# Florida's
# DOMESTIC VIOLENCE BENCHBOOK
# June 2023


**Office of the State Courts Administrator**
**Office of Family Courts**
**Florida Institute on Interpersonal Violence**

This project was supported by Contract YLN13 awarded by the state administering office for the STOP Formula Grant Program. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the state or the U.S. Department of Justice, Office on Violence Against Women.

Sponsored by the Office of the State Courts Administrator and the State of Florida, Department of Children and Families, Office of Domestic Violence.

## HOW TO USE THIS BENCHBOOK

This benchbook approaches interpersonal violence from the perspectives of both established precedents and promising practices. It is intended for use by new and seasoned family law judges when conducting judicial proceedings. Recent Florida appellate cases are updated monthly and available on the website.
The citations in this benchbook have been abbreviated to improve the flow of the text. A citation to section 741.30, Florida Statutes, appears as § 741.30.
The benchbook features:

- Domestic Violence, Repeat Violence, Sexual Violence, Dating Violence, Stalking, Elder Abuse, and Injunction Modification or Dissolution Benchcards
- Mandatory Reporting of Abuse Checklist
- Colloquy for Injunction Hearings
- Domestic Violence Legal Outline
- Domestic Violence Civil and Criminal Proceedings Outlines
- Child Support in Domestic Violence Proceedings
- Comparison of Chapter 741 and 39 Injunctions
- Comparison of the five Injunctions for Protection
- Firearms and Domestic Violence Quick Reference Guide
- Articles and Publications Related to Interpersonal Violence

Whether you use the online version or print it out and put it in a notebook, we hope you find this benchbook to be a reference you turn to often. We invite your suggestions for additions and improvements. Please provide comments and suggestions to: Kathleen Tailer, Office of Family Courts, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1900. You may also send comments and suggestions via email: tailerk@flcourts.org, or phone: 850-414-1507.

**Upon request by a qualified individual with a disability, this document will be made available in alternate formats. To order this document in an alternate format, please contact the Office of Family Courts, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1900. Phone: 850-414-1507.**

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|---|---|
| **First:**<br><br>A petition is filed for protection from domestic violence. | • Access to court/courthouse<br>• Employment, children, transportation, office hours<br>• Completion of forms – usually pro se<br>• Lengthy, confusing forms<br>• Language/literacy<br>• Determination of necessary accommodations for persons with disabilities<br>• Determination of interpretation needs for limited English proficiency speakers<br>• Denial/minimization of abuse as survival strategy<br>• Emotional upset/agitation |
| **Second:**<br><br>The court reviews the petition and issues an order granting or denying a temporary injunction. A final hearing is set if a temporary injunction is granted or if the petition is denied because there is no appearance of immediate and present danger of domestic violence. In some jurisdictions, a petitioner who has been denied the protection of an ex parte temporary injunction may elect to decline a final hearing in writing. A petitioner may also file a supplemental affidavit if there is additional information that the court should consider. | • Urgency for protection and whether a temporary injunction must be issued to protect the petitioner from violence.<br>• Increased danger<br>• Safety of persons and pets<br>• The respondent may have a very angry reaction to service of temporary injunction and/or notice of final hearing on the petition for protection<br>• **MOST DANGEROUS TIME FOR PETITIONERS/VICTIMS** – separating or attempting to separate from partner<br>• ***Especially dangerous if court has scheduled a hearing without issuing a temporary injunction*** |

| | |
|---|---|
| **Third:**<br><br>The court holds a final hearing to determine:<br><br>1) whether the petitioner is a victim of domestic violence or is in imminent danger of becoming a victim; and<br><br>2) whether to grant a final injunction of protection against domestic violence. | • Access to court/courthouse<br>• Difficulties effectuating service on respondent<br>• Employment, children, transportation<br>• Safety of persons and pets<br>• Unknown cultural barriers<br>• Threats, violence to coerce petitioner to drop case, directly or through others<br>• Courthouse/courtroom safety issues<br>• Due process and 5th Amendment concerns related to respondent<br>• Maintaining a trauma-informed approach<br>• The respondent's access to children through time-sharing<br>• Unsupervised time-sharing by respondent<br>• Firearms issues<br>• Family support<br>• Time-sharing provisions<br>• Child support/alimony<br>• Sole possession of residence<br>• Counseling, other services for victim and children (not part of injunction order)<br>• Ensuring that the order is clear and contains all necessary information |
| **Fourth:**<br><br>Ensuring the respondent complies with the terms of an injunction. | • Safety<br>• No contact<br>• No violence<br>• Firearms surrender<br>• Vacating shared residence if so ordered<br>• Treatment/family support<br>• BIP/other treatment for respondent<br>• Time-sharing provisions<br>• Child support/alimony<br>• Compliance hearing to ensure the respondent's compliance |

## DOMESTIC VIOLENCE BENCHCARD (JUNE 2023)

### A. DEFINITION

Domestic violence means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member. § 741.28(2).

### B. STANDING

- The petitioner and the respondent must be family or household members. § 741.30(1)(e).

- "Family or household member" means spouses, former spouses, persons related by blood or marriage, persons who are presently living together as if a family or who have lived together in the past as if a family, and persons who are parents of a child together even if they never married or lived together. § 741.28(3).

- With the exception of persons who have a child in common, the family or household members must be currently residing together or have in the past resided together in the same single dwelling unit. § 741.28(3). A minor child can file by and through a parent as "next friend." Parrish v. Price, 71 So. 3d 132 (Fla. 2d DCA 2011).

- There is no minimum residency or venue requirement. A petition may be filed in the circuit where the petitioner currently or temporarily resides, where the respondent resides, or where the domestic violence occurred. § 741.30(1)(j).

- The petitioner must be a victim of domestic violence or have reasonable cause to believe he or she is in imminent danger of becoming a victim of any act of domestic violence. § 741.30(1)(a).

- A person's right to petition for an injunction shall not be affected by such person having left a residence or household to avoid domestic violence. § 741.30(1)(d).

- Being a spouse is not a requirement to petition for domestic violence. § 741.30(1)(e).

- No bond shall be required for entry of an injunction. § 741.30(2)(b).

## C. EX PARTE TEMPORARY INJUNCTIONS

**In order to issue an ex parte temporary injunction, the court must determine whether an immediate and present danger of domestic violence exists. § 741.30(5)(a).**

- When a petition for an ex parte temporary injunction is denied:
    - The court must issue a written order stating the legal grounds for the denial. § 741.30(5)(b).
    - The court must set a hearing on the petition at the earliest possible time with notice if the only ground for denial is no appearance of an immediate and present danger of domestic violence. § 741.30(5)(b).

- Some circuits allow the petitioner to request in writing that the court dismiss the case rather than set a hearing. This practice increases victim safety.

- Except as provided in § 90.204, in a hearing ex parte for the purpose of obtaining such ex parte temporary injunction, no evidence other than verified pleadings or affidavits shall be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. § 741.30(5)(b).

**If it appears to the court that an immediate and present danger of domestic violence exists, the court may grant a temporary injunction ex parte, pending a full hearing, and may grant such relief as the court deems necessary, including:**

- Restraining the respondent from committing any acts of domestic violence. § 741.30(5)(a)1;

- Awarding the petitioner temporary exclusive use and occupancy of the dwelling the parties share or exclude the respondent from the petitioner's residence. §741.30(5)(a)2;

- Providing the petitioner with a temporary parenting plan, including a time-sharing schedule, which may award petitioner up to 100 percent of the time-sharing. The temporary parenting plan, established on the same basis as provided in chapter 61, remains in effect until the order expires or an order is entered in a pending or subsequent case relating to time-sharing issues. § 741.30(5)(a)3. Paternity must be legally established for the court to award time-sharing to the father;

- Ordering the respondent to surrender any firearms and ammunition in his or her possession to the specified sheriff's office pending further order of the court;

- Awarding the petitioner exclusive care, possession, and control of an animal, ordering respondent to temporarily have no contact with the animal, and enjoining respondent from taking, concealing, harming, or disposing of the animal. This does

not apply to animals owned primarily for agricultural purposes or to a service animal, if the respondent is the service animal's handler. § 741.30(5)(a)4.

- Ordering additional relief as the court deems necessary to protect the petitioner from domestic violence. § 741.30(5)(a);

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2)(A), the temporary and permanent injunction forms approved by the Florida Supreme Court shall be the forms used for issuance of a temporary ex parte injunction.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 741.30(6)(d).

- A temporary injunction shall be effective for a fixed period not to exceed 15 days; however, it shall be extended as necessary to remain in force during any period of continuance. § 741.30(5)(c).

- A full hearing shall be set for a date no later than the date when the temporary injunction ceases to be effective. § 741.30(5)(c).

- The court may grant a continuance of the hearing before or during a hearing for good cause shown by either party, which shall include a continuance to obtain service of process. § 741.30(5)(c).

## D. FINAL INJUNCTIONS ISSUED AFTER NOTICE AND HEARING

- The court shall allow an advocate from a state attorney's office, an advocate from a law enforcement agency, or an advocate from a certified domestic violence center who is registered under § 39.905 to be present with the petitioner or the respondent during any court proceedings or hearings related to the injunction for protection, provided the petitioner or the respondent has made such a request and the advocate is able to be present. § 741.30(7).

- All domestic violence proceedings shall be recorded. Recording may be by electronic means as provided by the Rules of Judicial Administration. § 741.30(6)(h).

- Upon notice and hearing, when it appears to the court that the petitioner is either the victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim, the court may grant such relief as it deems proper, including an injunction:

    - Restraining the respondent from committing any acts of domestic violence. § 741.30(6)(a)1;

- Awarding the petitioner exclusive use and possession of a shared dwelling or excluding the respondent from the petitioner's residence; § 741.30(6)(a)2;

- Providing the petitioner with a temporary parenting plan, including a time-sharing schedule, which may award the petitioner 100 percent of the time-sharing. The temporary parenting plan, established on the same basis as provided in chapter 61, remains in effect until the order expires, or an order is entered in a pending or subsequent case relating to time-sharing issues. § 741.30(6)(a)3.

- Paternity must be legally established for the court to award time-sharing to the father.

- Providing temporary support, established on the basis as provided in chapter 61, for the petitioner and/or any minor children. This temporary support remains in effect until the order expires, or an order is entered in a pending or subsequent case affecting child support. § 741.30(6)(a)4;

- Awarding the petitioner exclusive care, possession, and control of an animal, ordering the respondent to temporarily have no contact with the animal, and enjoining the respondent from taking, concealing, harming, or disposing of the animal. This does not apply to animals owned primarily for agricultural purposes or to a service animal if the respondent is the service animal's handler. § 741.30(6)(a)7.

- Ordering the respondent to participate in treatment, intervention, or counseling at the respondent's cost. If the court orders the respondent to participate in batterers' intervention program, the court must provide the respondent with a list of such programs. § 741.30(6)(a)5;

- The court must order the respondent to attend a batterers' intervention program if it finds that the respondent willfully violated the ex parte injunction; the respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; or the respondent, in this state or any other state, has had at any time a prior injunction for protection entered against the respondent after a hearing with notice. § 741.30(6)(e).

- Referring the petitioner to a certified domestic violence center. The court must provide the petitioner with a list of certified domestic violence centers in the circuit; however, the petitioner may not be ordered to attend counseling. § 741.30(6)(a)6.

- The court is prohibited from issuing mutual orders of protection. The court may issue separate injunctions for protection against domestic violence where each

party has complied with the statutory requirements to petition for an injunction. § 741.30(a)(i).

- A judgment should indicate on its face that it is valid and enforceable in all counties in the State of Florida. § 741.30(6)(d)1.

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2)A, the forms approved by the Florida Supreme Court shall be used for the final injunction.

- The final injunction order must provide that it is a violation of § 790.233 and a first-degree misdemeanor, for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition, unless § 943.10(14) applies. § 741.30(6)(g); § 790.233(1); 18 U.S.C. § 922(g)(9).

- The terms of an injunction stay in effect until modified or dissolved. Either party may move the court to modify or dissolve (vacate) the injunction at any time. No specific allegations are required. Such relief may be granted in addition to other civil or criminal remedies. §§ 741.30(6)(c) and (10).

- The petitioner may move to extend the injunction prior to its expiration. The court has broad discretion to extend the injunction after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

## E. COMPLIANCE, ENFORCEMENT, AND VIOLATIONS OF INJUNCTIONS

- If the court orders additional remedies, such as participation in a batterers' intervention program, the respondent should be served with a notice for a compliance hearing, to be held within 30-45 days from issuance of the injunction, when served with the final injunction. The hearing may be cancelled if the respondent can show that he or she has complied with court-ordered obligations. The petitioner should be given notice of the compliance hearing. Follow-up hearings can be set as necessary.

- The court may enforce a violation of an injunction for protection against domestic violence through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under § 741.31.

- If the respondent violates the injunction, the petitioner may petition for a show cause order (forms 12.980(w) and 12.980(x)). If the affidavit alleges a crime, the affidavit shall be referred to the appropriate department for investigation and forwarding to the state attorney. § 741.31.

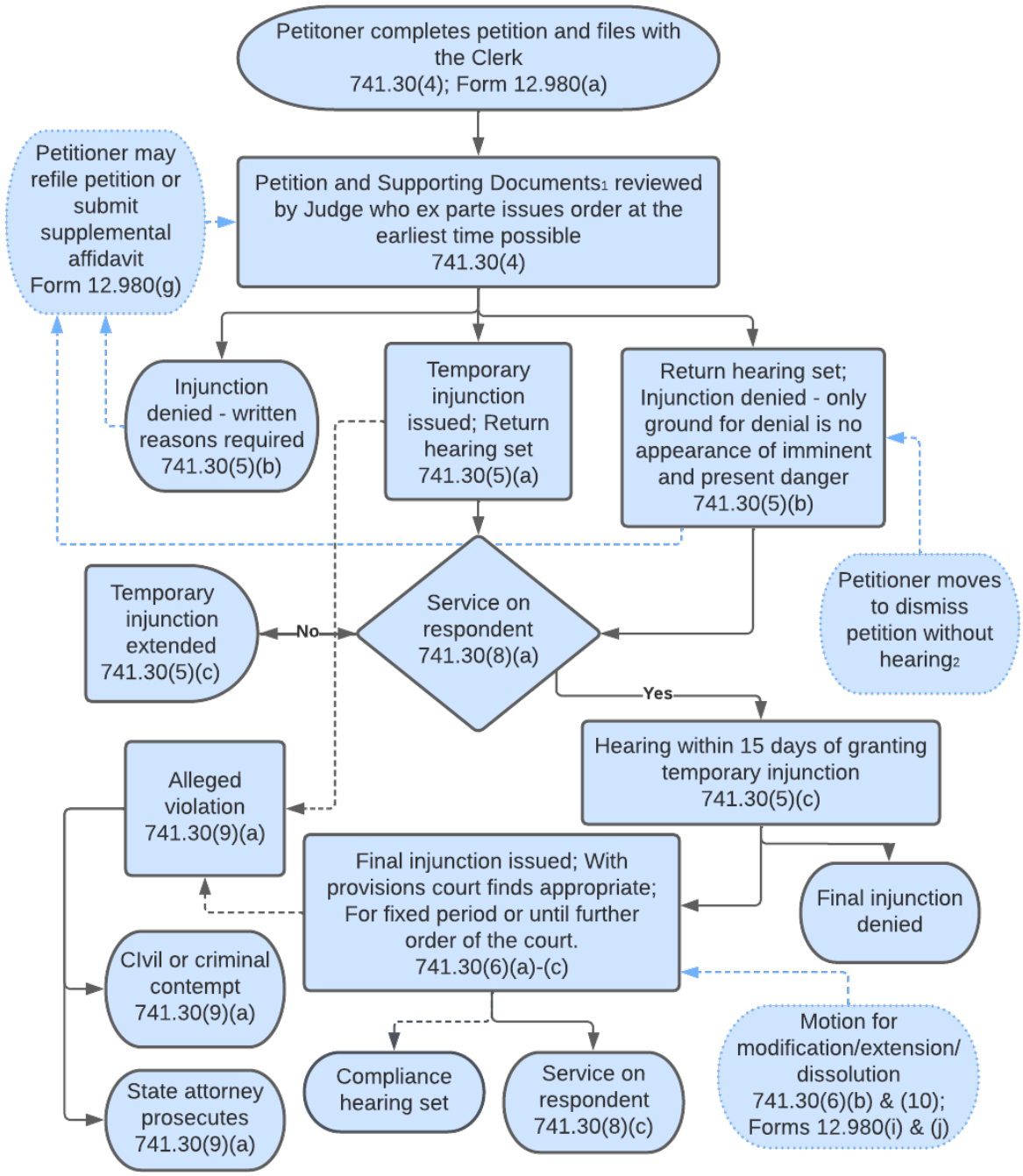
- The court may enforce the respondent's compliance with the injunction through any appropriate civil and criminal remedies, including but not limited to, a monetary assessment or fine. § 741.30(9)(a).

- A respondent who willfully violates an injunction for protection commits a misdemeanor of the first degree. § 741.31(4)(a).

- It is a violation of § 790.233, and a first-degree misdemeanor, for the respondent to have in his or her care, custody, possession or control any firearm or ammunition unless respondent receives or possesses a firearm or ammunition for use in performing official duties. § 741.31(4)(b).

- A person with two or more prior convictions of a violation of an injunction for protection, who then subsequently commits a violation of an injunction against the same victim, commits a felony of the third degree. § 741.31(4)(c).

## F. INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE




[1]UCCJEA, Affidavit, Confidential Address, Child Support Guidelines Worksheet, Coversheet for Family Law Cases

[2] In some circuits

*Statutory citations are from 2022 Florida Statutes.

--- In some cases

## DATING VIOLENCE BENCHCARD (JUNE 2023)

### A. DEFINITION

Requires a dating relationship existing in the past 6 months between the parties, which had an expectation of affection or sexual involvement, and was of a continuous nature. The term does not include violence in a casual relationship or violence between individuals who have only engaged in ordinary fraternization in a business or social context. § 784.046(1)(d).

As used in this section, "violence" means any assault (§ 784.011), aggravated assault (§ 784.021), battery (§ 784.03, § 784.041), aggravated battery (§ 784.045), sexual assault (§ 794.051, § 794.05), sexual battery (§ 794.011), stalking (§ 784.048), aggravated stalking (§ 784.048), kidnapping (§ 787.01), or false imprisonment (§ 787.02), or any criminal offense resulting in physical injury or death, by a person against any other person. § 784.046(1)(a).

### B. STANDING

- Any person who is the victim of dating violence and has reasonable cause to believe he or she is in imminent danger of becoming the victim of another act of dating violence, **or**

- Any person who has reasonable cause to believe he or she is in imminent danger of becoming the victim of an act of dating violence, **or**

- The parent or legal guardian of any minor child living at home who seeks an injunction for protection against dating violence on behalf of that child. § 784.046(2)(b).

- If the party against whom the injunction is sought is a parent, stepparent, or legal guardian of the minor child, the parent filing on behalf of that minor child must have been an eyewitness to, or must have direct physical evidence or affidavits from eyewitnesses to, the specific facts and circumstances that form the basis of the relief sought. § 784.046(4)(a)1.

- If the party against whom the injunction is sought is *not* a parent, stepparent, or legal guardian, the parent filing on behalf of a minor child living at home must have reasonable cause to believe that the minor child is a victim of dating violence to form the basis on which relief is sought. § 784.046(4)(a)2.

- No bond is required for entry of an injunction. § 784.046(3)(c).

- The sworn petition shall include the specific facts and circumstances that form the basis upon which relief is sought. § 784.046(4)(a).

## C. TEMPORARY EX PARTE INJUNCTIONS

- Upon the filing of a petition, the court shall set a hearing to be held at the earliest possible time. The respondent shall be personally served with the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. § 784.046(5).

- Except as provided in § 90.204, in an ex parte hearing for an injunction, no evidence other than the verified pleading or affidavit shall be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. § 784.046(6)(b).

- When it appears to the court that an immediate and present danger of dating violence exists, the court may grant a temporary ex parte injunction, pending a full hearing. § 784.046(6)(a).

- An ex parte temporary injunction shall be in effect for a fixed period not to exceed 15 days. A full hearing must be set before the injunction ceases to be effective. The court may grant a continuance of the injunction and the hearing for good cause shown by any party, or upon on its own motion for good cause, including failure to obtain service. § 784.046(6)(c) and Florida Family Law Rule of Procedure 12.610.(c)(4)(A).

- A temporary ex parte injunction may grant such relief as the court deems proper, including an injunction enjoining respondent from committing any acts of violence. § 784.046(6)(a).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2)A, forms approved by the Florida Supreme Court shall be used for ex parte injunctions.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.046(7)(d).

## D. FINAL INJUNCTIONS ISSUED AFTER NOTICE AND HEARING

- Upon notice and hearing, the court may grant such relief as the court deems proper, including enjoining the respondent from committing any acts of violence and ordering any such relief as the court deems necessary for the protection of the petitioner. § 784.046(7).

- Terms of a permanent injunction may include ordering the respondent to surrender any firearms and ammunition in the respondent's possession. §§ 784.046(7)(b) and 784.047(1)(h). Note that, unlike in injunctions for protection against domestic violence, the restriction on possession of firearms and ammunition for injunctions for protection from dating, repeat and sexual violence is not mandatory. § 790.233. The court must make a finding that it is necessary to protect the petitioner and allow the respondent due process of law regarding the necessity of incorporating such provisions into the final judgment. *Lagner v. Cox*,

826 So. 2d 475 (Fla. 1st DCA 2002); *see also Popper v. Ficarelli*, 12 So. 2d 930 (Fla. 4th DCA 2009).

- The court may also order the respondent to: vacate a shared dwelling; cease contact with the petitioner; and not be within a certain distance from the petitioner's residence, school, place of employment, car, or place regularly frequented by the petitioner or any named family or household member. § 784.047(1).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2), forms approved by the Florida Supreme Court shall be used for issuance of a final injunction.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.046(7)(d).

- The terms of the injunction stay in effect until modified or dissolved. Either party may move to modify or dissolve the injunction at any time. § 784.046(7)(c).

- The petitioner may move to extend the injunction. The court has broad discretion to extend the injunction after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

## E. COMPLIANCE, ENFORCEMENT, AND VIOLATIONS OF INJUNCTIONS

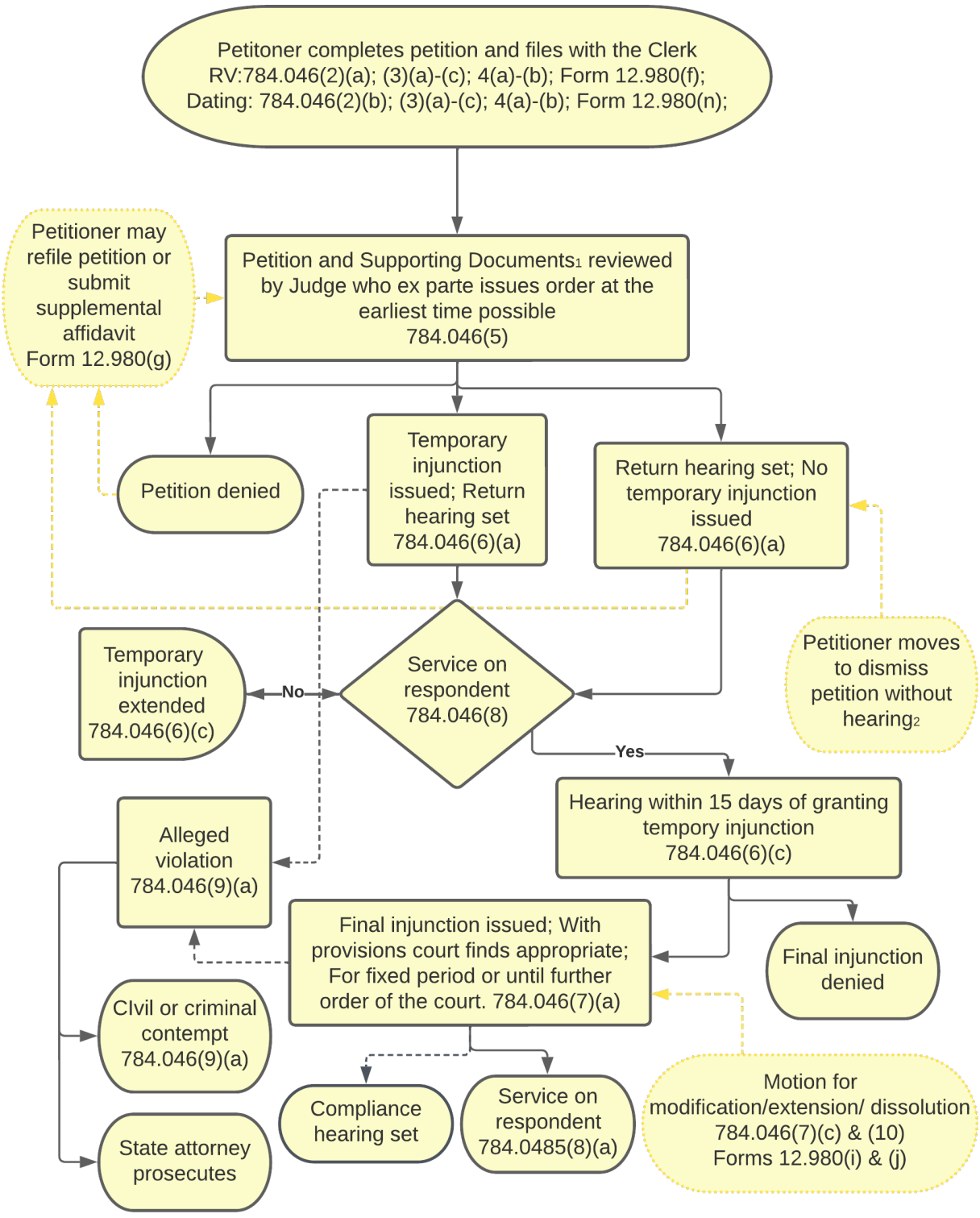
- If the court orders additional remedies, such as participation in a batterers' intervention program, the respondent should be served with a notice for a compliance hearing, to be held within 30-45 days from issuance of the injunction, when served with the final injunction. The hearing may be cancelled if the respondent can show that he or she has complied with court-ordered obligations. The petitioner should be given notice of the compliance hearing. Follow-up hearings can be set as necessary.

