**TABLE OF CONTENTS**


Introduction. . . . . 1

1. **Domestic Violence in Utah**. . . . . 3
   - 1.1 Dan Jones study. . . . . 3
   - 1.1.1 Prevalence of domestic violence. . . . . 3
   - 1.1.2 Usage and effectiveness of resources.. . . . . 4
   - 1.1.3 Experiences with protective orders. . . . . 4
   - 1.1.4 Experiences with courts. . . . . 5
   - 1.1.5 Victims' recommendations. . . . . 5
   - 1.1.6 Summary. . . . . 5
   - 1.2 CDC study. . . . . 6

2. **Understanding Domestic Violence**. . . . . 7
   - 2.1 Conditions present in domestic violence cases. . . . . 8
     - 2.1.1 Domestic violence as a learned behavior.. . . . . 8
     - 2.1.2 The opportunity to abuse... . . . . 8
     - 2.1.3 Choosing to abuse.. . . . . 9
   - 2.2 Alcohol and drug use.. . . . . 9
   - 2.3 Stress, anger, and mental health issues.. . . . . 9
   - 2.4 Weapons.. . . . . 10
   - 2.5 The power imbalance and counseling.. . . . . 10
   - 2.6 The cycle of violence.. . . . . 11
   - 2.7 Common factors found in perpetrators.. . . . . 12
   - 2.8 Lethality factors.. . . . . 12
   - 2.9 Factors that might be exhibited in court.. . . . . 13
   - 2.10 Victims' responses. . . . . 13
   - 2.11 Victim impacts**.**. . . . . 14
   - 2.12 The Stockholm Syndrome. . . . . 15
   - 2.13 Effects on children. . . . . 16
   - 2.14 Reducing recidivism. . . . . 17
   - 2.15 Males as victims.. . . . . 18
   - 2.16 Gay and lesbian victims of domestic violence. . . . . 18
   - 2.17 Cultural issues. . . . . 19

3. **Cohabitant Abuse Act**. . . . . 20
   - 3.1 Standards for a protective order.. . . . . 20
   - 3.2 Jurisdiction and venue. . . . . 21
   - 3.3 Protective order forms. . . . . 21
   - 3.4 Victim privacy. . . . . 22
   - 3.5 Duty to disclose other cases. . . . . 22
   - 3.6 Protective order sections. . . . . 23
     - 3.6.1 Criminal provisions. . . . . 23

3.6.2 Civil provisions. . . . 24
3.6.3 Exercising discretion. . . . 25
3.7 Court clerks assisting with forms. . . . 25
3.8 Interpreters. . . . 26
3.9 Identifying information. . . . 26
3.10 Review by a judge. . . . 26
3.11 Putting the ex parte order on the statewide network. . . . 27
3.12 Accuracy of information. . . . 28
3.13 Service of process. . . . 28
3.14 Out-of-state service. . . . 28
3.15 Protective order hearings. . . . 29
3.16 Dismissal. . . . 30
3.17 Mutual protective orders. . . . 31
3.18 Mediation. . . . 32
3.19 Victim advocates. . . . 33
3.20 Domestic violence coalitions. . . . 33
3.21 Fees. . . . 33
3.22 Divorce cases and protective orders. . . . 34
3.23 Foreign protective orders. . . . 34
3.24 Violations of protective orders. . . . 34

4. **Child Protective Orders**. . . . 36
4.1 Who can file. . . . 36
4.2 Jurisdiction. . . . 36
4.3 Petition and other forms. . . . 36
4.4 Ex parte protective orders. . . . 37
4.5 Content of protective orders. . . . 37
4.5.1 Criminal provisions. . . . 37
4.5.2 Civil provisions. . . . 38
4.6 Hearings. . . . 38
4.7 Courts' other obligations. . . . 39
4.8 Transfer to district court. . . . 39
4.9 Expiration. . . . 40
4.10 Fees. . . . 40
4.11 Privacy. . . . 40

5. **Dating Violence Protection Act**. . . . 42
5.1 Standards for a protective order. . . . 42
5.2 Dating partner. . . . 42
5.3 Jurisdiction. . . . 43
5.4 Protective order forms. . . . 43
5.5 Protective order provisions. . . . 43
5.6 Court clerks assistance. . . . 44
5.7 Review by a judge. . . . 44

5.8 Service of process. . . . 45
5.9 Protective order hearings. . . . 45
5.10 Weapons restrictions. . . . 45
5.11 Protective order effective dates, modification, and dismissal. . . . 46
5.12 Protective order denial. . . . 46

6. **Civil Stalking Injunctions**. . . . 47
6.1 Stalking definition. . . . 47
6.2 Process for obtaining an ex parte civil stalking injunction. . . . 47
6.3 Civil stalking injunctions. . . . 48
6.4 Criminal stalking injunctions. . . . 49
6.5 Expiration. . . . 50
6.6 Cohabitants and stalking. . . . 51

7. **Cohabitant Abuse Procedures Act**. . . . 53
7.1 Domestic violence offenses. . . . 53
7.2 Enhanceable offense. . . . 54
7.3 Law enforcement response. . . . 55
7.4 Predominant aggressor. . . . 56
7.5 Protective orders in criminal cases. . . . 57
7.6 Jail release agreements or jail release court orders. . . . 58
7.7 First appearances. . . . 59
7.8 Bail. . . . 60
7.9 Victims' rights to be notified. . . . 62
7.10 Pretrial protective orders. . . . 62
7.11 Privacy. . . . 64
7.12 Dismissing domestic violence cases. . . . 64
7.13 Pleas in abeyance. . . . 64
7.14 Spousal privileges. . . . 65
7.15 Sentencing. . . . 66
6.15.1 Mandatory sentencing provisions. . . . 67
6.15.2 Optional sentencing provisions. . . . 68
7.16 Sentencing protective order. . . . 68
7.17 Domestic violence courts. . . . 70

8. **Child Welfare and Domestic Cases**. . . . 72
8.1 Children and violence. . . . 72
8.2 Removal of children from the home. . . . 72
8.3 Parent-time in child welfare and domestic cases involving violence. . . . 73
8.4 Treatment. . . . 74

9. **Evidentiary Issues**. . . . 75
9.1 Crawford v. Washington. . . . 75
9.2 Davis v. Washington. . . . 75

9.3 Evidence of prior bad acts. . . . 77
9.4 Self-defense. . . . 78
9.5 Present sense impression and excited utterance. . . . 79
9.6 Then existing mental, emotional, or physical condition. . . . 80
9.7 Statements of medical diagnosis or treatment. . . . 81
9.8 Battered Woman Syndrome. . . . 81
9.9 Physician and mental health therapist/patient privilege. . . . 82
9.10 Communications to clergy. . . . 83
9.11 Marital rape law. . . . 83
9.12 Rape shield law. . . . 84
9.13 Search and seizure. . . . 84
9.14 Criminal Rule 14(b). . . . 85
9.15 Voir dire. . . . 85

10. **Victims' Rights Act**. . . . 88
10.1 Constitutional rights. . . . 88
10.2 Legislative intent. . . . 88
10.3 Victims' Bill of Rights. . . . 88
10.4 Children's rights. . . . 89

11. **Rights of Crime Victims' Act**. . . . 90
11.1 Victims' rights to attend court. . . . 90
11.2 Victims' rights to be heard. . . . 90
11.3 Notice to victims. . . . 91
11.4 Victims as witnesses. . . . 91
11.5 Enforcement. . . . 91
11.6 Expungement. . . . 92

12. **Violence Against Women Act**. . . . 93
12.1 Protection orders. . . . 93
12.2 Full faith and credit. . . . 93
12.3 Registration of foreign orders. . . . 95
12.4 Enforcement of foreign orders. . . . 95
12.5 Weapons. . . . 96

Terminology. . . . 99

## Introduction

In the past few decades, domestic violence has received considerable attention from researchers, criminal justice agencies, and legislatures. A century ago, many violent acts committed by a husband against his wife were not considered crimes. Husbands were given some latitude in addressing family and marital issues, including the right to use physical force, and the states were reluctant to intervene. In recent years, state legislatures have enacted laws moving from discretionary intervention into domestic violence matters to mandatory intervention by the criminal justice system. An important component of mandatory intervention is accountability. If law enforcement officers, prosecutors, courts and others are required to take certain actions, they must follow these actions to completion to ensure that perpetrators are held accountable and that victims receive the redress that they need and deserve. Accountability and follow-through increase the odds that domestic violence incidents will not be repeated.

This benchbook contains information that might assist courts in dealing with domestic violence cases. The book offers information about domestic violence and its perpetrators and victims. The book also discusses the applicable state and federal laws in this area. Court personnel must be careful about pre-judging facts or individuals involved in domestic violence cases. The information in this benchbook may be useful in understanding perpetrators and victims once domestic violence incidents have been confirmed through criminal, cohabitant abuse, or child welfare cases.

The intimate relationships between domestic violence perpetrators and victims create unique challenges for courts. Domestic violence often results from an attempt by one individual to control another individual. The controlling acts might include verbal abuse, physical attacks, intimidation, isolation, and coercion. Because a domestic violence perpetrator is attempting to control the victim, courts must be particularly careful about the types of intervening measures that are used. A perpetrator may feel like he or she is losing control when the justice system intervenes. The perpetrator might escalate his or her behavior in order to regain control. The perpetrator might also use the justice system to further manipulate and control the other party. At the same time, victims might minimize the acts against them, fearing future consequences. Courts should carefully assess the unique characteristics of each perpetrator and victim when dealing with domestic violence cases.

Domestic violence often occurs in situations in which perpetrators have unlimited access to their victims. The individuals typically live together or have regular contact through shared parental or other domestic obligations. Domestic violence usually occurs in the privacy of the individuals' home. This often makes it difficult for the justice

system to determine what has occurred because of the lack of witnesses. The following materials might help courts understand the dynamics of domestic violence and domestic violence cases in order to sort through these private occurrences. Although the book provides information on the general facts of domestic violence, it is important to remember that each case will be unique.

# 1. Domestic Violence in Utah

## 1.1 Dan Jones Study.

In 1997 and again in 2005, the Utah Commission on Women and Families commissioned Dan Jones & Associates to conduct a survey on the prevalence of domestic violence in Utah.[1] One thousand women were surveyed each time. In addition to gauging the prevalence of domestic violence, the study provided information on victims' experiences with the justice system.

### 1.1.1 Prevalence of domestic violence.

The 2005 study concluded that more than one in three women (37%) had experienced some form of domestic violence.[2] Twenty-five percent of those surveyed had experienced emotional abuse, which was defined as "someone putting you down, calling you names, making you think you are crazy, playing mind games, humiliating you, and/or making you feel guilty."

- 7% had experienced emotional abuse on a daily, weekly, or monthly basis.
- 5% had experienced hitting/slugging/socking.
- 5% had experienced pushing/shoving.
- 2% had experienced strangling.
- 2% had experienced sexual abuse.

[1] The study can be found at http://udvc.org/utah-domestic-violence-information/statistics-reports

[2] The study defined domestic violence as "primarily, though not exclusively, a crime committed by men against women including: a pattern of assaultive and coercive behaviors; psychological, sexual, and physical abuse; and behavior used by an individual to hurt, dominate, and control an intimate partner." The definition includes behavior that is not actionable - e.g. psychological abuse - but is nevertheless a serious concern in the community. This type of behavior can also sometimes lead to physical violence.

### 1.1.2 Usage and effectiveness of resources.

Women were asked where they would turn to receive help for domestic violence. Forty percent of the women said family, twenty percent said law enforcement, and fifteen percent said clergy.[3]

Victims were asked to rate the effectiveness of various resources on a scale of 1 to 7, with 1 being not effective at all, and 7 being very effective.[4] The scores of the various resources were:

- Domestic violence shelters - 5.57
- Domestic Violence Linkline - 5.55[5]
- Advocates - 5.03
- Rape crisis centers - 4.86
- Doctors - 4.69
- Hospitals - 4.59
- Churches - 4.52
- Legal services - 4.28
- DCFS - 3.98
- Law enforcement - 3.78
- Prosecutors - 3.72
- Schools - 3.57
- Courts - 3.54

### 1.1.3 Experiences with protective orders.

The survey found that many victims of domestic violence do not seek a protective order. The survey asked those who had obtained a protective order to rate their effectiveness. Among the conclusions:

- 66% stated that the protective order process was efficient.

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[3] These numbers provide support for the supposition that domestic violence cases might be under-reported because victims often do not turn to the criminal justice system.

[4] The responses were based on both actual and perceived effectiveness. The report did not seem to separate the two.

[5] 1-800-897-LINK (5456). The line is operated 24 hours a day, 7 days a week, to offer resources to victims.

- 48% stated that the order was effective in keeping them safe.
- 42% stated that the order was ineffective.
- 70% stated that the order was violated by the respondent.
- 48% stated that the respondent violated the order four times or more.
- 83% called law enforcement when the order was violated.
- 25% stated that the perpetrator was arrested as a result of the call.

### 1.1.4 Experiences with courts.

One in nine women reported having dealt with the courts as a result of domestic violence. Half of the women dealt with the courts on their own behalf, and the other half dealt with the courts on behalf of others.

- 75% stated that the courts treated the victim with dignity and respect.
- 55% stated that they were satisfied with how the case was resolved.
- 41% were dissatisfied with the results.
- 45% of the dissatisfied felt that the perpetrator was let off too easily.

### 1.1.5 Victims' recommendations.

Victims were asked for suggestions on improving the justice system.

- 20% stated that a greater effort needs to be made to arrest perpetrators when protective orders are violated.
- 10% stated that tougher penalties are needed.
- 5% stated that there needs to be better protection for women and children.
- 4% suggested an improvement in the system's attitudes toward women.
- 3% expressed a desire to deal with more women when navigating the judicial system.

### 1.1.6 Summary.

Although improvements have been made in Utah in some areas,[6] domestic violence is a problem in the state. The justice system must improve its responsiveness to victims and must take steps to help reduce future incidents of violence by holding perpetrators accountable and implementing effective rehabilitation measures.

[6] The 2005 survey noted that some improvements had been made since the 1997 survey.

## 1.2 CDC study.

In November 2011, the Center for Disease Control and Prevention (CDC) issued a report on the prevalence on domestic and sexual violence throughout the country. The report is titled National Intimate Partner and Sexual Violence Survey and can be found at http://www.cdc.gov/violenceprevention/nisvs/. The CDC conducted a random survey of 9,000 women and 7,400 men. According to the survey:

- One in four women stated that they had been violently attacked by their husband or boyfriend.
- One in five women say that they have been victims of rape or attempted rape.
- More than half of the rape victims stated that the perpetrator was an intimate partner and approximately 41% stated that the perpetrator was an acquaintance.
- One in six women stated that they had been victimized by stalking, while one in nineteen men also reported having been a stalking victim.
- One in three women reported having experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime. More than one in four men reported that they had experienced the same.
- Nearly half of all women and men reported experience with psychological aggression by an intimate partner.
- Nearly three in ten women and one in ten men reported long term impacts from the violent behavior such as post-traumatic stress disorder, needing healthcare for an injury, needing new housing, needing legal services, missed work or school, and needing the assistance of a crisis hotline. Many also reported other long term health problems.

## 2. Understanding Domestic Violence[7]

Domestic violence cases are filed in every trial court in the state. Criminal domestic violence cases involving class B misdemeanors or less are filed in the justice courts. The district courts have jurisdiction over domestic violence criminal cases involving class A misdemeanors and above. Civil protective orders are sought in district courts and domestic violence is sometimes alleged in domestic relations cases. The juvenile courts have jurisdiction over child protective orders, and domestic violence is often a factor in child welfare cases.

It is important for judges, commissioners, and other court personnel to understand domestic violence and its effects. Understanding domestic violence will assist in establishing effective remedies for perpetrators and in addressing the needs of those affected by domestic violence. Court personnel should also understand the procedures that must be followed and the resources that are available in domestic violence cases. Some of the important goals in domestic violence cases are to protect victims, hold perpetrators accountable, prevent future instances of domestic violence, and send a message to others that domestic violence will not be tolerated.

Domestic violence incidents occur equally throughout all segments of our society. Factors such as socioeconomics, race, religion, ethnicity, and education are not predictors of domestic violence, although some of these factors might affect responses to domestic violence and whether victims report abuse. The factors might also affect whether victims believe that they have access to certain resources.

Approximately ninety percent of domestic violence cases involve male perpetrators and female victims. The rest of the cases involve female perpetrators or same sex relationships. Community resources are often geared toward male perpetrators and female victims. For example, shelters are sometimes limited to female victims and their children. However, some shelters are expanding their services to men who are victims of domestic violence. Courts should be prepared to adequately address domestic violence in all types of relationships. As with other types of criminal activity, domestic violence perpetrators and victims do not fall within a single profile. However, there are common factors that are often present in domestic violence incidents.

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[7] The information in this chapter was gathered from a review of domestic violence websites, literature, and benchbooks from other states. The material represents common information culled from those sources.

## 2.1 Conditions present in domestic violence cases.

When domestic violence occurs, there are typically three conditions that exist: 1) the perpetrator has learned to abuse, 2) the perpetrator has found an opportunity to abuse, and 3) the perpetrator has chosen to abuse.

### 2.1.1 Domestic violence as a learned behavior.

Many domestic violence perpetrators learned about abuse at an early age. The majority of perpetrators come from violent homes. These perpetrators were either abused by their parents or they observed their parents or others engage in abusive acts. Some perpetrators were not abused and did not observe abuse but they were raised in environments in which women were devalued. In these kinds of environments, perpetrators often learn that domestic violence is tolerated and that it might even be rewarded because the perpetrator, by controlling the victim, gets what the perpetrator wants.

Because domestic violence is a learned behavior, perpetrators' behaviors can be changed through appropriate court actions. If the criminal justice system fails to adequately address domestic violence, this can contribute to perpetrators' perceptions that domestic violence is tolerated. Courts contribute to the learned behavior when they 1) fail to issue orders that adequately protect victims, 2) fail to enforce orders once they are issued, 3) issue mutual protective orders that cause victims to also be considered perpetrators, 4) issue vague orders that allow perpetrators to find loopholes to continue manipulative acts, and 5) require parties to mediate and cooperate, ignoring the imbalance of power that is present in domestic violence situations. Courts must ensure that they are not contributing to perpetrators' perceptions that domestic violence is not a serious matter. Courts must send a strong message that domestic violence is not tolerated.

### 2.1.2 The opportunity to abuse.

Although domestic violence is a learned behavior, most children who observe domestic violence do not become abusive adults, nor do most men who live in environments that devalue women eventually commit acts of violence against their domestic partners. Perpetrators find opportunities to abuse and they find it in situations in which the abuse is tolerated or even rewarded. Perpetrators find the opportunity to abuse through having close contact with their victims in areas in which others are not present. A perpetrator who finds that violent acts are an effective means of getting what the perpetrator wants, without consequence, is likely to continue the violent acts.

Courts can eliminate opportunities for abuse by 1) restricting access to information about victims who are hiding from perpetrators, 2) providing a safe environment for those who come to court, 3) requiring perpetrators to attend appropriate treatment programs and to meet specific goals, and 4) ensuring that perpetrators pay the costs of their activities. These court actions will help keep perpetrators away from victims and will show perpetrators that domestic violence is neither rewarded nor tolerated.

### 2.1.3 Choosing to abuse.

Even if a perpetrator has lived in an environment of domestic violence and has an opportunity to commit acts of violence, the perpetrator can still choose not to engage in those acts. The judicial system will be dealing with those who have chosen to engage in domestic violence. Courts can help ensure that perpetrators do not prospectively choose such acts by treating domestic violence offenses as serious crimes and holding all perpetrators appropriately accountable. Because of the potential for repeated assaults against victims, and because of the abusive environment that domestic violence perpetuates, courts must consistently enforce domestic violence laws to deter perpetrators from choosing to participate in additional acts of violence. Courts can help convey the message to perpetrators that choosing to commit domestic violence will result in severe consequences.

## 2.2 Alcohol and drug use.

The use of drugs and alcohol does not cause domestic violence, but the use can increase the likelihood of serious injury in domestic violence incidents. In criminal domestic violence cases in which drug or alcohol use was a factor during the incident, any court-ordered treatment should be directed toward both the violence and the substance abuse.

## 2.3 Stress, anger, and mental health issues.

There is no indication that stress directly relates to domestic violence. In dealing with domestic violence cases, courts should not place much emphasis on stress and anger management as a part of a domestic violence treatment program. An overemphasis on a perpetrator's stress and anger can result in the perpetrator refusing to take responsibility for his or her actions. The perpetrator will claim that the stressful situation affected the perpetrator's ability to control his or her emotions and actions. Perpetrators can sometimes benefit from anger and stress management programs, but these should be only one small piece of a broader treatment program.

Mental health problems also do not directly correlate with causing incidents of domestic violence. However, similar to alcohol and drug use, mental illness may be an aggravating factor, increasing the frequency or severity of such acts. A mental health problem could be an obstacle to rehabilitation and therefore must be identified before intervention can be successful.

### 2.4 Weapons.

According to statistics found on the American Bar Association's website, at http://www.americanbar.org/groups/domestic_violence/resources/statistics.html#prevalence perpetrators who have access to weapons are five times more likely to inflict serious injury on their victims. The Violence Against Women Act[8] prohibits certain individuals who are subject to protective orders, or who have been convicted of misdemeanor domestic violence offenses, from possessing weapons.[9] Courts can help reduce the risk of serious injury to victims by ordering perpetrators to surrender weapons and by providing necessary tools[10] to law enforcement officers to assist them in confiscating weapons from perpetrators who refuse to voluntarily surrender their weapons.

### 2.5 The power imbalance and counseling.

In attempting to resolve difficulties in relationships subject to domestic violence, there may be a temptation to have perpetrators and victims attend couples counseling or family therapy sessions. Courts should avoid ordering this type of counseling or therapy. These programs begin by placing the couple on equal footing. They ask each individual to take shared responsibility for the problem and to work mutually toward solutions. Domestic violence usually involves a power imbalance, with the perpetrator controlling or attempting to control the victim. Placing the couple on equal footing requires the victim to accept some responsibility for the abuse, causing additional victimization. This may also convey a message to the perpetrator that he or she is not at fault, thus rewarding

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[8] The Act was passed in 1994 and has been amended several times since then. Its provisions are spread throughout the United States Code. The Act is discussed in more detail in section 11.

[9] Restrictions are placed on those who are considered "intimate partners" as defined by federal laws. The restrictions are discussed in more detail in Section 11.

