-type: none"> <li>Was this the <b>first time</b> that something like this happened? If not, what happened before? How long ago?</li> <li>What was the <b>worst or most serious thing</b> that happened? Medical treatment needed?</li> <li>Has the <b>physical violence increased</b> in frequency or severity over the past year?</li> <li>Is there a recent <b>loss of employment</b>?</li> <li>Is there a history of <b>substance abuse or mental health</b> concerns?</li> </ul>	Use of some illegal drugs; increased severity/ frequency of violence; unemployment increase lethality and recidivism. FCA §842(h); medical costs can be allocated as per §828(h); substance abuse/mental health programs can be ordered under §842(g).
<b>Criminal and Family Court History</b>	<ul style="list-style-type: none"> <li><b>Criminal and Family Court check</b>, OP registry, sex offender registry</li> <li>Pending or prior <b>Orders for Protection</b></li> <li>Pending order of <b>Support</b></li> </ul>	Prior OPs/criminal history can be a risk factor for re-offending. FCA §814 provides for comm. bet. crim and civil; prior orders are relevant under §827.
<b>Relationship Status</b>	<ul style="list-style-type: none"> <li>When did the relationship begin? When did it end?</li> <li>Where does each party live? Did they live together, if so when?</li> <li>Are they <b>recently separated</b>?</li> </ul>	Separation within the past year increases risk of lethality and recidivism. FCA §828 authorizes temporary child support; FCA §842 and RPL §227-c authorize lease termination.
<b>Firearms/ Weapons</b>	<ul style="list-style-type: none"> <li>Does respondent have <b>access to a firearm or weapon</b>?</li> <li>Is there a firearm or weapon in the home?</li> <li>Has the respondent ever used or <b>threatened to use a weapon</b> against the petitioner?</li> </ul>	Respondent access to firearm and use or threatened use of lethal weapon increases lethality risk. FCA §842-a and 18 U.S.C. 922(g)(9) include firearms restrictions.
<b>Strangulation</b>	<ul style="list-style-type: none"> <li>Has respondent ever <b>attempted to strangle</b> or choke the petitioner?</li> </ul>	Strangulation increases lethality. Obstruction of breathing, PL §121.11/12/13.
<b>Threats to Kill</b>	<ul style="list-style-type: none"> <li>Has respondent ever <b>threatened to or tried to kill</b> the petitioner?</li> </ul>	Disorderly Conduct, Harassment and Aggravated Harassment PL §240.20/25/30/30 (1).
<b>Sexual Violence</b>	<ul style="list-style-type: none"> <li>Has respondent <b>forced the petitioner to have sex</b>?</li> </ul>	Sexual misconduct, PL §130.20/52/55/60.
<b>Controlling Behavior</b>	<ul style="list-style-type: none"> <li>Does respondent <b>try to control</b> most or all of petitioner's daily activities?</li> <li>Is respondent <b>constantly or violently jealous</b>?</li> <li>Who has <b>access to bank accounts</b>, the car, etc.?</li> </ul>	Violent jealousy and stalking behaviors are lethality factors and may constitute Stalking PL §120.45-60.
<b>Stalking</b>	<ul style="list-style-type: none"> <li>Does the respondent <b>repeatedly call, text, or email</b> the petitioner?</li> <li><b>Send unwanted gifts</b> or other items to the petitioner?</li> <li><b>Monitor petitioner's phone calls</b>, computer use, or social media?</li> <li><b>Use technology</b>, like hidden cameras or global positioning systems (GPS), to track the petitioner?</li> <li><b>Drive by or hang out</b> at the petitioner's home, school, or work? Follow or show up wherever the petitioner is?</li> </ul>	Stalking increases risk of lethality. Stalking PL §120.45-60.
<b>Petitioner Belief</b>	<ul style="list-style-type: none"> <li>Does the petitioner <b>believe that the respondent will re-assault or attempt to kill</b> the petitioner?</li> </ul>	Petitioner belief of harm is a lethality factor. FCA §812(b).
<b>Children</b>	<ul style="list-style-type: none"> <li>Has there been <b>direct physical abuse</b>? <b>Threats to harm</b> children? Child <b>sexual abuse</b>?</li> <li>What is the <b>biological relationship</b> of respondent and children?</li> <li>Were <b>children present</b> during the incident?</li> <li>Have the <b>children witnessed violence</b> between the parties?</li> </ul>	Having a child who is not the responding party's increases lethality and recidivism. Assault during pregnancy increases risk of lethality. Children present increases risk of recidivism. FCA §842(b)(c) and following: court may limit access or custody on OP; Annie C. v. Marcellus W., court may include child as protected party on OP.
<b>Safety Planning</b>	<ul style="list-style-type: none"> <li><b>Are there safety measures in place</b>? Petitioner service referral? Is the petitioner eligible for an attorney?</li> </ul>	FCA §821-a requires court to inform petitioner of right to attorney; §844 covers modification

