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JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS

VOLUME 6 ❖ 2005

COURTS RESPONDING TO DOMESTIC VIOLENCE

PARENTAGE ISSUES CHALLENGING CALIFORNIA'S JUDICIAL SYSTEM

PERSPECTIVES

JUDICIAL COUNCIL OF CALIFORNIA ❖ ADMINISTRATIVE OFFICE OF THE COURTS

Journal of the Center for Families, Children & the Courts

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The *Journal of the Center for Families, Children & the Courts* is a periodical dedicated to publishing a full spectrum of viewpoints on issues regarding children, families, and the interplay between these parties and the courts. Focusing on issues of national importance, the journal encourages a dialogue for improving judicial policy in California.

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The *Journal of the Center for Families, Children & the Courts* welcomes submissions addressing contemporary issues in family and juvenile law, the administration of family and juvenile courts, and the provision of court-connected services to children and families. The journal seeks to foster dialogue among various practical and academic disciplines, and so invites contributions from the fields of law, court administration, medicine and clinical psychology, the behavioral and social sciences, and other disciplines concerned with the welfare of children and families.

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Editor's Note

The Judicial Council of California and the Administrative Office of the Courts are pleased to present Volume 6 of the *Journal of the Center for Families, Children & the Courts,* which focuses on court responses to domestic violence. The Judicial Council has signaled its ongoing concern about the significant issues presented in domestic violence cases by recently naming a statewide task force to study ways to improve court practice and procedure in those cases. The task force, in collaboration with expert and innovative judges and court administrators, will consider recommendations to improve protective-order forms, develop procedural guidelines, and improve the accurate and timely entry of restraining orders into the statewide database. The council's overarching goal is to ensure fair, expeditious, and accessible justice for domestic violence litigants while promoting both victim safety and perpetrator accountability.

The council's overarching goal is to ensure fair, expeditious, and accessible justice for domestic violence litigants while promoting both victim safety and perpetrator accountability.

The articles in the focus section cover a broad range of domestic violence issues that confront our courts. Professor Emily J. Sack leads off by providing background on federal and state gun seizure laws and suggesting best practices on the issue of gun seizure in domestic violence cases. Then Judge Donna J. Hitchens and Dr. Patricia Van Horn discuss the effects of witnessing domestic violence on children and make specific recommendations about ways that the courts can work together to better serve children and families, including proposed policies to protect children's interests. Next, Lisa Lightman and Francine Byrne grapple with the challenges and potential benefits of addressing the co-occurrence of substance abuse and domestic violence through the model of problem-solving courts. Mary Twomey, Mary Joy Quinn, and Dr. Emily Dakin shed light on elder abuse and domestic violence in late life by providing background information: the incidence and prevalence of elder abuse, theories

on the reasons elder abuse occurs, and barriers to services specific to older victims. Finally, Dr. Peter G. Jaffe, Dr. Claire V. Crooks, and Judge Frances Q.F. Wong tackle the role of the family court in domestic violence cases, particularly in determining parental contacts following allegations of domestic violence. They provide strategies for courts to limit the opportunities for children to be exposed to parental conflict and violence.

We have devoted our issues forum section to parentage issues challenging California's judicial system. First we introduce the subject through an edited and abridged transcript of a Fred Friendly Seminar on parentage presented at the Administrative Office of the Courts, Center for Families, Children & the Courts' annual Beyond the Bench conference held in December 2004. With Professor Charles J. Ogletree as moderator, a panel of well-known experts wrestle with the issue "What Is a Family?" Then Frank H. Free provides a brief primer on pre-2005 case law addressing nonbiological "presumed parents." Diana Richmond advances the premise that parentage should be determined by using the "intention-of-the-parties" method employed in assisted reproductive technology cases, and she discusses California Supreme Court decisions in three same-sex parentage cases decided in August 2005. Jenny Wald closes with an analysis of California's Uniform Parentage Act, its protection of this state's children, and its place in the discussion about the three recently decided same-sex parentage decisions.

Our Perspectives section features some thoughts by Justice Laurence D. Kay (Ret.) on the essential elements needed for courts to be fair, efficient, and accessible in domestic violence cases. And Judge Ronald Adrine and Michael W. Runner discuss prevention strategies, review research on men's attitudes toward domestic violence, and introduce some research-based initiatives to engage men and boys.

We welcome your comments and suggestions on how we can improve the journal to ensure that it continues to feature a full spectrum of viewpoints on issues regarding the interplay between children, families, and the courts in order to encourage a dialogue for improving judicial policy in California.

—Chris Cleary

Contributors

Hon. Ronald Adrine has served on the bench of the Cleveland (Ohio) Municipal Court since 1981. He served as a member of the Governor's Task Force on Family Violence in Ohio, the Ohio Attorney General Victims Assistance Advisory Board, the Domestic Violence Task Force of the Ohio Victims Assistance Advisory Board, and the Supreme Court of Ohio's Domestic Violence Task Force. He also serves as chair of the board of directors of the Family Violence Prevention Fund and was elected to serve as the first chair of Cleveland's Domestic Violence Coordinating Council. Judge Adrine has lectured extensively on domestic violence issues for a host of organizations, associations, and governmental agencies, and he chairs the faculty of the National Judicial Institute on Domestic Violence, a joint initiative of the National Council of Juvenile and Family Court Judges and the Family Violence Prevention Fund financed by the U.S. Department of Justice.

Francine Byrne, M.A., has been a senior research analyst with the AOC Center for Families, Children & the Courts since September 2004. Before joining the CFCC, she was a project coordinator for the Center for Health Care Evaluation in Palo Alto. She has collaborated on projects related to Court Appointed Special Advocates and the area of guardianship and recently completed a multiphase, statewide cost-benefit evaluation of drug courts. She received a master's degree in sociology from the University of Massachusetts in Boston and a bachelor's in international relations from California Lutheran University.

Claire Crooks, Ph.D., C.Psych., is associate director of the Centre for Addiction and Mental Health, Centre for Prevention Science. She is also an assistant professor at the Centre for Research on Violence Against Women and Children and an adjunct professor in the Psychology Department at The University of Western Ontario. In February 2005, Crooks provided testimony on understanding the intersection between domestic violence and divorce as an issue relevant to the U.N. Convention on the Rights of the Child to the Senate Committee on Human Rights for the Canadian federal government. She co-founded the Caring Dads program, a parenting intervention for men who have maltreated their children. Crooks has co-authored numerous articles and chapters on topics including children's exposure to domestic violence, child custody and access, adolescent dating violence and risk behavior, intervening with fathers who maltreat their children, and trauma.

Emily Dakin, M.S.S.A., Ph.D., is a National Institutes of Health postdoctoral research fellow at the University of California at San Francisco, where she is evaluating the use of multidisciplinary teams and geriatric assessments in elder abuse cases. Dakin previously was coordinator of the Institute on Aging's information and referral program and was assistant director of its elder abuse prevention program. She received a bachelor's degree in psychology from Oberlin College and a master of science in social administration and a Ph.D. in social welfare from Case Western Reserve University.

Frank H. Free is an attorney in private practice in Oakland, emphasizing juvenile dependency, family, and criminal law in both the trial and the appellate courts. He is a graduate of the University of California at Berkeley and Golden Gate University School of Law. He represented the presumed father in *In re Nicholas H.,* discussed in his article. Free is a member of the Amicus Committee of the Northern California Association of Counsel for Children.

Hon. Donna J. Hitchens was the presiding judge of the Superior Court of California, County of San Francisco from 2003 to 2005, after many years of serving as the presiding judge of the unified family court. In 2001 she was awarded the Benjamin Aranda III Access to Justice Award. Sponsored by the Judicial Council, the State Bar, and the California Judges Association, the award is presented annually to a trial judge or appellate justice whose activities demonstrate a long-term commitment to improving access to the courts for low- and moderate-income Californians. Judge Hitchens was instrumental in securing federal grants that assisted San Francisco County's selection as a demonstration site for the SafeStart Initiative and the Greenbook Project, both projects dealing with issues of family violence.

Peter G. Jaffe, Ph.D., C.Psych., is a member of the clinical adjunct faculty for the Departments of Psychology and Psychiatry at The University of Western Ontario and academic director at the university's Centre for Research on Violence Against Women and Children. He was the founding director of the Centre for Children and Families in the Justice System (London, Ontario, Canada), a children's mental health center specializing in issues that bring children and families into the justice system, and the founding chair of the London Coordinating Committee to End Woman Abuse. He is currently actively involved in research on the impact of family violence on children. He serves as a faculty member of the family violence department of the National Council of Juvenile and Family Court Judges' "Enhancing Judicial Skills in Domestic Violence Cases" workshops. Jaffe has co-authored several books on domestic violence, including *Children of Battered Women,* 21 *Developmental Clinical Psychology and Psychiatry* (with David A. Wolfe and Susan Kaye Wilson, Sage Publ'ns 1990), and edited *Working Together to End Domestic Violence* (Nancy K.D. Lemon et al., Mancorp Publ'g 1996).

Hon. Laurence D. Kay recently retired as presiding justice of the Court of Appeal, First Appellate District, Division Four (San Francisco). Justice Kay was appointed in September 2005 by Chief Justice Ronald M. George to chair a new statewide task force that will study ways to improve practice and procedure in domestic violence cases. While serving on the appellate court, Justice Kay authored more than 40 published opinions and participated in hundreds of other cases. Appointed to the Judicial Council of California in 2002, he served as vice-chair of the council's Policy Coordination and Liaison Committee and is outgoing chair of the Rules and Projects Committee. He received the Trial Judge of the Year award from San Francisco Trial Lawyers Association in 1994 and the Appellate Justice of the Year award in 2004 from Consumer Attorneys of California.

Contributors, continued

Lisa Lightman, M.A., is a court services analyst with the AOC Center for Family, Children & the Courts' Family Dispute Resolution unit, where she organizes training and education programs for family court mediators and evaluators. In her former position with the Collaborative Justice Programs unit of the AOC's Executive Office Programs Division, she was responsible for developing communications strategies and training and educational outreach about innovative court programs for court staff and key stakeholders. Lightman is a current faculty member for the National Drug Court Institute's adult drug court training initiative. She began her career in drug courts as the statewide director of drug courts at New Mexico's Administrative Office of the Courts. She has a liberal arts degree from Hampshire College and a master's degree in public policy from Tufts University in Medford, Massachusetts.

Mary Joy Quinn, R.N., M.A., served as a conservatorship investigator for 12 years and has been the director of the Superior Court of San Francisco County's probate court since 1989. She received a B.S. degree from the University of Oregon and an M.A. from the University of San Francisco. She has written and lectured extensively in the fields of elder abuse and neglect, undue influence, and conservatorship of adults. She serves as a commissioner on the American Bar Association's Commission on Law and Aging and is a member of the Judicial Council's Probate and Mental Health Advisory Committee. In 2004, the U.S. General Accounting Office recognized the work of San Francisco County's probate court by designating it as one of four exemplary probate courts in the United States.

Diana Richmond is a partner in the law firm of Sideman & Bancroft LLP in San Francisco and was trial and appellate counsel for E.G. in the case of *K.M. v. E.G.* decided by the California Supreme Court. A certified family law specialist since 1980, she is co-editor (with Kathryn Kirkland and Ira Lurvey) of *California Family Law Practice and Procedure, Second Edition* (LexisNexis/Matthew Bender 1994 & updates).

Michael W. Runner is the Family Violence Prevention Fund's (FVPF) director of legal programs, which includes the FVPF partnership in the National Judicial Institute on Domestic Violence, a joint project with the U.S. Department of Justice Office on Violence Against Women and the National Council of Juvenile and Family Court Judges. Since 1999, the National Judicial Institute has presented a three-day, comprehensive domestic violence workshop, "Enhancing Judicial Skills in Domestic Violence Cases," to more than 800 state court judges nationwide. For 10 years, Runner was the assistant director for programs of the AOC Center for Judicial Education and Research.

Emily J. Sack, M.A., M.Phil., J.D., is an associate professor of law at Roger Williams University School of Law, where she teaches criminal law, domestic violence law, and family law. She helped develop the first domestic violence courts in New York State and the Manhattan Family Treatment Court, which handles cases of parents charged with child neglect due to substance abuse. The Manhattan court received an Innovations in American Government Award from the Ford Foundation and Harvard University. Sack continues to be interested in the development of specialized courts and court reform initiatives, and her research focuses on the tensions in areas where family law and criminal law intersect, such as domestic violence and child neglect. She received her juris doctor from New York University School of Law and her master's degrees in European history from Columbia University.

Mary Twomey, M.S.W., is the director of the San Francisco Consortium for Elder Abuse Prevention, a program of the Institute on Aging. Twomey was formerly director of social services at the Volunteer Legal Services Program of the Bar Association of San Francisco. She spent 11 years with the national office of the American Association of Retired Persons in Washington, D.C., where she coordinated the National Guardianship Monitoring Project, a program that worked with judges and court staff throughout the country to improve the courts' oversight of adults under conservatorship and guardianship.

Patricia Van Horn, Ph.D., J.D., is a licensed clinical psychologist, a staff psychologist, and assistant clinical professor in the Department of Psychiatry at the University of California at San Francisco and the director of training of the UCSF Child Trauma Research Project located at San Francisco General Hospital. Van Horn received her J.D. in 1970 from the University of Colorado School of Law and her Ph.D. in 1996 from the Pacific Graduate School of Psychology. Her current work at the Child Trauma Research Project is with children under age 6 who have witnessed domestic violence. Van Horn was the lead planner for the San Francisco SafeStart Initiative and is a member of the steering committee of the Youth Family Violence Court in San Francisco's unified family court. She has lectured widely on the subjects of early childhood development and the impact on young children of witnessing domestic violence.

Jenny Wald is a managing associate at the Hersh FamilyLaw Practice in San Francisco, where her practice focuses on trial and appellate work and she specializes in complex legal issues and cases involving same-sex parentage. She completed mediation training with the Northern California Mediation Center and has mediated dissolutions and other family law disputes. From May 2002 to June 2003 Wald was a child custody attorney with the Administrative Office of the Courts, Center for Families, Children & the Courts. She is also on the faculty of San Francisco Law School, where she has taught legal writing and community property. She graduated from University of California, Hastings College of the Law in 1997.

Contributors, continued

Hon. Frances Q.F. Wong serves in the First Judicial Circuit of the State of Hawai'i and is currently assigned as a deputy chief judge and senior judge of the family court. Judge Wong has also presided over the O'ahu Drug Court and the felony criminal motions calendar. She was first appointed as a district family judge in 1983 and was subsequently appointed to the circuit court in 1992. She is currently planning a girls' court and recently received a three-year Juvenile Accountability Block Grant from the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, to further her efforts. Judge Wong obtained her juris doctor from the University of Southern California Law Center.

COURTS RESPONDING TO DOMESTIC VIOLENCE

Illustration, page 1:

"My Life"

Deanna

Age 10

2004 Children's Art & Poetry Contest

Confronting the Issue of Gun Seizure in Domestic Violence Cases

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Despite the clear goal of federal and state firearms laws—to protect victims—confronting the issue of guns and domestic violence raises complex legal and practical concerns for the courts and law enforcement agencies that are grappling with the laws' implementation. Yet the numbers make it clear that communities working together to improve their response to domestic violence cannot afford to put off addressing these concerns.

This article briefly reviews the federal firearms laws relating to domestic violence and discusses issues regarding their interpretation, then examines the difficulties that have arisen in their enforcement. Next it analyzes state laws designed to address firearms and domestic violence and discusses legal issues that have arisen in their implementation. Finally, it concludes with several recommendations to state judges, law enforcement officials, and prosecutors for effective policies and procedures gleaned from the lessons of other jurisdictions. ■

Firearms caused 44 percent of the 61 homicides related to domestic violence in California's San Diego County between 1997 and 2003.[1] The New York State Commission on Domestic Violence Fatalities concluded in the late '90s that firearms were used in more than half of the domestic violence homicides it investigated.[2] In Washington State, almost 60 percent of the 209 victims of domestic violence homicides from January 1997 to August 2002 were killed with a firearm.[3] Nationally, the U.S. Department of Justice reported that more than two-thirds of spouse and ex-spouse homicide victims were killed by guns.[4] As the police chief in one New Hampshire town, who is also a member of the state's domestic violence fatality review committee, put it, "[T]he fact is that the vast majority of domestic violence homicides are committed by firearms.... And half of all homicides are domestic violence–related. I don't know what people don't understand about that."[5]

Federal firearms laws passed in the last decade provide authority to ban firearm possession by many domestic violence perpetrators. But despite the obvious risk created by the availability of firearms to abusers, most jurisdictions have not developed effective strategies for addressing the problem. This is, in part, because the federal laws have proven difficult to implement and have created confusion among state and federal law enforcement agencies and the courts about their proper roles in enforcing the laws. And while a growing number of states have enacted laws barring firearm possession by domestic violence offenders, many of the state laws have significant gaps and create inconsistencies between state and federal law. Moreover, in some jurisdictions, there is basic resistance to the concept of taking guns away from private citizens. Even assuming that appropriate laws are in place and agencies stand willing to enforce them, the actual procedures for surrendering or confiscating weapons, storing them, and returning them have proven difficult to develop and implement.

FEDERAL LAW ON DOMESTIC VIOLENCE AND FIREARM POSSESSION

In recognition of the heightened risk created by access to guns in domestic violence situations, Congress added a new provision to the Gun Control Act of 1968 as part of the Violence Against Women Act of 1994.[6] That provision,

18 U.S.C. § 922(g)(8), prohibits possession of a firearm or ammunition by any person subject to a protection order that meets certain criteria. The respondent must have received both actual notice and the opportunity to participate at a hearing held before the order was issued.[7] The order must restrain the respondent from harassing, stalking, or threatening an intimate partner or a child of the intimate partner or respondent, or from engaging in conduct that would place an intimate partner in reasonable fear of bodily injury to either the partner or the child.[8] In addition, the order must either include a finding that the respondent represents a "credible threat" to the physical safety of the intimate partner or child or, by its terms, must explicitly prohibit the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury.[9] The firearm prohibition lasts only as long as the protection order itself is in effect.

Congress also defined *intimate partner* in the law to mean the respondent's spouse, former spouse, parent, or child or "an individual who cohabitates or has cohabited with the respondent."[10] The provision contains an "official-use" exception, which exempts from the law police, military personnel, and other government employees who must use weapons in connection with their official duties.[11]

In 1996, Congress again amended the Gun Control Act to prohibit anyone previously convicted of a "misdemeanor crime of domestic violence" from possessing any firearm or ammunition.[12] At that time, the Gun Control Act already contained a provision barring all convicted felons from possessing firearms.[13] The provision included domestic violence felonies, together with all other felony crimes. But in many jurisdictions domestic violence crimes were undercharged or pleaded down to misdemeanors more frequently than other felonies. The 1996 law, known as the Lautenberg Amendment and codified at 18 U.S.C. § 922(g)(9), was designed to address this fact by expanding the firearm prohibition to domestic violence misdemeanors.[14]

A conviction must satisfy several requirements to trigger the federal weapon prohibition. The defendant must have been represented by counsel and, if entitled to a jury trial, must have received one (or waived that right).[15] The crime must

- have included the use or attempted use of physical force or the threatened use of a deadly weapon; and
- have been committed by a defendant who
  - was the current or former spouse, parent, or guardian of the victim, or
  - shared a child in common with the victim, or
  - was cohabiting with or had cohabited with the victim as a spouse, parent, or guardian, or
  - was similarly situated to a spouse, parent, or guardian of the victim.[16]

The federal provision, 18 U.S.C. § 922(g)(9), is applicable when the defendant has been convicted of a misdemeanor crime of domestic violence under federal or state law and the defendant thereafter knowingly receives or possesses a firearm or ammunition and the firearm or ammunition is transported in interstate or foreign commerce. The firearm prohibition for those convicted of a misdemeanor crime of domestic violence is permanent.[17] Unlike section 922(g)(8), this section has no "official-use" exception, so law enforcement officers, military personnel, and other government employees who require weapons to perform their duties are not exempted from the weapon prohibition.

LEGAL CHALLENGES TO THE FEDERAL FIREARMS LAWS

Numerous constitutional challenges have been mounted to both sections 922(g)(8) and 922(g)(9) on several different grounds. All have ultimately failed at the federal appellate level, and they are mentioned only briefly here. More significant in terms of shaping the law at both the state and federal levels have been legal challenges based on statutory interpretation.

CONSTITUTIONAL ARGUMENTS

Constitutional challenges to section 922(g)(9) have been made on equal protection grounds because the statute applies only to defendants convicted of domestic violence misdemeanors and not to any other misdemeanants. However, the courts have held that a rational basis exists to distinguish domestic violence misdemeanors from other misdemeanors, and that therefore there is no equal protection violation.[18] Defendants have argued that section 922(g)(9) violates the Ex Post Facto Clause, because it applies retroactively to convictions that occurred before the law was enacted. But because the law makes illegal only firearm possession that occurred *after* the law was enacted, there is no ex post facto issue.[19] Commerce Clause challenges have been made, particularly in the wake of *United States v. Morrison,* where the Supreme Court struck down another provision of the Violence Against Women Act on these grounds.[20] Yet, unlike the provision at issue in *Morrison,* the firearms laws contain an explicit jurisdictional element requiring that the weapons have been in or have affected interstate or foreign commerce.[21]

Several cases have challenged the statutes on Tenth Amendment grounds, arguing that firearm regulation is a right reserved to the states. The courts, however, have held that the federal government is not usurping state law or state officers by enacting these federal laws that are prosecuted federally.[22] There have also been some challenges on Second Amendment grounds, arguing that the restrictions on firearms violate an individual's right to bear arms. This argument, too, has been rejected by the courts, which have held that the Second Amendment does not prohibit regulation of firearms.[23]

While challenges to the federal firearms statutes have occurred quite frequently, particularly in the years just after the laws' enactment, it has become clear that no constitutional impediment bars enforcement of these laws.

STATUTORY INTERPRETATIONS

Case law interpretations of federal and state firearms laws primarily center on two separate questions: Does the crime fit the federal requirement that it be a "misdemeanor crime of domestic violence," and is the protection order a "qualifying protection order" under the federal law? The following review examines some state and federal decisions addressing those questions.

The "Misdemeanor Crime of Domestic Violence" in Section 922(g)(9)

The firearm prohibition in section 922(g)(9) applies only when a defendant has been convicted of a qualifying "misdemeanor crime of domestic violence," which must satisfy several criteria. But many states have no specific domestic violence crimes in their penal codes, so a domestic violence offender may be convicted under general assault, harassment, and other criminal statutes. In those cases, what makes a crime a "domestic violence crime" is the relationship between the defendant and victim, determined from the underlying facts of each case, but that is not an actual element that must be proven for conviction. The question then arises whether these convictions qualify as "misdemeanor crimes of domestic violence" under the federal law, which requires a certain relationship between the parties. Must the relationship between the defendant and victim be an element of the state criminal statute to meet the federal requirements, or would proof of such a relationship in the facts of the case satisfy these criteria?

In *City of Cleveland v. Carpenter,*[24] the defendant pled no contest to misdemeanor assault under Ohio law for punching his ex-wife and threatening to kill her.[25] The police had seized eight weapons from the defendant's home at the time of his arrest. The lower court held that the firearms should not be returned to the defendant because he had been convicted of a misdemeanor crime of domestic violence and therefore was prohibited under 18 U.S.C. § 922(g)(9) from possessing firearms. The defendant argued that the crime of assault for which he was convicted did not meet the federal definition of *misdemeanor crime of domestic violence,* because it contained no element of relationship between the defendant and victim.

The Ohio appellate court held that the federal definition did not require that the relationship be an element of the crime of which the defendant was convicted. Because there was no dispute that the conviction was a misdemeanor under state law and that it contained an element of use or attempted use of physical force, the definition was satisfied if the conviction included the use or threat of force and if the defendant and victim actually did have one of the connections identified in the federal statute.[26] The court affirmed the lower court's ruling denying the defendant's request for return of his eight weapons.[27]

Similarly, a New Jersey appellate court held that a person convicted of a simple assault offense under state law was convicted of a "misdemeanor crime of domestic violence," as required by the federal statute, when the assault involved the use or attempted use of physical force against that person's current or former spouse or domestic partner.[28] Still, state case law is not uniform on this issue. At least one Pennsylvania court recently came to the opposite conclusion, holding that to qualify as a "misdemeanor crime of domestic violence," the required relationship between defendant and victim must be an element of the crime, not just part of the underlying facts of a particular case.[29]

The federal courts have been more consistent in concluding that, for the crime to qualify under section 922(g)(9), the relationship between the parties does not have to be an element of the crime for which the defendant was convicted.[30] This does not mean, though, that the courts can look at all facts in a case to determine whether the qualifying relationship exists. Most recently, the Ninth Circuit Court of Appeals in *United States v. Nobriga* confirmed the courts' use of the "modified categorical approach" to determine whether the criminal conviction satisfied the definitional requirements of the federal statute.[31] Under this approach, the court looks only to formal court records, such as the charging instrument and the judgment of conviction, along with the statutory elements, to determine whether the defendant in fact was convicted of a "misdemeanor crime of domestic violence" as defined under the federal law.[32]

In *Nobriga,* the defendant pled guilty to "physically abus[ing] a family or household member."[33] But the court record did not establish that the defendant and victim had ever cohabited, nor did the parties meet any of the other relationship categories of the federal statute.[34] With no record to provide evidence of a qualifying relationship, the court held that the defendant's motion to dismiss his indictment for possessing a firearm after being convicted of a misdemeanor crime of domestic violence should have been granted.[35]

This case law demonstrates that, while the predominant interpretation of section 922(g)(9) does not require that the relationship between the parties be an actual statutory element of the misdemeanor crime, state prosecutors and judges nevertheless must be careful to put the relationship between the parties on the record as well as in court documents when the case involves a misdemeanor crime involving domestic violence. Doing so will establish the necessary predicate for a qualifying conviction in any future federal prosecution for illegal possession of firearms by a person convicted of a misdemeanor crime of domestic violence. Moreover, in states where the courts have found that a relationship must be an element of the crime to qualify, prosecutors and others should consider advocating legislation that will create specific domestic violence crimes where this relationship element will be included.

A Qualifying Protection Order Under Section 922(g)(8)

For the firearm prohibition of section 922(g)(8) to apply, the respondent must have both notice and an opportunity to be heard before the underlying protection order is issued—a basic requirement of due process. But, in most states, the protection order process includes an opportunity for petitioners to obtain a temporary ex parte order that lasts for several days, until the court holds a full hearing on a final protection order. The ex parte order must then be served on the respondent, with notice of the hearing date. This suggests that Congress intended for section 922(g)(8) to exclude temporary orders from

the firearm prohibition and to impose the weapons bar only when a final order has been issued, after the defendant has had an opportunity to contest the allegations. But, given the variety of protection orders and procedures for obtaining them under state laws, questions have arisen about what kind of due process is required to establish a qualifying order for purposes of that section.

In *United States v. Calor,* the Sixth Circuit Court of Appeals addressed the validity of the underlying protection order for purposes of a conviction under that section.[36] A domestic violence victim had obtained an ex parte emergency protection order against her husband that included provisions not to possess any firearms and to turn any firearms into the local law enforcement agency.[37] It was served on the defendant with notice of a hearing on the final order to be held a few days later.[38] On the day of the scheduled hearing, defendant's counsel requested an adjournment of the hearing for several days.[39] The court granted the adjournment and did not take testimony from sworn witnesses or receive other evidence. But because the ex parte order had expired on the day of the hearing, the court issued a second temporary order that was effective through the adjourned date.[40] A few days later, before the adjourned hearing date, the defendant violated the temporary order and was arrested.[41] A search of his vehicle revealed several handguns, so he was charged under section 922(g)(8) for possession of a firearm while subject to a valid protection order.[42]

The defendant argued that the protection order was not a valid predicate for the federal charge because it did not occur after a hearing that afforded the required due process.[43] The court rejected this argument, finding that though the hearing on the final order was adjourned, the defendant had been given notice of the original hearing date and had had an opportunity to participate before the court entered the second order extending the protection until the adjourned date.[44] This second order provided the predicate order for the defendant's prosecution under section 922(g)(8).[45] The court stated, "Given that the minimum requirements of the statute comport with the requirements of due process, we . . . declin[e] to embellish the hearing requirements explicitly set forth in [section] 922(g)(8)."[46]

In *United States v. Bunnell,*[47] the defendant challenged his conviction under section 922(g)(8) because he had not appeared at the hearing on the final order of protection, nor had counsel represented him.[48] But the court rejected defendant's argument, noting that the federal law only required the order to be issued after a hearing of which the defendant had had both notice and an opportunity to participate.[49] Although the defendant had been served and received actual notice of the hearing, he had chosen not to appear and avail himself of the process to which he was entitled.[50] This is not a violation of due process, so the order was a valid predicate for the federal firearms charge.[51]

The *Bunnell* case follows the traditional rule that when a defendant receives notice and opportunity to be heard but voluntarily defaults, any ruling by the court satisfies due process requirements. The *Calor* case, by contrast, reveals a quite liberal reading of due process and may even demonstrate the courts' willingness to broadly interpret section 922(g)(8)'s due process requirements for a protection order so that the firearm prohibitions will be more likely to apply.

IMPLEMENTATION OF THE FEDERAL FIREARMS LAWS

The new firearms laws significantly expanded the protections available to victims of domestic violence and made available to law enforcement additional tools to hold batterers accountable. Despite these improvements, these laws have not lived up to their promise, and several years after their enactment they remain severely underenforced.

One important reason is the lack of guidance that the laws provide on implementation or enforcement. Although violation of the provisions is a federal crime, their central underlying predicates, a protection order or a misdemeanor conviction, are most likely to be based on state law, and thus cases are handled in state courts. This dichotomy has blurred the

line of whether state or federal authorities possess the power and the responsibility to ensure that the laws are enforced. While obviously federal prosecutors must pursue violations of federal laws, knowledge about violations is more likely to reside with local law enforcement officials and judges who are aware of existing protection orders or misdemeanor convictions. And questions arise: Because a misdemeanor conviction or the issuing of a protection order occurs in state court, do state judges then have the responsibility or authority to confiscate weapons, and should local law enforcement be responsible for follow-up with abusers who are in violation of federal law because they have not surrendered weapons?

Federal prosecutors have not pursued these cases aggressively, and prosecutions under both sections 922(g)(8) and (9) remain relatively rare.[52] One commentator has calculated that from the time section 922(g)(8) took effect in 1995 through 2001, only 187 federal prosecutions were filed under the statute.[53] This represents a minuscule 1 percent of the approximately 6,000 federal gun possession charges filed each year.[54] This level of prosecution does not come close to reaching the number of eligible cases. Judge Richard A. Posner of the Seventh Circuit Court of Appeals has estimated that approximately 40,000 people violate section 922(g)(8) each year by possessing firearms while subject to a protection order.[55] Prosecutions under section 922(g)(9) are only slightly higher. Since that statute took effect in 1996, 379 cases have been filed, representing only 2 to 3 percent of total federal gun law prosecutions.[56]

Likely explanations for this low level of prosecution include both the structure of U.S. Attorneys' offices, in which domestic violence crimes may not fall naturally within a prosecution unit, and their culture, where prosecutions that rely on state-based convictions or orders may not be as prized as the more traditional white-collar criminal investigations and prosecutions. Given these traditional priorities, federal authorities may have limited resources available to enforce the federal firearms laws.[57] Perhaps the most important explanations for the underprosecution of the firearms laws, however, lie in the lack of coordination and communication between the state and federal systems of law enforcement and prosecution, the lack of clarity of state and federal roles, and some state jurisdictions' resistance to getting involved with federal law enforcement.

Some state and local law enforcement agencies view the federal laws as an infringement on state police power because those agencies are needed to enforce the federal law.[58] Moreover, the federal government provided no additional resources to the states to help them carry out their role in enforcing federal law.[59] Certain state and local agencies have even argued that they should create and enforce their own firearms laws in this area, rather than spend their own resources enforcing federal laws.[60] The 1996 Lautenberg Amendment, which did not exempt law enforcement officers themselves from the ban on firearms for anyone convicted of a domestic violence misdemeanor, has been particularly unpopular in the law enforcement community.[61]

Some state courts have resisted involvement in the federal ban on weapon possession. Substantial anecdotal evidence suggests that some judges are attempting to evade the federal law or are directly refusing to comply with it, particularly section 922(g)(8), through their direct involvement in setting the terms of a protection order.[62] Because the order must satisfy certain requirements to qualify as a predicate for a firearm prohibition under the code, some judges have refused to make the specific findings that would meet these requirements. Others have crossed out the language on protection order forms that notifies the defendant of the federal prohibition on weapon possession while the order is in effect,[63] have written on the protection order that the federal law does not apply, or have failed to check a box on the order noting a firearm prohibition.[64] Commentators have speculated that this refusal may sometimes be due to judges' personal beliefs in the right to own guns and their reluctance to limit such access to respondents.[65] It may be particularly relevant in jurisdictions where hunting is a popular pastime, because the federal law prohibits hunting rifles, along with handguns.[66]

State judges can certainly affect whether protection orders qualify for the federal firearm ban by making (or failing to make) specific findings that federal law requires.[67] Still, a determination of whether a protection order meets the requirements of a federal statute is made exclusively under federal law. State judges cannot control the application of federal law. Therefore, if a protection order by its terms *does* meet the requirements under federal law, the federal firearm prohibition will apply, notes or crossed-out text or unchecked boxes notwithstanding.[68]

Some state courts, however, have more fundamental concerns with the role of the state in implementing federal laws, particularly where differences may exist between state and federal law in this area. The New Jersey appellate court considered this issue in *State v. Wahl.*[69] The defendant was convicted of a domestic violence misdemeanor, and under state law his weapons were confiscated. Following state procedures regarding return of weapons seized in domestic violence cases, the state judge later ordered return of the weapons after finding that the victim did not feel threatened and did not object to the return. The state argued that federal law mandates a permanent ban on weapons possession for an offender convicted of misdemeanor domestic violence,[70] and it contended that this federal law preempted the state provision and therefore the weapons should not be returned.[71]

The appellate court noted that under the Supremacy Clause, the laws of the United States "shall be the supreme law of the land."[72] Therefore, state laws that "'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution,' are invalid."[73] Under preemption doctrine, federal law will preempt a state statute if it is impossible for a court to comply with both the federal and state laws or where the state law poses an obstacle to the intent of Congress.[74]

But the court found that the state and federal firearms laws in this area did *not* conflict and that the federal law was incorporated into the state statute, because state law provided grounds for barring the return of weapons in domestic violence cases if "the owner is unfit."[75] A defendant convicted of a misdemeanor crime of domestic violence is, by definition, "unfit" under the state statute and barred from possessing any firearms under state law, as well as under section 922(g)(9).[76] Therefore, the federal and state statutes *were* consistent and the federal preemption doctrine was not relevant.[77]

The Ohio appellate court in *Conkle v. Wolfe* also made this point.[78] The Ohio protection order statute permitted a court to include in a protection order such "other relief that the court considers equitable and fair."[79] Under this provision, the state court had enjoined the respondent from possessing weapons. The court considered whether this state law conflicted with section 922(g)(8), which requires a finding in a protection order that the subject "represents a credible threat to the physical safety of an intimate partner or child" to qualify for a prohibition on weapon possession.[80] The state court had made no such finding, which was not required under state law to invoke the catchall provision permitting the bar on weapon possession.[81]

The appellate court held that because Congress's intent was to assist states in regulating firearms, not to provide obstacles against such regulation, there was no conflict between the federal and state law, and thus the federal preemption doctrine did not apply.[82] The state court was able to follow its own law to enjoin the defendant from possessing weapons without making the "credible-threat" finding required under federal law.[83] In *Benson v. Muscari,*[84] the Vermont Supreme Court also noted that the federal preemption doctrine did not preempt the state's power to "impose a parallel restriction."[85]

The Ninth Circuit Court of Appeals recently addressed the potential conflict between state and federal laws regarding weapon prohibition for domestic violence misdemeanants.[86] In *United States v. Brailey,* a defendant was convicted in Utah of a misdemeanor crime of violence, which, under that state's law, did not bar him from possessing a weapon.[87] Brailey argued that the federal law must give this state law "full effect," and therefore he could not be prosecuted under section 922(g)(9).[88] But

the Ninth Circuit held that federal law, not state law, controlled the right of a defendant to possess a weapon under a federal statute.[89] Because under federal law a conviction for a misdemeanor crime of domestic violence makes firearm possession a federal crime, Brailey was properly charged with violating the federal law. In effect, the state and federal laws were two independent provisions, and neither controlled the other's application.

As these cases illustrate, the differing state and federal laws on firearms do not pose a Supremacy Clause issue, because the federal law is not preempting state law.[90] Rather, the laws are "parallel restrictions," both of which remain applicable. If in a certain circumstance a defendant would be subject to firearm prohibition under federal law but not state law, the federal law does not supersede the state statute.[91] Both laws would, however, be applied to the situation, with the conclusion that the defendant would not be in violation of state law but would be violating federal law by possessing weapons.[92]

STATE FIREARMS LEGISLATION IN DOMESTIC VIOLENCE CASES

Considering the myriad issues that have arisen in implementation of the federal firearms laws, several states that do not already have similar gun laws have moved to enact them. Although domestic violence offenders are already subject to the federal law, state legislation makes it straightforward that the state courts must implement the law and thereby prevents resistant judges from failing to enforce firearms laws in domestic violence cases. In addition, states can enact laws that broaden the definitions of eligible parties, the terms in protection orders, and other elements that can make it easier to prosecute firearms cases under state law. Local law enforcement officials are most familiar with handling domestic violence cases and are also better able to enforce state laws on firearms.[93]

Yet the state laws vary tremendously on central issues—both from each other and from federal law.[94] For example, the laws differ on whether weapon seizure is mandatory or discretionary, on the authorized method for weapon seizure and weapon return, and on the definition of the "intimate relationship" that makes a party eligible for a protection order.[95] They also vary considerably on whether the weapons must have been used in the domestic violence incident in order to permit their seizure, on the amount of time provided to the state to petition for forfeiture of the weapons, and on the balance of the burden placed on law enforcement and the defendant regarding return of the weapons.[96]

RESISTANCE TO STATE FIREARMS LEGISLATION: PENNSYLVANIA AND DELAWARE

Several states have not passed any legislation on the issue. Perhaps not surprisingly, proposed state firearms laws in these states have met with significant resistance.[97] For instance, proposed legislation in Pennsylvania was designed to expand police authority to seize weapons, not only in situations where a protection order is issued after an incident involving use or threat of use of the weapon, but in *any* situation after issuance of a protection order. A national organization, Gun Owners of America, contested the legislation, arguing that the protection orders resulted from ex parte proceedings where the respondent had no due process right, and stated that "[e]ven in the Orwellian world of leftist feminism, where legislators do what they're told to do by the politically correct, the lack of fundamental due process embodied in this legislation is breathtaking."[98]

While some firearms legislation did ultimately pass in Delaware, proposed legislation to prohibit firearm possession for five years by anyone who was convicted of a domestic violence misdemeanor or who violated a protection-from-abuse order encountered years of resistance by gun rights advocates.[99] The proposed law was narrower in scope than its federal counterpart, which prohibits firearm possession permanently on conviction of a domestic violence misdemeanor. However, the Delaware State Sportsmen's Association argued that a cause-and-effect relationship should be shown between a protection order violation and the possession of a gun

that indicated a risk of violence before the gun could be seized.[100] Another bill that passed the Delaware Senate in 1998 would have made it a felony to violate a protection order that included a prohibition against firearm possession, but gun-rights groups derailed the bill in the House.[101]

STATE LEGISLATION MORE LIMITED THAN FEDERAL LAW: OKLAHOMA, MONTANA, AND OHIO

Much of the state legislation is considerably narrower than sections 922(g)(8) and (9). For example, Oklahoma law requires officers to seize a weapon in a domestic violence incident, but this requirement applies only "when such officer has probable cause to believe such weapon or instrument *has been used to commit an act of domestic abuse . . . provided an arrest is made, if possible, at the same time.*"[102] The statute also requires the prosecutor to file a notice of the seizure and forfeiture within 10 days, or the weapons must be returned.[103] Montana law mandates that an officer seize weapons when responding to a call relating to assault on a partner or family member, but only if they have been "used or threatened to be used in the alleged assault."[104] Similarly, Ohio law permits seizure of weapons in alleged incidents of domestic violence or of violating a protection order but limits the seizure to those weapons used or threatened to be used or brandished during or in connection with the incident.[105]

STATE LEGISLATION WITH DIFFERENT BOUNDARIES THAN FEDERAL LAW: NEW YORK

Some state laws are broader in some respects than the federal laws, though narrower in others. In New York, for example, criminal and family courts have the power to suspend or revoke a firearms license when either a temporary or a final protection order is issued.[106] The suspension of a firearms license is mandatory when the court issues a protection order if it finds that the defendant has previously failed to comply with a protection order and the failure involved infliction of serious physical injury, use or threat of use of a deadly weapon, or behavior constituting a violent felony offense.[107] The court also may suspend the defendant's firearms license when it finds a substantial risk that the defendant may use or threaten to use a firearm unlawfully against the person for whose protection the order is issued.[108]

The definition of *intimate relationship* in section 922(g)(8) is quite narrow and does not include, for example, partners who have never lived together.[109] But in New York the state firearms laws apply to protection orders obtained in either family or criminal court and can include a broader definition of *relationship.*[110] On the other hand, New York has no law comparable to the prohibition on firearm possession for a person convicted of a misdemeanor crime of domestic violence in section 922(g)(9).[111] Some differences may also be noted between the federal and state laws in the weapons included in the definition of *firearms.*[112] In addition, impoundment of a weapon when a protection order is issued is discretionary under New York law, while such prohibition is mandatory under the federal statute if all the statutory elements are met for a qualifying protection order.[113]

STATE LEGISLATION MORE COMPREHENSIVE THAN FEDERAL LAW: NEW JERSEY AND ARIZONA

One of the most comprehensive firearms laws relating to domestic violence was passed in New Jersey. Under that state's Prevention of Domestic Violence Act, a court may issue a search warrant for weapons to accompany an ex parte temporary protection order, and a warrant form is a physical part of the temporary protection order form.[114] The law also provides a detailed procedure for forfeiture after weapons have been seized following issuance of a domestic violence protection order prohibiting such weapons. Prosecutors must petition within 45 days to obtain title to the weapons or revoke all licenses and permits for them, on the ground that "the owner is unfit or . . . poses a threat to the public in general or a person or persons in particular."[115] If the prosecutor fails to act within the required 45 days the weapons

must be returned.[116] The statute requires that after the hearing to determine title, the court "shall order the return" of the weapons in one of the following circumstances: (1) when the complaint has been dismissed at the victim's request and the prosecutor has determined that there is insufficient probable cause to indict, (2) if the defendant is found not guilty of the charges, or (3) if the court determines that the domestic violence situation no longer exists.[117]

Arizona's law also provides a detailed mechanism to seize weapons from a defendant in a domestic violence case.[118] At the scene of a domestic violence incident, a law enforcement officer may question anyone present to determine if there are firearms on the premises.[119] The statute then provides that "[u]pon learning or observing that a firearm is present on the premises, the peace officer may temporarily seize the firearm if the firearm is in plain view or was found pursuant to a consent to search and if the officer reasonably believes that the firearm would expose the victim or another person in the household to a risk of serious bodily injury or death."[120] The weapons must be held for at least 72 hours, and the victim must be notified before the firearms are released.[121] The statute also provides a procedure to retain the firearms if there is reasonable cause to believe that returning them may endanger the victim, the person who reported the incident, or others in the household.[122]

THE EVOLUTION OF STATE LEGISLATION: CALIFORNIA

The law in California has seen significant developments on this issue over the past several years. In 1990, the state Legislature passed an act that prevented a person who was the subject of a domestic violence protective order from purchasing or obtaining a gun.[123] But the law did not address confiscation of firearms already owned or possessed by the subject of the order.[124] In 1994, new legislation passed that attempted to remedy this gap and included a section on removing firearms from domestic violence abusers subject to restraining orders.[125] Under that law, at the hearing when a protective order was issued, the judge could also order surrender of firearms to the local police station, but only if the victim proved by a preponderance of the evidence that the defendant had a likelihood of using, displaying, or threatening to use a firearm in a future act of violence against the victim.[126] This was often difficult to prove, as information about the use or threat of use of a firearm was not routinely noted in police reports.[127] Judges also had the discretion to limit the gun restriction to a shorter period.[128] As one author stated, before passage of the Domestic Violence Prevention Act, "unless clear and convincing evidence existed that the offender would act violently in the future, courts remained reluctant to confiscate guns from domestic violence offenders."[129]

In 1999, domestic violence law enforcement was strengthened and assistance to victims was broadened[130] when the state amended the Domestic Violence Prevention Act, a 1993 law that consolidated a number of statutes that had been duplicated in various parts of California law.[131] Its firearms section was specifically drafted to be consistent with the federal provisions under 18 U.S.C. § 922(g)(8).[132] The 1999 law makes it illegal to possess, purchase, or receive a firearm while subject to a restraining order and requires the court to notify a defendant that such acts will violate the terms of the order.[133] The law no longer requires the court to issue a separate order regarding firearms, based on a finding that firearm use or threat of firearm use in future violence is likely.[134] Instead it eliminates the court's discretion on the issue and makes mandatory the relinquishment of all firearms.[135] Nor may the judge determine the length of time that the weapons must be confiscated: the time period is automatically equal to the period for which the protective order remains effective.[136]

The 1999 law also provided a procedure for relinquishing weapons. If the respondent is present at the protective order hearing, he or she must immediately relinquish any firearms possessed and has 24 hours to relinquish any other firearms, either by turning them in to local law enforcement or by selling them to a licensed dealer.[137] Within 72 hours of receiving

the order, the respondent must file a receipt with the court that proves that any firearms were either relinquished to police or sold.[138] Local law enforcement may also charge a storage fee for the weapons.[139]

When the protective order expires, the 1999 law requires law enforcement to return the weapons to the respondent within five days, unless the court finds that a firearm was stolen, the respondent is prohibited from gun ownership for other reasons, or a new protective order has been issued.[140] The court may exempt a specific weapon from the relinquishment requirement if the respondent can show that a particular weapon is necessary for his or her employment.[141]

California law also requires that a law enforcement officer take temporary custody of any firearm discovered in plain view or during a consensual or warranted search at the scene of a domestic violence incident involving a threat to human life or a physical assault, as necessary to protect the officer or other persons present.[142] The officer must provide the owner with a receipt that lists and provides identifying information about the firearms and notes the time and place that the weapons can be recovered.[143] Unless a weapon is being held for use as evidence, was possessed illegally, or is retained pending a decision by the court as to whether the weapon should be returned, the police must make the weapon available to the owner or possessor within 48 hours to 5 business days after its seizure.[144] If law enforcement has reasonable cause to believe that the return of the weapon is "likely to endanger the victim or person reporting the threat or assault," the law enforcement agency can petition the court within 60 days to determine whether the weapon should be returned.[145] The law enforcement agency must notify the person who originally possessed the weapon about the court proceeding, and, if he or she fails to respond, the court will issue an order forfeiting the weapon.[146] If the person desires a hearing on the issue, the case must be heard within 30 days of the request.[147] The court must order a return of the weapon unless it is shown by a preponderance of the evidence that the weapon's return would endanger the victim or the person reporting the assault or threat.[148] If the court does not return the weapon, the original possessor or owner has one year to petition for a second hearing.[149] At that hearing, barring clear and convincing evidence that the return would endanger the victim or person reporting the assault or threat, the court must order the weapon to be returned.[150] If there is no second hearing or it is unsuccessful, the weapon may be disposed of.[151]

While some states have begun to enact detailed firearms laws pertaining to domestic violence, most have laws more limited than the federal law or have no laws in this area. At least for the time being, we cannot rely on state laws to address the critical problem of abusers' access to firearms. States must enforce and implement the federal firearms laws if those laws are to achieve their purpose of promoting the safety of victims of domestic violence.

PROCEDURAL ISSUES IN IMPLEMENTATION OF FIREARMS LAWS

A number of procedural issues have challenged the successful implementation of firearms law, including procedures for weapon search and seizure—both at the scene of an incident of domestic violence and when a domestic violence protection order is in place—and procedures for the return of weapons. A brief review of some legal challenges to firearms laws based on those procedural issues is instructive.

WEAPON SEARCHES AND SEIZURES IN DOMESTIC VIOLENCE CASES

There is significant debate over whether a warrant is necessary to search for and seize weapons after a defendant either has been convicted of a misdemeanor domestic violence crime or is subject to a protection order, as well as what standard of suspicion, if any, is necessary for a "reasonable" search under the Constitution. This issue arises in two situations: in a criminal context, when an officer is at the scene of a domestic violence incident, and in a civil context, when a protection order is issued.

Weapon Searches and Seizures at the Scene of a Domestic Violence Crime

In New Jersey, the Prevention of Domestic Violence Act permits a law enforcement officer to seize weapons when there is probable cause to believe that an act of domestic violence has been committed in the following circumstances:

> (1) In addition to a law enforcement officer's authority to seize any weapon that is contraband, evidence or an instrumentality of crime, a law enforcement officer who has probable cause to believe that an act of domestic violence has been committed may:
>
> (a) question persons present to determine whether there are weapons on the premises; and
>
> (b) upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury.
>
> (2) A law enforcement officer shall deliver all weapons seized pursuant to this section to the county prosecutor and shall append an inventory of all seized weapons to the domestic violence report.[152]

The statute authorizes a warrantless search for weapons once the officer has probable cause to believe that an act of domestic violence has occurred. The weapons need not have been used in the crime or illegally possessed. Nor is it clear whether the officer must have probable cause to believe weapons are present before beginning a search. Once the officer "observes or learns" that a weapon is present, the officer may seize it on reasonable belief that it would put the victim at risk of serious bodily injury.

The courts have considered whether this type of search and seizure is constitutional under the Fourth Amendment. The New Jersey appellate court has held that the law *is* constitutional because it is "undertaken to promote legitimate state interests unrelated to the acquisition of evidence of criminality or in furtherance of a criminal prosecution."[153] This is what the U.S. Supreme Court has termed "special needs" searches; because they are not conducted for the purpose of a criminal prosecution, they need not meet the usual standards of a warrant and probable cause. These searches are still subject to the Fourth Amendment, but they must only be "reasonable" in order to be constitutional.

The New Jersey court noted that the language of the statute distinguishes this type of search from a criminally focused search, stating that it is "in addition to a law enforcement officer's authority to seize any weapons that are contraband, evidence or an instrumentality of crime."[154] Here, the state's interest in seizing the weapons is to ensure the safety of domestic violence victims, so search and seizure are reasonable, though law enforcement had neither a warrant nor probable cause to conduct the weapons search.[155]

In *State v. Perkins,*[156] another New Jersey appellate case, officers responded to a 911 call from a woman who said that her husband had hit her in the head with the telephone, that he had been drinking, and that he had a lot of weapons in the home.[157] When the officers arrived, they saw the victim, who was visibly upset and had a red mark on the right side of her face. They located the defendant, who confirmed the wife's story. The officers then conducted a search of the house, where they found multiple firearms, as well as ammunition and other weapons, which they seized.[158]

The court found that the 911 call, the demeanor of the victim, and the mark on her face gave the officers probable cause to believe that the defendant had committed an act of domestic violence.[159] They also had "reasonable cause" to believe, first, that the defendant had access to weapons, based on the 911 call and, second, that the weapons posed a "heightened risk of injury to the victim."[160] The court specifically noted that finding risk of injury did not require proof that the defendant had used or threatened to use a weapon against the victim; the focus was on the threat of future use: "[T]he absence of the use or threatened use of a weapon is not necessarily a useful barometer or predictor of future behavior

vis-à-vis the future use of weapons by a defendant against the victim."[161] The court also found that the officers acted reasonably, by searching only the areas of the home where the victim informed them that weapons might be found.[162] The court stated that "like any special needs search, [the search for weapons under the act] is not based upon suspicion that a crime has been committed, but instead countenanced by a State interest, civil in nature, to protect potential victims, thereby going beyond the normal purview of law enforcement."[163]

By contrast, the Pennsylvania Supreme Court has held that the state statute mandating the seizure of weapons used in certain domestic violence offenses does not authorize a warrantless search for such weapons.[164] In *Commonwealth v. Wright,*[165] police responded to the home of the defendant after receiving a report that he had shot his wife.[166] The police entered the residence, arrested the defendant, and proceeded to search the home without a warrant. Two weapons, one of them the weapon used in the shooting, were found during the search.[167] The trial court denied the defendant's motion to suppress the weapons, holding that the state statute involving confiscation of weapons used in domestic violence offenses required seizure of all weapons used by the defendant.[168]

But the Pennsylvania Supreme Court observed that, because the statute involves weapon seizure but does not address *the means that may be used* to locate the weapons,[169] the search for weapons must meet either the usual Fourth Amendment requirement of a warrant or one of the recognized exceptions to a warrant.[170] Because there was no warrant and the court found that the search was not justified by exigent circumstances, consent, or as a search conducted incidental to arrest,[171] it held that the weapons should have been suppressed and remanded the case for a new trial.[172]

The Hawai'i Supreme Court reached a similar conclusion, ruling that a state statute authorizing seizure of firearms in domestic violence situations does not permit warrantless searches.[173] The relevant Hawai'i statute states that

> (4) Any police officer *with or without a warrant,* may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence:
>
> ....
>
> (f) The officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.[174]

First the court found that the statute, which concerned seizure, did not apply to searches. Moreover, the court noted that the statute "may not be executed at the expense of [the defendant's] constitutional right against unreasonable searches and seizures."[175] It found that a warrantless search of a mattress, which met no recognized exception to the warrant requirement, was unconstitutional and that the gun evidence obtained must be suppressed.[176]

Weapon Searches and Seizures Under a Domestic Violence Protection Order

New Jersey also authorizes weapon searches and seizures in a civil context after a protection order has been issued. As part of a temporary ex parte restraining order, the court may forbid the defendant from possessing any firearm, and it may further order "the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located."[177] If a final restraining order is issued, the firearm prohibition becomes mandatory.[178] At the hearing for the final order the judge may also order the search for and seizure of the firearms under this provision, again "at any location where the judge has reasonable cause to believe the weapon is located."[179]

New Jersey's case law regarding weapon searches and seizures under the terms of a civil protection order is consistent with its court rulings regarding these searches and seizures in the criminal context. In *State v. Johnson,*[180] the state appellate court considered the

constitutionality of a warrant to search for firearms issued under the temporary restraining order statute.[181] The court again found that this type of search is subject to the restrictions of the Fourth Amendment, but because the purpose of the warrant was to protect the domestic violence victim from further violence, and not to discover criminal evidence, the warrant did not need to meet a probable cause standard. Instead, "to support issuance of a search warrant pursuant to [the temporary restraining order statute], the judge must find there exists reasonable cause to believe that, (1) the defendant has committed an act of domestic violence, (2) the defendant possesses or has access to a firearm or other weapon . . . and (3) the defendant's possession or access to the weapon poses a heightened risk of injury to the victim."[182]

Juxtaposed with other states, Pennsylvania may have made a distinction between searches and seizures in the criminal and civil context. In a case after its Supreme Court decided *Commonwealth v. Wright,* a lower court ruled, in *Kelly v. Mueller,* that a judge had authority to order a warrantless search and seizure of guns in a protection order context.[183] The defendant did not appear at the hearing for a final protection order; the plaintiff testified that the defendant had threatened to kill her while pointing at her a loaded handgun owned by his father. She also listed several weapons kept in the defendant's home.[184]

The court entered an order requiring the defendant to surrender all weapons he had used or threatened to use in an act of abuse against the plaintiff, and it identified all such weapons. But when a sheriff went to the defendant's home to retrieve the weapons listed in the order, the defendant signed a statement saying there were no weapons.[185] The plaintiff returned to court the same day to request a supplemental order, testifying that she had seen weapons in the defendant's home. So the court entered an order directing the sheriff to search both the defendant's residence and the father's hunting cabin.[186] The order also directed the sheriff to seize any weapons and use whatever force necessary to enforce the order.[187]

The defendant argued that the court had no authority to issue search-and-seizure orders under the protection order statute, which discussed only relinquishment and not seizure of weapons.[188] The court agreed that the relinquishment provision did not grant the court authority to order search and seizure of the weapons but found that the trial judge was justified in believing that the plaintiff was in serious danger based on the defendant's threats to use the weapons against her.[189] Therefore the court concluded that "the law as expressed . . . is sufficiently explicit and broad to deal with weapons, once adequately described under oath, to the same degree that an affidavit of probable cause would have been permissible to authorize a search and seizure."[190] The search-and-seizure order was within the "general intent" of the statute to confiscate the weapons.[191]

Still, this is only a single case, and the Pennsylvania Supreme Court has not yet ruled on the issue of searches and seizures of weapons in the protection order context. Moreover, the *Kelly* decision has been highly controversial.[192]

PROCEDURES FOR THE RETURN OF WEAPONS

Disputes have arisen in jurisdictions across the country on the procedures and responsibilities of law enforcement personnel for returning weapons seized either during a domestic violence incident or while a domestic violence protection order was in effect.

Often there is simply no procedure in place and confusion abounds over the proper means to handle return of weapons. In an Ohio case, *Golden v. Bay Village Police Dep't,*[193] law enforcement had confiscated 14 weapons from the plaintiff's home, under a temporary protection order issued in connection with an allegation of criminal domestic violence. A few months later the order was dissolved when the criminal charge was dismissed, and Golden subsequently demanded that the police department return his weapons.[194] The police department told him that he would need a directive from the chief of police for release of the weapons, so he wrote a letter requesting such a directive. In response, the police chief

told Golden that he would need to file an action for replevin[195] and obtain a court order.[196]

Golden took no immediate action, but when police informed him a few months later that his weapons would be destroyed unless he filed an action for replevin, he did so. At a pretrial hearing, the police department agreed to an order returning the weapons to Golden, and the magistrate granted the replevin order.[197]

In *Golden,* the Ohio appellate court considered whether an award of attorney fees to Golden was in order on the ground that the police department's failure to return the weapons to him after his criminal charges were dismissed was in bad faith.[198] The appellate court rejected the request for fees, finding that "at all times, the onus was on Golden to seek the necessary court order for the release of his property."[199] According to the court, because the police seized the weapons under court order, it was reasonable for them not to return the property except by court order, and the dissolution of the temporary protection order was not relevant.[200] The court also noted that Golden could have requested such a court order at the time the temporary protection order was dissolved. Because he had failed to do that and the criminal case had already been dismissed, the replevin action suggested by police was a reasonable alternative.[201]

The actual procedures necessary for the search, seizure, and return of firearms in domestic violence situations, as well as the legal standards required for these processes, are only now beginning to be developed among the states. Moreover, the limited case law available demonstrates a focus on enforcement of state laws rather than federal firearms laws. States definitely need to enact legislation that provides clear standards and protocols for implementing both the federal and any state firearms laws. Without the guidance of such legislation, the correct method for implementation of these laws remains uncertain, and, unfortunately, the uncertainty constrains jurisdictions from attempting any implementation at all.

RECOMMENDATIONS FOR EFFECTIVE ENFORCEMENT OF FEDERAL AND STATE FIREARMS LAWS

Review of both the state and federal legislation and case law on its implementation gives guidance on how to provide effective enforcement of the state and federal firearms laws. The following recommendations derive from the above review.

1. Draft domestic violence protection order forms to conform to federal requirements under section 922(g)(8).

Protection order forms that track the federal requirements serve at least two critical functions. First, if a violation of section 922(g)(8) is alleged, it will be easy to ascertain whether the protection order meets the requirements of the federal statute and facilitates prosecution. Currently, while many orders do meet the requirements, this can only be discovered through close reading of the order, any court records from the case, and the petition. Second, an order tracking federal language and clearly demonstrating eligibility under the federal firearms laws enables it to be entered accurately into the national protection order registry. Those orders meeting the requirements receive a "Brady Indicator."[202] All gun dealers are required to submit identifying information about each potential gun purchaser to a national database maintained by the FBI. Any orders bearing a Brady Indicator trigger a finding that the potential purchaser is not eligible to purchase a weapon.[203] Conversely, without this indicator there is no such response. Therefore, amending the forms to facilitate both the notation of pertinent criteria and the accurate entry of data into the database is an important first step toward improving enforcement of the federal firearms law.

For example, Pennsylvania has changed its standard protection order form by tracking the federal statute's language, adding the criteria that establish a qualifying domestic violence protection order for purposes of federal law section 922(g)(8).[204] The state's judges now can easily indicate on the form whether the criteria have been met, which then

makes it clear whether or not firearm possession is prohibited under federal law.[205]

2. Provide notification on all protection orders that firearm possession may violate federal law and any relevant state law.

Although notification on protection orders that firearm possession may violate federal law is not required for the law to be effective, it can be helpful for several reasons. It prevents any later argument that the defendant was ignorant of the law. And, as above, it facilitates later federal prosecution of a violation of the federal law, as well as accurate entry into the national registry. Furthermore, for full-faith-and-credit purposes, it alerts law enforcement in other states that the order is subject to the federal firearms laws. Many states already have language on their protection order forms noting that the orders are entitled to full faith and credit in all other states. Language concerning federal firearms laws could be added to strengthen enforcement of the federal law.

3. At a hearing on the protection order, the judge should inquire if the respondent has firearms. And, where authorized under state law, a clause prohibiting weapons should be included on the protection order form.

If there are firearms, the judge can arrange for their surrender under the procedure described below and can take the opportunity to inform the defendant of the federal law. If state law authorizes making a weapons ban a direct term of a protection order, this should be done. If the defendant remains in possession of any weapons after issuance of such an order, he or she will then be in violation of both the federal law and any state firearms law, as well as the protection order under state law, which may impose a more severe penalty than a state firearms law alone. If state law authorizes a weapons ban on an ex parte order, the judge should make the firearms inquiry at both an ex parte hearing and a final order hearing.

4. Courts should not order diversion programs, deferred sentencing, or any other process that fails to result in the recording of a misdemeanor domestic violence conviction.

For a number of reasons, diversion programs and other sentencing models that ultimately result in dismissals of domestic violence convictions are not recommended.[206] This is particularly relevant in the context of firearms laws, because without a domestic violence misdemeanor conviction on the record, section 922(g)(9) will not apply. Although abusers without the recorded conviction may be guilty of the same behavior as those with the record, they will not be subject to the federal weapons prohibition.

5. Develop a specific and detailed procedure for the surrender, storage, and return of all firearms. This includes designating specific personnel at each involved agency to be responsible for these tasks, as well as developing forms to ensure a "paper trail" of the handling of all weapons.