- The court shall enforce violations of injunctions for protection through a civil or criminal contempt proceeding. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment § 784.046(9)(a).

- A respondent who willfully violates an injunction for protection commits a misdemeanor of the first degree. § 784.047(1).

- A person with two or more prior convictions of a violation of an injunction for protection who then subsequently commits a violation of an injunction against the same victim, commits a felony of the third degree. § 784.047(2).

## F. INJUNCTION FOR PROTECTION AGAINST DATING VIOLENCE




[1]Less likely to be needed in non-domestic violence petitions. Can request confidential address.

[2] In some circuits

*Statutory citations are from 2022 Florida Statutes.

## REPEAT VIOLENCE BENCHCARD (JUNE 2023)

### A. DEFINITION

Two incidents of violence or stalking committed by the respondent, one of the which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member. § 784.046(1)(b).

As used in this section, "violence" means any assault (§ 784.011), aggravated assault (§ 784.021), battery (§ 784.03, § 784.041), aggravated battery (§ 784.045), sexual assault (§ 794.051, § 794.05), sexual battery (§ 794.011), stalking (§ 784.048), aggravated stalking (§ 784.048), kidnapping (§ 787.01), or false imprisonment (§ 787.02), or any criminal offense resulting in physical injury or death, by a person against any other person. § 784.046(1)(a).

### B. STANDING

- Any person who is the victim of repeat violence and genuinely fears repeat violence by the respondent, § 784.046(4)(b), or
- The parent or legal guardian of any minor child living at home who is a victim of repeat violence. § 784.046(2)(a).
- If the party against whom the injunction is sought is a parent, stepparent, or legal guardian of the minor child, the parent filing on behalf of that minor child must have been an eyewitness to or must have direct physical evidence or affidavits from eyewitnesses to, the specific facts and circumstances that form the basis of the relief sought. § 784.046(4)(a)1.
- If the party against whom the injunction is sought is *not* a parent, stepparent, or legal guardian, the parent filing on behalf of a minor child living at home must have reasonable cause to believe that the minor child is a victim of repeat violence to form the basis on which relief is sought. § 784.046(4)(a)2.
- No bond is required for entry of an injunction. § 784.046(3)(c).
- The sworn petition shall include the specific facts and circumstances that form the basis upon which relief is sought. § 784.046(4)(a).

### C. TEMPORARY EX PARTE INJUNCTIONS

- Upon the filing of a petition, the court shall set a hearing to be held at the earliest possible time. The respondent shall be personally served with the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. § 784.046(5).

- Except as provided in § 90.204, in an ex parte hearing for an injunction, no evidence other than the verified pleading or affidavit shall be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. § 784.046(6)(b).

- If it appears to the court that an immediate and present danger of repeat violence exists, the court may grant a temporary ex parte injunction, pending the full hearing. § 784.046(6)(a).

- An ex parte temporary injunction shall be in effect for a fixed period not to exceed 15 days. A full hearing must be set before the injunction ceases to be effective. The court may grant a continuance of the injunction and the hearing for good cause shown by any party, or upon on its own motion for good cause, including failure to obtain service. § 784.046(6)(c) and Florida Family Law Rule of Procedure 12.610.(c)(4)(A).

- A temporary ex parte injunction may grant such relief as the court deems proper, including an injunction enjoining respondent from committing any acts of violence. § 784.046(6)(a).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2), forms approved by the Florida Supreme Court shall be used for an ex parte injunction.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.046(7)(d).

## D. FINAL INJUNCTIONS ISSUED AFTER NOTICE AND HEARING

- Upon notice and hearing, the court may grant such relief as the court deems proper, including enjoining the respondent from committing any acts of violence and ordering any such relief as the court deems necessary for the protection of the petitioner. § 784.046(7).

- The respondent should be served with a notice for a compliance hearing, set within 30-45 days of issuance of the injunction, when served with the final injunction. The hearing may be cancelled if the respondent can show that he or she has complied with court-ordered obligations. The petitioner should be given notice of the compliance hearing. Follow-up hearings can be set as necessary.

- Terms of a permanent injunction may include ordering the respondent to surrender any firearms and ammunition in the respondent's possession. §§ 784.046(7)(b) and 784.047(1)(h). Note that, unlike in injunctions for protection against domestic violence, the restriction on possession of firearms and ammunition in injunctions for protection against repeat, dating or sexual violence is not mandatory. § 790.233. The court must make a finding that it is necessary to protect the petitioner and allow the respondent due process of law regarding the necessity of incorporating such provisions into the final judgment. *Lagner v. Cox*,

826 So. 2d 475 (Fla. 1st DCA 2002); *see also Popper v. Ficarelli*, 12 So. 2d 930 (Fla. 4th DCA 2009).

- The court may also order respondent to: vacate a shared dwelling; cease contact with the petitioner; and not be within a certain distance from the petitioner's residence, school, place of employment, car, or place regularly frequented by the petitioner or any named family or household member. § 784.047(1).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2), forms approved by the Florida Supreme Court shall be used for issuance of a final injunction.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.046(7)(d).

- The terms of the injunction stay in effect until modified or dissolved. Either party may move to modify or dissolve the injunction at any time. § 784.046(7)(c).

- The petitioner may move to extend the injunction. The court has broad discretion to extend the injunction after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

## E. COMPLIANCE, ENFORCEMENT, AND VIOLATIONS OF INJUNCTIONS

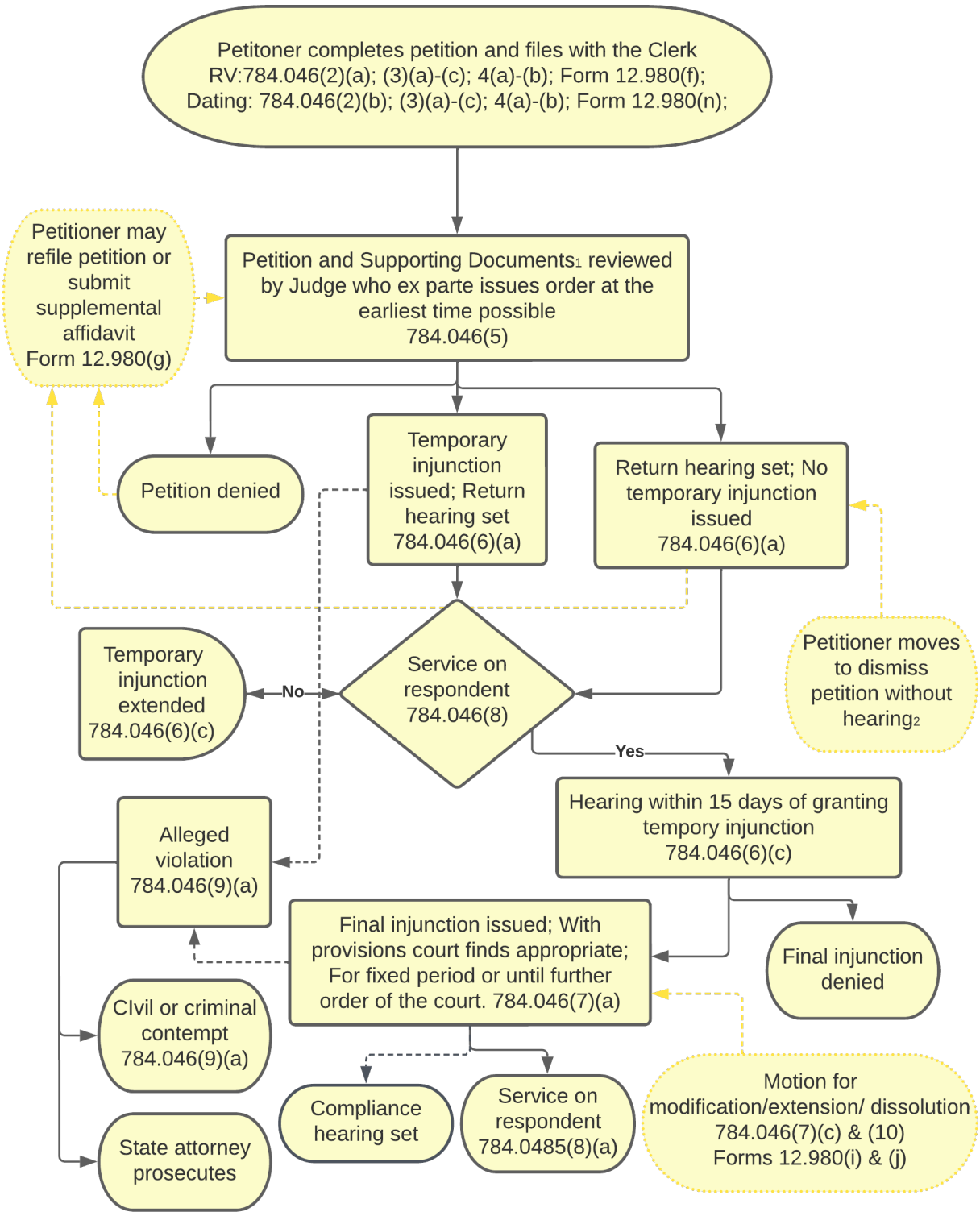
- If the court orders additional remedies, such as participation in a batterers' intervention program, the respondent should be served with a notice for a compliance hearing, to be held within 30-45 days from issuance of the injunction, when served with the final injunction. The hearing may be cancelled if the respondent can show that he or she has complied with court-ordered obligations. The petitioner should be given notice of the compliance hearing. Follow-up hearings can be set as necessary.

- The court shall enforce violations of injunctions for protection through a civil or criminal contempt proceeding. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. § 784.046(9)(a).

- A respondent who willfully violates an injunction for protection commits a misdemeanor of the first degree. § 784.047(1).

- A person with two or more prior convictions of a violation of an injunction for protection, who then subsequently commits a violation of an injunction against the same victim, commits a felony of the third degree. § 784.047(2).

## F. INJUNCTION FOR PROTECTION AGAINST REPEAT VIOLENCE




[1]Less likely to be needed in non-domestic violence petitions. Can request confidential address.

[2] In some circuits

*Statutory citations are from 2022 Florida Statutes.

## SEXUAL VIOLENCE BENCHCARD (JUNE 2023)

### A. DEFINITION

Any one incident of: sexual battery, as defined in chapter 794; lewd or lascivious act, as defined in chapter 800, committed on or in the presence of a person younger than 16; luring or enticing a child, as described in chapter 787; sexual performance by a child, as described in chapter 827; or any other forcible felony where a sexual act is committed or attempted. § 784.046(1)(c).

### B. STANDING

- Any person who is the victim of sexual violence, or the parent or legal guardian of any minor child living at home who is a victim of sexual violence if:
    - The person has reported the sexual violence to a law enforcement agency and is cooperating in any criminal proceeding against respondent, regardless of whether charges have been filed, reduced, or dismissed by the state attorney, § 784.046(2)(c)1; or
    - The respondent's term of imprisonment for the sexual violence committed against the victim or minor child, has expired or is due to expire within 90 days following the date the petition is filed. § 784.046(2)(c)2.
- If the party against whom the injunction is sought is a parent, stepparent, or legal guardian of the minor child, the parent filing on behalf of that minor child must have been an eyewitness to, or must have direct physical evidence or affidavits from eyewitnesses to, the specific facts and circumstances that form the basis of the relief sought. § 784.046(4)(a)1.
- If the party against whom the injunction is sought is *not* a parent, stepparent, or legal guardian, the parent filing on behalf of a minor child living at home must have reasonable cause to believe that the minor child is a victim of sexual violence to form the basis on which relief is sought. § 784.046(4)(a).
- No bond is required for entry of an injunction. § 784.046(3)(c).
- The sworn petition shall include the specific facts and circumstances that form the basis upon which relief is sought and should include information of the law enforcement incident report or the notice of inmate release. § 784.046(4)(a).

### C. TEMPORARY EX PARTE INJUNCTIONS

- Upon the filing of a petition, the court shall set a hearing to be held at the earliest possible time. The respondent shall be personally served with the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. § 784.046(5).

- Except as provided in § 90.204, in an ex parte hearing for an injunction, no evidence other than the verified pleading or affidavit shall be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. § 784.046(6)(b).

- If it appears to the court that an immediate and present danger of sexual violence exists, the court may grant a temporary ex parte injunction, pending a full hearing. § 784.046(6)(a).

- An ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days; however, an ex parte temporary injunction which has been granted due to the respondent's release from incarceration for the sexual violence committed against the victim or minor child, is effective for 15 days following the date the respondent is released from incarceration. § 784.046(6)(c).

- A full hearing must be set before the injunction ceases to be effective. The court may grant a continuance of the injunction and the hearing for good cause shown by any party, or upon on its own motion for good cause, including failure to obtain service. § 784.046(6)(c) and Florida Family Law Rule of Procedure 12.610.(c)(4)(A).

- A temporary ex parte injunction may grant such relief as the court deems proper, including an injunction enjoining respondent from committing any acts of violence. § 784.046(6)(a).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2), forms approved by the Florida Supreme Court shall be used for an ex parte injunction.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.046(7)(d).

## D. FINAL INJUNCTIONS ISSUED AFTER NOTICE AND HEARING

- Upon notice and hearing, the court may grant such relief as the court deems proper, including enjoining the respondent from committing any acts of violence and ordering any such relief as the court deems necessary for the protection of the petitioner. § 784.046(7).

- Terms of a permanent injunction may include ordering the respondent to surrender any firearms and ammunition in the respondent's possession. §§ 784.046(7)(b) and 784.047(1)(h). Note that, unlike in injunctions for protection against domestic violence, the restriction on possession of firearms and ammunition in injunctions for protection against repeat, dating or sexual violence is not mandatory. § 790.233. The court must make a finding that it is necessary to protect the petitioner and allow the respondent due process of law regarding the necessity of incorporating such provisions into the final judgment. *Lagner v. Cox*, 826 So. 2d 475 (Fla. 1st DCA 2002); *see also Popper v. Ficarelli*, 12 So. 2d 930 (Fla. 4th DCA 2009).

- The court may also order the respondent to: vacate a shared dwelling; cease contact with the petitioner; and not be within a certain distance from the petitioner's residence, school, place of employment, car, or place regularly frequented by the petitioner or any named family or household member. § 784.047(1).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2), forms approved by the Florida Supreme Court shall be used for issuance of a final injunction.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.046(7)(d).

- The terms of the injunction stay in effect until modified or dissolved. Either party may move to modify or dissolve the injunction at any time. § 784.046(7)(c).

- The petitioner may move to extend the injunction. The court has broad discretion to extend the injunction after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

## E. COMPLIANCE, ENFORCEMENT, AND VIOLATIONS OF INJUNCTIONS

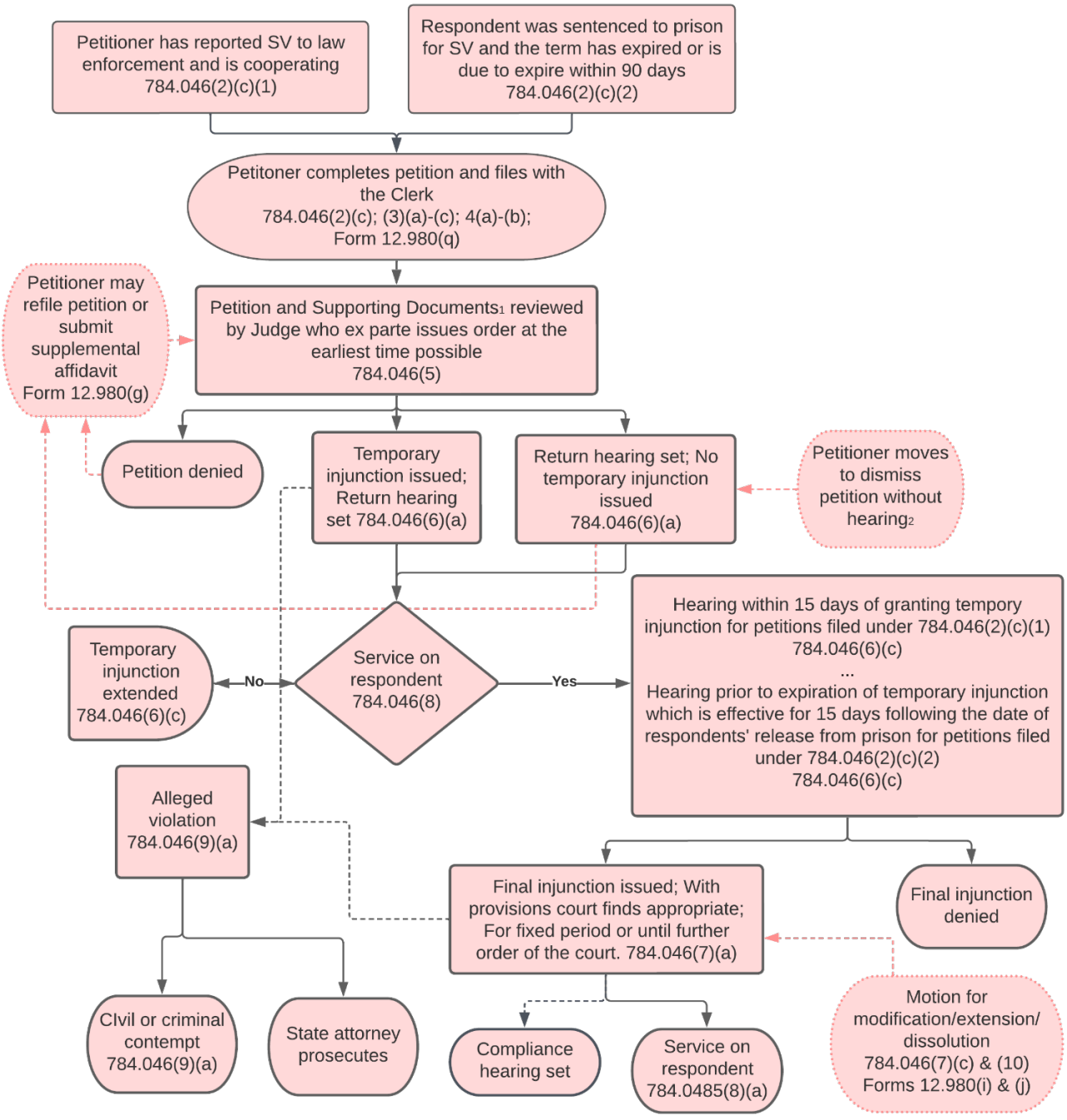
- If the court orders additional remedies, such as participation in a batterers' intervention program, the respondent should be served with a notice for a compliance hearing, to be held within 30-45 days from issuance of the injunction, when served with the final injunction. The hearing may be cancelled if the respondent can show that he or she has complied with court-ordered obligations. The petitioner should be given notice of the compliance hearing. Follow-up hearings can be set as necessary.

- The court shall enforce violations of injunctions for protection through a civil or criminal contempt proceeding. The court may enforce the respondent's compliance with the injunction by imposing a monetary assessment. § 784.046(9)(a).

- A person who willfully violates an injunction for protection commits a misdemeanor of the first degree. § 784.047(1).

- A person with two or more prior convictions of a violation of an injunction for protection, who then subsequently commits a violation of an injunction against the same victim, commits a felony of the third degree. § 784.047(2).

## F. INJUNCTION FOR PROTECTION AGAINST SEXUAL VIOLENCE




[1]Less likely to be needed in non-domestic violence petitions. Can request confidential address.

[2] In some circuits

*Statutory citations are from 2022 Florida Statutes.

## STALKING BENCHCARD (JUNE 2023)

### A. DEFINITION

Willfully, maliciously, and repeatedly following, harassing, or cyberstalking another person. At least two incidents are required. Stalking includes cyberstalking. §§ 784.048(2) and 784.485(1).

### B. STANDING

- Any person who is the victim of stalking, or
- The parent or legal guardian of any minor child living at home who seeks an injunction for protection against stalking on behalf of the minor child. § 784.0485(1)(a).
- The petition may be filed in the circuit where the petitioner currently or temporarily resides, where the respondent resides, or where the stalking occurred. § 784.0485(1)(f).
- The sworn petition shall include the existence of stalking and shall include the specific facts and circumstances for which relief is sought. § 784.0485(3)(a).

### C. TEMPORARY EX PARTE INJUNCTIONS

- Upon the filing of a petition for stalking, the court shall set a hearing to be held at the earliest possible time. The respondent shall be personally served with the petition, notice of hearing, and temporary injunction, if any, prior to the hearing. § 784.0485(4).
- Except as provided in § 90.204, in an ex parte hearing for an injunction, no evidence other than the verified pleading or affidavit shall be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. § 784.0485(5)(b).
- Denial of a temporary ex parte injunction shall be by written order noting the legal grounds for denial. If the only ground for denial is no appearance of an immediate and present danger of stalking, the court shall set a full hearing on the petition with notice at the earliest possible time. § 784.0485(5)(b).
- If it appears to the court that stalking exists, the court may grant a temporary injunction ex parte, pending the full hearing, and may grant such relief as the court deems proper, including an injunction restraining the respondent from committing any act of stalking. § 784.0485(5)(a).

- An ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. A full hearing must be set no later than the date the injunction ceases to be effective. The court may grant a continuance of the hearing for good cause shown by any party, or upon on its own motion for good cause, which shall include failure to obtain service. A temporary injunction shall be extended, if necessary, to remain effective during any period of continuance. § 784.0485(5)(c) and Florida Family Law Rule of Procedure 12.610.(c)(4)(A).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2)A, forms approved by the Florida Supreme Court shall be used for ex parte injunctions.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.0485(6)(c).

## D. FINAL INJUNCTIONS ISSUED AFTER NOTICE AND HEARING

- Upon notice and hearing, the court may grant such relief as the court deems proper, including: enjoining the respondent from committing any act of stalking; ordering the respondent to participate in treatment, intervention of counseling at his or her cost; referring a petitioner to appropriate services; and ordering any such relief as the court necessary for the protection of a victim of stalking. § 784.0485(6).

- Pursuant to Florida Family Law Rule of Procedure 12.610(c)(2)A, forms approved by the Florida Supreme Court shall be used for final injunctions.

- The injunction shall state on its face that it is valid and enforceable in all counties of the State of Florida. § 784.046(6)(c)1.

- The injunction must state on its face that it is a violation of § 790.233 and a misdemeanor of the first degree for the respondent to have in his or her care, custody, or control any firearms or ammunition. § 784.0485(6)(e).

- The terms of the injunction stay in effect until modified or dissolved. Either party may move the court to modify or dissolve the injunction at any time. Specific allegations are not required. Such relief may be granted in addition to other civil or criminal remedies. §§ 784.0485(6)(b) and (10).

- The petitioner may move to extend the injunction. The court has broad discretion to extend the injunction after considering the circumstances. No specific allegations are required. Florida Family Law Rule of Procedure 12.610(c)(4)(B).