This Guide is to assist Family Court judges in identifying domestic violence risk factors and to offer legal remedies or specific conditions that may be appropriate that respond to the correlating risk. This Guide may also be valuable in assisting courts in crafting temporary and final custody, parental access and visitation orders in cases involving domestic violence. The Guide is not exhaustive, is not meant to be a substitute for the court's discretion in determining the credibility of the allegations and weight of each factor and is not meant to be filled out, scored in any way, or placed in any court file.

## HOW TO USE – FAMILY COURT JUDICIAL GUIDE TO DOMESTIC VIOLENCE RISK FACTORS

### General Instructions

- Provide both parties with notice of right to retain counsel and, if indigent, to assigned counsel under FCA 262(a)(ii) and 821-a(3)(a) and DRL 35
- Provide the responding party with an opportunity to be heard as to any risk factors identified
- Explain the terms and conditions of the Temporary Order to all parties, with the assistance of an interpreter where limited English proficiency or hearing impairment is an issue
- If ex parte application for a TOP involves exclusion from the home, the case should be scheduled with a short return date

### Limitations of eliciting safety or risk information from petitioners in open court

- **Safety concerns or trauma** can affect the petitioner's ability to provide accurate information in open court
- **Soliciting information from petitioners** in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the petitioner

### At Initial Hearing under §828:

- This tool can assist in determining the terms and conditions on the temporary order, whether to issue a warrant, how quickly to calendar the return hearing, and whether temporary support should be ordered

### At Dispositional Hearings §833:

- This tool can assist in determining type and length of order, whether aggravating circumstances apply and which conditions are appropriate, including firearms surrender, support, children on the order, and/or program mandates

### Requests for Modifications §844; Violation Hearings §846:

- This tool can assist in modification of type and length of order, and which conditions are appropriate, including firearms surrender, support, children on the order, and/or program mandates; or adding terms and conditions after a violation hearing

### Provide petitioners information on risk assessment factors and the option of consulting with confidential advocates

- Information and access to advocates improves petitioner safety and the quality of petitioners' risk assessments and, as a result, the court's own risk assessments

### Cultural factors may impact litigants' understanding of this tool

- Information and access to language services should be made available to litigants to ensure their understanding of the risk factors and the petition
- Some of the terms on this tool may need to be explained in more detail

### Note that this list of risk factors is not exclusive

- The listed factors are the ones **most commonly present when the risk of serious harm or death exists**
- Additional factors exist which assist in prediction of re-assault
- Petitioners may face and fear other risks such as homelessness, poverty, criminal charges, loss of children or family supports

### Remember that the level and type of risk can change over time

- The most dangerous time is during or after the period when the petitioner:
  - is separating or has separated from the respondent
  - has disclosed or is attempting to disclose the abuse to others

Risk factors may be used to tailor supervision strategies and oversight.

**This tool may also be valuable in assisting courts in crafting temporary and final custody, parental access, and visitation orders in cases involving domestic violence.**

**This is an educational tool used to contextualize certain behaviors within the NY State Penal Code.**

## REMEMBER TO EXPLAIN THE TERMS AND CONDITIONS OF THE TEMPORARY ORDER TO THE PETITIONER.

These factors were compiled based on the work of Minnesota's Gender Fairness Implementation Committee; 2009, Identifying Risk Worksheet created by Probation Officer James E. Henderson Jr. of the 15th District Court in Ann Arbor MI. This project was supported by subgrant No. VW10562640 and subgrant no. VW12562642 awarded pursuant to a S.T.O.P. Violence Against Women Formula Grant Program administered by DCJS, the New York State administering office. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_

-----X

**JANE JONES,**

Index No.