[10] Utah protective orders include a provision for courts to order respondents to surrender their weapons and for law enforcement officers to confiscate the weapons. Law enforcement officers will sometimes request a writ of assistance to allow the officers to use any reasonable means necessary to enforce the confiscation order.

the perpetrator by confirming that abuse might be justified or at least tolerated in situations in which the perpetrator believes that the victim is causing the problem.

A court may still require parties to participate in the mediation of certain issues between the parties, such as divorce matters. However, mediation of this type should be conducted only by a mediator who has been trained in domestic violence. These mediators understand the issues surrounding protective orders and the dynamics between perpetrator and victim.

## 2.6 The cycle of violence.

A phrase that is frequently used in domestic violence discussions is "the cycle of violence." There are three main components to the cycle of violence:

- In the first phase tension builds between the perpetrator and the victim. The perpetrator expresses hostility toward the victim and dissatisfaction with the victim. The phase often involves emotional abuse, along with attempts by the victim to placate the perpetrator.
- In the second phase the tension builds to the point where physical abuse occurs. This is the point at which law enforcement officers might be called and the victim might seek a protective order.
- The third phase is sometimes referred to as the "honeymoon" phase. In this phase the perpetrator is contrite and loving toward the victim. The perpetrator apologizes and promises that the abuse will end. The perpetrator may very well believe that he or she can and will end the violence. The victim minimizes the abuse and may even take responsibility for provoking the incident. By the time the criminal case comes to court, the victim and the perpetrator are often in this phase. This also might be a time in which the victim seeks to have a protective order rescinded, or the victim might knowingly and without objection allow the perpetrator to contact the victim, in violation of the order.

After the third phrase, the cycle starts again as tension builds between the perpetrator and the victim.

Domestic violence might increase in frequency and severity if the cycle is repeated over and over without effective intervention. It is important that courts effectively address domestic violence to help stop the cycle of violence.

## 2.7 Common factors found in perpetrators.

There is no single profile for domestic violence perpetrators. However, a perpetrator might exhibit one or more of the following traits:

- Selfish and self-centered.
- Dependent - fears abandonment.
- Jealous - demands complete loyalty from the victim.
- Controlling - determines when and where the victim can go.
- Isolated - keeps self and victim away from family and friends.
- Hypersensitive - takes everything personally and is easily hurt.
- Poor interpersonal skills - uses anger to manage conflict/express emotions.
- Cruel to animals and children.
- Rigid gender roles - expects men to be dominant, women submissive.
- Verbally abusive - degrades the victim.
- Blames others - blames victim for causing all problems.
- Forces sex - acts out fantasies where the victim is helpless.
- Threatens violence - controls victim by threatening harm.
- Unrealistic expectations - expects victim to meet every need.
- Breaks objects - shows victim that perpetrator will act out violently.
- Refuses to accept responsibility for actions - “I’ve been under pressure.”

## 2.8 Lethality factors.

Women are much more likely than men to be victims of domestic violence. Women are therefore much more likely to become victims of domestic violence homicide. The perpetrator might not intend to kill the victim, but the perpetrator miscalculates or simply does not consider the potential effects of the abuse. The perpetrator might also very well intend deadly consequences. As with domestic violence perpetrators in general, there is no single profile for an individual likely to commit domestic violence homicide. However, the more that the following factors are present, the greater the danger to the victim:

- Used or threatened to use a weapon.
- Threatened to kill the victim.
- Previously tried to strangle the victim.
- Constantly jealous.
- Has forced the victim to have sex.
- Abuse involves strangling, choking, or biting.
- The victim has started a new relationship.

- Frequency or severity of the violence has increased.
- Weapon in the home.
- Illegal drug use.
- Has killed or mutilated a pet.
- Mental illness, including depression.
- History of violating court orders.
- Abuse has occurred when victim was pregnant.
- Stalks the victim.

## 2.9 Factors that might be exhibited in court.

Domestic violence is often a result of one cohabitant attempting to control the other. Perpetrators might extend these controlling behaviors into court proceedings. Factors that are sometimes present include:

- Threats against those attending court in support of the victim.
- Follows the victim in and out of court.
- Glares at the victim, attempting to silence the victim.
- Invites family and friends to court in order to intimidate the victim.
- Blames the victim while in court.
- Requests a mutual protective order.
- Repeatedly requests continuances.
- Initiates retaliatory litigation.
- Manipulates parent-time and child support obligations.
- Sends notes to the victim while in court.

If a perpetrator has sufficient funds, the perpetrator might attempt to wear down the victim through repeated and lengthy court filings. The perpetrator might also hope to bankrupt the victim, continuing the perpetrator's controlling acts. As noted above, if the perpetrator is successful, this will contribute to a perpetrator's belief that domestic violence can be rewarded.

## 2.10 Victims' responses.

Unlike perpetrators, there aren't any general personality traits commonly found in victims. However, there are common responses to abuse. It is very difficult for any individual to leave a relationship. This is often true even when abuse is not involved. Leaving a relationship is sometimes a series of progressive steps.

Many victims of abuse do not leave after the first incident. They might either believe that the abuse is an isolated incident, or fear that leaving will anger the perpetrator and the abuse will escalate.

If the abuse continues, the victim might leave for a short period. At this point the perpetrator might respond by apologizing and promising to change. The victim might believe the perpetrator's promises, in part because the victim believes that the threat of leaving has made the perpetrator realize that the abuse cannot continue or the victim will leave, and in part because the victim does not want the alternative of being alone. The victim might believe that there is no choice but to accept the perpetrator's promises.

Even if the abuse continues, many victims still find it very difficult to leave. The reasons might include:

- Fear that the perpetrator will respond with lethal violence.
- Lack of a place to go.
- Lack of job skills.
- No means of support, especially for the children.
- A belief that it is best for the children if the victim stays.
- A lack of confidence in the justice system's response.
- Religious or cultural beliefs that strongly discourage leaving.
- Belief that sacrificing one's health is worth saving the relationship.
- The perpetrator threatens suicide if the victim leaves.

## 2.11 Victim impacts.

Whether victims of domestic violence stay with or leave perpetrators, they incur medical costs because of the abuse, and they suffer damages by needing time off from work for court appearances and medical visits. Employers throughout the country annually lose millions of days of productivity because of domestic violence and

stalking.[11] Judges may want to be mindful of these pressures and concerns as delays occur, hearings are scheduled, and sentences are issued.

## 2.12 The Stockholm Syndrome.

The Stockholm Syndrome takes its name from a bank robbery and kidnaping that occurred in Sweden in 1973. The victims of the kidnaping bonded with their captors such that they defended the kidnapers' actions and even maintained relationships with the kidnapers after the kidnaping ended. The victims bonded with the kidnapers because they had become totally dependent on the kidnapers for their survival. The victims believed that the kidnapers were merciful because the kidnapers did not kill the victims. This perceived "mercy" lead to the bond, which lead to sympathy and defense.

The Stockholm Syndrome is frequently referenced in domestic violence cases. A domestic violence victim is often in a situation in which the victim depends completely on the perpetrator. The perpetrator controls the finances, determines when and where the victim can go, and threatens the victim with violence if the victim does anything outside of the perpetrator's expectations. The victim feels wholly dependent on the perpetrator for survival. The victim might believe that the perpetrator is showing mercy toward the victim by supporting the victim, showing occasional acts of kindness, and sometimes showing restraint from violent acts. Because the victim feels dependent on the perpetrator, the victim will often take the perpetrator's side when domestic violence occurs. The victim might accept responsibility for the violence, believing that he or she caused the situation in which the perpetrator acted out, or that he or she could have prevented the abuse by doing as the perpetrator had asked.

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[11] Many employers have adopted workplace violence policies to address the situations of both victims and perpetrators in the workplace. The Utah State Courts have adopted a workplace violence policy in section 540 of the Personnel Policy and Procedures manual. The policy encourages victims to provide notice to the employer of their protective orders so that appropriate measures can be taken, such as making security personnel aware of the perpetrator's identity so that the perpetrator will be refused access to the victim. The policy recognizes that victims may need to be absent from the workplace to address various issues and management is required to help adjust work schedules to avoid lost wages. For perpetrators, the policy clarifies that being a perpetrator of domestic violence may be cause for termination. If the perpetrator is not terminated, accommodations will be provided so that the perpetrator may attend necessary rehabilitative programs.

The victim might also exhibit some of the following:

- Positive feelings toward the perpetrator.
- Negative feelings toward family, friends and others who try to help the victim out of the situation.
- Support of the perpetrator's behavior.
- Inability to engage in behaviors that might result in the victim leaving.

**2.13 Effects on children.**

Children who witness abuse and domestic violence suffer both immediate and long term effects. Many children are themselves the victims of violent acts. A child might be the target of the perpetrator's actions, or a child might attempt to intervene in a dispute and be accidently struck. In homes where spouse abuse occurs, children are much more likely to be abused, when compared to children in homes where spouse abuse does not occur.

Children who witness domestic violence are traumatized by what they see. Obviously, the most serious damaging effects occur when a child witnesses a domestic violence homicide. Even if they don't personally observe the abuse, children are often nearby where they hear yelling, threats, scuffling, objects breaking, sobbing, etc. This also has a serious impact on children.

Children who witness domestic violence are more likely to abuse drugs and alcohol, engage in prostitution and risky sexual behavior, and run away from home. These children have higher risks of depression and educational and developmental problems. A high percentage of juvenile delinquents have a history of domestic violence within their families. The majority of males who commit domestic violence were abused as children. Males who saw their fathers hit their mothers (or boyfriends hit their mothers) are many times more likely to hit their girlfriends or wives.

Children might have an unhealthy traumatic bond with the perpetrator. Children may become allied with the perpetrator in order to remain safe, accepting the perpetrator's distorted view of the victim. Perpetrators often show increased acts of kindness toward children after incidents of abuse. This creates a confused connection between abuse and love in the children's minds.

Domestic violence is often perpetuated from generation to generation. The courts' response to domestic violence incidents can help not only the current perpetrator and

victim, but it can also help reduce the likelihood that future generations will engage in the same acts.[12]

In domestic cases in which there are allegations of domestic violence, courts must be particularly sensitive to issues of custody and parent-time. The court should consider appointing a guardian ad litem to help gather information on any family violence and its impacts on the children. If family violence is occurring, court decisions should reflect consideration for the safety and welfare of the children.

### 2.14 Reducing recidivism.

There are dozens of studies on recidivism rates in domestic violence cases, and the factors that are most likely to reduce recidivism. The studies often reach different conclusions[13] on the effectiveness of certain programs such as mandatory arrests, batterer intervention, or orders for protection, but most agree that a coordinated community response that holds perpetrators accountable is effective in reducing recidivism.

An act of domestic violence may involve the victim's and perpetrator's families, law enforcement agencies, courts, prosecutors, shelters, child and family services, medical and mental health professionals, and corrections officials. If all those involved coordinate and share information, provide immediate and effective relief and establish accountability, the likelihood of future acts of domestic violence is reduced. A victim's phone call for help becomes ineffective if law enforcement officers do not adequately respond. An arrest by law enforcement is ineffective if prosecution is not effectively pursued. Prosecution is ineffective if a court's sentence does not address rehabilitation. A court's sentence may be ineffective if the court does not have adequate information from other entities. It is important that all affected individuals and entities work together toward information-sharing and accountability.

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[12] Recognizing the serious effects of domestic violence on children, the Utah Legislature has established a separate offense of committing domestic violence in the presence of a child. (§ 76-5-109.1). The penalties range from a class B misdemeanor to a third degree felony, depending on the type of domestic violence offense that was committed. The charge is separate from the underlying domestic violence charge.

[13] It is often difficult to study the effects of certain factors and their effects on recidivism because other factors will be present at the same time and it is difficult to determine which of the factors are actually having an impact one way or another.

## 2.15 Males as victims.

As noted at the beginning of this section, approximately ninety percent of domestic violence cases involve male perpetrators and female victims. The number of cases involving male victims may be underreported because of difficulties faced by male victims. Male victims may be reluctant to report domestic violence for several reasons:

- They may feel like the criminal justice system will not believe them.
- They may feel like they will be treated as "less than a man" for being subject to female dominance.
- A lack of available resources for male victims.

Male victims often have limited access to resources such as shelters. Most shelters are not equipped to house both male and female victims. Some cities throughout the country have attempted to establish male-only shelters but many have ultimately closed due to a lack of resources. The male-only shelters were not used as much as anticipated because male victims were reluctant to step forward and because of the stigmas attached to being a male victim of female violence. Although male-only shelters have been unsuccessful in many circumstances, some shelters have initiated programs to provide services to male victims in addition to services provided to female victims. Even if the shelters are not equipped to house male victims, they may be able to provide shelter by booking a motel room for the victim or by finding other temporary housing. They may also be able to provide services such as counseling or child care. Nevertheless, many male victims end up in homeless shelters because they are the only places that provide a place to stay. Courts should recognize the unique circumstances faced by male victims.

## 2.16 Gay and lesbian victims of domestic violence.

Gay and lesbian victims of domestic violence share some of the same obstacles as male victims. They may also be afraid to report violence because they wish to keep their sexual identity private. Lesbian victims of domestic violence will have access to shelters and other resources while gay victims of domestic violence face the same challenges as their heterosexual counterparts. There may also be a perception that domestic violence does not occur in homosexual relationships because there is no power imbalance, as the acts occur between two females or two males. However, the same controlling behavior and power imbalance may be present in all types of relationships.

## 2.17 Cultural issues.

There have been various studies on the impacts of domestic violence in different minority communities and cultural groups and some of these studies suggest that each group may have unique challenges related to reporting domestic violence and access to resources. In some groups, domestic violence might be seen more as a private family matter. Some groups also find themselves socially and economically marginalized and therefore victims believe that they do not have access to domestic violence resources such as shelters. The victims find it more difficult to leave their perpetrators because of a lack of resources.

Immigrants and refugees face additional challenges such as an inability to speak English or a cultural background in which domestic violence was tolerated. These individuals might also lack confidence in the legal system because their native systems were infested with corruption. Many victims are reluctant to report domestic violence for fear that reporting may affect their immigration or visa status. Victims might also be reluctant to report violence in order to keep families together.[14]

[14] Because of the unique challenges faced by different minority and cultural groups, various organizations have gathered information on domestic violence specifically geared toward different minority and cultural groups. Some of these are found at websites such as http://womenofcolornetwork.org, www.nsvrc.org/organizations/96 and www.futureswithoutviolence.org.

## 3. Cohabitant Abuse Act

The Cohabitant Abuse Act found in Title 78B, Chapter 7, Part 1 of the Utah Code creates civil remedies in district courts for victims of domestic violence.

### 3.1 Standards for a protective order.

A district court may issue a protective order upon determining that a cohabitant has been subjected to abuse or domestic violence, or there is a substantial likelihood of abuse or domestic violence toward the cohabitant. (§ 78B-7-103(1)). The petitioner must prove at least one of these factors by a preponderance of the evidence. A court may not deny a petitioner a protective order solely because of a lapse of time between an act of domestic violence or abuse and the filing of the petition.[15] (§ 78B-7-110).

In order for the petitioner to obtain relief, the petitioner and the respondent must be cohabitants. (§ 78B-7-102(2)). The definition of cohabitant includes both opposite sex and same sex relationships, even if they are not intimate. The definition includes those who reside together,[16] roommates and former roommates, and it includes anyone related by blood or marriage.[17] A difficulty that courts might face is that the statute does not limit

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[15] In Hedgcock v. Hedgcock, 2009 UT App 304, 221 P.3d 856, the court addressed a situation in which a wife had filed a petition for a protective order that was subsequently dismissed by stipulation. The wife then filed another petition for a protective order and included two incidents that had been the subject of the prior petition. The court stated that it was appropriate for the district court to consider the prior acts under § 78B-7-110, stating that "if past abuse is coupled with a present threat of future abuse, a person may seek a protective order." Id. at ¶ 11.

[16] In Keene v. Bonser, 2005 UT App 37, ¶ 25, 107 P.3d 693, the court stated that the "inquiry into whether a person is a 'cohabitant' under the Act is a fact-sensitive determination that requires a court to make detailed findings of fact, on a case-by-case basis, in reaching its conclusion." The question in that case was whether the respondent had spent sufficient time at his girlfriend's residence. The court reviewed whether there were indicia of the respondent having settled into the residence, enough to support a finding that the respondent resided at the residence.

[17] In Corwell v. Corwell, 2008 UT App 49, 179 P.3d 821 the court determined that, after an annulment, the marriage is considered as never having happened and therefore the parties could not be considered former spouses. In Corwell, the parties had also never resided together and therefore did not fall under any other provision of the Act.

the degree of relationship for those who are related by blood or marriage. Second cousins and more distant relatives might fall under this definition. If the statutory criteria are met, the statute does not seem to give courts much discretion to determine who is and who is not a cohabitant.

### 3.2 Jurisdiction and venue.

District courts have exclusive jurisdiction to issue protective orders under the Cohabitant Abuse Act. (§ 78B-7-104). A petitioner may file a petition in the county where: 1) the petitioner resides, 2) the respondent resides, or 3) the abuse or domestic violence occurred. (§ 78B-7-104(2)). The statute will permit, for example, an individual traveling through the state to obtain a protective order if abuse occurs within this state, such as in a hotel room.

Some cohabitant abuse cases involve victims who have left one county and moved to another to avoid future abuse. A victim might seek a protective order in the new county. The court might have to evaluate whether the individual now resides in the new county.

A person resides in a particular county if the person settles in established housing with an intent to remain in the county.[18] If the victim is living in a domestic violence shelter, it is unlikely that the victim could be considered a resident of that county because shelters are transitory. Personal jurisdiction can be waived,[19] and a court could wait to see if the respondent raises the issue.

### 3.3 Protective order forms.

The Administrative Office of the Courts is required to create forms for the protective order process. (§ 78B-7-105(1)). The Code sets forth the specific provisions

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In Martin v. Colonna, 2009 UT App 227, 217 P.3d 1147 the court recognized that a parent and child could become cohabitants once the child reaches the age of majority, but allegations of abuse that occurred while the child was a minor could not support the issuance of a protective order.

[18] See e.g. Allen v. Greyhound Lines, Inc., 583 P.2d 613, 614-615 (Utah 1978) ("The intention need not be to remain for all time, it being sufficient if the intention is to remain for an indefinite period . . . . [T]he burden of proof is on the person contending to the contrary. (A man's home is where he makes it, not where he would like to have it.)")

[19] See e.g. Barnard v. Wassermann, 855 P.2d 243 (Utah 1993).

that must be included in the forms. Each clerks' office is required to have the forms available. (§ 78B-7-105(1)(b)). The forms are also available on the judiciary's website. www.utcourts.gov/resources/forms/#protective-orders.

The Code requires all orders to be issued on the courts' forms. (§ 78B-7-105(5)(a)). Parties cannot present their own protective orders to the court. When a protective order is issued, the court must enter the information into the Statewide Domestic Violence Network.[20] The computer fields on the network mirror the protective orders. Uniformity is necessary. This is one important reason why protective orders must be issued on court forms. The statute does not require petitions to be on the courts' forms, but the practice should be encouraged to promote uniformity in being able to evaluate the allegations.

### 3.4 Victim privacy.

In order to maintain privacy, a petitioner is entitled to omit his or her address from all pleadings filed with the court. (§ 78B-7-109(3)). Because the petitioner will often have moved away from the respondent, this provision ensures that the respondent will not be able to locate the petitioner's new address through the court. If the petitioner elects this option, the petitioner must submit a separate sheet with the petitioner's mailing address. (§ 78B-7-109(3)). The court must maintain this sheet separate from the file. The sheet is available only to the court and law enforcement entities to help them fulfill their duties.

### 3.5 Duty to disclose other cases.

When an individual files a petition for a protective order, the individual must notify the court of any other court proceedings involving the parties. (§ 78B-7-109). This helps to ensure that the court is aware of all other cases so that it does not issue any orders that are inconsistent with other court orders. This is particularly important when each party separately attempts to obtain a protective order. In addition to providing this information in the initial petition, the parties have a continuing obligation to inform the court of any such proceedings. (§ 78B-7-109(1)). The parties must provide the case name, file number, and court in which the case is filed. If other proceedings are pending,

[20] The process is explained in section 3.11.

the petitioner is not barred from seeking a protective order, but it is important that the court have this information to be fully informed in making a decision.[21]

### 3.6 Protective order sections.

Section 78B-7-106(5) divides protective orders into two portions: civil and criminal. The civil portion is effective for up to 150 days unless the court extends the time and states on the record why it is extending the time. (§ 78B-7-106(6)(a)). The civil portion of the protective order includes provisions that can be awarded in another type of proceeding, such as a divorce case. The primary purpose of a protective order is to provide protection, and not to permanently decide issues such as custody, support and parent-time. In establishing the 150 day limit, the Legislature's intent was to provide the parties with time to file an independent action to decide these other issues before the date the civil provisions expire. For example, because a protective order will result in the parties not having any contact, the order might award parent-time to one of the parties. The parent-time provisions will expire in 150 days. The parties should establish a permanent parent-time schedule through more traditional means such as a divorce or paternity case. A court should consider legislative intent in determining whether the 150 days should be extended.

The criminal portion of the protective order contains terms that can be punished criminally if they are violated. (§ 78B-7-106(5)(a)). The violation of a protective order is a class A misdemeanor. (§76-5-108(1)). Violations of the civil portion cannot be punished criminally. Both the criminal provisions and the civil provisions can be enforced through contempt proceedings. (§ 78B-7-106(5)(c)). The criminal provisions are in effect indefinitely, unless and until one of the parties asks for the protective order to expire. The petitioner can ask for the protective order to be terminated at any time. The respondent generally must wait at least two years before asking for termination. (§ 78B-7-115(1)).

#### 3.6.1 Criminal provisions.

The criminal portion of the protective order form must include the following provisions:

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[21] A court clerk should also do a case search on all available databases prior to the protective order hearing to locate cases involving the parties, in the event that the parties do not fulfill their obligations under the statute. The search should include justice court cases because there may be domestic violence charges against one of the parties in a justice court.

- Enjoin the respondent from threatening to commit or committing domestic violence or abuse against the petitioner and any designated family or household members;
- Prohibit the respondent from harassing, telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly;[22]
- Order that the respondent be excluded from the petitioner's residence and its premises, and order the respondent to stay away from the residence, school, or place of employment of the petitioner, and the premises of any of these, or any specified place frequented by the petitioner and any designated family or household members;
- Upon finding that the respondent's use or possession of a weapon may pose a serious threat to the petitioner, prohibit the respondent from purchasing, using, or possessing a firearm or any other weapon specified by the court; and
- Order possession and use of an automobile and other essential personal effects, and direct the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, automobile, and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings.