## E. COMPLIANCE, ENFORCEMENT, AND VIOLATIONS OF INJUNCTIONS

- If the court orders additional remedies, such as participation in a batterers' intervention program, the respondent should be served with a notice for a

compliance hearing, to be held within 30-45 days from issuance of the injunction, when served with the final injunction. The hearing may be cancelled if the respondent can show that he or she has complied with court-ordered obligations. The petitioner should be given notice of the compliance hearing. Follow-up hearings can be set as necessary.

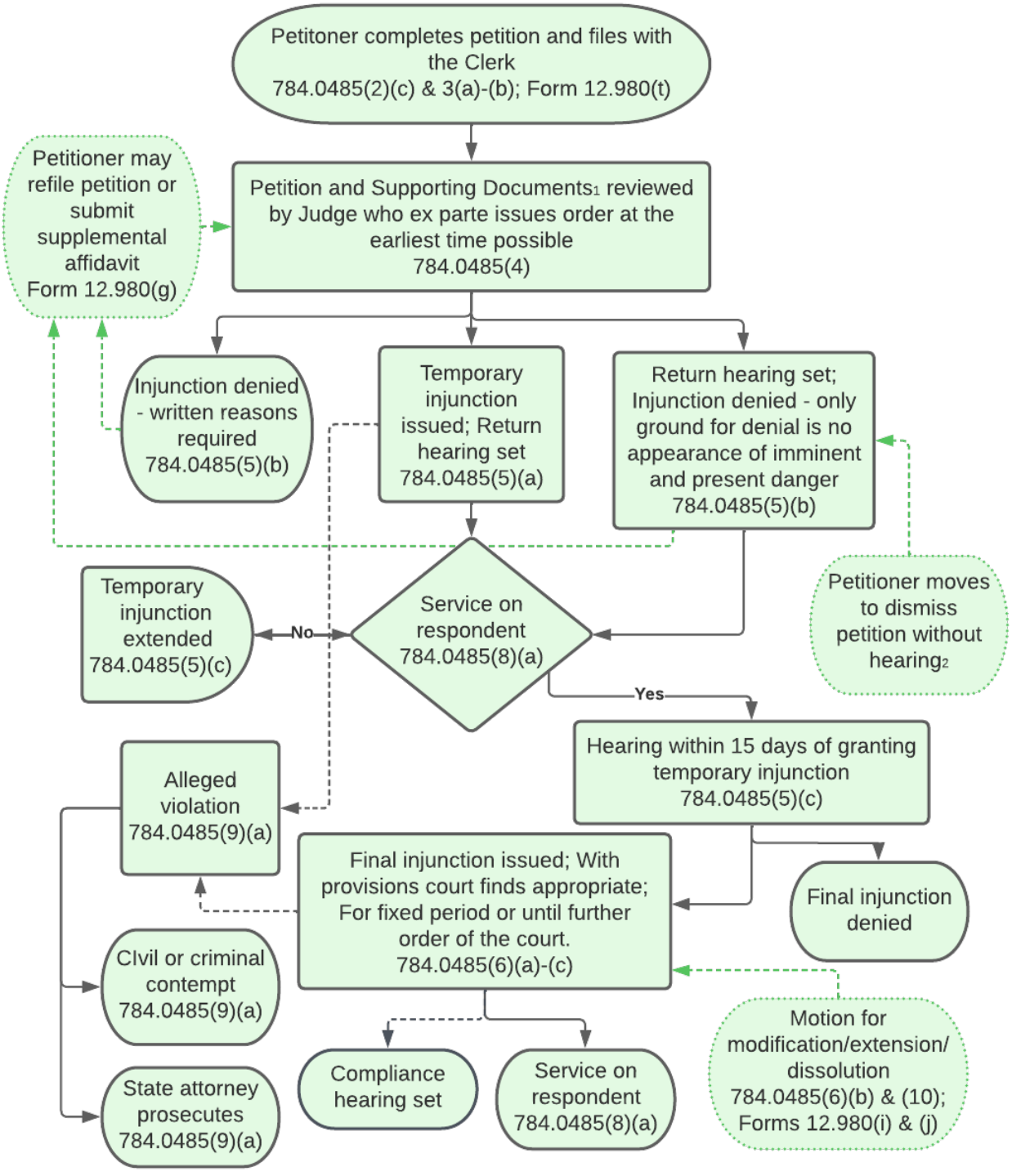
  - The court shall enforce violations of injunction for protection through a civil or criminal contempt proceeding. § 784.0485(9)(a).

- If the respondent violates the injunction, the petitioner may petition for a show cause order (forms 12.980(w) and 12.980(x)). If the affidavit alleges a crime, the affidavit shall be referred to the appropriate department for investigation and forwarding to the state attorney. § 784.0487.

  - A respondent who willfully violates an injunction for protection commits a misdemeanor of the first degree. § 784.0487(4(a).

  - A person with two or more prior convictions of a violation of an injunction for protection, who then subsequently commits a violation of an injunction against the same victim, commits a felony of the third degree. § 784.0487(4)(b).

## F. INJUNCTION FOR PROTECTION AGAINST STALKING




[1]Less likely to be needed in non-domestic violence petitions. Can request confidential address.

[2] In some circuits

*Statutory citations are from 2022 Florida Statutes.

## ELDER ABUSE BENCHCARD AND EXPLOITATION OF VULNERABLE ADULTS (JUNE 2023)

### A. DEFINITIONS

- Elderly person means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired. § 825.101(4).
- Caregiver means a person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person. The term includes, but is not limited to: relatives, court-appointed or voluntary guardians, adult household members, neighbors, health care provider, and employees and volunteers of facilities. § 825.101(2).
- Abuse of an elderly person means:
    - Intentional infliction of physical or psychological injury upon an elderly person;
    - An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person; or
    - Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person. § 825.102(1).
- Aggravated abuse of an elderly person occurs when a person:
    - Commits aggravated battery on an elderly person;
    - Willfully tortures, maliciously punishes, or willfully and unlawfully cages, an elderly person; or
    - Knowingly or willfully abuses an elderly person and in so doing causes great bodily harm, permanent disability, or permanent disfigurement. § 825.102(2).
- Neglect of an elderly person means:
    - A caregiver's failure or omission to provide an elderly person with the care, supervision, and services necessary to maintain the elderly person's physical and mental health; or
    - A caregiver's failure to make a reasonable effort to protect an elderly person from abuse, neglect, or exploitation by another person. § 825.102(3).
- Lewd or lascivious offenses committed upon or in the presence of an elderly person include:
    - Lewd or lascivious battery upon an elderly person or disabled person;

- Lewd or lascivious molestation of an elderly person or disabled person; § 825.1025(3)(a); and
- Lewd or lascivious exhibition in the presence of an elderly person or disabled person. § 825.1025(4).

- Exploitation of an elderly person means:
  - Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person. § 825.103(1)(a).
- All forms of elder abuse as defined in Chapter 825 are felonies. §§ 825.102(1) & (2), 825.1025(3)(b), 825.103(3).

## B. POSSIBLE INDICATORS OF ELDER ABUSE AND NEGLECT

- **Physical/Sexual Abuse:** slap marks; unexplained fractures; bruises; welts; cuts; sores; burns; nonconsensual sexual contact.
- **Emotional Abuse:** withdrawal from normal activities; unexplained changes in alertness; or other unusual behavioral changes; aggressive or controlling caregiver.
- **Financial Abuse/Exploitation:** sudden change in finances and accounts; altered wills and trusts; unusual bank withdrawals; checks written as "loans" or "gifts," loss of property; improper use of power of attorney.
- **Neglect:** lack of basic hygiene; lack of medical aids (glasses, walker, hearing aid, medications, etc.); hoarding; incapacitated person left without care; pressure ulcers; malnutrition; or dehydration.

## C. MANDATORY REPORTING

The statute requires that certain persons, including, but not limited to, physicians and other health care professionals, spiritual healers, staff of nursing homes or other facilities caring for adults, social workers, and State, county, or municipal criminal justice employees or law enforcement officers, who know, or have reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited, shall immediately report such knowledge or suspicion to the central abuse hotline. § 415.1034.

## D. POSSIBLE INJUNCTIVE RELIEF

- **Abuse by Family Members; Order for Protection Against Domestic Violence:**
  - The petitioner and the respondent must be family or household members. § 741.30(1)(e);

- Family or household member means spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family. With the exceptions of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit. § 741.28(3);
- For further information please see the Domestic Violence Benchcard.

- **Abuse by Non-relative Caregivers; Order for Protection Against Repeat Violence**:
  - Two incidents of violence or stalking committed by the respondent, which are directed against the petitioner or the petitioner's immediate family member. § 784.046(1)(b);
  - One of the two incidents of violence or stalking must have been within 6 months of the filing of the petition. § 784.046(1)(b);
  - For further information please see the Repeat Violence Benchcard.

- **Abuse by Individuals in a Dating Relationship**; **Order for Protection Against Dating Violence:**
  - Violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on the consideration of the following factors:
    - A dating relationship must have existed in the past 6 months;
    - The nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and
    - The frequency and type of interaction between the persons involved in the relationship must have included that the persons have been involved over time and on a continuous basis throughout the course of the relationship. § 784.046(1)(d).
  - For further information please see the Dating Violence Benchcard.

## E. SEXUAL ABUSE

- **Order for Protection Against Sexual Violence:**
  - While the statutory definition of sexual violence does not specifically include elders, the statute does include "any forcible felony wherein a sexual act is committed or attempted." § 784.046(1)(c).
  - Section 825.1025 refers to lewd or lascivious offenses committed on elders.

- Any victim of sexual violence has standing in the circuit court to file a sworn petition for an injunction for protection against sexual violence if:
  - The petitioner reported the sexual violence to law enforcement and is cooperating in any criminal proceeding against the respondent, regardless of whether criminal charges based on the sexual violence have been filed, reduced, or dismissed by the state attorney; or
  - The respondent who committed the sexual violence was sentenced to a term of imprisonment in state prison for the sexual violence, and the respondent's term of imprisonment has expired or is due to expire within 90 days following the date the petition is filed. § 784.046(2)(c).
- For further information please see the Sexual Violence Benchcard.

## F. STALKING

- **Order for Protection Against Stalking**
  - **Stalking** means the willful, malicious, and repeated following, harassing, or cyberstalking of another person. Stalking includes cyberstalking. § 784.048(2).
  - **Cyberstalking** means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose. § 784.048(1)(d).
  - For further information please see the Stalking Violence Benchcard.

## G. EXPLOITATION OF AN ELDERLY PERSON, OR A VULNERABLE ADULT

- Statutes governing exploitation of elderly persons or vulnerable adults include those listed below; some proceedings may be referred to the circuit court division which handles probate and guardianship cases.
- A breach of a fiduciary duty to an elderly person by the person's guardian, individual trustee, or agent is exploitation. § 825.103(1)(c).
- Guardianship is addressed in chapter 744. Pursuant to § 825.1035(2), an injunction for protection against exploitation of a vulnerable adult may be filed by:
  - A vulnerable adult in imminent danger of being exploited;
  - The guardian of a vulnerable adult in imminent danger of being exploited;
  - A person or organization acting on behalf of the vulnerable adult with the consent of the vulnerable adult or his or her guardian; or
  - A person who simultaneously files a petition for determination of incapacity and appointment of an emergency temporary guardian.

- A sworn petition for an injunction for protection of a vulnerable adult must follow the format of § 825.1035(3)(a).
- The court must schedule a hearing on a filed petition at the earliest possible date. § 825.1035(3)(c).
- An order denying a petition for an ex parte injunction shall note the legal grounds for denial. If the only ground for denial is the failure to demonstrate an appearance of an immediate and present danger of exploitation, the court must set a full hearing at the earliest possible date. § 825.1035(5)(c).
- If the conditions in § 825.1035(5)(a)1 are met, the court may issue an ex parte temporary injunction for a fixed period of time not to exceed 15 days unless good cause is shown to extend the injunction. The ex parte temporary injunction may be extended one time for up to an additional 30 days. A full hearing must be set before the injunction ceases to be effective. § 825.1035(5)(d).
- An ex parte injunction may grant relief pursuant to § 825.1035(5)(a)2.
- Upon notice and hearing, the court may issue a permanent injunction with relief it deems appropriate pursuant to § 825.1035(8).
- The petitioner, the respondent, or a vulnerable adult may move to modify or dissolve the injunction at any time. No specific allegations are required. The terms of the injunction remain in effect until modified or dissolved. § 825.1035(8)(c) and (13).
- The court may enforce a violation by the respondent of the injunction through a civil or criminal contempt proceeding, and the state attorney may prosecute it as a criminal violation under § 825.1036.

## INJUNCTION MODIFICATION OR DISSOLUTION BENCHCARD (JUNE 2023)

### A. DURATION OF FINAL INJUNCTIONS AND TIMING OF MODIFICATIONS AND DISSOLUTIONS

**Duration of Final Injunctions:**

- In effect until dissolved / Until further order of the court, or
- For a fixed period

**Timing of Motion for Modification or Dissolution:**

- At any time, or
- Prior to expiration if the injunction is for a fixed period

**Domestic Violence:** The terms of an injunction restraining the respondent or ordering relief for the victim shall remain in effect until dissolved. Either party may move at any time to modify or dissolve the injunction. No specific allegations are required. Such relief may be granted in addition to other civil or criminal remedies. § 741.30(6)(c).

**Repeat, Dating, and Sexual Violence:** The terms of the injunction shall remain in full force and effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Such relief may be granted in addition to other civil or criminal remedies. § 784.046(7)(c).

**Stalking:** The terms of an injunction restraining the respondent or ordering other relief for the protection of the victim shall remain in effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Specific allegations are not required. Such relief may be granted in addition to other civil or criminal remedies. § 784.0485(6)(b).

Florida Family Law Rule of Procedure 12.610(c)(4)(B) states that "any relief granted by [a permanent] injunction for protection against domestic, repeat, dating, or sexual violence, or stalking shall be granted for a fixed period or until further order of court. Such relief may be granted in addition to other civil and criminal remedies."

Florida Family Law Rule of Procedure 12.610(c)(6) states that "[t]he petitioner or respondent may move the court to modify or vacate an injunction at any time."

The instructions of Florida Supreme Court Approved Family Law Form 12.980(j) indicate that a petitioner "**must file a motion for modification <u>before</u> the previously entered order expires.**" *Id.* (emphasis original).

## B. STANDING

The petitioner or the respondent may move the court to modify or dissolve an injunction at any time. §§ 741.30(10), 784.046(10), 784.0485(10) and Florida Family Law Rule of Procedure 12.610(c)(6).

*See* Florida Supreme Court Approved Family Law Form 12.980(j) which instructs that a party to a previously entered injunction may move to modify.

A parent may also petition for modification or dissolution on behalf of a minor child. *See Miley v. Dunn*, 264 So. 3d 219 (Fla. 2d DCA 2018).

## C. SERVICE REQUIREMENT

- Florida Family Law Rule of Procedure 12.610(c)(6):
    - Service of a motion to modify or vacate injunctions shall be governed by subdivision (b)(2) of this rule.
- Florida Family Law Rule of Procedure 12.610(b)(2):
    - (2) Service of Petitions.
        - (A) Domestic Violence. Personal service by a law enforcement agency is required. The clerk of the court shall furnish a copy of the petition for an injunction for protection against domestic violence, financial affidavit (if support is sought), Uniform Child Custody Jurisdiction and Enforcement Act affidavit (if custody is sought), temporary injunction (if one has been entered), and notice of hearing to the appropriate sheriff or law enforcement agency of the county where the respondent resides or can be found for expeditious service of process.
        - (B) Repeat Violence, Dating Violence, Sexual Violence, and Stalking. Personal service by a law enforcement agency is required. The clerk of the court shall furnish a copy of the petition for an injunction for protection against repeat violence, dating violence, sexual violence, or stalking, temporary injunction (if one has been entered), and notice of hearing to the appropriate sheriff or law enforcement agency of the county where the respondent resides or can be found for expeditious service of process.
        - (C) Additional Documents. Service of pleadings in cases of domestic, repeat, dating, or sexual violence, or stalking other than petitions, supplemental petitions, and orders granting injunctions shall be governed by rule 12.080, except that service of a motion to modify or vacate an injunction should be

by notice that is reasonably calculated to apprise the nonmoving party of the pendency of the proceedings.

- However, for service of a motion to modify to be sufficient if a party is not represented by an attorney, service must be in accordance with rule 12.070, or in the alternative, there must be filed in the record proof of receipt of this motion by the nonmoving party personally.

## D. STANDARD

*There is some disagreement among the circuits as to the pleading requirements and scope of motions to modify or dissolve injunctions for protection against domestic, dating, repeat, and sexual violence, and stalking.*

The relevant sections of the Florida Statutes indicate that a party may move "at any time" to modify or dissolve the injunction and the statutes relating to injunctions for protections from domestic violence and stalking indicate that "no specific allegations are required." As a result, "the caselaw on the issue of what pleading and proof is necessary in order to obtain a hearing and relief on a motion to modify or dissolve a domestic violence injunction is confused and inconsistent." Reyes *v. Reyes*, 104 So. 3d 1206, 1207 (Fla. 5th DCA 2013).

**Standard for Pleadings**

- *Applicant Is Not Required to Allege a Change in Circumstances and May Address the Initial Procurement of the Injunction – Summary Denial Prohibited as Due Process Violation Because Relevant Statutes Allow a Party to Move for Modification or Dissolution at "Any Time"*
    - *York v. McCarron*, 842 So. 2d 281 (Fla. 1st DCA 2003) (holding that the "any time" language in the statute required the court to hold an evidentiary hearing to allow the movant to present evidence regarding the initial procurement of the injunction) (*declined to follow by Reyes, infra).*
        - *Cf.* Motion to modify or dissolve must assert a change in circumstances. *Knight v. Waters*, 786 So. 2d 1289 (Fla. 1st DCA 2001).
    - *Madan v. Madan*, 729 So. 2d 416 (Fla. 3d DCA 1999) (reversing and remanding as the trial court should have allowed the appellant to present evidence regarding the initial procurement of the injunction at the hearing because the statute allows either party to move at any time to modify or dissolve the injunction) (*declined to follow by Reyes, infra*).

- *Betteman v. Kukelhan*, 977 So. 2d 702 (Fla. 4th DCA 2008) (holding that a summary denial of a motion to vacate an injunction violated due process requirements because the statute provides for a motion to modify or dissolve an injunction at any time) (*declined to follow by Reyes, infra*).

- *Colarusso v. Lupetin*, 28 So. 3d 238 (Fla. 4th DCA 2010) (reversing trial court's summary denial of respondent's motion to dissolve injunction after noting that "caselaw has not clearly set forth the applicable legal standard for determining whether a domestic violence injunction should be vacated or modified" but "even assuming that appellant was required to allege a change in circumstances…appellant alleged in his motion that there was a change in circumstances because the injunction had served its purpose, he had not contacted the petitioner, has been incarcerated, and the injunction limited participation in prison work programs").

- *Party Must Allege a Basis upon Which Relief May Be Granted – Summary Denial is Permissible When Motion is Facially Insufficient*

  - Motion to modify or dissolve must assert a change in circumstances. *Knight v. Waters*, 786 So. 2d 1289 (Fla. 1st DCA 2001).
  - *Bork v. Pare*, 252 So. 3d 394 (Fla. 2d DCA 2018) (appellate court reversed trial court's summary denial of motion to dissolve a final injunction on the grounds that the petitioner's motion was facially sufficient and warranted a hearing.).
    - Although the statute authorizes a party to an injunction to file a motion to dissolve it at any time without making any specific allegations, a motion to modify or dissolve should allege some basis upon which relief may be granted. *Id.* at 395. "[B]ecause a movant must show a change of circumstances to obtain relief…the motion is facially sufficient if it alleges facts demonstrating a change of circumstances." *Id.*
  - The motion to modify or dissolve injunction is required to contain an allegation of the changed circumstances and not merely a challenge to the original issuance of the injunction. *Reyes v. Reyes*, 104 So. 3d 1206 (Fla. 5th DCA 2013) (affirming trial court's summary denial of respondent's motion to modify or dissolve injunction for protection against domestic violence because it failed to allege any change in circumstances).

    - *Cf. Reed v. Reed*, 816 So. 2d 1246 (Fla. 5th DCA 2002) (holding that the trial court's denial of respondent's motion to vacate final judgment of injunction without a hearing violated his due process

rights and remanding so that respondent could obtain service of his motion and schedule an evidentiary hearing).

**Standard for Relief**

Modification: The moving party must establish a change in circumstances such that equity requires the modification.

- "The movant has the burden of establishing a change in circumstances such that equity required the modification to ensure the victim remains protected as was contemplated when the injunction was originally entered." *Miley v. Dunn*, 264 So. 3d 219, 221 (Fla. 2d DCA 2018) (reversing the denial of a motion to modify an injunction for protection against sexual violence where mother of protected minor sought to modify the terms of the injunction to include the child's new school). "The trial court has broad discretion to modify or dissolve an injunction when changes in circumstances make it equitable to do so." *Id.* at 222.
- Evidence must support a change in circumstances. *Simonik v. Patterson*, 752 So. 2d 692 (Fla. 3d DCA 2000) (affirming trial court's denial of motion to modify injunction for protection against repeat violence where defendant sought a modification of a provision that prohibited him from possessing firearms but at the evidentiary hearing respondent did not present any evidence that the circumstances had changed since the injunction was entered). "The terms of a permanent injunction must be confined to what is required by the circumstances justifying the injunction, and those terms are subject to alteration when those circumstances change." *Id.* at 693.

Dissolution: The moving party must establish a change in circumstance such that no valid purpose remains for the continuation of the injunction. In determining whether an injunction continues to serve a valid purpose, the trial court should consider whether the victim reasonably maintains a continuing fear of becoming a victim.

- *Alkhoury v. Alkhoury*, 54 So. 3d 641 (Fla. 1st DCA 2011) (affirming denial of motion to dissolve injunction against domestic violence where the circumstances that originally justified the injunction had not changed and the respondent made no showing that the injunction did not remain necessary to fulfill the purposes of 741.30(6)(b)). "As a general rule, permanent injunctions, which remain indefinitely in effect, may be modified by a court of competent jurisdiction whenever 'changed circumstances make it equitable to do so.'" *Id.* at 642 (citing *Hale v. Miracle Enters. Corp*, 517 So. 2d 102, 103 (Fla. 3d DCA 1987)).
    - "In the specific context of a domestic violence injunction, we believe the 'changed circumstances' rule can best be carried out by a requirement that a party, against whom a domestic violence injunction has been entered, must, if such party seeks to dissolve the injunction, demonstrate that the scenario

underlying the injunction no longer exists so that continuation of the injunction would serve no valid purpose." *Id.*

- *Hobbs v. Hobbs*, 290 So. 3d 1092, 1094 (Fla. 1st DCA 2020). "[I]n determining whether an injunction continues to serve a valid purpose, the trial court considers whether the victim "reasonably maintain[s] a continuing fear of becoming a victim of domestic violence."
- *Spaulding v. Shane*, 150 So. 3d 852 (Fla. 2d DCA 2014) (trial court applied incorrect standard in denying petitioner's motion to dissolve permanent injunction for protection against domestic violence when the court ruled that it did not find the collateral adverse effects of the injunction sufficient to warrant dissolution. The appropriate standard is whether there has been a change in circumstances since the injunction was entered such that continuation would serve no valid purpose.).
- *Elias v. Steele*, 940 So. 2d 495, 497 (Fla. 3d DCA 2006) ("an individual seeking to modify or dissolve an injunction must establish that the circumstances justifying the injunction have changed so that the terms of the injunction are no longer equitable").
    - *Hinson v. Hussey*, 317 So. 3d 219 (Fla. 3d DCA 2021) (citing *Trice and Simonik, supra* for the principles that a showing of a change in circumstances is required and that the trial court has broad discretion).
    - *See also Reed v. Giles*, 974 So. 2d 624 (Fla. 4th DCA 2008), where the court noted that courts have broad discretion regarding injunctions and that the standard of review on appeal is abuse of discretion.
- "For a movant to be entitled to obtain relief on a motion to modify or dissolve a domestic violence injunction, the movant must prove a change in circumstances." Reyes *v. Reyes*, 104 So. 3d 1206, 1207 (Fla. 5th DCA 2013) (rejecting the argument that a movant can obtain modification or dissolution based on a challenge to its initial procurement).
    - *See also Hamane v. Elofir*, 226 So. 3d 330 (Fla. 5th DCA 2017) (reversing order granting dissolution of injunction where petitioner did not demonstrate at the evidentiary hearing that the scenario underlying the injunction no longer existed to that continuation of the injunction would serve no valid purpose).
- The movant has the burden of establishing a change in circumstances and must present more than "barebones allegations". A court reviewing a motion to modify or terminate should consider whether the facts alleged existed at the time of the entry of the final injunction. And the facts alleged that form the basis for the change in circumstances must be proven at a hearing or stipulated to by the parties in order for a court to grant the motion. "Unsworn representations of

counsel about factual matters do not carry any evidentiary weight." *Bradley v. Slyman*, 325 So. 3d 245 (Fla. 5th DCA 2021).