Plaintiff,

- against-

**JOHN JONES,**

**ORDER AUTHORIZING  
DISCLOSURE OF PATIENT  
RECORDS UNDER  
42 CFR § 2.61-2.64**

Defendant.

(For Records Only;  
No Appearance Required)

-----X

In accordance with 42 U.S.C. 4582 and 21 U.S.C. 1175, this Court finds:

(A) That the record shows good cause for the disclosure of certain objective data specified below, pertaining to **JANE JONES** for the purpose of . determining custody of infant issue, JACK JONES, D.O.B. October 3, 20\_\_\_\_, 10 years old and JILL JONES, D.O.B. May 4, 20\_\_\_\_, 5 years old.

(B) **JOHN JONES'S** diagnosis, treatment and prognosis is material and relevant to the custody proceeding in connection to this matter.

***IT IS THEREFORE ORDERED*** that \_\_\_\_\_ Hospital, Medical Records Department is authorized, in accordance with 42 CFR §2.61- §2.64 and 42 U.S.C. 4582 and 21 U.S.C. 1175 to disclose to this Court any and all medical records which are essential to fulfill the above-described objective.

To the extent the disclosed information is to be retained by the Court, in accordance with S2.64(g)(3), it will be kept in a sealed record.

Except pursuant to an authorizing Court Order issued in accordance with §2.65, no information .disclosed pursuant to this Order may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

DATED: September \_\_\_\_, 201\_\_

ENTER

HON. \_\_\_\_\_, J.S.C.

# Coercive Control Dynamics and their Impact on Family Offense and Custody Matters

Parts III, IV, and V

## III. Evidence Gathering and Admissibility

### ► Scope of Permissible Discovery

Family Offense and Custody Cases  
are special proceedings.



## Scope of Permissible Discovery

- In the First and Second Departments, there is limited ability to do discovery on family offense or custody issues. Depositions with respect to issues related to custody are generally not permitted. *Garvin v Garvin*, 162 A.D.2d 497 (2d Dept 1990); *Hunter v Hunter*, 10 A.D.2d 291 (1st Dept 1960); *P v P*, 93 Misc.2d 704 (Sup Ct NY County 1978), and bills of particulars may not be demanded ( see, *Ginsberg v Ginsberg*, 104 A.D.2d 482 (2d Dept 1984).

## Scope of Permissible Discovery

- In Family Court, since these are special proceedings, leave of court is required to be able to engage in discovery.





## Scope of Permissible Discovery

- ▶ Obtain your own client's documents to provide some evidence of coercive control.
- ▶ Financial records - For coercive control cases, there may be evidence of financial abuse that can be shown through records.
- ▶ Releases - obtain your own client's documents through release forms.
- ▶ CPLR 4518 on Certification of Business Records - get all records with the required certification and delegation of authority to make them admissible without calling the custodian of the records to testify
- ▶ Medical Records - HIPAA form

## Scope of Permissible Discovery

Obtain the opposing party's documentary evidence

- ▶ Opportunity to obtain records when discovery is not permitted in the custody matter
  - ▶ If it is a matrimonial action, financial discovery will be happening simultaneously with custody litigation.
  - ▶ By filing a separate child/spousal support proceeding - but leave of court to serve discovery demands may be required.

## CHILD SUPPORT



## SPOUSAL SUPPORT



## Scope of Permissible Discovery

### Subpoenas duces tecum

- ▶ Must be served on the adversary as well as the entity being subpoenaed. Adversary has opportunity to make a motion to quash the subpoena.
- ▶ Some types of records must be obtained via judicial subpoena and be returnable to the court.