(§ 78B-7-106(2)(a)-(e)).

### 3.6.2 Civil provisions.

The civil portion of the protective order form must include the following provisions:

- Grant the petitioner temporary custody of any minor children of the parties;
- Order child support upon request;
- Order arrangements for parent-time of any minor children and require supervision of that parent-time by a third party or deny parent-time if necessary to protect the safety of the petitioner or child; and

[22] In State v. Hardy, 2002 UT App 244, 54 P.3d 645 the court rejected the argument that this provision "may only prohibit 'harassing, violent, abusive, threatening, libelous, or obscene' communication but not 'innocent' communication." Id. at ¶ 18. The court recognized that "innocent comments between estranged cohabitants can easily escalate into arguments that result in incidences of domestic violence." Id. at ¶ 18.

- A section to award any other relief that the court considers necessary to provide for the safety and welfare of the petitioner and any designated family or household members.

(§ 78B-7-106(2)(f),(h),(i), and (3)(b)).

### 3.6.3 Exercising discretion.

Although the forms must contain all of the above provisions, a judge is certainly free not to award certain relief or strike any provision that the judge does not want to order. A judge is required to initial each provision that the judge wants to include in the order.[23] A judge can also strike some of the language within a provision. For example, there might be a circumstance in which the petitioner wants the protective order but also wants the respondent to be able to telephone her. The court could modify that provision by striking certain words.

## 3.7 Court clerks assisting with forms.

The court clerk is required to provide forms and any non-legal assistance required by the petitioner or the respondent. (§ 78B-7-105(1)(a)). Court clerks cannot give legal advice or complete the forms for the parties. The exception to this latter prohibition is that a court clerk may complete the forms for an individual who requires assistance under the Americans with Disabilities Act or similar law,[24] or when the individual is in such an emotional or physical state that it is impossible for the individual to complete the forms. If a clerk completes the forms for an individual, the clerk must write verbatim the words of the person seeking relief. At the bottom of the form, the clerk must note that the form was completed by the clerk, but that the words were those used by the individual filing the petition. The clerk should then sign that declaration.

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[23] As of the publication of this benchbook, the Administrative Office of the Courts is creating a system to electronically generate completed protective orders. The generated document will only include the provisions that the judge has authorized, eliminating the need to initial each provision.

[24] The clerk would only provide assistance if the assistance is reasonably necessary to complete the protective order process. For example, a person who is sight-impaired might need such assistance.

The clerk must also provide a list of legal service organizations that might be able to provide legal assistance to the petitioner. (§ 78B-7-105(2)(e)). The list must include the telephone numbers of those organizations.

The clerks' office can designate another entity, agency, or person to provide clerical assistance. (§ 78B7-105(2)(c)). In some areas of the state the courts refer individuals to a legal services organization or a victims advocate. However, the clerks' office is ultimately responsible for ensuring that assistance is provided if other entities or individuals fail or refuse to provide assistance.

### 3.8 Interpreters.

A clerk is not required to complete a form on behalf of someone who does not understand English. The clerk should arrange for an interpreter to provide assistance. Rule 3-306 of the Rules of Judicial Administration states that a language interpreter will be provided at government expense in all cases, but the court may assess interpreter fees as costs to a party as provided by law.[25]

### 3.9 Identifying information.

Section 78B-7-106(6)(b) states that the petitioner should provide a separate information sheet that will help law enforcement officers identify and locate the respondent. The judiciary has created a separate information sheet for this purpose. The information sheet should include information such as the respondent's social security number, driver license number, birth-date, address, telephone number, and physical description. The petitioner should also provide information on other addresses where the respondent might be located, such as work, bars, clubs, or school. Because some respondents often will not have a reliable address for service, it is important in some cases for petitioners to provide this information to help law enforcement officers locate and serve those respondents.

### 3.10 Review by a judge.

When a petitioner completes the petition for a protective order, the clerk should deliver the forms to a judge for immediate review. Given the serious nature of domestic violence and the need to protect victims, immediate review is important. Each court site should ensure that a judge is available to review petitions during working hours. If a

[25] For example, Utah Code § 78B-1-146(3) permits a court to assess interpreter fees against the person for whom the service is provided.

judge is not available at the courthouse, the court should make arrangements to have a judge review the documents by fax, email, or other means of effective communication. If all of the judges in the district are unavailable, the court should contact a judge in another district to review the petition.

### 3.11 Putting the ex parte order on the statewide network.

If a judge issues an ex parte protective order, the clerk is responsible for setting a hearing, making arrangements for service, and putting the order onto the Statewide Domestic Violence Network. (§ 78B-7-106(4)). The CORIS network has been programmed to automatically transfer protective orders into the Statewide Domestic Violence Network once the protective orders are entered into CORIS.[26] Under § 78B-7-113(1)(b) the Administrative Office of the Courts and the Department of Public Safety are required to create a statewide network containing all orders for protection issued in civil and criminal cases. The network must also include all other reports and actions that are required under state statutes.

When a court issues a protective order, a clerk is required to enter the protective order into the network within 24 hours. (§ 78B-7-113(1)(d)). If the court that issued the order does not have direct access to the statewide network, the order must be entered within 72 hours. (§ 78B-7-113(1)(d)). A court without direct access should either work with another court to have orders entered or the court should contact the Administrative Office of the Courts to have orders entered into the network.[27]

The information in the network is available to courts, law enforcement officers, and law enforcement agencies. (§ 78B-7-113(1)(e)). Law enforcement officers access the network when responding to domestic violence calls. The officers can determine whether any of the individuals have an order of protection issued against them. The network is also used for background checks when an individual wants to purchase a weapon.

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[26] The processes are explained at http://www.utcourts.gov/intranet/clerktraining/resources/docs/Protective_Orders.pdf and http://www.utcourts.gov/intranet/clerktraining/resources/docs/Domestic_Violence_on_Statewide.pdf

[27] All courts in the state should now have direct access to the network through CORIS, but the Administrative Office of the Courts can still help enter orders.

### 3.12 Accuracy of information.

When a clerk inputs information into the Statewide Domestic Violence Network it is critical that the information be entered accurately. The Statewide Domestic Violence Network is used by law enforcement agencies when responding to domestic violence calls. It is also used by the Department of Public Safety when doing background checks for weapons purchases. If information is entered incorrectly - such as a last name being misspelled - these entities might not be able to find valid protective orders. This could result, for example, in someone purchasing a weapon when it is illegal for the person to do so.

### 3.13 Service of process.

It is the county sheriff's responsibility to serve protective orders.[28] (§ 78B-7-106(8)(a)). The court clerk should deliver protective orders to the county sheriff for service. Each court site should make arrangements with the sheriff for the most effective means of sending protective orders to the sheriff on a regular basis, at least once a day.

The clerk must explain to the petitioner how the protective order will be served and what happens after that point. (§ 78B-7-105(2)(d)). The clerk must also send a copy of the protective order to any law enforcement agencies designated by the petitioner. (§ 78B-7-106(4)(c)). The petitioner might want the law enforcement entity of the city or county in which the petitioner lives or works to have a copy of the order in the event that problems arise.

### 3.14 Out-of-state service.

An issue that arises from time-to-time is when a petitioner requires a petition and protective order to be served on a respondent who resides in another state.[29] Because the

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[28] Another law enforcement officer can serve a petition and protective order if the law enforcement officer responds to a domestic violence call, reviews the domestic violence network, and determines that the petition and order have not yet been served. (§ 78B-7-106(8)(b)). The officer may then serve the protective order and enforce the provisions in the order, if the order is available, such as from the petitioner or the sheriff. The officer should contact the sheriff to have the service information entered into the statewide network.

[29] A problem also sometimes arises when out-of-state service information is to be entered into the statewide network. County sheriffs have the obligation to enter the information, but they have refused in some circumstances because they didn't serve the order. The court should record

Utah courts do not have connections with out-of-state sheriffs, and the Utah Code cannot direct the activities of an out-of-state law enforcement entity, the petitioner should make arrangements for service. The court could also make these arrangements if the out-of-state law enforcement agency will agree to serve the order without cost. Any government entity that receives funds from the federal government under the Violence Against Women Act (VAWA) is required to serve protective orders without cost to a petitioner. (42 U.S.C. § 3796gg-5). Many out-of-state law enforcement agencies will be recipients of VAWA funds and must provide free service.

### 3.15 Protective order hearings.

If a judge issues an ex parte protective order, the court is required to schedule a protective order hearing within twenty days of the issuance of that order. (§ 78B-7-107(1)(a)). The court can extend the time for that hearing if: 1) the respondent has not been served within the twenty days; 2) the petitioner is unable to attend the hearing; 3) the respondent agrees that the ex parte order can be extended until the hearing is held; 4) the respondent has not had an adequate opportunity to prepare for the hearing; or 5) for any other exigent circumstance. (§ 78B-7-107(1)(b)). The ex parte order will be extended until the hearing is held. Prior to the hearing, the clerk must provide written information to the petitioner on the process for transporting a respondent who is incarcerated. (§ 78B-7-105(2)(f)). Under no circumstances may the court extend an ex parte protective order beyond 180 days. (§ 78B-7-107(1)(c)).

In many cases petitioners do not show up for the hearing. There may be many reasons for the failure to participate. In a significant number of cases the abuse will have ceased and the perpetrator will have left the area. In many other cases, the petitioner will have established a safety plan using other resources. The ex parte order will have served an important function and courts should not assume that the process has been abused. If the petitioner fails to appear, any dismissal should be without prejudice because the merits will not have been litigated.

In Buck v. Robinson, 2008 UT App 28, 177 P.3d 648, the Utah Court of Appeals upheld the constitutionality of using court commissioners to conduct evidentiary hearings under the Cohabitant Abuse Act. The court held that, in that case, the respondent's "constitutional rights were not violated when the court commissioner held an evidentiary hearing, made proposed findings, and made a recommendation to be acted upon by a judge in [the] protective order proceeding." Id. at ¶ 12. The court recognized that the

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service in the court docket and put the information in the "note" field of the statewide network.

commissioner's determinations were recommendations that are orders of the court unless and until modified by the judge. The court recognized that either party may object to the recommendation under Rule 108 of the Utah Rules of Civil Procedure and Utah Code Ann. § 78B-7-107(1)(f).

If the court does not issue an ex parte protective order the court is not required to schedule a hearing unless a hearing is requested by the petitioner.[30] (§ 78B-7-107(3)). If the petitioner requests a hearing in this circumstance, the court is not required to hold the hearing within twenty days. This type of hearing might also be scheduled when a judge reviews the petition and determines that immediate, ex parte relief is not required, but a hearing is still warranted to receive information from both sides in order for the court to determine whether it should issue a permanent protective order.

### 3.16 Dismissal.

A petition for a protective order cannot be dismissed without permission from the court. (§ 78B-7-103(3)). All voluntary dismissals must be reviewed by a judge. Even if both parties agree to dismissing the protective order, the court should scrutinize the reasons for dismissal. The reason for this provision is to ensure that victims are protected and are not being pressured to dismiss the case by the respondents. As noted in Section 2 above, if a respondent finds that he or she can pressure a petitioner into dismissing a case, the respondent may feel bolstered by the lack of accountability.

There are several ways that a respondent can have a protective order vacated. The respondent can seek to vacate an ex parte protective order by filing a motion to vacate and serving the motion on the petitioner at least two days prior to the protective order hearing. (§ 78B-7-107(4)). The respondent must serve a notice of hearing on the petitioner at the time the motion to vacate is served. Because a hearing date will already have been set, there is nothing in statute that prohibits the court from hearing the motion to vacate at the protective order hearing. The court could also hear the motion prior to that hearing if it appears, for example, that the ex parte order is unnecessarily depriving the respondent of a right or necessity.

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[30] Presumably the court would not be required to schedule a hearing if the judge determines that the court does not have jurisdiction or otherwise dismisses the case. For example, it might be evident from the petition that the parties are not cohabitants or the abuse occurred outside of the court's jurisdiction. The court would not have jurisdiction to proceed further.

A respondent can also file a motion to vacate the order after two years have expired from the date the order was issued.[31] (§ 78B-7-115). The respondent must serve the petitioner with a copy of the motion. The court can vacate the order if it determines that the petitioner no longer has a "reasonable fear of future abuse."[32] (§ 78B-7-115(1)). In determining whether to vacate, the court considers any relevant factor such as: a) whether the protective order was ever violated; b) whether the respondent complied with any treatment recommendations; c) claims of harassment, abuse, or violence by either party; d) counseling undertaken by either party; and e) the impact on any minor children. (§ 78B-7-115(1)).

The court may also amend or dismiss a protective order after one year if: 1) the basis for the order no longer exists; 2) the petitioner has repeatedly acted contrary to the order by inducing the respondent to violate the order; 3) the actions show that the petitioner no longer fears the respondent, and 4) the respondent has not been convicted of violating the order or of another crime of violence and there are no unresolved charges. (§ 78B-7-115(2)). The statute does not identify a process for raising the issue with the courts, but presumably it would be by motion from the respondent.

Dismissals may also occur as described in section 3.22. All dismissals must be entered into the Statewide Domestic Violence Network.

### 3.17 Mutual protective orders.

Utah Code Ann. § 78B-7-108 prohibits a court from issuing a mutual protective order or mutual orders unless each party has separately filed a petition for a protective order, establishes that abuse or domestic violence occurred, and establishes that the abuse

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[31] In Choi v. Iacavazzi, 2008 UT App 79 (per curiam) the court recognized "that the criminal portions of the cohabitant protective order could not be removed [earlier than two years] without [the petitioner's] consent."

[32] The statute does not mention the factor of "domestic violence" when considering whether to vacate the order, but this is one of the defined criteria upon which the original order can be based. The two terms-"abuse" and "domestic violence"-are defined separately and the two cover different behaviors. The Legislature may have intended to include domestic violence, but it is not listed. In other words, as written, the court does not consider whether the petitioner has a reasonable fear of future domestic violence in deciding whether to vacate the order. The result of this would be that a protective order could be vacated even though the victim has a reasonable fear of future domestic violence as long as the victim does not have a reasonable fear of future abuse. The Legislature most likely did not intend such a standard or result.

or domestic violence did not occur in self-defense.[33] This portion of the statute does not use the standard found in § 78B-7-103 which states that a court may issue a protective order if there is a substantial likelihood of abuse or domestic violence. The Legislature perhaps intended to include all the criteria upon which a protective order can be based. This might not ultimately be critical but it might be a consideration in deciding whether to issue mutual protective orders. Mutual orders are disfavored because in most situations there will be a predominant aggressor, with the other person reacting to that aggression. Courts must avoid mutual orders unless the statutory criteria are plainly met.

### 3.18 Mediation.

Section 78B-7-111 prohibits court-ordered mediation in cohabitant abuse cases. This also means that a court could not order parties to resolve domestic violence and protective order issues as a part of divorce mediation.[34] One of the reasons that mediation is prohibited is because it brings the respondent and petitioner together physically. It places the parties on equal footing when domestic violence almost always includes a power imbalance. Mediation would require the victim to accept some responsibility for the abuse and the result might bolster the perpetrator's sense of justification. Nevertheless, mediation may be ordered for other issues between the parties. These mediations should only be conducted by someone trained in the dynamics of domestic violence to ensure the physical safety and emotional well-being of the victim.

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[33] The statute thus places the burden on both petitioners to prove that the other party was not acting in self defense when the other party committed abuse or domestic violence. This is perhaps best done by showing that the other party was the predominant aggressor. A discussion on predominant aggressors is found in section 6.4. In any given domestic violence incident there might be injuries that were inflicted in self-defense, but that person might also have inflicted other injuries out of anger and aggression. A court should carefully consider whether the separate injuries truly justify mutual protective orders. Mutual orders are not favored because it is rare to have both sides be considered predominant aggressors. In the majority of cases, one of the parties would not have inflicted injuries if the other party had not been the one to introduce violence into the relationship.

[34] The court can refer the parties to mediate other issues in a divorce. The court should ensure that such mediation is conducted only by a mediator trained in domestic violence issues. Mediators must ensure that victims are not placed in difficult situations and must ensure that the domestic violence issues are not directly mediated.

### 3.19 Victim advocates.

The Division of Child and Family Services is required to "develop a statewide network of volunteers and community resources to support, assist, and advocate on behalf of victims of domestic violence." (§ 78B-7-112(1)(a)). The Division is also required to "train volunteers to provide clerical assistance to persons seeking orders for protection ...; coordinate the provision of volunteer services with Utah Legal Services and the Legal Aid Society; and assist local government officials in establishing community based support systems for victims of domestic violence." (§ 78B-7-112(1)(b), (c) and (d)). The Division fulfills some of its responsibilities by sponsoring a 24-hour hotline for domestic violence victims. The number is (800) 897-LINK (5465). Individuals who call the hotline can be referred to shelters, advocates, and counseling facilities. More information can be found at http://www.dcfs.utah.gov/services/domestic-violence.

In some areas, law enforcement agencies and local prosecutors have employed individuals to assist victims. These entities have found that victims of domestic violence are more likely to leave abusive situations and assist with prosecutions if they have support from the system. The Utah Domestic Violence Council publishes a list of victim advocate programs throughout the state. The list is found at http://www.udvc.org/linkline.

### 3.20 Domestic violence coalitions.

Domestic violence coalitions have been organized in various areas throughout the state. These local coalitions help coordinate domestic violence responses within their communities. The coalitions might also conduct public awareness campaigns. Under Informal Opinion 98-6 issued by the Judicial Council's Ethics Advisory Committee, a judge can be a member of a domestic violence coalition if the membership of the coalition includes a cross-section of those who deal with domestic violence matters - i.e. prosecution and defense, victim and perpetrator treatment perspectives, etc. If the coalition does not consist of an adequate cross-section, a judge can still participate in coalition discussions about court issues as long as the discussions are not about pending cases and the discussions are not biased for or against a viewpoint that might be litigated before the judge.

### 3.21 Fees.

The court cannot charge a filing fee for a petition for a protective order. (§ 78B-7-105(3)). The court also cannot collect fees for the parties to obtain copies of the court

documents. The court has discretion to collect other fees. However, the court should consider waiving fees in all circumstances when petitioners are not in a reasonable financial position. The sheriff cannot charge fees for serving the protective order documents.

### 3.22 Divorce cases and protective orders.

Section 78B-7-115(5) states that when a divorce is pending between a petitioner and a respondent the court should dismiss the protective order when the divorce decree is signed if it determines that the protective order is no longer needed. The court must give the petitioner notice of its intentions concerning the protective order before it takes any such action.

### 3.23 Foreign protective orders.

Under § 78B-7-116 and the Violence Against Women Act, protective orders issued by other states and tribal courts are entitled to full faith and credit in this state. The Utah Code permits an individual to register a foreign protective order in this state. However, registration is not required for the order to be enforceable in Utah. A more detailed discussion on enforcement and registration is found in Section 11.3.

### 3.24 Violations of protective orders.

A court may take action against both the respondent and the petitioner for violations of a protective order. As noted above, the court may proceed against a respondent with criminal charges and/or contempt proceedings. The protective order form states that if the petitioner violates the order by acting "in contravention of the protective order provisions to intentionally or knowingly induce the respondent to violate the protective order" then the court may amend or dismiss the protective order. However, the court may only do this if at least one year has passed since the issuance of the order.

The Utah courts have not decided whether a respondent may be charged with a violation of the protective order if the petitioner induces the respondent to violate the order. In a case out of the District of Columbia, the court determined that the respondent could be held in contempt even though the petitioner invited communications from the respondent. See In re Shirley, 2011 WL 2473458 (D.C. April 16, 2011). The court recognized that there was nothing in their legislative history indicating that a respondent could not be charged with contempt just because the victim induced the respondent. The court noted that its decision might have been different if not for the fact that the respondent could not ask the court to modify the protective order to allow contact.

Presumably, if a respondent does not have an opportunity to seek a modification a court might be more lenient toward individuals who are attempting to reconcile their differences and there is no way to accomplish that without violating the order.[35]

It is questionable whether a petitioner can be criminally charged with inducing a respondent to violate a protective order. In Ohio v. Lucas, 795 N.E. 2d 642 (Ohio 2003), the court noted that its legislature had not enacted any statute to criminalize such activity. The court also held that a petitioner could not be charged with "complicity" in the respondent's violation of the order. The court stated that if "petitioners for protection orders were liable for criminal prosecution, a violator of a protection order could create a real chill on the reporting of the violation by simply threatening to claim that an illegal visit was the result of an illegal invitation." Id. at 647.

[35] In Cole v. Cole, 556 N.Y.S. 2d 217, 219 (N.Y. 1990) the court stated that "[a] victim of domestic violence who has procured an order of protection is entitled to the court's protection from further violence throughout the duration of an order of protection, even if the victim is desirous of pursuing a goal of voluntary reconciliation with the offender."

## 4. Child Protective Orders

The provisions on child protective orders are found in Title 78B, Chapter 7, Part 2 of the Utah Code.

### 4.1 Who can file.

A cohabitant seeking a protective order in district court can include the cohabitant's children in the petition for a protective order. The district court can then include the children within the provisions of that order. An individual can also file a petition for a protective order in juvenile court that seeks relief solely on behalf of a child.

The Code states that any interested person may file a petition for a protective order on behalf of a child. (§ 78B-7-202(1)). The Code does not define "interested person." The term could be broadly construed to include anyone who has an interest in the welfare of that particular child, including relatives, service organizations, and friends.

### 4.2 Jurisdiction.

A petition for a child protective order must be filed in the juvenile court. (§ 78A-6-103(1)(d)). Unlike the Cohabitant Abuse Act, the child protective order statutes do not state in which county the protective order action must be filed. A petition could be filed in the county where the respondent resides or in which the abuse occurred because those are the usual factors giving a court personal jurisdiction over an individual. The petition could perhaps also be filed in the county in which the child resides because that is where a child welfare case could be filed.

Prior to filing a petition, the petitioner must make a referral to the Division of Child and Family Services. (§ 78B-7-202(1)). The statute does not indicate whether this requirement is jurisdictional. The purpose of this requirement is to give DCFS an opportunity to initiate a child welfare case if abuse is confirmed. The juvenile courts are therefore currently treating this requirement as jurisdictional to ensure that DCFS is aware of these cases.

### 4.3 Petition and other forms.

The court is required to have forms available for use by the petitioner. (§ 78B-7-207(2)(a)). The Administrative Office of the Courts is required to create the forms. (§ 78B-7-207(1)). Unlike provisions in the Cohabitant Abuse Act, there isn't a provision that requires petitioners and the courts to use the forms. (§ 78B-7-203(2)). However,

courts should still require their use to promote uniformity and to facilitate entry into the Statewide Domestic Violence Network.