After an order to surrender firearms is issued, often little follow-up is done to determine whether the weapons were actually relinquished.[207] The development of a protocol for the handling of firearms is essential, so that court orders for weapon surrender are enforced, weapons are accounted for, and the procedure for weapon return is both clear and effective. Designating personnel in each agency strengthens the likelihood that procedures will be followed and also enables a partnership to help hold agencies accountable for performing their assigned roles.

While developing a detailed protocol can be daunting, some models do exist. The Domestic Violence Division of the Circuit Court in Miami–Dade County, Florida, has one of the most developed protocols for the handling of firearms.[208] At every protection order calendar, the bailiff gives each respondent a form, "The Respondent's Sworn Statement of Possession of Firearms and/or Ammunition," before the respondent has been heard. The form is available in Spanish and Creole, in addition to English, and clearly states that "[i]f a Respondent remains in possession of a firearm or ammunition after a Final Judgment of Injunction is entered he or she would be in violation of 18 U.S.C. § 922(g)(8), which is punishable by a maximum of ten (10) years imprisonment and or a $250,000.00 fine." Court personnel collect the form and provide it to the judge with the court file when the case is called.

The judge then makes an "on-record" inquiry of each respondent concerning the form, to verify relevant information such as the current status of weapons. The judge may issue an order to surrender firearms, which is handed to the respondent at the conclusion of the hearing.[209] The order includes detailed instructions to the respondent on surrendering the weapons at the local police station, obtaining a receipt, and faxing this documentation to the court within 24 hours of the order's issuance.[210] The court also provides a detailed information sheet that includes the federal laws against firearm possession when a permanent injunction is in effect or when a person has been convicted of a misdemeanor crime of domestic violence.

The case manager, a court employee at the Miami domestic violence court, is responsible for monitoring the respondent's compliance with the order and for providing proof of surrender. The procedures direct the case manager to maintain a firearms surrender log book for this purpose, and in the event of noncompliance the case manager notifies the judge, who issues an "Order to Show Cause Why Respondent Failed to Surrender Firearms and/or Ammunition," which orders the respondent to appear at a particular time at the court for a hearing on the issue.

The information sheet provided to respondents also explains court procedures on the return of firearms or ammunition if the protection order is no longer in effect.[211] In this situation, the respondent must either file a motion or write a letter to the court that includes the weapons' identifying information, a copy of the bills of sale evidencing the respondent's ownership of the weapons, and a signed affidavit providing all relevant information. If the judge determines that the weapons should be returned, he or she will enter a court order providing for their return. A copy of this order is sent to the petitioner. If the judge determines that there is no a legal basis for return of the weapons, the court will set a hearing on request.

If the respondent receives a court order providing for the return of the weapons, he or she can take the order, together with the police property receipt, and proofs of ownership, to the police station where the weapons are stored. The information sheet notes that some police department policies require that weapons and ammunition not be returned at the same time, for safety reasons. Unless the owner claims the surrendered weapons within eight months of receipt of the court order providing for their return, the weapons are forfeited to the state and there can be no further action for their recovery.

King County, Washington, also has developed specific procedures to improve enforcement of firearms laws. Since 1993, Washington State has had laws that prohibit people convicted of certain domestic violence misdemeanors—including assault, stalking, coercion, and violating a no-contact order—from possessing a firearm, and that require law enforcement agencies to seize weapons from such domestic violence perpetrators.[212] But initially the laws were not widely implemented, because there was neither a procedure for enforcement nor sufficient financial resources provided to local law enforcement to implement the laws.[213] Courts did not issue weapon surrender orders consistently, the justice system did little follow-up to hold defendants accountable, and agencies lacked the facilities to store the surrendered weapons.[214]

But in 2003, judges from the district court and the King County Sheriff's Office initiated a firearm forfeiture program to improve enforcement of the state law.[215] The program developed a form for the sheriff's office that provides deputies with a detailed procedure to follow when removing weapons in domestic violence cases.[216] The deputies must attempt to determine if an existing protection order is in effect. Because the federal law bars the subject of a valid protection order from possessing a firearm, the deputies can remove any weapon found when an order is in effect.[217] If there is no existing order, the deputies record identifying information about weapons available to the suspect.[218] This record provides the prosecutor with information to present in court later about the defendant's ability to access weapons.[219] Under the new program, judges who are presented with this information may even order defendants to surrender weapons as a condition of bail.[220]

The sheriff's office now designates a particular officer to handle all surrendered weapons. This officer follows a specific procedure for recording and storing the weapons so that they can be identified and accessed quickly.[221]

In Seattle, the municipal court has also effected the changes in policy regarding weapon surrender.[222] The court's probation unit routinely screens defendants jailed on misdemeanor charges and now notes those who are arrested for domestic violence crimes.[223] The screeners check for existing protection orders against defendants and ask about firearms. They then relay this information to municipal court commissioners, who can order the surrender of weapons.[224]

In New York State, when the court orders the surrender of firearms, the order of protection must specify the date, time, and location where they must be surrendered and also must direct the authority receiving the firearms to immediately notify the court of the surrender.[225] The law also includes directives for notification of local law enforcement by the court when an order has been issued for surrender of firearms or ineligibility for license.[226] In addition, the court must notify the statewide registry of protection orders.[227]

As this description of sample protocols demonstrates, development of an effective firearms protocol must involve, at a minimum, judges, courtroom personnel, and all local law enforcement agencies, along with prosecutors and defense counsel. An effective protocol is also very detailed, so that the respondent knows precisely what steps he or she must take to comply with the law. Numerous practical considerations must be dealt with, such as determination of available storage space for the weapons and designation of police and court personnel to perform specific tasks.

It is critical that the protocol include personnel responsible for monitoring the defendant's compliance with the process and notifying the judge about noncompliance to enable quick and consistent follow-up.

6. Local prosecutors and law enforcement should reach out to federal counterparts in their jurisdiction to discuss specific methods of coordinating the investigation, enforcement, and prosecution of firearms crimes in domestic violence cases.

In many jurisdictions, a chasm seems to separate state and federal justice agencies. They may have little need for interaction and tend by habit to enforce and prosecute the law independently of one another. In some jurisdictions, some rapprochement has already occurred between the two systems, owing to other federal criminal laws enacted under the Violence Against Women Act, including interstate stalking, interstate violation of a protection order, and interstate domestic violence. The U.S. Department of Justice has also required each U.S. Attorney's Office to designate a specific prosecutor to handle VAWA crimes and act as liaison with state prosecutors. Yet the impact of these changes on improved federal-state coordination and communication remains to be proven.

This kind of coordination in firearms cases is critical, for two reasons. First, the federal firearms laws depend on state law predicates—protection orders or misdemeanor convictions—to be enforceable. Second, as more states develop their own laws on firearms and domestic violence, the potential for conflicts in prosecution becomes greater. While, technically, both a state and a federal prosecution can proceed simultaneously, in practice this is often a waste of time and resources.[228]

One project to encourage this kind of federal-state coordination has gained national attention. Although it is not focused specifically on domestic violence cases, it may provide some lessons for such coordination in the domestic violence area.

In 1997, Richmond, Virginia, initiated Project Exile, a partnership among federal, state, and local prosecutors and law enforcement agencies to coordinate prosecution of illegal gun possession or use.[229] The goal of the project is to reduce gun violence by encouraging federal prosecution of firearms charges where possible.[230] Under the project, Richmond police officers receive special training to identify state firearm violations that also can be charged as federal crimes.[231] When an arrest is made by local police on state firearms charges that could be charged feder-

ally, the local police immediately notify a designated agent from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives. Federal and state law enforcement work together to determine whether it is an appropriate case for federal prosecution, and, if so, they refer it to the U.S. Attorney's Office.[232] If the federal prosecutor is able to obtain an indictment on the federal charge, the Commonwealth's Attorney voluntarily drops the state charges.[233]

Project Exile focuses on three groups of firearms law violators: felons, drug offenders, and domestic violence offenders.[234] The project imposes tough penalties for violations, such as a mandatory federal prison sentence of several years served at out-of-state facilities.[235] The project also included a widespread publicity campaign to deter would-be violators while gaining the support of the community.[236] Project Exile was expanded statewide in Virginia and has now been adopted in several cities in other states.[237] The U.S. Department of Justice has also become an official supporter of the project and has instituted grants to fund development of similar projects around the country.[238] Its proponents argue that Project Exile has resulted in a significant drop in homicide rates.[239]

The project has been controversial. Some argue that the project is "overenforcing" firearms laws, giving defendants significantly more severe sanctions than they would receive under state law. There have also been legal challenges contending that the federal-state alliance of Project Exile infringes on a state's sovereignty in enforcing its own laws.[240] These challenges have been unsuccessful, yet they do demonstrate some resistance on both the state and federal sides to this type of coordination. In dicta, a federal district court criticized state law enforcement authorities for their involvement in Project Exile, arguing that these charges could be brought under state law; "[h]owever, instead of bringing the resources of the Commonwealth to bear, local authorities have abdicated their responsibility to the federal government."[241]

Despite all the objections, Project Exile incorporates important strategies that could be useful in enforcement of the federal firearms laws in the arena of domestic violence. Law enforcement personnel have developed a paging system so a designated federal law enforcement officer can immediately confer on the appropriateness of a federal charge. At least one state Commonwealth's Attorney has been cross-designated as a federal prosecutor to prosecute these cases, and additional federal prosecutors have been assigned to the project. A publicity campaign has also improved public awareness of the problem while helping to create an atmosphere of "zero tolerance" for firearms offenders.

7. Mandate judicial training specifically on firearms and domestic violence, federal firearms laws, and any state firearms laws.

The importance of training judges in domestic violence issues has become a familiar mantra, because the judicial role is so central to any domestic violence justice initiative. After strenuous efforts across the country over several years, the knowledge, sensitivity, and effectiveness of judges who handle domestic violence cases have improved. The intersection of domestic violence and firearm possession, however, appears to be one in which significant confusion or resistance remains on the part of judges. Many court systems now have mandatory domestic violence training for the judiciary. This topic should be a high priority for training and can also be combined with related issues, such as full faith and credit, the national registry on protection orders, and other federal domestic violence laws.

8. Investigate the development of specialized or integrated domestic violence court models.

The recommendations to improve firearms law enforcement can be implemented in any justice system. But a specialized domestic violence court will facilitate these initiatives perhaps more expeditiously and effectively.[242] As a basic matter, such specialized courts maintain a well-developed justice partnership, having created strong working relationships with all key justice players, including law enforcement agencies, prosecutors, the defense bar, probation officials,

and pretrial release officials. Specific personnel from the court and several agencies are often designated to the specialized court, so that they can focus entirely on domestic violence cases and so that they will be both experienced and knowledgeable about domestic violence issues. Moreover, the concentration of domestic violence cases in one court makes it easier to track any firearm surrender protocols and to monitor for violations. An integrated domestic violence court, which handles both protection order cases as well as domestic violence misdemeanors, will have easy access to information on the underlying state predicates for federal firearms laws.

CONCLUSION

The states are increasingly becoming aware of the necessity to remove firearms from domestic violence perpetrators. However, the local firearms laws that do exist vary in their clarity and comprehensiveness, even as methods for their enforcement remain confusing. Worse yet, many jurisdictions have no enforcement procedures in place.

In many ways this situation is similar to the one that existed after Congress enacted a provision in the Violence Against Women Act that required each jurisdiction to give full faith and credit to domestic violence protection orders from other jurisdictions. The law was passed without any direction about its implementation, and for some years many states failed to address it. However, the federal government eventually recognized its failure to provide guidance, and by the late 1990s federally funded training and regional conferences became available to help the states enforce the full-faith-and-credit provision. Clear informational pamphlets for targeted audiences, such as law enforcement officials and victim advocates, were developed to assist these groups in understanding and implementing the law. A National Center on Full Faith and Credit was created with federal funds to focus entirely on providing training and technical assistance on the provision's enforcement, including development of model implementation statutes to guide states in enacting such legislation.

This same kind of effort is required for implementation of the federal firearms laws relating to domestic violence. While certainly the federal government has funded and promoted some training on this issue, most of the training has merely explained the laws, not assisted on the issue of enforcing them. There has not yet been the strong focus required for broad state implementation. The firearms laws present many of the same complexities generated by the full-faith-and-credit law, such as confusion over the correct legal standards, the existence of several practical obstacles to enforcement, and the need for federal and state officials to coordinate their efforts. Model state implementation laws, intensive and practical training, and targeted conferences devoted to enforcement of the laws are needed. These efforts should include gatherings that bring together federal and state prosecutors and law enforcement leaders to discuss their concerns and how best to coordinate efforts. Judicial training is required on the definition of federal terms and the federal requirements for the predicate crimes and protection orders necessary to trigger the firearms laws. Effective legislation and procedures from states that have moved forward in this area should be shared with other states. Local jurisdictions, too, bear the responsibility of educating their judiciary and law enforcement personnel about the importance of enforcing the firearms laws and of bringing together the requisite agencies to develop a clear and effective implementation plan.

Unquestionably, the seizure of weapons in domestic violence cases raises a set of difficult and complex issues. Yet the lethal mix of batterers and firearms is too critical for jurisdictions to avoid. Both the states and the federal government have an obligation to confront and solve the confounding challenges of gun seizure.

NOTES

1. *Holes in System: Abusers Are Supposed to Surrender Firearms,* San Diego Trib., Apr. 6, 2004, at B6.

2. N.Y. State Comm'n on Domestic Violence Fatalities, Report to the Governor 16 (1997).

NOTES

3. Hector Castro, *County Moves to Seize Guns in Domestic Violence Cases,* Seattle Post-Intelligencer, Mar. 16, 2004.

4. Bureau of Justice Statistics, U.S. Dep't of Justice, Homicide Trends in the U.S.: "Intimate Homicide," *available at* www.ojp.usdoj.gov/bjs/homicide/intimates.htm. This figure is from the period between 1990 and 2002. *Id.*

5. *Legislator Calls for Study of Gun Seizures,* Union Leader (Manchester, N.H.), Jan. 2, 2005, at A18 (quoting Henniker, N.H., Police Chief Timothy Russell).

6. 18 U.S.C. § 922(g)(8) (2000).

7. 18 U.S.C. § 922(g)(8)(A).

8. 18 U.S.C. § 922(g)(8)(B).

9. 18 U.S.C. § 922(g)(8)(C).

10. 18 U.S.C. § 921(a)(32).

11. 18 U.S.C. § 925(a)(1).

12. 18 U.S.C. § 922(g)(9) ("[I]t shall be unlawful for any person . . . who has been convicted . . . of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm or ammunition . . . ." *Id.* This provision is commonly known as the Lautenberg Amendment to the Gun Control Act of 1968. The amendment is named after Senator Frank Lautenberg of New Jersey, the bill's leading sponsor).

13. 18 U.S.C. § 922(g)(1).

14. Jason M. Fritz, Comment, *Unintended Consequences: Why Congress Tossed the Military Family Out of the Frying Pan and Into the Fire When It Enacted the Lautenberg Amendment to the Gun Control Act of 1968,* 2004 Wis. L. Rev. 157, 165.

15. 18 U.S.C. § 921(a)(33)(B)(i)(I).

16. 18 U.S.C. §§ 921(a)(33)(A)(ii), 922(g)(9).

17. In some limited circumstances the firearm ban may be lifted, such as when the conviction is "expunged or set aside" or the defendant has been pardoned for the offense or has had his civil rights restored. 18 U.S.C. § 921(a)(33)(B)(ii).

18. *See, e.g.,* United States v. Lewitzke, 176 F.3d 1022, 1024 (7th Cir. 1999); United States v. Barnes, 295 F.3d 1354, 1368 (D.C. Cir. 2002); United States v. Hancock, 231 F.3d 565–67 (9th Cir. 2000); United States v. Smith, 171 F.3d 617, 623–26 (8th Cir. 1999).

19. *See, e.g.,* United States v. Mitchell, 209 F.3d 319, 323–24 (4th Cir. 2000); United States v. Napier, 233 F.3d 394 (6th Cir. 2000) (holding that section 922(g)(8) does not violate the Commerce Clause or the Due Process Clause); United States v. Hemmings, 258 F.3d 587, 594 (7th Cir. 2001); United States v. Pfeifer, 371 F.3d 430, 436–37 (8th Cir. 2004).

20. United States v. Morrison, 529 U.S. 598 (2000).

21. *See, e.g.,* United States v. Gallimore, 247 F.3d 134, 138 (4th Cir. 2001); United States v. Pierson, 139 F.3d 501 (5th Cir. 1998) (finding section 922(g)(8) constitutional under the Commerce Clause); *Napier,* 233 F.3d at 399, 402 (holding that section 922(g)(8) does not violate the Commerce Clause or the Due Process Clause); United States v. Wilson, 159 F.3d 280, 284–89 (7th Cir. 1998) (holding that section 922(g)(8) is constitutional under the Commerce Clause and the Fifth and the Tenth Amendments); United States v. Lewis, 236 F.3d 948 (8th Cir. 2001) (holding that section 922(g)(9) does not violate the Commerce Clause, the Equal Protection Clause, the Second Amendment, or the Eighth Amendment); United States v. Jones, 231 F.3d 508, 514–15 (9th Cir. 2000) (rejecting a Commerce Clause challenge to 18 U.S.C. § 922(g)(8)); United States v. Cunningham, 161 F.3d 1343, 1345–47 (11th Cir. 1998); (rejecting a Commerce Clause challenge to section 922(g)(8)).

22. *See, e.g.,* United States v. Meade, 175 F.3d 215, 224–25 (1st Cir. 1999) (rejecting a Tenth Amendment challenge to section 922(g)(8)); United States v. Bostic, 168 F.3d 718, 723–24 (4th Cir. 1999) (rejecting a Tenth Amendment challenge to 18 U.S.C. § 922(g)(8)); United States v. Hemmings, 258 F.3d 587, 594 (7th Cir. 2001) (holding that neither the Second nor the Tenth Amendment bars federal firearms regulation).

23. United States v. Emerson, 270 F.3d 203, 260–63 (5th Cir. 2001) (rejecting a Second Amendment challenge to section 922(g)(8)); United States v. Jackubowski, 63 F. App'x 959, 961 (7th Cir. 2003) (holding that federal law barring gun possession after a felony conviction, 18 U.S.C. § 922(g)(1), does not violate the Second Amendment, and noting that all federal appellate courts to consider the issue have held that federal regulation of firearms is constitutional).

24. City of Cleveland v. Carpenter, No. 82786, 2003 WL 22976619, at *1 (Ohio Ct. App., Dec. 18, 2003).

25. *Id.* at *1.

26. *Id.* at *3–*4.

27. *Id.* at *5.

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28. State v. Wahl, 839 A.2d 120, 122 (N.J. Super. Ct. App. Div. 2004). The court did remand to the Family Part judge to determine whether the seized firearms had ever been shipped or transported in interstate commerce, another required element of the federal statute. *Id.* at 134. The court noted, however, that "the market in firearms is heavily interstate in nature . . . and it would be indeed rare that a firearm, or at least some of its component parts, would have never moved across state lines." *Id.*

29. *See, e.g.,* Hesse v. Pennsylvania State Police, 850 A.2d 829, 832 (Pa. Commonw. Ct. 2004).

30. *See, e.g.,* United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999) (both the statute's plain language and legislative history demonstrate that the predicate offense need not contain a domestic relationship between the parties as an element); United States v. Meade, 175 F.3d 215, 218–19 (1st Cir. 1999) (similarly); United States v. Barnes, 295 F.3d 1354, 1360–61 (D.C. Cir. 2002) (similarly).

31. United States v. Nobriga, 408 F.3d 1178, 1181–83 (9th Cir. 2005).

32. The "modified categorical approach" is based on the U.S. Supreme Court's approach in Taylor v. United States, 495 U.S. 575, 602 (1990) and reaffirmed in Shepard v. United States, 125 S. Ct. 1254 (2005). Under this approach, courts may consider only "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard,* 125 S. Ct. at 1263.

33. *Nobriga,* 405 F.3d at 1181.

34. *Id.* at 1181–83.

35. *Id.* at 1183.

36. United States v. Calor, 340 F.3d 428 (6th Cir. 2003).

37. *Id.* at 429.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 430.

42. *Id.*

43. *Id.*

44. *Id.* at 431.

45. *Id.*

46. *Id.*

47. United States v. Bunnell, 106 F. Supp. 2d 60 (D. Me. 2000).

48. *Id.* at 66.

49. *Id.*

50. *Id.*

51. *Id.*

52. *See* Tom Lininger, *A Better Way to Disarm Batterers,* 54 Hastings L.J. 525, 530–31 (2003).

53. *Id.* at 531. This information was provided to Lininger by the Executive Office for United States Attorneys on July 24, 2002. *Id.* at 530 n.18. The report also predicted that 58 additional cases would be filed by the end of 2002. *Id.* at 531.

54. *Id.*

55. *Id.* at 531 & n.23 (citing United States v. Wilson, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, J., dissenting)). Judge Posner estimated that approximately 100,000 domestic violence protection orders are issued each year and that, since 40 percent of U.S. households own guns, approximately 40,000 people would be in violation of section 922(g)(8). *Id.*

56. Lininger, *supra* note 52, at 532 (relying on report from Executive Office for United States Attorneys).

57. Comment, *Domestic Violence and Guns: Seizing Weapons Before the Court Has Made a Finding of Abuse,* 23 Vt. L. Rev. 349, 364 (1998) (referring to report from Vermont's U.S. Attorney that it is rare for the U.S. Attorney's Office to enforce the federal firearms laws against persons subject to domestic violence protection orders, because of limited resources).

58. *See* Melanie L. Mecka, Note, *Seizing the Ammunition From Domestic Violence: Prohibiting the Ownership of Firearms by Abusers,* 29 Rutgers L.J. 607, 643–44 (1998). For example, in 1997, the president of the Salt Lake County, Utah, Sheriff's Association said that the federal law provides no penalty if states choose not to "mirror the federal law." *Id.* at 644 n.211 (citing Judy Fahys, *House Battles Over Gun Bill that Disarms Domestic Abusers; Gun Bill Would Disarm Domestic Abusers,* Salt Lake City Trib., Jan. 31, 1997, at A1).

59. *Id.* at 645.

60. *Id.* at 644–45.

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61. *Id.* at 637–38.

62. *See* Carrie Chew, *Domestic Violence, Guns, and Minnesota Women: Responding to New Law, Correcting Old Legislative Need, and Taking Cues From Other Jurisdictions,* 25 Hamline J. Pub. L. & Pol'y 115, 149 & nn.166–67 (2003) (citing correspondence from domestic violence victim advocates in Minnesota and Texas); Lisa D. May, *The Backfiring of the Domestic Violence Firearm Bans,* 14 Colum. J. Gender & L. 1, 1–2 (2005) (describing case in rural Missouri jurisdiction where judge denied protection order despite substantial evidence of physical injury and later in court cited the approach of quail-hunting season as one reason not to issue another protective order). May also describes a case in Hennepin County (Minneapolis) where the judge expunged a police department employee's domestic violence record, to avoid the consequences of the federal firearms law. *Id.* at 1. This observation is also based on discussions between the author and victim advocates in such jurisdictions as Maine and Montana.

63. *See* Michelle N. Deutchman, Note, *Getting the Guns: Implementation and Enforcement Problems With California Senate Bill 218,* 75 S. Cal. L. Rev. 185, 209 (2001) (quoting Mary Malefyt, then senior attorney at the Pennsylvania Coalition Against Domestic Violence).

64. Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges,* Ct. Rev. 32, 38 (Summer 2002).

65. Chew, *supra* note 62, at 149 & nn.166–67.

66. *Id.;* Deutchman, *supra* note 63, at 209.

67. Chew, *supra* note 62, at 149 & nn.166–67; Deutchman, *supra* note 63, at 209.

68. *Id.*

69. State v. Wahl, 839 A.2d 120 (N.J. Super. Ct. App. Div. 2004).

70. 18 U.S.C. § 922(g)(9) (2000 & Supp. 2004).

71. *Wahl,* 839 A.2d at 128 (N.J. Super. Ct. App. Div. 2004).

72. U.S. Const. art. VI, cl. 2.

73. *Wahl,* 839 A.2d at 130 (quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (quoting Gibbons v. Ogden, 22 U.S. 1, 211 (1824))).

74. *Id.*

75. *Id.* at 133 (quoting N.J. Stat. Ann. § 2C:25-21d(3) (West 2005)).

76. *Wahl,* 839 A.2d at 122 (finding that weapons forfeiture provisions contained in N.J. Stat. Ann. § 2C:25-21g[9] and 18 U.S.C. § 922(g)(9) are "in harmony").

77. *Id.*

78. Conkle v. Wolfe, 722 N.E.2d 586, 593–94 (Ohio Ct. App. 1998).

79. *Id.*

80. *Id.*

81. *Id.* at 593.

82. *Id.* at 594.

83. *Id.*

84. Benson v. Muscari, 769 A.2d 1291 (Vt. 2001).

85. *Id.* at 1298.

86. United States v. Brailey, 408 F.3d 609 (9th Cir. 2005).

87. *Id.*

88. *Id.*

89. *Id.*

90. Mitchell & Carbon, *supra* note 64, at 38.

91. *Id.*

92. *Id.*

93. Sharon Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws,* 91 Ky. L.J. 935, 952–53 (2002–03).

94. See Mitchell & Carbon, *supra* note 64, at 34 (collecting state statutes and noting differences in firearm prohibitions in domestic violence cases). Mitchell and Carbon note that, as of 2002, in at least nine states a civil protection order meeting certain criteria creates a mandatory prohibition on firearm possession, while in a greater number of states judges have discretion whether to include a term prohibiting firearms in the protection order. *Id.* Mitchell and Carbon also note differences in state law regarding criminal cases. In some states, a domestic violence conviction triggers a mandatory firearm prohibition, while in other states such a prohibition is discretionary, and the law may require the judge to make specific findings. *Id.* Some states permit a firearm prohibition to be imposed as a condition of bail or probation. *Id.* In addition, some states limit the weapon ban to those

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weapons actually used or threatened to be used in the offense. *Id.*

95. *See* Chew, *supra* note 62, at 132–37 (providing examples of inconsistencies among state laws and their variation from federal law); Timothy Johnson, *Domestic Violence and Federal Firearms Laws,* 33-SEP Colo. Law. 61, 63 (2004) (discussing the differences between federal law and Colorado law in areas such as the definitions of *domestic violence* and *intimate relationship*).

96. *See* Mecka, *supra* note 58, at 622–23.

97. *See, e.g., Proposed PFA Rules Rattle Gun Owners; Seizure of Weapons Is Focus of Debate,* Intelligencer J. (Philadelphia, Pa.), Apr. 24, 2004, at A1. (proposed revision to Pennsylvania's domestic violence law, which would give judges explicit discretion to take all guns from individuals under protection-from-abuse orders, is subject of controversy).

98. Paul Carpenter, *Some See PFA Bill as an Expansion of Gun Control,* Morning Call (Allentown, Pa.), May 23, 2004, at B1 (quoting Gun Owners of America press release).

99. Nancy Charron, *Legislation Targets Guns of Domestic Violence Offenders,* News J. (Wilmington, Del.), Feb. 18, 1999, at 3B. The proposed law would also have prohibited weapon possession while a protection order was in effect. *Id.*

100. *Id.*

101. *Id.*

102. Okla. Stat. tit. 22, § 60.8 (2003) (emphasis added).

103. *Id.*

104. Mont. Code Ann. § 46-6-603(1) (2005).

105. Ohio Rev. Code Ann. § 2935.03(B)(3)(h) (West Supp. 2005).

106. N.Y. C.P.L.R. 530.14 (McKinney Supp. 2005); N.Y. Fam. Ct. Act § 842-a (McKinney Supp. 2005). *See* Robert F. Nicolais, *State and Federal Statutes Affecting Domestic Violence Cases Recognize Dangers of Firearms,* 71-Nov N.Y. St. B.J. 39, 40 (1999).

107. Nicolais, *supra* note 106, at 40–43; N.Y. C.P.L.R. 530.14; N.Y. Fam. Ct. Act § 842-a.

108. Nicolais, *supra* note 106, at 42–43.

109. *Id.* at 45.

110. Connecticut law also has a definition of *intimate relationship* that differs from the federal law. The federal law includes partners who are cohabiting or have formerly cohabited. The Connecticut statute's definition of *family or household member* is broader because it does include "persons in, or [who] have recently been in, a dating relationship," but it does not define the meaning of *recent,* so that former intimate partners may not necessarily be covered by the law. Conn. Gen. Stat. § 46b-38a(2) (2004). *See also* State v. Logan, No. 18CR020108012, 2003 WL 22413490, at *1, *2 (Conn. Super. Ct., Oct. 6, 2003) (noting the limitations of the definition of *relationship* under the statute).

111. Nicolais, *supra* note 106, at 45.

112. *Id.*

113. *Id.* at 45–46.

114. N.J. Stat. Ann. § 2C:25-28j (West 2005) (authorizing ex parte order to include "forbidding the defendant to possess any firearm or other weapon . . . , ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located . . ."). *See also* State v. Cassidy, 843 A.2d 1132, 1134 (N.J. 2004) (discussing warrant portion of order form).

115. N.J. Stat. Ann. § 2C:25-21d[3].

116. *Id.* Despite what appears to be the plain language in the statute, the New Jersey appellate court has held that the 45-day period in which the prosecutor must file a forfeiture petition runs not from the actual seizure of the weapon but instead from the date on which the prosecutor either came to possess the weapon or learned of its seizure. State v. Saavedra, 647 A.2d 1348, 1350–51 (N.J. Super. Ct. App. Div. 1994). *See also In re* the Seized Firearms Identification Card of Peter Hand, 700 A.2d 904, 907–08 (N.J. Super. Ct. Ch. Div. 1997) (noting the conflict between the legislation's clear language and the statutory construction by the appellate division, to which the lower court must adhere).

117. N.J. Stat. Ann. § 2C:25-21d[3]. There has been substantial case law in New Jersey on this statute, particularly the apparent conflict between the mandatory language requiring return upon dismissal of the complaint and the discretionary language permitting the court to order that weapons be retained if the owner is "unfit." *See In re* Return of Weapons to J.W.D., 693 A.2d 92, 93 (N.J. 1997) (overruling earlier case law and holding that the mandatory language did not trump the court's discretionary power, so that despite the dismissal of the complaint, a court may still retain the seized weapons if it determines that the defendant continues to "pose a

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threat"). *See also* State v. Volpini, 677 A.2d 780, 785–87 (N.J. Super. Ct. 1996) (earlier lower-court case using reasoning later employed in *J.W.D.* to find that, since the clear legislative purpose of the New Jersey statute was to offer the maximum protection to domestic violence victims, the inconsistency between parts of the statute should be resolved in favor of permitting the court to consider additional grounds to retain the weapons even where a domestic violence complaint has been withdrawn).

A New Jersey appellate court considered a related issue under the same statute. In a situation in which the prosecutor had failed to file a petition to retain the seized weapons within the 45-day time period required in section 2C:25-21d[3], the defendant argued that the weapons must be returned to him. State v. S.A., 675 A.2d 678, 681–82 (N.J. Super. Ct. App. Div. 1996). However, the court found that this provision must be read together with the part of subsection d[3] that finds that no weapons shall be returned if the court finds that "the owner is unfit or that the owner poses a threat to the public in general or a person or persons in particular," unless "the domestic violence situation no longer exists." *Id.* at 682. Therefore, the state has the right to retain the weapons as long as the court finds the owner to be a threat to the victim of domestic violence. The right to petition for forfeiture within 45 days of seizure is an additional right, but "failure of the state to seek a forfeiture does not give the defendant the automatic right under New Jersey law to the return of the seized weapons so long as the domestic violence restraining order is outstanding." *Id.* at 683.

118. Ariz. Rev. Stat. § 13-3601 (West 1994 & Supp. 2005).

119. Ariz. Rev. Stat. § 13-3601C.

120. *Id.*

121. Ariz. Rev. Stat. § 13-3601D, E.

122. Ariz. Rev. Stat. § 13-3601F.

123. Deutchman, *supra* note 63, at 189.

124. *Id.*

125. Cal. Fam. Code § 6389(a) (West 1994 & Supp. 2005) ("A person subject to a protective order . . . shall not own, possess, purchase, or receive a firearm while that protective order is in effect").

126. Cynthia D. Cook, *Triggered: Targeting Domestic Violence Offenders in California,* 31 McGeorge L. Rev. 328, 331 (2000) (describing the firearm surrender order process).

127. Deutchman, *supra* note 63, at 190.

128. Cal. Fam. Code § 6389(g).

129. Cook, *supra* note 126, at 331.

130. *Id.* at 335; Deutchman, *supra* note 63, at 190–91.

131. Cal. Fam. Code §§ 6200–6390; Deutchman, *supra* note 63, at 190 n.34.

132. Cook, *supra* note 126, at 342 n.131.

133. Cal. Fam. Code § 6304.

134. Cal. Fam. Code § 6389; Cook, *supra* note 126, at 335–36; Deutchman, *supra* note 63, at 191.

135. *Id.*

136. Deutchman, *supra* note 63, at 191.

137. Cal. Fam. Code § 6389(c); Deutchman, *supra* note 63, at 192. If the respondent is not at the hearing, he or she has 48 hours after being served with the order to follow this procedure. *Id.*

138. Cal. Fam. Code § 6389(c). This requirement is the same for defendants who were not present at the hearing but were served with the order. *Id.*

139. Cal. Fam. Code § 6389(e).

140. Cal. Fam. Code § 6389(g); Deutchman, *supra* note 63, at 192.

141. Cal. Fam. Code § 6389(h). This exception was also in the 1994 legislation. Deutchman, *supra* note 63, at 192–93. The law places several restrictions on possession of a weapon under this exception. *Id.*

142. Cal. Penal Code § 12028.5(b) (West 1994 & Supp. 2005). The Penal Code also requires that each law enforcement agency track and report the total number of domestic violence cases involving weapons to the state Attorney General on a monthly basis. Cal. Penal Code § 13730(a). The Attorney General, in turn, will compile this information and provide an annual report to the Governor, the Legislature, and the public. Cal. Penal Code § 13730(b). The Penal Code also requires that each law enforcement agency develop a domestic violence incident report form that includes a notation of whether the officer inquired as to the presence of a firearm or other deadly weapon and whether that inquiry disclosed the presence of such firearm or weapon. Cal. Penal Code § 13730(c)(3).

143. Cal. Penal Code § 12028.5(b).

144. *Id.* Prior to a 2002 amendment that provided a maximum of five business days after the seizure in which

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the weapon must be returned, the statute permitted a shorter maximum of 72 hours. See CAL. PENAL CODE § 12028.5, Notes.

145. CAL. PENAL CODE § 12028.5(f). The law originally provided law enforcement with only 10 days to file the petition, but this was changed to 30 days in a 2000 amendment. Deutchman, *supra* note 63, at 195 n.70. A 2002 amendment further extended this time period to 60 days. CAL. PENAL CODE § 12028.5, Notes.

146. CAL. PENAL CODE § 12028.5(g).

147. CAL. PENAL CODE § 12028.5(h).

148. *Id.* A 2002 amendment changed the standard of proof to "preponderance of the evidence" from the previous, higher standard of "clear and convincing evidence." CAL. PENAL CODE § 12028.5, Notes.

149. CAL. PENAL CODE § 12028.5(j).

150. *Id.* This language was added in a 2002 amendment.

151. CAL. PENAL CODE § 12028.5(j).

152. N.J. STAT. ANN. § 2C:25-21d[1], [2] (West 2005).

153. State v. Johnson, 799 A.2d 608, 610–11 (N.J. Super. Ct. App. Div. 2002) (citing several U.S. Supreme Court cases discussing the "special-needs" exception to Fourth Amendment requirements).

154. N.J. STAT. ANN. § 2C:25-21d[1]; State v. Perkins, 817 A.2d 364, 370–71 (2003).

155. State v. Saavedra, 647 A.2d 1348, 1349 (N.J. Super. Ct. App. Div. 1994) ("Protection of the victim [is] the clear and unequivocal message. Law enforcement personnel and the courts [are] encouraged to insure, indeed charged with insuring, the safety of all victims exposed to actual or potential acts of domestic violence or abuse"); *Perkins,* 817 A.2d at 370; State v. Masculin, 809 A.2d 882 (N.J. Super. Ct. Ch. Div. 2002).

156. *Perkins,* 817 A.2d at 364.

157. *Id.* at 366.

158. *Id.* at 366–67.

159. *Id.* at 369.

160. *Id.* at 369–70 (quoting State v. Johnson, 799 A.2d 608, 611 (N.J. Super. Ct. App. Div. 2002)). The court noted that "reasonable cause," the words used in the statute, were equivalent to "reasonable suspicion," a lesser standard of suspicion than "probable cause." *Id.*

161. *Perkins,* 817 A.2d at 370 (quoting *Johnson,* 799 A.2d at 611).

162. *Id.* at 370. However, in the earlier case of State v. Younger, 702 A.2d 477, 480 (N.J. Super. Ct. App. Div. 1997), a New Jersey appellate court found that a warrantless search of a change purse under the domestic violence statute violated the Fourth Amendment. The consent by the defendant's grandmother to search in the defendant's bedroom was limited to a search for a handgun, which could not possibly be in a small change purse. *Id.* at 480. The court noted that the state statute is subject to the U.S. Constitution under the Supremacy Clause and so is subject to the limits on searches imposed by the Fourth Amendment. *Id.* at 481. The court found that "[t]he authority granted by the Domestic Violence Act does not constitute a license for the officer to conduct a general and intensive search beyond what is reasonable to locate the weapon the officer believes is on the premises." *Id.*

163. *Perkins,* 817 A.2d at 370–71.

164. Commonwealth v. Wright, 742 A.2d 661 (Pa. 1999). The relevant Pennsylvania statute is 18 PA. CONS. STAT. ANN. § 2711(b) (West Supp. 2005).

165. Commonwealth v. Wright, 742 A.2d at 661.

166. *Id.* at 662.

167. *Id.* at 662–63.

168. *Id.* at 663. The defendant was convicted, and the superior court affirmed. *Id.*

169. *Id.* at 664.

170. *Id.*

171. *Id.* at 664–65.

172. *Id.* at 666.

173. State v. Rodriguez, No. 22978, 86 P.3d 1000, 2004 WL 605318 (Haw. 2004).

174. HAW. REV. STAT. § 709-906(4)(f) (West 2004) (emphasis added).

175. *Rodriguez,* 2004 WL 605318, at *8 (citing State v. Peseti, 65 P.3d 119, 128 (Haw. 2003) (finding that a statutory privilege must defer to the defendant's constitutional rights in the context of cross-examination)).

176. *Rodriguez,* 2004 WL 605318 at *8.

177. N.J. STAT. ANN. § 2C:25-28j (West 2005). The court must specify the reasons for and the scope of the search and seizure authorized by the order. *Id.*

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178. N.J. Stat. Ann. § 2C:25-29b ("In addition to any other provisions, any restraining order issued by the court shall bar the defendant from purchasing, owning, possessing or controlling a firearm . . . during the period in which the restraining order is in effect or two years whichever is greater").

179. N.J. Stat. Ann. § 2C:25-29b[16]. The judge must also specify the reasons for and scope of the search and seizure authorized. *Id.*

180. State v. Johnson, 799 A.2d 608 (N.J. Super. Ct. App. Div. 2002).

181. *Id.* at 611.

182. *Id.* "Reasonable cause" is identical to the "reasonable suspicion" standard.

183. Kelly v. Mueller, 861 A.2d 984 (Pa. Super. Ct. 2004).

184. *Id.* at 988.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 990. The provision of the statute referred to is 23 Pa. Cons. Stat. Ann. § 6108(a)(7) (West Supp. 2005).

189. *Kelly,* 861 A.2d at 991.

190. *Id.* at 993.

191. *Id.*

192. The Pennsylvania chapter of the American Civil Liberties Union criticized the decision: "The court can certainly order that weapons be turned in, but to actually go and authorize a search and seizure without a warrant of probable cause being issued seems to me a stretch of the Protection from Abuse Act." *No-Warrant Searches for Guns OK'd,* Evening Sun (Hanover, Pa.), Nov. 9, 2004 (quoting Larry Frankel, legislative director of ACLU's Pennsylvania chapter).

193. Golden v. Bay Village Police Dep't, No. 79379, 2002 WL 253878, at *1 (Ohio Ct. App. 2002).

194. *Id.*

195. A specific court action filed to regain possession of personal property. *See* Bryan A. Garner, A Dictionary of Modern Legal Usage 757–58 (2d ed. Oxford 1995).

196. *Golden,* 2002 WL 253878, at *1.

197. *Id.*

198. *Id.*

199. *Id.* at *2.

200. *Id.*

201. *Id.*

202. Dragani v. Dragani, 42 Pa. D. & C.4th 295, 304 (Ct. Common Pleas 1999).

203. *Id.*

204. *Id.* at 302–03.

205. *Id.* at 303–04. Section 922(g)(8) prohibits firearm possession by persons subject to a final protection order, which meets the following criteria: (1) the order must have been entered after the defendant had notice and an opportunity to be heard; (2) the plaintiff or protected person is an "intimate partner" within the definition of the federal statute, or a child of an intimate partner or child of the defendant; (3) the terms of the order restrain the defendant from harassing, stalking, or threatening the plaintiff or protected person; and (4) the order includes a finding that the defendant represents a credible threat to the physical safety of the intimate partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury. 18 U.S.C. § 922(g)(8) (2000). *See also Dragani,* 42 Pa. D. & C.4th at 303–04.

206. *See* Emily J. Sack, Family Violence Prevention Fund, Creating a Domestic Violence Court: Guidelines and Best Practices 22–23 (2002) (discussing the negative impact of diversion models on defendant accountability for domestic violence crimes).

207. Deutchman, *supra* note 63, at 200–01. (providing examples across the country of very low surrender rates despite legislation requiring firearm relinquishment).

208. These "Procedures for Firearm and/or Ammunition Surrender" are on file with the author. All of the information in this paragraph is taken from these procedures.

209. All of the forms discussed in this paragraph are contained in an information packet from the Miami–Dade County Circuit Court (11th Jud. Dist. of Fla.), on file with the author.

210. The court also developed a form *Affidavit of a Third Party for Sale/Transfer of Firearm and/or Ammunition,* to provide documentation for the respondent that he or she will be transferring the weapon to a third party legally

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allowed to own it, and a form *Order Releasing Firearms and/or Ammunition to Third Party.*

211. This information sheet is contained within the information packet discussed *supra* note 209, on file with the author. All of the information in this paragraph is taken from this information sheet.

212. Castro, *supra* note 3.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* Though the city of Seattle is located within King County, it has its own law enforcement agency and court system.

223. Castro, *supra* note 3.

224. *Id.*

225. Nicolais, *supra* note 106, at 43.

226. *Id.*

227. *Id.* Another example is the sheriff's department in Contra Costa County, California, which has designated one officer to be responsible for filing the petitions and acting as department representative at hearings on the petition. One commentator reports that Contra Costa County now has a far higher rate of filed petitions for forfeiture of weapons than other counties in California. Deutchman, *supra* note 63, at 199–200.

228. There is no double jeopardy problem with state and federal prosecutions for the same conduct, because they are "dual sovereigns."

229. Gold, *supra* note 93, at 946.

230. United States v. Jones, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999).

231. United States v. Taylor, 240 F.3d 425, 426–27 (4th Cir. 2001) (describing Project Exile).

232. *Id.*

233. *Id.*

234. Gold, *supra* note 93, at 946.

235. Edwin E. Hamilton, Police Foundation Reports, Prelude to Project Safe Neighborhoods: The Richmond, Virginia Experience 1–2 (Jan. 2004; Gold, *supra* note 93, at 947.

236. Gold, *supra* note 93, at 947.

237. *Id.* at 948.

238. The federal project, launched by President Bush in May 2001, is called Project Safe Neighborhoods. Hamilton, *supra* note 235, at 1–2.

239. Gold, *supra* note 93, at 947 (during the first year of Project Exile's operation in Richmond, murder rates dropped 33 percent).

240. *See, e.g.,* United States v. Taylor, 240 F.3d 425, 427–28 (4th Cir. 2001) (rejecting defendant's argument that local police were acting as federal officers when they arrested him, so that federal speedy-trial provisions should control); United States v. Nathan, 202 F.3d 230 (4th Cir. 2000) (rejecting defendant's argument that Project Exile interfered with state criminal proceedings and violated principles of federalism).

241. United States v. Jones, 36 F. Supp. 2d 304, 313 (E.D. Va. 1999).

242. For an extensive discussion of the principles of specialized domestic violence courts and of various models, see Sack, *supra* note 206, *passim.* See also May, *supra* note 62, at 33 (discussing how integrated domestic violence courtroom would ensure judicial and court personnel expertise in domestic violence issues).

The Court's Role in Supporting and Protecting Children Exposed to Domestic Violence

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The effects on children of witnessing domestic violence has been the subject of a growing and increasingly sophisticated scientific literature. This article summarizes that literature as well as literature describing the impact of violence on parenting behavior and factors that have been found to influence children's safety with offending parents. It describes barriers to the application of the literature, including traditional attitudes that conflict with the growing available knowledge about the impact of violence on children, inefficient communication between departments of the court, laws and policies that sometimes conflict with the needs of children, and conflicting values about judicial activism. Finally, the article recommends specific ways that courts can work together to serve children and families, and policies that protect children's interests. ■

Mark and Sue are fairly typical of the hundreds of self-represented litigants that appear yearly on the family law domestic violence calendar. A month before the court date, Mark had come home drunk and was enraged because, when he tried to call Sue, the line was busy. He entered their apartment screaming accusations of infidelity. When Sue denied having a boyfriend, Mark slapped her across the face, causing her to trip over a chair and fall to the floor. Sitting motionless and terrified at the kitchen table were their two children, ages 3 and 5. When Mark stormed off to the bedroom, Sue grabbed the crying children and ran to a neighbor's apartment, where she called the police. The police came, arrested Mark, and interviewed Sue and the traumatized children. Sue got an emergency protective order and a referral to an agency that would help her get a restraining order. By the time she got her temporary restraining order, Mark was out of jail and staying with his mother. Mark's mother called Sue, berated her for getting Mark arrested, and demanded that the children come to her house to see their father. Sue informed her mother-in-law that this was not the first time Mark had hit her. Sue also asked that Mark give her some money for groceries. Mark's mother told Sue she could get some money when she brought the children over to visit.

Before they appeared in front of the judge, Mark and Sue each met separately with a family court mediator. Sue talked about how controlling and violent Mark could be and complained about how aggressive the children were when they returned from visits with their father. Sue told the mediator it would be okay for the children to see their dad, and she knew she wouldn't get any money unless she allowed visits. When Mark talked to the mediator, he accused Sue of overreacting and trying to poison the children against him. Mark wanted joint physical and legal custody. Because no agreement was reached, the case went before the judge for a decision on the restraining order and temporary custody. Neither Sue nor the judge knew that the criminal court had issued a stay-away order that included the children.

Portions of this hypothetical will be familiar to anyone who has encountered domestic violence cases. The initial reaction is to evaluate the situation from the perspective of the parents—the batterer and the victim. But what about the children? What trauma have they experienced? How do we address the physical and psychological safety of these children? Should the court system do more to

understand and protect the best interest of children who witness domestic violence in the home?

Every day, in cases involving domestic violence, family law judges and commissioners make decisions that shape the lives of parents and children, often with only the conflicting testimony of the parties, unsupported by independent evidence, to guide them. Many cases involve children who have witnessed violence between the adults in their lives, and there is ample evidence that witnessing family violence can have a powerful negative impact on a child, both psychologically and behaviorally. The family court thus has an opportunity to assume a legitimate role in breaking the cycle of violence with every family that comes before it. This article proposes that it is crucial for courts to advance this effort, despite the inherent difficulty of these cases, by intervening to protect children in families experiencing violence in the home.

To offer courts concrete assistance in meeting the challenges posed by these families, the article briefly reviews some key literature on the impact of witnessing domestic violence on children's development, on the risk and resilience factors that mediate and moderate the effects of witnessing violence, on the impact of violence on parenting behaviors, and on factors that influence children's safety with offending parents. Next the article reviews relevant law on domestic violence and describes some of the challenges that courts face in these cases. Finally, it concludes with recommendations informed by law and literature that can help courts structure procedures and programs that both comply with the law and protect children.

WHAT DO WE KNOW ABOUT CHILDHOOD EXPOSURE TO DOMESTIC VIOLENCE?

In recent years the scientific literature on the impact of exposure to violence on children's development has become more sophisticated, and there are now excellent sources that describe developmental threats and resilience factors common to children from violent homes.[1] Studies have found that witnessing domestic violence has an impact on children's lives, whether it is the only major stressor they suffer[2] or it compounds the effects of child abuse[3] or community violence.[4] Although the possible consequences of exposure to violence are complex, there are some general principles upon which courts and other systems that work with families can rely. The next sections discuss those principles under the following headings:

- What kinds of problems do children experience?
- Which children are the most vulnerable?
- What are the mechanisms by which violence affects children?
- What do we know about domestic violence and parenting?

When a family with domestic violence issues comes before the court, knowledge of these principles can guide a judge's thinking about whether referrals for evaluation are needed, what the referral questions should be, and what orders will best strike the balance between protecting the children's right to have relationships with both parents and guaranteeing the safety of the children and the nonoffending parent.

WHAT KINDS OF PROBLEMS DO CHILDREN EXPERIENCE?

Studies generally describe children's problems in terms of behavior problems or diagnostic categories. Many studies discuss so-called externalizing behavior problems in children who witness domestic violence. In fact these aggressive, destructive behaviors, which may include bullying, destruction of property, or assault, are probably the most frequently reported problems among children of battered women.[5] Child witnesses also suffer from internalizing problems (anxiety, withdrawn behaviors, depression, low self-esteem).[6]

The most common psychiatric diagnosis that has been studied in children of battered women is post-

traumatic stress disorder (PTSD). To be diagnosed with PTSD, the child must have experienced an event that was threatening to the life or bodily integrity of the child or someone else, and the event must have inspired feelings of fear, helplessness, and horror.[7] After the event, the child must develop symptoms of three different kinds: (1) reexperience of the trauma (e.g., nightmares, intrusive thoughts of the trauma), (2) emotional numbing and avoidance (e.g., avoiding reminders of the trauma, amnesia for important parts of the trauma, being unable to experience some emotions), and (3) hyperarousal (e.g., difficulty with sleeping, inability to concentrate, feelings of irritability, exaggerated startle response).[8] Children with symptoms in all three groups meet diagnostic criteria for PTSD.[9] Studies assessing children living in domestic violence shelters for posttraumatic stress disorder have found incidence rates ranging from 13 percent[10] to more than 50 percent.[11]

The kinds of problems that child witnesses to domestic violence suffer differ sometimes depending on the developmental stage of the child. Babies and very young children can be expected to express their distress behaviorally: they may develop interruptions in sleeping or eating, cry more, or lose developmental skills such as toileting or language. They may also develop fear of separation or other new fears.[12]

Preschool-age children who witness domestic violence have been shown to perform less well on tests of verbal intelligence than comparison children who have not been exposed[13] and to be less empathic and less able to make accurate social inferences than children from nonviolent homes.[14] These children misread the intentions of others. They may, for example, interpret a gesture intended as an invitation to play as threatening and respond with aggression. In their play with peers, preschoolers exposed to domestic violence are more likely to express negative feelings, to play aggressively, to withdraw from others, and to insult or name-call than nonexposed children.[15]

School-age children who witness domestic violence have more academic difficulties than their peers from nonviolent homes[16] and are also compromised in their ability to judge right from wrong.[17] Adolescent boys exposed to father-to-mother violence are more likely than nonexposed peers to run away, to report suicidal behavior, and to be aggressive with their mothers.[18] In addition, their academic and social functioning is compromised compared to peers who have not witnessed domestic violence.[19]

Not all child witnesses suffer these consequences. Two studies assessed behavior problems in children living in battered women's shelters. They relied on self-report from children (who were at least 6 years of age in one study and 8 years of age in the other) and on reports from their mothers and found that 26 to 31 percent of the shelter residents were doing well. Their externalizing and internalizing behaviors were within normal limits for children their age, and they had high levels of self-esteem.[20] How is it possible to predict which children will suffer the dramatic consequences described above and which children will emerge relatively unscathed from the experience of witnessing domestic violence? This is the question that the next section will discuss.[21]

WHICH CHILDREN ARE THE MOST VULNERABLE?

Although results of the studies are not unanimous on this point, there is a great deal of evidence that children 5 years old and younger may be disproportionately exposed to domestic violence[22] and that they may suffer more than older children as a consequence of witnessing it.[23] Indeed, one study indicates that children under 4 years of age have more symptoms of anger and aggression if they witness threats to their caregiver's well-being than they do from any other kind of trauma.[24]

In addition to age, several factors predict resilience in children who witness violence. Some of these are contextual or relational, and others are internal to the child. First, it is generally the case that children do better if they are exposed to one or, at the most, two major risk factors. When children must cope with three or more negative factors (e.g., exposure to violence, parental substance abuse or mental illness, poverty, or racism), the risk for poor outcome is multiplied.[25] Therefore, children from families with

multiple problems are especially vulnerable and in need of protection from the courts. Their coping capacities are stretched to the limit, and their parents may be too burdened with their own life difficulties to fully appreciate their children's plight.

Children who are intelligent and who have easy temperaments generally fare better in the face of risk, as do children with a strong relationship with at least one parent or a strong relationship with another adult.[26] For children exposed to domestic violence it is critical, therefore, that at least one strong parent-child relationship be preserved and protected. As will be discussed in a later section, one predominant characteristic of batterers is a tendency to undermine the children's relationship with the other parent. Courts should do what they can to prevent this, and one important way they can do so is to make orders that support the strongest possible relationship between the children and the nonoffending parent.

Parental factors have also been linked to children's resilience. Parental competence, sound maternal mental health, low levels of hostility toward children, and low levels of psychological aggression in the household are all associated with children who have fewer problems.[27]

WHAT ARE THE MECHANISMS BY WHICH VIOLENCE AFFECTS CHILDREN?

Four major theoretical models explain why exposure to domestic violence has such a profound impact on children's behavior and functioning. The first is physiological; the other three are psychological. It seems likely that all four interact with each other and that for any particular child affected by violence each of these theories may explain a bit of the puzzle.

Neurophysiological Responses: Trauma Affects the Developing Brain

Children's brains develop rapidly, especially in the first three years of life.[28] Because the brain develops at a pace that will never again be equaled, it may be especially vulnerable to assault from stress. Scientists now understand that certain hormones secreted by the body in times of extreme stress are toxic to brain tissue.[29] In fact, one theorist believes that exposure to traumatic events during the first two years of life permanently changes the structure of the brain, enriching connections in parts of the brain that are devoted to dealing with emergency, depleting connections in parts of the brain that are devoted to planning and regulation of emotion, and destroying cells in areas of the brain central to memory formation and memory retrieval.[30] But a less deterministic view of the data is also possible. Many years of research confirm that traumatized individuals do better with time and treatment, suggesting that there are corrective experiences that can follow traumatic ones and help the brain "rewire" and reregulate.[31] Nevertheless, well-designed studies have demonstrated that in both animals and humans high and continuing levels of stress dysregulate the stress hormone system and cause certain portions of the brain to atrophy[32] and that these physical changes are associated with behavioral changes. Overly stressed animals have been found to be more clingy to their mothers, more aggressive with their peers, more prone to behave defensively in situations that others may not perceive as threatening, less likely to explore, and less able to concentrate and learn.[33] Traumatized children with stress hormone dysregulation have been found to have deficits in verbal memory and intelligence,[34] to have less positive relationships with their primary caregivers,[35] and to pay selective attention to negative stimulation.[36] It is entirely possible that the aggressive and destructive behaviors, and the cognitive and social deficits that are so frequently observed in child witnesses of domestic violence, are related to dysregulations in their central nervous systems that follow repeated exposure to frightening behavior. This seems even more likely if the children were very young when the exposure began. If this is the case, intervention may be needed to help the children reregulate their systems before their behavior and functioning can be expected to improve.

Example: Tony's mother was pregnant with him the first time Tony's father beat her. He continued to hit her after Tony's birth, and Tony was almost always nearby crying when his parents fought. When Tony came for treatment, he was 3 years old. He had been expelled

from two different preschools because of his aggression toward other children and toward the teachers. In therapy, Tony learned some ways to help himself feel relaxed and calm. He learned to take deep breaths and to turn his body into a "wet noodle" when he felt too excited. More important, his mother learned some ways to help him. She learned that rubbing his hands or shoulders could calm him down, and that having predictable routines helped him feel calmer in general. As Tony more frequently had experiences of going from an excited internal state to a calm one, he learned what it felt like to calm himself and he began to use what he had learned when he was at preschool. His aggression diminished, and he made two friends whom he enjoyed playing with.

Cognitive-Affective Models: Violence Changes the Way That Children Think and Feel

If children are exposed to violence between the people on whom they depend for protection, that experience will change the way they view the world.[37] Theoretical models that focus on children's thoughts and feelings propose that children are motivated by a wish for emotional security and that their security is threatened by hostile, poorly resolved conflict between their parents. The models propose that children, especially if they have been long exposed to anger, perceive adult anger as aggressive and threatening and cope with this threat by taking action to end the discord and restore a sense of security.[38] The action may or may not be useful. For example, children may show distress when faced with their parents' arguing and aggression; they may blame themselves for the argument; they may engage in a fantasy about how they can stop or prevent future fights; they may feel guilty for not having been able to stop past fights. The proponents of these models assert that it is the less-than-effective means of coping with their loss of emotional security and their appraisals of threat and danger that lead to children's aggressive, destructive, anxious, and depressed behaviors and to their other social and relational problems.

Behavioral Models: Children Learn What They See

Social learning theory teaches that behavior is learned by modeling or observational learning: both children and adults imitate behavior that they see, particularly if the actor is someone who is appealing to or has power over the observer, or if the behavior leads to outcomes that are desirable to the observer.[39] Parents, who provide children's initial schemas of relationship behavior, are likely to be particularly potent models. They are inherently attractive to their children, especially their young children, who want nothing more than to please and be like their parents. They have seemingly boundless authority over their children. When a parent models aggression, children are very likely to follow the example. Not only is the parent a powerful model, but children also see some outcomes of parental aggression as desirable. They may be simultaneously terrified of the physical harm that their violent parents cause and thrilled by and attracted to the amount of power and control their parents exert. During an incident of parental violence, when the child is feeling most weak and vulnerable, power and a sense of control over the situation are valuable outcomes.

Social learning theory also teaches us that when children are emotionally aroused—for example, experiencing anxiety in a novel situation—they are most likely to rely on information that they previously learned by modeling.[40] A child in a violent home learns by modeling that aggression is effective in controlling situations and making people do what he or she wants them to do. A child who is anxious in a new situation—for example, approaching a group of unfamiliar children or starting school—may use the aggressive behavior learned at home to gain a sense of mastery over anxiety.

Aggressive behavior is not the only behavior that children in violent homes learn through modeling. Children may also model submissive behaviors, particularly if they see that these may be a way to avoid getting hurt or to avoid feeling helpless. Neither aggression nor submission, however, are suitable in most situations children face, and overreliance on

these behavioral schemas can lead to the kind of dysfunction noted in many children exposed to domestic violence.

Disordered Attachments: Children Become Unable to Trust Relationships

According to attachment theory, one of every infant's primary developmental tasks is to establish a relationship with a caregiver.[41] John Bowlby, author of seminal works explicating attachment theory, envisioned the attachment relationship as one essential to the survival of the individual and of the species and asserted that children are as strongly motivated to seek, and adult caregivers as strongly motivated to provide, this bond as they are to seek food. Under his theory, the attachment system is designed to protect younger, weaker members of a species in times of stress or threat. Bowlby asserted that children's drive for attachment is expected to be activated under conditions in which children feel (consciously or unconsciously) that their safety is threatened. He also believed that when child-rearing conditions or relationships are threatening, as they would be in a violent family, the attachment system is in a relatively constant state of activation, overwhelming other behavioral systems, such as the urge to explore.[42] When children are inhibited in their exploration, their learning and their mastery over the environment are also limited, leading to the cognitive deficits that have been noted in children exposed to violence.

Attachment theory, as postulated by Bowlby, holds that it is essential to a child's healthy development that the child have an attachment to at least one caregiver whom the child can trust to provide protection at times of threat or insecurity. To witness this caregiver being attacked and wounded is a profound assault on the child's trust. In the moment of assault, when the child most needs to be close to and reassured by the caregiver, the caregiver is too hurt, frightened, and angry to provide for the child.[43] When violent assaults on the caregiver are ongoing, the co-occurrence of intense need and complete helplessness leads to a chronic state in which the child feels at a loss to make and maintain satisfying emotional relationships. When the perpetrator is also an attachment figure, as is the case when one parent assaults the other, the child's mental representations of who is safe and who is dangerous suffer an additional profound split between love and fear. Under these circumstances, children develop profound insecurities and disorganizations in their mental and emotional schemas of relationships. These kinds of insecurities have been strongly linked with conduct problems in childhood, of the kind seen in children exposed to domestic violence.[44]

But it would be a distortion of attachment theory to use it to support the position that a victim of domestic violence is, by virtue of having been assaulted, somehow endangering children by failing to uphold the responsibility to protect them. From the children's point of view, their security is further shaken if they are removed from their important attachment figures. Children have their best chance to achieve good outcomes after exposure to violence if they can rely on the presence of a caregiver who can care for them, help them sort out their mixed and sometimes confusing feelings, and help restore a sense of calm. Courts have an important role to play in ensuring that relationships between victims of violence and their children are not further disrupted and in guiding families to the supportive services that they need.

WHAT DO WE KNOW ABOUT DOMESTIC VIOLENCE AND PARENTING?

Violence in the relationship between parents is not limited in its effects on the two adults but has a direct impact on their children as well. It is well established empirically that the quality of the relationship between parents is *directly* linked both to the quality of the parent-child relationship and to children's outcomes.[45] And in the context of family court, we must directly confront the reality that violence does not end when the parents separate. The period after the separation is often especially dangerous for both the adult victim and the children.[46] As perpetrator parents feel the other parent and the children slipping away from their control, they may escalate their

violence to regain a sense of control in the situation. It is also important to realize that abusive parents may attempt to use the family court as a way to continue to maintain power and control over the victim and the children, even after separation. For example, men who have been alleged to be violent with their partners are more likely to seek custody of their children than are nonviolent men.[47]

It is critical to keep these general characteristics of domestic violence cases in mind as we examine the parenting behavior of nonoffending parents, the parenting behavior of offending parents, and the cooccurrence of domestic violence and violence against children. Most studies that examine the impact of domestic violence on parenting have studied families in which the mother was the nonoffending parent and the father was the offending parent. Therefore the following discussion assumes that dynamic except when a particular study makes a different assumption.