## Scope of Permissible Discovery

The parties may consent to release said medical records by executing Authorization for Release of Health Information Pursuant to HIPAA. If consent is not voluntarily provided, counsel may submit an Order Authorizing Disclosure of Patient Records Under 42 Code of Federal Regulations§ 2.61-2.64 to be ordered by the Court and submitted to the applicable health care provider. ORDER AUTHORIZING DISCLOSURE OF PATIENT RECORDS UNDER 42 CFR § 2.61-2.64

## Mental and Physical Health at Issue in Custody Matters

Rosenblitt v. Rosenblitt, 107 A. D.2d 292, 486 N.Y.S.2d 741 (2nd Dept. 1985) (parties to a custody proceeding place their physical and mental condition at issue).



## Mental and Physical Health at Issue in Custody Matters

- CPLR 3121 §3121. Physical or mental examination -
- . . . any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician . . .



## Mental and Physical Health at Issue in Custody Matters

Although CPLR 3121 applies to matrimonial actions, the potential for abuse is so great that the courts often use their broad discretionary power to grant protective orders to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any party.

- ▶ Wegman v. Wegman, 37 N.Y.2d 940, 343 N.E.2d 288 (Ct of App. 1975)
- ▶ Hirschfeld v. Hirschfeld, 114 A.D.2d 1006, 495 N.Y.S.2d 445 (2nd Dept. 1985)  
aff'd 69 N.Y.2d 842, 514 N.Y.S.2d 704 (1987)
- ▶ Lohmiller v. Lohmiller, 118 A.D.2d 760, 500 N.Y.S.2d 151 (2nd Dept. 1986)
- ▶ Rosenblitt v. Rosenblitt, 107 A.D.2d 292, 486 N.Y.S.2d 741 (2nd Dept. 1985)
- ▶ Garvin v. Garvin, 162 A.D.2d 497, 556 N.Y.S.2d 699 (2nd Dept. 1990)
- ▶ Torelli v. Torelli, 50 A.D.3d 1125, 857 N.Y.S.2d 615 (2nd Dept. 2008)

## Mental and Physical Health at Issue in Custody Matters



But wait until we get to forensic evaluations . . .

## Audio and Video Recordings



## Audio and Video Recordings

- ▶ Harv R. v. Esther R., 134 Misc.2d 404, 510 N.Y.S.2d 792 (Fam.Ct. 1986)  
Where father recorded his conversation with mother, said recording was admissible inasmuch as the father was a party to said conversation and obviously consented to the recording of same. The fact that the mother had no knowledge of the recording was immaterial.



## Audio and Video Recordings

- ▶ CPLR §3101 (l) evolved due to advancements in and increased use of surveillance materials, such as film, video tapes, audio tapes and photographs, including transcripts or memoranda of said materials. Unedited copies of such material must be produced when demanded. A party may not produce only those portions of the video, for example, that the party intends to produce at the hearing. All out-takes must be included in the materials to be produced. This provides an opportunity for disclosure of all materials prior to trial. In the event the materials are not disclosed, the party who demanded the production may object to their being introduced at trial.

## Other electronic evidence

### EMAILS

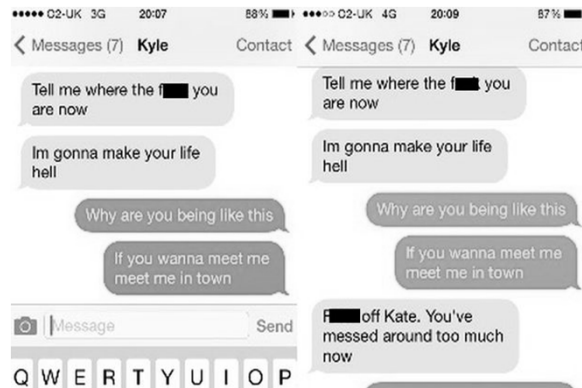
- ▶ Emails sent to your client by the other party
- ▶ Emails sent by the other party to third parties



## Other electronic evidence

### TEXT MESSAGES

- Showing the number from whom the message was sent
- How to present the text messages



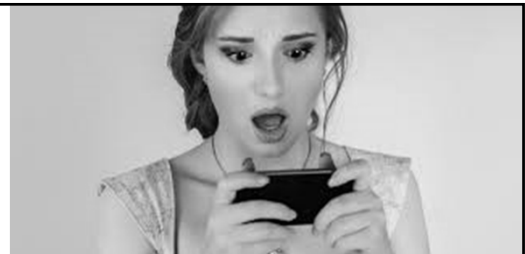
## Other electronic evidence

### SOCIAL MEDIA

- Gathering social media evidence
- Ethical considerations -

N.Y. State Bar Ass'n, N.Y. Comm. on Prof'l Ethics, Op. 843 (Sept. 10, 2010)

A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).