When a petition is filed, the clerk is required to: 1) search and pull all records from the juvenile court, district court, and DCFS concerning the child and the parties;[36] 2) obtain records from any law enforcement entity that has investigated the alleged abuse; and 3) identify and obtain any other information that might assist the court. (§ 78B-7-202(2)). The court may appoint a guardian ad litem to represent the child. (§ 78B-7-202(4)).

### 4.4 Ex parte protective orders.

Similar to petitions that are filed under the Cohabitant Abuse Act, the court must immediately review a petition for a child protective order to determine whether the child is being abused or is in imminent danger of being abused. (§ 78B-7-202(3)). Abuse is defined as "physical abuse or sexual abuse." (§ 78B-7-201(1)). If the court determines that the child is being abused or is in imminent danger of being abused, the court must issue an ex parte protective order. (§ 78B-7-202(3)).

### 4.5 Content of protective orders.

Similar to protective orders issued under the Cohabitant Abuse Act, a child protective order, including an ex parte protective order, contains criminal provisions, the violation of which can be charged as a crime, and civil provisions, the violation of which can only be punished by contempt. (§78B-7-204).

#### 4.5.1 Criminal provisions.

The provisions of a child protective order that may be punished criminally, as well as through contempt, are as follows:

- Enjoin the respondent from threatening to commit or committing abuse of the child.
- Prohibit the respondent from harassing, telephoning, contacting, or otherwise communicating with the child, directly or indirectly.

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[36] Although not listed in statute the clerk should also search for justice court records as they are now readily available on Xchange. Domestic violence cases are often filed in justice courts and therefore relevant information might be available.

- Prohibit the respondent from entering or remaining upon the residence, school, or place of employment of the child and the premises of any of these or any specified place frequented by the child.
- Upon finding that the respondent's use or possession of a weapon may pose a serious threat of harm to the child, prohibit the respondent from purchasing, using, or possessing a firearm or other specified weapon.
- Determine ownership and possession of personal property and direct the appropriate law enforcement officer to attend and supervise the removal of personal property.

(§ 78B-7-204(1)(a)-(e)).

### 4.5.2 Civil provisions.

The provisions of a child protective order, that can only be punished by contempt, include the following:

- Determine temporary custody of a child who is the subject of the petition.
- Determine parent-time of a child who is the subject of the petition, including denial of parent-time if necessary to protect the safety of the child, and require supervision of parent-time by a non-party.
- Determine support in accordance with Title 78B, Chapter 12, Utah Child Support Act.
- A section to order any other relief that the court considers necessary to provide for the safety and welfare of the child.

(§ 78B-7-204(2)(a)-(d)).

## 4.6 Hearings.

The court must schedule a hearing to be held within twenty days of the ex parte determination. (§ 78B-7-203)(1). If the court issues an ex parte order, the hearing is mandatory. If the court does not issue an ex parte order, the court must schedule a hearing if requested by the petitioner. The exception to this latter requirement would be if the court dismisses the petition for a lack of jurisdiction. For example, the court would not need to conduct a hearing if it is evident that the court does not have jurisdiction over any of the parties or the abuse did not occur within the state.

At the hearing, the court must determine whether the minor is being abused or is in imminent danger of being abused. The standard of review is preponderance of the

evidence. (§ 78B-7-203(5)). Any individual who has information about the alleged abuse may be permitted to testify. (§ 78B-7-203(3)). Either party can subpoena an agent of the Division of Child and Family Services to testify about the referral that was made and the results of that referral. (§ 78B-7-203(4)).

### 4.7 Courts' other obligations.

If the petitioner is not represented by counsel,[37] a court clerk must provide assistance in completing the forms and filing the petition. (§ 78B-7-207(2)(b)). The clerk cannot give legal advice. The clerk must also provide information about service of process, a list of organizations that may represent the petitioner, and information about transporting a respondent who is incarcerated. (§ 78B-7-207(2)(c)(d)(e)). The clerk is required to deliver petitions and protective orders to the sheriff for service. (§ 78B-7-205(1)(b)). The sheriff is required to serve petitions and orders without cost. (§ 78B-7-207(3)). A clerk is also required to send a copy of a protective order to any law enforcement agency designated by the petitioner. (§ 78B-7-205(1)(c)). The clerk must also enter all protective orders into the Statewide Domestic Violence Network. (§ 78B-7-205(1)(c) and § 78B-7-206)). The process for entering the orders into the network is found in the CQR manual at http://www.utcourts.gov/intranet/juv/cqr/docs/Protective_Orders_on_Behalf_of_a_Child.pdf.

### 4.8 Transfer to district court.

Section 78A-6-103(1)(d) states that under certain circumstances, the juvenile court may transfer a child protective order case to the district court if there is a case pending in the district court. The court may transfer the case if the petitioner and the respondent are the parents of the child; there is a divorce, protective order, or paternity case involving the petitioner and the respondent pending in the district court; and it is in the best interests of the child to transfer the case.

Under Rule 100 of the Utah Rules of Civil Procedure, a petitioner is required to notify both courts of the two cases. The rule states that the judges of the two cases shall communicate with each other when "child custody, child support, or parent- time is an issue" in the two cases. If a child protective order is filed in the juvenile court when a divorce action involving the same family is filed in the district court, the issues of child

[37] Because the child protective order provisions are found in Title 78B, and not within the Juvenile Court Act in Title 78A, it is questionable whether any of the parties could receive court-appointed and government paid counsel under § 78A-6-1111.

custody, child support, or parent-time might be relevant in the two cases. The judges of the two courts should communicate to ensure that the courts do not issue conflicting orders. The statute on transfer is not constrained by Rule 100, but the Rule helps provide guidance on communications between the two courts.

The juvenile court should consider transferring a child protective order case to the district court when an appropriate case is pending in district court. A transfer is not mandatory because the juvenile court is more experienced with juvenile issues and the domestic case might have very little to do with the abuse.

### 4.9 **Expiration**.

A child protective order expires after 150 days unless the court, after finding good cause, sets a different date for expiration, either shorter or longer. (§ 78B-7-205(6)). The court must include the expiration date in every order the court issues. (§ 78B-7-204(4)(a)). A court may modify or vacate an order at any time upon a showing of a material change in circumstances. (§ 78B-7-205(5)). Unless a judge orders otherwise, a protective order expires when the child turns 18.[38] (§ 78B-7-205(7)).

### 4.10 **Fees**.

As with petitions under the Cohabitant Abuse Act, the court may not charge a fee for a petitioner to file a petition. (§ 78B-7-207(3)(a)). The court also may not charge a petitioner for obtaining any copies necessary to serve the protective order. (§ 78B-7-207(3)(b)). If the petitioner requires copies for any other reason, the court can charge the fees that are established in Rule 4-202.08 of the Rules of Judicial Administration. However, fees cannot be charged to a petitioner or respondent who is impecunious. (URJA 4-202.08(8)(A)(ii)). The court also should still consider whether waiving the fees might be appropriate in other circumstances.

### 4.11 **Privacy**.

The petitioner's address is to be kept private. The protective orders issued by the court must include a statement that the petitioner's address will not be made available to

[38] It is not clear what happens in cases involving more than one child in a protective order. The order will continue until the youngest child turns 18, but it's not clear whether the provisions are still enforceable against the older children during that period. The court should clarify its intentions.

the respondent. (§ 78B-7-204(4)(b)). The court will serve on the petitioner all necessary process on behalf of the respondent.

## 5. Dating Violence Protection Act

The Dating Violence Protection Act found in Title 78B, Chapter 7, Part 4 of the Utah Code creates civil remedies in district courts for victims of dating violence. The procedures are substantially similar to those procedures found in the Cohabitant Abuse Act.

### 5.1 Standards for a protective order.

A district court may issue a dating violence protective order upon determining that a person has been subjected to, or there is a substantial likelihood that the person will be subjected to, abuse or dating violence by a dating partner of the person. (§ 78B-7-403(1)). The standard is preponderance of the evidence.

"Abuse" is defined as intentionally or knowingly causing or attempting to cause physical harm or placing a dating partner in reasonable fear of imminent physical harm. (§ 78B-7-402(1)). "Dating violence" includes any criminal offense involving violence or physical harm or threat of violence or physical harm when committed by a person against a dating partner of the person. (§ 78B-7-402(4)(a)). "Dating violence" also includes any attempt, conspiracy, or solicitation by a person to commit such an offense. (§ 78B-7-402(4)(b)).

### 5.2 Dating partner.

A person may only obtain relief against a person who is considered to be a dating partner. A dating partner is someone who is 18 years of age or older or is emancipated, and is or has been in a dating relationship with that person. (§ 78B-7-402(2)). Dating partner does not include an intimate partner as defined in federal law. (§ 78B-7-402(2)(b)). Intimate partners include spouses, ex-spouses, or people who have lived as spouses. Intimate partners qualify for cohabitant abuse protective orders and therefore have no need for dating violence protective orders.

In determining whether the parties have or had a dating relationship the court will look at the totality of the circumstances. (§ 78B-7-402(3)(c)) The Utah Code sets forth various factors that the court should consider in determining whether a dating relationship exists. These include:

- Whether the parties developed interpersonal bonding above a mere casual fraternization.
- The length of the parties' relationship.

- The nature and the frequency of the parties' interactions, including communications indicating that the parties intended to begin a dating relationship.
- The ongoing expectations of the parties, individual or jointly, with respect to the relationship.
- Whether, by statement or conduct, the parties demonstrated an affirmation of their relationship to others.
- Whether other reasons exist that support or detract from a finding that a dating relationship exists.

(§ 78B-7-402(3)(c)(i). The list is not all-inclusive and the absence of one or more factors will not preclude a finding that a dating relationship exists. (§ 78B-7-402(3)(c)(ii)).

### 5.3 Jurisdiction.

The district court has exclusive jurisdiction over domestic violence protective orders. (§ 78B-7-404(1)). Unlike the cohabitant abuse statutes, the dating violence statutes do not contain a specific provision on venue and jurisdiction. Therefore, the traditional rules of jurisdiction would presumably apply, meaning that the action should be filed where the defendant resides or where the acts occurred. (§ 78B-3-307(1)). Unlike the cohabitant abuse statutes, there isn't a provision for filing based on the fact that the petitioner resides within the county.

### 5.4 Protective order forms.

The Administrative Office of the Courts is required to create forms for the dating violence protective order process. (§ 78B-7-406(3)(b)). Each clerks' office is required to have the forms available. (§ 78B-7-406(3)(b)(ii)). The forms are also available on the judiciary's website: http://www.utcourts.gov/resources/forms/protectorder/forms.html. All dating violence protective orders must be issued in the form adopted by the AOC. (§ 78B-7-406(7)(a)). The parties cannot use their own forms for the orders, although in theory parties could use their own forms for the petition. Nevertheless, this practice is discouraged in order to promote uniformity. All dating violence orders are required to be placed on the statewide domestic violence network and uniformity is critical for input into the system. (§ 78B-7-404(7)(c)).

### Section 5.5 Protective order provisions.

Both the ex parte protective order and the final protective order may include any of the following provisions:

- Prohibit the respondent from threatening to commit or committing dating violence or abuse against the petitioner and any designated family or household member described in the petition.
- Prohibit the respondent from directly or indirectly telephoning, contacting, or otherwise communicating with the petitioner or any designated family or household member.
- Order that the respondent is excluded and shall stay away from the petitioner's residence and its premises, school and school premises, place of employment, and places frequented by the petitioner and any designated family or household member.
- Prohibit the respondent from being within a specified distance of the petitioner.
- Order any further relief that the court considers necessary to provide for the safety and welfare of the petitioner and any designated family or household member.

(§ 78B-7-404(2)). The final protective order may also contain a provision on weapons, which will be discussed below.

### 5.6 Court clerk assistance.

The court clerk is required to provide forms and non-legal assistance necessary for the petitioner to proceed. (§ 78B-7-406(3)(a)). The type of assistance will be similar to that which a clerk must provide under the cohabitant abuse procedures discussed in section 3.7. The clerks' office may designate another entity to provide these services, but the clerks' office is ultimately responsible for ensuring that the services are provided. (§ 78B-7-406(5)).

### 5.7 Review by a judge.

After a petitioner completes the petition for a dating violence protective order, the clerk should deliver the forms to a judge for immediate review. (§ 78B-7-404(1)(a)). As with the cohabitant abuse process, each court site should make certain that a judge is available during working hours for review of the documents. The judge will review the petition to determine whether an ex parte order should issue. If the judge determines that a dating partner has abused or committed dating violence against the petitioner the court may immediately issue an ex parte dating violence protective order. (§ 78B-7-404(1)). If the judge issues an ex parte protective order, the clerk puts the order on the network, following the same process described in section 3.11.

## 5.8 Service of process.

The county sheriff's office has primary responsibility for serving dating violence protective orders. (§ 78B-7-404(8)). A constable or other law enforcement agency may serve a dating violence protective order if the constable or law enforcement agency has contact with the respondent and service is possible, or if the constable or law enforcement agency determines that service is in the best interests of the petitioner. (§ 78B-7-404(8)(b)).

## 5.9 Protective order hearings.

If a judge issues an ex parte protective order, the court is required to conduct a hearing within 20 days. (§ 78B-7-405(1)(a)). The court can extend the 20 day time-frame if: 1) the petitioner is unable to attend the hearing, 2) the respondent has not been served, or 3) exigent circumstances exist. (§ 78B-7-405(1)(b)). The time period may not be extended for more than 180 days. (§ 78B-7-405(1)(c)). At the hearing, the court will determine whether a dating violence protective order is warranted. If such an order is warranted, the court may order the relief described in section 5.5 and may restrict possession or use of a weapon as described below.

## 5.10 Weapons restrictions.

The district court may not prohibit the respondent from possessing a weapon unless the respondent has been given notice and an opportunity to be heard, and the court makes two distinct findings. (§ 78B-7-404(5)). The court must first find that the petition establishes by a preponderance of the evidence that the respondent has committed abuse or dating violence against the petitioner. (§ 78B-7-404(5)(b)(i)). The court must then determine by clear and convincing evidence that the respondent's use or possession of a firearm[39] poses a serious threat of harm to petitioner or the designated family or household member. (§ 78B-7-405(5)(b)(ii)). The standard for restricting possession in the dating violence context is thus much stricter than in the cohabitant abuse context.

[39] The statute uses both the terms "weapons" and "firearm." The court is allowed to restrict access to all weapons but the findings are based on the respondent's use of a firearm. The respondent's use of some other type of weapon apparently does not support a weapons restriction.

## 5.11 Protective order effective dates, modification, and dismissal.

A dating violence protective order is effective for 180 days from the day on which the order is issued. (§ 78B-7-404(6)). A district court may only modify or vacate a dating violence protective order if the petitioner is served with notice of the hearing and appears before the court and consents to the modification or vacating of the order, or the petitioner submits an affidavit agreeing to the modification or vacating of the order. (§ 78B-7-404(10)).

## 5.12 Protective order denial.

If a district court denies the request for an ex parte protective order the court need not schedule a hearing unless specifically requested by the petitioner. (§ 78B-7-405(3)). The court would still facilitate service of the petition upon the respondent. The hearing need not be scheduled within a particular period of time but should be done as soon as practicable.

## 6. Civil Stalking Injunctions

Stalking is included within the list of criminal acts that constitute domestic violence. (§ 77-36-1(4)(i)). Stalking therefore also falls within the Cohabitant Abuse Act and cohabitants can obtain protective orders based on stalking. Individuals who are not cohabitants but have been subjected to abusive acts might be able to obtain a civil stalking injunction. This could be a remedy for individuals who are simply dating. A cohabitant who has been subjected to stalking might choose to seek a stalking injunction instead of a protective order, although this would be very rare.

### 6.1 Stalking definition.

Stalking occurs when a "person . . . intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person: (a) to fear for the person's own safety or the safety of a third person; or (b) to suffer other emotional distress."[40] (§ 76-5-106.5(2)). A course of conduct means two or more acts directed at or toward a specific person. (§ 76-5-106.5(1)(b)). A violation of a stalking injunction is also considered to be stalking. (§ 76-5-106.5(3)).

### 6.2 Process for obtaining an ex parte civil stalking injunction.

A victim of stalking can file a petition seeking an ex parte civil stalking injunction. The Administrative Office of the Courts is required to create forms for this process. (§ 77-3a-101(3)). The forms are found at http://www.utcourts.gov/resources/forms/civilstalking/. All petitions and injunctions must be on these forms. (§ 77-3a-101(3)(a)). The district court has jurisdiction over all petitions for a civil stalking injunction. (§ 77-3a-101(2)). A minor (with his or her parent or guardian) may file a petition for a civil stalking injunction, or a parent, guardian, or custodian may file a petition on the minor's behalf.[41] (§ 77-3a-101(2)). The petition may

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[40] A previous version of the statute was subjective, requiring the victim to actually fear for his or her own safety or suffer emotional distress. The current statute has an objective standard, viewed from the standpoint of a reasonable person. Bott v. Osburn, 2011 UT App 139.

[41] Because the Cohabitant Abuse Act does not cover dating situations, teenagers who have been subject to dating violence might seek a civil stalking injunction. Teen dating violence is as serious of a problem as domestic violence between cohabitants. Up to one-third of all teenagers report being subjected to physical or sexual violence in a dating relationship. Teens who commit dating violence are likely to continue that violence in their adult relationships. Just

be filed in the district[42] where either party resides or where any of the acts occurred. (§ 77-3a-101(2)).

When a petition is filed, the court must review the petition as soon as possible to determine whether the court should issue an injunction. The petitioner must include evidence of stalking, such as through a police report, letters, affidavits, phone records, etc. (§ 77-3a-101(4)(e)). If the court determines that "there is reason to believe that an offense of stalking has occurred," the court may issue an ex parte civil stalking injunction. (§ 77-3a-101(5)).

The court may include any of the following provisions in the injunction:

- enjoin the respondent from committing stalking;
- restrain the respondent from coming near the residence, place of employment, or school of the other party or specifically designated locations or persons;
- restrain the respondent from contacting, directly or indirectly, the other party, including personal, written or telephone contact with the other party, the other party's employers, employees, fellow workers or others with whom communication would likely cause annoyance or alarm to the other party; or
- any other relief necessary or convenient under the circumstances for the protection of the petitioner and other specifically designated persons.

(§ 77-3a-101(5)(a)-(d)).

### 6.3 Civil stalking injunctions.

After service, the respondent has ten days to request, in writing, a hearing. (§ 77-3a-101(6)). If a hearing is requested, the hearing must be held within ten days. (§ 77-3a-101(6)(a)). At the hearing, the petitioner has the burden of showing by a preponderance of the evidence that stalking of the petitioner by the respondent has occurred. (§ 77-3a-101(6)(a)). The court may modify, revoke or continue the ex parte injunction. (§ 77-3a-101(7)). If the respondent does not request a hearing, the ex parte injunction

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as it is important for courts to effectively address domestic violence through cohabitant abuse civil and criminal cases, it is important for the justice system to recognize teen dating violence and to create effective remedies to protect victims and promote rehabilitation of offenders.

[42] The statute uses the word "district" rather than the word "county."

automatically becomes a civil stalking injunction. (§ 77-3a-101(6)(b)(iii)). The respondent may still request a hearing after ten days but the burden is then on the respondent to show "good cause" why the stalking injunction should be dissolved or modified. (§ 77-3a-101(10)). If the ex parte injunction is not served within 90 days, the injunction expires. (§ 77-3a-101(9)).

## 6.4 Criminal stalking injunctions.

Under Utah Code § 76-5-106.5(9)(a), when a defendant is convicted of stalking, or enters into a plea in abeyance, the conviction or plea "serves as an application for a permanent criminal stalking injunction limiting the contact between the defendant and the victim." Based on this automatic application, the court is required to issue a permanent criminal stalking injunction at sentencing, although the defendant may request a separate stalking injunction hearing at the time of the conviction or plea. (§ 76-5-106.5(9)(b)). The court must notify the defendant of the right to request such a hearing. The statute does not explain the process, criteria, or standards for such a hearing. The standard for issuing a civil stalking injunction is "that an offense of stalking has occurred." Because the defendant will have been found guilty or admitted guilt, the purpose of any requested hearing may be to discuss the parameters of the injunction.

If the stalking conviction occurs in a justice court, the victim must take a certified copy of the judgment and conviction to the district court and file it as an application for a permanent criminal stalking injunction and request for hearing. (§ 76-5-106.5(9)(d)). Again, because guilt will have been established, the hearing may be to decide the parameters of the injunction.

A criminal stalking injunction may include the following relief:

- An order restraining the defendant from entering the residence, property, school, or place of employment of the victim.
- An order requiring the defendant to stay away from the victim and members of the victim's immediate family or household.
- An order requiring the defendant to stay away from any specified place that is named in the order and is frequented regularly by the victim.
- An order restraining the defendant from making contact with or regarding the victim, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm to the victim.

(§ 76-5-106.5(10)). The criminal stalking injunction forms can be found at http://www.utcourts.gov/resources/forms/criminal/permanent_stalking_injunction.pdf.

The court is required to enter the criminal stalking injunction into the statewide warrants network.[43] (§ 76-5-106.5(13)). A criminal stalking injunction is permanent and can only be dissolved upon application of the victim. The application is filed in the court that issued the injunction. (§ 76-5-106.5(12)).

Because stalking can occur between cohabitants, a permanent criminal stalking injunction must be issued whenever a cohabitant is convicted of stalking another cohabitant. This is true even if the victim has obtained a protective order against the defendant. The two orders should complement each other. It is possible that the respondent could ultimately have a protective order rescinded, but there is no such provision in the stalking statute. The court should therefore issue a stalking injunction that does not conflict with provisions in the protective order, and which will provide permanent protection unless the victim asks that the injunction be rescinded.

If a stalking injunction is violated, § 76-5-106.5(15)(b) states that the prosecutor may file new charges or the victim may initiate a civil action. The type of civil action isn't clear from the statute. The court could presumably open a new civil stalking injunction case and initiate contempt proceedings. The victim might also be able to initiate another type of civil action, such as a tort action based on intentional infliction of emotional distress.[44]

### 6.5 Expiration.

As noted above, an injunction issued out of a criminal case is permanent unless the victim asks for the order to be dismissed. (§ 76-5-106.5(12)). The defendant does not have a right to request dismissal of the injunction. A civil stalking injunction is valid for three years from the date that the ex parte injunction is served on the respondent. (§ 77-3a-101(9) and (11)(a)). The victim may request dissolution of a civil stalking injunction at any time. (§ 77-3a-101(13)). As noted above, the respondent may also file a request for

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[43] As of the date of the writing of this document, permanent criminal injunctions had been issued in less than half of all stalking cases. The statewide warrants network includes relatively few stalking injunctions in relation to the number of stalking convictions. Courts and prosecutors should remember that the Code requires injunctions in criminal stalking cases.