Parenting Characteristics of Battered Women

It is well established that battered women experience more parenting stress than do nonbattered women in comparison groups.[48] In spite of this increased stress, there is relatively little difference between the actual parenting behaviors of battered and nonbattered women when one considers studies that rely on observational data as well as self-report. In one study, battered women and their children were observed to be involved in conflict more often than were the comparison women and their children, and the battered women attended less frequently to their children's play. In spite of this diminished attention, the battered women and their children did turn to one another and attempt to maintain contact. They initiated interactions with one another more frequently than did the comparison mothers and their children.[49] Battered women do, however, see themselves differently from comparison women. In one study, battered women reported that they were less affectionate with their children than comparison women. This self-report was not borne out in the observational data, however, which revealed that the women in the two groups were equally affectionate with their children.[50]

One conception about battered women as parents is that they are more violent with their children than women who are not victimized by domestic violence. This commonly held belief has only minimal support in the literature. One study found that battered women are more aggressive with their children while they are in the violent relationship,[51] but analysis of follow-up data with these women revealed that within six months of leaving the violent relationship their levels of aggression toward their children had returned to normal.[52] Other studies have found no difference in the level of corporal punishment used by battered women and comparison women.[53] It appears that most battered women deal with the stress of violence to themselves without resorting to physical punishment or other acts of aggression against their children.

Women's violence against their partners is an area that deserves more attention. Indeed, the literature on the impact of domestic violence on children can be criticized because it generally does not take into account the impact of violence perpetrated by mothers. The few studies that do examine mothers' violence have one unanimous finding, however: where mothers have engaged in violent acts against the father, those violent acts are not associated with increased behavior problems in children. This is true whether the children's behavior problems are measured by self-report, parent report, or observation.[54]

Parenting Characteristics of Violent Men

While mothers' aggression against fathers has not been associated with increased child behavior problems, fathers' aggression against mothers decidedly has. As is shown below, both research and clinical literature report the significant impact of fathers' aggression on their children, even when the aggression is not directed at the child, and that fathers who are aggressive toward their children's mothers parent differently from nonaggressive fathers.

In one study that asked battered women and a comparison group of women from the community

to report on the parenting behaviors of their husbands, the battered women reported that their husbands were more irritable with their children, spanked their children more, and were less affectionate with their children than did the comparison women. The battered women also reported that they altered their own parenting behaviors in the presence of their husbands in order to appease them or to control the children's behavior and keep the husband from becoming angry.[55] Two studies that rely on observation of father-child interactions found that fathers who were violent with their partners were also more physically and emotionally aggressive in interactions with their children, that they were more authoritarian, and that they displayed more negative emotion.[56] These parenting behaviors were more evident with boys than they were with girls. In response to their father's authoritarian style, the boys became more submissive in their behavior during the study tasks. Boys living with aggressive fathers made fewer suggestions and took a less active role in relating to their fathers than did boys whose fathers were not aggressive.

The clinical literature cites a number of ways in which the parenting behavior of violent men puts their children at risk. Men who are aggressive with their intimate partners frighten their children with their acts of violence; they risk undermining mother-child relationships; they are poor role models; their parenting behaviors may be alternately rigid/authoritarian and neglectful/irresponsible.[57] Beyond these behaviors, man-to-woman partner violence is associated with other increased risks for children: increased risk of abduction by the violent parent,[58] risk of psychological abuse and manipulation (especially postseparation in connection with visitation),[59] increased risk of sexual abuse or physical abuse,[60] and continuing risk of violence in the father's new relationship.[61]

With all the problems for children attendant to father-to-mother violence, it is fair to ask whether continued contact with a violent father is ever in the best interest of the child. But where contact can be physically and emotionally safe, it is important for children to have a continuing relationship with their fathers. In one study of preschool-age children from homes with domestic violence, children who had little contact with their fathers after separation had more symptoms of anxiety and depression than children who saw their fathers frequently.[62] The level of violence in the home was less predictive of children's anxiety and depression than the amount of contact they had with their fathers. From an attachment perspective, it is worth maintaining an existing father-child relationship even in the face of domestic violence if that can be done safely for the children and the mother.

Predicting Child Abuse From Domestic Violence

It is difficult to predict whether a parent who perpetrates partner violence will become violent with the children. Some authors suggest that instruments used to assess the level of danger for a woman can also be used to assess danger for her children.[63] These authors also point out that generally a battered woman is the best predictor of how dangerous a particular violent partner will be, suggesting that courts give added weight to concerns that battered women voice about their safety and the safety of their children.

Even in the absence of formal measures, however, there are some empirically based factors that can be used to predict, in families with domestic violence, whether a parent is likely to abuse a child. One study analyzed data from a representative sample of the national population and identified the following factors:[64]

- Frequency of acts of violence against the spouse or partner was the strongest predictor of child physical abuse. For men, each additional act of violence against the partner increases the odds that he will physically abuse his children by 12 percent; for women, each act of physical violence toward her partner increases the likelihood that she will abuse her children by 4 percent.
- Male children are more likely to be physically abused.
- Men and women who sustained corporal punishment as adolescents are more likely to physically abuse their children.

Other studies using smaller, nonrepresentative samples have also found that boys are more often abused and that frequency and severity of marital violence are the strongest predictors of child abuse.[65]

WHAT CAN COURTS DO TO BETTER SERVE CHILDREN EXPOSED TO DOMESTIC VIOLENCE?

Our evaluation of the literature to determine its implications for court practices and judicial decision making with respect to child custody and placement reveals several guiding principles. If we are to serve the best interest of children exposed to domestic violence, intervention is required and it should be based on the research. Family court systems need to identify those families where there is partner abuse; parents need to be aware of the effects of the violence on their children; court orders, procedures, and referrals need to support and strengthen the nonoffending, custodial parent; children need to continue an existing relationship with the offending parent if it can be done in a safe and meaningful setting; and therapeutic services need to be available. The actual implementation of these proposed court practices requires judicial education, a review of service delivery systems, and court leadership. Most significant, it also requires a reexamination of some of the assumptions that form the basis of traditional child custody proceedings in light of what we now know about domestic violence.

ASSUMPTION: PARENTS WILL ALWAYS ACT IN THEIR CHILDREN'S BEST INTEREST

The law requires child custody and visitation decisions to be made based on the best interest of the child.[66] The only significant limitation to this basic standard is a relatively recent statute that sets forth a rebuttable presumption that a parent who has perpetrated domestic violence is not entitled to sole or joint custody of a child.[67] While it does not set forth a presumption regarding custodial preferences, another section of the California Family Code does list a number of factors that the court should consider. These factors include "[t]he health, safety and welfare of the child," any history of domestic violence or child abuse by a parent, contact between the child and each parent, and substance abuse.[68] If a court orders sole or joint custody to a parent with a history of perpetrating abuse, the court must state the reasons for the decision in writing or on the record,[69] unless the parties stipulate to custody or visitation orders.[70] Children are not parties to the proceedings, and the court receives its awareness of their needs primarily through the lens of a parent. In fact, courts assume that parents, even during times of great conflict and stress, will know what their children need and will agree to arrangements that promote the best interest of their children. Mediation is required in contested child custody and visitation cases[71] for the purpose of assisting parents in reaching an agreement, ensuring continued contact with both parents, and avoiding continued conflict between the parents.[72] In general, courts seek to avoid proceedings on custody and visitation issues because of the manner in which they escalate parental conflict and the devastating effects they have on children.[73]

ASSUMPTION: PARENTS COME INTO COURT WITH EQUAL POWER

Another assumption that guides California's approach to child custody proceedings is that parents come into the judicial system with equal authority, power, and ability to advocate for themselves and their children. Included within this assumption is a belief that a parent who is a victim of domestic violence will inform the court of the situation and will be able to prove it.

ASSUMPTION: DOMESTIC VIOLENCE IS IRRELEVANT TO CUSTODY INQUIRIES

Judicial officers may be influenced by their own values regarding parenting and misconceptions about the dynamics of domestic violence. For example, the legislative scheme places a high value on frequent and consistent contact with both parents.[74] With

this comes an assumption that the parent most willing to provide liberal contact with the other parent is promoting the best interest of the children.[75] Common misconceptions include assumptions that domestic violence ends when the parents separate, that it is behavior between adults and not relevant to custody inquiries, and that mere exposure to domestic violence is not damaging to children.[76]

ASSUMPTION: THE ROLE OF THE COURT IS TO RESOLVE CONFLICTS FRAMED BY THE PARTIES

The final assumption relevant to this inquiry concerns the role of the court. The assumption is that the judiciary exists solely to resolve conflicts presented by those unable to reach their own resolution. It is the responsibility of the litigants to frame the issues and present the evidence that will enable a judicial officer to make a wise and reasoned decision.

FALLACY OF ASSUMPTIONS IN CASES OF DOMESTIC VIOLENCE

There is nothing inherently wrong with the above assumptions except that, in the context of domestic violence, they fail to promote judicial decisions that serve the best interest of children. One reason is that the literature revealing the effects of domestic violence on children is relatively recent, and even mental health professionals are just beginning to appreciate the scope of the problem and implications for intervention and treatment.[77] And it is unrealistic to expect parents to understand the damage they perpetuate by exposing their children to violence within the family when professionals are just beginning to understand it. Nor do victims of domestic violence come to court with power and ability equal to that of the perpetrators. These assumptions do not reflect the dynamics of domestic violence. By its very nature, domestic violence is "[o]ne intimate partner's attempt to control, dominate, and humiliate the other partner through a variety of means, including physical, sexual, psychological, financial, and spiritual abuse."[78] So fear, degradation, shame, and economic dependence are substantial and common impediments to achieving equal standing in the judicial process.[79] As a result, violence within the parental relationship will often be unreported or underreported.[80] Even where it is disclosed, a victim may be too traumatized to present an organized, persuasive case to a trier of fact. The victim is also more likely to be pressured into a visitation or custody settlement or minimize the extent of the violent behavior in order to secure some level of future safety and security.[81] Finally, there are limits to what mediators and judicial officers can do, in isolation, to protect children exposed to domestic violence. There are, however, strategies that can be implemented to vastly improve the current system.

STRATEGIES TO IMPROVE COURT HANDLING OF DOMESTIC VIOLENCE CASES

Every judicial officer making custody and visitation decisions carries an enormous responsibility to, minimally, do the least amount of damage possible and, optimally, make decisions that truly serve the physical, emotional, and intellectual best interests of the child. This responsibility carries with it the need to evaluate one's own biases, values, and assumptions about parenting. But there is little training for the enormity of this role and little encouragement and time for self-evaluation. We now have the opportunity to utilize the research on children exposed to domestic violence as a mechanism of self-reflection and program development that can enhance our decision making and service to children and families.

Education and Training

The greatest barrier to providing a judicial system that addresses the best interest of children who are exposed to domestic violence is a lack of information. It is critical that judicial officers, mediators, evaluators, family law facilitators, self-help center staff, and parents receive training with a focus on the dynamics of domestic violence, its effects on children, and interventions that promote future safety and ameliorate the damage of past exposure. While

the judicial system is designed to be reactive to the conflicts presented, a more thorough understanding of the dynamics and effects of domestic violence can empower us to become more creative and proactive in implementing constructive changes in court procedures and services.

Quite simply, there has been insufficient time for this new learning to have had a uniform impact on the education, understanding, and practice of professionals, even those specializing in family dynamics or the children of divorce. The integration of this new knowledge into the practices of mental health professionals is as incomplete, and as urgent, as its integration into the practices of family court practitioners and judges.[82]

Success in these efforts requires judicial leadership and commitment by court staff to better serve these children and their families. Judicial officers can take the lead by obtaining relevant training for themselves and demanding that court staff and attorneys also receive training.

Identifying Relevant Family Groupings

Obviously, we cannot serve children exposed to domestic violence unless they are identified. The most prevalent means currently available in most courts is self-reporting by a parent. However, because domestic violence is significantly underreported, other procedures should be implemented. Efforts implemented in San Francisco have resulted in the identification of more than double the number of families that self-reported. These efforts included the following methods:

- Utilizing a confidential questionnaire, distributed during a mandatory parent orientation held prior to child custody mediation, that asked parents to indicate whether certain behaviors had occurred in the relationship (see Appendix A). When asked directly whether domestic violence had occurred in the relationship, many parents responded in the negative but submitted questionnaire responses indicating significant threats, controlling behaviors, slapping, and other violent acts. With this knowledge, mediators were better able to structure the mediation to protect the victimized parent, educate the parents about the effects of the violence on their children, facilitate a custody and visitation plan that was child-focused, and make appropriate service referrals.
- Working in collaboration with community and public agencies to change police response to domestic violence incidents where children were present. This included changing police reporting procedures to include the names and ages of all children who were present in the residence where the violence occurred. This change in procedure provided a means by which information regarding the children could come to the attention of both the criminal and family law departments.
- Requesting those who provide assistance to self-represented litigants, both court-based and community providers, to include the names and ages of children on applications for temporary restraining orders. This procedure provided information to both the judicial officer and mediator that assisted in appropriate procedures, inquiry, court orders, and referrals.

Evaluating and Restructuring Court Procedures

There is no specific set of procedures appropriate for all courts to address children's issues in domestic violence cases. Courts vary enormously in the size and structure of their family law departments. Significant differences result depending on whether a county has a confidential mediation program or one where mediators provide specific information and recommendations to the judicial officer. What is important is an individualized evaluation of whether the procedures and programs within a given court address the needs of children exposed to domestic violence. To do this effectively, the court must also address the safety and needs of the nonoffending, custodial parent. The following questions are key in conducting such an evaluation:

- Is the court adequately identifying those families where children are being exposed to domestic violence?
- If the court offers parenting programs or parent orientation sessions, does the curriculum include information on the effects of domestic violence on children?
- Are judicial officers, mediators, evaluators, and other staff adequately trained in domestic violence issues, including its effect on children? Are they aware of resources available in the community such as supervised visitation, batterers' intervention, victim support, and child therapy programs?
- Are court calendars structured to minimize the number of required appearances and the potential for further conflict and violence? For example, are parents able to come to court at different times for orientation, mediation, child support orders, and custody/visitation hearings?
- Are courts able to identify other proceedings involving the same family? Is there a protocol or local rule of court enabling the criminal and family law courts to share information?

On the specific issue of other proceedings involving the same family, it is not unusual for families to have a variety of matters pending at the same time or in close proximity, such as a criminal domestic violence case, a child support matter, and a custody dispute. There may even be conflicting orders issued because judicial officers are not aware of a preexisting order. A criminal court may issue a stay-away order of which the judicial officer in family court has no knowledge. The family law judicial officer may issue an order allowing the defendant supervised visitation in violation of a previously issued stay-away order. California law expects judicial officers to have access to existing restraining orders.[83] However, most courts do not have computer systems that easily provide such information from within their own counties, much less access to orders from other counties. The California Rules of Court require each county to develop a local rule of court to establish a protocol for the sharing of information between the criminal and family law divisions regarding domestic violence orders.[84] (See Appendix B for an example of a local rule.) Establishing such a protocol is especially important for children who have been witnesses to domestic violence. While the criminal justice system may have domestic violence advocates available to assist the nonoffending parent, they generally lack the expertise or awareness of resources to address the needs of the children. The family law division is better positioned to address those needs but cannot do so unless an appropriate protocol is developed for referrals from the criminal division and permission to modify stay-away orders.[85]

Identifying Community Resources

A critical task in the process of improving service to children exposed to domestic violence is to identify services, both public and private, available within the community. Because information regarding the trauma suffered by children exposed to domestic violence, as well as successful interventions to ameliorate those effects, is relatively new, the available services must also be assessed for their expertise in working with these children and their families.[86] The identification and assessment of such services inform the court for the purpose of making appropriate referrals and court orders.[87] Some relevant inquiries include the following:

- Is a supervised visitation program available? If so, how closely monitored are the interactions between the offending parent and the child? Because it is common for offending parents to use the children in ongoing conflict and to disparage and blame the nonoffending parent, it is important for the judicial officer to understand the level of service provided before ordering supervised visits between a child and an offending parent.[88] This, of course, assumes that any visitation is safe and appropriate. Interventions, such as supervised or therapeutic visitation, can be effective but are

not always safe. For example, if there is sexual abuse in the family, an intervention to enhance the parent-child relationship should not be used because it may make the child more trusting of and vulnerable to a predator.[89] In cases involving family violence, a small number of perpetrators will be psychopathic and outside the reach of treatment.[90] Courts should heed the advice of service providers and not insist on interventions that involve the offending parent and the child in treatment together in these cases because to do so will increase the risk to the child.

- Are batterers' intervention programs available? If so, do they cover the effects of domestic violence on the children and cover parenting without violence? Do they provide regular reports to the court regarding a parent's participation? This information assists the court in understanding what to expect from such a program and may be helpful in determining when, if at all, supervised visitation can be implemented.
- Are parenting programs available? If so, does the curriculum include information on domestic violence, its impact on children, and strategies to assist children who have been exposed to such violence? Again, this information is valuable to a judicial officer in determining appropriate referrals or court orders.
- Is there an individual professional or organization available with the expertise to assess the needs of the family members? Obviously, not all domestic violence situations are the same, nor do all family members need the same interventions. The extent and duration of the violence, the offending parent's amenability to treatment, whether there has been child abuse, the resilience of the child, and the coping and parenting abilities of the nonoffending parent are some of the characteristics that should be considered in developing a visitation or treatment plan.[91]
- Are there victim advocacy and mental health programs available to work with the nonoffending parent and child? As the literature indicates, a parent who has been a victim of domestic violence is likely to be experiencing a high level of fear and stress that impedes his or her ability to be attuned to the child's needs and respond appropriately to behaviors that indicate distress. Support for the nonoffending parent and assistance in developing parenting skills specifically directed at interacting with a traumatized child are essential to enabling the child to develop the emotional, behavioral, and cognitive resources necessary to healthy development and relationships.

Court and Community Collaborations

Our judicial system has gained considerable experience in developing collaborations with other agencies with the goal of achieving more lasting and positive outcomes for litigants and criminal defendants. Developing such collaborations to assist the courts in providing better service to child witnesses of domestic violence will result in improved judicial decisions and healthier children. People from public agencies, academia, advocacy groups, and community service organizations are extremely receptive to working with the judiciary on efforts to improve service delivery. As observed by FitzGerald et al., "[j]udges can set expectations, rally the community and others around the creation of needed services, and bring collaborations together…."[92] Collaborative partners can be especially helpful in providing education programs for court staff and service providers, identifying and assessing currently available resources, identifying gaps in available services, and working together to develop new programs responsive to the needs of children from violent homes. For example, groups providing child and family therapy, supervised visitation, domestic violence advocacy, batterer intervention, parent education, and public health services can offer important perspectives on the effects of violence within the home and are likely to have great interest in working with the court on intervention strategies.

CONCLUSION

Much has been written about adult domestic violence victims and the need for the courts to be informed and responsive. As a result, legislation, court rules, mediation procedures, and judicial education have focused on the court's role in protecting and serving domestic violence victims. We now possess information that assists our understanding of the degree to which children who witness domestic violence are also victims. It provides us with the opportunity to engage the judiciary in services and procedures that address the best interest of the children whose future is dramatically affected by our decisions.

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APPENDIX A

CONFIDENTIAL SCREENING FORM FOR FAMILY COURT SERVICES

Please fill out this questionnaire. This information will remain confidential with Family Court Services. Thank you.

NAME: _____ DATE: _____

CHILDREN AND AGES: _____

Are you and the other parent residing together? _____ Date of separation if applicable: _____

1) Has the other parent ever been responsible for any incidents of violence against you? Have you ever experienced any of the following by the other parent? (Circle any letter that applies.)
   - a) Yelling/name calling
   - b) Threats
   - c) Breaking, throwing things
   - d) Hurting pets
   - e) Pushing, shoving
   - f) Slapping, hitting, kicking, biting
   - g) Choking, strangling, smothering
   - h) Threats to use a gun, knife or other weapon
   - i) Use of guns, knives or other weapons
   - j) Forced sex
   - k) Other: _____

2) Have you ever received bruises or scrapes during these incidents? _____
3) Have you ever received other injuries from these incidents? _____
4) When was the most recent incident? _____
5) Have the children ever witnessed these incidents? _____
6) Were Child Protective Service Reports made? _____
7) Were the police called? _____ Were police reports made? _____
8) Were there arrests or convictions? _____
9) Were medical reports made? _____
10) Does the other parent possess weapons at this time? _____
11) Is there currently a restraining order against either parent? _____
    Expiration date of the current order: _____
12) Has there ever been a restraining order against the other parent? _____
    When? _____
13) Do you think that you have problems with drugs or alcohol? _____
    Does the other parent have problems with drugs or alcohol? _____
14) Are you afraid of the other parent? _____
15) Do you have a plan to protect yourself and/or your children? _____

Pursuant to Family Code section 6303, the party protected by a restraining order has the right to have a support person with him or her during mediation.

Pursuant to Family Code section 3181, where there has been a history of domestic violence or where a protective order is in effect, at the request of the person alleging domestic violence in a written declaration under penalty of perjury, or at the request of the person protected by the order, the mediator shall meet with the parties separately and at separate times.

APPENDIX B

This local rule is adopted in compliance with rule 5.500 of the California Rules of Court, requiring a court communication protocol for domestic violence and child custody orders.

COURT COMMUNICATION PROTOCOL FOR DOMESTIC VIOLENCE AND CHILD CUSTODY ORDERS

Modifications of Criminal Protective Orders
Referrals from Criminal to Unified Family Court
Procedures in Juvenile and Probate Courts

I. Statement of Principles and Goals

A. This protocol is adopted to reflect the joint goals of protecting all victims of domestic violence and promoting the best interests of children. Exposure to violence within the home and between parents can result in long term emotional and behavioral damage to minor children. Severing all contact between an offending parent and the children may exacerbate the harm and not be in the best interests of the children or family unit. The Unified Family Court has programs and services, such as supervised visitation and parenting education programs, that enable children to have visitation with an offending parent in a safe and constructive setting. At the discretion of the judge presiding over a domestic violence criminal case, a referral can be made to the Unified Family Court, giving the latter court the authority to modify a criminal protective order as to minor children.

B. This protocol recognizes the statutory preference given to criminal protective orders. Such orders will not be modified by the Unified Family Court unless specifically authorized by the judge in the criminal proceeding.

C. A plea or conviction of domestic violence in the Criminal Division triggers the presumption regarding physical and legal custody set forth in Family Code section 3044.

D. Services and programs are available through the Unified Family Court to provide and facilitate safe parent-child contact and assist people in providing violence-free parenting to their children.

E. Courts hearing cases involving child custody and visitation will take every action practicable to ensure that they are aware of the existence of any protective orders involving the parties to the action currently before them.

II. Procedure in Criminal Court

A. When the Criminal Court does or has issued a protective order covering the minor children of the defendant:

1. The Court may, at the judge's discretion:

   a. Allow the protective order, as to the minor children, to be modified by the Unified Family Court;

   b. MAIL a copy of its order to the Unified Family Court case manager. A copy of the order shall be given to the defendant and the victim by the Criminal Court;

c. Advise the defendant and victim that the Unified Family Court may be able to provide services that will assist them in meeting the needs of their children in a safe and supportive way and advise the defendant and victim of the right to seek visitation through the Unified Family Court; and

d. Provide the defendant with the Judicial/Information letter, which shall inform the defendant that the protective order, with respect to the minor children, will not be modified unless he or she files a motion and participates in all programs required by the Unified Family Court. The Information letter will also advise defendant that the Unified Family Court will be informed of all court dates in the criminal department and any violations of the protective order or other probation conditions.

2. The District Attorney's Office will:

a. Provide the victim with the Information letter; and

b. Advise the victim of the right to seek a restraining order, child support and supervised visitation through the Unified Family Court.

3. Upon receipt of the Unified Family Court orders, the Criminal Court shall either give the order to the appropriate department (if there is a future date) or place the order in the case file (if the case has been adjudicated).

B. *At Other Hearings:* The Criminal Court will inform the Unified Family Court of any changes in court orders or violations of probation.

III. Procedure in Unified Family Court

A. The Court will:

1. Set all cases referred from the Criminal Court on the Domestic Violence Calendar;

2. Include the criminal case number as a cross-reference on all orders that result in a modification of the criminal protective order;

3. Specify the fact, on any Visitation Order, that the criminal protective order is being modified and have the order registered on the CLETS network; and

4. Schedule periodic appearances for progress reports.

B. Family Court Services will:

1. Provide a parent orientation program specific to domestic violence issues;

2. Provide mediation services to the parents in conformance with safe practices in domestic violence cases; and

3. Provide a referral to a Parenting Without Violence education program that highlights the effects of domestic violence on children.

C. The Unified Family Court case manager will:

1. Track Unified Family Court hearings involving custody and visitation issues and cross-reference orders from both the Criminal Court and Unified Family Court;

2. Send a copy of Unified Family Court orders to the Adult Probation Department and to the Criminal Court; and

APPENDIX

3. Assist both parents in accessing the following services when ordered by the Court:
   a. Parent Orientation
   b. Mediation
   c. Supervised Visitation
   d. Parent Education
   e. Child Trauma Project
   f. SafeStart
   g. Family Law Facilitator (when there are child support issues).

D. The Self-Help Center will:
1. Provide legal assistance to both defendant and/or victim, to properly place the matter on calendar; and
2. Include a copy of the protective order from the criminal proceedings in the motion with all requests to modify a criminal protective order.

IV. Procedure in Juvenile Dependency Court

A. The San Francisco Department of Human Services:
1. Will perform a search for criminal and civil court protective orders involving a prospective custodian when filing a dependency petition and recommending a minor's change of custody to that person; and
2. Must not place a minor with a prospective custodian who is restrained by a protective order, but must inform the Dependency Court of the existence and terms of the protective order.

V. Procedure in Juvenile Delinquency Court

A. The San Francisco Juvenile Probation Department:
1. Will perform a search for criminal and civil court protective orders involving a prospective custodian other than the minor's regular legal custodian before releasing a minor to that person; and
2. Must not release a minor to a prospective custodian who is restrained by a protective order, but must inform the Delinquency Court of the existence and terms of the protective order.

VI. Procedure in Probate Court

The Probate Court will cross-check petitions for probate guardianship for cases in juvenile and family court. The Probate Court will also search for criminal and civil protective orders involving the proposed guardian and other adults living in the proposed guardian's household.

Addressing the Co-occurrence of Domestic Violence and Substance Abuse

Lessons From Problem-Solving Courts

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Crimes related to both substance abuse and domestic violence place an enormous burden on society. While courts throughout the country have established innovative problem-solving approaches designed to address these issues, the criminal justice system rarely applies them concurrently. This article explores the challenges and potential benefits of addressing the co-occurrence of substance abuse and domestic violence by means of the problem-solving-court model. The authors include examples of best practices for developing similar programs in other courts.

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In January 2004 the Judicial Council, recognizing the high co-occurrence of substance abuse and domestic violence, hosted a teleconference roundtable discussion on developing a coordinated approach to these issues in both court operations and the provision of services to substance abusers and batterers. Several California judges, along with legal practitioners, treatment professionals, and academics, discussed existing problems in the current approach to the two issues, identified obstacles to change, and debated best practices for a more comprehensive and coherent approach to these issues. Participants were selected based on diversity of experience, academic and legal expertise in the area, and judicial leadership. The objective of the roundtable was to elicit a focused discussion on the mounting evidence of associations between domestic violence and substance abuse and the intricacies of addressing concurrent treatment from a programmatic, legal, and philosophical point of view. Comments of roundtable participants are quoted throughout this article.[1]

Crimes related to both substance abuse and domestic violence place an enormous burden on society. Research indicates a strong and well-documented correlation between these two social problems, with estimated rates of co-occurrence ranging from 40 to 92 percent.[2] Although these issues are correlated, they arise in different legal and social contexts and have provoked distinct criminal justice approaches and service interventions. Yet the criminal justice system rarely addresses these problems concurrently, despite their high rate of co-occurrence among the defendant population. The authors argue that the extant data require that the criminal justice system and community-based service providers develop effective interventions that recognize the coexistence of substance abuse and domestic violence while maintaining appropriate distinctions in theory and approach. The problem-solving court may offer an effective model for approaching this challenge.

In recent years, jurisdictions throughout the United States have established specialized calendars to address just such issues as substance abuse and domestic violence through the application of intensive judicial oversight and services provided by community-based organizations. These innovative courts, often called "problem-solving courts," emphasize partnerships

among courts, attorneys, and community agencies to coordinate interventions and ensure defendant accountability. While evidence suggests that problem-solving courts have successfully reduced recidivism, the tested models have generally focused on a single specialized area, such as substance abuse or domestic violence. But the close judicial monitoring and strong partnerships with service providers that define such specialized courts offer a promising opportunity to effectively address the co-occurrence of substance abuse and domestic violence.

This article first explores the challenges and potential benefits of addressing the co-occurrence of substance abuse and domestic violence both in the justice system and among service providers, and then investigates possible methods for coordinating interventions by courts and service programs. Because much of the philosophy and practice in these two areas has been in tension, coordination among courts and services is likely to be complex. Any successful coordination must respect the distinct concerns that substance abuse and domestic violence present. This article does not propose a specific model of problem-solving court to address the two issues; rather, it invites dialogue on issues of co-occurrence and potential responses to it. Increasing understanding of the co-occurrence of domestic violence and substance abuse will lead to heightened defendant accountability, enhance the health and safety of both defendants and victims, and improve public confidence in our justice system.

THE CORRELATION BETWEEN SUBSTANCE ABUSE AND DOMESTIC VIOLENCE

High rates of co-occurring substance use and domestic violence are well established. A recent study found that fully 92 percent of domestic violence perpetrators had used alcohol or drugs on the day of a domestic violence assault, and 72 percent had a record of prior arrests related to substance use.[3] Other studies have shown that between one-fourth and one-half of men who commit acts of domestic violence are addicted to alcohol or other drugs.[4] Research also shows that alcohol and drug abuse are related to an increased risk of violent death in the home.[5] Early onset of drug- and alcohol-related problems is strongly correlated to domestic violence.[6] In addition, alcohol and drug use has been associated with greater severity of injuries and increased lethality rates when present in conjunction with domestic violence.[7] Although neither alcohol use nor drug use has, by itself, been proven to cause domestic violence, and though the cessation of alcohol or substance abuse is no guarantee that batterers will change their abusive behavior, research does suggest that, overall, domestic violence is reduced through the treatment of alcohol abuse.[8]

Despite this research, the criminal justice system and community-based services do not routinely recognize or contend with the frequent co-occurrence of these problems in cases that may present solely as domestic violence or as substance abuse. Domestic violence convictions that do not result in incarceration generally lead to batterers' intervention programs, with substance abuse treatment being ordered only for offenders with obvious substance addiction issues.[9] Similarly, battering behavior in defendants charged with substance abuse is rarely identified or acted on.[10] Roundtable participants confirmed that the current approach did not address both issues and stated that the courts and service providers needed to develop a coordinated approach. Judge Susan Finlay, a domestic violence court judge in San Diego County who formerly presided over a drug court, said that in the 26 batterers' intervention programs used by her court, the average time spent on substance abuse was 8 hours out of the 104 hours mandated for defendants. She commented that the failure to address substance abuse problems among domestic violence defendants was "totally self-defeating because the people are not going to change their behavior unless they have dealt also with their addiction." Moreover, failure to address domestic violence can affect recovery from drug addiction.[11] Judge Finlay referred to research indicating that "unless you address both of the issues—substance abuse as well as violent behaviors—neither gets any better. In fact both can get

worse." She noted that in "[e]very single failure that I look at, with rare exception, on the probation revocation calendar, a person who cannot do the domestic violence program, it's because of alcohol or other drug issues."

Because of the different causes and behaviors associated with domestic violence and substance abuse, a single type of service intervention will never be adequate to address both problems. As Patti Bland, statewide training coordinator for the Alaska Network on Domestic Violence and Sexual Assault, explained, "Substance abuse treatment can help make it possible for batterers to recover from alcohol and other drug dependence but does not adequately address domestic violence and cannot be substituted for batterer accountability or intervention programs designed to stop violence." The question then becomes how best to approach the coexistence of these issues. Specialized problem-solving courts could provide the judicial attention and service coordination necessary to address the co-occurrence of substance abuse and domestic violence.

THE EMERGENCE OF PROBLEM-SOLVING COURTS: DRUG COURT AND DOMESTIC VIOLENCE COURT MODELS

In recent years, policymakers, courts, and practitioners have supported the development of problem-solving courts as a response to increasing caseloads and the growing frustration of "business-as-usual" case processing.[12] These innovative court models evolved from a recognition that the legal system, in its inability to stem the tide of drug usage or stop the violence, is "doomed if it remains static."[13] As New York State Chief Judge Judith S. Kaye has written, "In many of today's cases, the traditional approach yields unsatisfying results. The addict arrested for drug dealing is adjudicated, does time, then goes right back to dealing on the street. The battered wife obtains a protective order, goes home and is beaten again. Every legal right of the litigants is protected, all procedures followed, yet we aren't making a dent in the underlying problem."[14]

Instead of simply moving cases through the system, problem-solving courts focus on strong collaborations with service providers and legal partners to address the underlying issues in these cases. Judicial leadership is critical to promote defendant compliance and to ensure effective relationships among the court and its partners, including prosecutors, defense attorneys, law enforcement and probation officials, and service providers in a variety of community-based agencies. Judicial oversight appears to have significant impact in motivating behavioral change,[15] thereby improving outcomes for victims and defendants while increasing public safety. The positive results of specialized courts have resulted in public and political recognition of their efficacy and an increase in financial support to the courts from executive agencies, legislators, and county governments. As we enter the second decade of problem-solving courts,[16] and as our knowledge and sophistication about the complexities of comprehensive interventions grow, the justice system will continue to refine and expand these innovative initiatives. Drug courts and domestic violence courts are well positioned to consider new methods that advance the coordination of substance abuse and domestic violence interventions.[17]

The first problem-solving court, a drug court, opened in Miami in 1989 to cope with the proliferation of drug offenders during the height of the crack cocaine epidemic.[18] Before the development of the drug court, a typical offender charged with a low-level nonviolent drug offense would receive a jail or probation sentence with no linkage to substance abuse treatment and would quickly cycle through the Dade County justice system. It was likely that a drug-addicted offender would repeat the offense, so the process would recycle, with no attempt made to address the underlying substance abuse.

One important feature of the drug court model is that both court and case management personnel quickly assess the type and severity of addiction of each defendant and provide opportunities for placement in appropriate substance abuse treatment with providers maintaining close contact with the

court. Structures for pleas, sanctions, and sentences have been worked out beforehand, so that a defendant can plead quickly and enter treatment soon after arrest, with the understanding that failure to complete the program will result in criminal sentencing. The court, prosecutors, and defense attorneys, together with court case management staff, probation officers, and service providers, operate as a team to focus on the defendant's successful rehabilitation from substance abuse, which will result in reduction or dismissal of the charges. The judge closely monitors the defendant's progress by requiring frequent status reports from service partners on program participation and drug test results and by mandating frequent court appearances by the defendant. The judge imposes immediate consequences for the defendant's noncompliance with the court's orders through a series of graduated sanctions and recognizes the defendant's success through court-mandated rewards.

Although every drug court has unique characteristics, most adhere to uniform principles based on 10 key components defined by the U.S. Department of Justice's Office of Drug Court Programs.[19] The use of judicial authority, early assessment and access to treatment, and consistent monitoring of defendants has proven effective in addressing substance abuse and reducing recidivism.[20] The encouraging results of the adult criminal drug court model have led to its widespread replication and its adaptation to juvenile and family court settings.[21] By January 2005, some 16 years after that groundbreaking drug court opened in Miami, the total number of adult, juvenile, and family drug courts had reached 1,262 nationwide.[22]

Domestic violence courts developed somewhat later than drug courts and were rooted in dramatic changes in domestic violence policy in other parts of the justice system throughout the 1980s and 1990s. Through significant efforts by the battered-women's movement, the justice system began to focus attention on domestic violence. Ensuring access to civil protection orders for battered women was an early focus of the movement and remains an ongoing priority. Advocates for battered women also successfully worked for changes in criminal justice policy, such as mandatory arrests on probable cause and more aggressive prosecution policies in domestic violence cases. The resulting rise in domestic violence caseloads and increased attention by law enforcement and prosecutors led to calls for specialized domestic violence courts, supported by specialized court and partner staff, to ensure educated and consistent judicial decision making.[23] The structure of these domestic violence courts was often influenced by elements of the existing drug court model, including strong judicial involvement and monitoring as well as close collaboration with multiple partners from the court and community.

Unlike drug courts, however, domestic violence courts handle cases with targeted victims, and the defendants are, by definition, alleged to be violent offenders. As a result, the primary goals of domestic violence courts have always been to ensure victim safety and defendant accountability.[24] Many services linked to the domestic violence court focus on victims' needs, including victim advocacy, safety planning, access to shelter, and children's counseling, all of which are voluntary. Such courts also mandate batterers' intervention programs for defendants, but this is part of the effort to increase defendant accountability and these programs are not substitutes for the imposition of criminal sentences. Some states require convicted domestic violence defendants to attend batterers' programs with specific components. In California, for example, convicted batterers must attend a state-approved, 52-week intervention program.[25]

Defendants ordered to participate in batterers' intervention programs and other services return to court regularly for compliance reviews before the domestic violence judge, and failures to comply with court orders result in swiftly imposed sanctions. Such sanctions might include additional group sessions, community service, referral back to court for specific legal sanctions, or even termination from the group. Service providers, probation, and other agencies working with defendants coordinate closely with court personnel and furnish regular status reports.

Victim advocates link with domestic violence victims early in the cases to offer services and serve as liaisons with the criminal justice system.[26] Intensive judicial monitoring, partnerships with court- and community-based partners, and voluntary services for victims are all focused on keeping victims safe and holding batterers accountable for their crimes.[27]

Unlike drug courts, domestic violence court models have developed for both the civil and criminal justice systems. Civil domestic violence courts usually focus on protective-order calendars, but some also address custody and visitation issues.[28] Criminal domestic violence courts may focus solely on domestic violence charges or may incorporate additional charges facing the defendant. A recent development is an integrated domestic violence court model that addresses both criminal domestic violence charges and related civil issues, including civil protection orders, custody, visitation, and divorce, and that may handle cases involving other family members as well as the defendant.[29] Each type of drug court and domestic violence court model involves some distinctions in the exercise of judicial authority and operation of court proceedings. This article focuses on the criminal drug court and criminal domestic violence court models, where coordination of substance abuse and domestic violence interventions may be at the same time the most urgently needed and the most difficult to accomplish.

COMMON ELEMENTS IN DRUG COURTS AND DOMESTIC VIOLENCE COURTS

Drug courts and domestic violence courts have different roots, goals, and challenges. Still, both models have achieved some success by directing the attention of judges, court professionals, and community partners to these issues. Because of these courts' specialized caseloads, a substantial proportion of their defendant populations are involved in both substance abuse and domestic violence. Their dedicated caseloads give drug courts and domestic violence courts strong incentive to investigate methods for dealing with the co-occurrence of these problems, while their design allows them the potential for instituting a coordinated approach to address both issues. As momentum toward dealing with co-occurring problems in a coordinated manner increases, it becomes essential for the courts and their community partners to fully understand the common elements of drug courts and domestic violence courts.

JUDICIAL LEADERSHIP

Drug courts and domestic violence courts each require strong judicial leadership. The judge's authority is pivotal in ensuring defendant accountability in both courts; defendants return to court frequently for compliance monitoring and are subject to swift consequences for any failures. In addition, judges use their authority to foster communication among partners, seek additional court resources, or promote education within the court system and among community members. A problem-solving approach to domestic violence and substance abuse "posits several new roles for judges: active case manager, creative administrator and community leader."[30]

DEFENDANT ACCOUNTABILITY

Drug courts and domestic violence courts share a common focus on defendant accountability, which is strengthened when the court strictly monitors defendants' compliance with court orders. In drug courts, this accountability can lead to successful recovery from drug abuse, while in domestic violence courts it can help keep domestic violence victims safe. But when defendants fail to comply with judicially monitored substance abuse treatment or batterers' intervention programs, they face immediate sanctions, including increased frequency of court appearances, community service obligations, or even incarceration.

COLLABORATION AMONG JUSTICE SYSTEM PARTNERS

Both drug courts and domestic violence courts emphasize ongoing collaboration among diverse partners, including judges, court staff, prosecutors, defense attorneys, and law enforcement person-

nel, along with probation, treatment, and service professionals. The particular composition of the collaborations in each court differs; for example, victim advocates are prominent in any domestic violence court partnership, though they are not likely to be involved in typical drug court collaboration. The relationship among these partners also varies. Defense attorneys often eagerly participate in drug courts that can offer their clients beneficial case dispositions as well as access to treatment. In contrast, the defense bar is less likely to enthusiastically support specialized domestic violence courts, because they typically promote greater defendant monitoring and accountability than do other courts.

Yet in both models collaboration is critical, and the two feature frequent partnership meetings to coordinate procedures, share information when appropriate, and handle operational challenges. Both drug courts and domestic violence courts dedicate court and partner personnel to the court so that they can promote a consistent and knowledgeable response to cases. In addition, each of the court models incorporates a case manager or resource coordinator who acts as a liaison between the community-based partners and the court. This person ensures that defendants enter appropriate programs; that these programs provide up-to-date, accurate, and comprehensive information on defendants' participation; and that community-based providers receive information about court actions and defendant status.

STAFF TRAINING AND EDUCATION

Drug and domestic violence courts' emphasis on continuing education and training for all partners enhances the collaboration necessary to ensure the effectiveness of both these court models. It is critical for the multiple system players involved in each specialized court to receive ongoing training on relevant case issues. This training, as well as the culture of continuing education, is an accepted component of both domestic violence and drug courts. The training gives court and partner staff the tools to identify promising practices to improve court and program operations.

PROGRAM AND COURT ACCOUNTABILITY

Because drug and domestic violence courts emphasize coordination with service providers and rely on providers' information to monitor defendant compliance, the quality of program operations and reporting is critical to these courts' success. Therefore, both models closely monitor not only defendant compliance but also the performance of the programs that the court utilizes. This focus helps ensure that court-mandated programs employ consistent procedures, provide high-quality services, and transfer reliable, up-to-date information to the court.

Specialized courts' focus on accountability goes beyond individual program quality, however. These court models are innovations that must define clear guidelines for measuring success, by identifying and tracking appropriate outcome measures that are both qualitative and quantitative. As Chief Judge Kaye has written, "[O]utcomes—not just process and precedents—matter."[31] Both court-focused and program-focused outcome measures are critical to the long-term success of the two court models. Although drug courts and domestic violence courts face quite different issues in defining and tracking outcome measures, most specialized court models, unlike traditional courts, require and train court and partner staff to document accomplishments along with failures. This shared culture of accountability in courts and programs alike is key to problem-solving courts' achieving success.

Specialized drug courts and domestic violence courts share certain key principles that could serve as a foundation for addressing substance abuse and domestic violence in a coordinated fashion. Judicial leadership, defendant accountability, collaboration with community-based partners, intensive training, and accountability of programs and court operations—all make these specialized courts well situated to focus on both issues in a responsible manner that would improve outcomes while also respecting the important differences in the problems of substance abuse and domestic violence.

CHALLENGES IN DEVELOPING A COORDINATED RESPONSE TO SUBSTANCE ABUSE AND DOMESTIC VIOLENCE

Despite its potential for developing a coordinated response to substance abuse and domestic violence, the specialized-court approach faces serious challenges. Significant differences exist in drug and domestic violence courts' philosophies, goals, case-processing styles, and program operations that make responsible coordination difficult and raise the question whether such coordination is preferable or even possible. But it does not seem that the courts or their service provider partners can continue to ignore the high co-occurrence of substance abuse and domestic violence if they hope to reduce defendant recidivism and enhance victim safety in the long term. This section focuses on the different ways in which courts and service providers address the two problems, with special attention to identifying areas of conflict in methodology. Progress in developing an effective method of intervening in cases where both problems exist demands a deep understanding of both approaches.

DIFFERENCES IN PHILOSOPHY AND PRIORITIES

Fundamental differences can be noted in the philosophy and goals of drug courts and domestic violence courts that reflect the distinct causes and dynamics of substance abuse and domestic violence as well as appropriate interventions for them. Drug courts generally rely on a medical model of treatment—approaching the addiction as a disease—and though they require accountability, they operate on the assumption that relapse is a natural part of recovery. Drug courts typically handle only nonviolent offenders and focus on their rehabilitation, an achievable goal because successful methods of promoting recovery from substance abuse are well established. Defendants voluntarily opt to have their cases heard in drug court by agreeing to accept both a plea and the conditions of treatment that the court and clinical staff have identified as necessary for successful completion after an initial assessment. Once the defendant is participating in drug court, the court, the prosecutor, and the defense attorney are all focused on the defendant's success, so they adopt a "team approach" to handling issues that arise. Drug courts promote a supportive atmosphere where participants are applauded and rewarded for good behavior and progress in treatment.

In contrast, domestic violence courts focus on violent perpetrators who have hurt their targeted victims. These courts see domestic violence not as an illness but as a learned and voluntary behavior, making an illness and treatment model inapplicable. "Relapse" in domestic violence is not tolerated. Moreover, unlike treatment programs for substance abuse, batterers' intervention programs are largely untested, and no approach has clearly proven successful in reducing long-term battering behavior. For practitioners familiar with the dynamics of domestic violence, the concepts of rehabilitation and being powerless over addiction, familiar ideas in drug courts, are inappropriate in domestic violence courts.

Instead, the highest priority of domestic violence courts is victim safety, and therefore the court focuses on procedures and outcomes that will promote it. The court emphasizes victim services, which are voluntary and centered on assisting the victim and the children to achieve safety both in the short and long term. These services can include links to shelter and food, counseling, safety planning, health care, and job training. For the defendant, the court's focus is on accountability and punishment rather than rehabilitation. The court routinely imposes criminal sentences, including incarceration and intensive probation supervision.

While community partnerships are important in a domestic violence court, the court maintains the traditional adversarial process and does not rely on the "team approach" used in drug court. Defendants do not choose whether to participate in domestic violence court. All defendants who are charged with certain defined crimes or who are in a close relationship with the victim are prescreened to assess their

appropriateness for the specialized court. The court's intensive monitoring and coordination with other agencies are distinctive to the domestic violence court, but other features of the court's operations, such as discovery procedures, hearings, and the plea process, follow traditional case processing, though they are likely to be more efficient than in a typical court. Most domestic violence courts utilize batterers' programs and do not view successful completion as a sign that a defendant will not reoffend. Further, domestic violence charges are not dismissed on program completion. Unlike the supportive atmosphere and celebratory tone of drug courts, domestic violence courts retain the adversarial atmosphere of a criminal court and do not reward defendants for not reoffending, since that behavior is considered a minimum expectation.

Given these differences, court personnel and service providers in these fields often view their counterparts with suspicion, as they use approaches that seem alien to their own training and values. Drug court personnel and substance abuse treatment providers alike may be uncomfortable around violent offenders. In fact, federal funding guidelines for drug courts prohibit offenders charged with a violent crime from participation in drug courts.[32] Because drug courts focus on rehabilitation and support for defendants, they may find it difficult to develop an effective approach that addresses and penalizes the violence shown by defendants who are both substance abusers and batterers. Such courts may view the approach used by domestic violence practitioners as overly punitive and unlikely to create the supportive environment necessary for recovery from drug addiction.

Conversely, domestic violence court personnel and service providers may be concerned that substance abuse treatment programs tend to relieve the defendant of responsibility for his or her abusive actions, and that the risks to victims associated with domestic violence are ignored if drug treatment takes precedence. Domestic violence court personnel and batterers' program providers may also find it difficult to address substance addiction in batterers when they must simultaneously treat the addiction and provide support for recovery while maintaining a constant focus on victim safety and defendant accountability.

Roundtable participant Emily Sack, a law professor who was involved in the development of domestic violence courts in New York, noted that practitioners in domestic violence courts are concerned that addressing substance abuse in this setting could change the courtroom tone and jeopardize its effectiveness with domestic violence defendants: "[T]here's a real resistance to having the . . . nonadversarial [atmosphere], applauding for substance abuse success in treatment the way drug courts do it." She asked whether there might be a way to determine which issue should be the predominant focus of the court, so that the other problem could be addressed without undermining the tone and atmosphere most appropriate for the case. Judge Pamela Iles, who was presiding over a domestic violence calendar in Orange County, California, noted that if the defendant were in court to answer a domestic violence charge, the court could indeed address the substance abuse while adhering to domestic violence court procedure and tone: "I don't applaud. I don't run a drug court here. People are sent to alcohol or drug treatment as part of their conditions of probation. This is not a deferred entry of judgment. This isn't a situation where they're getting approval for doing what they should've done in the first place. Drug and alcohol abuse in my court is often used as an excuse for the violence, and it is neither an excuse nor a license to commit violence. So I don't count that as a reason to reduce accountability or violence."

A deep philosophical divide separates the approaches to substance abuse and domestic violence that dictate the distinct goals and practices of drug courts and domestic violence courts, as well as their varying service interventions. It may never be possible, or even appropriate, to attempt to merge these practices into a single approach to both issues. But it may be feasible to identify the primary issue before the court and maintain the procedures suited to that problem while also recognizing and addressing other existing

problems. The development of such a coordinated approach to the co-occurrence of substance abuse and domestic violence would be a sensitive and complex project, yet it deserves further consideration.

DISTINCT TARGET POPULATIONS AND CHALLENGES TO COMPREHENSIVE ASSESSMENT

In drug courts, most programs limit participation to low-level, nonviolent offenders with demonstrated problems of substance abuse. Defendants seeking entry to the drug court undergo screening by the court, including an assessment of whether and how they abuse substances like drugs or alcohol. Assessment is designed to identify the specific substances being used and the potential presence of coexisting health problems, such as mental health disorders. On the advice of a court clinical team, the judge selects from a number of modes of available treatment, such as residential or outpatient programs, and may suggest programs that focus on particular addictions as conditions for the defendant. The treatment plan is typically structured and responsive to the needs of the individual defendant. While the Addiction Severity Index (ASI) is used by most drug courts and includes domestic violence as a factor in the assessment, it is unusual for drug courts to focus on battering when sobriety is the prime motivation. As noted earlier, arrests for domestic violence crimes generally exclude offenders from drug court eligibility. The substance abuse treatment programs themselves perform additional assessments once a defendant has entered a program. Like the drug court itself, a program may identify domestic violence as an issue, but it is typically used to make a defendant ineligible for treatment mandated by the drug court and is not addressed directly.

In contrast, violent perpetrators make up the population of domestic violence courts. These defendants target their victims and attempt to exert power and control over them, making victim and child safety a primary concern. In addition, batterers can be highly manipulative and recalcitrant in adhering to court orders. Typically, the court itself does not undertake an assessment of defendants. Because entry into the domestic violence court is involuntary and determined by objective criteria, screening for the level of domestic violence inflicted, as well as for any substance abuse or mental illness, is rarely, if ever, done at the court itself. If a convicted defendant is not incarcerated, he or she will likely be ordered to participate in a batterers' intervention program as part of the sentence. In contrast to substance abuse treatment, research on batterers' programs is not well developed, and little differentiation can be noted in the approaches to batterers' intervention. Usually a judge will not have distinct choices in batterers' programs nor will the judge know whether one or another program is likely to be a better "fit" for a particular defendant. At the batterers' program itself defendants usually undergo a brief psychosocial assessment that may indicate mental illness or substance abuse, though this assessment is typically far less developed than its counterpart in substance abuse treatment.

These different defendant populations and assessment methods would pose a challenge in any attempt by drug courts and domestic violence courts to seriously address the co-occurrence of substance abuse and domestic violence. Drug courts would need to focus on domestic violence issues within their existing population and would have to consider expanding their population to include offenders charged with violent crime. Assessment tools used by drug courts would need to address domestic violence more comprehensively. Domestic violence courts would have to explore a more comprehensive assessment for substance abuse problems, performed earlier in the process, so that substance abusers could be identified before placement in batterers' programs. The substance abuse treatment and batterers' intervention programs also would need to perform more comprehensive assessments and act on cases where substance abuse and domestic violence co-occur.

Developments such as these would require significant changes in the assessment processes now being used by both drug courts and domestic violence courts. They would also require that court and program staff

possess the necessary expertise to assess substance abuse and domestic violence. Today, however, the courts and the programs rarely have staff with expertise in both issues, and neither is well equipped to address the two issues at the same time. Roundtable participants strongly agreed both that defendants must be assessed for each issue and that currently assessments are often left to program staff who lack the expertise to adequately screen in both areas.

Larry Bennett, a researcher whose work focuses on batterer characteristics as well as the intersection of substance abuse and battering, pointed out that screening for both issues could also help identify the domestic violence defendants who were most likely to reoffend. Citing the research of Edward Gondolf, Bennett said, "Ninety percent of the reoffense[s] . . . [were] committed by about 20 percent of the batterers and . . . these people could be identified. Substance abuse, not at intake but during the program, was one of five major predictors of reoffense." Bennett stressed the importance of using substance abuse and other factors to distinguish among domestic violence offenders, something that is rarely accomplished presently. Domestic violence offenders "are sentenced as if there's such a thing as a batterer; there is not really—one is not distinguished. In other words, [the courts are] not looking at substance abuse. They're not looking at perniciousness where [perpetrators have] reoffended in the past. They're not looking at severity of offense, how bad was the injury or whatever. Looking at those kinds of things which could actually help us come up with different sentencing options, different treatments as a matter of fact for different men." Williams Downs, a researcher who has studied the linkage between women who have been victims of domestic violence and who are in substance abuse treatment programs, agreed with Bennett's conclusions: "[W]hen it comes to domestic violence, it's a crime. The person is responsible. I think we have to always keep that in mind. But when it comes to the intervention above and beyond that, I think we need to go to the next step when it comes to batterers as to what differential programs should we be developing based on assessments of different levels of substance abuse, different levels of mental health issues."

However, Judge Iles questioned whether detailed defendant assessments were a realistic possibility in view of the limited time and resources available in many criminal courts: "I don't have a police report in my case. I get a couple of minutes of discussion with the attorneys . . . . And then I make an assessment based on that [of] what the sentence is going to be." Judge Mary Ann Grilli, who presides over a unified domestic violence family court calendar in the Superior Court of Santa Clara County, echoed these concerns: "I agree with the concept in general about assessment. I'm also a realist in the sense that assessment requires funding. Assessment requires somebody to do it . . . . [I]f you look around the state, you're going to find that those programs are very, very limited because there is no resource available to fund it."

Judge Deborah Andrews, who oversees a misdemeanor domestic violence calendar in Los Angeles County and previously presided over a drug court in Long Beach, pointed out that an additional difference in performing assessments in drug courts versus domestic violence courts is the drug courts' greater availability of comprehensive information about the defendant. This can affect the judge's ability to conduct effective assessments and develop appropriate sentences. "[W]e're often handicapped by having very little empirical information in a domestic violence court as opposed to drug court, where there's a team approach," Judge Andrews noted. "[In drug court,] [e]verybody is fairly open about what has transpired with this individual. You know a lot about their history. You know the amount of drugs that they were found with, their drugs of choice, et cetera, as opposed to a domestic violence case, where, in my court at least, it's not really a team approach. It's definitely adversarial."

The different legal dynamics in drug courts and domestic violence courts also affect the judge's ability to do effective assessments. In drug court, defendants choose to enter the court and want to participate in its program because they can obtain access to treat-

ment and other services. A further inducement is that if they succeed in treatment their criminal charges will be reduced or dismissed. For these reasons, most potential drug court defendants voluntarily and quickly submit to assessments to determine if they are eligible and to identify an appropriate treatment plan. They are then told the details of the proposed plan before having to decide whether to take a plea and submit to the drug court program.

However, comprehensive assessments made early in the domestic violence court process are likely to be resisted by defense attorneys. Defendants cannot choose whether to participate in the domestic violence court, and their charges are neither reduced nor dismissed if they complete batterers' programs or other interventions. Therefore, they are not likely to welcome more intensive assessments that may result in additional court-ordered conditions beyond the batterers' intervention program, such as participation in an intensive substance abuse treatment program. Emily Sack noted that in the more adversarial setting of a domestic violence court, this resistance to assessments could take the form of a legal challenge by the defense "if you were going to make certain determinations of bail or sentencing based on assessments with unproven, predictive qualities." Judge Andrews pointed out that because of the traditional adversarial nature of these courts, "defense counsel's commitment is not for long-term change and growth" and that defense counsel are understandably concerned about referrals to multiple programs that create additional barriers for defendants to complete probation without violations: "[T]heir worry is, '[t]his is one more way for my guy to screw up.'" Judge Iles added that the legal dynamics of sending a case out for an assessment before sentencing could result in far fewer guilty pleas in domestic violence court. This could have a dramatic effect on a criminal justice system already severely stressed, where case turnover is necessarily rapid and in which individual judges such as Judge Iles handle thousands of cases every year.

There is a consensus that comprehensive assessments that can identify both domestic violence and substance abuse issues in the early stages of a criminal case would permit more effective interventions. But several hurdles must be overcome before such a plan could be implemented, including better training for court officials conducting dual assessments and securing appropriate resources to support the anticipated needs for additional staff. Finally, policymakers must address legal incentives to ensure that assessments do not have the unintended consequence of discouraging pleas and participation in necessary interventions.

SENTENCING ISSUES

The sentencing structures of drug courts and domestic violence courts also vary because of the courts' differing philosophies and populations. Generally, defendants must be charged with offenses that are nonviolent and low-level to be eligible for drug court, so the court accepts pleas that do not include incarceration. The court's focus is on offering defendants the opportunity to enter drug treatment and ultimately recover from addiction. A drug court typically proffers a deferred sentence. Defendants enter drug treatment with the understanding that if they successfully complete the program their charges may be dismissed or reduced. But if they are unsuccessful, they know that a criminal sentence will be imposed.

Domestic violence courts concentrate on keeping victims safe and holding defendants accountable for their behavior. Incarceration is a definite alternative for convicted defendants, depending on factors such as severity of the offense and criminal history. Defendants who are not incarcerated may still be subject to intensive probation and other methods of strict monitoring. Importantly, practitioners and experts in the field disapprove of any diversion option—for example, where batterers' intervention programs are used as a substitute for incarceration. Batterers' programs are not equivalent to substance abuse treatment, nor does the research indicate that completion of an intervention program results in "recovery" from domestic violence. Because victim safety is of prime concern, these programs should not be used either to substitute for

incarceration or other close monitoring or to excuse batterers from punishment.

Judges must understand these distinctions if they are to handle cases with domestic violence issues. As Emily Sack commented, "[Y]ou can't just . . . translate that type of [drug court sentencing model] to domestic violence court. Incarceration is not a bad thing for many of these guys; and, at least from my perspective, often it's the thing that makes them wake up. So I don't want to . . . say that we should all be talking about putting them on probation and going into treatment programs immediately." Patti Bland noted that incarceration also can be important in domestic violence cases because it provides a victim with the opportunity to establish a safer environment. Bland added that "on-site prison services addressing both domestic violence and addiction may be useful to consider."

Larry Bennett agreed that incarceration is appropriate for some batterers but emphasized the need to differentiate among domestic violence defendants to determine appropriate sentencing options, and to consider the effect that particular sentences will have on the victim. Judge Grilli pointed out that domestic violence cases can also be particularly complex because the defendant and victim may have children together: "I think that one of the things that gets overlooked in sentencing is a very basic question, 'Do you have children with the alleged victim?' And I think that asking that question and really following up with knowing whether there are orders regarding the children . . . and really looking at how can the criminal court integrate better with family, and juvenile, and probate, to really have an appropriate response for the kids, not just the perpetrator."

Any court that addresses issues of both substance abuse and domestic violence must develop a sentencing structure that incorporates the concerns reflected in the distinct sentencing models of drug courts and domestic violence courts as well as particular concerns arising from the dynamics of substance abuse and domestic violence. This task is daunting, and it has yet to be the focus of discussion among practitioners and policymakers.

TRAINING AND EDUCATION

Although their specialized caseload requires drug court judges to understand addiction issues and judges in domestic violence court to be informed about the dynamics of intimate partner violence, few judges are sufficiently knowledgeable about the complex web of domestic violence and substance abuse. Cases involving abuse of an intimate partner coupled with chemical addiction are far more complex than most drug court cases, because they include a threat to the victim's safety, something not at issue in a typical drug case. Judges need to understand the potential risks to victims that the court process involves. Arrest of a perpetrator can present "a particularly high risk for continuing, even escalating violence . . . . [B]attered women often have compelling reasons—like fear, economic dependence or affection—to feel ambivalent about cooperating with the legal process."[33] Judges and court personnel who have not had domestic violence training may exhibit an anti-victim bias because they simply do not understand why a victim would choose to remain in a violent relationship.

Drug court judges, though familiar with ways to monitor defendant progress, must also learn to incorporate victim advocates into their court process and ensure that victims themselves are informed about the defendant's compliance with court-ordered programs. In addition, they must state clearly that their support for a defendant's recovery from substance abuse does not excuse the violence. And they must coordinate with substance abuse treatment programs to make certain that the programs do not use procedures such as requiring spousal involvement in a treatment plan that could endanger a domestic violence victim. Achieving an appropriate courtroom atmosphere and making victim safety a priority requires that a drug court judge handling cases that include domestic violence be highly knowledgeable about the dynamics of intimate partner violence. The drug court judge must also know the effect that substance abuse and treatment for substance abuse can have on those dynamics. Few drug court judges

are currently trained to identify and deal with these complexities.

Conversely, domestic violence judges unfamiliar with addiction and substance abuse treatment research may have difficulty in effectively addressing the substance abuse of a domestic violence defendant. Relapse, though unfortunate, is generally considered a common element in the process of recovery from substance abuse. Judges trained to adopt zero-tolerance policies in regard to violence may find it difficult to adjust their expectations for substance abuse and to deal constructively with relapse. Substance abuse treatment relies on rewarding clients for periods of successful sobriety, while domestic violence defendants are expected to refrain from violence completely and are not rewarded for doing so. As discussed above, few judges are familiar with the dynamics of both domestic violence and substance abuse and trained to address their co-occurrence effectively.

Additionally, staff from both substance abuse treatment providers and batterers' intervention programs require effective cross-training to deal with the co-occurrence of substance abuse and domestic violence. At present this cross-training is rare or minimal when it does occur. Alyce LaViolette, who has worked at a battered-women's shelter and founded a batterers' intervention program in California, noted that only 4 hours of the 40-hour training mandated for staff of court-approved batterers' programs in California are devoted to substance abuse.

LaViolette cited a recent development: that many substance abuse programs are beginning to provide batterers' intervention services to make up for the loss of some traditional funding sources. She noted that staff at many of these programs lack adequate training in domestic violence dynamics, and some are even purveying outdated and inaccurate information, including "the old party line" that "if the substance abuse dries up, the battering dries up," and that "[t]he woman, the co-dependent, is sicker than the alcoholic." Inadequate training can directly place domestic violence victims at risk. William Downs observed that effect in a program he studied, involving domestic violence victims participating in substance abuse treatment. The providers "inadvertently were doing practices that might prove dangerous for women. For example, they were including abusive partners in the treatment plans for the women, and they didn't know any better." Victims can also be placed at risk when the abuser is in substance abuse treatment and the program presses the victim partner to participate.