## IV. Litigation Skills

- ▶ A. Direct Examination of Your Client
- ▶ B. Cross Examination of Opposing Party
- ▶ C. Expert Witness Cross Examination
- ▶ D. Hiring a Domestic Violence/Coercive Control Expert

## Direct Examination of Your Client

1. Crafting the narrative
  - ▶ Theory of the case
  - ▶ Details to demonstrate all elements to be proven



## Direct Examination of Your Client

### 2. Witness preparation

- ▶ Understanding the effect of coercive control on the victim
- ▶ How trauma affects a witness's testimony
- ▶ Walking the fine line of showing the abusive and controlling behavior of the opposing party without appearing to be an "unfriendly parent"

## Cross Examination of Opposing Party

### 1. Preparing for cross-examination

- ▶ Know the facts of your case backwards and forwards
- ▶ Understand your adversary's theory of the case
- ▶ Figure out what you need to prove to get the outcome your client desires



Getty Images

## Cross Examination of Opposing Party

### 2. Impeachment materials

- ▶ Make a list of impeachment evidence - convictions, prior bad acts, inconsistent statements, inadequate perception, contradiction by other evidence
- ▶ Ask questions that will establish the witness's testimony to be very clearly inconsistent with impeachment materials before introducing impeachment materials, foreclosing possible explanations for the discrepancies that the adversary might try to introduce on redirect
- ▶ Know the rules of evidence for getting those impeachment materials admitted

## Cross Examination of Opposing Party

### 3. Getting the batterer to reveal a controlling attitude

- ▶ What favorable facts can you get the witness to admit?
- ▶ What unfavorable testimony will the witness be giving and how can you minimize it?
- ▶ Decide on the tone and manner of the cross-examination - know the personality of the witness and how he/she may respond



## Cross Examination of Opposing Party

### 4. Developing your cross examination questions

- ▶ Avoid open-ended questions
- ▶ Use short, simple leading questions whenever possible
- ▶ Have a purpose for each question you ask
- ▶ Come up with questions for which there is no good yes or no answer
- ▶ Plot out possible responses that may be given and frame questions that can be used for different answers - e.g., have a "choose your own adventure" tree in your list of questions that will lead you down one line of questions if the witness answers yes and another line of questioning if the witness answers no
- ▶ Don't ask a question without knowing the answer
- ▶ Don't ask one question too many - You usually don't want to ask the opposing party "Why?"
- ▶ Determine the sequence of topics and organize questions around each topic so the cross-examination tells the story you want clearly without confusing the judge
- ▶ Word the questions appropriately to achieve the desired response - only ask questions that help you

## Expert Witness Cross-Examination

### 1. Role of the Forensic Evaluator

- ▶ a. §202.18 of the Uniform Court Rules (22 NYC RR §202.18) - giving the court discretion to appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody and visitation.
- ▶ b. §251 of the Family Court Act
- ▶ c. In *Young v. Young*, 212 A.D.2d 114, 628 N.Y.S.2d 957 (2nd Dept. 1995), the Second Department, Appellate Division, held as follows: "While it is true that the recommendations of a court-appointed expert are but one factor to be considered in making a custody determination and are not determinative, such recommendations are entitled to some weight, unless such opinions are contradicted by the record". See *also*, *Millerv. Pipia*, 297 A.D.2d 362, 746 N.Y.S.2d 729 (2nd Dept. 2002). The Appellate Division reversed the trial court's decision inasmuch as the trial court failed to adequately explain why it failed to consider the recommendations of the neutral expert, which the Appellate Division found to be "complete, strong, firm, competent, weighty and unbiased." The Second Department further concluded that the lower court's decision to completely disregard the forensic's recommendation was arbitrary as it lacked "any discernible reason or basis in the record to support such determination".