[44] Although certainly such an action could be initiated even without the existence of a civil stalking injunction.

a hearing any time after the ex parte injunction has become a civil injunction and show good cause why the injunction should be dissolved or modified. (§ 77-3a-101(10)). If a victim files a civil proceeding to enforce a criminal stalking injunction, the court should remember that the injunction is permanent even though filed in a civil case.

### 6.6 Cohabitants and stalking.

As can be seen, a protective order includes all the provisions that can be included in a stalking injunction. The protective order includes even more relief. However, there are a couple of differences in the enforce ability of the stalking injunction versus the protective order. In both types of orders the court can order any other relief necessary to protect the petitioner. In the protective order, these provisions can only be enforced civilly. The provisions in the stalking injunction can apparently be enforced criminally. Also, the violation of a protective order is generally a class A misdemeanor while the violation of a stalking injunction is a 3rd degree felony. (§ 76-5-108 and § 76-5-106.5(15)(a)). A domestic violence victim might therefore seek a stalking injunction in order to take advantage of the stricter penalties.

Another potential advantage of a civil stalking injunction is procedural. When the court issues an ex parte civil stalking injunction the court is not required to set a hearing date. The court will only hold a hearing if the respondent requests such a hearing. (§ 77-3a-101(6)). The respondent has ten days to request a hearing.[45] The respondent can request a hearing after ten days, but at that point the respondent will have the burden to show that the court should not have issued the injunction.[46] The respondent's request for a hearing must be in writing. The procedural advantages are thus that the petitioner might be able to avoid a hearing, and the petitioner might be able to shift the burden of proof to the respondent. However, because a protective order provides greater relief, there is otherwise little reason for a cohabitant to pursue a civil stalking injunction instead of or in addition to a protective order.

In Allen v. Anger, 2011 UT App 19, 248 P.3d 1001, the court stated that "it seems to us that the potential for emotional distress is so omnipresent in family matters and other intimate areas of the human experience that criminal or civil liability should lie only in the most extreme of circumstances." Id. at ¶ 20. The case involved a dispute between two sisters over the rearing of one of the sister's children. One of the sisters sought a stalking

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[45] The court must hold a hearing within ten days after a request for hearing is filed. (§ 77-3a-101(6)(a)).

[46] The court is required to hold a hearing within a reasonable time in this circumstance.

injunction against the other. The sisters would have also qualified as cohabitants. The court denied the stalking injunction recognizing that emotional distress is often a component of family relationships.

The court recognized that the degree of "emotional distress" for a stalking injunction is similar to the emotional stress standard for intentional infliction of emotional distress. The fact that the court apparently distinguished between "family matters and other intimate areas of the human experience," versus other relationships for purposes of stalking should not be seen as limiting cohabitant abuse protective orders to the "most extreme of circumstances." The two types of proceedings involve different standards and burdens. However, based on this decision, courts might limit stalking injunctions between cohabitants to only extreme circumstances.

## 7. Cohabitant Abuse Procedures Act

The Cohabitant Abuse Procedures Act at Title 77, Chapter 36 of the Utah Code creates processes and remedies in criminal domestic violence cases. The Act provides important provisions for law enforcement officers, defendants, victims, attorneys, and judges.

### 7.1 Domestic violence offenses.

Utah Code § 77-36-1 provides direction on which criminal offenses constitute domestic violence offenses. The section states that a domestic violence offense is any criminal offense that involves "violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another." The section also lists specific offenses that are considered domestic violence offenses when committed by one cohabitant against another. The offenses are:

- aggravated assault, as described in Section 76-5-103;
- assault, as described in Section 76-5-102;
- criminal homicide, as described in Section 76-5-201;
- harassment, as described in Section 76-5-106;
- electronic communication harassment, as described in Section 76-9-201;
- kidnaping, child kidnaping, or aggravated kidnaping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;
- mayhem, as described in Section 76-5-105;
- sexual offenses, as described in Title 76, Chapter 5, Part 4, Sexual Offenses, and Title 76, Chapter 5a, Sexual Exploitation of Children;
- stalking, as described in Section 76-5-106.5;
- unlawful detention, as described in Section 76-5-304;
- violation of a protective order or ex parte protective order, as described in Section 76-5-108;
- any offense against property described in Title 76, Chapter 6, Part 1, Property Destruction, 2, Burglary and Criminal Trespass, or 3, Robbery;
- possession of a deadly weapon with intent to assault, as described in Section 76-10-507;
- discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508;

- disorderly conduct,[47] as defined in Section 76-9-102; and
- child abuse as described in Section 76-5-109.1.

The code uses the definition of cohabitant found in the Cohabitant Abuse Act in Title 78B, Chapter 7, discussed in Chapter 3.[48] (§ 78B-7-102(2)).

## 7.2 Enhanceable offense.

Misdemeanor domestic violence offenses are enhanceable. A misdemeanor domestic violence offense will be charged one degree higher than the degree designated by statute if the offense was committed within five years after the defendant was convicted of another domestic violence offense or the defendant is convicted of the domestic violence offense within five years after the person is convicted of a domestic violence offense.[49] (§ 77-36-1.1). If a person is arrested for two separate acts of domestic violence and the defendant is then convicted of one offense, the second offense may be

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[47] Disorderly conduct only qualifies if it results from a plea agreement in which the defendant was originally charged with different domestic violence offense. See State v. Anderson, 2007 UT App 304, 169 P.3d 778.

[48] An issue in this area is whether the court must or should defer to the prosecutor on whether an offense is charged as domestic violence. For example, a fight between first cousins could be considered a domestic violence offense because it is an assault between individuals related by blood. However, it is not likely that a prosecutor would charge this as domestic violence. The question is then whether the court must completely defer to the prosecutor's discretion or is the court still free to apply the remedies of the Cohabitant Abuse Procedures Act. The issue is more complicated if the prosecutor chooses to file an assault charge by a spouse against a spouse, but does not file the case as a domestic violence offense. If the prosecutor chooses to treat a case as something other than a domestic violence offense, the federal government will still consider this offense as prohibiting the defendant from possessing a weapon if the offense otherwise fits within the federal criteria. The weapons restriction issue is discussed in section 11.5. There might be other domestic violence provisions - such as protective orders - that the court would consider even though not charged as a domestic violence offense.

[49] In State v. Ferguson, 2005 UT App 144, 111 P.3d 820, the defendant challenged the enhancement of a domestic violence conviction arguing that the record of the previous conviction did not show that he had the benefit of counsel or that he had waived the right to counsel. The court stated that prior convictions are entitled to a presumption of regularity and the defendant has the burden to produce some kind of evidence that rights were infringed. The court rejected the argument that the absence of evidence showed that the conviction was without the benefit of counsel. The court stated that a defendant must "adduce some evidence that he did not knowingly waive his right to counsel." Id. at ¶ 27.

enhanced even though the person had never been convicted of a domestic violence offense at the time the second offense was committed. A plea in abeyance is considered to be a conviction even if the charge is reduced or dismissed.

### 7.3 Law enforcement response.

When law enforcement officers respond to a domestic violence call,[50] they are required to identify who is the predominant aggressor and who is the victim, if possible. (§ 77-36-2.2(3)). After assessing the situation, the officers must then provide certain written information to the victim. The information must describe the process for obtaining a civil protective order. (§ 77-36-2.1(2)(b)(i)). The information must also identify the domestic violence services in the area, including shelters.[51] (§ 77-36-2.1(2)(b)(ii)). The officers must also take other steps to protect the victim. These steps might include arranging for housing or medical services, and providing protection and supervision while the victim removes personal effects from the residence. (§ 77-36-2.1(1)).

If law enforcement officers have probable cause to believe that domestic violence was committed, the officers must either arrest the alleged perpetrator or issue a citation. (§ 77-36-2.2(2)(a)). If the officers determine that bodily injury has occurred or a weapon was used, or if they have probable cause to believe that violence will continue, the officers must arrest the alleged perpetrator. (§ 77-36-2.2(2)(b)(i)). If there is probable cause indicating that a protective order has been violated, the officers must arrest the alleged perpetrator. (§ 77-36-2.4(1)).

The law enforcement officers responding to a domestic violence call must prepare an incident report that details the officers' disposition of the case. (§ 77-36-2.2(6)). If the officers do not arrest or issue a citation to anyone, or if the officers arrest both parties, the officers must prepare a detailed report discussing why the specific action was taken. (§ 77-36-2.2(5)(a)). Law enforcement agencies must maintain reports on all domestic violence calls. (§ 77-36-2.2(7)). These reports must be made available, free of charge, to

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[50] The Utah Court of Appeals has recognized that "a domestic violence complaint is one of the most potentially dangerous, volatile arrest situations confronting police." State v. Vallasenor-Meza, 2005 UT App 65, ¶ 16, 108 P.3d 123.

[51] In addition to providing housing, domestic violence shelters provide other resources for victims such as counseling, support groups, childcare, transportation, legal assistance, and access to donated items such as food and clothes.

the victims of the particular offenses. The law enforcement agency must also send each report to the prosecuting attorney. (§ 77-36-2.2(6)(e)).

If the officers do not make an arrest or issue a citation, the officers must explain to the victim the victim's right to initiate a criminal proceeding.[52] (§ 77-36-2.2(5)(b)). The officers must also explain the importance of preserving evidence. (§ 77-36-2.2(5)(b)). An officer may not threaten to arrest all parties as a means to dissuade any of the parties from requesting intervention. (§ 77-36-2.2(4)).

### 7.4 **Predominant aggressor**.

The Utah Code requires law enforcement officers to determine who is the predominant aggressor when responding to a domestic violence call in which both sides are complaining of violence. The purpose of this requirement is to reduce the number of dual arrests and to avoid arresting victims of domestic violence. The factors to be considered are:

- Prior complaints of domestic violence.
- Relative severity of the injuries inflicted on each party.
- Likelihood of future injury to each person.
- Whether one party acted in self-defense.[53]

(§ 77-36-2.2(3)).

The predominant aggressor issue is also relevant under the Cohabitant Abuse Act when two parties have each filed a petition for a protective order against the other. As discussed in section 3.15 above, in order to avoid a mutual protective order one party would show that the other party was the predominant aggressor. In assessing whether a

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[52] The statute does not explain what this right entails. A person typically does not have a right to initiate a prosecution, particularly in light of prosecutorial discretion. Presumably it is the right to contact a prosecutor to have the case screened to see if charges should be filed.

[53] "A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force." Utah Code Ann. § 76-2-402(1)(a). See e.g. State v. Fitz, 2005 UT App 364 (per curiam) (defendant was not justified in striking wife after wife had slapped him in the face but then retreated to a love-seat ten feet away.)

mutual protective order should issue, the court may consider the above factors, as well as the factors listed below.

In order to determine which individual is the predominant aggressor, law enforcement officers and the courts might also evaluate some of the following factors:

- Offensive and defensive injuries.
- Threats made by each party.
- The respective height and weight of the parties.
- Which party has the potential to seriously injure the other party.
- Prior convictions.
- Whether a protective order has ever been sought by either party.
- Whether a party has a fearful demeanor.
- Whether a party has a controlling demeanor.
- Witness statements.

Domestic violence calls are often very difficult for law enforcement officers. In many circumstances each party will have inflicted injury on the other. However, in most circumstances one party will have been the predominant aggressor and one party will have acted in self-defense. Law enforcement officers do their best to sort through these situations to identify who is the perpetrator and who is the victim. The officers might determine that one person was the predominant aggressor, but the other party used unlawful violence that was not in self-defense. The officers might arrest the predominant aggressor and issue a citation to the other party, particularly if children are in the home, in order to leave a caretaker in the home. A law enforcement officer may not threaten to arrest all parties in order to discourage a request for intervention. (§ 77-36-2.2(4)).

## 7.5 Protective orders in criminal cases.

There are three types of orders of protection that a court can issue in a domestic violence case. The orders are used to protect a victim[54] from the time that the alleged perpetrator is arrested until the time that the court's jurisdiction is terminated.[55] The

[54] The statutes repeatedly refer to the "victim," although at these stages of the case, the person is arguably an alleged victim.

[55] In addition to the three types of orders, § 77-36-2.5(1) states that it is a crime for a person who has been arrested for domestic violence to contact the alleged victim between the time of arrest and the time of release. Thus, an arrested person may not contact the alleged victim to assist with release, such as asking the alleged victim to post bail for the defendant.

timing of the orders should be such that there is never a gap in protection. The three orders are: 1) jail release court order[56] (a jail can have the defendant sign a jail release agreement which has the same effect as a jail release court order), 2) a pretrial protective order, and 3) a sentencing protective order (see definitions at § 77-36-1(5),(6),(10), and (11)). Each of these orders is discussed below.[57] A violation of any of these orders is a separate criminal offense.[58] A violation of one of these orders might subject the defendant to an enhancement depending on the situation.[59] (§ 76-5-108(2) and § 77-36-1.1(2)). These orders are only valid while the domestic violence case remains open. A dismissal of the case, or an amendment of the charges to a non-domestic violence offense, will result in the expiration of any order.

## 7.6 Jail release agreements or jail release court orders.

A person who has been arrested for domestic violence cannot be released unless the person is ordered by the court or the person agrees in writing that, until further order of the court, the person will:

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[56] Prior to 2010 these were referred to as "no contact orders." However, confusion often arose between no contact orders issued in domestic violence cases and no contact orders issued in other criminal cases in which a defendant was ordered to have no contact with the alleged victim. Domestic violence no contact orders were legally effective for only one business day, but courts were not following up with pretrial protective orders, potentially leaving victims unprotected. The Legislature therefore changed the terms in hopes of gaining clarity and consistency.

[57] Unlike the statutes for civil protective orders and civil stalking injunctions, the Utah Code does not mandate the creation of uniform forms in criminal domestic violence cases and therefore the Administrative Office of the Courts has not created forms for criminal cases. As with other pleadings, prosecutors are generally responsible for preparing and presenting these forms to the court for signature. However, the justice courts' forms committee has created forms for justice courts, found at http://www.utcourts.gov/intranet/just/forms/#domestic.

[58] Section 76-5-108 states that it is a criminal offense for a person to violate a protective order issued under the Cohabitant Abuse Procedures Act. Section 77-36-2.4 states that it is a criminal offense to violate any type of protective order, including jail release agreements and jail release court orders, pretrial protective orders, and sentencing protective orders.

[59] Section 77-36-1.1 states that a misdemeanor is enhanced a degree if the offense was either committed within five years after the person is convicted of the first offense, or the person is convicted of the second offense within five years after the person is convicted of the first offense. A person could therefore have two separate cases pending and after a conviction in one case, the second case may be enhanced a degree.

- not threaten or harass the alleged victim,
- not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim, and
- have no personal contact with the victim.

(§ 77-36-2.5(2)).

A court can issue a jail release court order or the county sheriff can release a defendant if the defendant signs a jail release agreement. (§ 77-36-2.5(2)). The victim can waive the latter two provisions above but not the first. (§ 77-36-2.5(5)(a)) The waiver must be in writing. The agreement or order must be entered into the Statewide Domestic Violence Network.[60] (§ 77-36-2.5(6)(b)). The agreement or order is enforceable the same as any protective order. (§ 77-36-2.4). The agreement or order has very limited duration. It is effective only until midnight on the day the person appears in court in person or by video arraignment. (§ 77-36-2.5(3)). As explained below, the defendant must appear within one business day after arrest.[61] If charges have not been filed by this time, the court may extend the agreement or order for three business days to give the prosecutor time to file charges. (§ 77-36-2.5(3)(b)(i)). If charges are filed during the three-day period, the agreement or order continues until the defendant's next scheduled appearance. (§ 77-36-2.5(3)(b)(ii)(B)). If charges are not filed, the order expires at midnight on the third day.

## 7.7 First appearances.

A person who has been arrested for domestic violence must appear before a magistrate within one judicial day after arrest. (§ 77-36-2.6(1)). The code does not define "judicial day" and it is a unique phrase in the code. However, it is generally understood to be a day on which courts are open. All Utah courts are open Monday through Friday,

[60] The process is explained in section 3.11.

[61] If the defendant does not appear within one day, for whatever reason, the pretrial order should still be considered effective because the statute states that it is effective until "the arrested person appears." (§ 77-36-2.5(3)(a)). The system should err on the side of ensuring that victims are protected. Jail release agreements should not contain a specific expiration date.

except holidays.[62] An alleged perpetrator must appear on the first day the court is open after the day of arrest.[63] (§ 77-36-2.6(1)).

A person who is charged by citation must appear no later than fourteen days after the date the citation was issued. (§ 77-36-2.6(2)). The time is extended if the fourteenth day falls on a weekend or holiday. Section 77-36-2.6(4) states that a defendant's appearance cannot be waived. This is an exception to § 77-7-21(1)(b) which states that a magistrate can waive the personal appearance of a defendant in any citation case charging a defendant with a class B misdemeanor or less. A person arrested for domestic violence must make a personal appearance in court.[64]

**7.8 Bail**.

Section 77-36-2.5(12) states that domestic violence crimes "are crimes for which bail may be denied." In any case in which the court is concerned about the victim if the defendant is released, the court should consider denying bail. The court must find that:

- there is substantial evidence to support the charge, and
- there is clear and convincing evidence that the alleged perpetrator is a substantial danger to the alleged victim.

There is a question about whether this provision applies to justice court judges because § 78A-2-220(2)(b) states that justice court judges cannot deny bail in any case. Because § 77-36-2.5(9) is a later, more specific pronouncement, there is a legitimate

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[62] Utah Code Ann. §§ 78A-2-211 and 212 state that all courts are open every day except Sundays and holidays. Rule 77 of the Utah Rules of Civil Procedure states that district courts are always open for purposes of filing and issuing process, but are only physically open Monday through Friday, except holidays. Rule 9-105 of the Rules of Judicial Administration states that all justice courts are open Monday through Friday, except for holidays recognized by the state legislature. A "judicial day" would be a day on which the court is physically open.

[63] Every justice court must be open at least one hour per day Monday through Friday. (Rule 9-105, Utah Rules of Judicial Administration). This means that justice court defendants must also appear within one business day of arrest. If the judge is not at the court every day, the judge should either come to court to arraign a domestic violence defendant, conduct a video arraignment, or the defendant should be taken to another judge to ensure that the defendant appears before a magistrate within the required time.

[64] Video arraignment constitutes a personal appearance.

argument that this statute also applies to justice courts.[65] Because of the serious nature of domestic violence, justice court judges can perhaps deny bail if the judge is concerned about a victim.[66] However, a justice court judge also has the option of setting bail in an amount that will keep the perpetrator in jail.[67]

When determining whether a defendant should be released, the court should consider the seriousness of the charged offense and factors that are often present in domestic violence cases, such as:

- Whether the defendant will have access to the victim.
- Whether the defendant has a history of violence.
- Whether the defendant has made any threats of retaliation against the victim or family members.
- The defendant's mental state.
- Whether the defendant used a weapon.
- Whether the defendant has access to weapons.
- Statements from the victim about the victim's fears.
- Whether the defendant was under the influence of drugs or alcohol at the time of the offense.

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[65] See for example cases discussing statutory construction such as Murray City v. Hall, 663 P.2d 1314 (Utah 1983), which states that later legislative pronouncements control over earlier pronouncements on the same subject, and Dairyland Ins. Co. v. State Farm Mut. Auto Ins. Co., 882 P.2d 1143, 1146 (Utah 1994), which states that statutes addressing a topic specifically control over statutes addressing the topic generally.

[66] Seven of the offense types listed in § 77-36-1 involve class B or C misdemeanors and therefore may be filed in justice courts. A significant percentage of domestic violence cases are in justice courts. There is no suggestion in the statute that bail decisions in these justice court cases should be made by a district court judge to determine whether bail should be denied. This adds to the argument that justice court judges may deny bail in domestic violence cases.

[67] Cash-only bail in a high amount might be an option. The Utah appellate courts have not addressed whether cash-only bail is permitted under Utah law. Some states' high courts have determined that cash-only bail is prohibited. See e.g. State v. Brooks, 604 N.W. 2d 345 (Minn. 2000). These holdings are based on interpretations of the respective states' constitutions, statutes, and rules, and those states are in the minority. Cash-only bail is often ordered in this state and there is nothing to suggest that it is not permitted. However, a court should only order cash bail based on a review of an individual defendant's personal circumstances. A blanket use of cash bail–such as in all domestic violence cases–is discouraged.

- Whether the defendant has exhibited any of the other factors that are indicators of domestic violence, discussed in Chapter 2.

## 7.9 Victims' rights to be notified.

Upon request, a victim has the right to be notified by the prosecutor of the prosecutor's decision on whether to file charges against the alleged perpetrator. (§ 77-36-7(1)). The prosecutor must send notice within five days after the decision is made. If the prosecutor decides not to file charges, the prosecutor must explain the victim's other rights, such as the right to seek a protective order and "of the procedures available . . . for initiation of criminal . . . proceedings.".[68] (§ 77-36-7(2)).

## 7.10 Pretrial protective orders.

At the first appearance, the court must consider whether to issue a protective order as one of the conditions of release pending trial. (§ 77-36-2.7(3)(a)). Any jail release agreement or jail release court order that was issued is effective only up until midnight on the day of this first appearance.[69] The pretrial protective order gives the court an opportunity to provide protections that are more expansive than those provided in the jail release agreement or jail release court order. Under § 77-36-2.7(3), the pretrial protective order may include any of the following provisions:

- enjoin the defendant from threatening to commit or committing acts of domestic violence or abuse against the victim and any designated family or household member;
- prohibit the defendant from harassing, telephoning, contacting, or otherwise communicating with the victim, directly or indirectly;
- remove and exclude the defendant from the victim's residence and the premises of the residence;
- order the defendant to stay away from the residence, school, place of employment of the victim, and the premises of any of these, or any specified place frequented by the victim and any designated family member; and

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[68] The statute states that the prosecutor shall explain to the victim "the procedures available to the victim in that jurisdiction for initiation of criminal and other protective proceedings." Given the prosecutor's decision to decline prosecution, it is not clear what other criminal proceedings might be available to a victim.

[69] Unless the agreement or order is extended for three days as explained in Section 6.6.

- order any other relief that the court considers necessary to protect and provide for the safety of the victim and any designated family or household member.