## E. ILLUSTRATIVE CASES

- Trial court abused its discretion in denying a motion to dissolve injunction where the respondent had alleged a significant change in circumstances since the injunction was entered. At the time that the injunction was issued, the parties were in the middle of a contentious divorce and had young children living at home. At the time of the motion to dissolve, 20 years had passed, the children were grown and out of the house, and the respondent had not attempted any contact in two decades. *Hobbs v. Hobbs*, 290 So. 3d 1092 (Fla. 1st DCA 2020).

- Former husband showed requisite change in circumstances since issuance of former wife's injunction for protection against domestic violence against him, such that former wife no longer maintained objective fear of becoming victim of domestic violence, and thus, dissolving injunction was warranted. Though former husband had violated injunction a year or two after it was issued, husband had not violated the injunction in almost 15 years since. The former husband made no threats of violence to former wife since entry of injunction, there was no evidence that former husband had spoken about former wife with anyone since her relocation or subsequent return to area, former husband did not know former wife's whereabout following injunction, and former husband did not wish to have any contact with her. *Labrake v. Labrake*, 335 So. 3d 214 (Fla. 1st DCA 2022).

- Trial court did not abuse its discretion in refusing to dissolve injunction for protection against domestic violence entered fifteen years prior to the motion. At the time that the injunction was issued, the petitioner was pregnant and married to the respondent. Following the issuance of the petition, the parties divorced, and their child was born. After the child was born, respondent had contact with the petitioner to visit their child. This was done with consent of the petitioner but in violation of the injunction. The petitioner even moved in with respondent when she became pregnant with twins. In the few years following the issuance of the injunction, the petitioner experienced further threats, controlling conduct, withholding of child support, and even one instance of battery. The respondent was then incarcerated and had no contact with the petitioner. At the hearing on the motion, the petitioner described the fear of the respondent and that she feared retaliation once his sentence expired. The trial court found that the petitioner had a reasonable fear of continuing domestic violence and denied the motion to dissolve. *Noe v. Noe*, 217 So. 3d 196 (Fla. 1st DCA 2017).

- A woman who was protected by an injunction sought dissolution. She testified that she and the man against whom the injunction was entered had matured since the

injunction, that both had completed domestic violence counseling and anger management courses, that she had completed additional counseling, and that she had not feared violence from the man for years. The trial court erred in denying motion for dissolution. *Green v. Bordiuk*, 344 So. 3d 630 (Fla. 2d DCA 2022).

- Trial court abused its discretion in denying motion to dissolve permanent injunction for protection from domestic violence issued six years prior. The respondent had been acquitted of the criminal charges, the facts of which had formed the basis for the original injunction. He further alleged that he had moved out of state, obtained a degree in criminal justice, and was hindered in his employment efforts by the injunction because it prevented him from getting licensed and legally handling firearms. The evidence established a single incident of contact after the injunction was entered in which the respondent was seen near the petitioner's vehicle but left as soon as he saw the respondent. The petitioner lived out of the country in Japan and was unsure of where her next assignment would be or when she would be relocating. The appellate court reversed noting "the trial court's conclusion that these circumstances were not 'such that dissolution of the injunction is warranted' could only have rested on a theoretical possibility that [the respondent] …might someday seek [the petitioner] out and harm her." *Trice v. Trice*, 267 So. 3d 496, 500 (Fla. 2d DCA 2019).

- "The possibility of future contact between the parties is not, without more, sufficient to conclude that the circumstances underlying the injunction remain the same." *Black v. Black*, 308 So. 3d 269, 271 (Fla. 2d DCA 2020) (citing *Hobbs v. Hobbs*, 290 So. 3d 1092, 1095 (Fla. 1st DCA 2020)).

- Trial court abused its discretion in granting a motion to terminate an injunction for protection against stalking when the moving party "did not sufficiently allege, nor prove, grounds necessary to support dissolution of the injunction." The final injunction was entered on August 18, 2019 with the respondent's consent. The respondent then moved a year and a half later to dissolve the injunction. He filed an unverified motion alleging that he had been arrested for cyberstalking on May 31, 2019, had worn a GPS monitor from May 31, 2019 to August 6, 2020 without violations, and had pled and was adjudicated guilty for misdemeanor staking. The motion also alleged that he lived "several miles" from the petitioner, had not had any contact with her, and had moved on with his life. The petitioner testified at the hearing on the motion that she was still in fear of the respondent and acknowledged that there had been no contact. The trial court granted the motion on the grounds that the continuation of the injunction would serve no valid purpose. This was error as most of the facts alleged existed at the time of the entry of the injunction. The new facts that remained were "barebones allegations" that were "legally insufficient to support the dissolution of the injunction," were contained in an unverified motion and in a deposition that was

judicially noticed, and the only actual evidence presented was the petitioner's statement that she was still in fear of the respondent. *Bradley v. Slyman*, 325 So. 3d 245, 246-47 (Fla. 5th DCA 2021).

## F. OTHER CONSIDERATIONS

- A petitioner who moves to dissolve an injunction may seek a new injunction for protection in the future; however, he or she will be obligated to meet the burden for granting an injunction with new factual evidence.

- When a trial court dissolves an injunction, it no longer has jurisdiction to impose temporary parenting plans based on the injunction. *Hunter v.* Booker, 133 So. 3d 623 (Fla. 1st DCA 2014) ("However, while section 741.30 authorizes a temporary parenting plan upon the issuance of a domestic violence injunction, it provides no authorization for a parenting plan upon the dissolution or denial of such an injunction."). *Id.* at 627.

- An order dissolving an injunction divests the court of jurisdiction. *Tobkin v. State*, 777 So. 2d 1169 (Fla. 4th DCA 2001) (The trial court could no longer order compliance with counseling.); *see also Berrien v. State*, 189 So. 3d 285 (Fla. 1st DCA 2016).

- When there is an extension, modification, or vacation of an injunction requiring temporary child support payments made to the State Disbursement Unit, the clerk's office must notify the State Disbursement Unit of any changes. In addition, if income deduction is facilitating payment, an Order to Vacate should be sent by the clerk to the employer and the State Disbursement Unit when a modification or termination is entered.

## COMPARISON OF INJUNCTIONS FOR PROTECTION (JUNE 2023)

- The Florida Statutes provide distinct types of injunctions for protection against the five types of interpersonal violence.
- Injunctions may be temporary or permanent; they may be dissolved, modified, or extended, depending on the circumstances.
- The proceedings are civil in nature; the Florida Evidence Code (Chapter 90), Florida Statutes, and the Florida Family Law Rules of Procedure apply.
- Pursuant to Rule 12.610(c)(2), Florida Supreme Court Approved Family Law Forms must be used for issuance of temporary and permanent injunctions.

| **Domestic Violence § 741.30** | **Repeat Violence § 784.046** | **Dating Violence § 784.046** | **Sexual Violence § 784.046** | **Stalking § 784.0485** |
|---|---|---|---|---|
| Purpose is to protect adults; however, children and family pets may be included in terms of the temporary or permanent injunction. | Protects adults and minor children. Requires two incidents of violence or stalking by the respondent on the petitioner or an immediate family member; one must be within 6 months of filing of the petition. | Protects adults and minor children. Requires a dating relationship, with an expectation of affection, within the past 6 months; does not apply to violence in a casual acquaintanceship or in business or social contexts. | Protects adults and minor children. Includes: sexual battery, ch. 794; lewd or lascivious act on child under 16 yrs., ch. 800; luring or enticing a child, ch. 787; sexual performance by a child, ch. 827. | Protects adults and minor children. Requires two incidents of stalking or cyberstalking. Stalking includes cyberstalking. |
| Parties must be family or household members to have standing. Excepting parents of a child in common, the parties must be presently living together or have lived together in the past as if a family. | Either victim, or parent or legal guardian of a minor child living at home who seeks an injunction on behalf of that minor child, has standing to file a sworn petition. | The victim, person with reasonable cause to believe he or she is in imminent danger of becoming a victim, or parent or legal guardian of a minor child living at home who seeks an injunction on behalf of child, has standing. | Either the victim, or parent or legal guardian of a minor child living at home, has standing. OBO actions require: 1) reporting and cooperation; or 2) release of respondent from prison for sexual violence offense within 90 days. | Either the victim, or parent or legal guardian of a minor child living at home who seeks an injunction on behalf of that minor child, has standing to file a sworn petition. |

| Domestic Violence § 741.30 | Repeat Violence § 784.046 | Dating Violence § 784.046 | Sexual Violence § 784.046 | Stalking § 784.0485 |
|---|---|---|---|---|
| The victim is the petitioner who must file a sworn petition with the court. A parent or guardian may file on behalf of a minor child as "next friend." | The victim is the petitioner who must file a sworn petition with the court. A parent or guardian can file on behalf of a minor child. | The victim is the petitioner who must file a sworn petition with the court. A parent or guardian can file a on behalf of a minor child. | The victim is the petitioner who must file a sworn petition with the court. A parent or guardian can file on behalf of a minor child. | The victim is the petitioner who must file a sworn petition with the court. A parent or guardian can file on behalf of a minor child. |
| The court shall set a hearing at earliest possible time; the respondent must be personally served with the petition, notice of hearing, and any temporary injunction. | The court shall set a hearing at earliest possible time; the respondent must be personally served with the petition, notice of hearing, and any temporary injunction. | The court shall set a hearing at earliest possible time; the respondent must be personally served with the petition, notice of hearing, and any temporary injunction. | The court shall set a hearing at earliest possible time; the respondent must be personally served with the petition, notice of hearing, and any temporary injunction | The court shall set a hearing at earliest possible time; the respondent must be personally served with the petition, notice of hearing, and any temporary injunction. |
| If an ex parte injunction is denied, the court must state the legal grounds for denial in writing. If the only ground for denial is no appearance of an immediate and present danger of domestic violence, the court must set a full hearing at the earliest possible time. | The court is not required to state in writing the legal grounds for denial of the ex parte injunction. | The court is not required to state in writing the legal grounds for denial of the ex parte injunction. | The court is not required to state in writing the legal grounds for denial of the ex parte injunction. | If an ex parte injunction is denied, the court must state the legal grounds for denial in writing. If the only ground for denial is no appearance of an immediate and present danger of stalking, the court must set a full hearing at the earliest possible time. |

| Domestic Violence § 741.30 | Repeat Violence § 784.046 | Dating Violence § 784.046 | Sexual Violence § 784.046 | Stalking § 784.0485 |
|---|---|---|---|---|
| The petitioner must show that he or she is a victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence. Issuance of a temporary injunction ex parte requires appearance of immediate and present danger of domestic violence. | The petitioner must have suffered at least two acts of repeat violence or stalking and must genuinely fear repeat violence by the respondent or must be the parent of a minor child living at home who has suffered two acts of violence. Issuance of a temporary injunction ex parte requires appearance of immediate and present danger of violence. | The petitioner must be: 1) a victim or parent of a victim of dating violence; or 2) must have reasonable cause to believe he or she or a minor child living at home is in imminent danger of becoming a victim of dating violence. Issuance of a temporary injunction ex parte requires appearance of immediate and present danger of violence. | The petitioner must be: 1) a victim, or parent of victim, of sexual violence who is cooperating with any criminal proceeding against the respondent; or 2) the person or parent of the person, against whom respondent committed sexual violence and the respondent's prison term has expired or will expire in 90 days. Issuance of a temporary injunction ex parte requires appearance of immediate and present danger of violence. | The petitioner must show stalking exists for issuance of a temporary injunction ex parte. |

| Domestic Violence § 741.30 | Repeat Violence § 784.046 | Dating Violence § 784.046 | Sexual Violence § 784.046 | Stalking § 784.0485 |
|---|---|---|---|---|
| A temporary injunction: grants relief the court deems proper, including an injunction enjoining the respondent from committing any acts of domestic violence, awards the petitioner exclusive use of a shared dwelling, may award the petitioner up to 100% time-sharing in temporary parenting plan, and may award the petitioner custody of a family pet unless it is the respondent's service animal. | A temporary injunction grants relief the court deems proper, including an injunction enjoining the respondent from committing any acts of violence. | A temporary injunction grants relief the court deems proper, including an injunction enjoining the respondent from committing any acts of violence. | A temporary injunction grants relief the court deems proper, including an injunction enjoining the respondent from committing any acts of violence. | A temporary injunction grants relief the court deems proper, including an injunction restraining the respondent from committing any act of stalking. |

## CHAPTER 39 INJUNCTIONS (JUNE 2023)

- Chapter 39, Florida Statutes, provides a method for obtaining an injunction to protect a child from abuse or domestic violence.
- Section 39.504 outlines a procedure similar to that followed in domestic violence proceedings.
- A trial court may issue an injunction to prevent any act of child abuse upon the filing of a petition or upon its own motion at any time after a protective investigation has been initiated by the department pursuant to part III of chapter 39.
- Issuance of an injunction requires reasonable cause.
- A petition for an injunction may be filed by the Department of Children and Families, a law enforcement officer, a state attorney, or other responsible person.
- Upon the filing of a petition, the court shall set a hearing at the earliest possible time.
- The petition must either be verified or accompanied by an affidavit. The petition must set forth the specific actions by the alleged offender from which protection for the child and remedies are sought.
- A temporary ex parte injunction, effective for 15 days, may be entered pending the hearing. The hearing must be held within that time unless continued for good cause shown, which may include obtaining service of process.
- The temporary injunction shall be extended during a continuance period.
- Personal service of the petition, notice of hearing, and temporary injunction, if entered, is required upon the alleged offender.
- The primary purpose of an injunction entered under § 39.504 is to protect and promote the best interests of the child, taking the preservation of the child's immediate family into consideration.
- The injunction applies to the alleged or actual offender in a case of child abuse or acts of domestic violence; its conditions are determined by the court.
- The injunction may order the offender to: refrain from further abuse or acts of domestic violence; participate in a specialized treatment program; have limited contact or communication with the child victim, other children in the home, or any other child; refrain from contacting the child at home, school, work, or

wherever the child may be found; have limited or supervised visitation with the child; or vacate the home in which the child resides.

- If properly plead, the court may award the following relief in a temporary ex parte or final injunction: exclusive use and possession of the dwelling to the caregiver or exclusion of the offender from the caregiver's residence; temporary support for the child or other family members; the costs of medical, psychiatric, and psychological treatment for the child incurred due to the abuse, and similar costs for other family members.

- An adult victim of domestic violence may seek protection under § 741.30.

- The terms of a final injunction, which is valid and enforceable in all counties of the state, shall remain in effect until either modified or dissolved by the court.

- Failure to comply with the injunction is a first-degree misdemeanor, punishable as provided in § 775.082 or § 775.083.

- The petitioner, the respondent, or a caregiver may move at any time to modify or dissolve the injunction. Notice of hearing on the motion to modify or dissolve the injunction must be provided to all parties, including the department.

- The person against whom an injunction is entered under this section does not automatically become a party to a subsequent dependency action concerning the same child.

- If there is a pending dependency proceeding regarding the child whom the injunction is sought to protect, the judge hearing the dependency proceeding must also hear the injunction proceeding regarding the child.

## COMPARISON OF CHAPTER 39 AND CHAPTER 741 INJUNCTIONS (JUNE 2023)

| CHAPTER 39 | CHAPTER 741 |
|---|---|
| **Purpose** is to protect and promote the best interests of the child in child abuse or domestic violence situations. | **Purpose** is to protect adults in domestic violence situations, but children may be included in terms of injunction. |
| DCF, a law enforcement officer, the state attorney, or a responsible adult may request, or the court on its own motion may issue, if there is reasonable cause, an injunction to prevent child abuse. | The petitioner files petition for injunction for protection against domestic violence with the court. A parent can file a petition on behalf of a minor child. |
| **Upon filing of a petition**, the court shall set a hearing to be held at the earliest time. The respondent must be personally served with the petition, related pleadings, notice of hearing, and a temporary ex parte injunction, if entered. | **Upon filing of a petition**, the court shall set a hearing to be held at the earliest time. The respondent must be personally served with the petition, related pleadings, notice of hearing, and a temporary ex parte injunction, if entered. |
| Pending the hearing, the court may issue an **ex parte temporary injunction**, effective up to 15 days, unless the hearing is continued for good cause shown, which *may* include obtaining service of process. Temporary ex parte injunctions *shall* be extended during the continuance period. | Pending the hearing, the court may issue an **ex parte temporary injunction**, effective up to 15 days, unless the hearing is continued for good cause shown by any party which *shall* include obtaining service of process. Any injunction *shall* be extended, if necessary, to remain in full force and effect during any period of continuance. |
| The petitioner, respondent, or caregiver may move at any time to modify or dissolve the injunction. Best interest of the child, taking the preservation of the child's immediate family into consideration, is still the court's benchmark. | Either party may move to modify or dissolve the injunction at any time. The petitioner may move to extend before injunction expires. Risk to children is not a factor. |
| **An injunction** may order an offender to refrain from further abuse or acts of domestic violence; obtain treatment, have limited or no contact with the child, and comply with the terms of a safety plan implemented in the injunction. It may also award: costs of medical, psychiatric, or psychological treatment for the child incurred due to | **An injunction** enjoins the respondent from committing any acts of domestic violence and from having firearms or ammunition in his or her care, custody, or control. Injunction may only order treatment or counseling for the respondent but may refer the petitioner to certified domestic center. The court may award exclusive use of shared |

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| the abuse and similar costs for other family members; temporary support for the child or other family members; and exclusive use and possession of the dwelling to the caregiver or exclusion of the offender from the residence of the caregiver. | dwelling to the petitioner or exclude the respondent from the petitioner's residence; may award temporary support for the child or petitioner; may award 100% of time-sharing to the petitioner. May order other relief the court deems necessary for the petitioner's protection. |
| Supervised visitation may be ordered with access to DCF visitation centers and supervision. | Supervised time-sharing may be ordered but will depend upon the availability of local programs. |
| Law enforcement has a duty and responsibility to enforce with specific authority to arrest. | Law enforcement has a duty and responsibility to enforce with specific authority to arrest. |
| **Violation of an injunction** is a first-degree misdemeanor. | Violations may be enforced by the court through a civil or criminal contempt proceeding or may be prosecuted by the state attorney as a criminal violation. |
| **Injunction** remains in effect until modified or dissolved by the court. Any party may move to modify or dissolve the injunction at any time. | **Injunction** ends on a specific date or when modified or dissolved by the court. Any party may move to modify or dissolve the injunction; the petitioner may move to extend prior to expiration. |

## COLLOQUY FOR INJUNCTION HEARINGS (JUNE 2023)

*Before the taking the bench, the bailiff should address the entire audience regarding appropriate behavior in court, cell phones, and paperwork. Some circuits show a video about the proceedings before the judge enters. The best practice is to schedule staggered hearings. This colloquy may be modified for use with a single case. Judges should also consider using an introductory video, multilingual, if possible, that explains how the hearing will be conducted, including when and how witnesses may be permitted to testify, how to introduce evidence, the legal burden of proof, and available legal options, including enforcement options, post-judgment.*

Good morning, ladies and gentlemen. I am Judge _____. Please give me your attention for a few minutes and I will explain how we are going to conduct these proceedings.

The purpose of today's hearings is to decide whether an injunction for protection against domestic, repeat, dating, sexual violence, or stalking should be issued. The person who filed the petition for injunction is the petitioner; the other person is the respondent. Based on the evidence presented, I will determine whether any temporary injunctions should be extended, any final injunctions should be entered, or any cases should be dismissed. If a temporary injunction has been issued in your case, it remains in effect right now.

This is a civil action and not a criminal action; however, it is possible that a respondent is also a defendant in a related criminal case or may be subject to the filing of criminal charges arising out of the same facts as this civil case. If so, he or she does not have to answer questions about or talk about the facts of the case here today. He or she has a constitutional right not to be required to testify against himself or herself. Today's proceedings are being recorded, and all testimony will be given under oath, so anything that a respondent says may be used against him or her by the State in any related criminal action.

The first thing I will do today is ask the petitioner specifically what he or she would like this court to order. In my experience, petitioners are often seeking a no-contact injunction, that is, they want a court order that tells the respondent to have no contact with them and to leave them alone. If you are the respondent and the injunction says that you cannot have any contact with the petitioner, you need to know that "no-contact" is a very broad term that means you cannot have ANY contact, direct or indirect, with the petitioner. For example, you cannot call, email, or text the petitioner or contact them through social media; you cannot write a card or send flowers to them; and you cannot have someone else do for you what you are not allowed to do. If by chance you run into the petitioner in public, you should immediately go the other way. If the petitioner contacts you and says, "Let's get together and talk", don't do that either, because by doing so you are violating the no-contact order.

Sometimes the respondent will ask for a mutual injunction against the petitioner. Under Florida law, this court cannot issue a mutual injunction. If you are the respondent and you want an injunction against the petitioner, then you need to file your own separate petition for an injunction with the clerk's office.

If the petitioner does not appear for the scheduled hearing today, the case may be dismissed. If the respondent does not appear because the temporary injunction was not served, the hearing will be reset for a later date, and the temporary injunction will be extended. If the respondent has been served and fails to appear, this court may go forward with the hearing. If it is appropriate, an injunction may include a parenting plan, establish a support obligation for the petitioner and any

minor children of the parties, require completion of a parenting class, or any other terms to ensure the safety and best interests of the parties' minor children.

When your case is called, please come forward to be sworn and seated. Do not bring the witnesses into the courtroom at this time. They will be sworn and asked to wait out of hearing of the court. A child cannot be a witness without a previously entered order allowing his or her testimony.

I will first ask if the respondent agrees or disagrees with issuing the injunction. There are consequences of having an injunction issued against you and you should be fully aware of these before you agree. If the respondent does agree, we will then establish how long the injunction will be in place and other specific terms. If respondent does not agree to the injunction, then we will have an evidentiary hearing to determine whether petitioner has presented sufficient evidence for issuance of an injunction. If there is a hearing, the petitioner has the burden of proof. If petitioner cannot establish the case, I will dismiss it without the need for further testimony. If the case goes forward, the respondent will then be allowed the opportunity to fully respond to the testimony and evidence presented. Each party will be allowed to call any witnesses and present any evidence they may have.

There are domestic violence advocates in the courtroom today whose purpose is to provide support and information to victims of domestic violence. This can include developing a personal safety plan. If you would like to speak with a domestic violence advocate before your case is heard, please let me or a deputy know when you come forward, and I will provide you the opportunity to do so. There is no charge for the services of an advocate.

If a final injunction is issued, please read it carefully and become familiar with it. If an injunction is issued, this court retains jurisdiction to modify or dissolve it. This court may also extend it, depending upon the circumstances, but the petitioner must request an extension prior to the expiration of the injunction.

The injunction may order the respondent to complete a batterers' intervention program (BIP) or participate in other evaluation or counseling. To ensure that this court's order is followed, a separate Order to Appear will be issued at the end of the case. The respondent will be required by court order to appear on a specific date to show that all the evaluations and recommendations have been filed and all other injunction requirements have been met or are being met. If you fail to appear as ordered, the court may issue a writ that requires the sheriff's office to take you to jail so that you can be brought before the court.

Under both state and federal law, a respondent against whom a final injunction for domestic violence or stalking is entered may not own, use, or possess a firearm or ammunition. Other injunctions may require surrender of firearms as well. A firearms affidavit must be completed here in court. If the respondent's job requires the use of a firearm, we will review that during the case.

If a final injunction is entered today and the respondent violates any part of it, he or she may be held in contempt of court or may be prosecuted by the State Attorney's Office.

No matter what happens today, after your case is heard, there is paperwork involved, and it takes us a while to get all the paperwork done. After your case is heard, please have a seat in the front row to await your paperwork. When you receive

it, please review it to ensure that it is accurate and that you understand it. Do not leave court today without some type of paperwork in your hand. It is very important that both parties update the clerk's office whenever their mailing address changes. If you are a petitioner, you can ask that your address be kept confidential.

Once the paperwork for an injunction has been completed and provided, the deputy will ask the respondent to remain in the courtroom for an additional 15 minutes to allow the petitioner time to leave the courthouse.

If you have any questions, feel free to ask them of me when your case is called. If you need help before then, ask my bailiff. If you are a person with a disability who needs any accommodation to participate in this proceeding, you are entitled, at no cost to you, to the provision of assistance. If you need assistance or would like more information, please check in with my bailiff.