Judge Susan Finlay pointed out that other key partners in the justice system also must be educated about both issues. In her jurisdiction in San Diego County, where the probation department oversees service providers, probation staff may not assign different interventions to domestic violence offenders who have substance abuse problems. Larry Bennett agreed that probation officers can play a crucial role, calling them "the linchpins of batterers' programs," because they often are responsible for placing defendants in programs and monitoring program operations. Therefore, training of these officers as case managers who understand both substance abuse and domestic violence is critical. Nevertheless, this kind of training is not common in all jurisdictions.

Patti Bland remained optimistic that ongoing comprehensive training and cross-training can help to develop service interventions that ensure both safety and sobriety. William Downs agreed that providers had good intentions and that on-the-ground cross-training could greatly ameliorate the problems created by providers' lack of knowledge: "[W]e have had domestic violence advocates from the shelters going into substance abuse treatment programs and training and educating providers in regard to domestic violence. We've had folks from the substance abuse treatment programs educating the advocates in the shelters in regard to substance abuse.... And so we had quite a bit of cross-training, and because we had the shelters training the substance abuse treatment providers and vice versa, instead of us as university 'experts' coming in and doing it, that resulted in some really strong collaboration between the two different treatment programs; and they've continued." Bland points out that training programs

have the additional benefit of enhancing collaboration among diverse agencies and programs: "[T]he goal of this training is not merely to share information but to create a climate where relationships can develop."

The lack of education and cross-training of court and service provider personnel in issues of substance abuse and domestic violence remains a glaring gap in the current system's approach to dealing with co-occurrence, yet it can be resolved relatively easily. Both the justice system and service professionals themselves should work to develop training involving experts and practitioners in each area. This straightforward action could have a significant positive impact in the effectiveness of interventions with defendants and could minimize practices that place victims at risk.

PROMISING PRACTICES IN ADDRESSING THE CO-OCCURRENCE OF DOMESTIC VIOLENCE AND SUBSTANCE ABUSE

Roundtable participants generally agreed that both substance abuse and domestic violence must be addressed in cases where they co-occur. However, experts are still grappling with the best strategy for treatment and service intervention in these cases.

INTEGRATED VS. COORDINATED APPROACH

A primary issue is which would be more effective—a single program that integrates both substance abuse treatment and batterers' intervention or two coordinated yet independent programs? The integrated approach has the benefit of requiring a defendant to attend only one program to address the two issues. This alleviates the concern that asking a defendant to participate in multiple programs may be difficult financially, may take a great deal of time, and may affect his or her ability to find and keep a job, an important element in a person's ability to function well in the community. An integrated approach also ensures that program staff know the defendant's status in both areas and can coordinate interventions as well as appropriate responses.

But reliance on a single program to provide integrated services, while promising, also raises some concerns. Larry Bennett pointed out that a program of integrated services "reduces accountability," because, first, it is difficult to ensure that the program staff have appropriate expertise in both fields and, second, assessments and placement into dual services are necessary for particular defendants: "[U]nless you've got an in-house domestic violence advocate, someone who knows how to hold people accountable for the kind of practice they're engaging in, I think it puts victims at risk to have integrated agencies, and I don't think we need to do it."

This accountability is of particular concern because the development of batterers' intervention programs is not well regulated in many jurisdictions, making it relatively easy for practitioners without necessary training to enter the field. Bennett commented that some substance abuse programs have "suddenly discovered a growth industry that is exempt from managed care in batterers' programs, and many of these proprietary substance abuse agencies are beginning to want to do batterers' intervention and even working with victims, and they're selling it under the guise of integrated services."

The alternative to an integrated program is a coordinated approach in which the two types of programs remain separate but communicate and coordinate their interventions. Judge Iles agreed that multiple programs were better because the court would not have to rely on a single program to provide the services as well as provide information to the court: "I want more than one person seeing this person . . . because what happens if you send them to a bad program?" Judge Finlay also observed that there could be "a conflict of interest if the same provider is recommending additional treatment. . . . [I]t then could be argued, 'Well, sure they're going to say that he needs substance abuse treatment. They're going to make more money.' So there's a basic conflict."

With a coordinated approach, substance abuse and batterers' intervention professionals are cross-

trained, so that each is knowledgeable about the other field. Larry Bennett noted that the coordination can go beyond cross-training to actual staff sharing. In Illinois, he noted, "[w]e have shelter people going into the substance abuse treatment agencies . . . and likewise substance abuse people going into the DV [domestic violence] agencies, actually putting in four to six hours a week doing various things, including assessments." William Downs also favored the coordinated approach, which is the structure of the program he has studied in Iowa: "We don't have substance abuse treatment programs by themselves providing domestic violence services either to men or to women. . . . What we have is people from the shelter going into the substance abuse treatment program and vice versa, and that would be the model that I would also support when it comes to providing services to batterers who have substance abuse problems." This approach permits each of the two types of programs, which involve contrasting approaches and philosophies, to continue in the practice specific to its area, while also improving both programs' awareness of the co-occurrence of these issues.

Some roundtable participants were optimistic that this coordination could be achieved because, despite important differences in substance abuse treatment and batterers' intervention programs, the programs do share certain elements in common. Larry Bennett remarked, "We are not all that good at treating substance abuse. We are good at treating substance abuse in men who are motivated to change and in helping them to become motivated. In that sense it's like domestic violence, which is widely assumed to have a social causation, but intervention is not societal (we can't change patriarchy), but behavioral. Social learning, motivation, and power are all key factors in substance abuse and domestic violence. What works in substance abuse [treatment] probably works in domestic violence [intervention]: increasing motivation through support and consequences, increasing social support, helping the victims of the problem through group-based intervention." Judge Finlay added that personal accountability, so critical in domestic violence interventions, is also important in treating substance abuse.

CONCURRENT VS. SEQUENTIAL APPROACHES

If the courts were to adopt a coordinated approach to addressing substance abuse and domestic violence, they would also have to determine the best method of mandating services. They could order substance abuse treatment and batterers' intervention either concurrently or sequentially. While little support is evident for requiring batterers' intervention before substance abuse treatment, experts dispute whether it is more appropriate to mandate both interventions concurrently or to require drug treatment before entry into a batterers' intervention program.

Proponents of the approach that requires substance abuse treatment before batterers' intervention emphasize that it is futile to mandate participation in a batterers' program when the defendant is not sober. For a batterer to have even a possibility of changing his or her behavior, he or she must not be currently abusing drugs or alcohol. But this approach raises concerns about the length of time it may take for the defendant to complete both interventions. In particular, some experts are troubled that substance abuse treatment could take a substantial period of time—a period during which the defendant will *not* be held accountable for the domestic violence. This gap could unnecessarily put the victim at greater risk. Larry Bennett pointed out that, while proponents of sequencing substance abuse treatment before batterers' intervention assume that sobriety is necessary to absorb batterers' intervention, "[n]ot as much attention is paid to the importance of nonviolence as a possible precondition for sobriety. Safety and sobriety are intimately linked."

An important factor in the choice between mandating program participation sequentially or concurrently is the length of time that the court has authority over a defendant. In many jurisdictions, the court may order programs for a limited period. Only with concurrent treatment would a judge be able to mandate both substance abuse treatment and

batterers' intervention. Emily Sack pointed out that sequential services would be difficult to mandate in jurisdictions such as New York, given both the limits on sentencing and the legal culture there: "We really don't have the luxury in New York to have jurisdiction over a defendant for a year of residential substance abuse treatment and then another year of DV [intervention]." And, even if that were legally possible, it is unlikely to be politically feasible, owing to the culture in criminal court and the expectations of the defense bar: "[Y]ou would not be able to have somebody . . . with a low-level misdemeanor conviction under the jurisdiction of the court for years like that. So I think [this would be true] in vast areas of the country, [and] obviously misdemeanors are a lot greater [in] number than felonies. We have to think of models that could address some of these issues, but in a shorter time frame." Larry Bennett concurred that time period was an issue in his Illinois jurisdiction: "We have a maximum of two years that the courts can be involved with these guys, and generally it takes sometimes four to six months to get a guy into a batterers' program."

In contrast, Judge Finlay noted that in California the court "can put people on probation for misdemeanors, domestic violence for three years, and for substance abuse five, and certain child abuse offenses five years. So we do have time to do a lot of things, and our experience has been it's pointless to send them to the domestic violence program until they get their substance abuse issues in hand and that can vary." She noted that in her court she is able to place "a really chronic offender who cannot function . . . into intensive outpatient or residential treatment for alcohol or substance abuse . . . and we just wait until they're sober and stable enough to take the 52-week [batterers'] program."

A third alternative is to mandate an initial brief period for alcohol or drug detoxification, if necessary. A defendant could then enter batterers' intervention while continuing treatment for substance abuse. This has the advantage of ensuring that the defendant is not actively abusing drugs when entering a batterers' program, while also making certain that his or her battering behavior is addressed quickly. Judge Iles agreed with this approach, observing that defendants who also have mental health issues might be self-medicating with illegal drugs. These defendants need an initial period to get on the appropriate medication. After initial treatment, Judge Iles mandates concurrent but separate programs to treat the substance abuse and domestic violence.

If the courts plan to seriously address the co-occurrence of substance abuse and domestic violence, these treatment issues must be explored and resolved, with the assistance of experts and service providers in both areas. At present, little data are available to confirm the effectiveness of various approaches—research that the justice system needs to make an informed decision on the best practice in this area.

OPPORTUNITIES FOR THE SPECIALIZED COURT MODEL

Policymakers and practitioners in the justice system need to explore not only best service approaches but also the best criminal justice procedures for addressing the co-occurrence of substance abuse and domestic violence. The differences in the justice system's approaches to these issues create a significant challenge. Still, the common elements and structures in specialized problem-solving courts hold promise for meeting that challenge.

Specialized courts feature a dedicated, experienced court and partner staff who focus on a specific caseload. This collaboration promotes consistency while it provides incentives for developing efficient procedures that incorporate promising practices in the field. These elements create a structure whereby the system could develop methods of addressing substance abuse and domestic violence in a responsible, effective way. Judge Iles asserted that "all domestic violence courts should be dedicated courts, they should be long-term assignments, they should be heavily enriched with staff . . . ." She emphasized that the resources, staff expertise, and focus of a specialized court would not only enhance services to defendants but also improve the safety of victims and increase the overall effectiveness of the justice system.

Specialized courts are designed to provide ongoing, intensive monitoring of defendants. This includes several elements: frequent court appearances by the defendant, coordination with community-based services, consistent protocols for reporting and information sharing between the court and programs, and established sanctioning schemes for noncompliance. These features are critical in any effort to address issues of substance abuse and domestic violence in the defendant population. For example, Larry Bennett pointed out that victim safety requires domestic violence perpetrators to be assessed, not only when they enter a batterers' program but also on an ongoing basis: "Ninety percent of the recidivism in batterer programs is caused by 25 percent of the men. These men can, for the most part, be identified, but not by paper and pencil or psychological tests. The best predictors are found during the program: drunkenness and victim fear. Assessment must be ongoing throughout the program. Batterers' intervention program staff is not usually prepared to do this. DV [domestic violence] court would help magnificently in this area. Once a month, everyone gets reviewed in court." Alyce LaViolette agreed: "[I]f you look at assessment, it's got to be ongoing, and the only people that are really in that position are the courts working in collaboration with batterers' treatment."

Problem-solving courts have been created to address core problems in the defendant population. These courts could be an excellent starting point for experimental programs that comprehensively address the coexistence of substance abuse and domestic violence in defendants.

CONCLUSION

The criminal justice system and the service providers with which it partners can no longer disregard the co-occurrence of substance abuse and domestic violence in their defendant populations. The co-occurrence is substantial, and failure to address one issue diminishes the system's ability to successfully address the other. Further, substance abuse is a marker for more severe and ongoing domestic violence, to the extent that failure to confront addiction in domestic violence perpetrators, or to address domestic violence in substance abusers, places victims at greater risk.

Consensus exists for the desirability of a comprehensive assessment of defendants charged with substance abuse or domestic violence so as to identify the co-occurrence, if any, of these problems at an early stage in the criminal justice process. Court personnel and community-based programs working with these defendants need extensive cross-training so that they can identify both issues, develop procedures for addressing them, and incorporate victim safety needs into any program protocols. While assessment procedures and training programs require resources, nevertheless both should be priorities for the justice system, and both will improve by addressing defendants' long-term problems.

Practitioners and experts alike agree that the system must move beyond mere identification of the problem to develop appropriate criminal justice and service intervention approaches to the co-occurrence of substance abuse and domestic violence. It is clear, though, that approaches to substance abuse and domestic violence, whether in the court system or by service providers, are quite distinct and may indeed prove incompatible. These distinctions rest on strong philosophical and practical foundations and cannot be easily dismissed. Any serious examination of a coordinated approach to these issues must recognize the potential costs that such an effort may create and must explore whether these costs are worth the benefits of such an approach.

Before we can expect judges to effectively handle cases involving both substance abuse and domestic violence, policymakers and practitioners need to undertake more comprehensive research to determine which approaches actually prove effective in addressing substance abuse and domestic violence and which court procedures can produce results without jeopardizing victim safety or ignoring fundamental theories of addiction and domestic violence. Specialized problem-solving courts that already work closely with community-based agencies have perhaps the greatest potential to develop the appropriate coordination of substance abuse and domestic

violence programs and to devise new criminal justice approaches to the co-occurrence of these issues.

While best practices in this field are still being developed, the justice system and its community-based partners can take several preliminary steps that would increase their efficacy in addressing both drug abuse and domestic violence. In addition to defendant assessments and cross-training, courts and service providers can strengthen referral networks among substance abuse treatment providers, batterers' intervention programs, and advocacy organizations for domestic violence victims. Providers in both the chemical dependency and domestic violence fields can develop procedures designed to support safety and sobriety among victims and victimizers alike. Batterers, even when participating in substance abuse treatment programs, cannot be relieved of accountability for their abusive behavior. Similarly, substance abuse programs can screen for domestic violence and can refer batterers in their population to a suitable intervention program.

The cross-training and referral network can also work to strengthen interpersonal relationships, which are critical to any effective response to the co-occurrence of substance abuse and domestic violence. As Patti Bland expressed it,

> Effective intervention requires systemwide recognition of individual limitations and a desire to join forces to provide a coordinated community response to end problems stemming from both domestic violence and addiction. To achieve these ends, providers in both the chemical dependency and domestic violence fields can begin acknowledging each other's good intentions and strive to provide services designed to support both safety and sobriety options for people seeking to achieve both. This may enhance an individual's chances for achieving both restraint from violence and sobriety while improving safety and health outcomes in our communities.

The court system can promote this coordination by imposing certain requirements on programs used by the court, as well as by harnessing the judicial authority to encourage program cooperation. In the best possible outcome, confronting the co-occurrence of these problems will have a profoundly beneficial impact on the success of our justice system's efforts to address the complex problems of defendants, provide safety to their victims, and reduce violence and drug abuse in our communities.

NOTES

1. All quotes in the article are from roundtable participants in the teleconference held on January 13, 2004. Participants are listed in the appendix following the article.

2. Carolyn Easton et al., *Motivation to Change Substance Use Among Offenders of Domestic Violence,* 19 J. Substance Abuse Treatment 1 (2000); *see also* D. Brookoff et al., *Characteristics of Participants in Domestic Violence Assessment at the Scene of Domestic Violence Assault,* 277 JAMA 1369, 1371 (1997).

3. Brookoff, *supra* note 2, at 1369, 1371.

4. Edward Gondolf, *Characteristics of Court-Mandated Batterers in Four Cities: Diversity and Dichotomies,* 5 Violence Against Women 1277 (1999); K. Leonard & T. Jacob, *Alcohol, Alcoholism, and Family Violence, in* Handbook of Family Violence 383 (Vincent Van Hasselt et al. eds., Springer 1987).

5. P. Rivara et al., *Alcohol and Illicit Drug Abuse and the Risk of Violent Death in the Home,* 278 JAMA 569 (Aug. 20, 1997).

6. Larry Bennett et al., *Domestic Abuse by Male Alcohol and Drug Addicts,* 9 Violence & Victims 359 (1994).

7. Lupita Patterson, Wash. State Coalition Against Domestic Violence, Model Protocol for Working With Battered Women Impacted by Substance Abuse 25 (Feb. 2003), *available at* www.wscadv.org/Resources/protocol_substance_abuse.pdf.

8. T. O'Farrell & C. Murphy, *Marital Violence Before and After Alcoholism Treatment,* 63 J. Consulting & Clinical Psychol. 256 (1995); Easton et al., *supra* note 2, at 1–5.

9. J.J. Collins et al., *Issues in the Linkage of Alcohol and Domestic Violence Services, in* 13 Recent Developments in Alcoholism: Alcohol and Violence 387 (Marc Galanter ed., Plenum Press 1997).

10. Office of Justice Programs, U.S. Dep't of Justice, National Symposium on Alcohol Abuse and

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Crime: Recommendations to the Office of Justice Programs (Apr. 1998).

11. *Id.*

12. Greg Berman & John Feinblatt, Ctr. for Court Innovation, Problem Solving Courts: A Brief Primer 6 (2001).

13. Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation,* 68 Fordham L. Rev. 1285 (2000).

14. Berman & Feinblatt, *supra* note 12, at 6.

15. While numerous state and national drug court evaluations report a variety of positive outcomes, research on domestic violence courts is less conclusive with success relying on anecdotal information. *See, e.g.,* Julia Weber, *Domestic Violence Courts: Components and Considerations,* 2 J. Center for Fam. Child. & Cts. 32 (2000). In addition, the short time that most domestic violence courts have been in operation, as well as several changes in the criminal justice system that occurred simultaneously, has made it difficult to obtain or interpret long-term recidivism data or other impacts of the specialized courts. Many studies have tended to focus instead on a process evaluation of the implementation of the court and some qualitative outcomes. *See, e.g.,* Randall Kleinhesselink & Clayton Mosher, Minn. Ctr. on Violence & Abuse, A Process Evaluation of the Clark County Domestic Violence Court (Mar. 2003); Lynn S. Levey et al., Nat'l Ctr. for State Courts, Lessons Learned in Implementing an Integrated Domestic Violence Court: The District of Columbia Experience (2001). Many courts have documented some promising changes, such as a dramatic increase in the proportion of victims accessing services, improved tracking of defendants both before and after disposition, and an increase in issuance of protection orders. Yet there remains a great need for outcome evaluations that can provide more definitive information on such traditional measures of success as recidivism.

16. The first drug court started in Dade County, Florida, in 1989. Domestic violence courts are a newer phenomenon within innovative courts yet are deeply influenced by the domestic violence shelter movement of the early 1970s.

17. Problem-solving courts have developed in a number of areas and include community courts and mental health courts. This article focuses on two such court models: drug courts and domestic violence courts.

18. Drug Courts Program Office, U.S. Dep't of Justice, Defining Drug Courts: The Key Components 5 (Jan. 1997).

19. *See id., passim.*

20. *Id.*

21. *Id.*

22. OJP Drug Court Clearinghouse, Am. Univ., Drug Court Activity Update (Jan. 2005), *available at* http://spa.american.edu/justice/resources/2004factsheet.pdf.

23. For a more comprehensive history of the development of domestic violence courts and its relation to the battered-women's movement, see Emily J. Sack, Toward an Understanding of Domestic Violence Courts: Origins, Practice, and Potential (2004) (unpublished manuscript on file with authors).

24. *See, e.g.,* Weber, *supra* note 15, at 26.

25. Task Force on Local Criminal Justice Response to Domestic Violence, Office of the Attorney Gen. of Cal., Keeping the Promise: Victim Safety and Batterer Accountability: Report to the California Attorney General From the Task Force on Local Criminal Justice Response to Domestic Violence (June 2005).

26. *See* Emily Sack, Family Violence Prevention Fund & State Justice Inst., Creating a Domestic Violence Court: Guidelines and Best Practices (May 2002).

27. Robyn Mazur & Liberty Aldrich, Ctr. for Court Innovation, What Makes a Domestic Violence Court Work 4–5 (2002).

28. Weber, *supra* note 15, at 23.

29. Mazur & Aldrich, *supra* note 27.

30. Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach,* 27 W. St. U. L. Rev. 1, 5 (1999–2000).

31. Berman & Feinblatt, *supra* note 12, at 8.

32. The authors acknowledge that a decade and a half have passed since the first drug court in 1989. Many drug courts may now be "funded out" of the option to access federal money and have institutionalized their courts through state and other funding. This enables the courts to admit into their programs potential clients who may not be allowed admittance under federal guidelines.

33. Kaye & Knipps, *supra* note 30, at 2.

APPENDIX ROUNDTABLE PARTICIPANTS

Judge Deborah B. Andrews oversees a misdemeanor domestic violence calendar in the Superior Court of Los Angeles County. She also served as a drug court judge in Long Beach for three years.

Larry Bennett has been a researcher at the University of Illinois at Chicago for more than 15 years. His work focuses on the characteristics of batterers, outcome evaluations on the effectiveness of batterers' programs, and the intersection of substance abuse and battering.

Patti Bland is the statewide training coordinator for the Alaska Network on Domestic Violence and Sexual Assault in Juneau.

William Downs is a professor at the University of Northern Iowa. For the past seven years he has been working on the Integrative Services Project, which received a National Institute of Justice research grant to study the linkage between women in substance abuse treatment programs and domestic violence victimization.

Judge Susan Finlay (Ret.) presided over a domestic violence court in the Superior Court of San Diego County. She formerly served as an adult and juvenile drug court judge. She has provided training on drug courts for the National Drug Court Institute and the Department of Justice.

Judge Mary Ann Grilli is a family court judge in the Superior Court of Santa Clara County. She presides over a unified domestic violence family court calendar, which includes a special link to the criminal court.

Judge Pamela Lee Iles serves in the Superior Court of Orange County. She presides over a vertical criminal calendar, which includes domestic violence, elder abuse, and a family violence court. She is also starting a teen dating violence program with the local board of education.

Alyce LaViolette worked at a battered-women's shelter from 1978 to 1984. She founded Alternatives to Violence, a program for batterers that she ran within the shelter. She conducts national and international training programs and coauthored a parenting curriculum on domestic violence.

Judge Jean Pfeiffer Leonard became a judge in 1993 for the Superior Court of Riverside County, where she started a family–domestic relations drug court. She currently oversees a juvenile delinquency drug court.

Emily Sack is a professor at Roger Williams University School of Law in Rhode Island. She teaches domestic violence law as well as criminal and family law and was formerly a deputy director of the Center for Court Innovation in New York.

Kate Yavenditti is a senior staff attorney at the San Diego Volunteer Lawyer Program and works with domestic violence victims in civil court. She is a member of the California Judicial Council's Family and Juvenile Law Advisory Committee.

From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life

Helen had been thrown down the stairs by her husband before. Their 40-plus years of marriage had been riddled with violence. But something was different this time. As she lay crumpled at the bottom of the steps, she had a flash of insight: "I'm 74 years old. The next time he throws me down the stairs, I'm going to die." Helen's revelation that day led her to the Institute on Aging's Consortium for Elder Abuse Prevention. Helen joined a support group for abused older women and slowly gained the courage she needed to leave her long-time relationship. Helen was able to open the door to safety with a lot of help and support. Whether seen as a survivor of elder abuse or as a survivor of domestic violence in late life, Helen is just one of thousands of elderly and disabled Americans who suffer behind closed doors.

Mary Twomey, M.S.W.
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As California's elderly population increases, so will the incidence of elder abuse, including domestic violence in late life. Ninety percent of all elder abuse is perpetrated by family members, a large part by spouses and partners. Both aging-services and domestic violence professionals often feel unprepared to adequately address the needs of elderly victims of family violence. And, while most elder abuse cases are seen in probate court (with petitions for conservatorship), all court departments may encounter elderly victims of family violence. This article provides background information, definitions of types of elder abuse, the incidence and prevalence of elder abuse,

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More than a quarter century has passed since elder abuse first became a matter of public concern in this country. Testimony on "parent battering" at a congressional hearing on family violence in 1978 brought the topic to light.[1] And yet recognition of elder abuse as a social and legal problem is years behind child abuse and domestic violence, its cousins in the triad of family violence issues. There is no federal legislation that focuses exclusively on elder abuse. The first proposed federal elder abuse bill, the Prevention, Identification, and Treatment of Elder Abuse Act of 1981, modeled after the Child Abuse Prevention and Treatment Act of 1974, was introduced to Congress 15 times by 1997 but never passed despite strong congressional and state support for it.[2] The Elder Justice Act was originally introduced in the 108th Congress in 2003 but did not pass.[3] Senators Orrin Hatch, R-Utah, and Blanche Lincoln, D-Ark., have plans to reintroduce the act in the next Congress. This legislation would create a collaborative law enforcement and public health approach toward researching, preventing, treating, and prosecuting elder abuse, neglect, and exploitation.[4]

Only 5 percent of those over 60 years of age are living in institutions at any given point in time.[5] While nursing-home residents may also be victims of abuse and neglect, this article focuses on the 95 percent of seniors who live in the community—in their own homes and apartments or with others. For the purposes of this article, *senior* and other similar terms mean those

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theories as to why elder abuse occurs, barriers to services specific to older victims, and challenges for the courts in confronting this growing problem. ■

65 years of age and older. An often-overlooked group also covered under California's "elder" abuse law[6] is adults 18 to 64 who are disabled either physically or mentally.[7] The appellation *dependent adult* describes this large cohort.[8] Importantly, any one of us may be "dependent adults" at any time that illness or an accident renders us "dependent." The condition need not be permanent to trigger the protections of the law.[9] In this article the term *elder abuse* includes dependent adults and victims of domestic violence in late life.

WHAT IS ELDER ABUSE?

According to the National Center on Elder Abuse (NCEA), "[e]lder abuse is a term referring to any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult."[10] The specificity of laws protecting elders varies from state to state. In California, elder abuse or abuse of a dependent adult includes (1) physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering; or (2) the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.[11] "Undue influence," akin to brainwashing, is a concept that is gaining recognition as a feature of emotional abuse leading to mental suffering.[12] In addition, sometimes elders neglect their own care, which can lead to illness or injury. This category of elder abuse, called "self-neglect," can include behaviors such as hoarding objects, failing to take medication, poor hygiene, and dehydration.[13] Self-neglect has been correlated with the presence of depression, dementia, and alcohol abuse.[14]

Photograph courtesy of Institute on Aging

In California, the law specifically defines physical abuse,[15] emotional abuse,[16] sexual abuse,[17] isolation,[18] false imprisonment,[19] financial abuse,[20] abandonment,[21] neglect,[22] and self-neglect.[23] All forms of abuse, with the exception of emotional abuse,[24] are mandated to be reported by those whom the law identifies as mandatory reporters (e.g., social workers, medical professionals, and ministers, to name a few).[25] The reports are made to the county's adult protective services (APS) agency, the government office charged with receiving and investigating reports of suspected elder and dependent adult abuse, neglect, and self-neglect.[26] When a report is made, the identity of the reporter is kept confidential.[27]

PREVALENCE AND INCIDENCE OF ELDER ABUSE

It is difficult to say how many older Americans are abused, neglected, or exploited, in large part because the problem remains greatly hidden. Findings from the National Elder Abuse Incidence Study suggest that more than 500,000 Americans aged 60 and over were victims of domestic abuse in

1996.[28] This study also found that only 16 percent of the abusive situations were referred for help, while 84 percent remained hidden.[29] Prevalence research suggests that from 700,000 to 1,100,000 older adults are victims of elder maltreatment each year,[30] a number that doubles when self-neglect is included.[31] Similarly, the House of Representatives' Select Committee on Aging found that up to 5 percent—1.5 million persons—of the nation's elderly may be subject to moderate to severe abuse.[32] Reports of elder abuse and neglect to local adult protective services units are on the rise; the number of APS reports increased from 117,000 in 1986 to 293,000 in 1996, a 150 percent increase.[33] The California Attorney General's Office estimates that nearly 200,000 seniors and dependent adults are abused, neglected, or self-neglecting each year in the state.[34]

The United States is experiencing an unprecedented growth in the numbers of people over 65 years of age. Of that group, the fastest growing segment is over 85. The "baby boomers," those born between 1946 and 1964, will begin turning 65 in 2011. In 2030, they will begin turning 85.[35]

California is the fastest growing state in total population and has the most elders of any state. Between 1990 and 2020, the number of elders in California will grow more than twice as fast as in the general population.[36]

In 1998, the California Legislature, recognizing the state's burgeoning elderly population and the need to strengthen protections for vulnerable adults, passed Senate Bill 2199, which significantly improved the state's response to elder abuse by augmenting staff at county APS programs, instituting response-time requirements (cases must be responded to in either 24 hours—for emergencies—or within 10 days), and adding new categories of mandated reporters.[37] Now California is one of the leaders in elder abuse prevention.

WOMEN OVER 80 ARE MOST VULNERABLE

While there is no "typical" victim of abuse, women are the victims in two-thirds of all cases reported to authorities,[38] and people over 80 years of age have a two to three times greater risk of being a victim than those from 60 to 79.[39]

ELDER ABUSE IS A FAMILY VIOLENCE ISSUE

Ninety percent of all elder abuse is perpetrated by family members.[40] Adult offspring and spouses account for almost 70 percent of this number.[41] Perhaps owing to methodological differences, research is conflicting regarding whether adult children[42] or spouses[43] are more likely to abuse. Similarly, research is conflicting regarding whether women[44] or men[45] are more likely to abuse; women may be more likely to engage in neglect, while men may be more likely to verbally and physically abuse.[46] The bottom line is that elder abuse is a family violence issue.

WHAT CAUSES ELDER ABUSE?

"Caregiver stress" as a primary cause of elder abuse enjoyed popularity in the early years of research on elder abuse.[47] The assumption of the caregiver-stress paradigm was that the more help the older person needed the more likely abuse was to occur.[48] While certain behaviors on the part of an elder-care recipient (e.g., refusal to bathe, aggressive behavior, unwillingness to give money that an abuser sees as "rightfully his") may trigger abuse,[49] in general caregiver stress as a cause of elder abuse has been debunked.[50] Instead, research indicates that perpetrator characteristics play a more important role than victim characteristics in explaining occurrence of abuse.[51]

Research has uncovered several key perpetrator characteristics: (1) drug and/or alcohol abuse, (2) impairments such as mental illness and developmental disabilities, (3) financial dependency on the elder, and (4) a bad past relationship with the elder.[52] When applied to family caregiving situations, these findings emphasize that, within the stressful context of caregiving, most people cope without resorting to violent or exploitive behavior.[53] Family members who experience one or more of these risk factors are much more likely to develop an abusive relationship with an elder relative.[54] Indeed, elder abuse resembles domestic

violence with its cycle of violence and dynamic of power and control.[55] Most cases of elder abuse involve the types of victim-abuser dynamics seen in other forms of domestic violence relationships.[56]

ELDER ABUSE AS DOMESTIC VIOLENCE

As elder abuse became identified as a social and legal problem, the initial response to it closely paralleled society's response to child abuse.[57] Child abuse law with its mandatory reporting became the model on which elder abuse legislation was based.[58] The weaknesses of this model, including its tendency to treat adults as children, led many to turn to the domestic violence paradigm as a better fit.[59] Recognizing that power and control dynamics existed in some elder abuse situations (even when the abuser was not a spouse or partner) brought a fresh understanding to the dynamics of elder abuse.[60] And yet, while elder abuse incorporates some of the features of domestic violence occurring with younger people, it is especially characterized by increased physical vulnerability due to age, changing mental abilities due to the increased incidence of dementia, undue influence, and financial abuse or exploitation.[61]

Experts have identified three kinds of domestic violence in late life:

1. a long-time, violence-free relationship that becomes violent with the occurrence of specific behaviors by an elder who has dementia (which may cause personality changes)
2. a new relationship (following divorce or widowhood) that turns violent (usually following a whirlwind courtship)
3. a long-term violent relationship that endures into old age[62]

Random-sample studies of seniors living in the community found more spouse/partner abuse than abuse by adult children.[63] Another study of 5,168 couples found that 5.8 percent of couples over 60 experienced physical violence in their relationship within the past year.[64]

Professionals may struggle with different issues when domestic violence in late life is uncovered. For example, law enforcement professionals may find it hard to arrest the perpetrator when he or she is 70, 75, or 80 years old. Judges may see a wife of 35 years and conclude that her reluctance to testify against her husband reflects her deep commitment to him, not her fear of losing her beloved home, her concern about her often-mistreated cat, or simply her terror of starting over in her "golden years." Lack of knowledge regarding elder abuse may blind a social worker to the truth when the victim's much younger wife uses "caregiver stress" as her reason for slapping her husband.

BARRIERS FOR OLDER CLIENTS

Older clients struggle with barriers that are both similar to those faced by younger victims and also different as a result of age and disability. For example, elder people

- are not typically used to seeking help;
- do not identify as domestic violence victims (or as elder abuse victims);
- are sensitized to putting other people's needs ahead of their own;
- may have multiple health issues, including difficulty with mobility;
- may adhere to the strict rules of their religion that bar divorce;
- may need in-home supportive services that cannot be delivered in a domestic violence shelter; and
- may be male and not have access to many services (one-third of all elder abuse victims are male).[65]

ISSUES FOR THE COURTS

The victim of elder abuse or domestic violence in late life may come to the court's attention in several ways. In one recent example, staff at a California

court called adult protective services about a prospective juror because the older man's ill health and poor hygiene concerned the judge, who feared that the man might be neglected or be self-neglecting. In civil courts handling landlord-tenant matters, elders may seek to evict tenants who are terrorizing them. Adult adoptions require special sensitivity and investigation to ensure that the motives of both parties are without malevolence. A large city court investigating the application for adoption of a 62-year-old man by his 92-year-old female neighbor discovered that the man was intent on inheriting the woman's house upon her death even though she had two sons and a daughter. Family courts see petitions for both domestic violence restraining orders and for elder abuse restraining orders. Probate courts see the most elder abuse in the context of conservatorships, which are commonly sought to remove an abuser from power over a vulnerable adult or to rectify abusive acts such as appropriation of bank accounts or property.[66] And, finally, more and more cases are coming into criminal courts as police and district attorneys are learning how to prosecute the cases through trial even when the victim may not be able to testify.[67]

While the occasional elder abuse case is replete with evidence and cooperating victims and witnesses, most cases of elder abuse and domestic violence in late life are extremely complex. These cases often pit reluctant or fearful parents against scheming adult offspring or spouses, a senior's right to folly against society's duty to protect the vulnerable, and undue influence against a senior's claim that the ancestral home was indeed given willingly to the new maid. And, although elder abuse is a crime,[68] it is still seen by many as a "family matter."

Whether abused by a spouse, a partner, an adult offspring, or a trusted friend, the victim of elder abuse comes before the legal system with embarrassment, deep shame and self-blame, significant reluctance to injure the alleged abuser, probable trauma, and possible confusion from deficits in mental functioning (as a result of stroke, Alzheimer's disease, Parkinson's disease, or another debilitating condition).

CALIFORNIA COURT PROJECTS FOCUSED ON ELDER ABUSE

In California, courts are taking steps to address the growing elder population and, in particular, elder abuse. In 2002, the Administrative Office of the Courts (AOC) funded two Elder Access programs, one each in the Superior Courts of Alameda and San Francisco Counties. Alameda County used its grant monies to create an Elder Abuse Protection Court Project with a court calendar dedicated to elder abuse cases. The separate calendar offers elders a shorter wait time in the courtroom and more privacy than is usually the case for public hearings dealing with very personal matters. The calendar is heard weekly at each of the four courthouses and starts late in the morning to give seniors more time to travel to court. The cornerstone of the project's success is collaboration with community agencies such as APS, the District Attorney's Victim Witness Program, legal aid, and pro bono attorneys. An elder abuse case manager assists the elders by helping them fill out the forms and by linking them with appropriate community agencies. More than 330 abused elders have been assisted since the project's inception. Most were low income and self-represented; 40 percent were male. Most of the alleged abusers were family members.

In the Superior Court of San Francisco County, the Elder Access project focused on conservatorships because the bulk of elders appear in probate court. The project surveyed the 150 agencies comprising the San Francisco Consortium for Elder Abuse Prevention to learn whether professionals in nonprofit agencies were familiar with the probate court and whether the court was accessible to elders. Over 90 percent of those surveyed were familiar with the probate court. The most commonly cited barrier to access was the inability to get a particular case into the court system because no individual or agency would file a petition for conservatorship. Project staff also reviewed the 168 conservatorships established in 2000 to learn more about the nature of these proceedings. Of the total conservatees, 87 percent were

older than 65. Perhaps not surprisingly, 40 percent of the conservatees were older than 85. Most (58 percent) were women. The most common impairment was cognitive (65.9 percent), followed by difficulties with basic activities of daily living (49.2 percent). Proposed conservators were family members in 35 percent of the cases. Other conservators were the public guardian, private nonprofit agencies, private professional conservators, and friends. The San Francisco project also convened a work group composed of professionals who serve vulnerable elders that explored obstacles to securing conservatorships. In addition, the project conducted individual and group interviews with representatives of the agencies that made or accepted referrals for conservatorships. It held public and professional educational sessions with particular outreach to minority groups. Staff wrote and published in the minority press a series of articles about the probate court. A direct outgrowth of the San Francisco project was the establishment of a conservatorship clinic where self-represented people could receive assistance in filing for conservatorship.

The Judicial Council of California has shown increasing concern about the impact of the aging population on the courts and about elder abuse in general, and convened a plenary session and roundtable discussions on the subject in conjunction with its statewide bench conference in September 2005. The AOC recently launched a research project to study conservatorships statewide, to collect basic data on conservatorships, and to lay the foundation for future work to determine how courts identify abuse in conservatorships and what practices are most effective in dealing with the abuse.

NATIONAL ATTENTION ON ELDERS IN THE COURTS

There is also movement on the national level to address elder abuse. The National Center for State Courts is embarking on a project to determine how courts identify and deal with elder abuse. The American Bar Association's Commission on Law and Aging (COLA) has also been active on the issue of elder abuse and the courts. In 1995, the commission received a grant from the State Justice Institute that enabled a groundbreaking project and produced *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse.* The recommendations were intended to aid the courts in

- providing appropriate judicial solutions that respect the values and wishes of elder abuse victims while protecting victims' welfare;
- facilitating access to the courts for appropriate cases;
- enhancing coordination among the court system, state and local agencies, and the elder-advocate network.[69]

Following this project, the State Justice Institute funded another project, this one enabling COLA and the National Association of Women Judges to develop three model interdisciplinary curricula on elder abuse for judges and for key court staff.[70] Currently, COLA is at work on a handbook for judges that will assist them in determining the mental capacity of elders appearing in their courts.

While it is certain that the incidences of elder abuse and neglect will rise given the aging of the "baby boomers," California courts are responding, and so are national organizations that can be helpful to California courts. The courts will need to work with a variety of community agencies in responding to the problem of elder abuse. No one institution and no one judge can do it alone.

NOTES

1. Rosalie S. Wolf, *Introduction: The Nature and Scope of Elder Abuse,* 24 Generations, J. Am. Soc'y on Aging 6 (Summer 2000).

2. E. Capezuti et al., *Reporting Elder Mistreatment,* 23 J. Gerontological Nursing 24–32 (1997); H.R. Rep. No. 101-752, at 67 (1990); H.R. Rep. No. 99-502, at 43 (1985); H.R. Rep. No. 97-277, at 125 (1981); J.M. Otto, *The Role of Adult Protective Services in Addressing Abuse,* 24 Generations, J. Am. Soc'y on Aging 33–38 (Summer 2000).

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3. Nat'l Ctr. on Elder Abuse, Elder Justice Act of 2003 (S. 333) (n.d.), *at* www.elderabusecenter.org/default.cfm?p=elderjustice.cfm.

4. Elder Justice Coalition, Question: What Does This Bill Do? (n.d.), *at* www.elderjusticecoalition.com/answers1.htm.

5. Mary Joy Quinn & Susan K. Tomita, Elder Abuse and Neglect: Causes, Diagnoses, and Intervention Strategies 12 (Springer Publ'g Co. 1997).

6. Elder Abuse and Dependent Adult Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600–15660 (West 2005).

7. Cal. Welf. & Inst. Code § 15610.23.

8. *Id.*

9. *See* Cal. Welf. & Inst. Code § 15610.23(b) (defining a *dependent adult* as anyone between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour facility, such as a hospital).

10. Nat'l Ctr. on Elder Abuse, Frequently Asked Questions (Aug. 23, 2005), *at* www.elderabusecenter.org/default.cfm?p=faqs.cfm#one [hereinafter NCEA/FAQ].

11. Cal. Welf. & Inst. Code § 15610.07 (West 2005).

12. Mary Joy Quinn, *Undoing Undue Influence,* 24 Generations, J. Am. Soc'y on Aging 65 (Summer 2000).

13. *See, e.g.,* NCEA/FAQ, *supra* note 10.

14. *Id.*

15. Cal. Welf. & Inst. Code § 15610.63 (West 2005).

16. Cal. Welf. & Inst. Code § 15610.53 (referred to as "mental suffering").

17. Cal. Welf. & Inst. Code § 15610.63(e).

18. Cal. Welf. & Inst. Code § 15610.43.

19. Cal. Penal Code § 236 (West 2005).

20. Cal. Welf. & Inst. Code § 15610.30 (West 2005).

21. Cal. Welf. & Inst. Code § 15610.05.

22. Cal. Welf. & Inst. Code § 15610.57.

23. Cal. Welf. & Inst. Code § 15610.57(a)(2), (b)(5).

24. But emotional abuse may be reported whenever a mandated reporter has knowledge or "reasonably suspects" that an elder or dependent adult's emotional well-being is endangered in any way. Cal. Welf. & Inst. Code § 15630(c)(1).

25. *Id.*

26. Cal. Welf. & Inst. Code § 15630(b)(1)(C).

27. Cal. Welf. & Inst. Code § 15630(b)(1)(C), (f).

28. Nat'l Ctr. on Elder Abuse, Am. Pub. Human Servs. Ass'n, The National Elder Abuse Incidence Study 4-3 (Sept. 1998) [hereinafter *Incidence Study*], *available at* www.elderabusecenter.org/default.cfm?p=nis.cfm.

29. *Id.*

30. K. Pillemer & D. Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey,* 28 Gerontologist 53–54 (1988); *see also* T. Tatara, *Understanding the Nature and Scope of Domestic Elder Abuse With the Use of State Aggregate Data: Summaries of the Key Findings of a National Survey of State APS and Aging Agencies,* 5 J. Elder Abuse & Neglect 35 (1993).

31. *See* Tatara, *supra* note 30.

32. H.R. Comm. on Aging, Publ'n No. 97-277, Elder Abuse: An Examination of a Hidden Problem (1981).

33. T. Tatara et al., Nat'l Ctr. on Elder Abuse, Elder Abuse Information Series No. 2: Trends in Elder Abuse in Domestic Settings (1997), www.elderabusecenter.org/basic/fact2.pdf (last visited 2002).

34. Bureau of Medi-Cal Fraud & Elder Abuse and Crime & Violence Prevention Ctr., Cal. Dep't of Justice, A Citizen's Guide to Preventing & Reporting Elder Abuse, at *Preface* (2002), *available at* www.safestate.org/documents/citizens_guide.pdf.

35. U.S. Admin. on Aging, Fed. Interagency Forum on Aging-Related Statistics, Older Americans 2004: Key Indicators of Well-Being (2004), *available at* www.agingstats.gov.

36. Those over 60 will grow by 112 percent while those over 85 will grow by more than 143 percent. Of 58 counties, 38 will have increases of more than 150 percent. Cal. Dep't of Aging, Statistics and Demographics (2005), *available at* www.aging.state.ca.us/html/stats/demographics.html.

37. Act of Sept. 28, 1998, ch. 946, 1997–98 Cal. Stat. {___} (codified as amended at scattered sections of Cal. Welf. & Inst. Code §§ 15600–15760 (West 2005)).

38. *Incidence Study, supra* note 28, at 4-17.

39. *Id.* at 4-13.

40. *Id.* at 4-28.

41. *Id.*

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42. *Id.*

43. Pillemer & Finkelhor, *supra* note 30, at 55; *see also* K. Pillemer & J. Suitor, *Violence and Violent Feelings: What Causes Them Among Family Caregivers?,* 47 J. Gerontology S165–72 (Jul. 1992); E. Podnieks, *National Survey on Abuse of the Elderly in Canada,* 4 J. Elder Abuse & Neglect 5–58 (1992).

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45. *Incidence Study, supra* note 28.

46. *Id.*

47. M.J. Quinn et al., *Authors View Transitions Over 20 Years,* Aging Today (Sept.–Oct. 2005), at 7, 10.

48. *Id.*

49. G.J. Anetzberger, *Caregiving: Primary Cause of Elder Abuse,* 24 Generations, J. Am. Soc'y on Aging 47–48 (Summer 2000); Pillemer & Suitor, *supra* note 43, *passim.*

50. *See generally,* G. Anetzberger, The Etiology of Elder Abuse by Adult Offspring (Charles C. Thomas 1987); L.R. Phillips, *Abuse and Neglect of the Frail Elderly at Home: An Exploration of Theoretical Relationships,* 8 J. Advanced Nursing 379 (1983); K. Pillemer, *Risk Factors in Elder Abuse: Results From a Case-Controlled Study, in* Elder Abuse: Conflict in the Family 239–63 (K. Pillemer & R.S. Wolf eds., Dover 1986); K. Pillemer & D. Finkelhor, *Causes of Elder Abuse: Caregiver Stress Versus Problem Relatives,* 59 Am. J. Orthopsychiatry 179 (1989); R.S. Wolf et al., *Maltreatment of the Elderly: A Comparative Analysis,* 3 Pride Inst. J. Long Term Health Care 10–17 (1986); M. Reis & D. Nahmiash, *Abuse of Seniors: Personality, Stress, and Other Indicators,* 3 J. Mental Health & Aging 337 (1997).

51. *See* Anetzberger, *supra* note 50; Pillemer, *supra* note 50; Wolf et al., *supra* note 50.

52. *See* Anetzberger, *supra* note 50; G.J. Anetzberger et al., *Alcoholism and Elder Abuse,* 9 J. Interpersonal Violence 184 (1994); P.N. Chen et al., *Elderly Abuse in Domestic Settings: A Pilot Study,* 4 J. Gerontological Soc. Work 3–17 (1981); Pillemer, *supra* note 50; Reis & Nahmiash, *supra* note 50; M. Lachs & K. Pillemer, *Abuse and Neglect of Elderly Persons,* 332 New England J. Med. 437–43 (1995); E. Podnieks, *National Survey on Abuse of the Elderly in Canada,* 4 J. Elder Abuse & Neglect 5–58 (1992); Wolf et al., *supra* note 50.

53. Pillemer & Finkelhor, *supra* note 50.

54. *Id.*

55. B. Brandl, *Power and Control: Understanding Domestic Abuse in Late Life,* 24 Generations, J. Am. Soc'y on Aging 39 (Summer 2000).

56. Pillemer & Finkelhor, *supra* note 30; Podnieks, *supra* note 52; L. Vinton, Abused Older Women: Battered Women or Abused Elders?, Report to the AARP Forum, Washington, D.C. (Oct. 29–30, 1992).

57. Wolf, *supra* note 1, at 6.

58. *Id.*

59. *Id.* at 7.

60. Brandl, *supra* note 55.

61. *Id.;* Vinton, *supra* note 56.

62. Nat'l Comm. for the Prevention of Elder Abuse, *Services for Older Battered Women Offer Hope and Healing,* 1 Nexus 1 (Oct. 1995).

63. Podnieks, *supra* note 52.

64. S. Harris, *For Better or for Worse: Spouse Abuse Grown Old,* 8 J. Elder Abuse & Neglect 27–29 (1996).

65. Nat'l Comm. for the Prevention of Elder Abuse, *supra* note 62.

66. Mary Joy Quinn, Guardianships of Adults: Achieving Justice, Autonomy, and Safety 12 (Springer Publ'g 2005).

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70. L.A. Stiegel, *What Can Courts Do About Elder Abuse?* Judges' J. (Fall 1996), at 38–42, *available at* www.abanet.org/elderly.

Parenting Arrangements After Domestic Violence

Safety as a Priority in Judging Children's Best Interest

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An emerging focus in the field of domestic violence is the role of the family court and its court-related services in determining parental contact following allegations of domestic violence. This article outlines some of the controversies that arise in postseparation parenting plans for couples where one parent has a history of perpetrating domestic violence against the other. The challenge for the court is to assess individual parents in the context of children's best interest. There is consensus that exposure to both parental conflict and violence may adversely affect children's adjustment.

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In recent years, all states have recognized domestic violence as an important factor in determining child custody and visitation plans.[1] Although states vary in their emphasis—in some states there is a rebuttable presumption against custody for perpetrators, in others domestic violence is a primary factor to consider—their concern has been the same: to ensure that the safety of children and their primary caretakers after separation is foremost when courts determine the best interest of children. While this principle of safety has been widely accepted, implementing system change has been more challenging. There are significant gaps in training and resource development, resulting in an uneven application of assessment and intervention approaches. Compounding the complexity of this problem, the majority of litigants in family court are representing themselves, thereby leaving judges to assess explosive family issues in their rawest emotional form.

The purpose of this article is to discuss some of the controversies surrounding parent-child access and outline practical guidelines within a clinical and legal context. It begins with an overview of the relevance of domestic violence in custody and access disputes, then provides a framework for differential assessment and interventions that are based on a thorough understanding of the dynamics of violence in a particular relationship. Finally, it identifies factors that should be associated with terminating access, supervising access, or supervising exchanges, which are the most common remedies in these circumstances. Each of the considerations and remedies is discussed with respect to the clinical and research literature, followed by judicial considerations from Judge Wong.

RELEVANCE OF DOMESTIC VIOLENCE IN CUSTODY AND VISITATION

Only within the last decade have legal and mental health professionals started to acknowledge that domestic violence may be relevant to the determination of child custody and visitation. Previously domestic violence was generally seen as an adult issue not relevant to the adjustment of children. Many courts accepted, and continue to do so today, the notion that a man could

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Courts and community services have a mandate to limit and redress this potential harm by limiting the opportunities for children's exposure to it. Strategies to meet this mandate include minimized contact between the abusive parent and the principal caregiver and possibly limiting the parenting role of the abuser. The appropriateness of applying these strategies is predicated on a systematic approach and consensus among service providers in community agencies and the justice system on definitions of conflict and violence. The article emphasizes the need for comprehensive assessment and differentiated intervention strategies for these families. Specifically, it discusses indicators and cautions for the application of cessation of access, supervised visitation, and supervised exchange as interventions.

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be a violent spouse but still be a good father. Several groups challenged this notion and encouraged major legislative reform to recognize domestic violence as a critical factor to consider in these cases.[2] Similar legislative changes (and the accompanying challenges) have emerged in Canada, Australia, and New Zealand.[3] Major initiatives have taken place, such as the U.S. Department of Justice's Safe Havens: Supervised Visitation and Safe Exchange Grant Program (Supervised Visitation Program),[4] which provides funding and technical assistance to communities for supervised visitation and exchanges in cases of domestic violence, and the new custody evaluation guidelines for judges on how to interpret and act on evaluations in cases involving domestic violence.[5] The rationale for these changes reflects current knowledge about domestic violence and family separation:

- **Abuse does not end with separation.** Research has shown that physical abuse, stalking, and harassment continue at significant rates postseparation and may even become more severe.[6] Promoting contact between children and a violent ex-spouse may create an opportunity for renewed domestic violence through visitation and exchanges of children.[7]

- **There is a significant overlap between domestic violence and child maltreatment.** The presence of domestic violence is a red flag for the coexistence of child maltreatment. In a review of studies investigating this overlap, results suggested that between 30 and 60 percent of children whose mothers had experienced abuse were themselves likely to be abused.[8]

- **Batterers are poor role models.** Children's socialization with respect to relationships and conflict resolution is negatively affected by exposure to a perpetrator of domestic violence. For example, when children witness one parent inflicting abuse upon the other or using threats of violence to maintain control within a relationship, their own expectations about relationships may come to parallel these observations.[9] The potential of violence in a batterer's subsequent intimate relationships represents a threat that children's exposure to poor modeling will continue.

- **Victims of domestic violence may be undermined in their parenting role.** Perpetrators of domestic violence may undermine their (ex-) partners' parenting in ways both obvious and insidious.[10] For example, batterers may blame the children's mother for the dissolution of the family or explicitly instruct the children not to listen to her directions.[11] Intervention with these fathers requires that this facet of their parenting be addressed; fathers need to both recognize the ways in which they undermine their children's mother and commit to stopping these behaviors.[12]

- **Perpetrators may use perpetual litigation as a form of ongoing control and harassment.** The family court can inadvertently become a tool for batterers to continue their abusive behavior.[13] Litigation exacts a high emotional

and financial price for abused women already overwhelmed with the aftermath of a violent relationship. Some authors have suggested that many batterers have exceptional skills to present themselves positively in court and convince judges to award them custody.[14]

- **In extreme cases, domestic violence following separation is lethal.** Domestic violence and homicides are inextricably linked. National figures from the United States and Canada suggest that women are most at risk of homicide from estranged partners with a prior history of domestic violence.[15] Thus, risk of homicide in domestic violence cases requires diligent investigation because of this growing literature linking domestic violence, separation, and homicide. Risk assessment tools have been developed to assist with this work.[16] In these extreme cases, children may become involved as witnesses to homicides or become homicide victims themselves.[17] Child abduction represents another traumatic outcome in these cases and represents a batterer's ultimate desire to regain control after the separation and to punish the former partner.

FRAMEWORK FOR DIFFERENTIAL ASSESSMENT AND INTERVENTION

The term *domestic violence* refers to violence in the context of an intimate relationship. Our discourse in this article is intended to focus on those relationships where there is a demonstrated *pattern* of abuse over the course of a relationship. These relationships may be heterosexual or same-sex relationships. Men or women may be perpetrators and victims, but for the purposes of our discussion we will highlight the issues most relevant to cases of male perpetrators and female victims. This emphasis is justified by the existing literature on violence that identifies male-perpetrated violence as that which is more likely to engender fear, serious harm, and concern about the safety of children.[18]

While domestic violence is relevant to child custody determinations in general, the range of relationships and histories that fall under the rubric "domestic violence" requires a range of interventions. Although historically the term *domestic violence* was reserved for a pattern of abuse and violence that included a significant power differential in the relationship, it is sometimes used more indiscriminately to refer to any episode of violence. Without minimizing the impact of any assault, a single incident of mutual pushing during an emotional period of separation is notably different from a longstanding pattern of terror, humiliation, and abuse. In this respect, a clinical assessment of domestic violence may yield very different results than a legal one. The civil and criminal justice system is by definition incident-based, which means that one incident can trigger a finding of domestic violence. Conversely, numerous subthreshold behaviors (in the legal sense) would not meet the legal standard but might clearly be part of a larger pattern of domestic violence. The role of clinical assessment is to evaluate the context of the behaviors—their intent, the impact on the victim, the degree to which the behaviors interfere with parenting and child well-being, and so forth. The context of isolated acts of violence is critical in a clinical determination of domestic violence.[19]

One source of confusion in the clinical assessment of domestic violence has come from the term *high conflict,* which has been used to describe the more intense and protracted disputes that require considerable court and community resources and that include domestic violence cases.[20] Compounding this confusion, the original and most popular measure of marital violence is called the "Conflict Tactics Scale," which involves a range of behavior from "insulted" to "used a knife or gun."[21] In the average courtroom the terms *domestic violence, conflict,* and *abuse* may be used interchangeably, without any clear definition or understanding of the terms.

In recent years it has been argued that a clearer distinction needs to be made between high-conflict and domestic violence cases in terms of assessment and intervention strategies.[22] In any event, the use of

these and related terms underscores a major controversy in the family court in which domestic violence advocates are concerned that domestic violence will be euphemized as conflict and others argue that any conflict may be interpreted as domestic violence. Even when domestic violence is identified, does the term *batterer* accurately describe the perpetrator or is the incident minor, historical, or isolated? Perpetrators and victims represent a heterogeneous mix of individuals and of relationships that differ with respect to intent, impact, frequency, and severity.[23] Although perpetrators of domestic violence are often indiscriminately labeled as batterers, we would argue that the term *batterer* should be reserved for individuals who demonstrate over time a pattern of abusive behaviors that are designed to control, dominate, humiliate, or terrorize their victims.

As we have argued elsewhere,[24] the difference between high conflict and domestic violence is a critical one. A clinical finding of domestic violence (versus high conflict) should be based on careful assessment and should lead to a differential outcome. Specifically, we have described the current approach to parenting plans (i.e., the focus on collaborative family law and shared parenting) as a superhighway that requires specific and well-marked off ramps for high conflict and domestic violence cases. In this article, we further operationalize this approach by identifying indications and contraindications for a specific range of remedies including cessation of access, supervised access, and supervised exchanges.

CONSIDERATIONS IN DETERMINING A DIFFERENTIAL RESPONSE

Once there is a clinical or judicial finding of domestic violence, numerous considerations should come into play in the choice of a specific remedy, including the

- safety of the children and principal caregiver;
- meaning and impact of the children's exposure to violence, the degree to which children have been drawn in as instruments of the abuse, and overlapping forms of maltreatment;
- identification of the extent to which the court process is being utilized to extend the power and control issues within the intimate relationship;
- availability of appropriate interventions for the principal caretaker and children; and
- ability of the court and court-related services to monitor safety and compliance with necessary reviews to hold parties accountable.

Each of these considerations is discussed briefly in the following section. They are discussed first from a clinical and research perspective, then with regard to judicial considerations in assessing the information that is before the court.

THE SAFETY OF THE CHILDREN AND PRINCIPAL CAREGIVER

Clinical and research literature. The many lessons learned from domestic violence death–review committees across the United States point to the importance of risk assessment awareness and tools.[25] These lessons underscore the critical period of separation and the warning signs of repeat violence and dangerousness, and the potential for lethal violence. For example, a history of domestic violence (particularly in combination with controlling behavior and/or access to weapons), stalking, threats to harm partner or self, and violation of previous court orders have all been identified as red flags in assessing dangerousness.[26] In these circumstances, the court must consider suspending the parent's contact with the children until a more thorough risk assessment and therapeutic interventions have been implemented. Provisions for ongoing risk management are also required.

Judicial considerations. The court's greatest initial challenge is to identify those cases in which domestic violence is an issue. It is far easier to identify cases of substantiated child abuse and cases where the parties are legally sparring with each other. However, the intended consequences of domestic violence (i.e., intimidation, silence, and fear), coupled with ill-

trained attorneys and the growing pro se population of litigants, increase the odds that the court simply will not know enough about the parties to be concerned about safety issues.

Courts must develop systems, procedures, and personnel able to provide at least rudimentary screening. For example, even the most resource-starved court must be able to search its own and related law enforcement databases for parties' previous contacts with the various systems. Some jurisdictions have successfully developed staff who actively assist the judge with relevant data gathering, sophisticated initial and ongoing risk assessments, and recommendations linking the principal caregiver and children's safety needs to available community resources.

CHILDREN'S EXPOSURE TO VIOLENCE AND OVERLAPPING FORMS OF MALTREATMENT

Clinical and research literature. Although exposure to domestic violence is harmful for most children,[27] there is considerable variability in the outcomes of individual children. A thorough clinical assessment identifies the impact of exposure to domestic violence. In addition to the more obvious potential effects (e.g., trauma symptoms, emotional and behavioral problems, difficulties at school), assessors should probe for more subtle impacts with respect to children's views of relationships, justification of violence, and victim blaming. The assessment should also include an evaluation of the extent to which children are being used as instruments of domestic violence and the potential for co-occurring forms of child maltreatment. While the finding of overt physical or sexual abuse quickly triggers the child protection system, the experience of the authors (Jaffe and Crooks) as custody evaluators has led them to probe carefully for a specific form of ongoing emotional abuse.

Specifically, in cases where the perpetrator of domestic violence feels unjustly blamed or victimized by the system, he may go to great lengths to rationalize his behavior to his children and to place blame on their mother. For example, a 6-year-old child might solemnly explain to the custody evaluator, "Daddy says Mommy has got away with her crap for too long and that he is going to take her to court to teach her a lesson." This ongoing exposure to inappropriate topics of conversation and belittling of the other parent constitutes a form of ongoing emotional abuse that affects children's sense of emotional security.

Judicial considerations. The "culture" of the legal field in domestic relations, child custody litigation, and family law still appears to subscribe to the *Leave It to Beaver* divorce—i.e., "Let's all get through this difficult time as decently as possible and everything will work out in the end." Despite the growing awareness that exposure to domestic violence harms children, the legal culture has not caught up to the fact that it itself may be furthering the harm to children. Although the vast majority of separating couples can work out their differences with very little court intervention, the domestic violence cases require a higher level of care and vigilance.

As with other needed legal conventions, such as maintaining civility in the courtroom and "no-continuance," judge-controlled case management, the responsibility falls on the court to model application of the growing body of knowledge and to demand consideration of that knowledge from practitioners. Sometimes judicial officers may find themselves in a position of knowing more about domestic violence than the litigants and their lawyers and may have to ask the difficult questions that nobody else in the court raises.

USE OF THE COURT PROCESS TO EXTEND POWER AND CONTROL

Clinical and research literature. In some cases of domestic violence, perpetrators actively employ the legal system as a means of maintaining ongoing control of their victims.[28] Indicators that this misuse is occurring include an investment in custody and/or access that is out of keeping with a parent's previous involvement in child rearing and an inability to focus on children's interests in the assessment process. Simultaneous misuse of the child protection

system is not uncommon in these cases; excessive reports to child protection authorities on minimal grounds for concern may indicate this tendency to use official systems for harassment purposes.

Judicial considerations. Misuse of court process is an extremely frustrating reality for judges to witness, particularly in cases of financial inequality. Judges need to balance heavy-handed techniques (such as declaring a party a "vexatious litigant" under relevant court rules) with the strong prevailing philosophy of public access to the courts and with the concern that parties must have continuing access when court orders affect children. If a litigant is able to manipulate various case types into existence (e.g., protective order, divorce, and child welfare cases), even the most coordinated of family courts are hard pressed to keep up. When these factors are coupled with a lack of judicial accessibility to screening and assessment for domestic violence and other forms of maltreatment, the judge's quandary is complete.

As distasteful as the word *activism* may be to some judges, courts have a responsibility to work within the judicial system to develop procedures to assist their decision making in such situations where the system is vulnerable to abuse. Furthermore, they must also work outside of the judicial system to encourage community responses that increase pro bono and affordable legal services to help overcome the resource imbalance that often is present in domestic violence cases.