## Expert Witness Cross-Examination

### 2. Problems with forensic evaluations in cases of coercive control

- ▶ Lack of domestic violence expertise
- ▶ Lack of cultural competency
- ▶ Psychological testing



## Forensic Evaluations in Custody Matters: Preparing your client for a forensic evaluation

### A. Life and Family History

- ▶ 1. Help your client create a clear, consistent, chronological life story including home life, family, school, romantic relationships, children, mental and physical health.
- ▶ 2. Make sure to get copies or subpoena therapists notes, and hospital records if any. Because a subpoena may have to be served on all parties pursuant to the CPLR, it may be best to get records using a release.
- ▶ 3. Get a copy of your client's journal if the client has one

## Forensic Evaluations in Custody Matters: Preparing your client for a forensic evaluation

### B. The Domestic Violence

- ▶ 1. It is important that the client realizes that DV is not part of a healthy, normal relationship. The client should convey to the forensic that they realize this now.
- ▶ a. It was not just "fighting." The client should not minimize the domestic violence by mischaracterizing it as mutual fighting.
- ▶ b. Explain the Power and Control Wheel.



## Forensic Evaluations in Custody Matters: Preparing your client for a forensic evaluation

### B. The Domestic Violence (continued)

- ▶ 4. The client should know the dates and places of the domestic violence and be able to tell the story clearly.
- ▶ 5. The client should be able to describe the effect of the domestic violence on herself/himself and the children
- ▶ 6. The client should be able to explain how religion, culture, personal relationships, financial situation or experiences caused her/him to make decisions regarding staying or going back to him-explaining any reconciliations is important.

## Forensic Evaluations in Custody Matters: Preparing your client for a forensic evaluation

### C. Current Relationship with Abuser

- ▶ 1. Anything redeeming to say?
- ▶ 2. It is important to show that the client is not a hostile parent. The "*friendly parent*" doctrine in case law states: court looks for the parent who is willing to enable visitation with non custodial parent and child. The client *should not* say that there should not be any visitation because she/he will appear unreasonable and "unfriendly." Help her think about what kind of visitation is in the **best interests of the child** and why?

## Forensic Evaluations in Custody Matters: Preparing your client for a forensic evaluation

### D. Best Interest of the Child Factors

### E. Weaknesses of your case

1. What worst the abuser can say?
2. Is it true? How are you going to explain it to someone?
3. BAD FACTS: criminal history, current or former substance abuser, history of mental health issues, suicide attempts?

## Forensic Evaluations in Custody Matters: Preparing your client for a forensic evaluation

### F. Appearance/Attitude

- ▶ 1. First impressions mean everything!
- ▶ 2. Advise client and children to be well dressed, conservative, not sexy, not revealing or too casual
- ▶ 3. Advise client to be on time. They will note it down if the client is late. Be there at least 15 minutes early to make a good impression. This shows that you are responsible and respectful to the expert, and you care about the child(ren) and the case.
- ▶ 4. Be truthful and consistent in each interview



"Fred always makes a poor first impression — he says it saves a lot of time."

## Cross Examination of Forensic Evaluator

- ▶ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In Frye, the Court based the admissibility of testimony regarding novel scientific evidence on whether it has “gained general acceptance in the particular field in which it belongs.” The court addressed whether an expert witness was permitted to testify regarding the results of a systolic blood pressure deception test. The court held in order for scientific evidence to be admissible it must have gained “general acceptance in the particular field in which it belongs.”
- ▶ In People v. Wesley, 83 N.Y.2d 417, 633 N.E.2d 451 (1994), the New York Court of Appeals held that the *Frye* standard is applicable for new or novel scientific evidence. The issue presented concerned the admissibility of DNA profiling evidence. The trial court held a *Frye* hearing and determined the evidence was generally accepted as reliable by the relevant scientific community.

The antiquity and general  
acceptance of an opinion is  
not assurance of its truth.