We are going to begin now. Please come forward when your name called. Thank you.

## OTHER AVAILABLE RESOURCES FOR INJUNCTION HEARING PRELIMINARIES (JUNE 2023)

- The Office of Family Courts has prepared a video that serves as an orientation to civil domestic violence court. It provides important information about courtroom procedures, discusses the participants in the hearing, and answers many of the questions litigants might have about what will happen when they come to court. The video is called "Florida Injunctions for Protection: the Hearing" and is available on the Florida courts website at https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Domestic-Violence/Videos#iphear.
- Videos of supplemental colloquies prepared by Judge Fahlgren and Judge Colaw are also available for review on the Florida courts website at https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Domestic-Violence/Benchbooks-Court-Guides.
- Judges are also encouraged to review the Judicial Promising Practices Guide for Domestic Violence Injunction Cases, June 2019, for additional information on promising practices related to injunction hearings and how judges should proceed. This guide is available at https://www.flcourts.gov/content/download/534005/file/Promising%20Practice%20guide%20-%20June%202019%20FINAL.pdf. An update to this guide is anticipated to be completed in the fall of 2023.

## PROTOCOL FOR INJUNCTION HEARINGS (JUNE 2023)

**DO:**

- Use a courtroom rather than chambers for domestic violence injunction hearings and do have law enforcement officers present. If in chambers, do not place parties in close proximity in order to avoid unseen kicking or intimidation through eye contact or gestures.
- Physically separate the petitioners and respondents in the waiting area and in the courtroom to ensure there is no verbal or physical intimidation by the respondent. Ideally, they should be separated in designated areas.
- Have the petitioners leave the courtroom before the respondents in order to lessen the risk of post-hearing danger. Allow at least 15 minutes between departures so the petitioner is not followed into the parking lot.
- Use the services of a victim advocate in the courtroom and waiting area.
- Familiarize yourself with any related cases between the parties, including, but not limited to paternity, dissolution, criminal, and juvenile dependency proceedings.
- Timely grant temporary child support and award ancillary relief where it is appropriate.
- Carefully address time-sharing in a temporary parenting plan, keeping in mind the safety of the parties and the children.
- Carefully address possession and control of family pets, keeping in mind the safety of the parties.
- Use the services of any available supervised visitation center when safety concerns for the petitioner and/or children indicate that time-sharing or pick-up and drop-off must be supervised.
- Serve the respondent with both the final judgment and an Order to Appear in 30 to 45 days for purposes of confirming compliance with any court-ordered obligations, such as BIPs, parenting, child support, and to review on-going safety and frequency of parenting considerations. The petitioner should be given notice of the compliance hearing. Set follow-ups as needed.
- Exercise your powers of contempt to enforce an injunction.
- Have a protocol in place with the clerk and your office to handle any post-judgment motions and contempt.
- Let the parties know that child support and time-sharing found in the temporary parenting plan is temporary and will terminate when the final injunction ends or when an order is issued in a related civil case. If they want to request permanent child support and/or time-sharing in a parenting plan, they may file a different civil case or cause of action.

- Recognize the short-term and long-term trauma that has led domestic violence petitioners to seek protection from the court and treat all persons, whether children or adults, with objectivity, sensitivity, dignity, and respect. For additional information see "Trauma Informed Justice" below.
- Be cognizant of and sensitive to the language you use. This includes words and body language. Use appropriate language depending on the individual circumstances of each case and each participant.

**DO NOT:**

- Issue mutual injunctions.
- Order the petitioner to attend a batterers' intervention program (BIP) or any other program other than parenting classes. You may refer the petitioner to other services but do not order these.
- Use any language or action that implies that a person is in any way complicit or responsible for the abuse that has happened to them. Be aware that this message can be conveyed unintentionally. For example, suggesting that a victim may have "put themselves at risk" or commenting on their "lifestyle choices." This type of language is commonly referred to as "victim blaming" and can be direct or indirect.
- Substitute an anger management program for a batterers' intervention program. Anger control programs do not adequately address domestic violence issues and are completely different programs from BIPs.
- Fail to order a respondent to complete a BIP merely because the respondent has a job which requires out-of-town work or long hours.
- Refer any case to mediation if there is a significant history of domestic violence between the parties which would compromise the mediation process.
- Award temporary time-sharing, child support, or establish a temporary parenting plan to anyone who is not a legal parent, adoptive parent, or a guardian by court order of a minor child or children. Paternity must be legally established.
- Award temporary support or time-sharing to the petitioner or establish a temporary parenting plan unless the petitioner has requested it in his or her petition or the respondent is present at the final hearing and waives notice.

## CONSEQUENCES FOR RESPONDENT ONCE A FINAL INJUNCTION FOR PROTECTION AGAINST DOMESTIC VIOLENCE IS ENTERED (JUNE 2023)

- An injunction may require no contact, limited time-sharing with children, supervised time-sharing, the respondent to leave the residence, and/or pay support for the minor children and/or petitioner.

- Under both state and federal law, the respondent is prohibited from possessing firearms and ammunition.

- Law enforcement officers or anyone employed in a position that requires the use of weapons may be affected.

- The respondent's current employment status or employment applications may be affected.

- Professional licenses may be affected.

- Entry into the military may be affected.

- Admission to schools, colleges, and universities may be affected.

- Violation of a final injunction may affect a resident alien's application for citizenship and may result in deportation if the respondent is not a citizen.

- Final injunctions are enforceable in all fifty states and all U.S. territories under the Full Faith and Credit Clause.

- Violation of a final injunction may result in arrest and charge of a first-degree misdemeanor for each violation with a maximum sentence of one year under Florida law.

- If the respondent stalks the petitioner who has an injunction against him or her, the respondent may be charged with aggravated stalking, a third-degree felony.

## SECURITY IN FAMILY COURTS (JUNE 2023)

Security is an essential element of any court; however, security measures are critical to ensure safe and effective operations of family courts which hear domestic violence proceedings. Although security measures vary from circuit to circuit based on geographic and demographic characteristics and financial resources, there are essential components that should be included in each circuit's safety plan. Fear for personal safety may prevent domestic violence victims from seeking relief through the court system. Thus, the safety plan should provide specialized instructions for proceedings involving parties with a history of domestic violence.

The safety plan should be in writing and should be updated as necessary to maintain consistency in the event of changes in courthouse structure or other circumstances. Once a security plan has been developed and safety procedures and policies are in place, training opportunities should be provided for family court personnel.

In addition to information on how to handle persons who exhibit violent behavior or those who may be under the influence of drugs and/or alcohol and emergencies such as bomb threats, a security plan should also include the practices listed below.

Because confrontations between petitioners and respondents can occur in the parking lot, the halls and stairways, and the courtroom itself, court security officers should always be present in the courtroom and should constantly monitor the waiting areas, halls, and stairways. Security guards that provide perimeter security for the courthouse should also be alert for threatening incidents that could occur in the parking lot and surrounding grounds. These measures should be followed:

- Court security should physically separate petitioners, respondents, and their witnesses both in waiting areas and the courtroom to ensure that there is no verbal or physical intimidation by the respondent. Waiting rooms should be located near a main security checkpoint of the family court where security officers are stationed and readily available. Waiting rooms should also be equipped with panic buttons and remain locked when not in use.

- If separate waiting rooms are not available, there should be clearly marked waiting areas and/or color-coded seating.

- Conference rooms provide a private meeting space for litigants to consult with their attorneys or advocates and to fill out forms without being in the presence of others. Conference rooms should be located near a security checkpoint, equipped with panic buttons, and remain locked when not in use.

- Packets served on the parties should include instructions as to where each party should wait in the courthouse. The packets should also contain information on steps a petitioner can take if he or she feels threatened.

- Court security officers should be provided with advanced notice of potentially

violent individuals scheduled to appear before the court.

- Judges should use a courtroom rather than chambers for hearings with law enforcement officers present.
- Cases should be called separately to avoid undue embarrassment to the parties. Staggered dockets can be utilized instead of mass dockets.
- The court should allow the petitioner to leave the courthouse at least fifteen minutes before the respondent and should instruct the respondent to remain in the courtroom upon conclusion of the hearing. This will allow the petitioner to exit the building without fear of confronting the respondent.
- There should be a diagram depicting where security offices and stations are located throughout the courthouse. The diagram should highlight the safest and most convenient evacuation routes should an emergency arise.
- Although the court cannot be responsible for providing security for programs outside the court, family court judges and staff should be aware of security issues that may arise when referring families and children to service providers within the community, such as: private mediators, parenting coordinators, parenting course providers, and supervised visitation centers. Courts can assist community providers by meeting with them regularly to determine how the court can help ensure family safety.
- To provide for the safety of parents and children, supervised visitation program staff should be informed of the reasons why supervised visitation was ordered and what activities should not be permitted during the visit.
- When dissolutions of marriage involve domestic violence, the court should order (and inform the provider) that the parents not attend the parenting class at the same time.
- The court may develop a screening protocol to identify families with a history of domestic violence prior to referring them to mediation.

## MANDATORY REPORTING OF ABUSE CHECKLIST (JUNE 2023)

**WHO NEEDS TO REPORT?**

In Florida, everyone is a mandatory reporter. However, there are two types of reporters:

- Mandated Reporter (General)
    - Any person who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare is a mandatory reporter. § 39.201(1)(a).
    - Any person, including but not limited to state, county, or municipal criminal justice employees or law enforcement officers, who knows or has reasonable cause to suspect that a vulnerable adult has been or is being abused, neglected, or exploited must make a report. § 415.1034(1)(a).
- Mandated Reporter (Professional)
    - Anyone who is legally obligated to report known abuse and must also identify themselves when reporting. These include:
        - Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, paramedic, emergency medical technician, or hospital personnel engaged in the admission, examination, care, or treatment of persons. §§ 39.201(1)(b)2a and 415.1034(1)(a)1;
        - Health or mental health professional other than listed in paragraph above;
        - Practitioner who relies solely on spiritual means for healing, §§ 39.201(1)(b)2c and 415.1034(1)(a)3;
        - School teacher or other school official or personnel (child), § 39.201(1)(b)2d;
        - Social worker, day care center worker, or other professional childcare, foster care, residential or institutional worker (child), § 39.201(1)(b)2e;
        - Nursing home staff; assisted living facilities staff; adult day care center staff etc. (vulnerable adults), § 415.1034(1)(a)4;
        - Employees of Department of Business and Professional Regulation conducting inspections of public lodging establishments, § 415.1034(1)(a)6;

- Law enforcement officer, §§ 39.201(1)(b)2f and 415.1034(1)(a)5; Judge, § 39.201(1)(b)2g and 415.1034(1)(a)5;
- Animal control officer, § 39.201(1)(b)2h; and
- Mediators. § 44.405(4)(a)3.

- Note: An officer or employee of the judicial branch is not required to again provide notice of reasonable cause to suspect child abuse, abandonment, or neglect when that child is currently being investigated by the department, there is an existing dependency case, or the matter has previously been reported to the department, provided that there is reasonable cause to believe that the information is already known to the department. This paragraph applies only when the information has been provided to the officer or employee in the course of carrying out his or her official duties. § 39.201(2)(a)2.

**WHAT NEEDS TO BE REPORTED?**

- Child Abuse
  - A child in need of supervision who has no parent, legal custodian, or responsible adult immediately known and available to provide supervision and care. § 39.201(1)(a).
  - A child abused by his or her parent, caregiver, guardian, or other person responsible for the child's welfare. § 39.201(1)(a).
  - Child abuse by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare. § 39.201(1)(b).
  - Childhood sexual abuse or victim of a known or suspected juvenile sex offender. § 39.201(5)(a
  - If the report contains information of an instance of known or suspected child abuse involving impregnation of a child under 16 years of age by a person 21 years of age or older, the report shall be made immediately to the appropriate county sheriff's office or other appropriate law enforcement agency. § 39.201(3)(c).
  - Reports involving surrendered newborn infants shall be made and received by the department. § 39.201(3)(e).
- Sexual Battery
  - Section 794.027 requires a person who observes a sexual battery and who has the ability to seek assistance for the victim without being exposed to a threat of physical violence must make a report. Someone other than the victim or a spouse or close family relative of the victim or offender who is not endangered

and who fails to seek assistance by reporting the offense to a law enforcement officer is guilty of a misdemeanor of the first degree.

- Vulnerable Adult Abuse

    - Section 415.1034(1)(a)5 states that any person, including, but not limited to any state, county, or municipal criminal justice employee or law enforcement officer, who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the central abuse hotline.

**WHO DO YOU REPORT IT TO?**

- Child and adult abuse should be reported to the Florida Department of Children and Families (DCF) through either the DCF statewide hotline (call 1-800-96-ABUSE) (1-800-962-2873) or through the DCF website at http://reportabuse.dcf.state.fl.us The hotline also accepts faxes at 1-800-914-0004 and web-based chats on their website. § 39.201(1)(a).

- If the abuse is by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare, the report will be transferred by hotline staff to the appropriate county sheriff's office. § 39.201(1)(a)1b.

- Sexual abuse of a child or juvenile sexual abuse must be reported immediately to the central abuse hotline, including any alleged incident involving a child who is in the custody of or under the protective supervision of the department. Such reports may be made in writing, through the statewide toll-free telephone number, or through electronic reporting. Within 48 hours after the central abuse hotline receives a report, the department shall conduct an assessment, assist the family in receiving appropriate services under § 39.307, and send a written report of the allegation to the appropriate county sheriff's office. § 39.201(5)(a).

**WHAT HAPPENS IF YOU DON'T REPORT?**

- Failure to report child abuse to DCF is a third-degree felony. § 39.205(1).

- Failure to report a sexual battery under § 749.027 is a misdemeanor of the first degree.

- Failure to report a case of known or suspected abuse, neglect, or exploitation of a vulnerable adult or preventing someone else from doing so is a misdemeanor of the second degree. § 415.111(1).

**WHAT HAPPENS IF YOU MAKE A FALSE REPORT?**

A person who knowingly and willfully makes a false report of child abuse, abandonment, neglect, or abuse of a vulnerable adult or who advises another to make

a false report is guilty of a felony of the third degree. §§ 39.205(9), 415.111(5). However, anyone making a report who is acting in good faith is immune from any liability. §§ 39.205(9), 415.111(5)(b).

## FIREARMS AND DOMESTIC VIOLENCE: A QUICK REFERENCE GUIDE TO FIREARM LAWS IN FLORIDA (JUNE 2023)

### DEFINITIONS

- **Firearm** - any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime. § 790.001(6); 18 U.S.C. 921(a)(3).

- **Force** - required to make a crime a "crime of domestic violence" for the purposes of a state's injunction firearm surrender requirement:

    - The Supreme Court held that the respondent's conviction qualified as a misdemeanor crime of domestic violence. It concluded that, in the statute under which he was indicted, the "physical force" requirement is satisfied by the degree of force that supports a battery conviction in common law—offensive touching. The Court stated that Congress is presumed to have intended to incorporate the common law meaning of terms used in its statutes and that nothing suggested that Congress intended to do otherwise here. Although the term "violence" when standing alone implies a substantial use of force, that is not necessarily true in domestic violence cases, because domestic violence is a term of art encompassing acts that might not be characterized as violent in a nondomestic context. *United States v. Castleman*, 572 U.S. 157 (2014).

### SURRENDER

- **Upon service of the injunction**, if so ordered, the respondent must surrender all firearms and ammunition to the police, obtain a receipt of surrender, and file the receipt with the court. § 790.233(1); 18 U.S.C. 922(g)(8); §§ 741.30(5)(a) & (6)(a).

- Surrender of firearms is **mandatory** in domestic violence and final stalking injunctions and cases; however, the court may order surrender of firearms in repeat, sexual, or dating violence injunction cases where the issue was presented or discussed during the hearing. *Blaylock v. Zeller*, 932 So. 2d 479 (Fla. 5th DCA 1996).

    - Note: There are procedures for the return of firearms after a valid injunction has been dismissed or expired. These procedures may vary from circuit to circuit; please contact your circuit for more information regarding return of firearm procedures.

Note: The court cannot prohibit the respondent from possessing firearms and ammunition in a temporary injunction for protection against stalking without specific findings. *Dean v. Bevis, 322 So.3d 167* (Fla. 2d DCA 2021); *see also Popper v. Ficarelli*, 12 So. 3d 930 (Fla. 4th DCA 2009) (issuing a similar holding for injunctions against repeat violence); *and Lagner v. Cox*, 826 So. 2d 475 (Fla. 1st DCA 2002) (holding that, in an injunction for protection against repeat violence, the inclusion of a prohibition from possessing firearms or ammunition absent specific findings regarding the necessity of such a provision violated the respondent's due process rights).

Recent federal case law of note:

In *U.S. v. Rahimi*, No. 21-11001 (5th Cir. 2023), the appellate court held that under 18 U.S.C.§ 922(g)(8), it is unconstitutional under the Second Amendment of the United States Constitution to prohibit someone subject to a domestic violence restraining order from possessing a firearm. While the Federal 5th Circuit Court left in place the federal ban on firearms for convicted abusers, it did state that the prohibition on possession of a firearm in civil restraining order cases is unconstitutional. Currently this opinion only affects the three states under the purview of the Fifth Circuit—Texas, Louisiana, and Mississippi.

**COMPLIANCE**

Upon issuing an injunction, the court should set a compliance hearing to determine whether the respondent has complied with surrender of firearms and ammunition. The hearing may be canceled if the respondent shows that he or she is in compliance with the injunction prior to the compliance hearing.

**SURRENDER EXEMPTION**

- Surrender of firearms shall not apply to a state or local law enforcement officer holding an active certification "who receives or possesses a firearm or ammunition for use in performing official duties on behalf of the officer's employing agency, unless otherwise prohibited by the employing agency." § 790.233(3).
- The exemption found in section 790.233(3) only applies to "firearm[s] or ammunition for use in performing official duties on behalf of the officer's employing agency;" thus, an injunction may provide limitations on any personal firearms or ammunition in the respondent's possession. *Martinez v. Izquierdo*, 166 So. 3d 947 (Fla. 4th DCA 2015).
- Under federal law, a surrender exemption exists for law enforcement officers and active military who are the subject of a protection order; said exemption has been interpreted by the Bureau of Alcohol, Tobacco and Firearm (ATF) to only allow "on-duty" possession of service weapons. 18 U.S.C. 925.

## PROHIBITION AGAINST POSSESSING FIREARMS UNDER CURRENT INJUNCTION

A person subject to a current final injunction against domestic violence, stalking, or cyberstalking is prohibited from possessing firearms or ammunition. § 790.233(1).

## RECORDS CHECK

The Florida Department of Law Enforcement (FDLE) is required to perform a record check for federal and state disqualifiers such as **injunctions** and **domestic violence convictions** prior to authorizing the purchase of a firearm. § 790.065(2).

## PROHIBITION AGAINST ISSUANCE OF CONCEALED CARRY PERMITS

- The Department of Agriculture and Consumer Services is **prohibited from issuing** a license to carry concealed weapons or firearms where the applicant has had adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless three years have elapsed since probation or any other conditions set by the court have been fulfilled, or the record has been sealed or expunged. § 790.06(2)(l).
- A license to carry a concealed weapon or firearm **may not be issued** to a person subject to a current injunction for protection against domestic or repeat violence. § 790.06(2)(m).

## PUNISHMENT FOR VIOLATIONS

- All violations of federal law regarding firearms prohibitions due to domestic violence are punishable by up to 10 years imprisonment and/or a $250,000 fine. 18 U.S.C. 924(a)(2).
- A person who has possession of firearms or ammunition in prohibition of a domestic violence injunction commits a **misdemeanor of the first degree**, punishable as provided in § 775.082 or § 775.083. § 790.233(2).

## LAUTENBERG AMENDMENT

A person convicted of a "qualifying" (right to counsel, jury trial, and conviction not expunged) misdemeanor crime of domestic violence is **permanently disqualified** from possessing a firearm or ammunition. The defendant must be spouse, former spouse, co-parent, parent or guardian of victim, person who cohabits or has cohabited as spouse, parent or guardian, or a person similarly situated. No "official use" exemption applies. 18 U.S.C. 922(g)(9).

## RETENTION OF FIREARM PROHIBITION AFTER EXPUNGEMENT

The court may retain the prohibition against firearm possession in any order for the expungement of a conviction. 18 U.S.C. 921(a)(33)(B)(ii).

# DOMESTIC VIOLENCE: STALKING LEGAL OUTLINE (JUNE 2023)

## A. DEFINITIONS

**Stalking**

- Occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person. Stalking is a misdemeanor of the first degree. § 784.048(2).

- **Harass** - to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose. § 784.048(1)(a).

- **Course of conduct** - a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests. § 784.048(1)(b).

- **Credible threat** - a verbal or nonverbal threat, or a combination of the two, including threats delivered by electronic communication or implied by a pattern of conduct, which places the person who is the target of the threat in reasonable fear for his or her safety or the safety of his or her family members or individuals closely associated with the person, and which is made with the apparent ability to carry out the threat to cause such harm. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat is not a bar to prosecution under this section. § 784.048(1)(c).

**Aggravated Stalking is a Third-Degree Felony and Occurs When:**

- A person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person. § 784.048(3).

- A person who, after an injunction for protection against repeat violence, sexual violence, or dating violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. § 784.048(4).

- A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a child under 16 years of age commits the offense of aggravated

stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. § 784.048(5).

- A person who, after having been sentenced for a violation of §§ 794.011, 800.04, or 847.0135(5) and prohibited from contacting the victim of the offense under § 921.244, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. § 784.048(7)

**Cyberstalking**

- Means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person; or, to access, or attempt to access, the online accounts or Internet-connected home electronic systems of another person without that person's permission, causing substantial emotional distress to that person and serving no legitimate purpose. § 784.048(1)(d).

**Sexual Cyberharassment**

- Found in § 784.049(2)(c), it is a misdemeanor of the first degree to publish to an internet website or disseminate through electronic means to another person a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person without the depicted person's consent, contrary to the depicted person's reasonable expectation that the image would remain private, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person. Evidence that the depicted person sent a sexually explicit image to another person does not, on its own, remove his or her reasonable expectation of privacy for that image. The law defines "sexually explicit image" as any image depicting nudity, as defined in s. 847.001, or depicting a person engaging in sexual conduct, as defined in s. 847.001. § 784.049(2)(d). If a person has a prior conviction for the same crime and commits a second or subsequent crime, the crime is a felony of the third degree. A law enforcement officer may arrest, without an arrest warrant, any person that he or she has probable cause to believe has violated this law. § 784.049(4)(a). The statute also provides that the victim may initiate a civil action against a person who violates this law and such civil action may include an injunction and monetary damages. § 784.049(5).

## B. ISSUES

**The Statute Requires Two or More Instances of Stalking.**

- Over a period of 4 months, the respondent repeatedly emailed and sent gifts to the petitioner, followed by a long letter that, due to the content, prompted her to file for an injunction against stalking which was granted by the court. The

respondent appealed, and the appellate court reversed the ruling. Although the court found that the letter would have caused a reasonable person to suffer the "substantial emotional distress" required by statute, there was no second incident of stalking that supported the issuance of the final injunction. *Laserinko v. Gerhardt*, 154 So. 3d 520 (Fla. 5th DCA 2015).

- A former wife received an injunction for protection against stalking against her former husband, and the former husband appealed. The court affirmed the injunction and found that there was sufficient evidence to show that the former husband's conduct constituted stalking. On three occasions, he had gone to the former wife's house at night, walked around her property, and shined a flashlight into the windows. *Robertson v. Robertson*, 164 So. 3d 87 (Fla 4th DCA 2015).

- The trial court granted a permanent injunction against stalking after the respondent pushed and verbally confronted his neighbor after she set off fireworks on the 4th of July. The appellate court reversed the lower court's decision, finding that there was not competent, substantial evidence to support a finding of stalking. The entire incident took place within a twenty-minute time frame, which the appellate court ruled was not a series or pattern of conduct and was not harassment, as the statute requires. *Packal v. Johnson*, 226 So. 3d 337 (Fla. 5th DCA 2017).

- However, note in *Pickett v. Copeland*, 236 So. 3d 1142 (Fla. 1st DCA 2018) that the court held that, by definition, repeated acts are required for one act of stalking, and a course of conduct is defined as a pattern of conduct composed of a series of acts which shows a continuity of purpose. The definition of stalking does not define stalking as a multiplier of itself and makes no reference to the repeat violence statute. Therefore, the court held that the injunction provisions of § 784.0485 only require the petitioner to prove a single incident of stalking.