Courts need to develop a process, compatible with their own rules of court and court practice, that will strike a middle ground between a formal declaration of "vexatious litigant" and unfettered manipulation of the court by a party. The court's adoption of criteria (such as those factors found in the section "The Safety of the Children and Principal Caregiver"), coupled with early screening, early assessment, and then periodic assessment thereafter, could identify cases earmarked for stricter control by the court. Such control could be accomplished by assigning the case to just one judge for all related matters and proceedings, judicial gatekeeping of certain filings, increased disposition of motions without court hearing, and judicious application of sanctions. This course of action is akin to application of differentiated case management techniques to control the course and conduct of litigation.

Courts must also assist workers in the areas of child protection and domestic violence to truly communicate with one another about how to ensure safety for the child and how to bring the "cultures" and practices of the two groups closer together. Without this bridge building, courts will continue to make less than adequate court orders.

AVAILABILITY OF APPROPRIATE INTERVENTIONS

Clinical and research literature. Good evaluations depend on appropriate and accessible resources in the community to make recommendations that are based in reality. In complex child custody disputes involving domestic violence, a host of services may be required to meet the needs of victims, perpetrators, and their children. If these services are not available or timely, intervention recommendations are meaningless. But if these services are unavailable, safety cannot be compromised. Thus, in cases where an assessor concludes that a certain level of service would facilitate more liberal access between the perpetrator and children but the services do not exist, we would encourage the assessor to err on the side of conservative recommendations to ensure safety.

For example, in a case where access should be supervised by professionals but no supervised-access center exists, then the recommendation should be a cessation of access until safety can be ensured. Too often we see the opposite, lack of appropriate services leading to more lenient decisions, such as the use of well-meaning but ill-equipped family or church members to fill the need for professional supervised access. In addition, custody evaluators should be encouraged to watch for opportunities to advocate for system reform. To assist in this advocacy role, evaluators may want to team up to compile a wish list for appropriate funding from state or private sources.

Judicial considerations. The notion of "safety first" can be a very divisive issue between persons working in the area of domestic violence and the courts, not unlike the issue of using court-ordered mediation in domestic violence cases. In both areas, court-ordered interventions are only as good as the options available to the judge. Judges strive to do their best given the acknowledged limitations noted elsewhere in this article. Decision making based on partial knowledge is a reality faced by courts every day, and judges are well aware that safety may be compromised. Courts and communities therefore must work together to establish and expand appropriate supervised visitation and safe exchange programs. Other avenues must be examined as well because these programs will not be able to provide services for all cases. Courts may need help envisioning how to determine or structure safe court orders that incorporate family members and other nonprofessionals. In addition to financial and other resource limitations, the facts of the case and/or the characteristics of a child or parent may dictate a less formal intervention. Considerations for this remedy are discussed in more detail later in this article.

Judges must also face how to administer "fairness" and "justice" in those cases where there are no community resources and the only perceived option is to (1) grant custody to a parent who has perpetrated domestic violence but who may continue to pose safety concerns to the other parent or (2) grant custody to a parent who has been rendered incapable of basic parenting by a number of factors that may or may not improve upon separation, including substance abuse and/or other issues that may have resulted from the domestic violence perpetrated by the abusive parent. This dilemma alone is sufficient to encourage appropriate judicial "activism" in the community.

ABILITY TO MONITOR SAFETY AND COMPLIANCE WITH NECESSARY COURT REVIEWS

Clinical and research literature. In our experience, clinical evaluations offer snapshots of families at a point of crisis, with the best possible recommendations for indicated interventions. Ideally, these recommendations are built on a prognosis implying a prediction of the future dependent on family members' motivation and capacity to attend and gain from recommended interventions. The initial snapshot needs to be turned into a moving picture with ongoing snapshots that provide reliable and valid information. In criminal proceedings, judges can rely on probation officers to monitor adherence to court orders and assess ongoing risk. In child protection proceedings, mandated risk assessments at regular predetermined intervals facilitate this monitoring process. The lack of a similar process in family court translates into wishful thinking that no news is good news. In our experience, families who do not come back to court are as likely to have used up their emotional and financial resources without any sense of progress in addressing the issues that brought them to court in the first place as they are to be living in relative harmony according to the provisos of the parenting plan.

Judicial considerations. Court reviews in isolation may not be as useful as court reviews that are an integral part of a procedure that begins with careful screening and assessment and ends with a community responsively providing services to the child, the victim of the abuse, and the perpetrator of the abuse and holding the perpetrator accountable by ensuring compliance with court orders. There is much debate in judicial circles about how active judges should be in managing cases. Heavy dockets and funding reductions in court resources may discourage judges from adjourning a matter to another date and receiving a progress report about the parents' ability to follow through on treatment plans. However, lack of effective enforcement of court orders is a serious problem, especially in complex cases involving domestic violence in which it may not serve the children's best interest to wait until one of the parents applies for a review hearing based on new crises.

FACTORS ASSOCIATED WITH CHILD ACCESS: INDICATIONS FOR SPECIFIC REMEDIES

When domestic violence has been identified as a relevant factor in the determination of a parenting plan, the court is left with the decision of whether to invoke one of three basic remedies that provide additional structure and supervision. In extreme cases, where a parent is a danger to the child and/or the child's principal caretaker, there may be a cessation of all contact until safety can be assured. In less extreme cases, the contact between a child and the perpetrator of domestic violence may be supervised by specialized staff in a structured setting. Informal supervision arrangements can also be recommended in situations that meet particular criteria. An even less restrictive option is supervised exchanges where the victim is protected from direct contact with the perpetrator but the child-parent contact is unsupervised. In cases of a minor, isolated incident of violence, where the perpetrator has clearly accepted responsibility and there are no safety concerns, the court may not require one of the three aforementioned remedies and may consider the whole range of parenting plans available to the court. In the following section we discuss these three remedies from both a clinical and a judicial perspective.

CESSATION OF PARENT-CHILD CONTACT

Clinical and research literature. The most difficult recommendation for a clinician to make or a court to consider is termination of contact between a parent and a child. In child protection hearings, this is a more common consideration after a history of child abuse, risk to the child, and lack of demonstrated ability to benefit from previous interventions have been shown. In a custody dispute, it is rare to consider terminating parental contact. However, when a perpetrator of domestic violence is a clear and present danger to his ex-spouse and/or children or the impact of past trauma is so severe that a healthy parent-child relationship is unlikely to emerge, then termination of access must be considered. The latter is particularly difficult, as it may occur in cases where a perpetrator has taken full responsibility and benefited from intervention; nonetheless, in some cases the damage to relationships is beyond repair. Obvious cases include children who have witnessed homicide or life-threatening injuries or ex-spouses who are in witness protection programs. Less obvious cases include children who have overt posttraumatic symptomatology that is triggered by any cues associated with the perpetrator.

These less obvious cases are extremely difficult to assess, in part because there is little research to guide decision making. While it is impossible to conduct experimental research in which families are randomly assigned to conditions, some recent studies counter the prevailing notion of maintaining some form of access between a parent who is violent and the children. For example, a study on the effects of father visitation on preschool-aged children in families with a history of domestic violence found a complex pattern of results.[29] The impact of father visitation depended somewhat on the severity of the violence that the fathers had perpetrated. Furthermore, father visitation was associated with better child functioning in some domains but more impaired functioning in others. The results primarily indicated the need for much more evaluation of the impact of father visitation.

Another study, one not focusing specifically on domestic violence but on the variability in the impact of father presence, demonstrated the negative impact of violent fathers on children's development.[30] In this study using data from an epidemiological sample of 1,116 pairs of 5-year-old twins and their parents, results showed that the less time fathers lived with their children the more conduct problems their children had, but only if the fathers engaged in low levels of antisocial behavior. In contrast, when fathers engaged in high levels of antisocial behavior, the more time they lived with their children the more conduct problems the children had. Although much more research is necessary in this area, emerging evidence indicates the possible need to rethink the presumption of access in all cases.

Judicial considerations. Prohibiting contact between a parent and child, even temporarily, is viewed as a drastic judicial remedy. Withholding visitation altogether demands much self-awareness and reflection by a judge. In the usual case, where the evidence is poorly developed and presented or where the equities and facts are not compelling, courts would reasonably order some form of visitation between the child and the perpetrator of domestic violence. However, in those cases where present danger is reasonably foreseeable or severe past trauma has been reasonably established, courts still remain reluctant to prohibit contact between the perpetrating parent and child. Individual judges must face their reluctance. It may be that, relative to other types of cases, this area is still "new." For instance, termination of parental rights in child welfare cases used to be a much rarer occurrence than it is today. Although it remains a highly difficult part of the job of being a judge, it has taken root in the judicial landscape as the number of juvenile dependency cases grows, along with the knowledge of harm suffered by children in flux for too long and a confidence that the court is doing the "right thing" in a fair number of these cases. As courts continue to develop expertise in the domestic violence area, jurisdictions can develop protocols and checklists of considerations to apply to the hard decision of prohibiting parent-child contact.

SUPERVISED ACCESS

Clinical and research literature. Consideration of supervised access is most relevant when there appears to be an attachment between the parent and child that is worth preserving but the clinician is uncertain about the child's physical and emotional safety. Emotional safety is compromised when a parent continues to undermine a child's sense of stability and security in their current circumstances. Supervision offers protection for a child while at the same time maintaining the relationship at an intensity and frequency that is developmentally appropriate. The visits can be complemented by school reports, exchange of holiday gifts, and updated medical reports as appropriate. Often in these circumstances, perpetrators have modeled inappropriate behaviors, which become the important boundaries for the supervisor to monitor.

In our experience, appropriately qualified and trained supervisors and supervision centers cannot be replaced by well-intentioned and naïve informal supervisors, who tend to lack not only the requisite training and awareness of issues but also do not have access to critical background information that is before the court. Thus, while untrained supervisors may be able to guard against blatant physical or sexual assault, they are poorly equipped to recognize and intervene when the perpetrator insidiously oversteps boundaries. A key concern about supervised visitation is that it is a time-limited intervention that should lead to a cessation of the relationship or a gradual withdrawing of supervision conditions. Withdrawing of conditions should not be an automatic next step following successful supervised access. A gradual plan, with the onus on the perpetrator to show an adequate ability and commitment to protecting the child from emotional harm, is required. The difficulty arises when it is not clear who bears the responsibility for assessing the perpetrator's progress or compliance with conditions. For example, a custody evaluator can propose an 18-month plan for reducing supervision *if things go well,* but if it falls on the other parent to return the matter to the court for appropriate orders, the plan to progressively reduce supervision may unravel, even when it is not in the best interest of the children.

In some instances, the use of informal volunteers as supervisors (such as the paternal grandmother) can be helpful. They may be most appropriate in cases where the concerns are not so much about safety as the need for assistance with parenting. We see many cases where a father who has been minimally involved in the basic care of his children receives access visits, causing great anxiety for the custodial parent (who may be aware, for example, that the father has never changed a diaper or prepared a bottle). If the father is not a danger to the children or their mother but requires support and monitoring during visits, an

informal supervisor may be appropriate. In these cases, the informal supervisor can probably assist the father in learning child-care skills and provide corrective feedback if necessary. However, it is less likely that this same supervisor could detect and intervene in boundary violations, such as the father's harassing the children to report on their mother's actions.

Judicial considerations. In many cases, the service of a supervised visitation center is the only assurance of safety offered to the principal caregiver and children. And yet, while courts are relieved to have this option to include in the court order, there may not be enough collaboration and coordination between the court and the visitation center. Courts must be aware of the range of services as well as the reasonable limitations of the supervised visitation centers and programs in their communities. They must identify those court practices that hinder the work of the center or program. For example, are the courts neglecting to provide important information that is readily available in the court record?

In most cases, supervised visitation will be temporary, whether supervised by a professional program or by informal volunteers. The considerations for the timing of cessation and/or gradual transitioning of supervision are fairly straightforward—i.e., the perpetrator's compliance with the court orders and/or treatment plan, whether the perpetrator has shown observable and measurable improvements vis-à-vis domestic violence as well as parenting, whether safety concerns for both the children and the principal caregiver have realistically lessened. While the considerations are easily articulated, the courts' real problems are resources, case management, monitoring, and enforcement. The state is not a party in family law cases, unlike child welfare cases, and bears no responsibility to act. In cases with very little private resources, the court can draft an order that attempts to link the principal caregiver with public agencies and advocacy groups. Ideally, the court would set reviews. In cases with resources, the court can depend on the parties' bringing the case back to court when necessary. However, in all cases, as with all court orders, a material change in circumstances should be required before protective terms and conditions are deleted or modified. Although courts generally favor agreements and stipulations, domestic violence cases require a judge's heightened review concerning issues of safety.

SUPERVISED EXCHANGES

Clinical and research literature. The least restrictive of the three remedies discussed in this article is supervised exchange. The principal goal in this intervention is to protect the victim from any ongoing harassment by the perpetrator. Even if perpetrators have changed their behavior, their very presence may trigger distress and anxiety for the other parent and children who are fearful to have their parents in the same doorway. This intervention is recommended for perpetrators who are not considered dangerous or likely to reoffend but still require an intermediate step before more flexible parenting plans can be put into effect. This strategy is also effective in high-conflict divorce cases where there is no domestic violence history but still a need to protect children from ongoing emotional harm brought upon by parental conflict. These exchanges can be built into existing children's routines—for example, one parent picks up the children from school on a Friday and drops them off at school on the following Monday morning. Another situation that can be greatly ameliorated by these structured, supervised exchanges is when the perpetrator of domestic violence is not posing a danger of physical harm but is exercising power and control by inconsistently showing up or being punctual for the exchanges or by habitually returning the children late.

Judicial considerations. Courts have the greatest confidence in supervised exchanges that are administered by trusted supervised visitation centers. However, the dilemma of scarce resources and the problem of faulty or incomplete screening and assessment mean that courts will settle for other reasonable and not-so-reasonable solutions in both domestic violence and high-conflict cases. Supervised exchanges,

like supervised visitation, are viewed as time-limited interventions and the "end of the road" for court involvement. But it is imperative that the court give serious thought to setting up "feedback loops" to avoid the "no news is good news" trap. Although supervised visitation centers are not intended to perform evaluation, they are often a source of valuable information about parents' ability to comply with court orders and to demonstrate some basic signs of responsible behavior. Together with other sources of information, information from the visitation center may help the judge develop a better appreciation of the parents' ability to follow through on court recommendations.

CONCLUSION

Courts and court-related services are beginning to recognize domestic violence as a significant factor in the determination of child custody decisions. Although child abuse has long been recognized by the court as a detriment to children, domestic violence was previously seen as an adult issue and deemed irrelevant to children's well-being. Since the initial publication of the Model Code on Domestic and Family Violence,[31] subsequent endorsements of the U.S. Congress, the American Bar Association, and the American Psychological Association have led state legislators to revise extant child custody legislation.[32] However, legislative change has only been the first step in changing awareness, training, resources, and everyday practice.

With practice developing in this area there is a clear hunger for appropriate assessment tools and intervention resources. As mentioned earlier, a number of encouraging developments support this awareness. One important development in the United States is the considerable expansion of supervised visitation and exchange services through the Supervised Visitation Program. Through this program the Office on Violence Against Women (OVW), U.S. Department of Justice, has poured millions of dollars into 63 communities throughout the country and into select territories to develop supervised visitation and safe exchange services for victims of domestic violence, sexual assault, stalking, and child abuse. In addition to funding communities to provide services to families, OVW has funded Praxis International, Inc., and the National Council of Juvenile and Family Court Judges (NCJFCJ) to provide technical assistance to those communities. As a result of the Supervised Visitation Program, the United States is taking a closer look at how to address the needs of battered parents and their children in a visitation setting.

Additionally, the NCJFCJ has launched, in partnership with the Family Violence Prevention Fund, seminars for judges on enhancing judicial skills in domestic violence cases. Courses include curricula focused on improving judicial decision making in custody cases involving domestic violence. These and other similar initiatives build capacity in the judicial system and provide much needed tools and guidelines.

Increasingly, the field is demanding clear definitions of domestic violence and more prescriptive guidelines for how to manage parent-child access in cases with domestic violence. Unfortunately, the complexity of these cases precludes simple formulae to measure dangerousness and match to parenting plans. In this article we have tried to capture some of the challenges in the field, which demand better informed clinical practices and thoughtful decision making on the part of judges. The justice system needs to develop more effective models for assessing, intervening, and monitoring change in these intricate family systems. Rather than looking at court intervention as an isolated, discrete event, judges need to be more actively involved in reviewing their court orders and ensuring both safety for victims and accountability for perpetrators.

In our travels across the United States we have seen a desperate need for adequate resources to meaningfully implement the legislative change in domestic violence law. Beyond these resources, applied research needs to expand to offer feedback on the effectiveness of differential interventions. Furthermore, this outcome research should address the whole system rather than singling out components.[33] To draw a

parallel to the effectiveness of batterers' intervention in the criminal justice system, collaboration and integration of justice and community service systems are not merely lofty goals but the only things that really matter.[34] The same fundamental truth is likely to underlie our success or failure in dealing with domestic violence in the family court.

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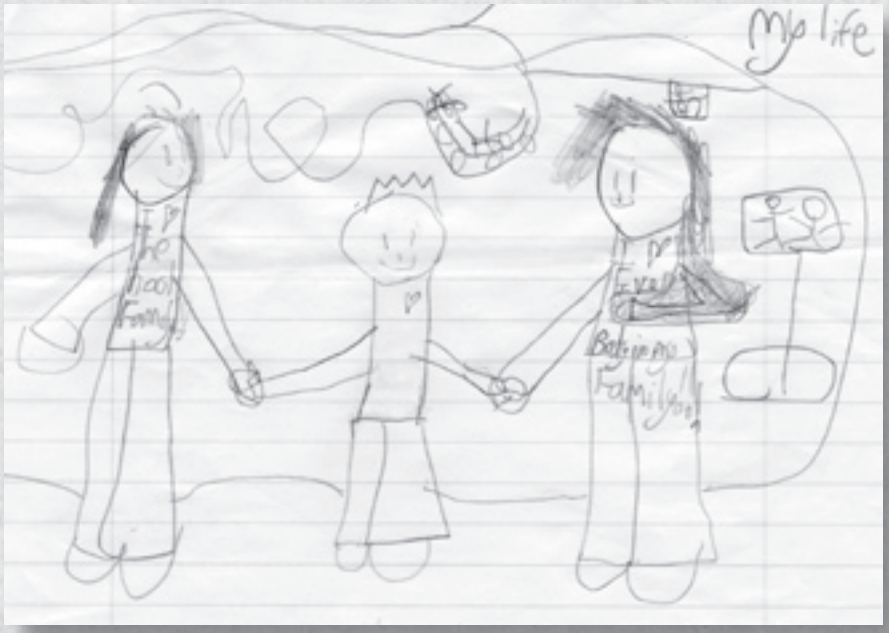
PARENTAGE ISSUES CHALLENGING CALIFORNIA'S JUDICIAL SYSTEM



Illustration, page 95

"Great America—My Life"

Anthony T.

Age 8

"I am in a foster home and I have the coolest moms in the world. But some time we get in a fight. But it is o.k. Thes persons take a lot of care of me. They give me a lot of clothes. They are so rich persons. You would want them to be your persons. I bet you my persons. I ♡ my foster family!!!"

2004 Children's Art & Poetry Contest

Parentage Issues Challenging California's Judicial System

We have devoted this journal's issues forum section to questions of parentage that are challenging California's courts. In addition to an abridged version of the transcript from the Fred Friendly Seminar that has been edited for clarification, we have included articles presenting different facets of the legal challenges facing the courts. Our intent is to provide a forum of ideas to promote a dialogue for improving judicial policy in this area.—Ed.

What Is a Family?

A Fred Friendly Seminar

In December 2004, the AOC Center for Families, Children & the Courts sponsored a Fred Friendly Seminar on parentage issues at its annual Beyond the Bench conference. More than 20 years ago, Fred Friendly, now deceased, started the seminars, which use the Socratic method to explore complex and vital issues challenging society. A skilled moderator, using a hypothetical case history, challenges panelists who have not been given any prior information about the hypothetical, to decide how to act in complicated situations where the "right" choices are not obvious or easy.

In the Beyond the Bench hypothetical, 4-year-old twins Ashley and Ben are found in a homeless shelter with their mother, Diane, who has a severe substance abuse problem rendering her incapable of caring for the children. When the children are identified by the "system," a search begins for a new family and home. Will their grandparents, loving and able but of very modest means, meet the standards necessary to serve as the children's foster parents? Will Diane's lover, who raised the children as a parent until a recent breakup, be given custody, rather than the children's aunt and uncle? Does it matter whether Diane's partner was a man or a woman? Does California law provide clear answers? And will a California court's decisions in this case be followed by an out-of-state court?

Moderator: This morning's discussion is about Ashley and Ben, two beautiful 4-year-old twins, a girl and a boy. Brittany Pettigrew, we want to talk to you about Ashley and Ben. They are here because their mother, Diane, lives in shelter care. She suffers from a severe drug abuse problem and can't care for them and is looking for foster care. And so we come to you to get a sense about what these children should expect. Tell us, Brittany, about your first reaction to these two 4-year-old children and what you will need to do.

Pettigrew: My first step would be to ask if there is family or friends of family who could possibly take the children in.

Moderator: I'm Ben, the 4-year-old. If you were talking to me, tell me about this experience. What am I going through?

Pettigrew: All right. Ben, your mom is having some problems, and she wants some help taking care of you. And so we want to take you to a place where you'll still be able to visit with your mom.

Moderator: You're taking me away from my mom?

Moderator:

Mr. Charles J. Ogletree, *the Jesse Climenko Professor of Law at Harvard Law School and a prominent legal theorist*

Panelists:

Hon. Patricia Bresee, *Commissioner (Ret.), Superior Court of California, County of San Mateo*

Mr. Falope Fatunmise, *Director, Edgewood Center for Children and Families, Kinship Support Network (San Francisco)*

Hon. Ernestine Gray, *Chief Judge, Orleans Parish Juvenile Court (New Orleans)*

Hon. Hannah-Beth Jackson, *35th Assembly District, California State Assembly*

Ms. Marjorie Kelly, *Former Deputy Director, California Department of Social Services*

Hon. Dan Lungren, *Representative-elect, 3rd Congressional District, and former Attorney General of California*

Ms. Martha Matthews, *Director, Domestic Violence Clinic, and Assistant Clinical Professor of Law, University of Southern California Law School*

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Mr. Michael McCormick, *Executive Director, American Coalition for Fathers and Children (Washington, D.C.)*

Hon. James Mize, *Judge of the Superior Court of California, County of Sacramento, and President, California Judges Association*

Ms. Brittany Pettigrew, *Child Welfare Supervisor, Alameda County Social Services Agency*

Mr. Ian Russ, *Family Counselor and Court Custody Evaluator (San Diego)*

Mr. Gary Seiser, *Senior Deputy County Counsel, Juvenile Dependency Division, San Diego County*

Ms. Janet Sherwood, *Juvenile Law Attorney (Corte Madera)*

Pettigrew: Yes.

Moderator: Can Ashley come with me?

Pettigrew: Yes. Both of you are going to go and live in a different home with what we call a "foster parent," who is a person who takes care of children who can't live with their parents right now. And we're going to try to help your mom, and we'll try to keep you in as much contact as possible so she can see you and talk to you on the phone.

Moderator: Tell me, Brittany, and tell this audience, is this agonizing for you?

Pettigrew: Yes, because before I talk to a child, I usually have a written report or something in front of me that I can look at, and I might make a couple of phone calls ahead of time to understand better what I'm walking into.

Moderator: Let me ask you, Ian Russ. A couple of months ago these children were in a stable relationship with two parents, two loving parents. And then Diane's drug abuse problem became so significant that they split and she left with the children, and now they're in a position to be considered for foster care. Tell us what these children are going through—what's happening here?

Russ: These children are going through confusion because they can't understand some of the words, they don't understand the process. All they understand is what is immediate and present in their lives. They're talking with strangers. They've probably been taught by their parents not to talk with strangers. They're afraid they could get their mother into more trouble. They don't know what to say and what not to say, and they're probably terrified about not being with Mom and not being with Dad.

Moderator: What is it that they need right now?

Russ: They need security and they need a sense of constancy. They're going to need contact with their mom. I don't know what happened with Dad. There's extended family. Extended family can fill in a lot of that along the way. But they need a consistent sense of warmth and loving in their lives.

Moderator: And stability—I assume you're trying to get some stability and some permanency?

Russ: Yes, but stability is difficult because as they're going off to foster care, they're moving into a house with all new rules, all new people; they don't know how things happen, and it's a very unstable world unless we can find a family member to do it.

Moderator: Well, Falope Fatunmise, let me ask you this. We have been unable to find the other parent. But Diane has been able to put you in touch with her parents, the grandparents of Ashley and Ben. And these are healthy grandparents, but they are of very modest means. They're living on a fixed income, on social security. What's your sense about whether we could think about these grandparents' being the responsible parents to take care of Ashley and Ben?

Fatunmise: Ideally, it appears that those grandparents may be the most logical step for those kids. But I have two questions. Are these kids in formal foster care at this point? Has 48 hours elapsed?

Moderator: We want to get them in foster care. We have loving grandparents. They've known them, they've seen them over holidays, they have a warm relationship—so it's done, right?

Fatunmise: Well, if they're going to be placed with those grandparents, they will have to go through a licensing process in order for those kids to officially reside in their home. That will require a criminal background check of not only those grandparents but anybody else who resides at or uses that address. So if Grandmother did something 20 years ago, it's going to come out. As far back as she's been living, actually.

Moderator: Forty years ago? Fifty years ago?

Fatunmise: Yes.

Seiser: Which is why Brittany is going to be talking to the mom and saying, "You know, if you take these children and put them into the system, into the dependency system, you're going to lose control."

Moderator: Well, Mom can't take care of them right now.

Seiser: I understand that, but in talking with her, Brittany's going to be saying, "Hey, Mom, let's see if we can do this informally, let's see if we can do this voluntarily."

Moderator: Tell me, what are the hurdles? They have no criminal record. What next?

Fatunmise: Now the house has to go through an inspection. These are two kids of a different gender—

Moderator: The house is beautiful, it's well kept; this is a terrific house.

Fatunmise: Yes, but it has to have a number of bedrooms for those kids to sleep in. They can't sleep in the same bedroom with those grandparents.

Moderator: These are two 4-year-old twins.

Fatunmise: They can't sleep in the living room; they can't sleep in the dining room either.

Moderator: They can't sleep in the same bedroom?

Fatunmise: At 4 years old they can sleep in the same bedroom. But if they get to be 5 years old, they will have to have separate bedrooms.

Moderator: Help me, Brittany. Help me here.

Pettigrew: That's right. When you're talking about a formal foster-care approval process, there are regulations that mirror those of licensure. But when you're talking about approving a relative or a friend of family, I look for any possible, reasonable exemption that I can find in order to preserve the family connection.

Moderator: What's the reasonable one here?

Pettigrew: "Reasonable" meaning that the benefit of placing the children with the caregiver continues to outweigh the cost of finding the exemption.

Moderator: Well, these children have come to the right place, because the grandparents just have one bedroom, right? But the great news is that they have a foldout couch in the living room. So we're good to go, right?

Pettigrew: For the most part, yes. We do have to also look at child protective services history, which is separate from criminal history.

Moderator: But the grandparents are on a fixed income; they're going to need financial assistance. They can get it, right?

Pettigrew: Not necessarily. Approval of a placement is separate from the issue of eligibility for funding.

Moderator: Okay, but we have everything. We have a loving set of grandparents. We have two grandchildren who want to be there. We have a nice clean, you know, immaculate home. We've got separate places for the grandparents and grandchildren to sleep in.

Pettigrew: Well, if they meet the requirements and I can get exemptions, then I don't have a problem with approving the home. But eligibility for financial assistance is a different process.

Moderator: I'm worried that if we start talking about going through all this red tape, you might even separate these children. Is that one of the risks

that we're facing? We've got loving grandparents. The grandchildren love these grandparents. We've got a home. It's not ideal. But it's ideal for them. It's not ideal in terms of the federal and state red tape.

Pettigrew: The reality of our situation is that if you're talking about a formal foster-care situation, every home has to be approved prior to the child's going there. So that could necessarily mean that a child will have to go to an emergency foster-care situation pending the approval of the home. And if there is no available emergency foster-care situations at the time that can take both 4-year-old children and keep them together, even with any kind of waivers and exemptions we might get for that placement possibility, then it is possible that we might have to separate the twins temporarily.

Moderator: What do you mean "temporarily"?

Pettigrew: The goal is to reunify them as quickly as possible in the same place.

Moderator: You still haven't answered my question. You're going to separate me and Ashley. Explain that to me, Ms. Pettigrew.

Pettigrew: Ben, I cannot promise you that I will not separate you.

Moderator: We're being punished.

Bresee: This is a frustration, I think, for anybody who sits on the bench and ultimately gets these cases. If Diane had made the arrangements on her own before she ever entered the treatment center and taken the children to the grandparents, the only thing that's missing is the money. Now there may be ways to receive some assistance for her family—if she's receiving benefits, then they may be able to. So I think what we're pointing up are the frustrations with "the system." I like to focus on the families' solving their own problems. And I certainly would want to know where that other parent was. And I would want to find out what Diane had in mind for these kids.

Moderator: Well, shouldn't the system focus on reasonableness?

Bresee: I think so.

Moderator: I mean, here we've got the home, we've got the loving grandparents, and why are we drawing back because of this technical two-bedroom rule? Janet Sherwood?

Sherwood: Judge Bresee is right. If you can keep the kids out of the system, that's probably the best thing.

Moderator: But we've got Brittany. Brittany's going to work through this, right? Can't Brittany creatively interpret this?

Sherwood: Brittany can't creatively interpret this.

Pettigrew: But I will admit that I am a very astute bureaucrat. Part of my role is to help families negotiate the system if they have no other options.

Moderator: I mean, who cares about the bedrooms? There's a bedroom for the grandparents. There are separate sleeping quarters for the two children. Why should that be an obstacle to keeping this family together? Marjorie Kelly, how would you respond to Brittany's dilemma here? What would you do in her circumstance?

Kelly: Part of the responsibility of the system is to work with families, to understand what they can do outside of the system, to help each other and to help themselves. And so, in this situation, efforts to track down the dad as the assumed preferential placement would be the obvious first avenue to pursue. And the second avenue is to say to Mom, "You can put those kids with the grandmother, go ahead and do it," just as my son can go to his grandparents without a judge's permission.

Moderator: My question is, are the social service people going to say, "I'm really going to try to figure out what's best for the children and try to navigate through this red tape"? It makes no sense to have this technical two-bedroom requirement.

Kelly: What you're actually hearing is how the system has become—and this is not a good term perhaps, but—perverted by the search for funding. And what Brittany is telling you isn't that she wants to do all these things to these children. She doesn't even necessarily want to make a case. What she's telling

you is, "I can get the grandparents more money if we make it a child welfare case and you meet all of these obligations and requirements." However, one of the things that we've not spent enough time on is how we explain to relatives what the options are, maybe at a lower rate of money but that allow them to operate as a family, caring for each other—for example, how to apply for welfare, an option that may not provide as much money as a dependency foster-care arrangement. You don't have to come into the system at all.

Moderator: All right. Judge Gray, welcome to California. Now, you're from Louisiana. Sort this out for us.

Gray: Well, quite frankly, if this case came to me, I would wonder why the agency is not taking advantage of what I heard they can do in this case. Since the children are 4, the regulation that is causing all these problems doesn't apply to this case. It only applies if they're older. So, if they came to me under this scenario, they would be in deep trouble because they haven't placed the children because they are 4 and the bedroom issue is not an issue. Second, in Louisiana, we have the ability to do emergency certification of homes for a temporary period of time. We do that quite often. So I would want to know whether or not we could place these children with their grandparents, do an emergency certification of their home, let the children go there, and make sure the criminal record's checked, all those things check out, and the children can stay there permanently. I think Marjorie has touched on something that is critically important. We don't explain, in my opinion, to parents, grandparents, and relatives the negatives of foster care. We present this as a truly positive thing. And we don't say to relatives and parents what are the downsides when the children get into foster care. Just because children go into foster care, they don't come out necessarily well grounded, adult—skilled adults. And I think we need to say honestly to people this is not the panacea that you think it may be, and, because it is not, you need to make decisions that may be burdensome to you, it may be hard for you to keep these children on a fixed income. But if you're looking out in the future, this may very well be the best thing for the children. And people have to stretch, and I think we should ask relatives to stretch.

Pettigrew: I want to say, though, that actually is a conversation that people repeatedly have. If a placement can be safely made outside of the foster-care system, we're definitely going to try to take advantage of that. You can do it quickly, you can execute quickly. I mean, for us, it's a lot more work to bring a child into the system than to find a safe alternative outside of our system. I do feel that we try, as much as we know, to explain what the options are.

Moderator: Martha Matthews, I've got some bad news for you and some good news for you. Grandpop had a stroke. But he's fine. He's recovering. But it's clear that they will not be able to handle the burden of raising twin 4-year-olds. It just won't work. The good news is that now we've found Chris.

Let me tell you about Chris. Chris is a wonderful person. Chris met Diane and, as they developed a relationship, Diane told him, "I'm pregnant by Mr. One-Night-Stand. I have no idea where he is or what he's doing."

And Chris said, "Diane, I love you very much. You should have the child (it turned out to be twins). I will support you."

And that's indeed what happens. Diane has the twins. Diane and Chris are living together. The twins call Chris "Dad." Chris works and provides for them, and Diane is a stay-at-home mom. And so, that's Chris's status.

And let me ask you, Martha, what is Chris? Is he a very, very good friend? Is he the father? Under California law, what is Chris's relationship to the children?

Matthews: Well, it depends. I mean, if he's held himself out as the father of those twins, if they think he's the father, if he's always acted as the father, he can assert himself to be what's called a "presumed parent" under California parentage law. Even if he knows he's not the biological father, as in the *Nicholas H.*[1] case, he could still be a presumed parent,

which means that he is someone the dependency system can work with as the other parent.

Moderator: Judge Bresee, how would you answer that question?

Bresee: I would agree with Martha. And we do have the guidance of our Supreme Court in that case. I look to the child's perception of parentage. Whom does the child see as a father, a mother, two fathers, or two mothers, whatever the situation may be? And whenever possible, I trust the children.

Moderator: Great. Well, it seems all settled, right, Gary Seiser? We've got the judge and the lawyers, right? And so there's no problem. The Supreme Court has spoken.

Seiser: The main problem is that we're not going to call this man a "presumed father" until the court does. Because at this point he's an alleged father. And so on the dependency petition Brittany's going to call him an "alleged father," which will raise a red flag to the court to say, "Hey—we need to deal with paternity." And if the court finds him to be a presumed father, then we will treat him as a presumed father. But until that happens, he's an alleged father, which means he's not eligible for placement, his relatives are not eligible for placement as actual relatives.

Moderator: I'm worried, Judge. You told me this was all settled, and I felt very comfortable. Is Gary right?

Bresee: Yes, Gary is right, but don't file the petition—

Matthews: Just let the kid go live with him. I wonder where he's been the last couple of months, though. I mean, where was this guy?

Moderator: Looking for his children, and looking for Diane. She left.

Matthews: If you find out about Chris, there doesn't need to be a dependency case in the first place. The kids can just go live with him.

Moderator: Janet Sherwood, any problem?

Sherwood: No, no problem. And I think Gary's only half right, by the way. I don't agree that his relatives would not be the children's relatives, because the definition of *relatives* includes relation by blood or affinity. And I think we've got the affinity piece.

Seiser: The rule of court defines *affinity,* and it wouldn't include Chris's relatives until the court makes a determination.

Sherwood: And I think the rule of court is inconsistent with the statute, and, therefore, we ignore it.

Seiser: Ohhh—

Moderator: All right. Hannah-Beth Jackson, what's your sense about this? Chris is on the scene now. Problem solved or problem complicated?

Jackson: I think that California law is moving in the direction of intentional parentage, and he clearly has held himself out as the father. I would have to agree to try to avoid the foster-care system and court system to the extent that you have a willing and capable parent. He clearly seems to come under that definition. And, unless and until there's some question that calls for the intervention of the court or a financial request that would then bring the system into play, I would agree that Chris is the man.

Moderator: Okay. What do you think about this, Michael McCormick? Good result?

McCormick: I think that based on the facts and circumstances of the moment, it is a good result.

Moderator: At the moment? Uh-oh, there's a little hesitation in your voice. Why?

McCormick: Well, I'm concerned about a child going into a foster-care system, being placed with grandparents, and down the road setting up an adversarial custody situation where the father is trying to get the children back from the grandparents. So the idea of avoiding the system initially is a very good idea and brings to mind that adage, "I'm from the government and I'm here to help." And I think we need to settle this outside of bureaucracy as much as we can.

Moderator: Dan Lungren, you're from the government and you are here to help, right? Tell this audience—we're working toward the right result here, right?

Lungren: Frankly, I don't know because I just find it strange that you have these people who claim they were living as a family, and one can go off with the two kids, the other one didn't find them for some time. That would suggest to me some instability. I don't know, just based on the facts, that there was a true father relationship with these kids. I don't have enough facts at this point to know exactly what I would do on this. And while I have seen the problems of foster care, I've also spoken to foster kids who, as much as they've had difficulty in foster care, have given me chapter and verse of the problems they had with their "parents." And in some cases, they would have been far worse off with those parents.

Moderator: You didn't draft these guidelines we talked about earlier, but is the Legislature trying to do something by setting up some clear guidelines that may frustrate all these caretakers?

Lungren: I think so. I mean, one of the comments made earlier was that so much seems driven by funding. And, unfortunately, many decisions in the Legislature are driven by budget. And you've just got so much budget to use, so you try to shoehorn your decisions within that. I believe the major thing that ought to be done here is an assessment of what's best for the kids involved, and in most cases that's trying to keep a family unit together. But we know there are some tremendous exceptions. So, as a legislator, you're trying to figure out what makes the most sense and where you want somewhat rigid rules and where you want to have discretion because you know there are fact patterns that you can't anticipate and you want to allow the judge or whoever is the decision-maker to be able to put those into the system.

Mize: You raised an issue that is of real concern to judges, and that is the idea that the Legislature really wants judges to have discretion. That's not the case in California, where the Legislature is always coming to judges and saying, "This is how we want you to rule when the facts are *A, B,* and *C.* And we do not want to give you discretion because of anecdotal evidence of judges' not making a clearly good choice." So, while I'd love to believe what you just said, in fact I don't think it's true.

Jackson: Well, part of the problem is that the Legislature is often reactive. And when we see a bad situation that comes into play because of some mix-up in the system or inattention—you have a hundred cases, it's the one case you couldn't get to that becomes headlines—that's when the Legislature tends to react and to respond in a way that takes away the discretion.

Mize: From the 99 judges that were doing well all along.

Jackson: Exactly. And part of the problem, too, is that you see fewer and fewer attorneys becoming legislators, particularly those who have practiced law, so we get farther and farther away from the reality of the court system and the entire process.

Moderator: There are two factual changes I want to add to this hypothetical. The first, Dan, is that your wife, "Jane," is the sister of Diane. And you and Jane have a 6-year-old, little Daniel. And Jane's interested in this situation because she's recognizing, "Here's my niece and nephew." You guys love them. You guys see them on holidays. You're very close to them. And, of course, Jane is a stay-at-home mom with little Daniel, and she thinks it would be great to have the twins there with your son. And she wants to try to persuade you to think about getting involved in this case. But there's also another important factual issue about Chris. I think that you have most of the facts but not all of them. I didn't mention that Chris is "Christine." And Christine is very interested in this proceeding, and we're going to get to a battle over who should have custody—Christine, a person who really loves and has raised these children, or the relative, Jane.

Jane comes to you and says, "Dan, dear, you know that Ashley and Ben need to be with their real family, not with this person who has no biological connection to them at all. We're not rich, especially since you took that doggone federal job. But we've got a nice home and we can take them in. We should seek

to become responsible for Ashley and Ben. I just want you to support me, Dan." Done?

Lungren: I would try. We grew up with the idea that you help one another. If you come to me and you tell me that you want us to see if we can do it, I'm game if we really do believe it's best for the kids. If so, we'll work as hard as we can to make sure it happens.

Moderator: But the question is, do you believe it's best for the kids?

Lungren: What I know about these children, yes. I mean, I'm happy to have them come live with our son.

Moderator: Do you at all think about taking these children away from their mother?

Lungren: No, I know my sister-in-law has a drug problem, I know it's serious, I'd like to see her get help. But I also know the difficulty, and a lot of things are stacked against her. And so I'm thinking about three people right now. I'm thinking about my sister-in-law, who has things stacked against her, and I'm thinking about the two kids. If I can save the two kids, and I can't save my sister-in-law, I'll do everything I can to save those two kids.

Moderator: Well, you might save them by letting them go with Christine, who they call "Mom," who they've lived with for four years, who's been their mom, who has a real bond with them. Why would you be against that? Why wouldn't you tell Jane, "No—I understand, honey, it's a good idea, but they've got a mother who has a good job, who can afford to take care of them. Why should we not let them go?"

Lungren: Well, I think we've got a stable relationship, we have a child here, we have an established family. It seems to me it's a better environment for those two kids.

Moderator: Why is it a better environment? Gary Seiser, what do you think about Dan's analysis here?

Seiser: I think it's perfect. He's trying to support his wife. But we haven't said what is best for the children. And the number-one question that I'm going to ask is, "Brittany, when you talk to these kids, where do they want to be, and who do they see as their most important family members?" I'm glad we're in the dependency system because now we've got a forum to litigate whether Chris has any rights or should get placement or the relatives and how we're going to do that. But I'm going to ask, number one, what is that relationship and what does it mean to the children? And that's going to be very important.

Moderator: Falope, let me ask you. Would you respond differently than the way that Dan Lungren responded? What do you see as the issues from your point of view? No red tape, we got bedrooms, all that stuff, we're set. She has the equal opportunity to provide for these two twins.

Fatunmise: Then I think Christine is the ideal placement for those children.

Moderator: Make Dan understand that. It might help him persuade his wife to go in the other direction. Talk to him.

Fatunmise: These kids have established a bond and a relationship with Chris, who they see as their mother. And I don't see anything that could be closer or more endearing or loving or caring for these kids than to be with their mother. It doesn't mean that your sister couldn't have visitation with these children. But to take these kids away from their mother is just a further disruption of these kids' lives.

Lungren: Look, I still think, and this may be the minority view on this panel, but I still think the best environment for a child is to have a mother and a father, if they can be raised in that setting. There are other situations that work. But I still believe that.

Matthews: But, Dan, that's not the choice with these children. The choice for Ben and Ashley is between staying with their mother after their other mother had to go into rehab and going to live with their uncle and aunt, who maybe they have visited, but they don't have that primary parent-child bond.

Lungren: Well, where has this mother been for months? Because my sister-in-law took off with the kids. So there obviously was not a stable relationship between those two. She took the kids away, essen-

tially stayed away from this other mom. And so I'm wondering how stable is that relationship?

Gray: But the sister-in-law was using drugs, so any decision that she made obviously might not have been a stable one. She was impaired by her drug usage. So, yes, she ran off and took the children with her, but that doesn't mean that she did it for lofty purposes.

Mize: Diane may not have been stable, but Chris may be very stable.

Gray: Right.

Moderator: Well, let's just resolve it. Judge Bresee, they're going to be in your courtroom. And Martha Matthews, you represent Christine, who is Diane's partner. Janet Sherwood, you represent Jane, who is Diane's sister. Each of you has to persuade this judge that your situation is the ideal one. Janet, why don't you go first?

Sherwood: I move for de facto parent status, Your Honor. Under the Constitution of the United States of America, my clients have a due process interest in participating in this proceeding because, as potential caretakers and relatives of these kids, they have at least a notice and hearing right to participate in the ultimate decision. But we shouldn't proceed until counsel has been appointed for these children.

Bresee: I agree.

Moderator: Counsel has been appointed. Don't worry about that. So, Martha, what's your argument?

Matthews: Your Honor, under the case of *Karen C.,*[2] my client is a presumed parent for the same reason that Nicholas H. was a presumed parent. My client held out the children as her own for four years. The children call her "Mommy." The children are intensely bonded with her. There's been a stable parent-child relationship. This dependency petition should be dismissed. There's no reason for a dependency here, and they should just go home and live with their mother and, hopefully, their other mother will get out of rehab.

Moderator: Talk to Gary, Brittany, about what you want to interject in this case, your thoughts, because he's going to have to argue to the court next, persuade the court which decision to make. Tell your supervisor what you think should happen.

Pettigrew: Well, after interviewing the children, it appears to me there's evidence that their primary connection is with their mother and their mother. So my preference would be placement with Christine as a nonrelative, extended family member, who is also an approved home. The dilemma I see is that I'm not sure if I'm allowed to give preferential treatment to this nonrelative, extended family member—someone who's defined as an approved relative—when all other things are considered equal. But I can tell you that my recommendation to the court would be that the children go with Chris because that's where their primary connection is and I hope that the court agrees, and that you litigate your little heart out to make it happen.

Moderator: Gary, you get a chance to appear before Judge Bresee. What are you going to say to her?

Seiser: Your Honor, we're here today to deal with where these children should be placed and whether they ought to be in the dependency system. But before we can do that, we need to determine who are the parents so that we can determine what rights they have in this litigation. And, as an officer of the court, I'm suggesting that we should first deal with the issue of whether Christine is a presumed mother. If so, she is going to have a right to appear as a parent and to litigate the issue of placement as well as jurisdiction. So I think that's an issue we have to deal with before we even get to the issues of placement and jurisdiction.

Bresee: I quite agree with counsel.

Moderator: Well, we've got one more intervenor here. Hannah-Beth Jackson, you represent the children. And what would you be saying to them?

Jackson: I would be saying to them that we were going to try to figure out a way to get them back to their home to live with their parents, with their mother Chris until their other mother is well and can come home to be with them. They have a good

relationship with their mom Chris and I'm going to make sure that the judge knows that they have that relationship, perhaps with an in camera meeting with the court if the judge felt that was appropriate, depending on how articulate they are in expressing their love and affection for Chris.

Moderator: Ian Russ, how would you advise Hannah-Beth Jackson to talk to Ashley and Ben? Is that a difficult conversation?

Russ: It is a difficult conversation. But rather than asking them their preferences, I'd prefer that you talk to them about the narrative of their lives. Because I don't want them in the position of feeling they're making the decision. So I want to know how they experienced their lives, what kind of things they did with Chris, what kind of things they did with Diane, how well they know Uncle Dan, to see where their life really is based and where their affections are, not by their conscious choice, but by their narrative of the story.

Jackson: Well, I jumped to the conclusion that they wanted to be with Chris, but I agree with you completely. But rather than be as focused on Uncle Dan, the question I keep coming back to is, if Chris were Chris and not Christine, would there even be this question? And I think the law today is clearly moving in the direction, particularly with AB 205,[3] that there will be equal parenting, whether it's a male or female, same-sex relationship or not—the question will be, were they the intended parents? Is there that relationship, parental relationship? Does it make a difference if it's Chris or Christine? I think the law in California is going to the point where the answer is no.

Moderator: Ian, you get a chance to argue to Judge Bresee. What's your argument to her? What should she do? Where should these children be placed based on what you know?

Russ: Your Honor, these children are already in a situation where the world has become chaotic. To stabilize these children's lives, to minimize the trauma, it is essential to their stability that they remain with Chris, who they know as their mother. This will stabilize their lives during a tough time. Bringing them into the system to move them to an uncle who's peripheral to their lives or to put them into foster care—

Moderator: Well, peripheral—come on now, it's not peripheral. This is Dan, right? He loves these children, and his wife loves them. You take exception to that, right?

Lungren: I took them to the World Series to see the Boston Red Sox win—they love me.

Moderator: But this is a slam-dunk. Everybody's saying Chris, not Jane and Dan, a wonderful biologically connected set of stable family members who want to care for and love their niece and nephew.

Bresee: I think any judicial officer making this decision wants to base it on case precedent and statutes that exist. And this is an evolving kind of process. I think Ian and Hannah-Beth have stated the strong position that I articulated earlier—that the children have made the decision for me. And I always trust the recommendation of the attorney, especially of the attorney whom I know well and trust has indeed spent time with the children.

Moderator: But Jan Sherwood has described a wonderful, stable, resourceful, loving family with a biological connection to these children. Janet, try to tell her why she should be cautious about what seems like a slam-dunk. Argue for Dan and Jane.

Sherwood: Well, I think that you need to consider the relationship that these children may or may not have with Christine. Because I think there were some issues about this relationship that need to be explored. But I think you also need to consider this family that can provide them with a stable home on a long-term basis if that's what ultimately becomes necessary. And in the beginning of this case we don't actually know if Diane is going to make it through rehab. We don't know if Christine is actually going to be able to take care of these kids without assistance. We do know that Dan and Jane and Daniel junior can provide these kids with a stable home, and that these children can be there long term if that's ultimately what becomes necessary.

Bresee: I certainly would listen very carefully to that and agree. These are children that were, first of all, ripped away from Chris by Diane. Now they may be facing another traumatic tearing away from someone. I think they're very fortunate to have other loving family members, and, if possible, it makes sense to try to maintain and enhance that relationship.

Moderator: It's interesting you have this loving relationship, but Christine, who has all the support and love, she's going to be working. There'll be a nanny there. Dan's wife, Jane, will actually be home with the two children and their own child.

Seiser: Oh, Your Honor—value judgment!

Moderator: Values don't matter?

Seiser: Values do matter. But we need not to impose our own values. We need to impose the system's values.

Moderator: Oh my God, didn't we just reject the system's values?

Seiser: No, no—we're working in the system. And the system's values say we have to make this decision as thorough and as promoting of long-term stability as we can. So the county is going to ask, Your Honor, not only that Christine is a presumed mother, but we're also going to ask that you make an alternative finding. That even if she wasn't a presumed parent, that you would find that, as a nonrelative, extended family member, this is a better placement for the children because of their relationship than the relative placement with Dan and his family. So should the Supreme Court say, "Hey, next year, we're not going to recognize the Uniform Parentage Act as gender-neutral," and they throw that stuff out and Christine isn't a presumed mother, those kids are still there in a nonrelative, extended-family-member placement.

Jackson: Except, Your Honor, relatives are entitled to preferential consideration and Dan's an uncle, so he's one of the relatives and is entitled to preferential consideration. And relatives, I believe, are one step above nonrelative, extended family members in terms of preferential consideration.

Bresee: Consideration, not presumption.

Jackson: I agree, Your Honor, consideration. But I think there's another issue here. I think Welfare and Institutions Code section 316.2 requires Christine to file a UPA action. And until she steps forward and files a UPA action and gets herself declared a presumed parent this is all just hypothetical, because she actually doesn't have any standing until she asserts her parental rights, if any, and she hasn't done that yet. All this discussion about Christine is premature.

Moderator: But your thinking is that the challenge is between the best interest of the children, as we hear Martha on behalf of Chris arguing, and what some may say, that society has a different interest, a biological interest. And is that a dilemma for judges, or is it clear enough that you're going to figure out the best interest of the children and not let society impact how you have to rule in this case? Because they could be in conflict.

Matthews: Parenthood trumps everything else. If you're a parent, you're on a whole different level from even the most loving and wonderful uncle or family friend. If you're a parent—and that's why I think the UPA is very important here—and you haven't been found unfit, our court really should not be in the business of saying, "Gee, is your uncle a lot better than your mother?" I mean, how many of us who are single parents would really want to have that go to court?

Pettigrew: As a social worker, I'm definitely going to recommend for the children to get placed with Chris, or for Chris to become a presumed parent and have that standing. But the reality is that I'm not expecting that to actually happen. In my experience, those kinds of decisions have been really inconsistent and based on various nuances of a particular case. So I'm not expecting anything. For me, I'm basically having to finesse both sides of the fence because regardless of where all the fallout lands after the decision is made, I have to work with whoever wins.

Moderator: Well, you prevail. It seems the majorities prevail. You and Gary and Martha and Ian—

sorry, Janet—all succeeded in getting this placement with Christine.

Bresee: First the court would declare Christine to be a presumed parent. There's a legal status to her.

Moderator: Professor Matthews, of course there's another little wrinkle. Christine has been working with Diane and trying to make this relationship work, but it hasn't worked. So Christine throws up her hands and says, "Y'know—I'm outta here."

And so Diane says, "Oh no, you're not. I'm filing a petition for child support for you to support these children."

Professor Matthews, not Attorney Matthews, tell me, does Diane have a case?

Matthews: Oh yeah. If you're a presumed parent under the UPA, I think the parenthood should not be unbundled. If you're a parent for one purpose, you should be a parent for all purposes.

Moderator: Never filed to become domestic partners, never filed to become formal parents.

Matthews: She's still a parent under *Nicholas H.*[4] and also *Karen C.*[5] If someone has been holding out for years and years to the child, and to the community, and usually to the other parent, "Hey, I'm a parent," and later it turns out that they don't have a biological connection, or even knew from the beginning they don't have a biological parent, tough luck, they're a parent.

Moderator: Dan, isn't this what you're worried about? Here we go. Now Christine is going to be held responsible for paying child support and you wanted to take over, you have a biological connection—

Lungren: I'm going to say let her pay. Let her pay.

Moderator: This is what they asked for, right?

Lungren: That's right.

Moderator: Mike McCormick, what do you think about this? What's going on here, Michael? Should Christine be forced to pay child support?

McCormick: I think that she is in a position where she is going to end up paying child support.

Moderator: But you haven't told me how you feel.

McCormick: Do I feel that she should necessarily be paying child support? No, I'd be more inclined to think the children ought to be with her and she ought to be supporting them, not necessarily writing a check that's going to flow to a different direction.

Seiser: But part of the answer is going to depend on what county are you in.

McCormick: Oh, absolutely.

Seiser: And another part is going to depend on what does the Supreme Court do next year with the *Kristine H.*[6] and *Elisa B.*[7] cases.

McCormick: Unquestionably, and I think that that's where the placement becomes so important here, because if you have an application to the foster system for benefits, the system is going to look back to a parent to collect child support from. We need to see if we can have those children with that parent regardless of whether it's Christine or whoever may be presumed to be the parent, where there is no triggering of all those mechanisms with regard to payment and support.

Jackson: I think as the law moves in the direction of intent of the parent or intent to be a parent, you have to take the responsibilities along with the rights. And I think in this situation, if Chris is the presumed parent, whether male or female, I think that there is a responsibility associated with that. If there's a relationship based upon an intention to have that relationship, there are responsibilities. Chris wanted all the rights to go with being a parent, and I'm hoping that we get more consistent so that we're not constantly finding different jurisdictions operating differently.

Seiser: Although the majority here on this panel would say she should be granted presumed-mother status, the law is not settled on that.

Moderator: There's another dilemma right down the hallway from this courtroom. In the courtroom right down the hall, there's a proceeding that's about to start with the appellate court. And the appellate court consists of Justices Lungren, Bresee, Mize, and Matthews, along with Chief Justice Gray.

Elaine and Francine were a lesbian couple, and Elaine actually donated her eggs to Francine seven years ago so that they could have a child. And they have these, again, twins. And these two 6-year-olds are part of this wonderful relationship. But they break up after six years. Francine gave birth to the children, but Elaine now wants to be declared a parent. She signed a consent form when she gave these eggs, acknowledging that she was waiving those rights. But now she says, "You know—my eggs, my children, six years—I want to be a parent."

Elaine, who donated the eggs, lost at the trial level. But now we have the court sitting en banc and I'd like to hear Chief Justice Gray. Let's figure out what do we do about Elaine's petition that says, "I want to be declared a parent." Do you speak first, or do you want to push one of your other colleagues?

Gray: Being the chief, I want to hear from Justice Matthews.

Matthews: Well, they're both parents. I mean, if they have been raising these children together as parents for six years, the mother who gave birth to the children is a parent by virtue of the UPA. The mother who donated the eggs may not be a parent by virtue of the egg donation because of the waiver. However, if they intended to parent the children together, and they actually did so for six years, then regardless of what she signed in the hospital, she's a parent. So they're both parents. Case closed.

Mize: I agree with that, I just have some concern about what her intention was when she waived the rights. Why did she waive them?

Matthews: Well, there are these standard forms that people sign when you're an egg donor; when you're giving your eggs away to strangers, you always have to sign a form. What probably happened, and of course we defer to counsel on the record, is that people get a stack of forms to sign in the hospital. And they sign them without paying that much attention. And they think, "This doesn't matter because, of course, I'm not giving my eggs to strangers. I'm giving my eggs to the children's other mother, and we intend to raise them together. So I'm just signing this silly form because I'm signing a bunch of forms without paying attention."

Moderator: She signed the form.

Lungren: But if in fact the record shows that for whatever reason she intended to sign the form because she did not want to take on the responsibility of being a parent, then I think we've got a whole different thing that we've got to worry about.

Gray: She signed the form, and it's too late to change her mind.

Moderator: All you need, Dan, are two votes.

Lungren: I understand. But you will find this hard to believe. I'm concerned about the interest of the children in this case. The forms have to mean something. She signed the form. Presumably she had knowledge at the time she did it. We have these forms so that they will in fact determine what a decision will be some years later. We can't just reject these forms out of hand. She put pen to paper. For whatever reason, she did not want to be the parent. Case closed.

Matthews: I actually agree with Justice Lungren that that is important. I mean, you could have a situation where someone intentionally sets it up so that the mother who gives birth is the only legal mother, and says, "Hey, I'll participate in this project of yours. You want to have kids, I'm your girlfriend—fine, here are some eggs. But you're really the only parent." I mean, it's important to know what they've been doing for six years. If they've been raising the children together, and the children call them "Mama" and "Mommy," then I think they really are both parents. If they're saying, "That's your mom, I'm just this friend over here, and, gee, I happen to look like you," then you're right.

Mize: How would this be any different if in fact they started their relationship after she was already pregnant and then just lived six years together? Clearly there would have been no intention to have donated the egg. But there would have been the six years. So I think the six years becomes determinative.

Gray: I guess I'm looking for help. Because, for me, I sort of agree with Dan on the signing of the form. And I would be concerned if we start saying people can sign the forms but they don't mean anything—that we're maybe undoing a lot of relationships that were based on signing that form. So I'm having a real problem, being a strict constructionist person that I am. But I'm sort of in the middle and I could, at this point, go either way. I'm also convinced by the fact that they held themselves out as parents for six years. And, to me, looking at the best interest of the children, who didn't know anything about the forms, that's not the issue for them. So how do we decide?

Bresee: I would defer to Justice Mize and his comments. I think we have to look at the relationship that's gone on for six years. How did that intent manifest itself?

Moderator: Interesting— You have a choice of the genetic connection as one way to go. You have the six-year relationship as another way to go. And you have the signing of the form. Those are all interesting, different facts in this case.

Mize: Let me see if I can clarify, also, to Chief Justice Gray. If it were three weeks or three months after the signing of this form, my opinion would, perhaps, be very different. So the six years makes a difference. I'm just saying that your concern is appropriate. We have to give some power to a signed document. We act as if people know what they're doing and give the opportunity for people to donate eggs and sperm without the necessity of having to worry about people coming back and getting child support from them. But this is six years later, and I think that makes it easy.

Lungren: But what if we had evidence that in the fourth year she still maintained that position, "I didn't want to do that." But then in the last two years has had a change of mind.

Mize: It's a closer case then.

Gray: So what's our decision?

Matthews: Were they holding out as parents? I think that's part of the record.

Gray: That's part of the record. Six years they held themselves out as parents. They made all the decisions about daycare, they made all the decisions about Little League baseball and all those kinds of things. They shared expenses. And so the record supports that they were both holding themselves out as parents. For six years they did that. And so I'm saying they're both parents.

Moderator: So is this unanimous? Is there a concurring opinion? Unanimous decision, okay.

Moderator: Well, we've got another interesting question I'd like Michael McCormick and Gary Seiser and Martha Matthews and Janet Sherwood to weigh in on. What happens when we have an egg donor or a sperm donor or both and a child is born? That child becomes, because of the separation of the parents, a ward of the state. Gary, should we be able to go after the egg donor or the sperm donor for support of this child in your view?

Seiser: Well, first off, in the dependency court, we're not going after them for support so I actually have no idea. That's a completely different area.

Moderator: Is there an agency that deals with it?

Seiser: Sure, sure—child support.

Moderator: And what do you think would come from child support? What would they say?

Seiser: Where can we get the money? They are far more concerned with—they're not really dealing with child custody, child placement, child welfare. They're dealing with fiscal responsibility. And they're most focused on, in my perception anyway, where can we get the money?

Moderator: Marjorie Kelly, what do you think of that? What do you do here? Go out to the egg donor, go out to the sperm donor—what do you think, having been involved in the system at some level?

Kelly: I'm stumped, frankly, because I think when we have egg donor situations and sperm donor situations, clear legal steps are taken to protect those folks from exactly this situation. And so I think that what you've got to overcome is not just the question of should we go after them. What you've got to

overcome is the central legal question of could you, if you wanted to, could you? And then, secondarily, should you?

Moderator: It's interesting because we're saying, "You have no rights, you're signing those waiver forms, you have no rights, but do you have any responsibilities?" Janet?

Sherwood: Part of the reason for the waiver forms is also to protect the sperm donor and egg donor from ever getting hit up for child support because they wouldn't donate if 10 years from now, surprise, you know, you're a mom.

Moderator: Does the form actually say that?

Sherwood: I think it's statutory. It's the rights/responsibilities thing. You're giving up your rights, so you're also being relieved of the responsibilities of a parent; and since you have neither, you have no legal responsibility for that child.

Moderator: And that makes sense to you, Michael McCormick?

McCormick: It's somewhat analogous to the determination of parental rights. If your parental rights are terminated, you don't continue to be financially responsible for the child. It's similar when you have a donor situation. They didn't donate with the intent that there would be a financial obligation down the road. They also didn't donate with the idea that they would be a part of the upbringing of the offspring of that particular union. So there shouldn't be the ability to go back after child support.

Moderator: We have one more interesting development in this hypothetical. Guess what? We have found Mr. One-Night-Stand. His name is Michael Smith. Very successful guy, has a wife, has a great family. Michael Smith actually had no idea back then that Diane became pregnant. It was a one-night stand, and they did not see each other for a long time. But then he happened to be at the home of a mutual friend of his and Diane's and saw this picture of these wonderful twins. And they looked just like Michael. And Michael's saying, "Those are my kids." And he has a genuine interest in finding out that he's been a father and to take responsibility for those twins. For the sake of this part of the hypothetical, Michael McCormick, I want you to play Michael Smith. Congratulations.

McCormick: Thank you.

Moderator: And your wife is interested in this as well. You have an interest in getting involved. I want you to talk to Ian Russ because Ian knows a lot about children and family and relationships and you really want to get involved and become the father of children for which you were responsible. Can you talk to Ian? Can you guys have a conversation? Ian, can you help him? What should he expect? What is he going to go through? What should he do and not do? Can you talk to Michael?