A court does not have authority in a criminal domestic violence case to address child custody, child support, and parent-time issues. The relief that the court orders, however, may affect each of these issues. To the extent possible, the court should inform the defendant and the victim of the need to have these issues addressed through civil processes. If the victim has already obtained a civil protective order, the court may not need to issue a pretrial protective order because all of the necessary protections may be in place.[70]

If the court issues a pretrial protective order, the court must provide the victim with a certified copy of the order "if the victim can be located with reasonable effort." (§ 77-36-2.7(3)(c)). Because the court often will not have the victim's information, the court may fulfill its obligation by instructing the prosecutor to provide the order to the victim. The court should help insure that the court file does not include any information about the victim's location, as necessary to protect the victim. The court must also enter the pretrial protective order into the Statewide Domestic Violence Network.

An issue that arises in many domestic violence cases is the possession of weapons by the alleged perpetrator. Unlike a sentencing protective order, which is discussed in section 6.15 below, the pretrial protective order statute does not contain a provision for the court to restrict the defendant from possessing weapons. However, the court can certainly consider issuing such an order as one of the conditions necessary to protect the victim and the victim's family.[71] The court can order the alleged perpetrator to surrender weapons to law enforcement officers, or the court can order law enforcement officers to seize any weapons.

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[70] However, the court should not deny a criminal protective order simply because the victim has a civil protective order. The penalties for violating the orders may be different and issuing an order through the criminal case will help promote the integrity of the criminal proceedings.

[71] A pretrial protective order may have consequences under federal law for a defendant's possession of a weapon. However, the court does not have an obligation to address the federal prohibitions at this stage of the proceedings.

## 7.11 Privacy.

In many circumstances a domestic violence victim will have moved to a new location to escape the perpetrator. Section 77-36-2.7(1)(c) states that the court shall waive any requirement that the victim's location be disclosed. The defendant's attorney may receive that information, but the court must order the attorney not to disclose the information to the client.

## 7.12 Dismissing domestic violence cases.

A court may dismiss a domestic violence case if both the prosecutor and the victim stipulate to the dismissal.[72] (§ 77-36-2.7(1)(e)). If the court dismisses a domestic violence case, the court must state on the record the reasons for the dismissal. (§ 77-36-2.7(4)(a)). The court must also enter the reasons for the dismissal into the Statewide Domestic Violence Network.[73] (§ 77-36-2.7(4)(b)).

## 7.13 Pleas in abeyance.

The court may approve a plea in abeyance agreement in a domestic violence case. (§ 77-36-2.7(1)(f)). The court may not approve a diversion agreement. (§ 77-36-2.7(6)). A plea in abeyance agreement should include a requirement that the defendant attend a perpetrator treatment program. (§ 77-36-2.7(1)(f)). The program should be one licensed by the Department of Human Services, as discussed below.[74] (§ 77-36-5(5)). A plea in abeyance is considered a conviction for subsequent enhancement purposes. (§ 77-36-1.1(3)).

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[72] The statute does not state that, if the prosecutor alone requests the dismissal, the court is prohibited from dismissing the case. This is another situation in which the court might be faced with a dilemma on prosecutorial discretion. There may be a circumstance in which the prosecutor believes that there isn't enough evidence to proceed but the victim will not stipulate to the dismissal. The court must balance the statute with the prosecutor's discretion. There will, of course, be many situations in which the victim does not want to proceed but the prosecutor chooses to pursue the case. It is obviously much easier for the court to honor prosecutorial discretion in that circumstance.

[73] The statute requires this information to be entered into the network even if a protective order was never issued in the case.

[74] A domestic violence treatment program means a nonresidential program designed to provide psychological treatment and educational services to perpetrators and victims of domestic violence. (§ 62A-2-101(11)).

## 7.14 Spousal privileges.

The Utah Code states that when the spousal communication or spousal testimonial privilege is invoked in a domestic violence case, the victim is to be considered an unavailable witness under the Utah Rules of Evidence.[75] (§ 77-36-2.7(5)). The cycle of violence was discussed in section 2.6. The cycle of violence in domestic violence cases often results in a spouse refusing to testify against the accused.[76] By the time a case goes to trial, the couple might be in the "honeymoon phase" and the victim believes that the abuse will not continue or the victim is otherwise attempting to keep the relationship together. The statute is the Legislature's attempt to nevertheless have the victim's statements admitted by declaring that the spouse is unavailable. There are two issues associated with the Legislature's declaration. The first is that under Article VIII, Section 4, of the Constitution of Utah, only the Utah Supreme Court can enact rules of evidence, and the Court, in Rule 804 of the Utah Rules of Evidence, has described the situations in which a witness will be declared unavailable. The other issue is that the U.S. Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004) establishes limits on when the statements of an unavailable witness may be admitted.

In Crawford the Court held that the testimonial statements of an unavailable witness cannot be admitted unless the opposing side had a previous opportunity to cross-examine the witness. The ruling only applies to testimonial statements. There may be non-testimonial statements from an unavailable witness that can be admitted if the statements fit within one of the hearsay exceptions.

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[75] Rule 502(b)(4)(c) of the Utah Rules of Evidence states that the spousal communication privilege does not apply in cases in which one spouse is accused of committing a crime against the other. Also, the communication privilege might not apply when the testimony is about actions, and not about communications. See e.g. State v. Bundy, 684 P.2d 58 (Utah 1984).

[76] In United States v. Chandler, 2011 WL 1871223, (D. Nev. May 16, 2011) the court stated "indeed, over eighty percent of domestic violence victims do not cooperate with law enforcement officials after the victims' initial allegations of abuse. R. Michael Cassidy, Reconsidering Spousal Privileges After Crawford, 33 Am. J.Crim. L. 339, 347 (2006). There are several factors that have been identified as contributing to this singularly high incidence of noncooperation among the victims of domestic abuse: 1) the victim fears retaliation from her abuser; 2) the victim fears that children of the relationship will be taken away from her or otherwise adversely effected [sic] by criminal proceedings; 3) the victim is economically dependent on her abuser and is concerned about the family's ability to support itself should the abuser be incarcerated; and 4) repeated cycles of abuse and reconciliation over time have caused the victim to internalize feelings of low self-esteem, learned helplessness, and even personal responsibility for her own abuse."

One of the common exceptions that is used in domestic violence cases is the "excited utterance." (URE 803). Given the often intense situation in domestic violence incidents, an individual might make statements under the significant stress of the moment. It is possible that those statements could be admitted.[77] These evidentiary issues are discussed in more detail in Chapter 7.

In State v. Timmerman, 2009 UT 58, 218 P.3d 590, the Utah Supreme Court recognized the difference between "the spousal testimonial privilege and spousal communications privilege." The spousal testimonial privilege is found in Article 1, Section 12 of the Utah Constitution and states that "a wife shall not be compelled to testify against her husband, nor husband against his wife." Id. at ¶ 1. If a victim spouse voluntarily testifies, the perpetrator cannot invoke the communications privilege. If the victim spouse refuses to testify, the victim spouse cannot be compelled by subpoena or court order to testify because of the testimonial privilege. Although the communications privilege does not apply when the spouse is accused of committing a crime, the testimonial privilege remains.

In Timmerman, the court recognized that the spousal testimonial privilege has been criticized because it "enables abusers to silence their victims and makes the testifying spouse vulnerable to coercion from the defendant spouse and his lawyer." Id. at ¶ 22. The court nevertheless recognized that only a constitutional amendment could remove the testimonial privilege. The issue in Timmerman was whether hearsay statements made by a wife could be admitted at a preliminary hearing without violating the testimonial privilege. The court held that "the spousal testimonial privilege does not apply to the voluntary, out-of-court statements given to the police and the sexual assault nurse," and therefore the privilege was not violated by admitting those statements from the preliminary hearing. Id. at ¶ 25.

## 7.15 Sentencing.

There is no justification for domestic violence. A perpetrator might blame his or her actions on stress, alcohol, loss of employment, or actions of the victim or the victim's

[77] The Utah Court of Appeals addressed the exception in an unpublished decision prior to Crawford. See Salt Lake City v. Hernandez, 2001 UT App 64. The analysis in that case and other cases dealing with the excited utterance exception are still largely relevant after Crawford, because excited utterances are usually non-testimonial. The Court of Appeals also touched on the issue in State v. Williams, 2005 UT App 493, 128 P.3d 47, discussed in section 8.5. There are many post-Crawford cases throughout the country that have addressed excited utterances in domestic violence cases. A search of these cases might be helpful if the issue arises.

family. Because of the serious nature of domestic violence and the recidivism rate for domestic violence offenders, it is important that the sentence in a domestic violence case balance accountability with rehabilitation. There have been many studies throughout the country on recidivism rates for domestic violence offenders. These studies have generally determined that recidivism rates for those who attend and complete a domestic violence treatment program are lower than for those who do not attend such a program.[78]

In addition to the full range of sentencing options that are available in all criminal cases, the Utah Code sets forth several other sentencing options that are available in domestic violence cases. The Code mandates two of these sentence provisions.

### 7.15.1 Mandatory sentencing provisions.

The mandatory provisions are:

- If the Division of Child and Family Services (DCFS) has provided services or treatment to the victim and any children affected by or exposed to the domestic violence offense, the court must order the defendant to pay the costs of services and treatment as restitution to DCFS or its contracted provider. (§ 77-36-5(4)).
- The court must order the defendant to obtain and satisfactorily complete treatment or therapy in a domestic violence treatment program that is licensed by the Department of Human Services, unless the court finds that there is no licensed program reasonably available or that treatment or therapy is not necessary. (§ 77-36-5(5)).

This latter provision is important for the rehabilitation of defendants. As noted above, the recidivism rate for those who attend an effective domestic violence treatment program is lower than for those who attend a program that does not adequately address domestic violence issues. A perpetrator treatment program must be geared specifically toward domestic violence. The Department of Human Services has established criteria for

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[78] "A collection of articles discussing perpetrator treatment can be found at such websites as www.vawnet.org and www.mincava.umn.edu. The precise effect of treatment programs on recidivism rates has been somewhat difficult to ascertain because of variables such as the variety of programs, attendance rates, the fact that many perpetrators would not recidivate even without treatment, and the effects of other sentencing conditions imposed at the same time as treatment. However, the studies generally agree that treatment programs specifically directed at domestic violence are more effective at reducing recidivism than programs that do not specifically address domestic violence.

effective programs. It is important that courts use these programs if at all possible. Anger management or similar programs do not address the root causes of domestic violence.

A domestic violence treatment program will include components such as:

- Recognizes domestic violence as a learned and socially sanctioned behavior.
- Keeps the victim and perpetrator apart.
- Defines domestic violence as including both criminal and non-criminal behavior.
- Defines domestic violence as a system of control--physical, emotional, sexual, and economical.
- The primary goal of the program is to stop violence.
- Holds the perpetrator completely accountable, with the victim receiving no blame.

Courts can locate licensed programs by using the search tool found at http://www.hslic.utah.gov/db_search.asp. Many counties do not have a licensed program within the county. If reasonable, the court should order the defendant to attend a program in a neighboring county. In some circumstances there will not be a program that is reasonably available. In those situations the court might consider whether there is a counseling program that includes at least some of the components that are used in perpetrator treatment and therapy, considering the criteria listed above.

### 7.15.2 Optional sentencing provisions.

The optional sentencing provisions in domestic violence cases include:

- The court may require the defendant to pay all or part of the costs of counseling incurred by the victim, and any children, as well as the costs for the defendant's own counseling. (§ 77-36-5(3)).
- The court may require the defendant to participate in an electronic or other type of monitoring program. (§ 77-36-5(2)).
- The court may issue a sentencing protective order against the defendant. (§ 77-36-5(1)).

## 7.16 Sentencing protective order.

If the court issues a sentencing protective order under § 77-36-5.1(2), the order may include any of the following conditions:

- enjoin the perpetrator from threatening to commit or committing acts of domestic violence against the victim or other family or household members;
- prohibit the perpetrator from harassing, telephoning, contacting, or otherwise communicating with the victim, directly or indirectly;
- require the perpetrator to stay away from the victim's residence, school, place of employment, and the premises of any of these, or a specified place frequented regularly by the victim or any designated family or household member;
- prohibit the perpetrator from possessing or consuming alcohol or controlled substances;
- prohibit the perpetrator from purchasing, using, or possessing a firearm or other specified weapon;
- direct the perpetrator to surrender any weapons that the perpetrator owns or possesses;
- direct the perpetrator to participate in and complete, to the satisfaction of the court, a program of intervention for perpetrators, treatment for alcohol or substance abuse, or psychiatric or psychological treatment;
- direct the perpetrator to pay restitution to the victim; and
- impose any other condition necessary to protect the victim and any other designated family or household member or to rehabilitate the perpetrator.

The sentencing protective order is separate from the sentence and judgment and is effective throughout the probation term.[79] The order must be entered into the Statewide Domestic Violence Network. A violation of the protective order can be treated as a probation violation, contempt, and/or a new criminal offense.[80] A violation of a sentencing protective order is a class A misdemeanor. (§ 77-36-5(1)(c)).

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[79] If the court previously issued a pretrial protective order, the order will expire and be replaced by the sentencing protective order. If the court chooses not to issue a sentencing protective order, the pretrial protective order will expire at sentencing.

[80] There might be a double jeopardy issue if a court pursues contempt against a defendant for violating a protective order while at the same time criminal charges are filed for violating the order. Some states have found that the Double Jeopardy Clause prohibits both actions because the elements of the two actions in those states were the same. In this state, a person who knowingly or intentionally violates a protective order is guilty of domestic violence under § 76-5-108. Under § 78B-6-301(5) a person can be held in contempt for "disobedience of any lawful judgment, order or process of the court." Courts should simply be aware of this issue and the potential that exists for a contempt proceeding to become a bar to a separate criminal proceeding. Pursuing an order to show cause for a probation violation does not present the same problem.

## 7.17 Domestic violence courts.

In some areas, judges have created domestic violence courts. Similar to other specialty courts, the goals of domestic violence courts are to hold perpetrators accountable and to promote rehabilitation by closely monitoring compliance with the conditions of probation. By closely monitoring domestic violence cases, courts can more frequently praise constructive behavior and more swiftly address probation violations. Domestic violence courts also have the potential of providing better support for victims. The programs can increase victim confidence in the judicial system's response to domestic violence. Even if such a specialty court is not created, a court could still follow the model for close supervision of offenders.

A domestic violence court initially decides the criteria upon which individuals will be admitted. The court would typically start with misdemeanor cases and with those individuals who are most likely to be receptive to treatment programs. The court can assess this by determining the defendant's criminal history and whether the defendant has any other cases in the system. These cases could include cohabitant abuse, divorce, child welfare, and other criminal cases.

After identifying those defendants who are suitable for domestic violence court, the court would determine the services that it will provide. The court can also determine the type of interaction that it might have with victims. Some domestic violence courts inform victims of resources in the community that assist victims in dealing with the domestic violence incidents. The resources might also assist victims with any transition that the victims wish to undertake.

The initial goal in a domestic violence case should be to provide stabilization. The court should ensure that the necessary orders are in place to protect the victim. Prosecutors and law enforcement officers should ensure that victims have access to necessary resources. The court should ensure that the defendant understands all pretrial obligations and the consequences of failing to comply with those obligations.

Similar to other specialty courts, domestic violence courts take a team approach. The courts will typically involve the same judge, the same prosecutor, and the same treatment representatives. The courts conduct frequent reviews of cases to ensure compliance with court probation requirements, such as perpetrator treatment, victim restitution, and compliance with protective orders. The courts can adjust orders as necessary and also impose appropriate punishments to help ensure compliance. Through frequent reviews, the court participants will be immediately aware of any information suggesting a danger to the victim or others. Although statistics are scant on the subject,

there is some indication that recidivism is reduced when a perpetrator attends a treatment program for a long period, such as a 52-week program. This type of weekly treatment can be monitored through a domestic violence court.

# 8. Child Welfare and Domestic Cases

## 8.1 Children and violence.

As noted above, domestic violence can have devastating effects on children. According to statistics gathered by the Utah State Domestic Violence Cabinet Council, between thirty to sixty percent of child welfare cases include domestic violence within the home. Eighty-five percent of children within these homes have either been eyewitnesses to the violence or indirectly experienced the violence behind closed doors. Children in these homes are more likely to be physically abused or sexually assaulted than children in non-violent homes. Children in these homes have difficulty distinguishing between situations which are simply uncomfortable versus those that are threatening or dangerous, affecting their perception of reality. A child who witnesses a traumatic event is three times more likely to develop post-traumatic stress disorder (PTSD) than an adult witnessing the same event.

## 8.2 Removal of children from the home.

In child welfare cases in which domestic violence is an issue, courts should appoint separate counsel for each parent because of the conflict that exists between the perpetrator and the victim. There may be circumstances in which a victim of domestic violence is accused of failing to protect children in a violent home. There may be many reasons for the victim's failure to act: 1) traumatic stress has affected the victim's ability to act and react; 2) the victim believes that "the children need their father," 3) the victim doesn't want the children to lose their father's financial resources; or 4) the victim fears losing the children to their father. Many victim's lose these fears once they are safely separated from perpetrators and these factors should all be considered when addressing reunification and permanency.

Children should remain with the non-abusive parent if possible. If a child is to remain in the home, courts should consider services to the child that will address the impacts of witnessing domestic violence. Courts should consider appropriate protective or no-contact orders and also address counseling and treatment for the parents. If the child is to be removed and put in a kinship placement, courts should consider those relatives who will help address any lingering effects from the domestic violence, as well as help to ensure that future acts of domestic violence do not occur.

In determining whether a child may remain with a non-offending parent, courts should consider such things as:

- Source of the abuse or neglect.
- Safety plans for family members.
- Emotional and other support systems available to the non-offending parent.
- Availability of culturally appropriate services.
- Cultural and other considerations that impact the non-offending parent's ability to leave the abusive relationship.
- Other factors such as substance abuse, health issues, and mental health concerns.

## 8.3 Parent-time in child welfare and domestic cases involving violence.

A court must carefully consider domestic violence issues when awarding parent-time. The Model Code on Domestic and Family Violence, by the National Council of Juvenile and Family Court Judges states that there is a "rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence." Although this provision is not binding in this state, it provides an important perspective on this issue.

The court may want to consider an evaluation by a domestic violence expert. The court must first consider whether parent-time can be awarded without compromising the health and welfare of the children. If parent-time is possible, then the court should consider appropriate restrictions to protect the children.

Utah Code § 30-3-10.10 includes requirements to consider when creating a parenting plan, if there has been evidence of domestic violence. If there is a protective order or a civil stalking injunction in place, or if the court otherwise determines that the parent has committed domestic violence, the court must make specific findings on the impact of the domestic violence when awarding parent-time. (§ 30-3-10.10(2)). If there is a protective order or civil stalking injunction in place, the court must consider whether to order pick-up and transfer through a third-party. The parent who is the victim of domestic violence may submit to the court the name of a suitable person. (§ 30-3-10.10(3)). If a third party is to be used, the parenting plan must provide specific information on the time, day, place, and manner of the exchange of the children.

In creating parent-time orders, the court should consider factors such as the following:

- Does the perpetrator present any of the lethality factors discussed in section 2.8?

- Should the perpetrator complete any type of counseling or treatment before parent-time begins?
- Are there any criminal charges pending?
- Will the order limit contact between the perpetrator and the victim so that the victim feels safe?
- Does the parent-time order conflict with any other orders, such as those in a separate child welfare, domestic, or cohabitant abuse case?
- Does the order contain specific and definite language so that the parties know what is expected and allowed?
- Does the order remove the possibility of manipulation?
- Is supervised visitation appropriate?
- Is there someone to help the children create a safety plan in the event that the perpetrator becomes abusive during parent-time?

## 8.4 Treatment.

As noted in other sections, courts should generally avoid ordering couples therapy or counseling in situations involving domestic violence. This type of therapy or counseling may increase the danger of further abuse and may empower the perpetrator. These situations may cause psychological harm to the victim who loses confidence that the system is equipped to address domestic violence issues.

In appropriate situations, couples therapy may ultimately prove beneficial. However the court must establish, and the parties must understand, the appropriate parameters of such therapy. The Utah Department of Health Human Servicing licensing rules require a perpetrator to attend a minimum of 16-weeks of domestic violence treatment sessions before couples therapy may even be considered in child welfare cases.

## 9. Evidentiary Issues

Domestic violence cases do not necessarily create unique evidentiary challenges, but there are some challenges that might arise more frequently than others.

### 9.1 Crawford v. Washington.

In 2004, the U.S. Supreme Court issued an important decision for domestic violence cases. In Crawford v. Washington, 541 U.S. 36 (2004) the defendant was convicted of stabbing a man who allegedly tried to rape his wife. After the incident, both the defendant and his wife gave statements to the police. The statements were somewhat inconsistent. At trial, the defendant invoked the marital privilege to prevent his wife from testifying. Under Washington law, the wife became an unavailable witness. The prosecution sought to admit the wife's statements to the police under the hearsay exception for statements against penal interest. The defendant objected, arguing that allowing the statements would violate his constitutional right to confront the witnesses against him. The trial court allowed the statement and the state supreme court affirmed.

The U.S. Supreme Court reversed the decision. The Court recognized that the Confrontation Clause prohibits "admission of testimonial statements of a witness who did not appear at trial unless she was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Id. at 53, 54. The court determined that the wife's statements were testimonial. The statements were given to law enforcement officers as a part of their investigation and in response to their questions. The court held that the statements should not have been admitted because the defendant never had an opportunity to cross-examine his wife about her statements.

### 9.2 Davis v. Washington.

In 2006, the U.S. Supreme Court applied the holding in Crawford to two domestic violence cases. In Davis v. Washington, 547 U.S. 813 (2006), the court consolidated two cases for review. In one case the defendant had been convicted of violating a protective order obtained by his girlfriend. During the incident the girlfriend had called 911 but hung up before the operator answered. The operator reversed the call and began asking the woman questions. During the conversation the woman described what was happening and she identified her boyfriend as the perpetrator. The recording of the 911 call was admitted into evidence.

In the second case, Hammon v. Indiana, law enforcement officers responded to a domestic violence call and found the wife on the front porch. One officer later testified

that the woman appeared to be somewhat frightened but the woman had stated that "nothing was the matter." The woman allowed the officers to enter the home where they observed some property damage and found the husband. The wife came inside the home and one officer stayed with her in one room while the other officer stayed with the husband in a different room. The wife was again asked what had happened. She gave an account of the events and signed an affidavit recounting what she had stated. The wife failed to appear at trial. Over the defendant's objection, the court allowed the wife's written statement to be admitted as a present sense impression and her oral statement as an excited utterance.