**"Harassing" Must Cause Emotional Distress.**

- The respondent appealed an order of protection against stalking entered on behalf of his former girlfriend. The appellate court reversed and found that the incidents described by the victim would not have caused a reasonable person to suffer substantial emotional distress. *Plummer v. Forget*, 164 So. 3d 109 (Fla. 5th DCA 2015).

- The respondent appealed from an injunction for protection against stalking which prohibited her from seeing her daughter. The petitioner and respondent were a same sex couple married in Vermont, and the petitioner became pregnant through alternative methods. The couple raised the daughter together until they separated. The respondent visited the child until the petitioner began prohibiting visitation. The respondent then tried to text and contact the child asking for visitation. Since none of the messages were threatening and served a legitimate purpose of arranging visitation, and, since they did not cause emotional distress,

the court reversed and vacated the injunction. *Lippens v. Powers*, 179 So. 3d 374 (Fla. 5th DCA 2015).

- Courts apply a reasonable person standard, not a subjective standard, to determine whether an incident causes substantial emotional distress. The petitioner was granted a four-year injunction for protection against stalking after a neighbor harassed her on several occasions. The neighbor appealed. Due to the substantial discrepancies between the testimony and the allegations in the petition, as well as the general lack of evidence, the court reversed the injunction. *Richards v. Gonzalez*, 178 So. 3d 451 (Fla. 3d DCA 2015).

- The trial court issued a stalking injunction after the respondent made derogatory comments, followed the petitioner with his car after work, and made a flyer with negative comments about the petitioner and passed it out in the petitioner's neighborhood. The appellant appealed the stalking injunction entered against him and claimed that the trial court erred in entering the injunction because there was insufficient evidence of a course of conduct to support a finding of stalking and that the conditions imposed by the trial court as part of the injunction were overly broad and thus unconstitutional as a restriction on the appellant's freedom of speech. The court affirmed the stalking injunction and noted that the flyer may not have been a true threat of violence but was distributed to harass the victim and sought to invade the victim's privacy. Thus, the flyer was not speech protected by the First Amendment. *Thoma v. O'Neal*, 180 So. 3d 1157 (Fla. 4th DCA 2015).

- The respondent appealed an injunction for protection against stalking that prohibited her from contacting the petitioner. Since there was no evidence that the conduct in question caused the petitioner substantial emotional distress under § 784.048(1)(a), the court reversed and remanded the case. *Roach v. Brower*, 180 So. 3d 1142 (Fla. 2d DCA 2015).

- Neighbors filed petitions for injunctions for protection against stalking against each other, and the court issued both injunctions. One neighbor appealed, stating that the evidence was insufficient to establish that appealing neighbor followed or harassed the other neighbor. The appellate court reversed, noting that there was not competent, substantial evidence to support the injunction. The behavior described during the hearing did not constitute following or harassment as described in the statute. Further, the evidence that was admitted was based upon hearsay and speculation. *Klemple v. Gagliano*, 197 So. 3d 1283 (Fla. 4th DCA 2016).

- An injunction was entered against a woman at the request of her husband's girlfriend, and the woman appealed. The appellate court reversed, noting that there was no proof that the repeated calls and texts the woman made to her husband caused the girlfriend substantial emotional distress. *Ashford-Cooper v. Ruff*, 230 So. 3d. 1283 (Fla. 1st DCA 2017)

- The nanny appealed after the court awarded her former employer an injunction for protection against stalking against her. The nanny claimed the evidence was insufficient to support the stalking injunction. However, the appellate court believed that the former employer had suffered severe emotional distress as a result of the nanny's actions and affirmed the injunction. The nanny had impersonated the employer and canceled the family's vacation and continued to send the family threatening communications weeks after the nanny was terminated. *Auguste v. Aguado*, 282 So. 3d 937 (Fla 3d DCA 2019).

**Cannot Be Overbroad**

- The respondent claimed that the petitioner, a police officer, cut him off in traffic, so he followed the police officer into the neighborhood where they both lived and complained to the officer about his driving. The officer then gave the respondent a ticket for driving without a seatbelt, which the respondent denied. The respondent then sent several letters to the officer's boss, other public officials, and to the officer's home address, complaining about his mistreatment, and, additionally, posted the officer's picture on the internet with a complaint. The officer petitioned for an injunction against stalking, which was issued and prohibited the respondent from coming within 500 feet of the officer's residence, from posting anything on the internet regarding the officer, and from defacing or destroying the officer's personal property. While the appellate court upheld the injunction, it also stated that the injunction was overly broad since the first amendment protects the respondent's right to criticize public officials and struck the provision which interfered with the respondent's freedom of speech. *Neptune v. Lanoue*, 178 So. 3d 520 (Fla. 4th DCA 2015).

- The trial court entered a final injunction for protection against domestic violence based on respondent engaging in stalking and cyberstalking. In the order, the trial court prohibited respondent from speaking with any employer of the petitioner about the petitioner. The appellate court reversed the trial court's prohibition, stating that the terms of the order constitute a prior restraint and violate the First Amendment. *DiTanna v. Edwards*, 323 So. 3d 194 (Fla. 4th DCA 2021).

- A neighbor received a stalking injunction against the other neighbor that included a provision that provided: "The respondent may travel on his driveway to enter and leave his property but may not linger on his driveway. The respondent is permitted to continue to live in his home but shall have no contact w/the petitioner." The injunction also required the respondent to remove the cameras bordering the neighbor's property within ten days and allowed the respondent to be on his driveway for that ten-day period in order to comply with the injunction. The appellate court affirmed the injunction but reversed the portion of the order that required the respondent to stay off of his driveway. The court ruled that this provision was overbroad because it included both behavior that could constitute stalking and legal behavior that should have been permitted. *Smith v. Wiker*, 192 So. 3d 603 (Fla. 2d DCA 2016).

**Due Process Issues**

- The defendant claimed he could not be convicted of violating a stalking injunction because the temporary injunction had expired, and he had not been served with the permanent injunction that had been ordered. The appellate court reversed, noting that the language on the temporary injunction clearly stated "Expired: July 5th, 2018 or until the final judgment of injunction of protection, if entered, is served to the respondent." Since the temporary was still in effect when the defendant violated it, the conviction was affirmed. *Garcia v. State*, 276 So. 3d 895 (Fla. 3d DCA 2019).

- The petitioner was awarded an injunction against stalking that the respondent appealed. At a very brief hearing in which both parties appeared pro se, the respondent was not allowed an opportunity to present his case. The appellate court reversed because there was not competent and substantial evidence to support the stalking injunction since the petitioner did not show that the respondent's behavior caused substantial emotional distress and only described one incident rather than the requisite two. The court also noted that they would have still reversed, even if the evidence presented was sufficient, because the trial court did not give the appellant a full hearing or an opportunity to present his case to satisfy due process. *David v. Schack*, 192 So. 3d 625 (Fla. 4th DCA 2016).

- A couple lived together for seven years before breaking up. The girlfriend filed a petition for protection against stalking after the boyfriend forced her out of their home and made over 200 harassing and threatening phone calls and text messages to both her and her family. The boyfriend tried to introduce copies of the texts and claimed they were well meaning, in addition to a witness, but the court stated that the sheer number of texts and calls constituted stalking and did not allow the copies into evidence. The judge did not allow the witness to testify, and the boyfriend appealed. The appellate court reversed and remanded since the boyfriend was not given due process at the hearing and could not present his defense. *Ceelen v. Grant*, 210 So. 3d 128 (Fla. 2d DCA 2016).

- The court struck a stalking injunction provision that forbid the respondent from coming within 500 feet of the petitioner's home since that prohibited the respondent from accessing and using his property. The court also noted that the trial court ended the hearing without articulating the terms of the injunction, and therefore the respondent was unaware of the 500-foot provision and did not have an opportunity to object. *Givens v. Holmes*, 241 So. 3d 232 (Fla. 2d DCA 2018).

- The petitioner filed for injunction against stalking and cited five occurrences of harassment and stalking. The court summarily denied the petition, and the petitioner appealed. The appellate court reversed, holding that the trial court was required to hold a hearing or otherwise provide an explanation of the deficiencies in the petition prior to denying it. *Vitale v. Holmes*, 229 So. 3d 832 (Fla 4th DCA 2017).

- The court reversed because the stalking injunction was not supported by competent, substantial evidence. The petitioner did not provide documentation of the numerous phone calls, emails and texts referenced during the hearing, and, without those, there was no way for the trial court to determine whether the communications would have created substantial emotional distress under a reasonable person standard. *Reid v. Saunders*, 230 So. 3d. 1288 (Fla. 1st DCA 2017).

- The court summarily denied the petition for an injunction against stalking in which the petitioner alleged that, over the span of several days, the respondent, a former co-worker, sent her over 160 unwanted photographs, videos, and messages, which she described as "graphic, obscene sexual statements." The petitioner also claimed that she asked the respondent to stop communicating with her and that these communications "made [her] feel very uncomfortable and unsafe." The trial court denied the petition without prejudice, finding that the petitioner failed to allege sufficient facts even after being afforded an opportunity to amend her petition. In its denial, the trial court failed to provide any explanation as to how the allegations were insufficient. The appellate court reversed and stated that the petitioner was entitled to either an order that specified the deficiencies in her allegations or an evidentiary hearing. *McCaffrey v. Ashley*, 265 So. 3d 688 (Fla. 5th DCA 2019).

- The defendant appealed after being convicted of aggravated stalking, claiming that the court abused its discretion by allowing several text messages into evidence. At the beginning of trial, the parties discussed the admissibility of various text communications between the defendant and his wife, and the court ruled that "the text messages could not be admitted during the state's case-in-chief because the state failed to file a timely notice to admit the text messages as collateral crime evidence. However, the court further ruled that this would not prohibit the defense from offering the text messages as impeachment evidence or the state from offering them as evidence during rebuttal." During cross-examination, the state was allowed to introduce, over defense objection, several threatening text messages sent by the defendant to the victim as impeachment evidence. As a result, the defense motioned for a mistrial, but the court denied the motion since the texts contradicted the defendant's testimony. The appellate court affirmed and held that the trial court did not abuse its discretion by allowing the state to introduce this impeachment evidence to correct the defendant's inaccurate and misleading testimony regarding the nature of his relationship with the victim. *Russell v. State*, 269 So. 3d 621 (Fla. 1st DCA 2019).

- Respondent filed an interlocutory appeal after the trial court prohibited his possession of firearms in an ex-parte injunction for protection against stalking. Appellate court affirmed in part and reversed in part stating the allegations were insufficient to support the prohibition of respondent possessing firearms under the alleged facts of the case, but otherwise affirmed the temporary injunction. *Dean v. Bevis, 322 So.3d 167* (Fla. 2d DCA 2021)

**Stalking Can Constitute an Act of Repeat Violence.**

- The petitioner appealed after the circuit court denied her petition for an injunction for protection against repeat violence. At the hearing, the petitioner testified that the respondent choked her multiple times and left marks around her neck, then threatened to kill her. On a later date, she testified that the respondent again choked her and left marks, then threw her to the ground. The respondent called the petitioner 28 times on one occasion and about 30-40 times during the month. He also left pictures of her house, texted her, followed her when she was with co-workers, and threatened to slash her tires. She further testified that he blocked her from leaving work with her car, banged on her car doors, and threatened her. The respondent did not appear at the hearing. The court denied the injunction, stating that there was no physical violence but that the petitioner could re-file under a different form of petition, such as a stalking petition. The appellate court reversed, indicating that it appeared that the trial court had overlooked the fact that stalking can constitute an act of repeat violence and finding that the petitioner clearly established two incidents of violence as the statute required, when she testified about the choking incidents and the course of conduct that the respondent had engaged in. *Austin v. Echemendia*, 198 So. 3d 1058 (Fla. 4th DCA 2016).

**Cyberstalking**

- The wife was granted an injunction for protection against domestic violence. The appellate court reversed and held that the husband's two posts on his own social media webpage did not amount to cyberstalking and that the wife failed to establish that she had reasonable cause to believe she was in imminent danger of becoming a victim of domestic violence. The wife believed the husband's posts showed that he had hacked her Facebook account or had been spying on her, and she testified that someone had installed a keylogger on her computer that kept track of her computer use. However, there was no evidence that it was her husband that installed the keylogger. The court noted that the husband's posts did not meet the statutory definition of cyberstalking because the posts were not directed at a specific person; they were posted to the husband's page and the wife was not "tagged" or mentioned, nor were the posts directed to her in any obvious way. The court also noted that, although the wife's assertions that the husband somehow "hacked" into her Facebook account were disconcerting, that behavior alone does not amount to cyberstalking because it is not an electronic communication. *Horowitz v. Horowitz*, 160 So. 3d 530 (Fla. 2d DCA 2015).

- Mr. Blum claimed that Mr. Scott sent out over 2,200 emails that negatively affected his business, and the court entered an order prohibiting Mr. Scott from cyberstalking. Mr. Scott appealed, claiming that the petitioner failed to meet his burden of proof and that the order hindered his free speech. The appellate court did not discuss the First Amendment issue because they reversed, finding that Mr. Blum failed to meet his evidentiary burden. While the emails may have caused Mr.

Blum some emotional distress or embarrassment, the appellate court found that they did not meet the definition of cyberstalking. *Scott v. Blum*, 191 So. 3d 502 (Fla. 2d DCA 2016).

- For cyberstalking, whether a communication causes substantial emotional distress should be narrowly construed and is governed by the reasonable person standard. In this case, the appellant appealed a non-final order denying his motion to dissolve an ex parte injunction prohibiting cyberstalking. Both parties have companies which produce holograms used in the music industry, and an argument and lawsuit arose regarding the right to show a hologram during a Music Awards show. The trial court granted the amended petition for protection that prohibited the appellee from communicating with the appellant or posting any information about him online and ordering that he remove any materials he already had posted from the websites. The order was based upon various texts, emails, posts, and a fear of violence. The appellant claimed that the texts and posts were merely the result of a heated argument and didn't constitute cyberstalking and the court order was a violation of his first amendment rights. The appellate court agreed and reversed the order that granted the injunction. The court stated that none of the communications should have caused substantial emotional distress and served a legitimate purpose, and therefore did not constitute cyberstalking. *David v. Textor*, 189 So. 3d 871 (Fla. 4th DCA 2016).

**Recent Applicable Rules Cases**

- The court must record stalking injunction hearings, and the recording can be transcribed at either party's expense. *In re Amendments to Florida Supreme Court Approved Family Law Forms—12.980(b)(1),* 246 So. 3d 1161 (Fla. 2018).

- The Supreme Court amended Florida Rule of General Practice and Judicial Administration 2.420 to add two new categories of information in court records that the clerk of courts must maintain as confidential. The clerk must keep identifying information confidential that can be used to identify a petitioner in interpersonal violence cases until the respondent is personally served. *In re Amendments to Florida Rule of General Practice and Judicial Administration 2.420*, 285 So. 3d 870 (Fla. 2019).

## DOMESTIC VIOLENCE OVERVIEW (Updated 2023)

## A. DOMESTIC VIOLENCE – BACKGROUND AND DEFINITIONS

**FEDERAL LAW**

- **The Violence Against Women Act**

  - Title IV of Public Law 103-322 was first passed in 1994 to provide funding to investigate and prosecute violent crimes against women.

  - VAWA was reauthorized in 2000, 2005, 2013, and most recently, in March of 2022. The current reauthorization is effective until 2027.

  - Although the title of the Act refers to victims of domestic violence as women, the operative text includes all victims, regardless of gender.

**Federal Definition of Domestic Violence**

- A misdemeanor crime of domestic violence is defined under federal, state, or tribal law as a crime that has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. 18 U.S.C. § 921(a)(33)(A). 18 U.S.C.A. § 2266(7).

- "Physical force" as used in this statute has been clarified to include "offensive touching" as the phrase is used in common law; the "physical force" referred to in the statute can be either direct force or indirect force. *U.S. v. Castleman*, 572 U.S. 157 (2014).

**Interstate Domestic Violence Statute - Offenses, 18 U.S.C. § 2261(a)**

- **Travel or conduct of offender -** A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in the penalties section below.

- **Causing travel of victim -** A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave

Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in the penalties section below.

- **Penalties** - A person who violates the sections above shall be fined under this title and imprisoned:
  - For life or any term of years, if death of the victim results;
  - For not more than 20 years if permanent disfigurement or life-threatening bodily injury to the victim results;
  - For not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;
  - As provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and
  - For not more than 5 years, in any other case, or both fined and imprisoned.
  - Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.
  - Enactment of 18 U.S.C. § 2261(a) does not exceed Congress' authority under the Commerce Clause. *See U.S. v. Bailey*, 112 F. 3d 758 (4th Cir. 1997).
- **Full Faith and Credit, 18 U.S.C. § 2265:**
  - The Violence Against Women Act requires all states and Indian nations to give full faith and credit to restraining orders and orders of protection against domestic violence that meet the federal definition if the respondent was given notice and an opportunity to be heard. The mandatory injunction forms used in Florida were created in part to qualify under the federal statute, including the written finding that the petitioner is a victim of domestic violence, and/or the petitioner has reasonable cause to believe that she or he is in imminent danger of becoming a victim of domestic violence.

## B. FLORIDA STATE LAW

**Florida Statutes: Chapter 741 Is the Exclusive Method to Obtain an Injunction**

- No other remedies, including an injunction under Florida Rule of Civil Procedure 1.610, may be utilized to obtain an injunction against domestic violence. *Campbell v. Campbell*, 584 So. 2d 125 (Fla. 4th DCA 1991); *see* Florida Family Law Rule of Procedure 12.610(a) and § 61.052(6).

- Section 741.30, not Chapter 61, is the appropriate vehicle for a domestic violence injunction. *Shaw-Messer v. Messer,* 755 So. 2d 776 (Fla. 5th DCA 2000).

- In addition to § 741.28, additional Florida statutes address issues associated with domestic violence cases, including:

  - Injunctions (§ 741.31);

  - Civil actions for damages (§ 768.35);

  - Confidentiality (§§ 39.908, 741.401, 741.465);

  - Evidentiary issues (§ 90.5036); and

  - Mediation (§ 44.102).

- Criminal cases: The court may issue a no contact order as a condition of pre-trial release in certain criminal cases. § 903.047(1)(b).

## C. OTHER TYPES OF INJUNCTIONS AVAILABLE IN FLORIDA

- Dating Violence Injunction. § 784.046.

- Sexual Violence Injunction. § 784.046.

- Repeat Violence Injunction. § 784.046.

- Stalking Injunction. § 784.0485.

- Juvenile Dependency Injunction Against Violence. § 39.504.

- Risk Protection Injunction. § 790.401.

- Protection for Vulnerable Adults. § 825.1035.

**Applicable Rules of Procedure**

- The Florida Family Law Rules of Procedure apply to domestic, repeat, dating, and sexual violence, and stalking proceedings. Rule 12.010(a)(1).

- Pre-trial discovery is available in injunction cases including: depositions (rule 12.290), interrogatories (rule 12.340), production of documents (rule 12.350), examination of persons (rule 12.360), and requests for admission (rule 12.370).

However, the mandatory disclosure required under Florida Family Law Rule of Procedure 12.285 for most family law cases is not available in domestic, repeat, dating, and sexual violence, or stalking injunction proceedings.

- Procedures for temporary and final injunctions for protection against domestic violence are governed by Florida Family Law Rule of Procedure 12.610.

- In conjunction with this rule, the Florida Supreme Court has approved a series of standardized domestic violence forms, which include petitions for various types of injunctions and mandatory injunction forms. Judges are required to use the injunction forms when making determinations in domestic violence cases.

- Modifications of the mandatory injunction forms themselves must be approved by the Supreme Court of Florida.

**Assistance from Clerks**

- The clerk of the court shall provide forms and assist petitioners in seeking both injunctions for protection against domestic violence and enforcement for a violation of an injunction. § 741.30(2)(c)(1).

  - Florida Family Law Rule of Procedure 12.610(b)(4)(A) broadens this obligation to require that the clerk of the court also provide forms and assistance to petitioners seeking injunctions for protection against repeat, dating, and sexual violence, and stalking.

- The clerk of the court cannot assess a filing fee for petitions for injunction against domestic violence. § 741.30(2)(a).

- Intake clerks should familiarize themselves with their circuit's policies and procedures for requesting ADA accommodations and language interpretation services and be prepared to provide assistance to petitioners and respondents in requesting those services.

## D. DOMESTIC VIOLENCE DEFINITIONS

- **Domestic violence** - any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any other criminal offense resulting in physical injury or death of one family or household member by another family or household member. § 741.28(2).

- **Assault** - an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. § 784.011(1). An assault is a misdemeanor of the second degree, punishable as provided in §§ 775.082 or 775.083. § 784.011(2).

- **Battery** - committed if someone (1) actually and intentionally touches or strikes another person against the will of the other, OR (2) intentionally causes bodily harm to another person. § 784.03. A battery is a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083. § 784.03(1)(b).

    - A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered. § 784.03(2).

- **Felony battery** - committed if someone (1) actually and intentionally touches or strikes another person against the will of the other; and (2) causes great bodily harm, permanent disability, or permanent disfigurement. § 784.041(1).

    - A person commits domestic battery by strangulation if the person knowingly and intentionally, against the will of another, impedes the normal breathing or circulation of the blood of a family or household member or of a person with whom he or she is in a dating relationship, so as to create a risk of or cause great bodily harm by applying pressure on the throat or neck of the other person or by blocking the nose or mouth of the other person. This paragraph does not apply to any act of medical diagnosis, treatment, or prescription which is authorized under the laws of this state. § 784.041(2)(a).

    - Felony battery and domestic battery by strangulation are a third-degree felony and punishable as set out above as provided in §§ 775.082, 775.083, or 775.084.

- **Aggravated battery** - occurs if, while committing battery, someone: (1) intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or (2) uses a deadly weapon. Furthermore, a person commits aggravated battery if the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant. § 784.045. Aggravated battery is a second-degree felony, punishable as provided in §§ 775.082, 775.083, and 775.084. § 784.045(2).

- The general view is that **consent is not a defense to battery**.

    - *Lyons v. State*, 437 So. 2d 711, 712 (Fla. 1st DCA 1983).

    - *State v. Conley*, 799 So. 2d 400 (Fla. 4th DCA 2001). "A view of the law that a victim of domestic violence can consent to the batteries and injuries perpetrated on him or her is incompatible with both the general law of battery and the specific legislative intent expressed in § 741.2901(2) . . ."

- **Stalking** - occurs if any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person. Stalking is a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083. § 784.048(2).

- **Cyberstalking** - to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose. § 784.048(1)(d). See *Branson v. Rodriguez-Linares*, 143 So. 3d 1070 (Fla. 2d DCA 2014). The petitioner received approximately 300 emails in one and one-half months. The court held that stalking and cyberstalking can be sufficient to establish the act of "violence" as required by the domestic violence statute, as long as the cyberstalking was directed at a family or household member.

- **Aggravated stalking** - defined as any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person and classified as a felony of the third degree, punishable as provided in §§ 775.082, 775.083, or 775.084. § 784.048(3).

    - Any person who, after an injunction for protection against repeat violence, sexual violence, or dating violence, pursuant to § 784.046, or an injunction for protection against domestic violence pursuant to § 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§ 775.082, 775.083, or 775.084. § 784.048(4).

    - Any person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a minor under 16 years of age commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in §§ 775.082, 775.083, or 775.084. § 784.048(5).

- **Sexually cyber-harass -** means to publish to an Internet website or disseminate through electronic means to another person a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person without the depicted person's consent, contrary to the depicted person's reasonable expectation that the image would remain private, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person. Evidence that the depicted person sent a sexually explicit image to another person does not, on its own, remove his or her reasonable expectation of privacy for that image. § 784.049(2)(c). The crime is a misdemeanor of the first degree; however, if a person has a prior conviction for the same crime and commits a second or subsequent crime, the crime is a felony of the third degree. The law allows a law enforcement officer to arrest, without an arrest warrant, any person that he or she has probable cause to believe has violated the law.

§ 784.049(4)(a). The statute also provides that the victim may initiate a civil action against a person who violates this law, and such civil action may include an injunction, monetary damages, and reasonable attorney fees and costs. § 784.049(5).

# DOMESTIC VIOLENCE COURT: CIVIL PROCEEDINGS (JUNE 2023)

## A. VALID ESTABLISHMENT OF DOMESTIC VIOLENCE COURTS

**Case Law Validating Establishment of Domestic Violence Courts**

- It is appropriate for circuits to establish domestic violence courts to enable family law judges to address all issues involving domestic violence in an expeditious, efficient, and deliberate manner. *Holsman v. Cohen*, 667 So. 2d 769 (Fla. 1996).