Russ: Well, I think that you need to talk to the mother. And to talk about whether or not they think there is a space for you somewhere in this relationship, that they would be willing to bring you in. Yet they are the parents that these children know. And to enter into a custody fight would be awful for these kids. But talk to the parents and to see if there is a place for Uncle Michael, maybe, in these kids' lives.

McCormick: What if they say no? If they just turn me down flat?

Russ: I think you need to think carefully about what the impact is going to be on these children's lives. And to understand that has to be the organizing factor and not your own wishes and feelings.

McCormick: And I could certainly deal with that and would want what's best for my children. You know, I have friends who have adopted children, and those children have gone back to find their birth parents. Children want to know where they came from. And so how do I help them know where they came from, not wanting to disrupt their lives, but wanting to give them the benefit of what we have in our life and to give them the benefit of their heritage. How do I do that?

Russ: Well, I think that you have to understand that you're talking about your wishes here, and they have value, but the children are living in a family that has

set up its own value systems and its attachments. And I would be very wary of interfering in that family's life if they don't want you in it.

McCormick: I appreciate that. If the children do want me in their lives and the parents do not, how do we handle that particular situation? Because I recognize that I want to be in their lives. Their mothers may not want me to be in their lives. But the children may have a desire different from what the mothers' are. How should I deal with that particular situation?

Russ: Well, I don't know how we would find that out without talking to the children about your existence, which would kind of already bypass the mothers' authority. Yes, at an older age they might wonder, "Hey Mommy, where's my daddy?" And I would hope that there are ways to go and investigate this.

Moderator: Michael, let me give a little advice. Don't talk to these child counselors. Get yourself a lawyer. Janet, you are Michael's lawyer. Talk to your client. He's excited. He's found two children that he's responsible for. Talk to him because you're going to court soon.

Sherwood: Well, Michael, you've got a couple of options. I'm not sure we've really clarified whether these kids have two mothers psychologically or these kids have two mothers legally.

Moderator: Yes, psychologically.

Sherwood: One of the first things you want to do if you want to establish a relationship with these children is file a UPA action to establish a parent-child relationship legally between yourself and these children. But you need to understand that if you do that, you're making yourself financially responsible for these children as well as giving yourself certain rights to custody and visitation and so forth. Second, you need to understand that if you file this UPA action, you're probably not going to end up with custody. The most you're probably going to end up with, at least initially, is visitation. And that may be very limited, and it may even be supervised by a therapist or somebody at least in the beginning, until the kids get to know you a little bit and are a little more comfortable with you. Third, you need to understand that this is going to be a very tough fight and you may lose altogether, and, therefore, I want my money up front. Because our Supreme Court, in a case called *In re Zacharia D.*,[8] said if you have unprotected sex, you are on notice that there may be a child as a result and the "I didn't know" excuse does not cut it. And so, if you delay in making an effort to find out whether a child resulted from that relationship and in attempting to establish your parental rights, that delay can be used against you. And it may be used against you in this case, and you may not be successful in getting a court to recognize a parent-child relationship between you and these kids. So, given all of that, what do you want to do?

Moderator: No, no, no. She's got your money, she wants money up front. I want something more positive than that. Aren't you going to win this case, Janet?

Sherwood: No.

Moderator: Why not? You've got the biological father here. You've got him.

Sherwood: I've just told him the reasons why I don't think we're necessarily going to win.

McCormick: Well, I want to ask you a question. I do have the resources to enter into this particular situation. But I'm also very pragmatic, and I want you to tell me, lay it out for me, what is the most likely scenario given this set of facts and circumstances?

Sherwood: Well, first of all, we're going to carefully choose the jurisdiction in which we file. And we're going to look at our family law bench, and we're going to hope we can file this in a jurisdiction where they're kind of conservative and where they're more sort of family-values oriented. Because that's going to increase your chances, I think, of convincing the court that your mere biological relationship is sufficient to establish—

Moderator: Mere biological? You're his lawyer. My goodness. How much are you charging this guy?

Sherwood: I have to tell him the truth. The answer is I cannot guarantee it. But in certain jurisdictions your odds are much better than in others.

Moderator: You've got the gist of it now, Michael. Judge Bresee, this case is now back on your calendar. And, of course, Martha Matthews, you represent Christine. So, Judge, who do you want to hear from? Here comes Michael Smith. Raring, able, loving, wants to be the parent.

Bresee: I think Jim thinks this is pretty simple.

Moderator: All right, Jim, it's simple. You decide it. Do you want to hear from the lawyers, or you don't need to hear anything from the lawyers?

Mize: I don't need to hear from the lawyers. This comes up all the time. Particularly, fathers come into play sometimes 6 months later, 6 years later, 12 years later. We see that all the time. Not this particular fact pattern, but others like this. And my philosophy always has been—I don't care how long it's been, if they're finally coming to the table to accept the responsibilities, then I'm going to let that happen. But Jan's advice was correct. There's a distinction between having the father come in and now being a father, paying the support, getting visitation versus custody. The likelihood of his getting custody or full custody or something is really very, very small.

Moderator: Why?

Mize: Because he hasn't been a part of the child's life during all the bonding periods.

Moderator: Well, not immediately. But you're not ruling out the possibility that he will now share—you can't say that he will never get full custody?

Mize: I won't say that at all, ever. But I will say that at the very beginning it's going to be possibly supervised, have a professional bring them together and then have some time to spend with them on a weekday basis. Then maybe extend to the weekend.

Moderator: Maybe we need to hear from Brittany and Gary Seiser because, Brittany, you know these two children and here comes the father, four years later. What do you think about this? Talk to Judge Mize. You've always been concerned about Ashley and Ben. Father wants to come back in the picture. He's got resources. He loves the children. He wants to take full responsibility. What do you say to the judge? He wants to get in their lives. Walk us through it. Do you have any reaction to his enthusiastic interest?

Pettigrew: Well, my reaction is obviously curiosity. I just want to know more about who you are and what you can offer the children. I don't know that you present an immediate detriment to the children. So I start with what is the most successful way that I can incorporate you into the children's lives. It's going to be disruptive no matter what happens, bringing a new person into something that's been cruising along. But what's the best chance of success for you to be introduced to these children and to have a relationship that honors where they've been but also gives an opportunity for the future?

Moderator: Falope, did we see this coming? He comes back. What would be your input at this point? Is this a good thing for these children? Or is it a bad thing?

Fatunmise: Well, I think it's a great thing for these kids. I always believe the largest support system that a child can have the better off the child is. I do feel that the most challenging aspect would be the relationship between him and the children versus him and those adults. So at some point I would offer some level of family conferencing so that they could actually get together and talk about how they're going to be intervening with these children. The truth is that those children really would want him in their lives because there is a relationship between a biological parent and a child that's never separated. So they will always want that relationship with that biological father.

Moderator: Judge Seiser?

Seiser: What we're creating here is the possibility of three parents that the court will recognize, if they recognize Mr. Casual Inseminator as a parent. We have a mother and another woman—we should not call them both "mothers"; we should say "mother" and "a second parent." Because the case law suggests

that we ought to use that terminology. If we've already done that and have two parents, this is going to be three.

Moderator: Right now we're really talking about Christine and we're talking about Michael.

Seiser: But we know there's another one out there. And the concern I have is that we're setting a precedent. And I realize it's not a published case, but if in our courthouse we have walked in and said, "There can be three parents," we are in deep doo-doo on the next case where we try to say, "No, only two."

Moderator: Dan, it sounds interesting, doesn't it?

Lungren: That's why they should have let the kids go with me, Uncle Dan. We could have solved this, we'd have stable relationships, they could go fight with themselves. They could come see the kids when they wanted to.

Matthews: I think that as the children get older they will have questions about their biological origins. But these kids already have two parents. And I've already filed my UPA petition and it's been granted. And there's also case law saying that when there are two competing presumptions, when one person shows up and says, "I've been holding out for four years," and another person shows up and says, "Oh yeah? But I was the one who got her pregnant," the presumption supported by the most compelling reasons of policy wins.

Bresee: And he isn't even a presumed father.

Matthews: This guy—well, maybe at the discretion of the parents. There are two fit parents. They get to decide what other relationships their children have. And so, as the children grow up, they get to decide when it is appropriate and how it is appropriate for them to meet their biological father.

Moderator: So what do you say to Michael? Is there no future for Michael in terms of ever becoming a parent to the two children that he has a biological connection to? I'm not asking you as Christine's counsel. I'm asking you as a citizen, as a person. Forget about the advocacy. Talk to Michael. Tell him.

Matthews: As a person, I really struggle with this because I actually think that the law may be moving in the long term toward the recognition that there are real children who really do have more than two parents. And it will be as you said, deep doo-doo. It'll be hard for our family court system to accommodate that. But there are stepparents. There are already children in my child's elementary school who have more than two parents. It's just the law doesn't call them that. And so I hope that we evolve to a family court system where somehow we can fairly adjudicate, "Hey, this kid has two mothers." Maybe we need tiers of parenthood.

Moderator: The question is, is there something wrong with three parents?

Matthews: No, but it's scary to think about in terms of how do you run your court system.

Moderator: Falope, here are three people who love this child. And we're trying to define it so that there are only two people.

Fatunmise: And my concern is that's all a legal aspect. What we are concerned about is "the system." We aren't concerned, it appears, enough about what's best for those children.

Moderator: Do you agree with that, Marjorie?

Kelly: What I actually think is that by the time this goes through all these assorted systems, with all the assorted value systems and decisions, the kids will become teenagers and they will choose where they want to live and it will just happen. And the judge won't get to say, and I won't get to say.

Moderator: And then Dan will get them, right? Brittany?

Pettigrew: In my view, it's our challenge to become more inclusive, because we know that children aren't really independent at 18 even though society calls them adults. So, to me, the challenge has to be how we include him without disrupting.

Moderator: Let me just ask you, Hannah-Beth Jackson, is a new law going to create this three-parent possibility?

Jackson: I think we're going to have to—I won't say close the door on it, but make some kinds of policy decisions that say, "If you get in the system, we are going to limit the extent to which we can make those decisions." I just think from the practical aspect there comes a point where we're going to have to put in some kind of guidelines so we don't end up having the biological father come in and then maybe Dan coming in—you know, we're going to have six different people with six different lawyers, six different sets of representatives for the children, and then six different members of the social-work community or DPS or the dependency courts, the juvenile courts—then we don't have enough judges to hear them all. That's the problem. So let's not make it worse.

Seiser: Our courts are doing us a great disservice when they create these multiple kinds of parents or start recognizing more than two parents without waiting for the Legislature to give us the tools and the guidelines to say how the people in the trenches every day should handle it.

Mize: The courts aren't in position to be able to make policy. They're just deciding the cases.

Seiser: No, no, no, you're talking the trial court. Our appellate courts and our California Supreme Court are making policy. And that's problematic. It needs to be dealt with in the Legislature, not in the courts.

Moderator: Judge Gray, this case comes to you. Here is a new and final twist on this amazing story. We're in the State of South Idelia where you are presiding judge. Both Christine and Diane come back together. And Diane is taking care of her drug problem. They seem to be very steady. Things are going well. Christine has a very good job. And all seems to be going well with the children and with the parents. And then tragedy strikes. While they're in South Idelia, living there, Diane dies in a traffic accident.

Michael, you live in South Idelia. You're a native of South Idelia. And so now you're in a state that also doesn't recognize same-sex marriages. You're home. And you've still got Janet Sherwood representing you. And Martha Matthews, you still represent Christine. And now Michael says, "Look. Now it's clear. These are my children, and I'm going for the full enchilada. I want full custody."

So, Martha, you're down in South Idelia practicing family law. Argue in front of Judge Gray whether or not Christine should retain custody now that Diane is gone. What's your argument to Judge Gray?

Matthews: What has Michael been doing all this time?

Moderator: Still trying to get closer to his children. He has been in their lives visiting.

Matthews: Well, I'm not sure what I have to work with in terms of case law.

Moderator: She was a parent in California. Here we are.

Matthews: Under the interstate compact, under full faith and credit, this person has a UPA declaration of parentage from California so she is a parent. Then there is this other biological parent who has not had much relationship with the child. I guess I'd be asking for a custody order to Christine with visitation—I mean, if there is any dispute between Christine and Michael, I would try to get a custody and visitation order nailed down with Christine having primary custody and Michael having visitation.

Moderator: Janet, what would you argue for Michael?

Sherwood: Well, Your Honor, this state does not recognize same-sex marriages. So whatever that order from California is, it's not recognized in this state. She may have been a legal parent in California, but she's certainly not a legal parent here. Michael clearly is the legal father of these children. And he's been trying for years to become the legal father of these children and to get custody and visitation. And Christine has totally cut him out and has refused to let him have any contact with his very own children. And now that Diane is gone, who was the other legal parent, this complete stranger should not be allowed to continue to cut Michael out of these children's lives. I'm asking the court to declare Michael the legal parent of these children and make a custody

order giving him full custody and perhaps giving him discretion as to whether or not Christine should have any visitation, depending on whether it's in the best interest of the children and whether she behaves herself.

Moderator: You must have paid all your legal bills. This is a much better argument. Boy, she's fired up, Michael.

Gray: The law is clearer.

Moderator: Okay, Judge Gray, it's clear—this is a simple case.

Gray: Under the law in my state, I'm prohibited from giving any recognition to an out-of-state same-sex marriage. No recognition at all.

Matthews: Can I have some rebuttal time? An order was not issued yet. This UPA declaration of parentage was not based on any purported same-sex marriage, which doesn't exist in California either. This was based on a finding under a presumption that is common to the Uniform Parentage Act in 33 states, and I don't know if South Idelia is one of them, that someone who holds his or her child out for more than two years as a parent is a parent. It doesn't matter if she's male or female. That presumption applies and, under full faith and credit, that parentage declaration is just as valid here as it was in the state in which it was issued. We would have chaos if states don't recognize each other's parentage orders. Your Honor, please reconsider your tentative decision.

Gray: I believe that I cannot under the current law. Down the road we may be able to do that, but currently I do not believe that I can. And, therefore, I'm ruling in favor of Michael.

Moderator: I'm Ben. Explain this—

Gray: And how old are you now?

Moderator: Eight. You just wanted me in chambers. Ashley's not feeling well. She's devastated to hear that you're going to take us away from our mommy.

Gray: I would not have Ben in chambers at 8 without his lawyer.

Moderator: All right, the lawyer's there.

Gray: And probably with every other lawyer as well because none of the lawyers trust me to get it right. So I have to have them all in chambers.

Moderator: It's all on the record—talk to me.

Gray: Ben, I know that you have been living with Christine—

Moderator: My mom.

Gray: —your mom, for some period of time.

Moderator: My whole life.

Gray: Your whole life. No, no, actually there was a period of time in your life, Ben, when you were not living with Christine.

Moderator: With my grandparents very briefly. My granddad had a stroke; my mom came back and she's been there for us.

Gray: And you know, Ben, that all during this time there have been lots of people who wanted to take care of you.

Moderator: And nobody loved me like my mom and my mom.

Gray: Well, actually Michael loves you. I've had—

Moderator: He said that, but I don't know him. He just came a couple of years ago.

Gray: Let me show you how I conclude that Michael loves you. Michael, when he didn't have to, came into court and said, "Judge, these are my children. And I want to be in their lives." And even though there were a lot of people saying that that shouldn't happen, Michael consistently, over the course of the last four years, has said to this court, "Judge, these are my children, I love them, I want to be involved in their lives."

Moderator: I just lost one of my mothers, and now you're going to take me away from the other one?

Gray: No, I'm not going to take you away from Christine. I'm not going to sever your relationship. I'm going to let you stay with Michael—

Moderator: Ian Russ, what am I hearing as 8-year-old Ben? Tell me what's going on here.

Russ: Disaster. When Michael professes his love to these children, it is not the love for these children; it's the love for the fantasy that he has about these children, because he hasn't had a relationship with them. And that is with all the goodwill and desire that he has to want them in his life. There isn't a history. What Ben is hearing is that the world that he knew doubly is lost. That his mother, Diane, is dead and that he is being kidnapped, taken away from his mother. And that this isn't like after a nasty divorce where, two years or so when things are calm, kids can kind of get back on their feet again. This is a huge loss and an unexplainable loss to an 8-year-old. Death is awful, but it's explainable. I know I miss my mom because my mom is dead. I went to the funeral. I cried. But to be taken away from my mom because of some mumbo-jumbo in a court is bizarre.

Moderator: Well, let me ask the judges very briefly—I hear you talking about the law and what you have to do. But take off the judicial robe just for a minute—does this seem right? Judge Bresee?

Bresee: I don't think the issue of same-sex marriage is what this issue is about. For one thing, they don't even have a same-sex relationship because Diane's dead. It's about parentage, and I buy Martha's arguments in terms of the UPA.

Moderator: So you'd like to figure out a way to keep these children with Christine?

Bresee: Absolutely.

Moderator: Judge Mize?

Mize: Might give it a shot if I could. Is the question difficult? Of course it is. We have this stuff 20 times a day in every custody decision. It happens all the time.

Moderator: Well, we can solve this. Dan Lungren, give us a piece of federal legislation, right? Can't you guys solve this problem? Do we need a federal law to address this issue? Two parents, three parents—what do we need to solve the problem?

Lungren: I don't think so. This does not implicate same-sex marriage. This goes to the question of parentage. And the states are, as we say, laboratories of democracy, and they're trying to work these things out. I think it's kind of presumptuous of the Congress to move in on this right now.

Moderator: Well, finally, the good news this week is that we don't have to worry about any of these problems, Gary Seiser, because on January 1, 2005, California's going to solve the whole thing, right?

Seiser: Not at all. California's not solving the whole thing. And that's unfortunate. We had, in 2004, a bill introduced in Sacramento to adopt the Uniform Parentage Act of 2004, an updated, expanded version. That's where we need to put focus. The Supreme Court is obviously going to hand us down a lot of guidance. But history shows us that individual cases create as many problems as they solve because they're dealing with one set of facts. We need the Legislature to deal with the Uniform Parentage Act and say that it's gender-neutral. And say that a woman can create presumptions this way just as a man. We need to deal with it all there in the Legislature so that the courts can ensure that we have guidelines and we operate by them. Our system right now is in chaos. The domestic partners bill[9]—that's a great bill and it's a step forward. But it doesn't solve what we've been talking about for the last two hours.

Moderator: Brittany, let me ask you finally for some brief comments, just in a sentence: What is a family?

Pettigrew: A family is what the child defines as his or her family.

Moderator: Dan Lungren, what is a family?

Lungren: Well, I think there are different kinds of families. I think we have the nuclear family, and then we are moving out from the nuclear family. I hope we don't define family so broadly that we lose any sense of what we initially talked about and from which we move out.

Moderator: Michael McCormick, what is a family?

McCormick: I'll agree with Mr. Lungren. The expansion of the definition of a family has led to a lot of these particular issues. I just think we have to work to maintain some semblance of respect for the relationship aspect of family and the biological aspects of family. As far as the specific definition, it's getting muddier every day.

Moderator: Falope, what's a family?

Fatunmise: A family is a group of people who are willing to support the best interest of the child.

Moderator: Judge Gray, what is a family?

Gray: A family, to me, is a group of people, some related by blood, others not, who agree on a set of principles that guide their relationships and they work on what's best for that group.

Moderator: And Martha Matthews, what is a family?

Matthews: What I would call a "nuclear family" is a family of adults who are responsible for a child, who have either brought a child into the world or by their intentional conduct caused a child to be there or adopted a child—responsibility plus relationship. By their conduct they have established that primary bond with the child. That's the family.

Moderator: I think that as we move into the 21st century, not just in California but around the nation, we're going to have to confront that issue in a democratic, progressive society and answer it for ourselves in a way that would have meaning in the 21st century.

I hope you will join me in thanking this panel for helping us grapple with some very tough issues this morning.

NOTES

1. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

2. *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).

3. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {___}, *available at* www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf (codified at Cal. Fam. Code §§ 297–297.5 (West 2005)).

4. *Nicholas H.,* 46 P.3d at 932.

5. *Karen C.,* 124 Cal. Rptr. 2d at 677.

6. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004).

7. Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004).

8. *In re* Zacharia D., 862 P.2d 751 (Cal. 1993).

9. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {___}, *available at* www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf (codified at Cal. Fam. Code §§ 297–297.5 (West 2005)).

A Brief Primer on Case Law Addressing Parentage Issues for Nonbiological Parents Before 2005

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Recent case law has interpreted the California Family Code as providing a mechanism for adults who are not biologically related to children to be declared "presumed parents" with full legal rights and responsibilities. How broad the class of such persons may be is the subject of continuing litigation. However, the factors that courts have found most significant to a determination of presumed parenthood are whether a biological parent has come forward, the child's age, and the extent of the bond between the child and the nonrelated adult. This article briefly addresses the primary cases that have interpreted California's laws concerning presumed parents. ■

While adoption continues to be the usual path to "nonbiological" parentage, it is not the only one. California courts have identified a narrow class of persons who may earn full legal parenthood through application of sections 7611 and 7612 of the California Family Code.[1] Those statutes establish a mechanism for determining legal paternity and also may be applied to determine maternity, as will be discussed later in this article.

How broad the category of "statutorily presumed nonbiological parents" may be is the subject of a fast-developing body of case law. The crucial factors for a court's evaluation of a person seeking presumed-parent status under the statutory mechanism appear to be whether a biological parent has been identified, the child's age, and the strength of the bond between the child and the adult seeking a parentage determination.

Section 7611 establishes two presumptions that cannot be rebutted by other evidence once a statutory deadline for the introduction of blood-test evidence has passed:[2] if a man and the child's mother have executed a voluntary declaration of paternity under sections 7570 through 7577 or if the man has established the "conclusive presumption" under section 7540 by having been married to and cohabiting with the child's mother at the time of conception.[3] It also sets forth a series of "rebuttable" presumptions. The first three of these are based on the couple's having married, or attempted to marry, prior to, or after, the child's birth.[4] The section that has been the route to "nonbiological" parentage in most cases is 7611(d), under which a man is "presumed to be the natural father" of a child if he has "received the child into his home and openly held the child out as his natural child."[5]

The leading case thus far on nonbiological parentage is *In re Nicholas H.*[6] In that case, Thomas, the only man claiming paternity, admitted during dependency proceedings that he was not the child's biological father.[7] He had, however, "received and held out" during Nicholas's four years of life: he had been Nicholas's primary source of financial support, Thomas and the mother had told all but a handful of people that he was the biological father, and Nicholas considered Thomas his father.[8] County counsel conceded this much but argued that the presumption was rebutted under section 7612(a),

which provides for rebuttal by clear and convincing evidence "in an appropriate action."[9] The juvenile court granted Thomas both presumed-father status and physical custody while continuing the dependency.[10] The Court of Appeal reversed, holding that because there was clear and convincing evidence that Thomas was not Nicholas's *biological* father, the presumption was rebutted.[11] A unanimous California Supreme Court, however, reversed the Court of Appeal, noting that it had disregarded the phrase "in an appropriate case."[12] Because no other man claimed paternity, and because Nicholas would be left fatherless if the presumption were rebutted, California's high court held that this was not "an appropriate action" for rebuttal.[13] In doing so, it noted three other Court of Appeal decisions that had recognized nonbiological paternity under sections 7611 and 7612.[14] In one, *In re Raphael P.,*[15] as in *Nicholas H.,* the court held that a nonbiological father could be found a presumed father where no other person had come forward to claim paternity.[16] And in the other two cases, *Stephen W. v. Matthew S.*[17] and *In re Kiana A.,*[18] the courts held that where two men claimed paternity, the one with whom the child had the stronger bond would prevail, even if the other claimant was the biological father.[19]

The court in *Nicholas H.* reserved the issue of whether a nonbiological father's claim could prevail over that of an acknowledged biological father.[20] But it resolved that question in favor of a nonbiological father in *In re Jesusa V.*[21] In that case, though the mother was married to Paul, with whom their five oldest children lived, she resided with Jesusa's biological father, Heriberto.[22] But she spent much of Jesusa's life under Paul's protection because Heriberto was physically abusive to her.[23] Dependency proceedings commenced after Heriberto raped the mother.[24] Because Paul was married to the mother when Jesusa was born, he qualified as a presumed father under section 7611(a);[25] Heriberto claimed paternity under section 7611(d) because he had received the child into his home.[26] The juvenile court found that both men qualified as presumed fathers.[27] After proceeding under section 7612(b), which states that, where two or more conflicting claims of paternity are found, the trial court must follow "considerations of policy and logic" in determining which man's claim prevails, the court determined that Paul was the child's presumed father.[28] The Court of Appeal affirmed, and Heriberto petitioned for review.[29] Noting that his criminal and immigration status were likely to preclude Heriberto from acting as Jesusa's father in the foreseeable future and that Paul qualified as a presumed father under the statute, the Supreme Court majority held that the juvenile court had not abused its discretion by declaring Paul the legal father.[30] Two strongly worded dissents focused on Heriberto's due process rights as a biological father and on Jesusa's very young age, which distinguished her from most of the children involved in "nonbiological paternity" cases.[31]

As noted, men are not the only "nonbiological parents" found under sections 7611 and 7612. To the surprise of many observers, at least three Courts of Appeal have applied the reasoning of *Nicholas H.* to cases involving women. In the first, *In re Karen C.,*[32] the putative mother held Karen out as her biological child to age 10 but then told a social worker that the real biological mother had given Karen to her at birth.[33] Based on the putative mother's denial of biological maternity, the juvenile court denied the child's motion to establish the maternity of the woman whom she had always believed was her mother.[34] The Court of Appeal reversed, noting that section 7650 dictated that the presumptions under sections 7611 and 7612 should be applied to determinations of maternity where that was practicable and that *Nicholas H.* therefore applied.[35] It remanded the case to the trial court for a hearing on whether the facts supported the child's motion.[36]

That reasoning was followed in *In re Salvador M.*[37] and in *Kristine Renee H. v. Lisa Ann R.*[38] *Salvador M.* involved only one claimant to maternity, an adult sister who had raised her younger brother as her own child after their mother's death.[39] The court found that the sister qualified as a "presumed mother."[40] *Kristine Renee H.,* along with two other cases, presented the issue of competing maternity claims before the

California Supreme Court. The others are *K.M. v. E.G.*[41] and *Elisa Maria B. v. El Dorado County Superior Court.*[42] In each of these cases, lesbian partners agreed to produce children through in vitro fertilization, with one of the women being the birth mother. Following birth, the women stayed together for significant periods, with the non–birth mother assuming a parental role. The partners dissolved their relationships and sought the court's assistance on issues concerning visitation, custody, and child support (which are more fully addressed in other articles in this Issues Forum). We now know the outcome of those cases recently argued before the California Supreme Court, analyzed in other articles in this section, and it is more clear than ever that we have come a long way in a short time since the early cases on "nonbiological paternity."

NOTES

1. All statutory references are to the California Family Code.

2. An alleged father has the right to have genetic testing performed to determine if he is the biological father of a child. He can use such testing results to set aside or vacate a judgment of paternity within two years of the date he received notice of an action to establish paternity. But after the two-year time period has expired, he no longer has that right, even if testing does show him to be the biological father. Cal. Fam. Code § 7635.5 (West 2005).

3. Cal. Fam. Code §§ 7540, 7570–7577, 7611.

4. Cal. Fam. Code § 7611(a), (b), (c).

5. Cal. Fam. Code § 7611(d).

6. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

7. *Id.* at 935.

8. *Id.*

9. *Id.* at 936; Cal. Fam. Code § 7612(a) (West 2005).

10. *Nicholas H.,* 46 P.3d at 936.

11. *Id.*

12. *Id.*

13. *Id.* at 933–34.

14. *Id.* at 937–40. The court also noted a fourth case, *In re Jerry P.,* 116 Cal. Rptr. 2d 123 (2002), where a man held himself out as the child's father both before and after the birth but was prevented from receiving the child into his home as required by section 7611 of the California Family Code because the child's mother stopped him from doing so. The Court of Appeal in that case held that a nonbiological father may have a sufficient liberty interest in his relationship with the child to attain standing to challenge the statutory scheme that precludes a man from attaining presumed-father status when he has been prevented from receiving the child into his home through no fault of his own. *Nicholas H.,* 46 P.3d at 939; *see also Jerry P.,* 116 Cal. Rptr. 2d at 140–41.

15. *In re* Raphael P. III, 118 Cal. Rptr. 2d 610 (Cal. Ct. App. 2002).

16. *Nicholas H.,* 46 P.3d at 941.

17. Stephen W. v. Matthew S., 39 Cal. Rptr. 2d 535 (Cal. Ct. App. 1995).

18. *In re* Kiana A., 113 Cal. Rptr. 2d 669 (Cal. Ct. App. 2001).

19. *Stephen W.,* 39 Cal. Rptr. 2d at 539; *Kiana A.,* 113 Cal. Rptr. 2d at 679–80.

20. *Nicholas H.,* 46 P.3d at 941.

21. *In re* Jesusa V., 85 P.3d 2 (Cal. 2004).

22. *Id.* at 7.

23. *Id.*

24. *Id.* at 6.

25. *Id.*

26. *Id.* at 7.

27. *Id.*

28. *Id.* at 7–8.

29. *Id.* at 8.

30. *Id.* at 13–14.

31. *Id.* at 27 (Kennard, J., dissenting), 32 (Chin, J., dissenting).

32. *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).

33. *Id.* at 678.

34. *Id.*

35. *Id.* at 681.

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36. *Id.*

37. *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003).

38. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004).

39. *Salvatore M.,* 4 Cal. Rptr. 3d at 706.

40. *Id.* at 709.

41. K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 2004).

42. Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004).

Parentage by Intention for Same-Sex Partners

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The California Supreme Court accepted for review three cases that gave it the opportunity to affirm or substantially revise the tests for determining parenthood. Although all three cases arose from the breakup of same-sex couples, they presented issues that could well apply to a far wider variety of parentage questions. This article explores different modes of determining parentage and advances the premise that the court's previously enunciated test of determining parenthood in assisted reproductive technology cases—the parties' intention at conception—is the most preferable. The Supreme Court decided the three cases after this article was written but prior to publication. The decisions are discussed in the afterword to this article. ■

California courts historically have made it difficult, if not impossible, for two persons of the same sex to be declared parents of a child. They have ruled that a lesbian partner who was not a biological parent and had not adopted is not an "interested person" who could bring an action under the Uniform Parentage Act (UPA).[1] They have ruled that a person who is not a biological parent of a child has no standing to assert parentage under the UPA.[2] Moreover, they have rejected attempts to create parentage by estoppel[3] and, until recently, have made it difficult to obtain second-parent adoptions. They have refused to extend the juvenile court's doctrine of de facto parentage to same-sex parentage cases.[4] This historical context is rapidly changing with a 2003 California Supreme Court decision upholding second-parent adoptions for same-sex couples[5] and with the enactment of the California Domestic Partner Rights and Responsibilities Act (DPA), which became effective January l, 2005.[6] While these two developments are major protections for same-sex families now and in the future, they do not provide a mechanism for determining the parents of children born to couples who were not registered as domestic partners or did not adopt. This article is premised on the notion that it should be easy for same-sex couples to determine parentage and that their intentions as articulated at the outset should decide the question.

On September l, 2004, the California Supreme Court accepted for review three parentage cases that are likely to reduce the existing hurdles to establishing same-sex parentage.[7] Some of the parties to these cases urge the Supreme Court to equally apply the presumptions of fatherhood contained in the UPA to women seeking co-parenthood. These parties also urge the court to abandon its prior finding that a child may have only one mother under the UPA.[8] Some urge that the Supreme Court resolve the question by use of the child's best interest or the child's constitutional right to the care and companionship of someone he or she has come to regard as a parent. Some assert that every child should have two parents. Some urge that the parentage question be resolved by use of the court's previously enunciated test, the intention of the parties at the time of conception. In the view of the author, who represents one of the parties in the pending cases, the law should be interpreted to make it easier for same-sex couples to establish co-parentage, if that is their intention; however, co-parentage should not be involuntarily imposed upon a natural mother or father if that was not the parties' mutual

intention from the outset. Whatever standards the court adopts should be capable of clear and consistent application, establish parentage as early as possible, and not permit parentage to change over time as relationships between parents change. Such standards should likewise create the same rights and obligations for same-sex couples as for opposite-sex couples. The author believes the intention test originally articulated by the California Supreme Court in *Johnson v. Calvert* in 1993[9] best accomplishes these objectives.

THE *JOHNSON v. CALVERT* DECISION

In *Johnson v. Calvert,* the California Supreme Court articulated a new test for parentage: "[I]ntentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[10] The case arose from an opposite-sex surrogacy contract that forced the court to make a choice between two competing mothers. Advances in medical technology have enabled people to become parents under circumstances that previously could not be imagined, and the state high court's approach to these developments was to fashion a test that adhered both to the parties' intentions and to the dictates of the UPA. This case provides the starting point for the analysis that follows.

In *Johnson,* a wife who was infertile and her husband entered into a contract with a second woman, who agreed to act as a surrogate for the couple, bear them a child, and relinquish any claims to parentage.[11] The contract specified that the husband and wife would be recognized as the child's parents.[12] After having an embryo from the husband's sperm and the wife's egg implanted in her uterus, the surrogate carried the child to term.[13] Because the relationship between the couple and the surrogate had deteriorated during the pregnancy, the surrogate had second thoughts and filed a parentage action, claiming that she was the mother because she had borne the child.[14] The court stated that the UPA applied, but that, since the act recognized only one mother, the court had to decide between the gestational mother and the biological mother.[15] The court looked to the parties' intentions as expressed in the surrogacy contract to resolve the question in favor of the wife.[16]

In *Johnson* the court made several other rulings. It stated that the presumptions of parentage under the UPA do not come into play where the parties' intentions are known.[17] Because a presumption is intended to aid in the determination of a fact when the circumstances are not known, the presumption is unneeded when the circumstances are known.[18] The court also stated that intentions rule over biology; an ovum donor is not a parent without the requisite intent, any more than a woman who bears the child from an ovum of another is a parent without the requisite intent.[19] In addition, the court explicitly rejected adoption of a best-interest test to determine parentage: "[S]uch an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody."[20]

THREE CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

All three cases pending before the California Supreme Court involve disputes between female same-sex former partners; no men are seeking parentage rulings in these cases. The court once again is called upon to interpret the UPA in situations not originally contemplated by the framers of the act. The questions raised include whether intention controls over the UPA's presumptions, whether a child can have two mothers under the UPA when there are no competing fathers, whether the presumptions under the UPA that refer to men should be construed to include women, and whether the cases should be decided from the standpoint of the child's best interest or constitutional rights instead of the intentions or rights of the adults involved.

KRISTINE RENEE H. v. LISA ANN R.

In this case[21] a same-sex couple decided to have and rear a child together.[22] Kristine was inseminated

informally with a friend's sperm and became pregnant.[23] In the eighth month of her pregnancy, she and Lisa decided to seek court approval of their decision to become parents together.[24] Both partners signed a stipulation that they intended to be parents of the child about to be born and that they both undertook the rights and responsibilities of parenthood.[25] Kristine filed a parentage action in court and presented the stipulation to a family court judge, who entered a judgment that both women were parents of the child.[26] The child's surname was a combination of the surnames of Kristine and Lisa, and Lisa was named as father on the child's birth certificate.[27] Lisa listed the child as a dependent on her health insurance, and both Kristine and Lisa provided financial support for the child.[28] Both women participated as parents for nearly two years.[29]

When the women broke up, Kristine challenged the judgment as exceeding the power of the court.[30] But the trial court upheld the earlier judgment, finding both women to be parents.[31] The Court of Appeal reversed, finding that the stipulated judgment exceeded the court's power; however, it stated that on retrial the court could use both the presumption arising from taking the child into one's household and holding the child out as one's own and the intention test as criteria for determining parentage.[32] The Court of Appeal held that the presumption should be applied equally to a woman as to a man.[33]

K.M. v. E.G.

E.G. had been trying to have a child as a single parent before meeting K.M.[34] After K.M. and E.G. started to live together, E.G. continued trying for more than a year to become pregnant by artificial insemination.[35] She then tried to become pregnant by in vitro fertilization using her own eggs and a stranger's sperm.[36] When she found she was no longer producing viable eggs, she accepted an ovum donation from K.M. on condition that E.G. would be the sole parent.[37] E.G. told K.M. that their relationship was too new and that she would consider an adoption only after the child was 5 years old if the parties were then still together.[38] Before they began the ovum donation procedure, the parties received counseling about the procedure.[39] E.G. agreed to accept all rights and responsibilities of parenthood by signing an ovum-recipient consent form.[40] K.M. signed the ovum-donor consent form at the hospital, a month before the egg retrieval procedure.[41]

K.M.'s eggs were fertilized with sperm from an anonymous donor; then four of the resulting embryos were implanted in E.G.'s uterus.[42] Twins were born and were given E.G.'s surname.[43] Only E.G. was listed on the birth and baptismal certificates.[44] The parties promised each other to tell no one of the twins' genetic connection to K.M.[45] E.G. and K.M. lived together and shared caretaking duties for the children, although only E.G. undertook financial responsibility for them.[46] Initially, only E.G. maintained life and medical insurance for the twins.[47] After two years, the parties began to argue about E.G.'s unwillingness to allow K.M. to adopt the twins.[48] When the children were 5 years old, K.M. brought a parentage action seeking to be determined a parent over E.G.'s continuing objection.[49] The trial court found by clear and convincing evidence that K.M. had "knowingly, voluntarily and intelligently" relinquished all claims to parenthood when she signed the consent form for ovum donation.[50] Both the trial court and Court of Appeal ruled against K.M. on the ground that the parties' intentions were that E.G. would parent the children and that K.M. had knowingly, intelligently, and voluntarily waived all claims to parentage when she made the ovum donation.[51] And both courts held that the presumption of parenthood that applies when a man holds a child out as his own, as extended to the mother-and-child relationship by California Family Code section 7650,[52] was inapplicable, because the parties' actual intentions were already known and because the presumption did not arise where K.M. did not hold herself out as the parent.[53]

ELISA MARIA B. v. SUPERIOR COURT

In *Elisa Maria B.*,[54] Elisa and Emily each decided to give birth to a child, using the same anonymous sperm

donor so that their children would be related.[55] Elisa gave birth to a son, and Emily gave birth to twins a year later.[56] All three children were given a hyphenated surname combining Emily's and Elisa's surnames.[57] The two women breastfed their three children interchangeably.[58] Elisa considered both Emily and herself mothers of the three children.[59] Emily did not return to work after the twins were born.[60] Elisa provided financial support for the entire family, listed all three children as dependents on her medical insurance, and claimed all three as her dependents for income tax purposes.[61] The parties separated a year after the birth of the twins and two years after the birth of the first child.[62] For a time Elisa continued to provide financial support for the twins, but when she stopped paying,[63] Emily went on public assistance and the county sought child support from Elisa.[64] The trial court granted child support, but the Court of Appeal reversed on the ground that, because Elisa was not the children's father under the UPA and did not give birth to the twins or adopt them, she could not be their parent under the UPA.[65]

CRITERIA FOR DETERMINING PARENTAGE

If there were no law on how to determine parentage, the court could choose from a number of criteria, such as biology, the relationship between the adults, the relationship between the child and the adults, or intention. Biology is certainly among the earliest of such organizing principles and still has a role to play in existing law:

- Under the UPA, motherhood is established by giving birth.[66]
- There is a blood-test exception to the conclusive presumption of parentage for a child born to a married couple.[67]
- A sperm donor who donates informally, without using a physician, is the natural father under the UPA.[68]

Biology, however, does not adequately resolve the question of parentage in assisted reproductive technology cases. It would not be logical for a sperm or egg donor who does not intend to become a parent to become one solely because of his or her genetic connection. For example, in *Kristine Renee H. v. Lisa Ann R.,*[69] application of a biological test would render the informal sperm donor the child's father and Lisa a legal stranger to the child—a result entirely contrary to the parties' intentions but not without precedent in prior case law. Nor does biology resolve the question of who is the mother in surrogacy cases. And use of biology alone would preclude at least one member of most same-sex couples from being determined a parent.

RELATIONSHIP BETWEEN ADULTS AS CRITERION

Likewise, the relationship between adults is used in some circumstances based on (1) the conclusive presumption of parentage for a child born during marriage;[70] (2) the presumption of parentage arising from attempting to marry the mother;[71] and (3) the rights of registered domestic partners with respect to a child of either of them.[72] Formalizing the relationship, by marriage or registration of a domestic partnership, is a logical, consistent way of assigning parentage. The formalizing of the relationship is a reliable measurement of the couple's conscious commitment to each other and to the responsibilities of parenting together.

But using the parties' relationship to determine parentage in the absence of such formalization is likely to lead to confusion and inconsistent results. In such an instance how does a court gauge the requisite level of commitment in the relationship in order to assign parentage to both members of the couple? Suppose a woman (it does not matter in this analysis whether she is homosexual or heterosexual) is impregnated by an anonymous sperm donor and then lives with an intimate partner for the first three years of the child's life. Assume further that the partner then leaves and the mother begins a relationship with another person with whom she registers as domestic partners or marries. That partner helps co-parent the child for the next five years

of the child's life. Is either partner a second parent to the child? If so, which of them, and why? What if the mother seeks to hold the first partner as parent over the objection of that partner? Is that fair from the perspective of any of the participants, including the child? The relationship between the parties does not resolve the question of parentage in any of the three pending cases, inasmuch as none of the couples had either married or registered as domestic partners with the Secretary of State.[73]

RELATIONSHIP BETWEEN CHILD AND ADULTS: UPA PRESUMPTION AND BEST INTEREST

Examining the relationship between the child and the adults in his or her life to determine "parentage" options is primarily used in juvenile dependency cases, where one or both of the child's natural parents have abandoned or abused the child and the court must choose a parent figure among the best available choices. In this context, the California Supreme Court ruled that a man who was not biologically related to a child but who had served in a parental role in the child's life could be established as the child's parent where the child otherwise would be orphaned.[74] In a similar context, the Court of Appeal ruled that the UPA presumption arising from a father's taking a child into his household and holding out the child as his own applied equally to a woman.[75] The relationship between the child and the adults is the underpinning for the statutory presumption of parentage arising from a father's taking a child into his household and holding the child out as his own.[76] It is also the underpinning for use of the best-interest test.

The UPA presumption at stake in these cases is inherently ambiguous and, for that reason alone, not helpful in determining parentage. The first clause of the presumption, a man "receives the child into his home,"[77] connotes an archaic model of a man who has primacy in the household and takes in a child he has fathered. The clause is more difficult to apply when a couple of either sex or either sexual orientation lives together and one of them has a child. Because the other member of the couple already lives in the household, it cannot be said that the other "receives the child into his [or her] home" because both members of the household already live there.[78] The fact of the child's entering the household is thus equivocal: it does not necessarily indicate parentage. Given that a presumption is intended to substitute for evidence where it would assist in resolving a factual question, this first clause of the UPA presumption is virtually useless without the second clause, "and openly holds out the child as his [or her] natural child."[79] Amici in the three pending cases urge that the presumption be applied to women as well as to men, just as it was by the Court of Appeal in *In re Karen C.*[80] If the presumption is to be used, it should be applied equally to women and men so that lesbians are not excluded from a means of determining parentage that is available to others. It logically follows that other related statutes should be applied equally to women and men. For example, if a man donates sperm to someone other than his wife through the services of a physician, he is a legal stranger to a child conceived from that sperm.[81] It follows that an ovum donor should likewise be treated as a legal stranger under the law. Similarly, a man and a woman can obtain a judgment establishing parentage based on their filing a written stipulation;[82] so, too, should a same-sex couple like Kristine Renee H. and Lisa Ann R. have the same right.

Use of the presumption or best-interest test would work well in the pending case of Elisa B. and Emily B.[83] The two women gave birth to children born of the same anonymous sperm donor, rendering their children biological half-siblings.[84] The two women held themselves out as the parents of each other's children and each contributed to the children's support while they were living together.[85] One can assume that their children were attached to each other and to both women. The children and one of the women were dependent on the financial support of the other woman, without which they became dependent on the state for support.[86] It is not difficult to determine that both women are parents by using either the presumption or the best-interest test because the facts so

clearly support such a finding. But with Kristine H. and Lisa R.,[87] the presumption arising from taking a child into one's household and holding the child out as one's own is less clear than the parties' own explicit enunciation of their intention in the stipulated judgment of joint parentage. Under the reasoning of *Johnson v. Calvert,*[88] the presumption is unnecessary because the facts are known.

Use of either of these tests with K.M. and E.G.[89] is far more problematic. The Court of Appeal found the presumption factually inapplicable because the children were born into a household in which both parties resided; there was no "receiving" of the child "as one's own" but, rather, a "welcoming" of E.G.'s child.[90] Further, K.M. never held herself out as the children's biological mother, consistent with the parties' explicit agreement that her genetic connection would be kept confidential.[91] And because both women, as in *Johnson,* qualified to be the natural mother—one giving birth, the other genetically related—there was no need to apply an evidentiary presumption because, in such a case, "the ultimate determination of legal parentage is made by examining the parties' intentions."[92] Here K.M. had relinquished all claims to parentage when she agreed to become an ovum donor and signed an agreement waiving her rights, while E.G. "intended to bring about the birth of the child to raise as her own."[93] However, both the trial court and Court of Appeal struggled with the question of the children's best interest because they found that the best interest of the children conflicted with the rights of E.G. and the parties' clearly expressed intentions.[94] Because *Johnson* made clear that intention, and not best interest, was the test, the courts ruled in favor of E.G. as the sole parent.[95]

DISADVANTAGES OF BEST-INTEREST TEST

A more generalized use of the best-interest test faces several challenges and obstacles. In *K.M. v. E.G.,* both the trial and appellate courts noted the unfairness of invoking best interest either to force co-parentage on a person who had undertaken to become a sole parent or to force parentage upon an unwilling cohabitant who had helped care for a child.[96]

One obstacle is the collision of a parent's fundamental right to make decisions about his or her own child[97] with a child's fundamental right to the care and companionship of a parent. The United States Supreme Court, signaling its deference for those parental rights, has ruled that a court may not intrude upon a parent's constitutional rights by imposing grandparent visitation on the parent over his or her objection.[98] In each of the three cases discussed in this article, there is one person who is irrefutably a parent of the child and who certainly holds these fundamental constitutional rights. Will the California Supreme Court rule that a child's constitutional right to the care and company of a parentlike figure overrides the acknowledged parent's constitutional rights? If so, the case could be appealed to the U.S. Supreme Court for resolution. However, there is a doctrine that courts will not reach constitutional questions when a decision can be made on some other legal basis,[99] and in each of the three cases the appellate courts have found other bases on which to make the decision. Therefore, it is unlikely that the California Supreme Court will invoke such conflicting constitutional rights when a decision can otherwise be made under existing law.

Another challenge to the application of either of these tests is the question of how many parents a child can have. It may be that more than one person takes the child into his or her household and holds out the child as his or her own, either simultaneously or sequentially. Will the courts require a child to have two parents if any way can be found to do so? How should the courts determine parentage if two or more persons have served sequentially in a caretaking role for the child? Some argue that the courts should do so on the ground that a child's interest is served by having two parents. Why not three or four? An argument can certainly be made that a child is better served by having more than one or two caretakers. If so, how should the court resolve the question of who is and is not a parent? These

issues will be invoked sooner rather than later if the court adopts a best-interest test.

The above questions expose the infirmities of using best interest as the test for parentage. Eschewed by the California Supreme Court as unwonted governmental interference in matters of fundamental privacy,[100] the best-interest test imposes a stranger's judgment upon that of a parent. While the flexibility and malleability of the best-interest test may well suit custody decisions, which can change over time for good reasons, these very features make it a poor test for determining parentage, which should be determined once and for all, as early as possible in a child's life. The best-interest test, over the past hundred years, has resulted in shifting and inconsistent decisions based (at different times and places and depending on the particular judge's worldview) on notions of reverence for motherhood; presumptions of paternal custody for boys; parental attachment theory; presumptions of sole or joint custody; the "conventional, middle class, middlewest background of the parents";[101] and presumptions against lesbian parents.[102] The best-interest test poses inherently vague criteria for the evaluator or the judge deciding the matter: there are gradations and shifts in attachment and connectedness, in weighing a child's temporary pain after a separation versus losing a caretaker and permanent emotional damage.[103]

In light of this history, it is curious that amici for lesbian and gay organizations in the three pending cases urge the court to adopt a best-interest test. To this author such a test appears to render the parties vulnerable to some of the same judicial biases that have precluded same-sex couples from becoming parents in the past. The positions of many of the amici are that children should have two parents, a bias that may or may not best serve the children and one that reflects cultural values that shift.

Intention is the underlying rationale for many modes of becoming a parent. It is the foundation for all adoption statutes, including adoption of a domestic partner's child and second-parent adoption.[104] In the *Sharon S.* second-parent adoption case, the Supreme Court observed: "The proceeding [adoption] is essentially one of contract between the parties whose consent is required."[105] Intention underlies the statutory provision that a man can become a father based upon a declaration of parentage upon birth.[106] Intention is the foundation for parentage of children born by means of artificial insemination under a physician's supervision.[107] Likewise, intention underlies the California Court of Appeal's 2000 decision upholding a contract between an unmarried man and woman who agreed that he would be the father of a child conceived with the sperm of another donor.[108] Even the presumption arising from receiving a child into one's home and holding the child out as one's natural child is essentially premised on intention.[109]

Janet Dolgin, an expert in the legal aspects of assisted reproductive technology, notes that "a central component of the traditional ideology of family—that family relationships stem from and reflect biogenetic unity—has been widely supplanted by understandings of family grounded in notions of choice."[110] She further comments that the law today recognizes "[a] set of contrasting assumptions that ground parentage in conscious, deliberate decisions and agreements, i.e., in intentions and in contracts," appearing alongside "traditional assumptions about parentage that ground the parent-child relationship firmly on biological truths."[111]

Intention has been employed by several courts in determining parentage in assisted reproductive technology cases. For example, biology was explicitly rejected in favor of intent in a case where a child was born from a surrogacy contract in which an embryo formed with sperm and ova from unrelated parties was implanted in a surrogate, who gave birth by contract to provide parentage to a married couple.[112] The court in that case declined to limit *Johnson* to its facts, citing the Supreme Court's "broader purpose" to emphasize the "intelligence and utility of a rule that looks to intentions."[113]

At least two decisions in New York have used the intention test to determine parentage in assisted reproductive technology cases. One appellate court used the egg donation analysis from *Johnson* to find

that a gestational mother, who, with the consent of her husband, had been implanted with embryos formed from his sperm and anonymously donated eggs, was the intended mother of the twins who were born.[114] The husband's arguments that the children should be declared illegitimate or that he should be declared the sole parent were defeated by application of his wife's intention to be a parent at the time of the in vitro fertilization.[115] Similarly, another New York case enforced an in vitro fertilization consent agreement providing that frozen embryos would be donated to the in vitro fertilization program for research if the parties were unable to make a decision about them.[116] Denying the request of a wife in a marital dissolution proceeding for custody of the frozen embryos so that she could bear another child, the New York high court ruled that the parties had clearly expressed their intent in the in vitro fertilization consent forms.[117] It reasoned:

> Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them. Indeed, parties should be encouraged in advance, before embarking on IVF [in vitro fertilization] and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of the IVF programs.[118]

Intention underlies the California Supreme Court's recent decision in an equitable-adoption case that "[t]he existence of a mutually affectionate relationship, without any direct expression by the decedent of an intent to adopt the child or to have him or her treated as a legally adopted child, sheds little light on the decedent's likely intent regarding distribution of property."[119] The court observed that a rule looking to the parties' relationship rather than to "particular expressions of intent to adopt, would necessarily be a vague and subjective one, inconsistently applied, in an area of law where 'consistent, bright-line rules' are greatly needed. Such a broad scope for equitable adoption would leave open to competing claims the estate of *any* foster parent or stepparent who treats a foster child or stepchild lovingly and on an equal basis with his or her natural or legally adopted children."[120] The court's rationale is not only applicable to intestate succession but also is arguably even more important in the court's determination of parentage for a minor when custody and affiliation are at stake.

A child's parentage should be determined based on facts that existed at the time of conception and established as soon as possible after the child is born, so that the child may be assured of care and support and so that the parents may have "some measure of confidence in the legal ramifications of their procreative actions."[121] California's statutory system provides a variety of means of announcing or determining parental intent, such as by birth certificates, declarations of parentage, and adoption decrees. Likewise, the legal system provides a variety of deadlines intended to secure parentage at the earliest time, such as the deadline on blood tests to determine paternity[122] and the requirement that a presumed father take prompt steps to establish his parentage or lose it.[123]

It stands to reason that a person who intends to become a parent will more willingly and consistently undertake the very real burdens of parenthood than one who becomes a parent involuntarily. One who has not undertaken any of the legal burdens of parenthood from the outset can easily walk away from responsibilities of caretaking and/or support if those responsibilities no longer suit that person's objectives.

By contrast, it would be destabilizing for both child and parent if parentage could be redetermined

over time, based on changes in domestic partners' relationships to each other or to the children, changes in domestic partners' intentions, or parents' changing partners. Each of the three pending cases arose because one partner changed her position on parentage from that which she held at the time the child was born. If best interest were to govern parentage decisions, there would be absolutely no certainty that a child would have the same parents over his or her lifetime. Former partners could change their minds about parentage without adverse consequences—contrary to existing legal doctrines that prohibit a person from changing his or her position when others have relied on it to their detriment. Parentage actions could be initiated by subsequent partners throughout a child's minority. Litigation would proliferate and settlements would not be fostered by use of the best-interest test. Litigation itself is a profoundly destabilizing element for the children as well as the adults involved. By contrast, giving effect to expressed intention in the three pending cases will help prevent future litigation over parentage. The absence, until recently, of clear legal standards for determining parentage in same-sex couples has provoked litigation that could have been avoided had a clear standard been in place.

The intention test avoids litigation by defeating a change of course based on one party's change of heart. Where intentions are set out in advance and enforced by restrictions on later claims based on a change of mind or heart, stability and constancy are promoted. The Supreme Court in *Johnson* and the Court of Appeal in *K.M. v. E.G.* observed that application of the best-interest test would foster litigation and promote instability in the children's lives.[124]

In contrast to the best-interest test, the intention test is objective, gender-neutral, and consistent. The intention test rests on judicial assessment of the parties' expressed intent, rather than on judicial assessment of what would most benefit the children involved. The best-interest test has historically resulted in shifting and inconsistent decisions based on shifting notions of parental roles, stereotypes, and biases.

The intention test allows same-sex parents, such as those involved in the three pending cases, to articulate parentage just as opposite-sex parents have been permitted to do. Indeed, the intention test harmonizes the three pending cases.

In *Elisa Maria B. v. Superior Court,* the parties evidenced their intent to co-parent by their expressions to themselves and to the world that they were both parents, from their children's birth certificates, and from their course of conduct after the children were born. In *Kristine Renee H. v. Lisa Ann R.,* the parties made their intent clear by obtaining a judgment based on their stipulation that they would both parent the child whom Kristine Renee H. was then carrying. In *K.M. v. E.G.,* it is likewise clear, both from the ovum-donor consent forms and from the parties' prior oral agreements, that the parties intended that E.G. be the sole parent. Application of the intention test provides consistency among these three cases and the assisted reproductive technology cases that have preceded them.

In contrast to biology, intention as the criterion leads to rational outcomes in reproductive technology cases. Prospective parents may choose to use the genetic material of someone to whom they are already related, such as a parent or sibling. If, for example, E.G. had used the ova from a sister instead of K.M.'s ova, the children would still be E.G.'s children under the intention test. But if this court were to use biology as the test, would the ovum donor be the children's aunt or their mother? The question becomes the more perplexing for a woman who uses, for example, a sperm donation from her father or an ovum donation from her mother. Biology does not provide a rational solution to the parentage issue in such cases, whereas intention does.

The decision whether to become a parent is an inherently private matter, long protected by both the U.S. and California Constitutions. A state's statute proscribing the distribution of contraceptives to prevent pregnancy, for example, gave rise to a resounding pronouncement in favor of individual autonomy: "If the right of privacy means anything, it is the right of the *individual,* married or single, to

be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[125] This right of privacy extends to the decision, subject to certain limitations, to end an unwanted pregnancy.[126] The right of privacy regarding procreative decision making was explicitly recognized by the California Supreme Court in *Johnson v. Calvert.*[127]

Such privacy rights are protected and served by a test that allows individuals to decide at the outset whether to become a sole parent or to take on a second parent. The intention test enables domestic partners to decide for themselves whether or not to become joint parents through adoption, through registration as domestic partners prior to birth, through a stipulated judgment of parentage, or by other clear expressions of their intent. The intention test enables a person to become a sole parent by adoption or by using a sperm donor, an ovum donor, or a combination of both, as did E.G. It likewise enables persons to become joint parents through the use of the same technology; the outcome is dictated by choice and clear expression of intention.

The autonomy afforded a person or a couple under the intention test would succumb to substantial uncertainty if the best-interest test, statutory presumptions, or biology were to be adopted as modes for determining parentage.

CONCLUSION

Contrary to the perceptions of some, the intention test is not unfriendly to same-sex partners. To the contrary, it fosters privacy, choice, and autonomy for same-sex partners. "To be or not to be"[128] a parent is a very real choice for same-sex couples, who principally rely on assisted reproductive technology to become parents. Whatever choice they elect at the outset should be binding upon them, whether only one of them is the parent or they are co-parents. Adoption of the best-interest test would impose unwilling parenthood on some persons who intended to be helpful partners but not parents or unwilling co-parenthood on some persons who intended to be sole parents. The intention test promotes stability and certainty for the children of same-sex couples through the early and final determination of parentage. And the intention test provides equal rights and responsibilities for same-sex and opposite-sex couples and ensures consistent application of the law.

AFTERWORD

The California Supreme Court issued decisions in the three cases on August 22, 2005, after this article was written but prior to its publication. In *Kristine H. v. Lisa R.,* the court ruled unanimously that Kristine was barred by the rule of judicial estoppel from denying the parentage of her partner because she had filed the petition for a declaration of parentage jointly with Lisa and had stipulated to the issuance of a judgment that both she and Lisa were "the joint intended legal parents" of her unborn child.[129] The court declined to rule on the validity of the stipulated judgment itself, thus leaving open that question.[130] This ruling thus provides little guidance for other couples who may have used or may want to use this procedure for establishing parentage. While the ruling may deter some parties from challenging the validity of such judgments in the future, it may also render it less likely that trial courts will render such judgments or that other states will enforce them when the parties relocate.

In *Elisa B. v. Superior Court,* the court ruled that a woman who agreed to rear children with her lesbian partner, supported her partner's use of an anonymous sperm donor, and received the children born of that procedure into her home and held them out as her own is the children's parent under the UPA and has an obligation to support those children.[131] The court found that the statutory presumption of paternity from California Family Code section 7611(d) applies to a woman who, though not biologically related to a child, receives that child into her home and holds out the child as her own.[132] It further held that both parents of a child can be women, distinguishing this case from the facts in the court's prior decision in *Johnson v. Calvert.*[133] And the decision cites

with approval the legislative preference for a child to have two parents for financial support.[134] The court disapproved the earlier Court of Appeal rulings in *Curiale v. Reagan,*[135] *Nancy S. v. Michele G.,*[136] and *West v. Superior Court*[137] (all of which had disallowed parentage claims by a birth parent's lesbian partner) to the extent they were inconsistent with its decision.[138] Of the three decisions, this one is likely to have the greatest applicability to other couples in the future, because it applies the UPA presumption for couples who did not adopt or otherwise formalize their relationship. There is no reason it should not apply as well to gay men as co-parents.

In a decision with two forceful dissents, the court decided in *K.M. v. E.G.* that when a woman provides her ova to her lesbian partner in order to produce children who will be raised in their joint home, both the ovum donor and the woman who bears the children are the children's parents.[139] Because these facts may be relatively rare, the case may or may not have limited applicability. But it is of great concern nevertheless, because the holding authorizes disparate treatment of ovum and sperm donors. The court specifically held that Family Code section 7613(b), which provides that a man is not a father when he provides semen to a physician to inseminate a woman who is not his wife, does not apply to a woman who provides her ova to a physician to impregnate a woman under the circumstances of this case.[140] The decision disregarded the parties' express prebirth intentions and the express written waiver of parentage by the ovum donor.[141] The majority stated that determining the parties' intent was unnecessary in a case where the parties' claims of parentage were not mutually exclusive, as in *Johnson v. Calvert;*[142] because one woman bore the children and the other provided the ova, they were both parents under the UPA, and there was no tie to break as there would have been if a third party had also asserted parentage.[143] And it also stated that "it would be unwise to expand the application of the intent test . . . beyond the circumstances presented in *Johnson.*"[144] Justice Werdegar's dissent decries the majority's ruling and abandonment of the intent test, stating that the majority's new rule "inappropriately confers rights and imposes disabilities on persons because of their sexual orientation."[145] She is concerned that the majority's rule "may well violate equal protection."[146]

In all three cases, the Supreme Court ruled that both members of the couple were the parents of the children. Although by different reasoning in each case, the court did in fact render it easier for same-sex parents to be recognized as joint parents.

NOTES

1. West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997); Cal. Fam. Code §§ 7600–7730 (West 2005).

2. Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

3. Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); *West,* 69 Cal. Rptr. 2d at 160.

4. *Nancy S.,* 279 Cal. Rptr. at 216–17.

5. Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

6. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {___}, *available at* www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-250/ab_205_bill_20030922_chaptered.pdf (codified at Cal. Fam. Code §§ 297–297.5 (West 2005)).

7. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004); Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004), *review granted sub nom.* Elisa B. v. Superior Court, 97 P.3d 72 (Cal. 2004); K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

8. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (finding that California law recognizes only one mother for any child).

9. *Id.*

10. *Id.* at 783 (quoting Marjorie McGuire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,* 1990 Wis. L. Rev. 297, 323 (1990)).

11. *Id.* at 778.

12. *Id.*

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13. *Id.*

14. *Id.*

15 *Id.* at 779, 781.

16. *Id.* at 782.

17. *Id.* at 781.

18. *Id.* The presumption urged by some of the parties in the current cases is that a man who accepts a child into his household and holds the child out to the world as his own is presumed to be the father of the child. Cal. Fam. Code § 7611(d) (West 2005). That presumption has been extended to the mother and child relationship. *Id.* § 7650.

19. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

20. *Id.*

21. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004).

22. *Id.* at 127.

23. *Id.*

24. *Id.* at 128.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 129.

31. *Id.*

32. *Id.* at 134, 143–46.

33. *Id.* at 142–43.

34. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 139 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

35. *Id.* at 140.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. K.M. v. E.G., 33 Cal. Rptr. 3d 61, 65 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S125643.PDF.

41. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 140–41 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

42. *Id.* at 141.