The U.S. Supreme Court determined that the statements in the first case were not testimonial, but the statements in the second case were. The Court's holding was premised on the following:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

The Court recognized that the statements in both cases were given as the result of police interrogations. In each case, law enforcement officers asked questions and elicited answers. In the first case, however, the victim's 911 call was initiated to resolve an emergency, and the questions that were asked by dispatch were directed toward eliciting information that would help resolve that emergency. The events were happening during the call. In the second case, the questions were directed at trying to determine what had happened. There wasn't an immediate threat. The interrogation was something that could just as well have occurred at the police station. The Court's holding recognized that testimonial statements can occur at the crime scene.

In Davis, the respective states and several amici had argued for greater flexibility in domestic violence cases because perpetrators often use intimidation to stop their victims from testifying. The Court stated that the Confrontation Clause is not to be adapted to particular case types. The Court noted, however, that there may be remedies in domestic violence cases because "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." Id. at 833.

## 9.3 Evidence of prior bad acts.

In many domestic violence cases, the incident will not have been the only documented violent act committed by the alleged perpetrator. The prosecutor can seek to introduce evidence of the defendant's prior bad acts under Rule 404 of the Utah Rules of Evidence,[81] as long as the evidence is not introduced for the purpose of showing the defendant's character. The evidence can be admitted if the evidence is relevant to the elements of the offense.

In State v. Holbert, 2002 UT App 426, 61 P.3d 291, the trial court permitted a victim of domestic violence to testify about a prior incident. The following is the Court's summary of the testimony:

> During the argument, Wife went to the telephone. Before Wife picked-up the telephone, Defendant picked up Wife by the neck and choked her into unconsciousness. Defendant then threw Wife four to five feet into the kitchen. Upon regaining consciousness, Wife realized she was bent over the kitchen table and Defendant was choking her. She blacked out again and awoke a second time on the kitchen floor with Defendant kneeling over her and choking her. Wife "went into survivor mode" and told Defendant "please don't kill me, I want to make this marriage work." Defendant stopped choking Wife but then "held her hostage for an hour and a half." The next day, Wife obtained the protective order, which was later modified.

Id. at ¶ 12.

The defendant objected to the testimony. The Court of Appeals upheld the trial court's decision because it was admitted to show defendant's intent and motive. The court reviewed the three-part test established by the Utah Supreme Court: 1) whether the prior bad acts evidence is being offered for a proper, non-character purpose, 2) whether the bad acts evidence meets the requirements of Rule 402, which permits admission of

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[81] "Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." (U.R.E. 404(b)(1)). "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." (U.R.E. 404(b)(2)).

only relevant evidence, and 3) whether the evidence meets the requirements of Rule 403 in that the probative value of the evidence is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The court reviewed domestic violence cases from other states in making its conclusion and those cases might also be helpful when dealing with this issue. Because domestic violence is a recurring problem in some relationships, evidence of prior incidents will often be admitted to show intent and motive.[82]

## 9.4 Self-defense.

Just as prior bad acts may be introduced to show motive and intent on the part of the alleged perpetrator, those acts might be introduced for showing self-defense**.** Utah Code Ann. § 76-2-402(1)(a) states that "a person is justified in threatening or using force against another when and to the extent that the person reasonably believes that the force or threat of force is necessary to defend the person or third person against another person's imminent use of unlawful force." Subsection (5)(e) states that "in determining imminence or reasonableness under subsection (1), the trier of fact may consider, but is not limited to, any of the following factors: . . . any patterns of abuse or violence in the parties' relationship."

In State v. White, 2009 UT App 81, ¶ 26, 206 P.3d 646, the Court of Appeals recognized that:

> the legislature explicitly stated that its intent in enacting this statute was to allow "otherwise competent evidence regarding the response by a victim of domestic violence to patterns of domestic abuse or violence to be considered by the trier of fact in determining the imminence" of another's

[82] In State v. Holbert, 2002 UT App 426, ¶ 36, 61 P.3d 291, the court recognized that "[o]ther courts have allowed evidence of prior acts of domestic violence committed by a defendant against the same victim to prove motive and intent." The court stated that evidence of "the prior assault helps demonstrate a pattern of domestic violence that goes to prove the specific intent element of intending to inflict injury or to terrorize." In State v. Johnson, 2007 UT App 184, ¶ 30, 163 P.3d 695, the court recognized that "evidence of prior bad acts is admissible under Rule 404(b) to explain why a witness was initially reluctant to provide information to police." In State v. Bates, 784 P.2d 1126, 1127 (Utah 1989), the court recognized that such evidence "was not offered to show the defendant's propensity for violence, but was elicited to describe the state of mind of the victim . . . The reason she did not report the incidents sooner was that she was afraid of the defendant."

use of unlawful force "or the reasonableness" of a domestic violence victim's belief that force is necessary to defend him or herself.

### 9.5 Present sense impression and excited utterance.

In Salt Lake City v. Williams, 2005 UT App 493, 128 P.3d 47, the court dealt with the admissibility of a 911 recording in a domestic violence case. The call was made and recorded while events were unfolding. The court first reviewed the Crawford decision and determined that the statements in the 911 call were not testimonial.[83] The court stated that determining whether statements on a 911 recording are testimonial will be done on a case-by-case basis. The court considered the following facts to be important in determining that the statements were not testimonial: 1) one of the statements was not made directly to the 911 dispatcher, but was made to a friend and overheard by the dispatcher, 2) the call was made while the incident was occurring, when the victim was seeking protection from the immediate danger, 3) the victim made the statements while she was upset and frightened because the perpetrator had blocked the victim's way, 4) the call was initiated by the victim and not by the police, 5) the statements were made in order to communicate the nature and seriousness of the problem, and 6) the victim did not foresee that the statements might be used to prosecute the perpetrator. Id. at ¶ 25.

The statements were made under the stress of the ongoing situation and the victim was relaying facts about the situation. The Court of Appeals determined that the statements could be admitted under either the present sense impression[84] or the excited utterance[85] exceptions to the hearsay rule.

In State v. C.D.L., 2011 UT App 55, 250 P.3d 69, the court again dealt with admission of a 911 call and the excited utterance exception. The court set forth the three prong test to determine whether a statement is admissible as an excited utterance: "(1) a startling event or condition has occurred; (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement relates to the startling event or condition." Id. at ¶ 30. The court determined that it was

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[83] The case was decided after Crawford but before Davis. The U.S. Supreme Court also dealt with a 911 call in Davis. Although Williams was decided before Davis, the Court of Appeals analysis and conclusions are consistent with Davis.

[84] "A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." U.R.E. 803(1).

[85] "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." U.R.E. 803(2).

permissible to admit a 911 call made by a wife while her husband was following her in another car, had hit her car with his car, and the collision was more than a "routine traffic accident."[86] Id. at ¶ 31.

### 9.6 Then existing mental, emotional, or physical condition.

Rule 803(3) of the Utah Rules of Evidence creates an exception to the hearsay rule for a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed."

In State v. Auble, 754 P.2d 935 (Utah 1988), the defendant was charged with killing his wife. The defendant claimed the shooting was in self-defense because the victim had pointed the murder weapon at him. The trial court allowed a witness to testify that "one week before the shooting, [the victim] told him that she had found an apartment and that in the past [the defendant] had threatened to kill himself if she moved out, but that this time 'he threatened to kill her if she moved out.'" Id. at 936. The Utah Supreme Court recognized that the statement of a murder victim

> may be admitted under the state-of-mind exception to the hearsay rule if it is not used to prove the truth of the matter asserted and if certain other criteria are met, specifically: (i) the evidence is probative of the decedent's state of mind at the time of the killing, and (ii) the decedent's state of mind has already been placed in issue by defense evidence or argument that the killing was (a) a suicide, (b) in self-defense, or (c) an accident to which the decedent contributed by acting as an aggressor.

Id. at 937.

Because the defendant had placed the victim's state of mind at issue by claiming that he acted in self-defense, the victim's hearsay statement could be admitted. The Utah Supreme Court stated that the statement had "significant probative value," given the nature of the defendant's defense.

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[86] In Salt Lake City v. Hernandez, 2001 UT App 64, the court stated that, although the officer was permitted to testify as to the victim's statement that the trial court determined was an excited utterance, the officer could not testify about the narrative that followed, after the victim invited the officer into the house to explain what had happened.

## 9.7 Statements of medical diagnosis or treatment.

Rule 803(4) of the Utah Rules of Evidence permits admission of "a statement that: (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause." These might be statements describing a person's medical history or a statement from an emergency room physician or nurse who treated the victim of domestic violence.

In State v. Jaeger, 1999 UT 1, 973 P.2d 404, the defendant sought to introduce a victim's statements made while in an adolescent treatment center in which she admitted that she had previously attempted suicide. The trial court denied the admission of the evidence. The appellate court determined that the trial court's decision was error. The court stated that Rule 803(4) "applies to statements made to a psychiatrist or a psychologist for the purpose of medical diagnosis or treatment. . . . [G]enerally, all statements made to psychiatrists or psychologists, regardless of content, are relevant to diagnosis or treatment since experts in the field view everything relating to the patient as relevant to the patient's personality." Id. at ¶ 27. (citations omitted)

## 9.8 Battered Woman Syndrome.

The Utah appellate courts have not had much of an opportunity to address the Battered Woman or Battered Spouse Syndrome. In State v. Valdez, 2007 UT App 112, the trial court admitted testimony from an expert on the Battered Woman Syndrome. The expert testified that "domestic violence is a pattern of physically aggressive behavior and emotionally abusive behavior that is committed by an intimate partner." Id. at ¶ 3. The expert "explained that BWS involves a 'cycle of violence' and a 'pattern of symptoms that women who are in abusive relationships have been through.'" Id. The expert stated that "BWS is a subcategory of Post-Traumatic Stress Disorder." Id. The expert had not personally interviewed the victim. The Utah Court of Appeals did not decide whether the trial court erred in admitting the evidence. The court determined that even if the court had committed error, the error was harmless because there was ample other evidence to support the conviction. However, this case at least shows the content of the Battered Woman Syndrome testimony that a trial court has admitted.

## 9.9 Physician and mental health therapist/patient privilege.

Rule 506 of the Utah Rules of Evidence limits the admissibility of statements between a patient and his or her doctor.[87] In State v. Gomez, 2002 UT 120, 63 P.3d 72, the court stated that the privilege does not apply to communications made by a victim to volunteer counselors at a rape crisis center because the counselors are not physicians or mental health therapists.[88]

In State v. Worthen, 2008 UT App 23, 177 P.3d 664, the court discussed the exception, stating that the privilege does not apply when the physical, mental, or emotional condition of the patient is an element of any claim or defense. (U.R.E. 506(d)(1)). The decision focused on how the defense may obtain such materials. The court stated that, in order to obtain the victim's medical records, "a party must show 'with reasonable certainty' that the record actually contains exculpatory evidence." Id. at ¶ 25. The court stated that a defendant may obtain evidence that would cast doubt on any element of the offense with which the defendant is charged. The court stated that if the defendant meets the initial burden of showing, with reasonable certainty, that exculpatory evidence is contained within the records, the court should then conduct an in camera review to sort through and separate evidence that is material from that which is immaterial.

The defendant in Worthen was charged with sexual offenses against his adopted daughter. The defendant sought information on the alleged victim from a medical center. The defendant wanted the records to show that the alleged victim had improper motives and biases. The court determined that the defendant had met the threshold for the in camera examination. The defendant was not seeking "general impeachment evidence" but evidence directly related to her accusations. Id. at ¶ 19.

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[87] "A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist." (U.R.E. 506(b)).

[88] Statements made to a sexual assault counselor are privileged under Utah Code § 78B-1-137(6).

## 9.10 Communications to clergy.

Perpetrators and victims of domestic violence often discuss their family situations with religious clerics. Rule 503(b) of the Utah Rules of Evidence states that a "A person has a privilege to refuse to disclose, and to prevent another from disclosing, any confidential communication: (1) made to a cleric in the cleric's religious capacity; and (2) necessary and proper to enable the cleric to discharge the function of the cleric's office according to the usual course of practice or discipline."

The Utah appellate courts have not had many occasions to address this particular privilege. Because one of the many duties of clergy is to provide guidance on family issues, perpetrators and victims will often discuss domestic violence situations with their clergy. These statements will often be considered privileged. Under Utah Code § 62A-4a-403, child abuse information must be reported to law enforcement or the Division of Child and Family Services. The statute also applies to clergy unless the statement is from a perpetrator to a cleric under the recognized practices and canons of the religion, and the cleric is bound by confidentiality under the religion's canon law, doctrine or practice.[88] (§ 62A-4a-403(2)(a) and (b)).

## 9.11 Marital rape law.

Under Utah Code § 76-5-402(2) the offense of rape "applies whether or not the actor is married to the victim." A spouse can thus be charged with rape if the victim does not consent to the sexual intercourse. As noted in section 2.7, some perpetrators force victims into sex and can therefore be charged with rape.

[88] The statute also applies to judges and court personnel, meaning that abuse must be reported if it is evident that others have not reported the abuse.

## 9.12 Rape shield law.

Utah has adopted a Rape Shield Law in Rule 412 of the Utah Rules of Evidence.[89] The Rape Shield Law could be raised in certain types of domestic violence cases. A cohabitant might claim that the defendant committed rape. The defendant might want to show that the alleged conduct was consensual or that a person other than the defendant was the source of damning evidence. The evidence can be admitted if it appears to be relevant and its probative value is not outweighed by the danger of unfair prejudice against the victim or of misleading the jurors.

The party intending to offer evidence under this rule must file a motion at least 14 days before trial. The court may set a different time-frame upon a determination of just cause. The motion must describe the evidence and state the purpose for which it is offered. When the prosecutor receives the motion, the prosecutor is required to notify the alleged victim. Before allowing the evidence to be admitted, the court must conduct a "hearing in camera" and allow the alleged victim and the parties an opportunity to attend and be heard.[90] The motion, related papers, and a record of the hearing remain sealed unless and until the court orders that those records be made available.

## 9.13 Search and seizure.

Domestic violence situations are often tied to exigent circumstances justifying warrantless searches and seizures. In State v. Comer, 2002 UT App 219, 51 P.3d 55, officers received a tip from a citizen informant about a family fight in progress. The officers went to the residence and a woman answered the door. The woman stepped out

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[89] Generally, the rule prohibits admission of "evidence offered to prove that a victim engaged in other sexual behavior; or evidence offered to prove a victim's sexual predisposition." There are three exceptions to the prohibition: 1) "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;" 2) "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor;" and 3) "evidence whose exclusion would violate the defendant's constitutional rights." U.R.E. 412(a) & (b).

[90] The reference in the rule to a "hearing in camera" is somewhat unique as an in-camera review is typically conducted solely by the judge, without others in attendance. The rule nevertheless makes it clear that this is a hearing that the parties and the alleged victim may attend.

on the porch where the officers explained that they were there to investigate a reported family fight. According to the evidence, the woman stated that "her husband was inside and then, without explanation [the woman] 'immediately turned and walked back inside the residence.'" Id. at ¶ 2. The officers followed the woman into the home where they ultimately found drugs and drug paraphernalia. The defendants challenged the warrantless search. The court determined that entering the home was supported by probable cause and exigent circumstances. The court stated that the citizen informant's reliable tip of a family fight in progress, and the woman's unexplained retreat into the home, established probable cause. Recognizing the "combustible nature of domestic disputes," "the officers could reasonably have feared that [the woman] retreated into the home (1) because of an immediately prior threat against her by her husband; (2) to immediately resume the altercation reported by the citizen informant; or (3) to cover up evidence of already-perpetrated domestic violence." Id. at ¶ 26. The volatile nature of domestic violence situations might therefore justify officers' warrantless entry into residences in order to adequately address a domestic violence situation.

## 9.14 Criminal Rule 14(b).

Rule 14(b) of the Utah Rules of Criminal Procedure has been adopted to provide a process for protecting many of the privileges discussed above. Before obtaining a subpoena for a victim's medical, mental health, school, or other nonpublic records, the defendant must submit a request for a subpoena to the court. The defendant must serve a copy of the request on the prosecutor and the victim or the victim's representative. The request is served only on the prosecutor if the victim is unrepresented. The court must conduct a hearing to determine whether the defendant is entitled to the records under applicable state and federal law. If the court determines that the defendant is entitled to the records under applicable law, the court must conduct an in camera review of the victim's records. The court will release only those records to which the defendant is entitled under those laws, including laws that permit only relevant evidence to be admitted.

## 9.15 Voir dire.

In Utah, there have been some successful Batson challenges in domestic violence cases in which all the individuals removed through peremptory challenges were of one gender. In State v. Valdez, 2004 UT App 214, 95 P.3d 291, the State used its peremptory challenges to strike several women as potential jurors. The State's explanations were that one of the jurors would be "overly compassionate," one of the jurors made responses that "would not make her a good juror for the State," one of the jurors had sat on a jury that had found a defendant guilty of manslaughter, which the State felt was probably a one-

step reduction in the case and therefore the juror would not be helpful to the State, and another juror would be "overly compassionate." Id. at ¶ 26. The court determined that the defendant had adequately shifted the burden to the State to justify the peremptory challenges. The State's explanations were not sufficiently "tied to the issues, evidence, and context of the case at hand." Id. at ¶ 29.

In State v. Jenson, 2003 UT App 273, 76 P.3d 188, the State used its three peremptory challenges on men. The State attempted to justify its challenges because the three men had been involved with protective orders and the prosecution "assumed that usually they would be on defendant's side, since more than likely . . . men are the respondents to the protective orders." Id. at ¶ 15. The appellate court determined that the State's explanation was not sufficient. The court stated that "the prosecutor's motivation was unavoidably linked to the jurors' gender." Id.

Rule 18(b) of the Utah Rules of Criminal Procedure states that "the court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct an examination." The following is a list of potential voir dire questions in domestic violence cases. The questions are from Bennett's Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation by Kathy E. Bennett and Robert B. Hirschorne.

1. What does the term "battered woman" mean to you?

2. What does the term "family violence" mean to you?

3. Have you, or any family member neighbor or coworker ever been the victim of any crime involving violence? Please tell me about the experience.

4. Have you personally ever been the victim of violence by someone you knew?

5. What would you think of a husband who forces his wife to have sex?

6. Often in marital disputes, it comes down to his word against hers. What would you do to try to determine the truth?

7. Why do you think that a woman might say that her husband was violent and then take it back?

8. Do you think people who are very upset necessarily show their feelings when they testify?

9. In your own experience, how useful is it to hear from experts about such things as “battered woman syndrome?”

10. What is the responsibility, if any, of friends, family members or neighbors in cases of family violence? What do you think other people should do?

11. How do you feel that society treats men who hurt their wives?

12. What experiences in your life have affected you in a significant way?

13. Tell me about books and magazine articles you have read or television shows you have seen regarding violence in the family.

14. In what ways do you believe that emotional violence and physical violence are alike?

15. What organizations do you or your family members belong to?

16. What do you think is the number one cause of divorce?

17. What do you believe is the main cause of domestic violence?

## 10. Victims' Rights Act

The Utah Code contains two chapters within Title 77 that deal specifically with victims' rights. Title 77, Chapter 37 is called Victims' Rights and contains the substantive rights that victims have in criminal cases. Title 77, Chapter 38 is called the Rights of Crime Victims Act and contains procedures for asserting and enforcing the substantive rights.

### 10.1 Constitutional rights.

In 1994, the Utah voters approved an amendment to the Utah Constitution that guarantees rights to all crime victims. The amendment became Article I, Section 28. The section provides these specific rights:

- To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process.
- To be informed of, be present at, and to be heard at important criminal justice hearings related to the victim.
- To have a sentencing judge receive and consider viable information concerning the background, character, and conduct of a person convicted of an offense.

The Constitution grants the Legislature the power to enact statutes to enforce and define the rights created by the Constitution.

### 10.2 Legislative intent.

The Victims' Rights section of the Code is rooted in Article I, Section 28. Utah Code § 77-37-1 describes the Legislature's intent in creating the Victims' Rights chapter in the Code. The intent is to "ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity." The statute also states that the rights are to be provided "in a manner no less vigorous than protections afforded criminal defendants." The Act sets forth a specific bill of rights for crime victims.

### 10.3 Victims' Bill of Rights.

Utah Code § 77-37-3(1) lists the bill of rights. The list includes:

- The right to be informed as to the level of protection from intimidation and harm available to them, and from what sources.

- The right to be informed and assisted as to their role in the criminal justice process.
- The right to a clear explanation of legal proceedings.
- The right to a secure waiting area that does not require them to be in close proximity to defendants or the family or friends of defendants.
- The right to seek restitution or reparations.
- The right to speedy disposition of their criminal cases.
- The right to timely notice of judicial proceedings they are to attend.
- The right to timely notice when any proceedings cancel.

## 10.4 Children's rights.

The Act gives additional rights to child victims and witnesses. (§ 77-37-4). These rights include:

- The right to be protected from physical and emotional abuse during their involvement with the criminal justice process.
- The right not to be accused of being responsible for the inappropriate behavior of adults and the right not to be questioned about any such behavior.
- The right to have interviews related to a criminal prosecution kept to a minimum.
- The right to be informed of available community resources such as counseling.
- The right to confidentiality of their interviews at a Children's Justice Center, absent release by a court order.

## 11. Rights of Crime Victims' Act

In order to give meaning to the Victims' Bill of Rights, the Legislature enacted the Rights of Crime Victims' Act. This Act creates the processes by which victims can exercise their rights. The Act also describes the duties of all criminal justice agencies that deal with victims.

### 11.1 Victims' rights to attend court.

A crime victim has the right to be present and to be heard at important criminal justice hearings. The right applies in class B misdemeanors and above. (§ 77-38-5). The right also extends to juvenile court proceedings. (§ 78A-6-114(1)(d) and (e)). Important criminal justice hearings include preliminary hearings, arraignments, any hearing involving the disposition of charges,[91] any hearing at which the court considers releasing the defendant, the trial, sentencing proceedings, including a restitution hearing, and any hearing at which the court considers modifying a defendant's sentence. (§ 77-38-2(5)). A victim also has the right to be present at a defendant's initial appearance to speak on whether the defendant should be released.

In order to effectuate the right to attend important criminal justice hearings, the victim must ask the prosecutor to send the victim notices of those hearings. (§ 77-38-3(8)). The prosecutor must initially send notice to the victim, apprising the victim of the right to receive notices of future proceedings. (§ 77-38-3(3)). Although a victim has the right to attend hearings in class B misdemeanors and above, the right to notice applies only in felony cases. (§ 77-38-3(12)).