**Local Rules and Administrative Orders Regarding the Implementation of Family Court Divisions Are Both Valid. *Holsman v. Cohen*, 667 So. 2d 769 (Fla. 1996).**

- District courts lack authority to review administrative orders.

- District courts' obligations do not include the approval of routine matters generally included in administrative orders such as the assignment of judges to divisions. In fact, the Supreme Court of Florida has exclusive jurisdiction to review judicial assignments. *Rivkind v. Patterson*, 672 So. 2d 819 (Fla. 1996).

**Judicial Assignments in Domestic Violence Court**

- "[T]hat judicial assignments at issue constitute a logical and lawful means to ensure the expeditious and efficient resolution of domestic violence issues..." *Rivkind v. Patterson*, 672 So. 2d 819 (Fla. 1996).

- County court judges may be assigned to hear circuit court work on a temporary or regular basis, provided that the assignment is directed to a specified or limited class of cases. Likewise, this applies equally to the assignment of circuit judges to handle county court matters. *Holsman v. Cohen*, 667 So. 2d 769 (Fla. 1996).

## B. JURISDICTION OF DOMESTIC VIOLENCE COURTS

**The Court Must Have Jurisdiction Before Entering a Final Judgment of Injunction for Protection Against Violence and Ancillary Relief.**

- The trial court, which lacked jurisdiction, incorrectly entered an injunction against repeat violence and supplemental order for a final injunction. *Velez v. Selmar*, 781 So. 2d 1197 (Fla. 3d DCA 2001).
- The trial court did not have jurisdiction to award custody, child support, and alimony, in a domestic violence action absent dissolution of marriage proceeding. § 741.30 does not authorize such awards, under provisions of chapter 61, when the petitioner in a domestic violence action is a minor child filing by and through her mother as "next best friend." *Rinas v. Rinas*, 847 So. 2d 555 (Fla. 5th DCA 2003).

- *Unique to this case was that the petitioner's mother was filing on her minor child's behalf, and, in such cases, ancillary relief may be limited.*

**Florida's Courts Lack Authority to Issue Protective Injunctions Granting Custody of Children Who Are Subjects of Foreign Custody Order.**

- *Baumgartner v. Baumgartner*, 691 So. 2d 488 (Fla. 2d DCA 1997).

- Florida courts likewise lack authority to prohibit children, who are subjects of foreign custody orders, from leaving Florida.

- Florida courts do have authority to issue protective orders to those persons within the state.

**Foreign Orders Which Prohibit Removal of Child from Other Countries**

- The Third District Court of Appeal held that the courts in Florida had no jurisdiction over a child for the purpose of making a custody determination under § 61.1308(1)(b) (*repealed* by Laws 2002, c. 2002-65, 7, eff. October 1, 2002; *current version* §§61.514-523 F.S.) where the child did not have any significant connection with the state of Florida. The child was born in Florida and later moved to Colombia. He had lived a third of his thirty-three months in Florida and two thirds (22 months) in Colombia. The father was a dual citizen of the U.S. and Colombia, where he resided. The mother was a Colombian citizen and had resided in the U.S. while attempting to qualify for residency. The child was present in Florida - visiting his mother for six days prior to the mother filing an injunction for protection against domestic violence. The Florida court entered a domestic violence injunction, asserted jurisdiction over the child, awarded her temporary custody, and ordered the child returned from Colombia by the father, who had sent him back to Colombia the day after the mother filed for the injunction. The father commenced formal proceedings in Colombia to determine custody of the child sometime after the final order of the Florida court in November 1998, which awarded custody to the mother. Service of process on the mother for the Colombian proceedings was attempted, though unsuccessfully, through the Colombian Consulate in Miami. In December 1998, the mother filed for dissolution of marriage, seeking permanent custody of the child. The mother subsequently dismissed her dissolution petition while the issue of jurisdiction was being considered by the family court. The domestic violence trial court later held the father in contempt for his failure to return the child to the mother, despite the father's argument that Colombian law prevented him from removing the child from the country while custody proceedings were pending. The Third District Court of Appeal reversed the trial court's custody order, finding that the court erred in asserting jurisdiction. Further, the Third District Court of Appeal reversed the contempt order, since the father was barred from removing the child from Colombia by Colombian law. *Abuchaibe v. Abuchaibe*, 751 So. 2d 1257 (Fla. 3d DCA 2000).

**Court's Authority in Consolidated Action Subsequent to Dismissal of Domestic Violence Injunction**

- Courts cannot enter no contact directives in related and consolidated paternity actions, subsequent to the court dismissing the temporary injunction. See *Taylor v. Taylor*, 831 So. 2d 240 (Fla. 2d DCA 2002). The trial court's sua sponte consolidation of the mother's petition for an injunction with the mother's subsequently filed paternity action did not confer authority on the court to enter no contact directives against the father, where the court dismissed the temporary domestic violence injunction. *Id.*; see also *Hunter v. Booker*, 133 So. 3d 623 (Fla. 1st DCA 2014) (*noting* that §741.30 authorizes a judge to establish a temporary time sharing plan upon the issuance of an injunction; however, it does not authorize such a measure upon denial of a petition or dissolution of an injunction).

**Circuit Court Does Have Jurisdiction to Hear §39.504 Injunction Case**

- After the mother's paramour allegedly raped a seven-year-old child, the Department of Children and Families (DCF) filed a petition seeking temporary and permanent injunctive relief prohibiting him from having contact with the child. The trial court dismissed the case, stating that it did not have jurisdiction, and DCF appealed. The appellate court reversed and held that the circuit court did have jurisdiction pursuant to §39.504. The court noted that a circuit court's jurisdiction attaches when a petition for an injunction to prevent child abuse is filed; however, an open dependency case is not required to issue a § 39.504 injunction. Therefore, the trial court had jurisdiction to hear and rule on the petition. *Department of Children and Families v. J.D.*, 198 So. 3d 960 (Fla. 5th DCA 2016).

**Long Arm Jurisdiction**

- The trial court did have long-arm personal jurisdiction to hear a petition for and injunction for protection against stalking in a case of feuding YouTube creators, one in Georgia and the other in Florida, because the allegedly tortious conduct was committed online, was about a Florida resident, accessible in Florida, involved multiple videos, and was in fact accessed in Florida by a third party. *Strober v. Harris*, 332 So. 3d 1079 (Fla. 2d DCA 2022).

## C. PARTIES/STANDING/RESIDENCY

**Petitioner Does Not Have to Vacate Residence**

- A person's right to file a petition for injunction against domestic violence is not affected by whether that person has left the parties' residence or household. § 741.30(1)(d).

- Likewise, a litigant may still be awarded exclusive use and possession of the parties' home, even if the litigant has left the home. Amendments to the Florida Supreme Court Approved Family Law Forms -- Domestic Violence Forms, 830 So. 2d 72 (Fla. 2002); Florida Supreme Court Approved Family Law Form 12.980(a).

**Petition Can Be filed Pro Se**

- A pro se litigant can file a petition for protection against domestic violence. § 741.30(1)(f).

**Standing**

- Section 741.30(1))(a) states: "Any person described in paragraph (e), who is either the victim of domestic violence as defined in § 741.28(2) or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence has standing in the circuit court to file a sworn petition for an injunction for protection against domestic violence."

- Reasonable Cause to Believe He or She Is in Imminent Danger of Becoming the Victim of Any Act of Domestic Violence

    - There is no statutory distinction between the standing to file a petition conferred above by being a victim of domestic violence or having a reasonable belief of being in imminent danger of becoming a victim and prevailing on the merits.

        - Section 741.30(6)(a) permits the court to enter the injunction upon making either of the findings in §741.30(1)(a). This interpretation of standing is also supported by case law. *Cleary v. Cleary*, 711 So. 2d 1302 (Fla. 2d DCA 1998); *Gustafson v. Mauck,* 743 So. 2d 614 (Fla. 1st DCA 1999).

- Parties Must Be "Family or Household Members" to Request an Injunction for the Protection against Domestic Violence.

    - Other cases discuss standing in the context of the relationship required to exist between parties before an individual can petition for a domestic violence injunction. A petitioner lacks standing to file a petition for injunction if he or she does not meet the "residing together" requirement for seeking a domestic violence injunction. *Partlowe v. Gomez*, 801 So. 2d 968 (Fla. 2d DCA 2001).

    - An injunction for protection against domestic violence requires that the domestic violence or threat of domestic violence occur between "one family or household member" and "another family or household member," but the petitioner is not required to be the spouse of the respondent. §§ 741.28(2) & 741.30(1)(e). Any "family or household member" as defined under § 741.30(1)(e) below, can file a petition for protection against domestic

violence.

- Under § 741.28(3), "Family or Household Member" means:
  - They are family or household members – spouses, ex-spouses, relatives by blood or marriage, anyone who lives or has lived together in the same dwelling as a family unit; and
  - They currently reside or have in the past resided together in the same dwelling as a family unit; or
  - They have a child in common, regardless of whether they have been married and regardless of whether they currently reside or have in the past resided together in the same dwelling.
  - **Note**: If the parties are relatives or did not reside together in the past, they may want to file for protection against dating violence, repeat violence, or sexual violence under § 784.046.
- Unless the parties have a child in common, the parties must have lived in the same single dwelling with the person against whom the injunction is sought. (Therefore, a child who has never lived with his biological parent could not seek a domestic violence injunction against the parent).
  - Definition of "family or household member" under Florida law is broader than under federal statutes: Florida includes blood relatives and in-laws, but federal law, 18 U.S.C. § 921(a)(33)(A), does not.
  - Furthermore, a minor child can file by and through a parent as "next best friend." However, in such case ancillary relief may be limited.
    - See Rinas v. Rinas, 847 So. 2d 555 (Fla. 5th DCA 2003). It was improper for the trial court to award custody, child support, and alimony for the petitioner's mother and sister in a domestic violence action where the petitioner was a minor child filing by and through her mother as "next best friend."
  - There is also no minimum residency requirement to petition for protection against domestic violence in Florida. § 741.30(1)(j).
  - **Note**: Based on the above cases, there are two aspects to the standing requirement in domestic violence injunction cases: reasonable belief of imminent harm; and the "Family or Household Members" requirement.

- Lack of Standing Must be Raised Initially.

**The Respondent Must Raise Lack of Qualification to Meet Definition of "Family or Household Member" before the Final Injunction is Entered.**

- The court affirmed the entry of a domestic violence injunction under Chapter 741, despite the claim that the respondent did not qualify as a "family or household member," where the issue was not raised until after the injunction was entered. *Andrews v. Byrd*, 700 So. 2d 1250 (Fla. 1st DCA 1997).

- **Standing Requirement Met**

  - Section 741.30 was intended to protect intimate (including same sex) partners and was not intended to exclude those who seek protection from someone of the same sex. *Peterman v. Meeker*, 855 So. 2d 690 (Fla. 2d DCA 2003).

  - Temporary stay of one week with their aunt satisfied statutory requirement that the parties were residing in the "same dwelling." *Kokoris v. Zipnick*, 738 So. 2d 369 (Fla. 4th DCA 1999).

  - The appellate court held that the petitioner was authorized to petition for the injunctions on behalf of the children. Section 741.30 clearly contemplates that children are among those who may invoke the statute's protection from domestic violence, and Florida Rule of Civil Procedure 1.120(b), applicable to all civil cases, provides that a minor cannot sue on his or her own behalf. Rather, suit must be instituted by an appointed representative or a "next friend," such as a parent. Thus, a child's only vehicle for seeking protection under the domestic violence statute is through a petition filed by a next friend or representative. *Parrish v. Price*, 71 So. 3d 132 (Fla. 2d DCA 2011).

- **Standing Requirement NOT Met**

  - The petitioner lacked standing to file a domestic violence action because, although the parties' relationship was romantic in nature with overnight visits, both parties lived in separate residences. *Slovenski v. Wright*, 849 So. 2d 349 (Fla. 2d DCA 2003).

  - The petitioner, who is the maternal grandfather and had custody of the grandchild, requested domestic violence injunction against the child's father. The Court found that, pursuant to § 741.28, the grandfather and father did not share a child in common and dismissed the petition. *Partlowe v. Gomez*, 801 So. 2d 968 (Fla. 2d DCA 2001).

  - In the case of a father and his adult son who never met until the son was an adult and who never lived in the same single dwelling unit, statutory DV cannot occur between them. *Fleshman v. Fleshman*, 50 So. 3d 797 (Fla. 2d DCA 2011).

    - **Note:** Section 784.046(2)(b) provides that "a person who is either the victim of dating violence and has reasonable cause to believe he or she

is in imminent danger of becoming the victim of another act of dating violence or has reasonable cause to believe he or she is in imminent danger of becoming the victim of an act of dating violence, has standing to file a petition for an injunction for protection against dating violence."

- The Florida Supreme Court amended the instructions and the wording of the forms to better explain that a parent or legal guardian has standing to petition for an injunction for protection against dating violence on behalf of a minor living at home**. If the person against whom the injunction is sought is also a parent or legal guardian**, the petitioning parent or legal guardian **must have been "an eyewitness to, or have direct physical evidence or affidavits from eyewitnesses of, the specific facts and circumstances that form the basis upon which relief is sought."** § 784.046(4)(a).

- **If the person against whom the injunction is sought is not a parent, stepparent, or legal guardian of the minor, the petitioner must "[h]ave a reasonable cause to believe that the minor child is a victim of ... dating violence to form the basis upon which relief is sought."** § 784.046(4)(a)(2).

**Alternative Procedure**

- If the petitioner does not have standing to file a petition for an injunction against domestic violence, an injunction against repeat violence may be applicable, depending upon the facts. § 784.046.

## D. PROCEDURAL REQUIREMENTS FOR CLAIMS

Florida Family Law Rule of Procedure 12.610 contains additional procedural sections that are titled requirements for: use of petitions, consideration of petitions by the court, forms, orders of injunction, issuing of injunction, service of injunctions, final injunctions, duration, enforcement, and motions to modify or vacate injunction.

**Venue or Residency Requirement**

- Section 741.30(1)(j) states: "Notwithstanding any provisions of Chapter 47 [Venue], a petition for an injunction for protection against domestic violence may be filed in the circuit where the petitioner currently resides, where the respondent resides, or where the domestic violence occurred. There is no minimum requirement of residency to petition for an injunction for protection."

- Location of the Alleged Act of Domestic Violence

  - *Violent Act Occurring Outside of Florida*

- Whether an injunction can be issued when the act of domestic violence or the alleged victim's basis for fearing he or she will become a victim of domestic violence occurs outside the State of Florida is a question that has not been answered by case law.

- The Fourth District Court of Appeal has stated: "741.30 creates a private cause of action' resting with the victim. Any person who is the victim of domestic violence as defined in the statute may file a sworn petition for an injunction for protection against domestic violence." *Tobkin v. State*, 777 So. 2d 1160, 1164 (Fla. 4th DCA 2001).

- However, § 48.193(1)(a)(2) states that a person submits to the jurisdiction of this state by "committing a tortious act within this state." This indicates that the acts forming the basis for a domestic violence injunction must be committed in Florida. *See Strober v. Harris*, 332 So. 3d 1079 (Fla. 2d DCA 2022).

- Nonetheless, when contemplating the issue discussed above, the court must recognize that the statutes do specifically state that the Legislature's intent is to protect the victim. Therefore, when determining whether to issue an injunction, the court must focus on the safety of the victim, the victim's children, and any other person who may be in danger, whether or not the alleged act occurred at home or just across the state line.

- Because § 784.046 provides for a protective injunction against dating violence but does not contain a special venue provision, the trial court was required to apply the general venue provision in § 47.011 which states "[a]ctions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located." The court also noted that the legislature amended § 741.30 to add a special venue provision, § 741.30(1)(j), which allows a petition to be filed in the circuit where the petitioner resides; however, there is no indication by the legislature that this special venue provision applies outside of chapter 741. Additionally, the court recognized that, under the instructions to family law form 12.980(n) appended to the Florida Family Law Rules of Procedure, a petitioner filing a petition for prohibition against dating violence is instructed to file the petition in the circuit where she lives. However, these instructions cannot contradict § 47.011. *Weimorts v. Shockley*, 47 So. 3d 386 (Fla. 1st DCA 2010).

**Service Requirements of Pleadings and Other Documents**

Florida Family Law Rule of Procedure 12.610(b)(2)(A) requires petitions for protection against domestic violence, other required documents, and the temporary injunction (if one has been entered) to be served by a law enforcement agency and requires the clerk to furnish a copy of the petition and applicable forms to law enforcement for service.

- Temporary and Final Injunctions Must be Served.

    - *See* Florida Family Law Rules of Procedure 12.610(b)(2)(A) and 12.610(c)(3)(A-B).

- Service Requirements for Subsequent Pleadings and Orders

    - "All orders issued, changed, continued, extended, or vacated subsequent to the original service of documents enumerated under subparagraph (1), must be certified by the clerk of the court and delivered to the parties at the time of the entry of the order. The parties may acknowledge receipt of such order in writing on the face of the original order. In the event a party failed or refuses to acknowledge the receipt of a certified copy of an order, the clerk shall note on the original order that service was affected. If delivery at the hearing is not possible, the clerk shall mail certified copies of the order to the parties at the last known address of each party. Service by mail is complete upon mailing." § 741.30(8)(a)(3). *See also* Florida Family Law Rule of Procedure 12.080.

    - **Motion to Modify or Vacate and Injunction**: The procedure for service of pleadings other than the petition, supplemental petitions, and orders is governed by rule 12.080, ***except that service of a motion to modify or vacate an injunction should be by notice that is reasonably calculated to apprise the nonmoving party of the pendency of the proceedings***. Florida Family Law Rule of Procedure 12.610(b)(2)(C).

**Due Process Problems**

- Notice Problems

    - The trial court's decision to permit psychologist's testimony, which was based on a child custody psychological report during a hearing on a temporary domestic violence injunction issued against the father, deprived the mother of procedural due process. The report, which recommended that the children be removed from the mother's custody due to severe alienation of the children from their father, was 35 pages single-spaced and was not received by the mother until the day before the hearing. *Schmitz v. Schmitz*, 890 So. 2d 1248 (Fla. 4th DCA 2005).

    - The lab report, which was sent directly to the judge, was an ex parte communication, and the court must provide a copy to each party and allow each side to be heard before suspending visitation base upon report. *Pierce v. Tello*, 868 So. 2d 1253 (Fla. 4th DCA 2004).

    - The former wife's due process rights were violated when the trial court, on its own motion, modified the "no contact" provision of the contempt order and domestic violence injunction when the husband did not request a modification and agreed at that hearing that the only issue to be decided was the amount of

child support. *Swanson v. Swanson*, 888 So. 2d 117 (Fla. 4th DCA 2004); see also *White v. Cannon*, 778 So. 2d 467 (Fla. 3d DCA 2001).

- Parties must have notice that dismissal will be considered. The trial court erred in dismissing an injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered. Thus, the appellate court found the petitioner was deprived of due process. *Farr v. Farr*, 840 So. 2d 1166 (Fla. 2d DCA 2003).

- The court erred in hearing the respondent's motion to modify temporary injunction concerning child custody at the same time as the final hearing. The petitioner claimed no notice and asked for continuance, which was denied. *Cervieri v. Cervieri*, 814 So. 2d 528 (Fla. 4th DCA 2002).

- Conversion of respondent's ex parte hearing on motion to quash injunction into full evidentiary hearing on original petition for injunction infringed upon due process. Therefore, the injunction was vacated, and the case remanded for a full hearing. *Melton v. Melton*, 811 So. 2d 862 (Fla. 5th DCA 2002).

- The respondent's right to due process was violated where custody and visitation were terminated without a petition requesting such relief. *Ryan v. Ryan*, 784 So. 2d 1215 (Fla. 2d DCA 2001).

- By dismissing injunction without motion, notice, or hearing, the court erred. *Chanfrau v. Fernandez*, 782 So. 2d 521 (Fla. 2d DCA 2001).

- A judge cannot sua sponte modify injunction where no motion seeking modification was filed. *Mayotte v. Mayotte*, 753 So. 2d 609 (Fla. 5th DCA 2000).

- The trial court issued an injunction for protection against domestic violence that did not provide for a change in time-sharing with the minor child. Without notice to the appellant or any pleadings to amend the judgment, the trial court then sua sponte entered an amended judgment that awarded one-hundred percent time-sharing to the appellee. On appeal, the appellant argued that the order was issued without notice or did not allow the appellant a chance to be heard. At the hearing on the appellant's motion to vacate the amended final judgment, the trial court stated that the amended judgment merely corrected a "clerical error." However, the transcript of the hearing leading up to the original judgment showed that the issue of time-sharing was not argued or ruled upon at the hearing. The appellate court reversed because the trial court erred in summarily denying the appellant's motion to vacate the amended final judgment. *Butler v. Cabassa*, 186 So. 3d 1114 (Fla. 4th DCA 2016).

- The wife filed a petition for protection against domestic violence alleging stalking and destruction of personal property. Since she was advised the

allegations were not sufficient for the issuance of a temporary injunction, the wife supplemented her petition with an additional affidavit that alleged acts of physical abuse by her husband. The court then granted the temporary injunction and set a hearing. The husband appeared pro se and claimed he had only received the additional affidavit a few days before and requested a continuance. The trial court denied the request and ultimately granted the petition, and the husband appealed on due process grounds. The appellate court reversed, stating that the trial court erred in denying the motion for a continuance since the notice of the hearing on the new and supplemental allegations was provided only a few business days before the final hearing. *Vaught v. Vaught*, 189 So. 3d 332 (Fla. 4th DCA 2016).

- Opportunity to Be Heard

    - A full evidentiary hearing is required. *Cisneros v. Cisneros*, 782 So. 2d 547 (Fla. 3d DCA 2001); *see also Chanfrau v. Fernandez*, 782 So. 2d 521 (Fla. 2d DCA 2001).

    - The court must allow evidence to be presented. *Wooten v. Jackson*, 812 So. 2d 609 (Fla. 1st DCA 2002).

    - It was error for the court to "cut hearing short" due to number of cases to be heard that day. Awarding temporary custody of the child to the mother without affording full evidentiary hearing denied the father due process. *Semple v. Semple*, 763 So. 2d 484 (Fla. 4th DCA 2000).

    - The petitioner requested emergency *writ of certiorari* for review of two separate orders which denied her ex parte motion for a domestic violence injunction. The first petition was denied without a hearing. The second petition denied relief, holding that the first order issued by a different judge was controlling. The *writ* was granted, and the judge issuing the first order admitted error because the petitioner's allegations were sufficient. The Fifth District Court of Appeal quashed both orders and remanded the case to the first judge with instructions to issue the temporary injunction. *Gonzales v. Clark*, 799 So. 2d 451 (Fla. 5th DCA 2001).

    - The trial court denied a petition for an injunction against domestic violence, and the appellate court reversed because the trial court failed to have a hearing or explain why the allegations were insufficient or improper. The appellate court stated that, on remand, the trial court must either enter an order explaining the deficiencies or hold a hearing on the petition. *Chizh v. Chizh*, 199 So. 3d 1050 (Fla. 4th DCA 2016).

- Opportunity to Have Counsel

    - The defendant, against whom injunction for protection was sought, was denied due process when the trial court granted her twenty days to obtain

representation, while, at the same time, required her to proceed pro se at a hearing in which all of the issues that required the assistance of an attorney were to be decided. *Sheinheit v. Cuenca*, 840 So. 2d 1122 (Fla. 3d DCA 2003).

**Injunction Must be Issued as a Separate Order under Chapter 741.**

- An injunction for protection against domestic violence must be issued as a separate order under Chapter 741, including service of process, proper pleadings, and sufficient evidence to support an injunction or waiver. *Guida v. Guida*, 870 So. 2d 222 (Fla. 2d DCA 2004).
    - Section 61.052(6), mandates that an injunction must be a separate order from the final judgment of dissolution of marriage.
        - Practical Reasons for this Mandate:
            - It facilitates protection by law enforcement. The Florida Supreme Court Approved Family Law Forms of final judgments pertaining to domestic violence are recognized due to their uniformity by law enforcement personnel, whereas individually created final judgments may not be registered or easily recognized. The form injunctions are registered in a statewide registry and may be verified by law enforcement personnel. A similar order under chapter 61 would not be registered.

**Entering and Interpreting Multiple or Inconsistent Orders – Chapter 741 vs. 61**

- Provisions regarding support, time-sharing, and exclusive use and possession of the home in Chapter 61 orders take precedence over inconsistent determinations in domestic violence injunctions, where a Chapter 61 case was filed and determined subsequent to the Chapter 741 action. § 741.30(1)(c).
    - Section 741.30(1)(c) states: "In the event a subsequent cause of action is filed under Chapter 61, any orders entered therein shall take precedence over any inconsistent provisions of an injunction issued under this section which addresses matters governed by Chapter 61."