*Pierre Bayle*

## Cross Examination of Forensic Evaluator

- ▶ Pursuant to 22 NYC RR §202.16(g)(2), the Courts have discretion to substitute written reports “for direct testimony at the trial.” Any expert witness a party expects to call to trial to testify for the purpose of offering expert opinion testimony, is required to exchange and file with the Court a written report no later than 60 day prior to the date set for the trial. In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. The report may be offered in lieu of direct testimony when:
  - ▶ (1) it is submitted under oath, and
  - ▶ (2) there is an opportunity for cross examination.

▶

## Cross Examination of Forensic Evaluator

- ▶ Qualifications of the Expert
- ▶ American Psychological Association Guidelines for Child Custody Evaluations
- ▶ American Academy of Matrimonial Lawyers Custody Evaluation Standard
- ▶ Review of Reports, Notes and Raw Data
  - ▶ i. Access to forensic reports is routinely limited; although copies are provided to counsel and the parties are entitled to review them, the reports may not be copied. *Morrissey v Morrissey*, 225 A.D.2d 779 (2d Dept 1996); *Matter of Scuderi-Forzano v Forzano*, 213 A.D.2d 652 (2d Dept 1995).
  - ▶ ii. *Ochs v. Ochs*, 193 Misc.2d 502 (NY Sup. 2002). *K. C. v J. C.*, 50 Misc. 3d 892 (Westchester County 2015).

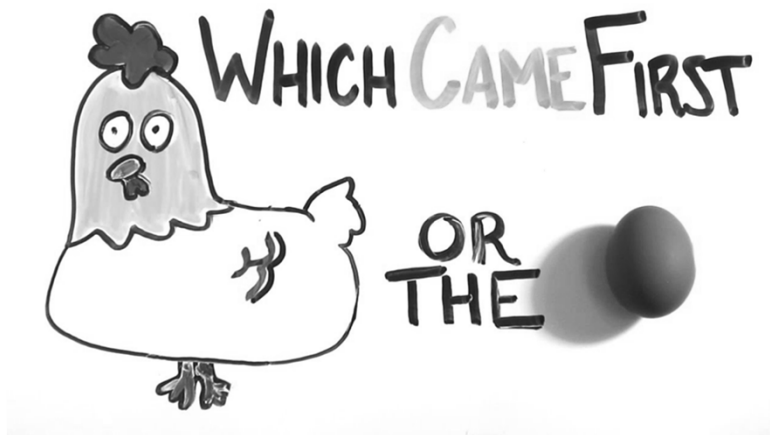


## Cross Examination of Forensic Evaluator

### Showing Bias

- New York courts have generally not allowed pretrial discovery of the notes, raw data and tests results of the forensic evaluator, absent special circumstances. Such "Special circumstances" would include a showing of bias on the part of the evaluator, or a deficiency in the report." Ochs v. Ochs, 193 Misc 2d 502, 749 N.Y.S.2d 650 [Sup. Ct., Westchester County 2002]

>>>this or that?<<<



## Hiring a DV/Coercive Control Expert



## Hiring a DV/Coercive Control Expert

- Pursuant to CPLR § 3101 (d) a party may demand that he or she be provided with a detailed listing regarding the experts that may or will be called to testify by the other party. Included in such information to be produced typically includes information regarding the expert's name, address and phone number, education, experience and qualifications, as well as information regarding the nature of the testimony to be offered by said experts, including recommendations and the basis for same. If such demand is served, and the information not timely provided before the trial, a motion to suppress the testimony of that witness may be made. In the absence of service of any such demand, the only pre-trial requirement regarding the testimony of that expert is the exchange and filing of a written report.

## Hiring a DV/Coercive Control Expert

- ▶ In Chebuskev. Burnhard-Vogt, 284A.D.2d456, 726 N.Y.S.2d 697 (2nd Dept. 2001), both the law guardian and court appointed forensic recommended that mother be awarded custody. However, the court awarded custody to father based on testimony and recommendations of father's experts who never interviewed either the mother or the child and were limited to only evaluating fathers fitness to serve as custodial parent. The Appellate Division reversed the lower court decision reasoning that they would be "seriously remiss if simply in deference to the finding of a trial judge, it allowed a custody determination to stand where it lacks a sound and substantial basis in the record and indeed, is contrary to the weight of credible evidence".

## V. Questions and Answers