43. *Id.*

44. *Id.*

45. *Id.* at 140.

46. *Id.* at 141.

47. *Id.*

48. *Id.*

49. *Id.* at 141–42.

50. *Id.* at 143.

51. *Id.* at 143–44.

52. Cal. Fam. Code § 7650 (West 2005).

53. *K.M.,* 13 Cal. Rptr. 3d at 151.

54. Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004), *review granted sub nom.* Elisa B. v. Superior Court, 97 P.3d 72 (Cal. 2004).

55. *Id.* at 497–98.

56. *Id.* at 498.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 499, 501–04.

66. Cal. Fam. Code § 7610 (West 2005).

67. *Id.* § 7541.

68. Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

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69. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004).

70. Cal. Fam. Code § 7540 (West 2005).

71. *Id.* § 7611(b).

72. *Id.* § 297.5(4).

73. *See* California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {___}, *available at* www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-250/ab_205_bill_20030922_chaptered.pdf (codified at Cal. Fam. Code §§ 297–297.5).

74. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

75. *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).

76. Cal. Fam. Code § 7611(d) (West 2005).

77. *Id.* § 7611(d).

78. Miller v. Miller, 74 Cal. Rptr. 2d 797 (Cal. Ct. App. 1998).

79. *Id.*

80. *In re Karen C.,* 124 Cal. Rptr. 2d at 677.

81. Cal. Fam. Code § 7613(b) (West 2005).

82. *Id.* §§ 7571, 17410–12.

83. Elisa Maria B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004), *review granted sub nom.* Elisa B. v. Superior Court, 97 P.3d 72 (Cal. 2004).

84. *Id.* at 498.

85. *Id.*

86. *Id.* at 497.

87. Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004), *review granted sub nom.* Kristine H. v. Lisa R., 97 P.3d 72 (Cal. 2004).

88. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

89. K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

90. *Id.* at 151.

91. *Id.* at 141.

92. *Id.* at 151.

93. *Id.*

94. *Id.* at 153–54.

95. *Id.* at 154.

96. *Id.*

97. Troxel v. Granville, 530 U.S. 57, 64–65 (2000).

98. *Id.*

99. *See, e.g., In re* National Recreation Products, Inc., 403 F. Supp. 1399, 1404 (C.D. Cal. 1975) ("Where possible it is preferable to base a decision concerning a question of law on statutory construction [rather] than on constitutional issues").

100. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

101. Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction, and the New Reproductive Technologies,* 28 Ariz. St. L.J. 473, 494–95 n.95 (1996) (citing Painter v. Bannister, 140 N.W.2d 152, 155–56 (Iowa 1966)).

102. *Id.* at 494–95.

103. David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness,* 2 J. Center for Fam. Child. & Cts. 109, 120 (2000).

104. Cal. Fam. Code §§ 8600–22, 8800–23, 9000–07 (West 2005); Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

105. *Sharon S.,* 73 P.3d at 562.

106. Cal. Fam. Code §§ 7571, 17410–12.

107. *Id.* § 7613; People v. Sorensen, 437 P.2d 495 (Cal. 1968).

108. Dunkin v. Boskey, 98 Cal. Rptr. 2d 44 (Cal. Ct. App. 2000).

109. Cal. Fam. Code § 7611(d) (West 2005).

110. Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law,* 23 Vt. L. Rev. 225, 228–29 (1998).

111. *Id.* at 235.

112. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

113. *Id.* at 290.

114. McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).

115. *Id.* at 480.

116. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

117. *Id.* at 178.

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118. *Id.* at 180 (citations omitted).

119. Estate of Ford, 8 Cal. Rptr. 3d 541, 548 (Cal. 2004).

120. *Id.* at 548 (citation omitted).

121. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 151 (Cal. Ct. App. 2004), *review granted,* 97 P.3d 72 (Cal. 2004).

122. Cal. Fam. Code § 7541 (West 2005).

123. Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992).

124. Johnson v. Calvert, 851 P.2d 782–83 (Cal. 1993); *K.M.,* 13 Cal. Rptr. 3d at 153.

125. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

126. Roe v. Wade, 410 U.S. 113 (1973).

127. *Johnson,* 851 P.2d at 786–87.

128. William Shakespeare, Hamlet act 3, sc. 1 (Washington Square Press 1992) (1623).

129. Kristine H. v. Lisa R., 33 Cal. Rptr. 3d 81, 87–88 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S126945.PDF.

130. *Id.* at 87.

131. Elisa B. v. Superior Court, 33 Cal. Rptr. 3d 46, 57 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S125912.PDF.

132. *Id.* at 58.

133. *Id.* at 53.

134. *Id.* at 51.

135. Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

136. Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

137. West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997).

138. *Elisa B.,* 33 Cal. Rptr. 3d at 59.

139. K.M. v. E.G., 33 Cal. Rptr. 3d 61, 63 (Cal. 2005), *available at* www.courtinfo.ca.gov/opinions/documents/S125643.PDF.

140. *Id.* The majority did, however, leave the door open for the application of California Family Code section 7613(b) to ovum donors under different circumstances, suggesting that this was a very narrow decision. *Id.* at 68.

141. *Id.* at 72.

142. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

143. *K.M.,* 33 Cal. Rptr. 3d at 71.

144. *Id.*

145. *Id.* at 78.

146. *Id.*

Legitimate Parents

Construing California's Uniform Parentage Act to Protect Children Born Into Nontraditional Families

No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), . . . courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored.

—*In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998)

In three recent landmark decisions, *Elisa B. v. Superior Court,*[1] *K.M. v. E.G.,*[2] and *Kristine H. v. Lisa R.,*[3] the California Supreme Court concluded that children born into gay and lesbian families must be afforded the same rights and legal protections provided to other children. These cases are monumental in that they represent the first reported decisions to hold that parental rights can be established by parents of the same gender without an adoption and without proof of a biological relationship to the child. The California Supreme Court is the first state high court to reach this issue.[4]

As evidenced by recent increases in the numbers and visibility of alternative families, new reproductive technologies have enabled single parents and gay and lesbian parents to have children.[5] All three cases respond to this reality by providing protection and security to the children born into these families. The decisions affirm that the parentage laws and public policies of California must equally protect the physical, emotional, and financial needs of children who are born into a family consisting of two same-sex parents.

The issues resolved by these cases will affect not only the children of these families but also thousands of other children who have been and, in the future, will be born to same-sex and unmarried heterosexual couples through assisted reproduction. The outcome of all three decisions promises to ensure that the parentage laws in this state will be applied consistently and fairly so that children in all kinds of families can rightfully expect equal treatment.

The article begins by providing the legal background and context for the Supreme Court's historic parentage decisions. For the reader to appreciate the significance of *K.M., Elisa B.,* and *Kristine H.,* it is necessary to understand California's statutory scheme for the establishment of parentage, including the important public policies and case law that contributed to the legal definition of the term *parent* over the 30 years since California adopted the Uniform Parentage Act (UPA) in 1975.[6] The second section examines the evolution of this state's legal framework for deciding parentage in cases involving reproductive

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The purpose of the Uniform Parentage Act (UPA) is to prevent discrimination against children based on the marital status of their parents. In August 2005, the California Supreme Court issued three seminal decisions interpreting the UPA that protect the rights of children born into families with same-sex parents. These cases promise legal protection for many children who are born into and live in nontraditional families. The legal issues resolved in the cases are consistent with recent parentage determinations under California's statutory scheme in cases involving reproductive technologies. This article analyzes the three parentage cases in the context of the history, policies, and purpose of California's parentage laws. In addition, it proposes that these decisions should be used as authority to establish parentage under two additional theories in future cases arising in the context of nontraditional families who procreate through assisted reproduction. ■

technologies and that framework's connection to the formation of nontraditional families.

Next, the article discusses the court's decisions in *K.M., Elisa B.,* and *Kristine H.,* explaining their significance in achieving the statutory objectives and policies of the UPA by affirming that children born into families with same-sex parents shall not be "excluded from the protection of a law intended to benefit all minors, legitimate or illegitimate."[7]

Finally, the article proposes two additional bases for establishing legal parentage in the context of assisted reproduction—Family Code section 7613(a) and the "intent" standard developed by case law.[8] *K.M., Elisa B.,* and *Kristine H.* address and rely on both theories and should be used as authority in establishing parentage in future cases involving unmarried heterosexual parents or same-sex parents who do not otherwise qualify for protection under California law.

THE PURPOSE AND POLICIES OF THE UPA—THE PRESUMPTION OF "LEGITIMACY"

The foundation of California's parentage laws lies in the Uniform Parentage Act. The following briefly discusses its background, enactment, and underlying public policies.

BACKGROUND OF THE UPA

Under the common law, concern for children's interests was deemed less important than the desire to restrict childbearing to the confines of marriage.[9] This resulted in rules that penalized nonmarital children. Most states denied a nonmarital child the right to inherit from his or her father, the right to bear the father's name, and the right to public benefits based on the parental relationship; paternity actions were also subject to very short statutes of limitation and evidentiary restrictions.[10]

Beginning in the late 1960s, the U.S. Supreme Court struck down "nearly all forms of legal discrimination against non-marital children."[11] In its 1972 decision, *Weber v. Aetna Casualty & Surety Co.,* the Court condemned in no uncertain terms the practice of punishing children for the irresponsibility of adults:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.[12]

During that same period, the Court established new rights for unmarried fathers. In *Stanley v. Illinois,*[13] the Court held that an unmarried father was entitled to a hearing on his fitness as a parent before his children could be placed in state custody.[14] The Supreme Court's decisions dramatically shifted the laws of paternity to focus on the constitutional rights of nonmarital children.[15]

ENACTMENT OF THE UPA

The UPA was adopted by the Legislature in 1975 and is now codified in California's Family Code.[16] The primary purpose of the statute was to eliminate the distinction between legitimate and illegitimate children.[17] It is the only California statute defining parental rights.[18]

Given the law's long-standing tradition of allocating parental rights according to legal judgments about the sexual conduct of parents, it is significant that the UPA bases legal parentage on the existence of the parent-and-child relationship instead of the relationship between the parents.[19] According to Family Code section 7601, the *parent-and-child relationship* is defined as "the legal relationship existing between a child and the natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship."[20]

Under Family Code section 7602, "[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents." Thus, legal recognition of parentage under the UPA is based on "the existence of a parent and child relationship rather than on the marital status of the parents."[21] The UPA is not confined to a determination of paternity, as the parent-and-child relationship expressly includes the mother-and-child relationship.[22]

An overview of the UPA's provisions makes it clear that the intention of the statute is to achieve the state's policy objectives of legitimizing children by facilitating the establishment of legal parentage.[23] For example, a husband who consents to the artificial insemination of his wife is "treated in law as if he were the natural father" of the child who is conceived.[24]

The Family Code includes a comprehensive statutory scheme for establishing the paternity of children born to unmarried women.[25] Legal parentage can be established if both parents sign a form evidencing the father's voluntary acknowledgment of paternity, which has the legal effect of a judgment of paternity.[26]

UNDERLYING PUBLIC POLICIES OF THE UPA

The original intent of the UPA was to guarantee the equal rights of all children by ensuring their financial support from both parents and by protecting their emotional and physical needs derived from existing social relationships with their parents.[27]

Because the fact of maternity was obvious, social motherhood—a mother's relationship with her child—was inextricably linked to a woman's biological relationship to her child.[28] In contrast, biological paternity was uncertain, and, at the time the UPA was enacted, difficult to prove through scientific evidence.[29] As a result, legal fatherhood could be based on a biological and/or a social parent-and-child relationship.[30]

The statutory provisions of the UPA incorporated traditional assumptions about the connection between sexual reproduction and the nuclear marital family—the law presumed that biological parentage could be located within the social relationship between a husband and wife.[31] Parentage, in the context of a marriage, reflects a public policy seeking to preserve the marital family by focusing on the father's relationship to the mother. Under the UPA, a married man does not need to demonstrate that he is the biological father in order to establish legal parentage; his paternity is presumed by the fact that he is married to the mother.[32]

By contrast, an unmarried man's paternity can be based only on scientific evidence that he is the biological father through blood or DNA tests,[33] on proof of an executed and filed voluntary acknowledgment of paternity,[34] or on evidence showing that he "received the child into his home" and "openly held the child out as his own."[35] By requiring different evidence based on the marital status of the father, the UPA legitimizes children by presuming that they were born into an extant marital union. The conclusive marital presumption of Family Code section 7540 may be rebutted by proof that another man is the biological father. However, this claim may be raised only within two years of the child's birth.[36]

The policy here is to preserve the intact marital family over the claims of biological parents. The statutory scheme is designed to protect established parent-and-child relationships that are presumed to exist between the mother's husband and child.[37]

To summarize, when assigning parental status, both the Legislature and the courts have relied on several policy objectives. Specifically, the legal tradition for establishing parentage under the UPA has been based on protecting the intact marital family, as well as on protecting the biological and social relationships between parents and children.

Equal Rights of Children to Parental Support and Care

By statute, the establishment of legal parentage confers rights and imposes responsibilities, which cannot be divorced from each other.[38] The paramount policy concern is to ensure that children have, whenever possible, two legal parents who are responsible for their care and financial support. This goal is important because it is intended to serve the interest of both the state's children and the public.[39]

California case law and statutes further both interests regarding children's physical and emotional needs by ensuring that private individuals, rather than the taxpayers, are responsible for the financial support of their children.[40] The Legislature requires the courts to determine child support according to the mandatory principles of Family Code section 4053, which defines the interests of children as "the state's top priority" and provides that a parent's duty to pay child support is every parent's "first and principal obligation."[41] The essential purpose of the mandatory support principles is to guarantee a child's entitlement to "share in the standard of living of both parents."[42] This objective is served as long as the amount of child support is determined "according to the parents' circumstances and station in life."[43]

To enable children to share in the standard of living of both their parents, California has devised an algebraic formula for calculating child support.[44] The amount of support is calculated according to the net disposable income of both parents. One express legislative policy that is served by basing support on parental income is to ensure uniform statewide awards of child support, so that children who are similarly situated will not be treated differently.[45]

Unlike agreements for the voluntary assumption of parental rights and obligations, which are encouraged under the UPA, courts may not enforce the private agreements made between parents that deny or diminish the rights of their children. As a matter of law, an individual cannot simply terminate his or her parental rights—and potential obligations—as a parent.[46] Whereas a written contract relieving a parent of his or her parental rights and concomitant obligation of support is unconscionable, a written promise to furnish support by either a parent or nonparent is enforceable by statute.[47]

Equal Protection of Existing Parent-and-Child Relationships

Based on the presumption of "legitimacy," the existence of a marriage confers parental rights. As a result, children born into traditional families are guaranteed the right that courts will make decisions according to their best interest. However, many children today are born into nontraditional families—single-parent families, lesbian and gay families, and unmarried heterosexual families.[48] Each of these family forms contains its own unique composition of parental figures.

The U.S. Supreme Court recently recognized that society's traditional definition of the "American family" has changed dramatically over the past several decades.[49] In *Troxel v. Granville,* a case regarding the visitation rights of grandparents and other third parties, Justice O'Connor observed: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."[50]

The American family is no longer characterized by a household of children and their two married biological parents. As noted by Justice Scalia in *Michael H. v. Gerald D.,*[51] the interests of the nonmarital unitary family is accorded constitutional protections: "The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children."[52]

Although the UPA did not anticipate all of the future permutations in the creation of biological and social families, it remains the only California statute defining parentage. To resolve the emerging parentage disputes in the context of these contemporary forms of families, courts have adhered to the underlying policies of the UPA by interpreting its provisions to protect existing social relationships between children and their parents. For example, courts have liberally construed its provisions to "legitimize" children living in alternative families by applying the paternity presumptions to women and nonbiological parents.[53]

These decisions affirm that legitimizing children and protecting their interests require legal recognition of the existing relationship between a parent and child, regardless of the parent's gender, marital status, or biological connection to the child.[54] In so doing, case law has clarified that the objective of the statutory presumptions of parentage is not to identify or locate biological parents; rather, the presumptions exist to protect the best interest of children.[55]

The statutory presumptions of paternity are designed to serve the state's policy of protecting a

child's existing relationship with a person whom the child knows as his or her parent. The primary purpose of determining legal parentage under Family Code section 7611(d), then, is to protect a *child's* perspective of his or her family by legally recognizing parentage in a person with whom the child has developed an actual parent-child bond.[56]

Indeed, the California Supreme Court and Courts of Appeal have categorically rejected biology as a factor in attaining status as a presumed parent under Family Code section 7611(d).[57] In *In re Nicholas H.,* the California Supreme Court concluded that a nonbiological father qualified as a presumed parent based on undisputed evidence that he had lived with the child for "long periods of time" and provided the child with "significant financial support…and has consistently referred to and treated Nicholas as his son."[58] The court focused its analysis on the "undisputed evidence that Nicholas has a strong emotional bond with [the father]" to find that the nonbiological father was a presumed parent.[59]

Likewise, in a recent decision, *In re Salvador M.,* the Court of Appeal, Fifth Appellate District, held that a child's adult half-sister, who acted as the child's de facto parent, was the child's presumed and legal parent under Family Code section 7611(d).[60] In that decision the court stated that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family."[61] The court in *Salvador M.* concluded that a woman's parental relationship to an 8-year-old child "resulting from years of living together in a purported parent child relationship…should not be lightly dissolved."[62] Consistent with the policies of the UPA, the California courts demonstrate a clear preference for allocating parentage according to the nature of the relationship between the child and his or her parent, rather than the nature of the relationship between the parents.

PARENTAGE IN CASES OF ASSISTED REPRODUCTION AND REPRODUCTIVE TECHNOLOGIES

Recent advances in reproductive technologies and science have led to the creation of even more unique family forms, as procreation no longer depends on sexual reproduction and can occur outside of marriage. Reproductive technologies have further deconstructed the traditional definition of *family* by dividing parentage into three components—genetics, gestation, and intent.

According to one legal scholar in the area of family law, Professor Janet Dolgin, surrogacy jurisprudence is beginning to "reflect demographic and ideological changes that have been altering the scope and meaning of family for decades."[63] Professor Dolgin further argues that judicial responses to surrogacy disputes, in seeking to resolve the various claims to maternity that they present, reflect a willingness to revise the model of the traditional marital family to make it more malleable and complex.[64]

In *Johnson v. Calvert,* the California Supreme Court addressed these novel issues in a parentage case of first impression—a child's maternity was disputed as a result of a gestational surrogacy contract.[65] *Johnson* involved a surrogacy arrangement in which an egg donated by the wife and fertilized by the husband's sperm was implanted in a gestational surrogate mother.[66] Prior to the birth, the parties signed a contract, agreeing that the husband and wife would be the child's parents and would raise the resulting child in their home.[67]

Under the terms of a signed surrogacy contract, the surrogate mother, Anna Johnson, agreed that she would relinquish "all parental rights" to the child in favor of the marital couple, Mark and Crispina Calvert.[68] In return, the Calverts agreed to pay Anna $10,000.[69] Before the child was born, relations deteriorated; both Anna and Crispina claimed to be the unborn child's mother, and both sought a declaration of legal maternity under the UPA.[70] Addressing the claims made by the two women to maternity of the same child, the Supreme Court observed that the Legislature did not address this issue at the time it enacted the UPA: "Passage of the [UPA] clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975."[71] Notwithstanding this lack of express legislative guidance, the court in *Johnson* found that the UPA applied to *any* determination of parentage.[72] It concluded that the UPA must

be interpreted on an ad hoc basis: "Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature."[73]

THE LEGAL FRAMEWORK OF *JOHNSON*

In *Johnson,* the court established a new framework for resolving the parentage of children born through assisted reproduction. First, it found that both the surrogate mother and the genetic mother had equally valid claims to maternity under the UPA.[74] The court in *Johnson* relied on the statutory language of Family Code section 7610(a) to treat maternity claims equally when they are demonstrated by "proof of having given birth" or by any other means available under the UPA.[75] Specifically, it determined that Anna could show she was the mother by "proof of having giving birth," and Crispina could show she was the mother by proof of her genetic relationship.[76]

However, a finding that both women were legal mothers under the UPA would have resulted in the child's having three parents.[77] Even though advances in science and technology have made it possible for the components of biological motherhood—genetics and gestation—to be divided between two women, the court declined to establish legal parentage in two women. Having determined that finding two legal mothers was inappropriate under the specific circumstances in *Johnson,* the court did not foreclose the possibility that a different set of factual circumstances could justify a court's conclusion that two women were the "natural" and legal mothers of the same child. ("We decline to accept the contention . . . that we should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here.")[78]

In *Johnson* the court resolved the parentage dispute by turning to evidence of the parties' intentions. To "break the tie" between the two women, *Johnson* looked to the preconception parenting intentions of the parties.[79] Relying on legal scholars, the court developed a new rule and held that "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[80] Because the genetic mother, Crispina, "intended to bring about the birth of a child that she intended to raise as her own," the court held that she, not the surrogate, should be recognized as a legal parent.[81]

PREFERENCE OF MARITAL FAMILY/SOCIAL RELATIONSHIPS

In addition to the explicit intent of the parties as stated in their surrogacy contract in *Johnson,* the intent of the genetic parents was presumed from the fact that they were a married couple living together in a committed relationship. The court in *Johnson* linked the genetic parents' marital relationship to its ultimate determination that they were the only biological, intentional, and legal parents.[82] The fact that the intended parents were in a committed marital relationship contributed to the court's legal conclusion that the Calverts should be considered the legal parents, as they jointly took steps to use reproductive procedures that created a child.[83]

Specifically, the court in *Johnson* found that recognizing legal parentage in a third party would have interfered with the marital family, their familial privacy, and their rights to make joint decisions about how to raise their child: "To recognize parental rights in a third party with whom the [marital family] has had little contact . . . since shortly after the child's birth would diminish [the genetic mother's] role as mother."[84]

Consideration of the marital status of the parties as an element of intent in *Johnson* is consistent with well-established California law regarding the issue of parentage in the context of a marital relationship. When the social interest of maintaining the marital family is considered against the interests of biological fathers to maintain relationships with their children, the former usually prevails over the latter.[85] Courts construing paternity statutes have reiterated this public policy.[86] For example, in *Michael H. v. Gerald D.,* the U.S. Supreme Court upheld California's conclusive presumption of paternity, finding that the statute furthered "traditions" protecting the privacy and autonomy of the marital family.[87] As in *Johnson,* the biological father in *Michael H.* was denied paren-

tal rights because he was viewed as a stranger to the marriage.

BEST-INTEREST ANALYSIS?

In her dissenting opinion in *Johnson,* Justice Kennard criticized the majority for relying on contract and property law as a basis for determining legal parentage. "Although the law may justly recognize that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such right, because children cannot be owned as property."[88]

The court in *Johnson* was able to conclude that property and contract principles outweighed a best-interest analysis in its determination because it considered legal parentage before the child was born. The majority in *Johnson* rejected the best-interest standard in favor of legal concepts borrowed from the arenas of intellectual property and commercial contracts:[89] "The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers."[90]

Arguably, the best-interest standard should be considered relevant because it reflects the policies underlying the UPA to recognize existing parent-and-child relationships. This approach is consistent with the well-established case law regarding presumed parentage under Family Code section 7611(d), which relies on the best-interest standard as an important policy and rationale for the allocation of parental rights under the statutory scheme.

Many legal scholars advocate for the application of a best-interest standard as a factor for deciding legal parentage in the context of reproductive technologies. In a recent law review article, Professor Ilana Hurwitz argued for the inclusion of a best-interest analysis in determining parentage in the context of reproductive technologies:

> Within a "best interests" rubric, a court may evaluate preconception intent, genetics, and gestation. In addition, the standard enables a court to consider other factors crucial to a child's well-being such as continuity of relationship [and] nurturing capacity of maternal claimants.... Cases present manifold factual constellations—children with differing needs; claimants with differing capacities for motherhood; varying situational aspects. Contextual analysis enables a judge to investigate each claim, to weigh each factor as circumstances warrant, and to create a parental composition tailored to meet the needs of a particular child.[91]

In the first California case to address a surrogacy arrangement, *Adoption of Matthew B.,*[92] the Court of Appeal, First Appellate District, focused entirely on the child's best interest. "The primary casualty of this conflict is a child caught in the cross fire.... The best interests of this young child must be our paramount concern."[93] Since the agreement was "fully performed," the court in *Matthew B.* determined that ruling on the legality or illegality of the surrogate contract was unnecessary.[94] But the court went on to point out the proper focus for resolution of the dispute: "Here, the state has a paramount interest in Matthew's welfare.... We can never ignore the child's best interests, 'no matter what preliminary action its parent or parents may have taken'. Indeed, the child's welfare *is 'the controlling force* in directing its custody, and the courts will always look to this rather than to whims and caprices of the parties.' "[95]

Explicit consideration of the best-interest standard as part of the analysis in the allocation of parental rights in the context of reproductive technologies is not inconsistent with the decision in *Johnson.* The court there did not purport to create an absolute rule that intent always governs parentage in the context of artificial reproductive technologies. Rather, the court in *Johnson* announced the intent standard as a *presumption* for deciding parentage: "[I]ntentions that are voluntarily chosen, deliberate, express and bargained-for ought to presumptively determine legal parenthood."[96]

As described by Professor Marjorie Shultz and quoted in *Johnson,* the essential purpose of an intent-based rule is to foster a child's best interest: "Honoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."[97] Relying on Shultz, the court in *Johnson* noted that the intent model offers a reliable means

to establish parentage because it is meant to predict the best interest of a child: "[T]he interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being'."[98]

Indeed, the California Supreme Court has consistently emphasized the importance of the best-interest standard as a means to guarantee a child's "well recognized right" to "stability and continuity" by protecting the child's permanent and actual custodial arrangements.[99] The Legislature has established California's public policy for ensuring a child's best interest when child custody and visitation are at issue: "[I]t is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children…."[100]

PRINCIPLES ESTABLISHED BY *JOHNSON*

The decision in *Johnson* established several basic principles. First, the court rejected the contention that explicit legislative guidance is required before courts may resolve new and unanticipated issues relating to the parentage of children born through reproductive technologies. Based on the long-standing principle that courts must often "construe statutes in factual settings not contemplated by the enacting legislature," the court held that the UPA provided "a mechanism to resolve this dispute, albeit one not specifically tooled for it."[101]

Second, the court concluded that the UPA must be applied in a strictly gender-neutral manner, even where the language of the statute is couched in gender-specific terms. Consistent with Family Code section 7650, the court held that the statutory means available to establish a father-child relationship must also "apply in an action to determine the existence or nonexistence of a mother and child relationship."[102]

Finally, rather than adopting a mechanical test for determining parental rights under the UPA, the court developed an approach that looked to the parties' intentions. *Johnson* affirms that "the courts have both the power and the obligation to apply the UPA—and go beyond it if necessary—to resolve the parentage of children who are born through artificial insemination, even if, as seems likely, the legislature did not specifically contemplate lesbian families [or surrogates] when the statute was enacted."[103]

ASSISTED-REPRODUCTION CASES SINCE *JOHNSON*

Relying on the reasoning and policies articulated in *Johnson,* the Courts of Appeal have protected the rights of children conceived through reproductive technologies by recognizing legal parentage in their "intended" parents.[104] Since *Johnson,* courts have been called upon to determine parentage in situations that are increasingly complicated by varying forms and new uses of reproductive technologies. The clear trend in all these cases is to expand the definition of *legal parentage,* particularly if there is an existing parent-child relationship.[105]

All of the California cases addressing these issues reveal that judicial determinations of parentage continue to be driven by the traditional public policies and original intent of the UPA. When people use assisted reproduction to create a child, the case law holds that *two* legal parents should be found whenever possible, irrespective of the marital status of the parents.[106]

Thus, when one person uses reproductive technologies with the intent to be a single parent, courts have resolved the competing claims asserted by other potential parents by finding that there are two legal parents. Similarly, when there are three persons seeking to establish parental rights to the same child, courts have recognized the child's family as consisting of only two parents.[107]

Two well-established themes from the UPA have been applied to the area of technological conception—children's interests come first, and two legal parents are preferable to one parent or three parents. This rule is true even if (1) the two people are complete strangers to each other, (2) the parents' relationship has ended, or (3) the second person seeks a determination that he or she is not the parent.[108]

Since *Johnson* there have been two surrogacy cases in which the appellate courts have determined parentage under the UPA. In *In re Marriage of Moschetta,*[109] the Court of Appeal addressed a traditional surro-

gacy arrangement. In that case, the surrogate mother was both the genetic and the gestational parent; the intended mother, who was married to the biological father, had no biological connection to the child.

To conclude that the surrogate mother was the legal mother under the UPA, the court in *Moschetta* turned to the analysis of *Johnson* but found that it was not necessary to look to intent under the facts presented: "[T]he framework employed by *Johnson v. Calvert* of first determining parentage under the Act is dispositive of the case before us. In *Johnson v. Calvert* our Supreme Court *first* ascertained parentage under the Act; only when the operation of the Act yielded an ambiguous result did the court resolve the matter by intent as expressed in the agreement. In the present case, by contrast, parentage is easily resolved in [the genetic/gestational surrogate] under the terms of the Act."[110]

In *Moschetta,* the court concluded that the intent standard of *Johnson* was inapplicable because it found no "tie" to break between the intended, nonbiological mother and the genetic/gestational surrogate mother.[111] Applying the framework established by *Johnson,* the court determined that the two women did not have equally valid claims to maternity under the UPA because only the surrogate mother could provide proof of maternity under Family Code section 7610(a) as set forth in *Johnson.*[112] With that finding the court held that it was unnecessary to look to the intent of the parties to decide which woman was the legal mother.[113]

To justify its reasoning, the court in *Moschetta* noted that all of the justices in *Johnson* agreed with the framework established by the majority, that before employing the intent test it was necessary to conclude that the parties had equal claims to maternity under the UPA: "Significantly, both Justice Arabian's concurring and Justice Kennard's dissenting opinions *agree* with the majority opinion's basic structure of first concluding the genetic mother and the birth mother were 'tied' under the Act and then breaking the tie."[114]

In *In re Marriage of Buzzanca,* a husband and wife agreed to use reproductive technologies to create a child with the assistance of anonymous sperm and ovum donors and a gestational surrogate.[115] The child was not biologically related to either the husband or wife, and the parties separated before the child was born. The only person who sought parental rights was the intended mother, Mrs. Buzzanca. The intended father, Mr. Buzzanca, denied paternity and requested that he not be held responsible for child support based on an alleged private agreement he had entered with Mrs. Buzzanca.[116]

The court in *Buzzanca* relied on Family Code section 7613(a), which provides that a husband who consents to the artificial insemination of his wife is the legal father of the child created by the insemination, to find that husband and wife were both legal parents under the UPA. In *Buzzanca* the court justified its conclusion because the husband and wife engaged in "*acts* which *caus[ed] the birth* of a child."[117]

The court in *Buzzanca* followed *Johnson* and relied on an artificial insemination case decided in 1968, prior to the enactment of the UPA, *People v. Sorensen,*[118] to find that the intention to parent is determined by evidence of procreative conduct, such as consenting to reproductive procedures with the hope of creating a child to raise as one's own. In *Sorensen,* the California Supreme Court held that a nonbiological father was the legal parent based on the fact that he consented to the artificial insemination of his wife, a procreative act that caused the birth of a child.[119] Because the husband was "directly responsible" for the "existence" of the child and because "without [his] active participation and consent the child would not have been procreated," he was found to be a legal father.[120]

Relying on the reasoning in *Sorensen,* the court in *Buzzanca* construed Family Code section 7613(a) liberally to determine that the husband was a parent based on his consent to the use of reproductive technologies to create a child. The court also held that the wife could prove that she was the legal mother under Family Code section 7613(a) based on her consent to the artificial insemination of another woman, conduct that resulted in the birth of a child.

Because *Johnson* relied on the statutory language of Family Code section 7610(a) to treat maternity claims equally when demonstrated by "proof of having given birth," or by other means allowed under the UPA,

Buzzanca reasoned that proof of maternity under Family Code section 7613(a) is no different from a maternity claim predicated on proof of a genetic and/or gestational tie.[121] Thus, Mrs. Buzzanca could prove her maternity by proof of her consent to the artificial insemination of another woman under Family Code section 7613(a).[122]

THE DECISIONS IN *ELISA B.*, *K.M.*, AND *KRISTINE H.*

Under Family Code section 297.5(d), registered domestic partners (and former or surviving domestic partners) of either partner now have the same rights and responsibilities with respect to a child of either of them as those of spouses (and former or surviving spouses).[123] By enacting this statutory scheme, the Legislature has clarified its intention that the same rules that apply to determining the parentage of children born to married parents must be applied to children born to registered domestic partners.

Although Family Code section 297.5 provides guidance regarding children born to same-sex parents after January 1, 2005, it does not resolve questions about the legal parentage of children born to same-sex couples prior to that date or of children born to same-sex couples not registered as domestic partners when their children were born.[124]

Elisa B., Kristine H., and *K.M.* are parentage cases that arose prior to the effective date of the current domestic partner statute. In guaranteeing protection to children born into nontraditional families, the decisions in these cases demonstrate important themes underlying the UPA, such as preventing discrimination based on marital status of the parents and preserving existing biological and social relationships between parents and children. Because the California Supreme Court recognized the possibility that a family may have two parents of the same sex, well-established principles and existing case law could readily be applied to determine parentage under the circumstances of the children in all three cases.

Johnson stands for the proposition that the UPA is a flexible document. So when the Supreme Court was called upon again to address maternity claims under the UPA in circumstances that "were virtually unknown in 1975,"[125] the court simply followed the principle of statutory construction that it announced in *Johnson:* "Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature."[126]

The court concluded that there can be two natural and legal mothers under the UPA without an adoption.[127] In so holding, the court guaranteed *Johnson*'s promise that the "UPA applies to *any* parentage determination."[128] All of the justices of the California Supreme Court were unanimous in finding that California law recognizes the establishment of two natural and legal same-sex parents of the same child.

ELISA B. v. SUPERIOR COURT

In *Elisa B.,*[129] a same-sex couple—Emily B. and Elisa B.—planned to have children together using artificial insemination by an anonymous sperm donor.[130] Emily gave birth to twins in 1998, one of whom had Down syndrome.[131] Before the twins' birth, the couple decided that Emily would stay home to care for the children and Elisa would be the family's breadwinner.[132] The couple's relationship dissolved 18 months later, and Elisa eventually cut off all contact and support.[133] Emily applied for public assistance from the state, which, in turn, filed an action for child support against Elisa.[134]

Two Natural and Legal Mothers

Until very recently, California courts refused to acknowledge the existence of more than one legal parent of the same sex. The decision in *Elisa B.* clarified that the statement in *Johnson* that California law recognizes only "one natural mother" was confined to the circumstances presented in that case;[135] namely, a finding of two mothers in *Johnson* would have left the child with three parents and imposed a third-party stranger into the intact marital family.

Indeed, as noted by the court in *Elisa B.,* since the time *Johnson* was decided there have been significant developments in statutory and case law regarding the legal rights of same-sex parents. There are now "com-

pelling reasons" to find that a child may have two legal parents of the same sex who have equal status in terms of their relationship to the child.[136]

> We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes….
>
> Prior to the effective date of the current domestic partnership statutes, we recognized in an adoption case that a child can have two parents, both of whom are women…. If both parents of an adopted child can be women, we see no reason why the twins in the present case cannot have two parents, both of whom are women.[137]

Most important, the Supreme Court's unanimous holding that there can be two legal mothers under the UPA overrules more than 15 years of California appellate court decisions denying legal protection to children born to same-sex parents.[138] Those cases held that a lesbian partner who was not a biological or an adoptive parent was not entitled to establish parentage under any provisions of the UPA.[139]

In 1991, the Court of Appeal, First Appellate District, in *Nancy S. v. Michele G.,* addressed whether the birth mother's lesbian partner, who was neither biologically nor adoptively connected to a child, could be considered a parent.[140] The court held that the status of the lesbian partner as a parentlike figure did not entitle her to custody or visitation rights.[141] The court refused to expand the definition of *parent* beyond its traditional meaning. It stated that courts should not adopt novel theories by which a nonparent could acquire the rights of a parent because they would then face years of unraveling the complex practical, social, and constitutional ramifications of this expanded definition of *parent.*[142]

In *Elisa B.,* the California Supreme Court expressly concluded that *Nancy S.* and two other older cases were incorrectly decided because those cases failed to adopt a gender-neutral application of the UPA.[143] Moreover, the court was clear that children born into families consisting of two same-sex parents could not be treated with bias or stigma based on the status of their birth. Specifically, *Elisa B.* cites to the purpose underlying the enactment of the UPA: "to eliminate distinctions based upon whether a child was born into a marriage, and thus was 'legitimate,' or was born to unmarried parents, and thus was 'illegitimate.'"[144] *Elisa B.* relies on the fundamental purpose of the UPA, which "provides that the parentage of a child does not depend upon 'the marital status of the parents.'"[145]

Social Relationship/Presumption of Paternity

The Supreme Court specifically concluded that Elisa's parentage could be established under Family Code section 7611(d).[146] The court noted that when *Johnson* was decided in 1993, case law regarding the presumed-paternity statutes had not previously addressed whether the statutes should apply to women or whether a biological relationship to the child was a prerequisite to meeting the requirements of Family Code section 7611(d).[147] Since that time, both issues have been resolved. A person's status as a presumed parent may be established regardless of gender or biological connection.[148]

As previously discussed, the statutory presumptions of paternity are designed to serve the state's policy of protecting a child's relationship with a person whom the child knows as his or her parent. The California Supreme Court, in *In re Nicholas H.,* recently articulated the well-established purpose of determining legal parentage under section 7611(d)—to protect a child's perspective of his or her family by legally recognizing parentage in a person with whom the child has developed an actual parent-child bond.[149] As the court has made clear, the state has a compelling interest in protecting established parent-child relationships, regardless of whether they are based on marriage or biology.[150]

The decision in *Elisa B.* directly relied on these case law developments under Family Code section 7611(d). After *Elisa B.* it is much clearer that the statutory presumption of parentage actually does apply equally regardless of biology, gender, sexual orientation, or marital status.[151] *Elisa B.* holds that the presumption applies regardless of whether the children already have one identified mother. The fact that the other legal parent is also a woman has no legal relevance. Just as in *Nicholas H.,* the court found that the nonbiological

mother in *Elisa B.* lived with the children and treated them in all respects as her children and therefore was a parent under the UPA.

Procreative Conduct

Elisa B. also addressed a concern that was raised by the court in *Nicholas H.:* the potential danger of imposing legal parentage under Family Code section 7611(d) on a nonbiological parent unwilling to accept the role and responsibilities of parenthood.[152] Unlike the father in *Nicholas H.,* Elisa was "unwilling to accept the obligations of parenthood."[153] As a result, the court in *Elisa B.* was required to determine whether the situation was "an appropriate action" for rebuttal of the presumption of Family Code section 7611(d) based on evidence that Elisa B. was not the biological parent.[154]

In this part of its analysis, the court considered evidence of Elisa's intentional procreative conduct and compared her to persons in other cases in which legal parentage had been based on similar procreative conduct: "[Elisa] actively assisted Emily in becoming pregnant with the expressed intention of enjoying the rights and accepting the responsibilities of parenting the resulting children.... Elisa's present unwillingness to accept her parental obligations does not affect her status as the children's mother based upon her conduct during the first years of their lives."[155]

Following the reasoning of *Sorensen,* the court in *Elisa B.* stated: "A person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children—regardless of her gender or sexual orientation."[156]

Based on its application of the case law for establishing parentage in the context of a husband's consent to the artificial insemination of his wife, the court in *Elisa B.* found that, as in *Nicholas H.,* the circumstances did not present an "appropriate action" to rebut the presumption with proof that Elisa was not the children's biological mother because "she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother,...and there are no competing claims to her being the children's second parent."[157]

In sum, the court's approach to the analysis of Elisa's parentage under Family Code section 7611(d) not only involves the presumed-parentage cases but also invokes the language, policies, reasoning, and holdings of the artificial insemination case law. These are the same policies and reasoning upon which Family Code section 7613(a) was established.

K.M. v. E.G.

In *K.M.,* a lesbian couple took steps to have a child together. K.M. contributed her ova, which were fertilized with sperm from an anonymous donor and implanted in her partner, E.G.[158] Both women could claim maternity as either the genetic or the gestational mother of the twin girls, who were born in 1995. K.M. and E.G. co-parented the girls until the couple separated in 2001.[159] After the separation, K.M., the genetic mother, filed an action asking the court to determine that she was a parent and to issue a custody and visitation award.[160] E.G., the gestational mother, argued that K.M. had no right to parent the children, largely because, when they were in the hospital for the ovum donation, K.M. had signed a standard hospital form that, among pages of information about the medical procedure, included a section allegedly waiving her parental rights to the children.[161]

Both the trial court and the appellate court found that K.M. was not a parent on the grounds that she was an "ovum donor" and that the parties had orally agreed that only E.G. would be the parent.[162] The California Supreme Court reversed the lower courts' decisions, finding that K.M. did not intend to be just a donor and that she and E.G. were the genetic, gestational, and legal parents of the twins under the UPA: "[W]e agree that K.M. is a parent of the twins because she supplied the ova that produced the children, and Family Code section 7613, subdivision (b),...which provides that a man is not a father if he provides semen to a physician to inseminate a woman who is not his wife, does not apply because K.M. supplied her ova to impregnate her lesbian partner in order to

produce children who would be raised in their joint home."[163]

After it decided that K.M. was not a donor, the Supreme Court reached a simple yet eloquent conclusion: K.M. and E.G. were the legal parents of the twins because, as the genetic and gestational parents, they had equally valid claims under the UPA.[164] As in *Elisa B.,* the court held there could be two legal mothers without an adoption. Because it found there was no "tie" to break between the parentage claims of K.M. and E.G., the court determined that it was not necessary to look to evidence of the parties' intentions to decide legal parentage.

Donor vs. Parent

To conclude that K.M. was not a donor, the court compared K.M. and E.G. to the marital couple in *Johnson,* finding that both couples similarly intended "to produce a child that would be raised in their own home."[165] In comparing K.M. and E.G. to the Calverts, the court unequivocally found that K.M. was not a "true" donor:

> It is undisputed, . . . that the couple lived together and that they both intended to bring the child into their joint home. . . . [T]he present case, like *Johnson,* does not present a "true 'egg donation' situation."
>
> K.M. did not intend to simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home.[166]

The court properly dismissed the legal relevance of the ovum-donor consent form under the circumstances of *K.M.* It noted that the law was clear that private parties may neither create nor destroy parental rights based on their own subjective agreements or understandings about the law.[167] Indeed, California has never assigned a child's legal parentage based on agreements between private parties.[168] It is well established that parents cannot, by agreement, limit or abrogate a child's right to support.[169] And parties who procreate by means of assisted reproduction are just as responsible for their children as those who do so "the old-fashioned way."[170]

Family Code Section 7613(b)

The Legislature enacted Family Code section 7613(b) to provide clarity regarding the parental rights of sperm donors by eliminating any rights or obligations of a donor who provides his "semen to a licensed physician for use in artificial insemination of a woman other than the donor's wife."[171] There is no comparable legislation in California governing the parental rights of ovum donors, and there is no precedent holding that Family Code section 7613(b) applies equally to ovum donors.

Based on the evidence, the court found that Family Code section 7613(b) did not apply to a woman who, like K.M., donated her ova to her lesbian domestic partner with whom she planned to raise the resulting children together in their joint home. As shown by the court's reasoning and its citation to a related Colorado Supreme Court case,[172] the court intended to treat K.M. and E.G. exactly as it would have if they had been an unmarried heterosexual couple.[173] A man who statutorily waived parental rights at the time he donated sperm cannot be denied paternity if he has taken the child into his home and loved and cared for the child as a parent.[174]

Other California cases have concluded that, when a sperm donor provides his semen to a physician and his sperm is used to inseminate a woman who is not his wife, the donor's parental rights will not be terminated under Family Code section 7613(b) where the facts warrant a different outcome.[175] For example, in *Robert B. v. Susan B.,* a fertility clinic made a mistake when it used sperm provided by a married man who did not intend to be a donor, and implanted the sperm in a single woman who requested sperm and ova from anonymous donors.[176] The Court of Appeal determined that the statute did not apply to terminate the donor's parental rights, even though his sperm was provided to an unknown recipient through a physician: "In order to be a donor under section 7613(b) a man must provide semen to a physician for the purpose of artificially inseminating 'a woman other than the donor's wife.' It is uncontested that Robert did not provide his semen for the purpose of inseminating anyone other than [his wife]. "[177]

In *Jhordan C. v. Mary K.,* the court declined to apply Family Code section 7613(b) to terminate the parental rights of a known sperm donor.[178] In that case, the biological mother obtained the sperm directly from the donor without the assistance of a doctor.[179] The mother claimed that the parties agreed prior to the donation that the donor would not be involved as a parent and argued that his rights should be terminated under Family Code section 7613(b).[180] The mother argued that the court should apply the statute because the donor's agreement that he would not be a parent was the functional equivalent of the requirement that a donor provide his sperm to a physician.[181] To hold the statute inapplicable to the donor in this case, the court in *Jhordan C.* focused on the parties' conduct after the donation of sperm, including visits between the mother and donor during the mother's pregnancy, the mother's agreement to the donor's establishment of a trust fund for the child, the listing of the donor as father on the birth certificate, and the donor's visits to the mother and child.[182]

In *K.M.* the court did not reach the issue of whether the sperm donor statute could or should be applied equally to ovum donors. "Even if we assume that the provisions of section 7613(b) apply to women who donate ova, the statute does not apply under the circumstances of the present case."[183] However, unlike almost every other provision of the UPA, equal application of that statute is factually impossible. In contrast to a sperm donor, an ovum donor can only "donate" her ova by providing ova to a "licensed physician." The statute cannot be applied equally, then, because a sperm donor has the option of donating his sperm without the assistance of a physician, which enables a man to donate sperm under the statute while preserving his parental rights.

The Legislature, not the court, is the appropriate branch to resolve the myriad and complex policy questions raised by the issue of whether Family Code section 7613(b) should apply equally to ovum donors.[184]

Framework of Johnson

After it found K.M. was not a donor, the court turned to the legal framework of *Johnson* and concluded that both K.M. and E.G. were legal parents under the UPA. First, the court found that E.G. and K.M. could both prove their maternity of the children under Family Code section 7610(a)—E.G., because she gave birth to the children, and K.M., because she was the genetic mother. "K.M.'s genetic relationship with the twins constitutes evidence of a mother and child relationship under the UPA…."[185]

Under the circumstances of *K.M.,* because California recognizes two natural mothers, the court concluded there was no "tie" to break between K.M. and E.G. Specifically, the court found that any parental rights afforded to K.M. would not come at E.G.'s expense or impair her parental bond with the children.[186] In *Johnson,* the court determined that the child should have two parents, not three. In *K.M.,* the question was whether the twins should have one legal parent or two. In finding that the children should have *two* parents instead of one, *K.M.* followed the well-established case law and public policies of the UPA.

The court in *K.M.* held that it is unnecessary to look to evidence of intent to decide parentage when there is no "tie" to break between two biological parents who have equally valid claims when their claims are not mutually exclusive. Thus, the court decided K.M. and E.G. were the legal parents based on the fact that both women could prove their maternity under Family Code section 7610(a). This is the precise approach adopted by the appellate court in *Moschetta:* "[T]he framework employed by *Johnson v. Calvert* of first determining parentage under the Act is dispositive of the case before us.... [O]nly when the operation of the Act yielded an ambiguous result did *[Johnson]* resolve the matter by intent…."[187] Like the donor fathers in *Robert B., Jhordan C.,* and *Moschetta,* K.M. is the second biological parent who came forward to assume responsibility for the children with whom she was genetically related. Similar to the genetic fathers of those cases, K.M. offered proof of a biological relationship to her children that was sufficient to establish her legal parentage.

ESTOPPEL: *KRISTINE H. v. LISA R.*

In *Kristine H.,* two women who had been in a long-term relationship decided to have a child through

artificial insemination.[188] Prior to the birth of the baby, the couple, relying on *Johnson,* obtained a judgment by stipulation that although Kristine was pregnant with the baby they would both be the parents of the unborn child.[189]

Kristine, Lisa, and the child lived together as a family in a home they shared.[190] When the child was about 2 years old, the women ended their relationship and Lisa moved out of the family home.[191] Following their separation and termination of their domestic partnership, Kristine sought to sever Lisa's status as a legal parent by filing a motion to vacate the judgment declaring them both parents of the child.[192]

After finding that the trial court had subject-matter jurisdiction to determine the existence or nonexistence of parent-child relationship, the Court of Appeal, Second Appellate District, held that the family court lacked authority under the UPA to enter a judgment of parentage because "[a] determination of parentage cannot rest simply on the parties' agreement."[193] In reversing that decision, the California Supreme Court concluded that Kristine was estopped from challenging the validity of the stipulated judgment that she and Lisa were both parents. The court found it unnecessary to decide whether the judgment was valid because it found that Kristine was estopped from challenging the judgment: "Given that the court had subject matter jurisdiction to determine the parentage of the unborn child, and that Kristine invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years, it would be unfair both to Lisa and the child to permit Kristine to challenge the validity of that judgment."[194]

APPLICATION OF *ELISA B., KRISTINE H.,* AND *K.M.* TO FUTURE CASES

In *Elisa B., K.M.,* and *Kristine H.,* the California Supreme Court did not decide the parental rights of the parties based on the intent standard of *Johnson* or on the artificial insemination statute, Family Code section 7613(a). But by relying on the reasoning, standards, and language of *Johnson* and Family Code section 7613(a), the court's decisions provide authority for establishing legal parentage under these theories in future cases involving similarly situated nontraditional families.

Specifically, in all three cases the court held that when a couple deliberately brings a child into the world through the use of assisted reproduction, both partners are the parents, regardless of their gender or marital status. Further, the court enunciated the following principles in *Elisa B., Kristine H.,* and *K.M.,* all of which support the application of *Johnson* and Family Code section 7613(a) to establish legal parentage in future cases:

- Marital status, gender, and sexual orientation of the parents should not be used as a basis to deny equal application of the establishment of parentage under the UPA.
- California public policy has a preference for two parents instead of one.
- Family Code section 7613(a) applies equally to women.
- The rule that a husband is the lawful parent based on his consent to the artificial insemination of his wife by an anonymous sperm donor also applies to same-sex and unmarried parents.
- Conduct of a same-sex couple to participate in and use artificial insemination or in vitro fertilization, with intent to produce a child to raise together in their joint home and treat as their own, is relevant to the determination of parentage under the UPA.

INTENT

The California Supreme Court found that the parties in *Elisa B., K.M.,* and *Kristine H.,* engaged in deliberate procreative conduct that resulted in the birth of their children, not unlike that of the married couples in *Johnson* and *Buzzanca.* In *Johnson,* the court held that when a couple intends to have children together and uses assisted reproduction to procreate, they will be treated as the legal parents of any children born to

them as a result of their procreative conduct: "[The Calverts] affirmatively intended the birth of the child and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist."[195]

The court discussed the intentional procreative conduct of the couples in all three decisions. As in *Johnson,* the court found that each of the couples initiated and participated in medical procedures that caused children to be born.[196] But for the couples' procreative efforts the children in each of these cases would not exist. For example, the court compared the joint preconception parenting intentions of K.M. and E.G. as a couple, to raise a child together in their joint home, to the similar intentions of the marital couple in *Johnson.*[197] In *K.M.* the court found that the joint parenting intentions of Mr. and Mrs. Calvert were analogous to those of K.M. and E.G: "The circumstances of the present case are not identical to those in *Johnson,* but they are similar in a crucial respect; both the couple in *Johnson* and the couple in the present case intended to produce a child that would be raised in their own home."[198]

To conclude that it was not "an appropriate action" for the presumption of Family Code section 7611(d) to be rebutted, the court in *Elisa B.* cited the presumed mother's procreative conduct and preconception intent: "[S]he actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother…."[199]

The reliance of the court in *Elisa B.* and *K.M.* on the reasoning of *Johnson* provides authority for application of that standard to establishing legal parentage based on intent for same-sex parents in future cases. A finding that same-sex parents are the intentional parents would not conflict with the principles and purpose of *Johnson,* so long as the parentage claims recognized are not mutually exclusive. Similar to the Calverts, a same-sex couple or unmarried heterosexual couple can be the intended parents, as there is no need to "break the tie" between two parents who intend to use reproductive technologies to create a family together. In fact, the policy preference in California is for two parents instead of one or three.[200]

Under *Elisa B., K.M.,* and *Kristine H.* the intent standard should apply to two parents regardless of their marital status, sexual orientation, or biological relationship to the child. Like the marital couple in *Johnson,* two same-sex parents can both be considered the legal parents based on their use of reproductive technologies to cause the birth of a child.

FAMILY CODE SECTION 7613(a)

Family Code section 7613(a) provides that a man who consents to his wife's insemination is the child's legal parent, even if he is not biologically related to the resulting child.[201] The statutory language in section 7613(a) refers only to married, different-sex couples. But under Family Code section 297.5(d), section 7613(a) applies to domestic partners effective January 1, 2005.[202]

In *Buzzanca,* the court construed Family Code section 7613(a) liberally to establish legal parentage in a husband and wife who consented to the insemination of another woman—a gestational surrogate. Both section 7613(a) and *Buzzanca* are grounded in the pre-UPA case of *Sorensen:* "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible."[203]

As in the situation covered by section 7613(a), *Sorensen* involved a married man who consented to the artificial insemination of his wife. To support the extension of the holding in *Sorensen* to unmarried persons, *Elisa B.* specifically cites that decision: "We observed that the 'intent of the Legislature obviously was to include every child, legitimate or illegitimate, born or unborn, and enforce the obligation of support against the person who could be determined to be the lawful parent.'"[204]

In determining that the presumption of Family Code section 7611(d) should not be rebutted based on evidence of Elisa's procreative conduct that caused the birth of the children, the court in *Elisa B.* quoted the reasoning of *Sorensen,* which is essentially the same as the

court's analysis of Family Code section 7613(a) in *Buzzanca:* "[A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood…. [I]t is safe to assume that without defendant's active participation and consent the child would not have been procreated."[205]

Likewise, the court concluded that Elisa B. "actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother…."[206] Similar to the analysis of *Elisa B.,* the *K.M.* court looked to the parties' procreative conduct to find that K.M. was not a donor under Family Code section 7613(b), finding instead that K.M. and E.G. "both intended to bring the child into their joint home."[207]

Although Family Code section 7613(a) does not specifically address the parental rights of a woman who consents to the insemination of another woman, the court in *Buzzanca* concluded that section 7613(a) applied to the wife because of her "acts which *caused the birth* of a child."[208] As noted by the court in *Elisa B.,* with respect to section 7613(a), *Buzzanca* holds that both husband and wife are equally situated.[209] According to *Buzzanca*'s statutory construction of section 7613(a) and a gender-neutral application of the UPA, as articulated by *Elisa B.,* it necessarily follows that section 7613(a) should apply to a woman who consents to the artificial insemination of her lesbian partner in the context of a committed relationship.

While *Elisa B.* did not establish legal parentage under Family Code section 7613(a), the court did cite to *Buzzanca* to support its determination that the UPA applied equally to men and women. *Elisa B.* summarized *Buzzanca* as follows: "[T]he declaration in section 7613 that a husband who consents to artificial insemination is 'treated in law' as the father of the child applies equally to the wife if a surrogate, rather than the wife, is artificially inseminated, making both the wife and the husband the parents of the child so produced."[210] Further, *Elisa B.* observed that the UPA was enacted to protect every child's relationship with his or her parents, regardless of the parents' marital status.[211] Indeed, the Legislature has declared that the parent-child relationship extends to every parent and child regardless of the parents' marital status.[212] *Elisa B.* also cites to *Dunkin v. Boskey,* a more recent appellate court case, which suggests that, if the issue had been presented, the court would have found that an *unmarried* man was the legal parent of a child born to his female partner based on his consent to her insemination and voluntary consequent assumption of parenting duties.[213]

Based on the reasoning of these decisions, *Elisa B., K.M.,* and *Kristine H.* provide authority for unmarried heterosexual parents or same-sex parents, who do not qualify for the protections of Family Code section 297.5(d), to establish legal parentage under section 7613(a) in future cases. In sum, section 7613(a) should be construed to hold that two people may establish parentage regardless of gender, sexual orientation, or marital status. Any other result would undermine the core purpose of the UPA and violate the most basic precepts of equal protection, which were unequivocally affirmed by the California Supreme Court in all three decisions.

CONCLUSION

The three recent California Supreme Court decisions have forever changed the legal landscape for same-sex parents and unmarried heterosexual parents and their children. Couples who are not registered domestic partners will continue to have children through artificial insemination, just as many unmarried heterosexual couples do.[214] These children will continue to exist, and their parentage must be resolved.[215] As noted by the court in *Buzzanca,* regardless of one's opinions regarding the creation of children and alternative families through reproductive technologies, "courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored."[216]

Elisa B., K.M., and *Kristine H.* uphold the proposition from *Johnson* that the UPA "applies to any parentage determination."[217] To treat the children born into families with same-sex parents equally, the California

Supreme Court has properly applied the express policies and fulfilled the fundamental purpose for which the UPA was enacted: to erode the stigma and prejudice by treating all children as "legitimate." And in these cases, that treatment has extended to legitimizing the same-sex parents of those children as well.

NOTES

1. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

2. K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

3. Kristine H. v. Lisa R., 113 P.3d 690 (Cal. 2005).

4. Citing the three California Supreme Court decisions, the Washington State Supreme Court, on November 3, 2005, determined that a lesbian partner of the birth mother could establish legal parentage based on a showing that she was a de facto parent. *See In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005).

5. Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction,* 5 UCLA Women's L.J. 329, 379–80 (1995).

6. Cal. Fam. Code §§ 7600–7730 (West 2005).

7. People v. Sorensen, 437 P.2d 495 (Cal. 1968).

8. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

9. *See* Harry G. Krause, Illegitimacy: Law and Social Policy 25–28 (Bobbs-Merrill 1971).

10. *See* Homer H. Clark, The Law of Domestic Relations in the United States 149–72 (Thomson-West 2d ed. 1988) (describing common-law rules and U.S. Supreme Court decisions on illegitimacy).

11. *See* Harry G. Krause et al., Family Law: Cases, Comments, and Questions 293 (Thomson-West 4th ed. 1998).

12. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972).

13. Stanley v. Illinois, 405 U.S. 645 (1972).

14. *Id.* at 658.

15. *See* Krause, *supra* note 9, at 64–74.

16. *See* Cal. Fam. Code §§ 7600–7730 (West 2005).

17. *See* Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).

18. *Id.* at 794 (Kennard, J., dissenting).

19. Krause, *supra* note 9, at 10–15; *see also* Cal. Fam. Code §§ 7601, 7602.

20. Cal. Fam. Code § 7601.

21. *Johnson,* 851 P.2d at 779.

22. *See* Cal. Fam. Code §§ 7601, 7610(a), 7650.

23. *See* Cal. Fam. Code §§ 7540, 7551, 7570, 7610, 7613.

24. *See* Cal. Fam. Code § 7613(a).

25. Cal. Fam. Code §§ 7570–7577.

26. Cal. Fam. Code §§ 7571, 7576.

27. *See generally* Krause, *supra* note 9.

28. *Id.* at 82.

29. *See generally* Krause, *supra* note 9.

30. *Id.*

31. *See, e.g.,* Cal. Fam. Code §§ 7540, 7611(a)–(c).

32. *Id.*

33. *See* Cal. Fam. Code §§ 7550–7558, 7635.5.

34. *See* Cal. Fam. Code §§ 7570–7577, 7644.

35. *See* Cal. Fam. Code § 7611(d).

36. *See* Cal. Fam. Code § 7541(b).

37. *See* Cal. Fam. Code §§ 7541, 7551; *see also* Miller v. Miller, 74 Cal. Rptr. 2d 797, 801 (Cal. Ct. App. 1998).

38. Cal. Fam. Code §§ 7570, 7601.

39. *See, e.g., In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 286–87 (Cal. Ct. App. 1998) (discussing a long line of cases assigning parental responsibility for support based on consent to artificial insemination rather than on biology).

40. *Id.;* County of Shasta v. Caruthers, 33 Cal. Rptr. 2d 18, 25 (Cal. Ct. App. 1995) ("California assigns to both the father and the mother of any child an equal and continuing responsibility to support their child").

41. *See* Cal. Fam. Code § 4053(a), (e).

42. *See* Cal. Fam. Code § 4053(f).

43. *See* Cal. Fam. Code § 4053(a).

44. *See* Cal. Fam. Code § 4055.

45. *In re* Marriage of Denise and Kevin C., 67 Cal. Rptr. 2d 508, 512 (Cal. Ct. App. 1997).

46. *In re* Marriage of Goodarzirad, 230 Cal. Rptr. 203, 208 (Cal. Ct. App. 1986).

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47. Cal. Fam. Code § 7614.

48. *See* Sharon S. v. Superior Court, 73 P.3d 554, 571 (Cal. 2003).

49. Troxel v. Granville, 530 U.S. 57 (2000).

50. *Id.* at 63.

51. Michael H. v. Gerald D., 491 U.S. 110 (1989).

52. *Id.* at 123.

53. *See, e.g., In re* Nicholas H., 46 P.3d 932 (Cal. 2002); *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002); *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003).

54. *Id.*

55. *See In re* Jesusa V., 85 P.3d 2, 14–15 (Cal. 2004); *Nicholas H.,* 46 P.3d at 937–38; *Salvador M.,* 4 Cal. Rptr. 3d at 708.

56. *See Nicholas H.,* 46 P.3d at 938.

57. That section presumes a man to be a child's natural father if "[h]e receives the child into his home and openly holds out the child as his natural child." Cal. Fam. Code § 7611(d).

58. *See Nicholas H.,* 46 P.3d at 935.

59. *Id.*

60. *Salvador M.,* 4 Cal. Rptr. 3d at 709.

61. *Salvador M.,* 4 Cal. Rptr. 3d at 708; *see also Jesusa V.,* 85 P.3d at 216 ("biological paternity by a competing presumed father does not necessarily defeat a non-biological father's presumption of paternity"); *Nicholas H.,* 46 P.3d at 937 (presumed parents have no burden to present evidence establishing a biological link to the child); Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1995) (familial relationship "is considerably more palpable than the biological relationship of actual paternity.")

62. *Salvador M.,* 4 Cal. Rptr. 3d at 708.

63. Janet L. Dolgin, Defining the Family: Law, Technology, and Reproduction in an Uneasy Age 34 (N.Y. Univ. Press 1997).

64. *See* Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law,* 23 Vt. L. Rev. 225, 236, 245 n.135 (1998).

65. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

66. *Id.* at 777–78.

67. *Id.* at 778.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 779.

72. *Id.*

73. *Id.*

74. *Id.* at 781.