### 11.2 Victims' rights to be heard.

A victim may exercise the right to be heard orally, in writing, by audio or videotape, or by other appropriate means. (§ 77-38-4(7)). The victim may designate a representative to speak on the victim's behalf. (§ 77-38-9). The court can limit the victim's statement to matters that are relevant to the proceeding. (§ 77-38-4(5)). If the victim wants to be heard, the victim will typically notify the prosecutor, who will notify the court of the victim's wishes.

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[91] This does not apply to hearings at which the defendant unexpectedly changes his or her plea.

## 11.3 Notice to victims.

When a felony case is commenced, the prosecutor is required to notify the victim within seven days from the date of filing. The notice must contain information about how the victim may elect to receive notice of all important criminal justice hearings. (§ 77-38-3(1) and (2)). If the victim elects to receive notice, it is the prosecutor's obligation to send the notices. (§ 77-38-3(3)). If a victim elects to receive notices of the hearings, the court's obligation is to schedule hearings in a manner that allows time for the victim to receive notices before the hearings. (§ 77-38-3(5)). The court and the attorneys should consider the victim's time when considering continuances and postponements.

## 11.4 Victims as witnesses.

A victim has the right to refuse to testify about the victim's address, telephone number, place of employment, or other locating information, unless the victim consents or the court orders disclosure upon finding that a compelling need exists to disclose the information. (§ 77-38-6)). This is particularly important in domestic violence cases to ensure that the perpetrator cannot locate the victim when the victim has changed addresses. The victim's right to attend trial is subject to the exclusionary provision in Rule 615 of the Utah Rules of Evidence. (§ 77-38-4(3)).

## 11.5 Enforcement.

Section 77-38-11 states that a victim may seek injunctive or extraordinary relief to enforce the victim's rights under the chapter. The failure to provide the victim with the rights under the chapter does not create a cause of action for monetary damages. (§ 77-38-11(4)). If the court determines that a victim's rights were violated, the court must determine an appropriate remedy. (§ 77-38-11(3)(b)). The court must reconsider any judgment or decision affected by the violation and consider whether the judgment or judgment would have been different without the violation. (§ 77-38-11(3)(b)). If the judgment or decision would have been different, the court must enter a new decision, except that a court may not order a new trial. (§ 77-38-11(3)(b)).

The Utah Supreme Court has hinted that failing to provide the victim his or her rights does not and cannot affect the results of the criminal defendant. In State v. Casey, 2002 UT 29, ¶ 40, n.2, 44 P.3d 756, the court stated that declaring a misplea for failing to allow a victim to speak at a defendant's plea hearing might create constitutional concerns for the defendant.

## 11.6 Expungement.

A victim has the right to be notified when the defendant seeks to expunge the record of the crime. The prosecutor provides notice to the victim of the expungement request. (§ 77-40-107(2)(a)). The victim has the right to object to the petition by filing an objection within 30 days after receiving the petition. (§ 77-40-107(3)). If neither the victim nor the prosecutor objects to the petition, the court may proceed without a hearing. If an objection is received, the court must hold a hearing and provide notice to the defendant, prosecutor, and victim. (§ 77-40-107(6)(a). As a general rule, a defendant must wait seven years before seeking expungement of a felony, five years for a class A misdemeanor, four years for a class B misdemeanor, and three years for any other misdemeanor.[92] An individual is allowed to expunge most types of domestic violence offenses.

[92] A court cannot grant an expungement unless the defendant has obtained a certificate of eligibility from the Bureau of Criminal Identification (BCI). Before issuing a certificate, BCI will determine whether the appropriate time frames have passed.

## 12. Violence Against Women Act

The Federal Violence Against Women Act (VAWA) contains many important provisions for state systems. The two most important provisions are probably those involving full faith and credit for protective orders, and firearm prohibitions against those who are subject to protective orders or who have been convicted of misdemeanor domestic violence offenses.

### 12.1 Protection orders.

18 U.S.C. § 2266(5) defines a "protection order" as:

> Any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence or contact or communication with or physical proximity to another person, including any temporary or final orders issued by civil or criminal courts whether obtained by filing an independent action or as a pendent lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and any support, child custody or visitation provisions, orders, remedies, or relief issued as part of a protection order, restraining order, or stay away injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, dating violence, sexual assault, or stalking.

The definition encompasses the various types of orders of protection that are issued in this state: ex parte protective orders, protective orders, mutual protective orders, child protective orders, jail release orders, pretrial protective orders, sentencing protective orders, and civil and criminal stalking injunctions.

### 12.2 Full faith and credit.

VAWA requires states and tribes to give full faith and credit to protective orders issued by another state or tribal court.[93] (18 U.S.C. § 2265). Utah has adopted the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, at Title

[93] The court must enforce the support, custody and visitation provisions that are part of the order. Enforcement may also be available under laws such as the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Uniform Interstate Family Support Act (UIFSA).

78B, Chapter 7, Part 3 of the Utah Code, to help implement VAWA's full faith and credit provisions. VAWA requires states and tribes to give full faith and credit to other states' or tribes' protective orders that were issued after the respondent was given "reasonable notice and an opportunity to be heard." (18 U.S.C. § 2265(b)(2)). Ex parte protective orders must be given full faith and credit if notice and an opportunity to be heard is provided within the time frames required by the state's statutes.[94]

VAWA states that registration is not required for an order to be enforced in the foreign state or tribe. (18 U.S.C.§ 2265(d)(2)). If a law enforcement officer responds to a domestic violence call and is presented with a protective order issued by another state, the officer must enforce the order if there is probable cause to believe that the order is valid, even if the order has not been registered in this state and is not found on the Statewide Domestic Violence Network. (§ 78B-7-304(1) and (4)). Even if a law enforcement officer is not presented with a copy of an order, the officer may consider other information to determine whether a valid foreign protective order exists. (§ 78B-7-304(2)).

A court of the state is required to enforce the provisions of a protective order from another state, even if the particular relief would not be available in this state. (§ 78B-7-303(1)). For example, if another state permits protective orders between individuals who are dating, a court of this state must enforce such an order even though dating protective orders are not available in this state.[95] If violation of a particular provision is a crime in the issuing state, the enforcing state must also treat it as a crime - i.e. violation of a protective order. A person has standing to enforce an order in this state if the person has standing to enforce the order in the issuing state. (§ 78B-7-303(2)).

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[94]At the time an ex parte order is enforced in a foreign jurisdiction, the enforcing state will not know whether the opportunity to be heard will, in fact, occur within the appropriate time frames. The ex parte order is enforceable if the respondent has been served with the ex parte order, and the respondent will have an opportunity to be heard within a reasonable time after the order was issued, "in a manner consistent with the rights of the respondent to due process." (§ 78B-7-303). Law enforcement entities or a court will consider how soon the respondent will be receiving a hearing in determining whether due process is being met.

[95] Protective orders are entitled to full faith and credit even if they do not involve "intimate partners," as defined by federal law. The issue of whether an order involves intimate partners is important for weapons restrictions as discussed below.

## 12.3 Registration of foreign orders.

Utah Code § 78B-7-116 creates a process for registering foreign orders. Although a person is not required to register a foreign order for it to be enforced, there are benefits to registration.[96] A registered order will be entered into the Statewide Domestic Violence Network. (§ 78B-7-116(2)(d)). The network is used by law enforcement officers when responding to domestic violence calls and orders on the network are presumed valid. This will allow officers to enforce a foreign order without question. Registration will also allow the individual to take advantage of court remedies, such as contempt, to ensure that the respondent complies with the order.

To register an order, the petitioner must present a certified copy of the foreign order to the clerk of the district court. (§ 78B-7-116(2)(a)). The person may register the order in any district court within the state. (§ 78B-7-116(2)(a)). Along with the order, the petitioner must sign an affidavit, affirming that the order is valid and that the respondent has been served with the order. (§ 78B-7-116(2)(b)). The form affidavit is found on the judiciary's website at: www.utcourts.gov/resources/forms/protectorder/forms.html. The clerk who receives the order opens a cohabitant abuse case and files the order. The clerk enters the order into the Statewide Domestic Violence Network. (§ 78B-7-116(2)(d)). The clerk then provides a certified copy of the order to the petitioner to show that the order has been registered. (§ 78B-7-116(f)). The court is not required to take any additional action unless and until requested by one of the parties. Neither the petitioner nor the court is required to notify the respondent that the order has been registered. A person who violates a foreign protective order is subject to the same penalties as a violation of a Utah protective order. (§ 78B-7-116(4)).

## 12.4 Enforcement of foreign orders.

As stated, registration is not required for law enforcement to enforce a valid foreign protective order. A foreign protective order is valid whether it is issued as a part of an independent action or issued in another type of proceeding, such as a protective order issued as a part of a divorce. (§ 78B-7-303(1)). The court enforces the order according to the substantive terms of the issuing state, but follows the procedures of this state for enforcing protective orders. (§ 78B-7-303(1)).

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[96] Although a state is required to enforce the provisions of a valid foreign protection order even if the order is not registered, it would seem necessary for such an order to be registered with a court in order for the court to civilly enforce the provisions, such as through order to show cause proceedings.

The court is required to enforce custody and visitation provisions if the custody and visitation provisions were issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing state. (§ 78B-7-303(3)). In other words, a person may not enforce custody or visitation provisions in a protective order issued by one state, if the provisions are contrary to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), in that custody and visitation orders were settled in a different state.

A court may enforce the provisions of a mutual foreign protective order only if the respondent also filed a pleading in the issuing state seeking a protective order, and the tribunal of the issuing state made specific findings in favor of the respondent. (§ 78B-7-303(7)).

The juvenile court has jurisdiction to enforce foreign protective orders if the juvenile court would have had jurisdiction over the order if it had originally been issued in this state.[97] (§ 78B-7-303(8)(a)).

**12.5 Weapons**.

The Violence Against Women Act contains provisions on a domestic violence perpetrator's ability to own, possess, or transport firearms or ammunition. Individuals who are subject to civil and criminal protective orders involving intimate partners are prohibited from owning, possessing, or transporting a firearm.[98] (18 U.S.C. § 922(g)(9)). However, there is an exception for law enforcement officers and military personnel when on actual duty. (18 U.S.C. § 925(a)(1). The prohibition applies to them when they are off-duty. Individuals who are convicted of misdemeanor domestic violence offenses are also prohibited from owning, possessing or transporting firearms or ammunition and there is no police or military exemption.[99] (18 U.S.C. § 922(g)(8)). In order to help enforce

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[97] Section 78B-7-116 states that foreign protective orders are only filed and registered in a district court. It is therefore not clear how the juvenile court would obtain jurisdiction over a foreign protective order and enforce its provisions, except perhaps as a part of an independently filed child welfare case.

[98] 18 U.S.C. § 921(a)(32) defines intimate partner as "the spouse of the person, a former spouse of the person, an individual who is a parent of the child of the person, and an individual who cohabitates or has cohabitated with the person."

[99] Not every crime defined as a domestic violence offense in Utah will result in a federal firearms restriction. 18 U.S.C. § 921(a)(33) defines a qualifying misdemeanor as one that "has as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,

these provisions in criminal cases, the Utah Rules of Criminal Procedure contains two provisions that require courts to notify defendants of the federal restrictions.[100]

Rule 11(g) of the Utah Rules of Criminal Procedure requires the court to provide a warning when a defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence. The court must warn the defendant that "it is unlawful for the defendant to possess, receive or transport any firearm or ammunition" as a result of the plea. If the court fails to warn the defendant, the failure will not invalidate the plea. However, courts should ensure that this warning is given in appropriate cases so that defendants are aware of the consequences, which will allow defendants to take immediate action to avoid additional criminal penalties in the future.

Rule 22(c)(2) of the Utah Rules of Criminal Procedure states that if a defendant is convicted of a misdemeanor crime of domestic violence, the court must provide the same type of warning as in Rule 11(g). The warning is given at the time of sentencing. Under both Rule 11 and Rule 22, the court can provide this warning either orally or in writing.[101]

The federal government has established a national instant criminal background check system for weapons purchases. States are required to place qualifying domestic violence offenses and protective orders onto this system to ensure that individuals who are disqualified from purchasing weapons may be identified no matter where they travel

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committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim." For example, telephone harassment between cohabitants may be a domestic violence crime in this state, but because the offense may not include an element of physical force, the offense will not qualify under federal law. Conversely, there may be situations that warrant federal firearms restrictions even though the situation does not constitute a domestic violence crime in this state. For example, in United States v. Cuervo, 354 F.3d 969 (8th Cir. 2004) the court stated a person "similarly situated" could include a boyfriend-girlfriend relationship even though there has not been cohabitation. Such a situation would not constitute a domestic violence offense in this state.

[100] An individual will be restricted under federal law whether or not the state court orders such restrictions. The state court may be more restrictive than federal law requires, but may not be less restrictive.

[101] The rules require the warning to be given in all domestic violence cases under state law even though the offenses may not, in fact, be disqualifying under federal law. The rules err on the side of ensuring that defendants are warned.

throughout the country. The state courts play an important role in identifying qualifying domestic violence offenses and protective orders, and in communicating that information to appropriate authorities.

## Terminology

"Abuse" (Cohabitant Abuse Act) means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm. (§ 78B-7-102(1))

"Abuse" (Rights of Crime Victims Act) means treating the crime victim in a manner so as to injure, damage, or disparage. (§ 77-38-2(1))

“Abuse” (Child Protective Orders) means physical abuse or sexual abuse. (§ 78B-7-201(1))

"Child" means a person who is younger than 18 years of age, unless otherwise specified in statute. The rights to information as extended in this chapter also apply to the parents, custodian, or legal guardians of children. (§ 77-37-2(1))

"Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

(a) is or was a spouse of the other party;
(b) is or was living as if a spouse of the other party;
(c) is related by blood or marriage to the other party;
(d) has one or more children in common with the other party;
(e) is the biological parent of the other party's unborn child; or
(f) resides or has resided in the same residence as the other party.

"Cohabitant" does not include:

(a) the relationship of natural parent, adoptive parent, or step-parent to a minor; or
(b) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.
(§ 78B-7-102(2))

"Conviction" means:

(a) a verdict or conviction;
(b) a plea of guilty or guilty and mentally ill;
(c) a plea of no contest; or
(d) the acceptance by the court of a plea in abeyance.
(§ 76-5-106.5(1)(a))

"Course of conduct" means two or more acts directed at or toward a specific person, including:

(i) acts in which the actor follows, monitors, observes, photographs, surveils, threatens, or communicates to or about a person, or interferes with a person's property:
(A) directly, indirectly, or through any third party; and
(B) by any action, method, device, or means; or
(ii) when the actor engages in any of the following acts or causes someone else to engage in any of these acts:
(A) approaches or confronts a person;
(B) appears at the person's workplace or contacts the person's employer or coworkers;
(C) appears at a person's residence or contacts a person's neighbors, or enters property owned, leased, or occupied by a person;
(D) sends material by any means to the person or for the purpose of obtaining or disseminating information about or communicating with the person to a member of the person's family or household, employer, coworker, friend, or associate of the person;
(E) places an object on or delivers an object to property owned, leased, or occupied by a person, or to the person's place of employment with the intent that the object be delivered to the person; or
(F) uses a computer, the Internet, text messaging, or any other electronic means to commit an act that is a part of the course of conduct.
(§ 76-5-106.5(1)(b))

“Court clerk” means a district court clerk. (§ 78B-7-102(4))

"Department" means the Department of Public Safety. (§ 77-36-1(2))

"Dignity" means treating the crime victim with worthiness, honor, and esteem. (§ 77-38-2(2))

"Divorced" means an individual who has obtained a divorce under Title 30, Chapter 3, Divorce. (§ 77-36-1(3))

"Domestic violence" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. Domestic violence also means commission or attempt to commit, any of the following offenses by one cohabitant against another:
(a) aggravated assault, as described in Section 76-5-103;
(b) assault, as described in Section 76-5-102;

(c) criminal homicide, as described in Section 76-5-201;
(d) harassment, as described in Section 76-5-106;
(e) electronic communication harassment, as described in Section 76-9-201;
(f) kidnapping, child kidnapping, or aggravated kidnapping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;
(g) mayhem, as described in Section 76-5-105;
(h) sexual offenses, as described in Title 76, Chapter 5, Part 4, Sexual Offenses, and Title 76, Chapter 5b, Part 201, Sexual Exploitation of a Minor;
(i) stalking, as described in Section 76-5-106.5;
(j) unlawful detention, as described in Section 76-5-304;
(k) violation of a protective order or ex parte protective order, as described in Section 76-5-108;
(l) any offense against property described in Title 76, Chapter 6, Part 1, Property Destruction, Part 2, Burglary and Criminal Trespass, or Part 3, Robbery;
(m) possession of a deadly weapon with intent to assault, as described in Section 76-10-507;
(n) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508;
(o) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with any of the domestic violence offenses otherwise described in this Subsection (4). Conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (4)(o), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Section 921, and is exempt from the provisions of the federal Firearms Act, 18 U.S.C. Section 921 et seq.; or
(p) child abuse as described in Section 76-5-109.1.
(§ 77-36-1(4))

“Emotional distress” (Stalking statute) means significant mental or psychological suffering, whether or not medical or other professional treatment or counseling is required. (§ 76-5-106.5(1)(d))

"Ex parte protective order" means an order issued without notice to the defendant in accordance with Title 78B, Chapter 7. (§ 78B-7-102(6))

"Fairness" means treating the crime victim reasonably, even-handedly, and impartially. (§ 77-38-2(3))

"Family member" means spouse, child, sibling, parent, grandparent, or legal guardian. (§ 77-37-2(2))

“Foreign protection order” means a protection order issued by a tribunal of another state. (§ 78B-7-302(1))

"Harassment" means treating the crime victim in a persistently annoying manner. (§ 77-38-2(4))

"Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months. (§ 76-5-106.5(1)(c))

"Important criminal justice hearings" or "important juvenile justice hearings" means the following proceedings in felony criminal cases or cases involving a minor's conduct which would be a felony if committed by an adult:

(a) any preliminary hearing to determine probable cause;
(b) any court arraignment where practical;
(c) any court proceeding involving the disposition of charges against a defendant or minor or the delay of a previously scheduled trial date but not including any unanticipated proceeding to take an admission or a plea of guilty as charged to all charges previously filed or any plea taken at an initial appearance;
(d) any court proceeding to determine whether to release a defendant or minor and, if so, under what conditions release may occur, excluding any such release determination made at an initial appearance;
(e) any criminal or delinquency trial, excluding any actions at the trial that a court might take in camera, in chambers, or at a sidebar conference;
(f) any court proceeding to determine the disposition of a minor or sentence, fine, or restitution of a defendant or to modify any disposition of a minor or sentence, fine, or restitution of a defendant; and
(g) any public hearing concerning whether to grant a defendant or minor parole or other form of discretionary release from confinement.
(§ 77-38-2(5))

"Jail release court order" means a written court order:

(a) specifying and limiting the contact a person arrested for a domestic violence offense may have with an alleged victim or other specified individuals; and
(b) specifying other conditions of release from jail as required in Subsection 77-36-2.5(2).
(§ 77-36-1(6))

"Law enforcement unit" or "law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of

the criminal statutes and ordinances of this state or any political subdivision. (§ 78B-7-102(8))

"Marital status" means married and living together, divorced, separated, or not married. (§ 77-36-1(7))

"Married and living together" means a man and a woman whose marriage was solemnized under Section 30-1-4 or 30-1-6 and who are living in the same residence. (§ 77-36-1(8))

"Not married" means any living arrangement other than married and living together, divorced, or separated. (§ 77-36-1(9))

"Peace officer" means those persons specified in Title 53, Chapter 13, Peace Officer Classifications. (§ 78B-7-102(9))

"Pretrial protective order" means a written order:

(a) specifying and limiting the contact a person who has been charged with a domestic violence offense may have with an alleged victim or other specified individuals; and

(b) specifying other conditions of release pursuant to Subsection 77-36-2.5(3)(c), Subsection 77-36-2.6(3), or Section 77-36-2.7, pending trial in the criminal case. (§ 77-36-1(10))

"Protective order" means an order issued pursuant to Title 78B, Chapter 7 subsequent to a hearing on the petition, of which the petitioner and respondent have been given notice. (§ 78B-7-102(10))

"Reasonable person" means a reasonable person in the victim's circumstances. (§ 76-5-106.5(1)(e))

"Reliable information" means information worthy of confidence, including any information whose use at sentencing is permitted by the United States Constitution. (§ 77-38-2(6))

"Representative of a victim" means a person who is designated by the victim or designated by the court and who represents the victim in the best interests of the victim. (§ 77-38-2(7))

"Respect" means treating the crime victim with regard and value. (§ 77-38-2(8))

"Sentencing protective order" means a written order of the court as part of sentencing in a domestic violence case that limits the contact a person who has been convicted of a domestic violence offense may have with a victim or other specified individuals pursuant to Sections 77-36-5 and 77-36-5.1. (§ 77-36-1(11))

"Separated" means a man and a woman who have had their marriage solemnized under Section 30-1-4 or 30-1-6 and who are not living in the same residence. (§ 77-36-1(12))

“Stalking” occurs when a person intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person:

(a) to fear for the person's own safety or the safety of a third person; or
(b) to suffer other emotional distress.
(§ 76-5-106.5(2))

Stalking also occurs when a person intentionally or knowingly violates:

(a) a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions; or
(b) a permanent criminal stalking injunction pursuant to section 76-5-106.5. (§ 76-5-106.5(3))

"Text messaging" means a communication in the form of electronic text or one or more electronic images sent by the actor from a telephone or computer to another person's telephone or computer by addressing the communication to the recipient's telephone number. (§ 76-5-106.5(1)(g))

"Victim" means a person against whom a crime has allegedly been committed, or against whom an act has allegedly been committed by a juvenile or incompetent adult, which would have been a crime if committed by a competent adult. (§ 77-37-2(3)) It also means a cohabitant who has been subjected to domestic violence. (§ 77-36-1(13))

"Victim of a crime" means any natural person against whom the charged crime or conduct is alleged to have been perpetrated or attempted by the defendant or minor personally or as a party to the offense or conduct or, in the discretion of the court, against whom a related crime or act is alleged to have been perpetrated or attempted, unless the natural person is the accused or appears to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct or a crime or act arising from the same conduct, criminal episode, or plan as the crime is defined under the laws of this state. (§ 77-38-2(9))

"Witness" means any person who has been subpoenaed or is expected to be summoned to testify for the prosecution or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether any action or proceeding has commenced. (§ 77-37-2(4))