75. *Id.* (The case refers to Civil Code section 7003, which became Family Code section 7610 when the Family Code became operative in 1994.)

76. *Id.*

77. *Id.* at 781 n.8, 782 n.9.

78. *Id.* at 781 n.8.

79. *Id.* at 782.

80. *Id.*

81. *Id.*

82. *Id.* at 786.

83. *Id.* at 786–87.

84. *Id.* at 781 n.8.

85. *See, e.g.,* Cal. Fam. Code §§ 7540, 7611, 7613(a) (West 2005).

86. See Michael H. v. Gerald D., 491 U.S. 110 (1989); Dawn D. v. Superior Court, 952 P.2d 1139 (Cal. 1998).

87. *Michael H.,* 491 U.S. at 111.

88. *Johnson,* 851 P.2d at 796 (Kennard, J., dissenting).

89. *Id.* at 782–83.

90. *Id.* at 783 (citation omitted).

91. Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood,* 33 Conn. L. Rev. 127, 130 (2000).

92. Adoption of Matthew B., 284 Cal. Rptr. 18 (Cal. Ct. App. 1991).

93. *Id.* at 21.

94. *Id.* at 25.

95. *Id.* (citations omitted).

96. *Johnson,* 851 P.2d at 783 (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood:*

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An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 309).

97. *Johnson,* 851 P.2d at 783 (citation omitted).

98. *Id.* (citation omitted).

99. Burchard v. Garay, 724 P.2d 486, 491 n.6 (Cal. 1986).

100. Cal. Fam. Code § 3020(a) (West 2005).

101. *Johnson,* 851 P.2d at 779.

102. *Id.* at 780.

103. Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World,* 20 J. Juv. L. 1, 17–18 (1999).

104. *Johnson,* 851 P.2d at 783; *see also In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

105. *See* Cal. Fam. Code § 7601.

106. *See Johnson,* 851 P.2d 776; Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003); *Buzzanca,* 72 Cal. Rptr. 2d 280; *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

107. *See Jhordan C.,* 224 Cal. Rptr. 530; *Johnson,* 851 P.2d 776; *Robert B.,* 135 Cal. Rptr. 2d 785.

108. *See Buzzanca,* 72 Cal. Rptr. 2d 280; *Robert B.,* 135 Cal. Rptr. 2d 785; *Moschetta,* 30 Cal. Rptr. 2d 893.

109. *Moschetta,* 30 Cal. Rptr. 2d 893.

110. *Id.* at 900.

111. *Id.*

112. *Id.*

113. *Id.* at 901.

114. *Id.* at 900.

115. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

116. *Id.*

117. *Id.* at 288 (emphasis added).

118. People v. Sorensen, 437 P.2d 495 (Cal. 1968).

119. *Id.* at 499.

120. *Id.*

121. *Buzzanca,* 72 Cal. Rptr. 2d at 284.

122. *Id.* at 282.

123. Cal. Fam. Code § 297.5(d) (West 2005).

124. *See also* Sharon S. v. Superior Court, 73 P.3d 554, 572 n.23 (Cal. 2003).

125. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).

126. *Id.*

127. *Id.* at 784.

128. *Id.* at 779.

129. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

130. *Id.* at 663.

131. *Id.*

132. *Id.*

133. *Id.* at 663–64.

134. *Id.* at 662–63.

135. *Id.* at 666.

136. *Id.*

137. *Id.* (citations omitted).

138. *See* West v. Superior Court, 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990).

139. *See, e.g., West,* 69 Cal. Rptr. 2d at 164 ("If the Legislature does not provide a person with standing to obtain parental rights, the courts must presume the Legislature is acting, or refusing to act, by virtue of its position as representatives of the will of the people").

140. *Nancy S.,* 279 Cal. Rptr. 212.

141. *Id.* at 219.

142. *Id.*

143. Elisa B. v. Superior Court, 117 P.3d 660, 671–72 (Cal. 2005).

144. *Id.* at 664.

145. *Id.*

146. *Id.* at 667.

147. *Id.* at 666–67.

148. *See In re* Nicholas H., 46 P.3d 932 (Cal. 2002); *In re* Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).

149. *Nicholas H.,* 46 P.3d at 938.

150. *Id.*

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151. *See also Karen C.,* 124 Cal. Rptr. 2d 677; *Nicholas H.,* 46 P.3d 932; *In re* Jesusa V., 85 P.3d 2 (Cal. 2004); Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535, (Cal. Ct. App. 1995); *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

152. *Elisa B.,* 117 P.3d at 669.

153. *Id.*

154. *Id.* at 668.

155. *Id.* at 669.

156. *Id.* at 670 (quoting amicus curiae the California State Association of Counties).

157. *Id.*

158. K.M. v. E.G., 117 P.3d 673, 675–77 (Cal. 2005).

159. *Id.* at 677.

160. *Id.* at 675.

161. *Id.* at 676.

162. *Id.* at 677.

163. *Id.* at 678.

164. *Id.* at 680–81.

165. *Id.* at 679.

166. *Id.* (citations omitted).

167. *Id.* at 682.

168. *See, e.g., In re* Marriage of Goodarzirad, 230 Cal. Rptr. 203 (Cal. Ct. App. 1986). In *Goodarzirad,* the biological father signed a stipulation in court whereby he waived "any and all rights to the care, custody and control of the minor child" in exchange for a waiver of all past-due and future child support. The court held that the stipulation was invalid as an unlawful abridgment of the court's inherent power to oversee contracts involving children to ensure that the children's welfare is protected. *Id.* at 206–09.

169. *See, e.g., In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998). In *Buzzanca,* Mr. Buzzanca asserted that he would "offer testimony to the effect that [his wife] told him that she would assume all responsibility for the care of any child born" and that she had promised not to hold him responsible for the child. In rejecting Mr. Buzzanca's claim that he should not be held to be a legal parent based on this understanding, the appellate court explained, "[I]t could make no difference as to [Mr. Buzzanca's] lawful paternity." *Id.*

170. *Id.*

171. *See* Cal. Fam. Code § 7613(b) (West 2005).

172. *In re* R.C., 775 P.2d 27 (Colo. 1989).

173. K.M. v. E.G., 117 P.3d 673, 680 (Cal. 2005).

174. *See* Adoption of Matthew B., 284 Cal. Rptr. 18 (Cal. Ct. App. 1991); *see also* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003).

175. *See, e.g., Robert B.,* 135 Cal. Rptr. 2d 785; *Matthew B.,* 284 Cal. Rptr. 18; Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

176. *Robert B.,* 135 Cal. Rptr. 2d at 785–86.

177. *Id.* at 787 (citations omitted).

178. *Jhordan C.,* 224 Cal. Rptr. at 531. (The case refers to Civil Code section 7005, which became Family Code section 7613 when the Family Code became operative in 1994.)

179. *Id.* at 532.

180. *Id.*

181. *Id.* at 534.

182. *Id.* at 532, 535.

183. K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005).

184. *See, e.g., Jhordan C.,* 224 Cal. Rptr. at 536.

185. *K.M.,* 117 P.3d at 680.

186. *Id.* at 681.

187. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Cal. Ct. App. 1994).

188. Kristine H. v. Lisa R., 113 P.3d 690, 691 (Cal. 2005).

189. *Id.*

190. *Id.* at 692.

191. *Id.*

192. *Id.*

193. *Id.* at 693.

194. *Id.* at 696.

195. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

196. *Johnson,* 851 P.2d at 782; K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005); Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005); *Kristine H.,* 113 P.3d at 691.

197. *K.M.,* 117 P.3d at 679.

198. *Id.*

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199. *Elisa B.,* 117 P.3d at 670.

200. *Johnson,* 851 P.2d at 781.

201. Cal. Fam. Code § 7613(a) (West 2005).

202. Cal. Fam. Code § 297.5(d).

203. People v. Sorensen, 437 P.2d 495, 499 (Cal. 1968).

204. *Elisa B.,* 117 P.3d at 670 (citation omitted).

205. *Id.* (citation omitted).

206. *Id.*

207. K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005).

208. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 289 (Cal. Ct. App. 1998).

209. *Elisa B.,* 117 P.3d at 667 (citation omitted).

210. *Id.*

211. *Id.* at 664.

212. Cal. Fam. Code § 7602 (West 2005).

213. Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 55 (2000).

214. *See id.* (litigation regarding child born through assisted reproduction to an unmarried heterosexual couple); *see also In re* Parentage of M.J., 787 N.E.2d 144 (Ill. 2003).

215. *See, e.g., In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998).

216. *Id.*

217. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).

PERSPECTIVES

Illustration, page 161:

"The River of Life"

Banessa

Age 18

2004 Children's Art & Poetry Contest

An Open Letter to the California Judiciary

Administration of Justice in Domestic Violence Cases

Hon. Laurence D. Kay (Ret.)
Court of Appeal, First Appellate District, Division Four

Why send a message to the California judiciary about domestic violence when it is neither a new problem nor one unfamiliar to the court system?

On September 6, 2005, Chief Justice Ronald M. George said farewell to me as the retiring chair of the Judicial Council Rules and Projects Committee and asked me to chair the newly formed Judicial Council Domestic Violence Practice and Procedure Task Force. Charged with making recommendations to the Judicial Council, the task force will submit proposals that help to ensure the fair, expeditious, and accessible administration of justice for litigants in domestic violence cases.[1] In my view, administering domestic violence cases should be the court system's highest priority. I know that it is mine.

I accepted the appointment with enthusiasm. The Chief has a long arm and, apparently, an even longer memory. In 1989, I served as a member of the planning committee for the first judicial education institute on criminal domestic violence, entitled "Domestic Violence: The Crucial Role of the Criminal Court Judge,"[2] and later served as faculty for a similar program conducted in 1990.[3] Nothing in the ensuing 15 years has changed my view that domestic violence cases require not only extraordinary care but also the essential presence of judicial leadership, on the part of both individual jurists and the judiciary collectively.

DOMESTIC VIOLENCE CASES REQUIRE NOT ONLY EXTRAORDINARY CARE BUT ALSO THE ESSENTIAL PRESENCE OF JUDICIAL LEADERSHIP, ON THE PART OF BOTH INDIVIDUAL JURISTS AND THE JUDICIARY COLLECTIVELY.

Regrettably, in 2005, many of the same issues that confronted me in 1989 are still true—the need for judicial leadership, the importance of compliance with statutory and other mandates, the need to develop best practices, and the importance of judicial branch education, to name just a few. I hope that the newly formed task force will not only implement significant gains in improving court practice and procedure but will also institutionalize those gains and develop a mechanism for monitoring, revising, and maintaining best practices. It is my further hope that 15 years from now another task force chair will not be pondering why we have not made more progress in the way we handle these extraordinarily important cases.

For the same reasons—the request of our Chief Justice and the importance of the subject—I ask each of you to take immediate steps in your courtrooms and in your courts as a whole to ensure that we are truly doing the best we can in these critical cases. I ask each of you to provide the task force with your comments, suggestions, ideas, and energy. And, finally, I ask each of you to indulge me while I summarize some of my own ideas about domestic violence cases—what makes them different, and what we can do together to truly work justice in these cases that tear at the fabric of our families and our communities.

WHAT IS DIFFERENT ABOUT DOMESTIC VIOLENCE CASES?

Domestic violence is the crime that tears families apart.[4] An act of domestic violence can be alleged in the context of cases filed in virtually every department of the court, from criminal to family to juvenile law. Some of these cases, deemed "cross-over" cases, involve multiple filings in one or more departments involving the same parties or family. In the case of elder victims, domestic violence may be a part of elder abuse or conservatorship proceedings in probate court. Domestic violence may form the basis for a claim of damages in a personal injury action filed in the general civil department. Indeed, the National Center for State Courts reports that during the last 10 years the number of domestic violence cases in state courts increased by 77 percent.[5] In short, domestic violence affects all of us and in the most pervasive ways.

Behavior defined as domestic violence is a health risk, it affects children, it often constitutes criminal conduct, and it can be lethal. Statistics recently reported by the Office of the California Attorney General[6] make these observations clear:

- A study by the California Department of Health Services on women's health issues found that nearly 6 percent of women, or about 622,000 women per year, experienced violence or physical abuse by their intimate partners.
- Women living in households where children were present experienced domestic violence at much higher rates than women living in households without children: each year domestic violence occurred in more than 436,000 households in which children were present, potentially exposing nearly a million children to violence in the home.
- In 2003, 48,854 arrests were made for domestic violence; 80 percent of those arrested were men. Of 194,288 telephone calls made to police for assistance in a domestic violence incident, 106,731 involved a weapon.
- In 2003, almost 25 percent of female homicide victims were killed by their spouses. In contrast, less than 1.5 percent of male victims were killed by their spouses.[7]

Most important, whether the court system is confronted with violent behavior in a criminal or civil context, domestic violence is an act that is perpetrated by one person

against another with whom the perpetrator has a relationship.[8] The two individuals involved may love each other; they may even have a child together. And since we all are the product of relationships, we have feelings about these cases—feelings about how people should treat each other and about how they should act within a relationship or a family. The prevalence of domestic violence means that, although we may not see it, it is all around us—in our families, in our neighborhoods, in our schools, in our places of work. We are all too aware that these cases can be extremely difficult, particularly when the victim recants or other problems of proof arise. But to the extent that we fail to do everything possible to treat domestic violence cases as a continuing and serious public safety risk both for victims and for their children, we are letting down these victims as well as our society. Children exposed to domestic violence in the home may be irrevocably damaged by that trauma or, on the other hand, may suffer greatly as a result of the absence of a parent, whether the father or the mother, in the aftermath of that abuse. The fact is that domestic violence remains an act that is most frequently perpetrated by a man against a woman—a fact that touches on all our cultural, historical, and emotional notions about the role of gender in our culture. As a result of these complexities, many judges find it infinitely more difficult to adjudicate domestic violence cases than other matters—whatever the legal standard may be—in a neutral and dispassionate way. And this is a task that I, along with each of you, have taken an oath to perform.

THE PREVALENCE OF DOMESTIC VIOLENCE MEANS THAT, ALTHOUGH WE MAY NOT SEE IT, IT IS ALL AROUND US—IN OUR FAMILIES, IN OUR NEIGHBORHOODS, IN OUR SCHOOLS, IN OUR PLACES OF WORK.

WHAT CAN GO AWRY IN DOMESTIC VIOLENCE CASES?

In December 2003, the Attorney General of California, Bill Lockyer, formed his own task force, in some ways similar to the one I now chair, to look at the local criminal justice response to domestic violence cases. This precursor task force, chaired by Casey Gwinn, former City Attorney of the City of San Diego, examined three issues that relate directly to the courts' work: obtaining and enforcing restraining orders, adjudicating misdemeanor domestic violence cases, and holding batterers accountable.[9] The Attorney General's task force report contained bad news about the criminal justice system—bad news that none of us wanted to hear. It did not break new ground or suggest radical reform. Rather, the report succinctly stated that in various ways many criminal justice agencies and, indeed, even the courts were not complying with the clear, unambiguous mandates contained in the law. Not surprisingly, the bulk of the report's recommendations urged renewed vigilance in complying with existing statutory and other mandates on the part of all aspects of the criminal justice system, including the courts.[10] Consider the following elementary proposals, to cite just a few examples culled from the Attorney General's task force report:

- Issue a criminal protective order when it is required by law.[11]
- Do not strike firearms restrictions that are mandated by both state and federal law.[12]
- Order batterers' intervention when it is required by law.[13]

- Order mandatory terms and conditions required by law, such as a three-year probationary term, a criminal protective order, and an order to attend a 52-week batterers' intervention program.[14]
- Enter all restraining orders and protective orders promptly and accurately into the criminal justice databases, as required by law.[15]
- Make emergency protective orders readily accessible to victims in appropriate cases, as required by law.[16]

THE REALITY OF ADJUDICATING ISSUES OF DOMESTIC VIOLENCE IS DAUNTING.

Ensuring the fair, expeditious, and accessible administration of justice for litigants in domestic violence cases—the job the Chief Justice would have our task force perform—requires much more than strict adherence to statutory and other mandates. I submit to you that it requires finely tuned systems that provide the necessary information, resources, staff, and time to the individual judicial officers who make the decisions that provide for victim safety, batterer accountability, and due process for all parties. This means that computers must talk to each other. It means that judges must have access to information. And it means that judges must be able to respond effectively to the differing needs of each individual case. The cornerstones of such a system are (1) the appropriate allocation of or increase in resources, including education and technology; (2) communication within the court and feedback from justice system partners and the public; (3) judicial and court leadership; and (4) accountability that includes ongoing assessment and monitoring of court performance.[17]

WHAT DO WE NEED TO DO THIS JOB?

The reality of adjudicating issues of domestic violence is daunting. Criminal cases are docketed on immensely busy misdemeanor calendars. Probation officers, as a direct result of dwindling resources (coupled with extraordinary caseloads), may be unable to perform supervision, monitoring, or certification of batterers' intervention programs to the extent necessary. Beleaguered family law judges decide the best interest of children exposed to domestic violence on "order-to-show-cause" calendars that tax even the most expert jurist's stamina.

And the judges who handle these calendars need vital information. They ask themselves a myriad of questions: Has the person before me been the restrained party on a prior occasion? in this court? in another county? Since I am a criminal law judge issuing a criminal protective order that orders a perpetrator to stay away from his or her children, is there perhaps another conflicting order issued by a family law judge out there somewhere? Can I order this person to stay away from his or her children? Was supervised visitation ever ordered? Did this person attend the batterers' intervention program as ordered, and does it seem to have done any good? Does this person have children? Does this person understand English, or is an interpreter available? Has this person had the benefit of legal services? Do I have

culturally competent services available to help this family? The list of questions goes on and on and, regrettably, on.

To help us get this vital information and to help us make a fair, impartial, and responsible judgment in the case, we need adequate time, staff, technology, and services.

Adequate resources will go a long way to assisting judges, but judges also need education. They need continuing, adequate, useful education as well as bench tools to help them do this difficult job. Fortunately, the education is available. The Administrative Office of the Courts (AOC) operates a grant-funded project that provides education on domestic violence, stalking, and sexual assault to California's judicial officers. The project provides statewide, regional, and local live programs; distance learning opportunities; and publications. The education available needs to be expanded, and judges need to use it.[18]

HOW CAN WE REACH OUT TO JUSTICE SYSTEM PARTNERS AND TO THE COMMUNITY?

In 1992, in a groundbreaking article, Judge Leonard P. Edwards of the Superior Court of Santa Clara County called for the creation of family violence councils as an effective means to foster a coordinated justice system response to domestic violence and to help decrease the incidence of that violence. In concluding his article, Judge Edwards stated:

> In order to deal effectively with the problem of family violence, a comprehensive change in the entire system which detects, investigates, prosecutes, and monitors family violence cases will be necessary. That change can be best accomplished through the workings of a family violence council.[19]

Judge Edwards's article followed a national conference and a California conference, both of which focused on creation of a coordinated response throughout the nation and urged each state and ultimately each California county to form family violence councils. A primary and important goal of such councils in California has been to provide a feedback loop between the courts and the other parts of the justice system as well as the public about practice and procedure in domestic violence cases. The beauty of this strategy is that it posed systemic remedies for what were, in fact, systemic problems. As a rule, judges and courts are isolated. They have few mechanisms, outside of an individual case, for discussion about policies, practices, and procedures that affect litigants generally. Family violence councils can provide this essential tool.

Yet now, 13 years later, we are unsure about the status of family violence councils across California. In some counties they remain vibrant and viable, but in others they have disbanded or strayed into activities that have made it ethically questionable for judges to continue to participate.

Community outreach and feedback are important judicial functions. They are not only ethically permissible; they are encouraged in the California Rules of Court and Standards of Judicial Administration.[20] By contrast, judges must be sure that the domestic violence councils do not involve them in impermissible activities. Such activities might include lobbying for substantive changes in the law not strictly related to practice and procedure, using the judicial office to raise funds for domestic violence causes, or speaking with council members about pending cases. To avoid an appearance of impropriety, councils must be inclusive, and all justice system partners must be entitled to and encouraged to participate.

THE NEED FOR EDUCATION IS CRITICAL FOR JUDGES WHO HEAR DOMESTIC VIOLENCE CASES REGULARLY, AND IT IS ARGUABLY EVEN MORE COMPELLING FOR JUDGES WHO HEAR THEM OCCASIONALLY.

The new Domestic Violence Practice and Procedure Task Force will actively endeavor to foster and renew the development of domestic violence councils or similar mechanisms to promote feedback from community to court in each county. We anticipate sponsoring regional conferences to discuss ways to improve court communication with our justice system partners and to review progress in remedying the problems identified to date.

HOW CAN WE MAKE THE COURT SYSTEM ACCOUNTABLE AND INSTITUTIONALIZE RECOMMENDED CHANGES?

California operates one of the largest and most complex court systems in the world. Its judges are assigned to hear matters involving domestic violence for often a brief period, and then they move on to another assignment. With a preference for generalists, our system necessarily struggles with the task of institutionalizing excellence and creating best practices that work in many different legal cultures and geographic locations. Judges must diligently avail themselves of opportunities for education on the topic of domestic violence and ensure that, as the law changes, they keep abreast of all new requirements. The need for education is critical for judges who hear domestic violence cases regularly, and it is arguably even more compelling for judges who hear them occasionally. Each judge must ensure that community justice partners have an opportunity to provide the court with feedback—not about individual cases, but rather about recommended practices and procedures that foster fairness, efficiency, and access to justice—and, in contrast, to call to the court's attention practices and procedures that operate as barriers. Finally, when other agencies within the justice system fail to carry out their clear responsibilities, it is the duty of the court to require and encourage improvement on the part of those agencies. Judicial leadership in this critical arena must be the catalyst for change.

We need methods to ensure accountability and review performance in order to maintain the quality of justice in our courts. This is most apparent when we look at the problems recently revealed in administering justice in domestic violence cases. Creation of the Judicial Council's domestic violence task force provides us with a vehicle to account for our performance as an institution in these vital cases.

The AOC has also launched a project—the Domestic Violence Safety Partnership project (DVSP)—that provides new tools on a local level. DVSP has distributed checklists to the courts that help them assess and monitor compliance with mandates and recommended safety measures in domestic violence cases. The self-assessment tools relate primarily to restraining orders and protocols for family court services. These tools are available and can be used voluntarily to identify problem areas. The AOC also can provide technical assistance or local training. In one small rural county, the presiding judge adopted an innovative approach. He shared the self-assessment tool with community and justice-system partners and asked them to help the court assess its performance. This project can be expanded to other areas relating to domestic violence. Other ideas about monitoring progress should be developed and implemented as well.

WHAT WILL THE NEW TASK FORCE DO?

At its first organizational meeting, the task force that I chair assigned committees to tackle at least the following projects over the next two years:

- the development of best practices in cases involving domestic violence allegations
- the improved handling of restraining orders to ensure prompt and accurate entry of these orders into relevant statewide electronic databases
- participation in the revision and creation of needed (and more easily understandable) Judicial Council forms relating to domestic violence
- improvement of communication between courts and community and justice-system partners about practice and procedure in domestic violence cases
- expansion of judicial branch education on domestic violence issues

As you can see, we have our work cut out for us. I hope you agree with me that there is an urgent need to address these challenges. I hope you will also agree that with this task force comes an exciting opportunity to make a real difference in the way California's courts respond to domestic violence. Thank you for considering my ideas and suggestions. We need your help.

NOTES

1. See Appendix A for a roster of members of the Judicial Council Domestic Violence Practice and Procedure Task Force.

2. Ctr. for Judicial Educ. & Research, Judicial Council of Cal., Domestic Violence: The Crucial Role of the Criminal Court Judge (Sept. 15, 1989) (unpublished conference materials on file with the *Journal of the Center for Families, Children & the Courts*).

3. Ctr. for Judicial Educ. & Research, Judicial Council of Cal., Domestic Violence: The Crucial Role of the Criminal Court Judge (Aug. 24, 1990) (unpublished conference materials on file with the *Journal of the Center for Families, Children & the Courts*).

NOTES

4. Videotape: Domestic Violence: The Crime That Tears Families Apart (Admin. Office of the Cts., Judicial Council of Cal., 1988) (on file with the *Journal of the Center for Families, Children & the Courts*).

5. Conference of State Court Admin'rs, Position Paper on Safety and Accountability: State Courts and Domestic Violence 3 (Nov. 2004) (on file with the *Journal of the Center for Families, Children & the Courts*).

6. TASK FORCE ON LOCAL CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE, OFFICE OF THE ATTORNEY GEN. OF CAL., KEEPING THE PROMISE: VICTIM SAFETY AND BATTERER ACCOUNTABILITY: REPORT TO THE CALIFORNIA ATTORNEY GENERAL FROM THE TASK FORCE ON LOCAL CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE 11–12 (June 2005) [hereinafter KEEPING THE PROMISE].

7. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEP'T OF JUSTICE, HOMICIDE IN CALIFORNIA (2003), *available at* http://ag.ca.gov/cjsc/publications/homicide/hm03/preface.pdf.

8. *See* CAL. PENAL CODE § 13700 (West 2005); CAL. FAM. CODE § 6203 (West 2005).

9. The Attorney General's task force also looked at the issue of law enforcement's response to health practitioner reports of domestic violence, but this issue did not generate recommendations relating to the courts.

10. See Appendix B for a summary of the findings and recommendations relating to the courts.

11. *See* CAL. PENAL CODE § 1203.097; KEEPING THE PROMISE, *supra* note 6, at 24.

12. *See* CAL. FAM. CODE § 6389(a); CAL. PENAL CODE § 12021(g); 18 U.S.C. § 922(g)(8) (2000 & Supp. 2005); KEEPING THE PROMISE, *supra* note 6, at 35.

13. *See* CAL. PENAL CODE § 1203.097 (West 2005); KEEPING THE PROMISE, *supra* note 6, at 54.

14. *See* CAL. PENAL CODE § 1203.097; KEEPING THE PROMISE, *supra* note 6, at 54.

15. *See* CAL. FAM. CODE § 6380(a), (b); Act of Oct. 7, 2005, ch. 631, 2005 Cal. Stat. {___}, *available at* www.leginfo.ca.gov/pub/bill/sen/sb_0701-0750/sb_720_bill_20051007_chaptered.pdf; KEEPING THE PROMISE, *supra* note 6, at 21–35.

16. *See* CAL. FAM. CODE § 6250(a); KEEPING THE PROMISE, *supra* note 6, at 28–29.

17. For a comprehensive discussion of these and other factors, see EMILY SACK, FAMILY VIOLENCE PREVENTION FUND & STATE JUSTICE INST., CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES (May 2002).

18. Judicial branch education is provided by the Administrative Office of the Courts' Violence Against Women Education Project and the Center for Judicial Education and Research. For information, see VIOLENCE AGAINST WOMEN EDUCATION PROJECT, JUDICIAL COUNCIL OF CAL., FACT SHEET (Jan. 2005), *available at* www.courtinfo.ca.gov/programs/cfcc/programs/description/VAWEP.htm.

19. Leonard P. Edwards, *Reducing Family Violence: The Role of the Family Violence Council,* 43 JUV. & FAM. CT. J. 1–17 (1992).

20. CAL. R. CT. 227.8; CAL. STDS. JUD. ADMIN. §§ 24, 39 (West 2005).

Appendix A

APPENDIX

DOMESTIC VIOLENCE PRACTICE AND PROCEDURE TASK FORCE

HON. LAURENCE DONALD KAY (RET.), CHAIR
Presiding Justice of the Court of Appeal, First Appellate District, Division Four

HON. TANI GORRE CANTIL-SAKAUYE
Associate Justice of the Court of Appeal, Third Appellate District

HON. DEBORAH B. ANDREWS
Judge of the Superior Court of California, County of Los Angeles

HON. JERILYN L. BORACK
Judge of the Superior Court of California, County of Sacramento

HON. JEFFREY S. BOSTWICK
Judge of the Superior Court of California, County of San Diego

HON. SHARON A. CHATMAN
Judge of the Superior Court of California, County of Santa Clara

HON. MARY ANN GRILLI
Judge of the Superior Court of California, County of Santa Clara

MS. TRESSA S. KENTNER
Executive Officer, Superior Court of California, County of San Bernardino

HON. JEAN PFEIFFER LEONARD
Judge of the Superior Court of California, County of Riverside

HON. WILLIAM A. MACLAUGHLIN
Presiding Judge of the Superior Court of California, County of Los Angeles

HON. GEORGE A. MIRAM
Presiding Judge of the Superior Court of California, County of San Mateo

MR. JAMES B. PERRY
Executive Officer, Superior Court of California, County of Yolo

HON. REBECCA S. RILEY
Judge of the Superior Court of California, County of Ventura

MR. ALAN SLATER
Chief Executive Officer, Superior Court of California, County of Orange

HON. DEAN STOUT
Presiding Judge of the Superior Court of California, County of Inyo

APPENDIX

Appendix B

TASK FORCE ON LOCAL CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE

Abridged Summary of Minimum Standards and Recommendations: What Courts Can Do

Source: Abridged and reprinted, with minor changes, with permission from TASK FORCE ON LOCAL CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE, OFFICE OF THE ATTORNEY GEN. OF CAL., KEEPING THE PROMISE: VICTIM SAFETY AND BATTERER ACCOUNTABILITY: REPORT TO THE CALIFORNIA ATTORNEY GENERAL FROM THE TASK FORCE ON LOCAL CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE 89–92 (June 2005).

Obtaining and Enforcing Restraining Orders

- Criminal courts must impose criminal protective orders and require completion of 52-week batterers' intervention programs when sentencing batterers to probation.
- All criminal protective orders must prohibit firearm possession.
- Task force–sponsored Assembly Bill 1288 (Chu), if enacted, will authorize the courts to prohibit firearm possession without having to order that the batterer and victim have no contact or peaceful contact. Prosecutors should move for firearm prohibitions at arraignment in all domestic violence cases.
- Criminal courts must ensure that criminal protective orders are entered into the Domestic Violence Restraining Order System within one business day.
- Family courts must ensure that domestic violence restraining orders are entered into the Domestic Violence Restraining Order System within one day if task force–sponsored Senate Bill 720 (Kuehl) is enacted.
- Courts should maximize the availability of emergency protective orders.
- Family courts and law enforcement should stop requiring domestic violence victims to carry restraining orders to the agency that will enter the orders into the Domestic Violence Restraining Order System.
- Family courts and law enforcement should stop requiring domestic violence victims to carry restraining orders to all law enforcement agencies that may have to enforce the order.
- The many problem practices identified by the task force can be mitigated or eliminated only through the close collaboration of multiple agencies. The leaders of the local agencies must convene on a regular basis to identify and address these problems.

APPENDIX

Prosecuting Domestic Violence Misdemeanors

- Misdemeanor courts should not take guilty pleas and sentence defendants charged with domestic violence unless a prosecutor is present.
- Courts should not accept plea agreements that allow batterers to avoid what is mandatory: 52-week batterers' intervention programs and three-year probationary terms.

Holding Batterers Accountable

- Courts and probation departments in each county should develop procedures for measuring and evaluating batterers' program enrollment rates, completion rates, recidivism rates, reasons for noncompletion, and judicial responses to noncompliance.
- Courts, probation departments, and prosecutors in each county should adopt a strategy that puts batterers on personal notice of the specific consequences of absences from programs and that follows up any unexcused absence with immediate arrest and sanctions.
- The Administrative Office of the Courts should develop a form that would be used in every criminal court to record the benchmarks of a batterer's performance on probation while in a batterers' intervention program: progress, noncompliance, terminations, sanctions, and completions.
- The Administrative Office of the Courts should incorporate, within its new statewide Criminal Case Management System, fields that capture all pertinent data on batterers on probation.

Enhancing System's Capacity

- Criminal justice agencies cannot collaborate effectively without judicial leadership. Courts are obligated to exercise such leadership and can do so without violating ethical requirements.
- Domestic violence courts should be studied and expanded, as they hold great promise for addressing the many and complex problems of domestic violence.

Engaging Men and Boys in Domestic Violence Prevention Strategies

An Invitation to the Courts

Hon. Ronald Adrine
Cleveland (Ohio) Municipal Court

Michael W. Runner
Family Violence Prevention Fund (San Francisco)

Despite the successes of intervention efforts in reaching and assisting battered women, domestic violence continues to be entrenched in society. A growing number of policymakers and advocates, in consideration of the long-term social and human costs of domestic violence, are exploring strategies to prevent violence before it occurs. This article discusses the prevention of domestic violence, focusing in particular on efforts to engage men and boys in prevention strategies. It briefly discusses prevention and how it contrasts with traditional intervention, describes early public awareness and prevention strategies, reviews research on men's attitudes toward domestic violence, and summarizes some recent examples

Continued on page 176

In California as well as nationwide, thousands of judges, court staff, attorneys, domestic violence advocates, law enforcement personnel, and other professionals engage daily in the battle to intervene after domestic violence, helping to protect the victims and their children, to hold perpetrators accountable, and to prevent future incidents of abuse. Many of these professionals benefit from superb credentials, improved legal tools, and ongoing, practical training about this complex, widespread social problem. Will this vast justice system response someday bring an end to domestic violence? If society continues to focus vast resources exclusively on intervention measures, widespread prevention of domestic violence before it occurs becomes unlikely.

This article will discuss the prevention of domestic violence, focusing in particular on efforts to engage men and boys in prevention strategies. It will briefly discuss prevention and how it contrasts with traditional intervention, describe early public awareness and prevention strategies, review research on men's attitudes toward domestic violence, and summarize some recent examples of research-based initiatives to engage men and boys in domestic violence prevention. The article will also suggest a potential process for analysis of future court policy and program design with respect to prevention.

The article does not focus on judges' prevention efforts performed outside of the court; many of these creative endeavors demonstrate individual judges' dedicated leadership to stop domestic violence in the community. Rather, this article suggests a process for determining appropriate prevention measures to incorporate in the daily work of judges and court staff. While intervention must continue until every victim of domestic violence achieves safety and receives services, the courts also must put significant effort into collaboration with broad segments of their communities to prevent domestic violence before it occurs.

TRADITIONAL INTERVENTION RESPONSES TO DOMESTIC VIOLENCE

During the past 25 years, the movement to end domestic violence in the United States has achieved tremendous successes in assisting some victims

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of research-based initiatives to engage men and boys. It also suggests a potential process for analysis of future court policy and program design with respect to prevention. ■

to secure safety and access services, classifying domestic violence as a serious crime and imposing criminal sanctions on persons who use violence in intimate relationships, making social service institutions more responsive, and creating public awareness. Specific strategies to end domestic violence have concentrated on responding to the immediate needs of battered women and their children; raising public awareness about domestic violence as a crime; bolstering criminal sanctions against perpetrators; developing batterers' intervention programs; and coordinating communities' responses through the collaboration of advocacy programs, justice systems, and social services.

Public policy has directed most resources to address domestic violence and sexual assault toward criminal justice responses and social services for abused women and their children. Thus, in many communities, through the Violence Against Women Act,[1] federal funds support shelters for battered women; counseling and other services for violence survivors, rape victims, and their children; and specialized domestic violence courts or court dockets to increase safety for victims and accountability for perpetrators. These traditional responses that focus on intervening in domestic violence and sexual assault are critical. Intervention activities must continue to be provided and improved, regardless of any initiatives developed to prevent violence before it occurs.

EXTENT OF THE COURTS' WORK INVOLVING DOMESTIC VIOLENCE

Much of the courts' existing work involves issues of domestic violence directly or indirectly. Consider the following statistics:

- In 2002, according to the Bureau of Justice Statistics, 1,455 people were killed by an intimate partner, representing almost 16 percent of all murders.[2]
- Between 1998 and 2002, females were 84 percent of spousal abuse victims and 86 percent of victims of abuse by a boyfriend or girlfriend.[3]
- Of 85,505 convicted violent offenders confined in a local jail in 2002, 30 percent had victimized an intimate partner.[4]
- The American Psychological Association has found that 40 to 60 percent of the men who abuse their wives also abuse their children.[5]
- In homes where partner abuse occurs, children are 1,500 times more likely to be abused.[6]
- Fathers who batter mothers are twice as likely to seek sole physical custody of their children as are nonviolent fathers.[7]

Although many victims of domestic violence do not access the court system, these statistics alone indicate potential court entry points where the judiciary finds itself grappling with domestic violence issues: criminal court, juvenile court, and family law court. Other entry points might be probate court if a matter involves an elder victim of domestic violence or a guardianship proceeding for a minor, or a court's self-help center when a party does not have an attorney. In fact, the issue of domestic violence is endemic to the court system, giving every judicial officer a reason to care about it.

PROMISING VIOLENCE PREVENTION STRATEGIES

Despite the successes of intervention efforts in reaching and assisting battered women, domestic violence continues to be entrenched in society. As work to end domestic violence evolves, much of what was called "prevention" just a few years ago would now be characterized as intervention or some combination of the two. Traditional responses to domestic violence included services to battered women and intervention by the justice system in selected cases, as well as elements of prevention such as media watches and educational programming created primarily by advocates for battered women. During the past 10 years, domestic violence cases involving high-profile persons and public education campaigns have dramatically raised awareness about the issue. Consequently, in a groundbreaking 2001 survey of over 3,300 American women, 92 percent of the respondents identified the reduction of domestic violence and sexual assault as the top priority of future focus for the women's movement.[8] Additional research reveals that the majority of the American public as a whole recognizes domestic violence as a serious problem.[9]

A growing number of policymakers and advocates, in consideration of the long-term social and human costs of domestic violence, are exploring strategies to prevent violence before it occurs. These strategies, which emphasize prevention and the changing of social norms, must target teens, young parents, and their children; violence perpetrators; and men generally. Research and programs, for example, are focusing on interventions with vulnerable children and youth, as well as on universal supports for young families, as strategies to prevent violence against women in adulthood. The following are examples:

- **Treating children exposed to violence at home.** This strategy, which uses intervention to achieve prevention, focuses on mental health support for children exposed to violence as well as strengthening of protective factors in the children's environment through work with parents. Project examples include Chicago's Child-Parent Centers, Early Head Start, and hospital-based programs in Boston and San Francisco.[10]
- **Providing supports for young and vulnerable parents.** Young parents could benefit from the inclusion of violence prevention services in a range of in-home and center-based parenting support programs. Nurse home visitation programs, for

example, have shown very promising results from working with first-time parents, many of them teenagers or young persons with multiple challenges.[11]

- **Strengthening of mentoring, parenting education, and other violence prevention strategies in programs for vulnerable youth.** Well-designed, ongoing mentoring and role-modeling programs can help young persons improve social interactions and develop healthy relationships. Promising programs include Big Brothers Big Sisters, Safe Dates, and Expect Respect: A School-Based Program Promoting Safe and Healthy Relationships for Youth.[12]

- **Incorporating violence prevention services in reentry programs for youth aged 14–24 who leave detention in the juvenile justice system or incarceration in a federal or state prison or local jail.** Mentoring, positive parenting, and violence prevention programs can help juveniles released from detention and prisoners returning from incarceration reunite with their families, lower the risk of harm to family members, and reduce the possibility of future arrest. Examples include La Bodega de la Familia (Family Justice, Inc.), a New York City program that focuses in part on recovering drug abusers returning from prison.[13]

- **Public education and leadership programs targeting men, teens, and children.** Public awareness and education campaigns can promote positive norms of behavior for teen relationships, engage men and boys in recognizing opportunities to connect positively and nonviolently with children and other young persons, and support young parents in their child-rearing roles.

The courts have contact with many persons targeted by these prevention strategies. In addition, the courts serve as resource referral points for connecting many of these programs with persons who would likely benefit. Therefore, the courts appear to be in an ideal position to participate in some of promising prevention practices and to develop additional strategies that can engage court system professionals in universal prevention measures without compromising the fairness and impartiality demanded by codes of ethics and expected by the public.

RESEARCH ON MEN'S ATTITUDES TO VIOLENCE

Traditionally, men have not been a major part of any popular effort to address domestic violence, despite important work in selected programs to redefine masculinity and to confront social norms that favor men over women. In fact, for many years in the context of domestic violence, men were mentioned almost exclusively as perpetrators of abuse or tacit supporters of systems that perpetuate violence. Work that focused primarily on services to victims and on criminal responsibility for violent men created at best an unwelcoming tone for engaging men. Thus, nonviolent men who might want to make a difference on these issues, other than men working in related social justice or academic areas, found it difficult to locate entry points for involvement.

During the past few years a shift to a more welcoming tone has created new opportunities for engaging large numbers of nonviolent men in domestic violence prevention in normal activities of their lives. National public opinion research conducted in 2000 provided valuable insight about men's attitudes concerning domestic violence and actions in which men were willing to engage regarding this issue. The

THE VALUE OF PUBLIC OPINION RESEARCH IN DEVELOPING A PUBLIC EDUCATION CAMPAIGN

Public opinion research is enormously important, if not critical, for the success of any public awareness or education campaign, particularly when the objective is not simply awareness but a change in behavior. Fulfilling a different role than behavior research, a strategic, outcome-based attitudinal research approach provides results that can effect attitudinal and behavioral change. The results also assist sponsoring organizations in developing concrete plans and communications to achieve their goals.

A public education campaign designed to effect attitudinal and behavioral change must gain the attention of the audience members before they will consider the message. Before they act on the message, however, audience members must accept it and be motivated by a belief that it is important, necessary, or socially desirable. Public opinion research is integral not only in determining the most salient approach and messages but also in identifying the most effective messengers and mediums to achieve a campaign's objectives. It is also critical for understanding the underlying values that inform and shape people's opinions on the relevant issues.

Public opinion research that includes both quantitative and qualitative components can help in setting objectives for a campaign, segmenting and profiling the audiences, identifying message strategies, and establishing baseline measurements of targeted attitudes and self-reported behaviors. Tracking surveys can be conducted at later intervals to measure awareness of the campaign, the target audience's degree of exposure and attention to the messages, and correlated changes in self-reported attitudes or behaviors targeted by the campaign.

Segmenting the audience is a particularly important component of this research because different subgroups within the larger audience will move from attention to a message to behavior for different reasons. The research identifies when and under what circumstances different groups of people will listen, respond, and ultimately act.

Qualitative research can provide important and valuable insights. Often, the targeting of specific populations is the result of epidemiological surveillance or some other method that does not provide any information about the social, psychological, and environmental context of targeted attitudes or behaviors. Message design and strategy benefits from understanding the audience's in-group catch phrases and slang, identifying sources or spokespersons who will attract the attention of the target audiences, and identifying unanticipated social or environmental constraints to changing a population's behavior. Qualitative research allows for the flexibility to probe where necessary to better understand an individual's thought process regarding specific areas of interest.—*Abigail Davenport (Peter Hart Research Associates)*

research included a national public opinion poll of 912 adult American men from diverse demographics, dial sessions (structured, computerized systems that monitor responses) to explore men's and women's reactions to various media segments, and a series of five focus groups primarily with men of different ages and races.[14] The survey findings showed that men were willing to intervene directly in violent situations if they knew one of the parties involved. Interestingly, the intervenor was most likely to engage in a discussion with the known party, regardless of that person's gender. Before this research, it was assumed that men would most likely intervene through a discussion with other men.[15]

The research also revealed men's willingness to take the time to get involved in important community and public efforts to stop violence against women. Men reported that they were most likely to take the time to petition elected officials to strengthen anti–domestic violence laws and to talk with children about the importance of healthy, violence-free relationships. In contrast, men stated that they were least likely to participate in a rally against domestic violence. Finally, when asked which of a list of reasons was the greatest barrier to active involvement in prevention, men most often selected the failure to *ask* men to become involved.[16]

Focus groups gauged participants' reactions to various types of messages in sample ads, yielding some interesting results:

- The "men as role models" theme had potential as an effective message to engage men in prevention of violence against women. Communicating an inclusive message that is not limited to men as fathers but as role models for boys in general would be an important way to reach multiple cultures and ages.
- A clear and simple message must be communicated on the issue.
- To avoid racist undertones, which negatively affected all surveyed men regardless of race, visual images must represent persons of all races.
- Negative themes interfere with men's ability to perceive the message as applicable to them and can easily trigger feelings that all men are being considered as potential batterers.[17]

Other research indicates that most males are uncomfortable with violence against women and with the attitudes, behaviors, and language of men who commit such violence.[18] Most men seek consent in intimate relationships and are uncomfortable with language and behavior that objectify and hurt women.[19]

Polling conducted over the past several years shows that women are more likely than men to identify domestic violence as an "extremely important" issue, more likely to report that they would do something to help reduce violence if they knew how to help, and less likely to accept rationalizations for the violence. One conclusion is that targeting men and boys for prevention efforts makes good sense because there

is significant "room for change" on attitudinal and behavioral indicators as reported by men nationwide.

In summary, the following themes can be gleaned from research to date:

- Engage men positively by using a welcoming, nonaccusatory, and culturally diverse tone and by communicating to men through other men.
- Engage large numbers of nonviolent men and boys by giving them simple, clear roles in educational activities that help to prevent violence against women and children.
- Engage men to stand publicly against violence by giving them an opportunity to state their commitment and engage their peers and families, giving men the opportunity to play a central role in prevention campaigns.
- Expand alliances of men by reaching out to new (and perhaps unlikely) partners with clear, simple messages they can incorporate in their existing work. Alliances might include, for example, men who for many years have worked with men who wish to overcome their violence, faith-based groups, organizations that promote responsible fatherhood, and men who work in the justice or social service system to intervene in violence against women.
- Engage men as leaders, role models, and mentors on the issue by creating opportunities for men to talk to other men, men to talk to boys, and teens to talk to other teens in the usual contexts of their lives (e.g., coaches talking to athletes).
- Engage men who are willing to become activists—for example, men who are already involved in violence intervention, prevention, or related activities, including community activists, social service and government workers, and academics, by giving them opportunities to share learning, collaborate, and expand the depth of their expertise and field of knowledge.

PREMISES BEHIND PREVENTION FOCUSED ON MEN AND BOYS

Much of the work to address domestic violence during the past three decades has been predicated on the belief that violence is a learned behavior that can be unlearned. Similarly, innovative prevention efforts employing public-education strategies have been based on the conviction that social norms condoning violence can be shifted. Indeed, educational efforts aimed at changing social norms have had considerable success in addressing alcohol, tobacco, and drug use and abuse in high school, college, and community settings.[20]

Within the field of domestic violence, experts agree that current, predominant social norms play a significant role in sanctioning and perpetuating inappropriate

male behavior. Thus, men can play a powerful role in promoting more positive attitudes and behavior with regard to violence against women and children.[21]

Males of middle school and high school age also have a role to play in preventing violence against women, especially relationship violence. In the 2000 survey, almost 9 in 10 men expressed support for incorporating into middle and high school curricula discussions about violence against women and ways to prevent it.[22] Men's thinking about and response to domestic violence therefore appears to be malleable; men pay attention to what other men think, say, and do and may be willing to take action if given the tools and embraced as potential partners with women in strategies to end violence. The research supports widespread public education and involvement campaigns targeting men and boys for participation in the prevention of domestic violence. And men, as a group, seem open to receiving messages and engaging in various levels of activities against violence.

PREVENTION ACTIVITIES FOCUSED ON MEN AND BOYS

This section discusses several examples of specific activities designed to engage male "bystanders" and youth in preventing domestic violence. The term *bystanders* in this context means nonviolent men who are family members, friends, teammates, classmates, and colleagues with whom all persons have contact in the course of their everyday lives. Bystanders may also include men whose peers engage in domestic violence.

Three initial, connected missions emerged based on the polling research: (1) involve men directly as models of violence prevention behavior and mentors to the next generation; (2) elicit a public, personal commitment from men to stand against violence; and (3) provide resources and build the capacity of violence prevention advocates to work with men. In pursuit of these missions, the Family Violence Prevention Fund developed a suite of three ongoing programs: Coaching Boys into Men, Founding Fathers, and the Building Partnerships Initiative to End Men's Violence.

Coaching Boys into Men

Coaching Boys into Men was launched nationally in February 2002 to all major commercial television stations, broadcast networks, cable networks, local cable affiliates, commercial radio stations, and the *New York Times.* The campaign encourages men to talk to boys early and often about appropriate ways to treat women. Public service announcements (PSAs) for television, radio, and print media emphasize that boys learn from watching men and encourage men to act as role models and communicate with boys about domestic violence. The PSAs also pose questions about the right time to raise with boys the issue of domestic violence. Coaching Boys into Men materials include tips for talking to boys of different ages, sample talking points, examples of times to talk, and starting points for conversations.

The Coaching Boys into Men campaign was designed to offer men a clear and manageable role in helping to solve the problem of domestic violence. To maximize the campaign's impact, strategic national partners were included from the beginning: the National High School Athletic Coaches Association, the New York Yankees, the San Francisco Giants, Major League Soccer, and local and regional sports-related groups.

The campaign was assessed through a study by the Advertising Council, issued in February 2005, which measured public perception about the importance of the issue, awareness of the ad campaign, and attitudinal and behavioral change.[23] Significantly, the study produced the following findings:

- About 9 in 10 adults (and 84 percent of men) "strongly agree" that men can help reduce domestic violence by talking to boys and feel it is extremely important that they do so.
- Respondents who saw the PSAs were significantly more likely than those who did not to agree that men can help solve the problem of domestic violence by discussing it with boys.
- There was a steady and significant increase in the proportion of men surveyed who had actually taken action and spoken to boys about violence against women—from 29 percent in November 2001 to 41 percent in February 2005.
- Awareness of the PSA campaign increased almost fivefold from benchmark levels, rising from 3 percent at benchmark to 14 percent in February 2005.[24]

Initial results from the Coaching Boys into Men program demonstrate that an appropriate delivery mechanism (in this case an extended sports metaphor) can engage men in specific, concrete actions to prevent domestic violence. The message that men can make a difference in preventing violence by talking to the young men and boys close to them is clear and uncomplicated. Future campaigns can use a modeling or mentoring strategy in other contexts that resonate with men and engage them in clear, positive, manageable actions with boys to prevent domestic violence.

Founding Fathers

The Founding Fathers campaign, initiated in 2003, was based on the theory that publicizing men's individual involvement, and thereby inspiring the involvement of their peers, was a critical component of a strategy to prevent domestic violence. The goal was to create a public role for men in the movement to end domestic violence, complementing the private role encouraged by Coaching Boys into Men. Some 350 men from all walks of life mobilized in 2003 for an unprecedented public declaration condemning domestic violence.

The Founding Fathers declaration, written by a group of five men, appeared in a full page of the *New York Times* on Father's Day 2003, with each of the 350 men listed

as a Founding Father.[25] This public expression underscored the importance of men's commitment to involve and validate the support of their peers. While some Founding Fathers' commitments were purely public, many were moved to pledge more extensive personal involvement. In addition to the *New York Times* declaration, for example, some Founding Fathers created personalized letter-writing campaigns to friends and family, hosted a series of open discussions among men on domestic violence, and donated resources and gifts. Some Founding Fathers even hosted meetings with other men to encourage them to declare their commitment publicly.

The Founding Fathers campaign was not evaluated formally, but anecdotal indicators were strong and positive: men expressed appreciation that Founding Fathers amplified measures to involve other bystanders. The campaign struck an emotional chord with both men and women as they tapped into vast personal constituencies of partners, friends, co-workers, and parents; men felt good about being placed at the leadership of what traditionally had been viewed as a women's issue. An informal survey among the campaign participants confirmed that the single most compelling reason for becoming Founding Fathers was "men setting an example for other men." The second most compelling reason was "men taking responsibility for an issue traditionally viewed as a women's issue."

The Building Partnerships Initiative to End Men's Violence

The Coaching Boys into Men and Founding Fathers campaigns focus on engaging men as bystanders, role models, and fathers. The third prong of work with men and boys, the Building Partnerships Initiative (BPI), involves active collaboration between men and women working in traditional programs to end violence against women. The BPI was intended to inspire more activist men to take a stand against men's violence by tapping into work at the community level—in grassroots nonprofit organizations, schools, the workplace, and places of worship—in an effort to create a network of new constituencies and to build capacity in local communities.

The BPI promotes stronger partnerships among persons currently working to end violence and individuals and organizations with potential for a more active prevention role, with a special focus on engaging men and boys in this process. To permit a more comprehensive prevention agenda, the network includes new, nontraditional allies—groups such as unions, faith-based institutions, schools and universities, sports and social clubs, the private sector, and responsible-fatherhood organizations. The BPI was designed in consideration of certain limitations and opportunities presented in the field: (1) innovative program work is often carried out in relative isolation, providing few structures for information exchange; (2) nontraditional partners bring great untapped potential to prevention work; and (3) ecological models suggest that a greater variety of individuals, groups, and community organizations should play a role in ending men's violence.

The first phase of the BPI, which incorporated information technology (IT) tools to interact and network across wide geographical and professional divides, consisted of an "online discussion series" for practitioners of violence prevention and potential new partner organizations. The eight-week series took place through an e-mail discussion list and was supported by a discrete Web site.[26] The discussion covered four topics: building a "big tent," learning from batterers' intervention programs, working with fathers' groups, and working with youth and schools. More than a thousand persons from all 50 states and 40 different countries signed on to the lively and fruitful discussions. Discussion participants made it clear that to engage men successfully in ending domestic violence, practitioners, community leaders, policymakers, and others must model respectful relationships and partnerships.

The second phase of the BPI provides to violence prevention practitioners and advocates an online toolkit for working with men and boys. The toolkit[27] contains guiding principles and "how-to" steps, training exercises, and background materials for working with men and boys. The toolkit builds on the momentum and connections made during the online discussion series to transform the conversations into practical steps for widespread prevention work with men and boys.

Because the BPI was recently implemented, analysis of the program is ongoing. Clearly, fatherhood programming (services to help men serve as responsible, involved fathers) provides a reservoir of experience in engaging men about intimate, familial relationships and in listening to men's concerns. Despite tension between domestic violence prevention advocates and some fathers' groups, bridges need to be constructed because of the simple reality that many children have ongoing contact with fathers who have used violence in the family. Ultimately, safety must take priority over healing and contact with a child. Thus, while widespread partnerships between fatherhood programs and violence prevention efforts seem to be in a nascent stage, father-involvement programs hold perhaps the greatest promise as partners in violence prevention.

EXISTING PREVENTION ACTIVITIES BY JUDGES

The three research-based strategies described above serve as examples of the myriad programs that could be developed to engage men in the prevention of violence against women. Many judges already participate outside of court in their own strategies, based on their individual interests, to prevent domestic violence. Examples of judicial activities include

- training of faith-based leaders and communities regarding domestic violence;
- mentoring children in various contexts, such as sports and Big Brothers;

- various education activities, including hosting schools in the courtroom, participating in teen dating workshops, presentations at service clubs, violence clinics at law schools, and mock trials in schools, senior centers, and malls; and
- serving as examples in their own personal lives.

These judicial efforts in the community further the prevention of violence before it occurs. But they depend largely on the personal leadership commitment of a relatively small group of dedicated professionals. In addition to these individual measures and the strong violence intervention role served by the courts, judges and court staff can begin to incorporate prevention in the daily work of the judiciary. The remainder of this article suggests a process for beginning to address prevention in the courts.

DEVELOPING PREVENTION STRATEGIES IN THE COURTS

The authors explored some examples of the current efforts to engage men and boys in strategies to prevent domestic violence, in the context of the more traditional service-based and justice-system responses that have greatly strengthened intervention. As noted, the concept of "prevention" has evolved over the past 25 years from a broad, all-encompassing label applied to *any* response to domestic violence to the current, more precise focus on activities that prevent violence before it occurs. Certainly the justice system must continue to treat domestic violence seriously as a crime and to intervene to help adult survivors achieve safety and protect their children. But prevention efforts also must expand dramatically to engage all members of society. Strategies to engage men and boys must incorporate some of the core concepts tested to date: clear, simple messages that are conveyed in the context of everyday lives, intergenerational role modeling to change social norms, and universal support of positive, healthy intimate relationships among all young persons. Working together, women and men can change attitudes, beliefs, and behaviors that recognize violence as an acceptable means of human interaction.

Based on these premises, the courts can engage in a process for determining how to reach court users with effective, culturally diverse prevention messages. This process would involve the following steps:

- **Assembling the appropriate discussion group.** The courts need to begin prevention efforts with the right persons at the table. Initially, these would include judges, court administrative leadership, and possibly providers of ancillary services (e.g., family court services and facilitators, probation). Upon agreement that the court can and should move forward with prevention, the discussion group could be broadened to include community-based domestic violence service providers, batterers' intervention programs, attorneys (plaintiff and defense), and others who can contribute to broadening the points of contact for prevention, as well as the development and implementation of prevention activities.

- **Identification of potential prevention message points.** The court needs to identify appropriate points at which to reach court users with universal violence prevention measures. Criminal and juvenile delinquency courts, for example, have contact with large numbers of men and boys who are entering the court as defendants, detainees, victims, and witnesses. At what points during these contacts could the court engage men and boys in prevention messages or other measures? The court needs to consider several specific questions, including, for example:
  - Are there points where judges personally can deliver universal violence prevention messages without compromising impartiality?
  - Where specifically in the courthouse can prevention messages be given to all court users (e.g., videos and literature in waiting rooms or hallways, posters to educate the public)?
- **Development and delivery of prevention activities.** Activities should consist of promising strategies that reach men and boys, such as the research-based initiatives outlined in this article. Essentially, these strategies engage men and boys in actions to which they appear receptive based on the research. Activities in the courts might range from delivering messages (verbally or electronically) to distribution of prevention awareness materials, including resources for users who currently experience violence. Through leadership, courts could also participate in constructing broad-based, inclusive prevention campaigns in the justice system, consisting of measures that ultimately could reduce the need for intervention by reaching large segments of society.

CONCLUSION

Additional research will be needed to help shape new prevention strategies for men and boys. Moreover, these new efforts must connect with other prevention measures focused on teens and young persons. Primary prevention strategies are critical elements of future responses to domestic violence, and violence against women cannot be prevented without the central involvement of men and boys in changing social norms that currently sanction violence. Elements of a violence prevention focus involving men and boys include the following:

- heightened personal awareness about violence against women and girls
- responsible personal behavior with respect to relationships and violence
- positive involvement in the lives of young men and boys
- collaboration among male and female advocates and prevention professionals
- partnership building, pursuant to common goals, between programs that promote responsible fatherhood and violence prevention groups

- unequivocal public commitments by men that violence against women and girls will not be tolerated.

Efforts to engage men and boys in prevention of violence against women have just begun. There remain more questions than answers, but we know a great deal more now than a few short years ago. Future research can assist in determining answers to numerous questions, such as these:

- What else needs to be learned about men's potential responses to violence against women and girls? What questions do men need to be asked about how to involve them in prevention strategies?
- What entry points can engage larger groups of male bystanders to participate in small, doable violence prevention efforts that are easily performed as part of their daily lives?
- How can men become engaged in multiple, coordinated campaigns to promote social norms that foster healthy relationships? What key ingredients will foster this kind of involvement, which can deepen men's commitment to changing social norms?
- What are potential collaborations with efforts to prevent other forms of violence against women, such as sexual assault and stalking, and related violence, such as youth violence and community violence?
- What settings, such as schools, sporting events, workplaces, and the justice system, provide opportunities to connect men and boys with messages that promote healthy intimate relationships as alternatives to violence?

Future efforts to end abuse must emphasize prevention of violence before it occurs if we are to create a world in which women, children, and men can safely pursue and exercise their basic human rights. Prevention efforts not only must engage professionals and advocates who dedicate themselves to end abuse but also must welcome, encourage, and support persons in all walks of life—from all cultures, genders and gender identities and from all economic classes—to undertake activities in the course of their everyday lives. Only through multiple, universal, accessible prevention strategies can we hope to end violence before it occurs.

NOTES

1. Violence Against Women Act of 2000, 42 U.S.C. § 10420 (2000).

2. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 17 (June 2005), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf.

3. *Id.* at 1.

4. *Id.* at 61.

5. AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 80 (1996) [hereinafter VIOLENCE AND THE FAMILY].

6. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM (1993).

7. VIOLENCE AND THE FAMILY, *supra* note 5, at 40.

8. CTR. FOR THE ADVANCEMENT OF WOMEN, PROGRESS AND PERILS: NEW AGENDA FOR WOMEN 11 (2003), *available at* www.advancewomen.org/womens_research/Progress&Perils.pdf.

9. Advertising Council, Family Violence Prevention Fund Domestic Violence Prevention PSA Campaign General Market Tracking Survey (2005) (unpublished survey, on file with the *Journal of the Center for Families, Children & the Courts*).

10. Programs to treat children exposed to domestic violence include the Child Witness to Violence Project, Boston Medical Center (information available at www.childwitnesstoviolence.org/about.html) and Child Trauma Research Project, San Francisco General Hospital. For lists and descriptions of resources, see the Web site of the National Center for Children Exposed to Violence, www.nccev.org/violence/domestic.html.

11. *See* D.L. Olds et al., Prenatal and Infancy Home Visitation by Nurses: A Program of Research (conference paper, Univ. of Md., Sch. of Pub. Policy, Welfare Reform Acad.), *available at* www.welfareacademy.org/conf/papers/olds/prenatal.cfm; see also references listed by the Administration for Children and Families of the U.S. Dept. of Health and Human Services, *available at* www.acf.dhhs.gov/programs/opre/welfare_employ/economic_analysis/reports/effect_nursefam/nursefam_refs.html.

12. See research reports listed by National Mentoring Center, www.nwrel.org/mentoring/research.html.

13. *See, e.g.,* Family Justice Web site, www.familyjustice.org; Frank Rubino, *Doing Family Time,* HOPE, Mar./Apr. 2004, at 24, *available at* www.familyjustice.org/assets/press/Hope_Article.pdf.

14. Peter D. Hart Research Assocs., Family Violence Prevention Fund Study No. 5702c (2000) (unpublished study, on file with the *Journal of the Center for Families, Children & the Courts*). Participants in the National Opinion Poll of Adult Men were aged 18–75. Of the 912 men who participated, 459 were Caucasian, 166 were African American, 139 were Hispanic, and 109 were of Asian descent. Twenty-three women and 24 men participated in two dial sessions. The five focus groups were Caucasian men aged 18–25, Caucasian men aged 26–55, African-American and Hispanic men aged 26–55, women aged 18–25, and African-American and Hispanic women aged 18–25.

15. *Id.*

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16. *Id.*

17. *Id.*

18. ALAN BERKOWITZ, FAMILY VIOLENCE PREVENTION FUND, THE SOCIAL NORMS APPROACH TO VIOLENCE PREVENTION (2003), *available at* http://toolkit.endabuse.org/Resources/TheSocial/view?searchterm=berkowitz.

19. *Id.*

20. *Id.*

21. *Id.*

22. Hart, *supra* note 14.

23. Advertising Council, *supra* note 9.

24. *Id.*

25. To view the declaration, see http://endabuse.org/programs/display.php3?DocID=9933.

26. *See* www.endabuse.org/bpi.

27. *See* www.endabuse.org/toolkit.