**Domestic Violence Hearings Must Be Recorded.**

- All proceedings must be recorded. Recording may be by electronic means as provided by the Rules of Judicial Administration. § 741.30(6)(h).

- The initial hearing must be recorded for contempt to be adjudicated; otherwise, facially sufficient claim of error cannot be refuted by the record. *Schmidt v. Hunter,* 788 So. 2d 322 (Fla. 2d DCA 2001).

**Mediation in Domestic Violence Cases**

***A court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.*** § 44.102(2)(c).

- Florida Family Law Rule of Procedure 12.610 prohibits mediation in domestic violence injunction cases until after all the issues involved in granting a final injunction have been resolved except for the issues listed in the rule under 12.610(c)(1)(C).

- **Florida Family Law Rules of Procedure, Rule 12.610(c)(1)(c)** states: "The court, with consent of the parties, may refer the parties to mediation by a certified mediator to attempt to resolve the details as to [issues listed in the rule 12.610(c)(1)(C).] This mediation shall be the only alternative dispute resolution process offered by the court. Any agreement reached by the parties through mediation shall be reviewed by the court and, if approved, incorporated into the final judgment. If no agreement is reached, the matters referred shall be returned to the court for appropriate rulings. Regardless of whether all issues are resolved in mediation, an injunction for protection against domestic violence shall be entered or extended the same day as the hearing on the petition commences."

**Bond is Not Required for Civil Domestic Violence Injunction.**

- No bond is required for issuance of a civil injunction for protection against domestic violence. § 741.30(2)(b); Florida Family Law Rule of Procedure 12.610(c)(2)(B).

**Error for Trial Court to Enter Final Injunction When no Petition was Filed**

- The trial court's sua sponte entry of a final injunction where there was no petition before it was in "direct contravention of § 741.30(1)(l), (4), and (6)(a), which requires the filing of a petition and a hearing on such prior to the issuance of an injunction." *Orth v. Orndorff*, 835 So. 2d 1283 (Fla. 2d DCA 2003).

**Petition Requirements**

- The petition must be sworn, and the petitioner must initial a statement in the petition acknowledging that he or she understands that the statements made in the petition are subject to the penalty of perjury. § 741.30(3)(b-c). *See also* § 741.30(1)(b) (stating an injunction "for protection against domestic violence may be sought regardless of whether any other actions are pending between the parties. However, the pendency of any other action must be alleged in the petition for protection against domestic violence.").

**Required Forms for Filing**

Depending on the request of the petitioner, the following additional Florida Supreme Court Approved Family Law Forms **must be filed in addition to the petition**:

- If temporary child support is requested:
    - Notice of Social Security Number, Florida Supreme Court Approved Family Law Form 12.902(j), Family Law Financial Affidavit (Florida Family Law Rules of Procedure Form 12.902(b) or (c)); and
    - Child Support Guidelines Worksheet, Florida Family Law Rules of Procedure Form 12.902(e).
- If temporary time-sharing of a minor child is requested:
    - Uniform Child Custody Jurisdiction and Enforcement Affidavit, Florida Supreme Court Approved Family Law Form 12.902(d).
- If temporary alimony is requested:
    - Family Law Financial Affidavit, Florida Family Law Rules of Procedure Form 12.902(b) or (c).

**E-Filing**

In March, 2015, several forms were amended to include language and instructions explaining e-service and e-filing, including but not limited to the petition and final judgment for an injunction for protection against domestic violence, the order setting hearing on petition for injunction for protection against domestic violence, repeat violence, dating violence, sexual violence, and stalking without issuance of an interim temporary injunction, and the temporary injunction for protection against domestic violence with and without minor children. See *In re Amendments to Florida Supreme Court Approved Family Law Forms,* 173 So. 3d 19 (Fla. 2015*); In re Amendments to the Florida Supreme Court Approved Family Law Forms*, 205 So. 3d 1 (Fla. 2015).

**Perjury**

If a petitioner makes false statements in a petition for an injunction against domestic violence, the petitioner is subject to perjury prosecution pursuant to the elements of § 837.02. *Adams v. State*, 727 So. 2d 983 (Fla. 5th DCA 1999).

The petitioner is made aware of this potential sanction when the petitioner signs the petition and takes the oath required under § 741.30(3)(c). In *Adams*, the wife was convicted of perjury by contradictory statement after filing a false affidavit in a domestic violence action against her husband. On appeal, she contended that the trial court erred in not granting her motion for judgment of acquittal because: 1) the evidence established that she did not sign the affidavit under oath; and 2) her defense of recantation was established as a matter of law. The Fifth District Court of Appeal Court of Appeals affirmed the trial court finding that neither argument possessed merit and emphasized the criminal consequences attach to the false swearing of complaints, even where the affiant might have been motivated by the

desire to benefit the person against whom the complaint was sworn.

Additionally, in a dissolution action, pursuant to § 61.13(3)(n), the court can consider false allegations made by a party in an injunction proceeding under § 741.30, when determining parental responsibility and physical residence of the parties' children.

**Frivolous Allegations**

Chapter 741 does not provide for sanctions when a party to an injunction proceeding makes frivolous allegations.

Pursuant to *Lopez v. Hall*, 233 So. 3d 451 (Fla. 2018), the Florida Supreme Court held that section 57.105 may be applied to repeat, dating, and sexual violence injunction proceedings under section 784.046. *See also* § 57.105(8) (Attorney fees may not be awarded under this section in proceedings for an injunction for protection pursuant to s. 741.30, s. 784.046, or s. 784.0485, unless the court finds by clear and convincing evidence that the petitioner knowingly made a false statement or allegation in the petition or that the respondent knowingly made a false statement or allegation in an asserted defense, with regard to a material matter as defined in s. 837.011(3)).

**Failure to Appear**

No specific sanctions are provided under Chapter 741 when a petitioner or respondent fails to appear at a hearing on an injunction petition. The court generally dismisses the petition if the petitioner fails to appear. Filing fees can no longer be assessed for a domestic violence injunction.

## E. SUBSTANTIVE REQUIREMENTS FOR CLAIMS

**Legal Grounds Required to Enter an Ex Parte Temporary Injunction**

The court is required to find that an immediate danger exists prior to issuing a temporary injunction. Section 741.30(5)(a) states that when a petitioner files a petition for injunction and "it appears to the court that an immediate and present danger of domestic violence exists," the court may grant a temporary injunction, ex parte.

**Legal Grounds Required to Enter a Final Injunction**

There are two bases for obtaining a final injunction for protection against domestic violence.

- ***A petitioner <u>must either show</u>***:

  1) **The petitioner is a victim of domestic violence**, as defined under § 741.28; OR

2) **The petitioner has reasonable cause to believe that he or she is in imminent danger of becoming the victim** for a court to issue an ex parte temporary injunction and/or a final injunction for protection against domestic violence. § 741.30(1)(a)-(6)(a).

- The Petitioner is a Victim of Domestic Violence

  - Physical Injury or Death Not a Pre-Requisite to Grant an Injunction: under § 741.28(1), the definition of "domestic violence" does not require that the physical injury or death occur in connection with the offense. In that subsection, the phrase "resulting in physical injury or death" pertains only to the generic term "criminal offense" immediately preceding it. The other crimes specified in the section, such as "assault," fall within the definition of domestic violence if they are committed against "one family or household member by another who is or was residing in the same single dwelling unit," even if the victim suffers no physical injury. *R.H. v. State*, 709 So. 2d 129 (Fla. 4th DCA 1998).

  - Chapter 741 does not require a petitioner to demonstrate that he or she has already been a victim of domestic violence. The petitioner's evidence that her former husband recently threatened her was sufficient to establish "reasonable cause to believe that she was about to become a victim of domestic violence" in light of her former husband's prior violent threatening behavior. *Rey v. Perez-Gurri,* 662 So. 2d 1328 (Fla. 3d DCA 1995).

- Courts Must Consider § 741.30(6)(b).

  - In determining whether the petitioner has reasonable cause to believe he or she is in imminent danger of becoming a victim, the court must consider all relevant factors alleged in the petition for injunction, including but not limited to:

    - The history between the petitioner and respondent, including threats harassment, stalking, and physical abuse.

    - Whether the respondent has attempted to harm the petitioner or family members, or individuals closely associated with the petitioner.

    - Whether the respondent has threatened to conceal, kidnap, or harm the petitioner's child or children.

    - Whether the respondent has used, or has threatened to use, any weapons against the petitioner such as guns or knives.

    - Whether the respondent has intentionally injured or killed a family pet.

- Whether the respondent has physically restrained the petitioner from leaving the home or calling law enforcement.

- Whether the respondent has a criminal history involving violence or the threat of violence.

- The existence of a verifiable order of protection issued previously or from another jurisdiction.

- Whether the respondent has destroyed the personal property, including, but not limited to, telephones or other communications equipment, clothing, or other items belonging to the petitioner.

- Whether the respondent engaged in any other behavior or conduct that leads the petitioner to have reasonable cause to believe that she or he is in imminent danger of becoming a victim of domestic violence.

- Remoteness of Incident(s) Forming Basis for Petition

  - There is no requirement that the incidents alleged to support the issuance of an injunction for protection against domestic violence occur within a certain time frame relative to filing of the petition. Section 741.30(6)(b) sets forth the factors the court should consider regarding whether a threat of domestic violence is imminent. Some factors indirectly address the proximity of the alleged acts to the filing of the petition, including: 1) the history of the parties; and 2) the prior criminal record of violence of the respondent.

- Fear of Imminent Danger Established

  - The Third District Court of Appeal held that the testimony of a former girlfriend alleging that her former boyfriend threatened her well-being by driving his truck on the expressway in an erratic and threatening manner, intentionally preventing her from exiting the highway at her desired exit, and rear-ending her vehicle, was internally consistent and sufficient to support the entry of a final injunction for protection against domestic violence. The Third District Court of Appeal held that the testimony of the girlfriend alone was sufficient, and the court expressly recognized the general cycle of violence." *Abravaya v. Gonzalez*, 734 So. 2d 577 (Fla. 3d DCA 1999).

- Fear of Imminent Danger NOT Established

  - The trial court erred in finding that the verbal statement from the respondent saying, "I should have killed her," made to a process server (shortly before the petition for protection against domestic violence was filed), provided the petitioner with an objectively reasonable fear of imminent domestic violence. A pushing incident that occurred twelve years ago, along with a gift sent to the petitioner from the respondent containing a knife in the back of the statuette,

may have given the petitioner a reasonable fear of imminent domestic violence sufficient to support the issuance of an injunction at that time. However, at the time of the injunction hearing, twelve years had passed without further violence or threats (with the exception of the statement above) despite continued litigation between the parties. The decision of the trial court was reversed. *Moore v. Hall*, 786 So. 2d 1264 (Fla. 2d DCA 2001).The petition described that the respondent threatened to harm the dog and the petitioner in court, destroy her financially, and emotionally abused the petitioner by brainwashing her and embarrassing her in front of her friends. The Second District Court of Appeal held that it was error for the trial court to grant initial ex parte injunction and amended temporary injunction against the respondent where the petitioner failed to establish "immediate or present danger" or threat of or actual "domestic violence," in accordance with § 741.30(5) and Florida Family Law Rule of Procedure 12.610. In order to balance the respondent's due process rights against harm sought to be protected, evidence supporting an ex parte injunction should be "strong and clear." Additionally, it was error to enter a final injunction where the petitioner amended her petition to include allegations sufficient to satisfy the statutory requirements, but where the petitioner's testimony at hearing still failed to satisfy the requirement that she had "a reasonable cause to believe she was in imminent danger of domestic violence." *Kopelovich v. Kopelovich*, 793 So. 2d 31 (Fla. 2d DCA 2001).

  - **Note**: This case was decided before injuring or killing a family pet was added to the statute as a relevant factor.

- Receipt of a letter and flowers and balloons on several occasions does not create "well-founded fear that violence is imminent" without more. *McMath v. Biernacki*, 776 So. 2d 1039 (Fla. 1st DCA 2001).

- General harassment of the petitioner and her children was insufficient. *Giallanza v. Giallanza,* 787 So. 2d 162 (Fla. 2d DCA 2001).

- The First District Court of Appeal held that the trial court erred in granting a final injunction for protection against domestic violence on the basis of repeated telephone calls made to the petitioner, where the calls did not give the petitioner objectively reasonable grounds to fear that she was in imminent danger of violence from the respondent, and there was no evidence of previous physical violence, although a final injunction had been previously entered which expired two years prior. The parties had not lived together for five years, and the calls subsided once the stepfather asked the respondent to stop calling. *Gustafson v. Mauck*, 743 So. 2d 614 (Fla. 1st DCA 1999)

- The petitioner and respondent were both students at the university. He parked his car in a school lot near her, greeted her, offered her a birthday card, and was seen on campus several times. There was no evidence offered at trial that show the respondent physically harmed her. The appellate court found there

was no reasonable cause to believe the petitioner was about to become a victim of domestic violence. *Farrell v. Marguez*, 747 So. 2d 413 (Fla. 5th DCA 1999).

- Competent, substantial evidence did not support finding that the wife had an objectively reasonable fear of imminent domestic violence at the hands of the husband, as required for issuance of injunction for protection against domestic violence. The danger feared must be imminent and the rationale for the fear must also be objectively reasonable. In this case, the husband (1) moved out of the home, taking most of his personal belongings except a loaded gun in the closet, which she concluded was a threat; (2) left angry messages on her cell phone and notes at the home; (3) broke into" the home with the aid of a locksmith after having moved out; (4) spit on her face and pushed her away when she tried to kiss him approximately nine months earlier; (5) is a very heavy drinker who becomes depressed and angry when he drinks; (6) beat on the door and walls of the home and, on one occasion, smashed a trash can in the kitchen; (7) threatened to make her life miserable if she did not offer to buy him out; and (8) has a mental health problem but does not take his medication. The wife did not allege that the husband ever physically harmed her or that he verbally threatened to physically harm her. *Oettmeier v. Oettmeier*, 960 So. 2d 902 (Fla. 2nd DCA 2007).

- The petitioner appealed a final judgment of injunction for protection against dating violence. Although she presented evidence that dating violence had occurred in the past, she did not prove that she believed she was in imminent danger of becoming the victim of another act of dating violence. Therefore, the court reversed the final judgment of injunction. *Alderman v. Thomas*, 141 So. 3d 668 (Fla. 2d DCA 2014). [**NOTE**: the standard for a dating violence injunction requires that the petitioner is a victim of dating violence and is in imminent danger of further violence.]

**Sufficiency of Allegations and Evidence**

Whether the conduct meets the statutory requirement is a question of fact for the trier of fact. *Biggs v. Elliot*, 707 So. 2d 1202 (Fla. 4th DCA 1998).

- Sufficient Evidence to Grant an Injunction

  - The petitioner requested an emergency writ of certiorari for review of two separate orders which denied her ex parte petition for a domestic violence injunction. The first petition was denied without a hearing. A different judge denied the second petition, holding that the first order was controlling. The writ was granted and the judge issuing the first order candidly admitted error, by filing a response with the district court, because the petitioner's allegations were sufficient to issue the injunction. The Fifth District Court of Appeal quashed both orders and remanded the case to the first judge with instructions

to issue the temporary injunction. *Gonzales v. Clark*, 799 So. 2d 451 (Fla. 5th DCA 2001).

- Following the petitioner, repeatedly telephoning her, and stalking her constitutes grounds to permit the issuance of a final injunction. *Biggs v. Elliot*, 707 So. 2d 1202 (Fla. 4th DCA 1998).

- A YouTube creator producing and uploading multiple videos "demeaning and criticizing" the petitioner, "directing his viewers to confront [petitioner] in public," and "soliciting monetary donations for further their dispute" could be found to have cyberstalked the petitioner. Petitioner viewed the uploaded videos and received death threats and harassing messages and calls. The appellate court ruled that, pursuant to § 784.0485(1)(d), even though the petitioner could not establish that the direct calls and messages were made by the respondent, there was sufficient evidence to establish that the respondent had "caused [those communications] to be delivered." *Strober v. Harris*, 332 So. 3d 1079 (Fla. 2 DCA 2022).

- Following a dispute between respondent's girlfriend and petitioner, respondent sent a message on Snapchat to petitioner, which petitioner perceived as "threatening and scary." Three months later, petitioner and her boyfriend were chased by respondent, who eventually smashed the back window of petitioner's boyfriend's vehicle. The trial court entered an injunction for three years based on these two incidents. The appellate court found that the second incident was not directed at petitioner but rather at her boyfriend, therefore failing to meet the statutory requirements for stalking. Because there two incidents do not demonstrate a continuity of purpose to harass petitioner, the appellate court reversed and remanded with instructions to dismiss the petition. *Stallings v. Bernard*, 334 So. 3d 365 (Fla. 2d DCA 2022).

- Chapter 741 does not require a petitioner to demonstrate that he or she has already been a victim of domestic violence. The petitioner's evidence that her former husband recently threatened her was sufficient to establish "reasonable cause to believe that she was about to become a victim of domestic violence" in light of her former husband's prior violent threatening behavior. *Rey v. Perez-Gurri*, 662 So. 2d 1328 (Fla. 3d DCA 1995).

    - **Note**: The 1997 statutory change requires that petitioner must either be a "victim of domestic violence or have reasonable cause to believe he or she is in imminent danger of becoming a victim…" Notwithstanding such change, the reasoning of this case should apply, provided the imminent standard is met.

- The appellate court held that the allegations were sufficient to support the temporary injunctions; however, the court offered no opinion on whether permanent injunctions were warranted. The petitions were based almost entirely on hearsay statements the children supposedly made to the petitioner.

At the renewed hearing on the permanent injunctions, the appellate court suggested that the trial court might consider taking testimony from one or both of the children in order to assess the accuracy of the allegations and to determine whether the respondent engaged in violence against his children. *Parrish v. Price*, 71 So. 3d 132 (Fla. 2d DCA 2011).

- The respondent appealed the trial court's entry of final judgment of injunction for protection against domestic violence. The record showed that the trial court, which also presided over three other cases involving the parties, relied primarily on non-record evidence from those cases to support the final judgment of injunction; however, it did not take judicial notice of the records as required in § 90.204(1). Therefore, the appellate court reversed because there was no competent, substantial evidence in the record to support the trial court's findings. *Carrillo v. Carrillo*, 204 So. 3d 985 (Fla. 5th DCA 2016).

- Insufficient Evidence to Grant Injunction

  - There is no error in denying petition for domestic violence when the petitioner's ultimate burden of proof is not met. *Hursh v. Asner*, 890 So. 2d 494 (Fla. 5th DCA 2004).

  - The Fifth District Court of Appeal held that it was error for the trial court to enter a final injunction for protection against domestic violence where no evidence was presented that the former husband had physically harmed or threatened the former wife, and the facts alleged and proved did not support the conclusion that the former wife had reasonable cause to believe that she was in imminent danger of becoming a victim of domestic violence. The testimony revealed four encounters did not involve any physical harm or threat of harm. During the first such encounter, the former wife discovered the former husband's parked car next to hers in the school parking lot; however, there was no evidence the former husband was present at the time. Second, the former wife saw the former husband three times at a school building where they both take classes. On one occasion, he greeted her in passing. On another occasion, he offered her a birthday card, and she continued to exit the building. On the third occasion, following the conclusion of a lecture they had both attended, when she attempted to cut through the crowd to leave and the former husband did not move out of her way, she reacted by pushing him out of the way with her book bag. The testimony revealed, however, that it was impossible for him to move due to the fact that there were people on both sides of him. *Farrell v. Marquez*, 747 So. 2d 413 (Fla. 5th DCA 1999).

**Aggravated Stalking**

- Continued Incidents Constitute Aggravated Stalking

- The defendant appealed convictions for aggravated stalking and trespass after violating a domestic violence injunction on the grounds that the evidence was not sufficient to sustain the charges. The court held that the defendant's conduct in visiting the victim's home after the issuance of the injunction and multiple phone calls from jail subsequent to his arrest constituted aggravated stalking under § 741.30. *Jordan v. State*, 802 So. 2d 1180 (Fla. 3d DCA 2001).

- Single Incident Not Enough

  - The defendant appealed a conviction for aggravated stalking after a no contest plea. The only evidence supporting the charge was the probable cause affidavit detailing the events of the night in question. The Fourth District Court of Appeal held that there was not a sufficient factual basis for a nolo contendere plea on a charge pursuant to § 784.048(3). The affidavit alleged a single incident on one occasion. There was no other evidence presented that the defendant had contact with the victim at any other juncture; therefore, a charge of aggravated stalking was inappropriate because there was only a single act. *Stone v. State*, 798 So. 2d 861 (Fla. 4th DCA 2001).

- Disjointed and Discrete Incidents Not Enough

  - Disjointed and discrete incidents, interspersed with one of more reconciliations between the defendant and the victim who were in an "on and off" again marital relationship, were not instances of repeated harassing conduct constituting aggravated stalking. *Butler v. State*, 715 So. 2d 339 (Fla. 4th DCA 1998).

**Sexual Cyber Harassment**

"Sexual cyber harassment" occurs when someone publishes a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an internet website without the depicted person's consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person. § 784.049(2)(c).

The crime is a misdemeanor of the first degree; however, if a person has a prior conviction for the same crime and commits a second or subsequent crime, the crime is a felony of the third degree. The new law allows a law enforcement officer to arrest, without an arrest warrant, any person that he or she has probable cause to believe has violated the law. § 784.049(4)(a). The statute also provides that the victim may initiate a civil action against a person who violates this law and such civil action may include an injunction, monetary damages, and reasonable attorney fees and costs. § 784.049(5).

## F. EX PARTE TEMPORARY INJUNCTIONS

**Required Forms & Information**

If the petition for injunction requests that the court address issues of temporary child custody or visitation of the parties' minor child or children, the required allegations under § 61.522 shall be incorporated into the petition for protection against domestic violence or a separate Uniform Child Custody Jurisdiction and Enforcement Act Affidavit Form (UCCJEA), which sets out the required information, shall accompany it. § 741.30(3)(d).

**Amended Petition**

The petitioner retains the right to promptly amend any petition, or otherwise be heard in person on any petition in accordance with Florida Rules of Civil Procedure. § 741.30(5)(b). Once amended, the court must consider the amended petition as if it was originally filed. Florida Family Law Rule of Procedure 12.610(c)(1)(A).

**Making the Judicial Determination of Whether to Enter a Domestic Violence Injunction**

In actual practice, the court reviews the petition and pleadings ex parte, the same day it is filed, to determine if an ex parte temporary injunction should be issued. To accomplish this, a judge must be available in each circuit 24 hours a day, seven days a week, to hear petitions for injunctions for protection against domestic violence. § 26.20.

**The Court Must Use Florida Supreme Court Approved Family Law Forms Applicable to Domestic Violence. Florida Family Law Rule of Procedure 12.610(c)(2)(A).**

**Period of Effectiveness**

- An ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days AND a full hearing on a final injunction shall be set for a date no later than the date the temporary injunction ceases to be effective. § 741.30(5)(c); Florida Family Law Rule of Procedure 12.610(c)(4)(A).

    - Case Example: The husband appealed an order that extended a temporary injunction against domestic violence for one year. The court reversed and noted that the purpose of extending a temporary injunction is to preserve the status quo until a final evidentiary hearing can be held. In this case, the temporary injunction was extended in lieu of a full hearing on a permanent injunction, which is not authorized by the Florida Statutes. *Bacchus v. Bacchus*, 108 So. 3d 712 (Fla. 5th DCA 2013).

**Notice of Full Hearing**

Once a petition for an injunction is filed, a hearing on the petition must be held at the earliest possible time. § 741.30(4). The respondent should receive notice of the hearing when the petition, temporary injunction, or order denying the petition and

other pleadings are served. § 741.30(4); Florida Family Law Rule of Procedure 12.610(c)(2).

**Required Verified Pleadings**

- The court can only consider the verified pleadings or affidavits in an ex parte hearing, unless the respondent appears at the hearing or has received reasonable notice of the hearing. § 741.30(5)(b).

- If the respondent appears at the temporary injunction hearing or has had reasonable notice of it, a full evidentiary hearing may be held. Florida Family Law Rule of Procedure 12.610(c)(1)(A).

- Court Cannot Consider Ex Parte Motion Unless it is Verified.

    - The appellant appealed from a non-final order issued without notice that temporarily enjoined her and her husband, the appellee, from removing their children from the jurisdiction of the circuit court and required her to relinquish the children's passports to her attorney or her husband. The Second District Court of Appeal reversed the trial court's decision because the trial court failed to conform to the requirements of Florida Rule of Civil Procedure 1.610. The Second District Court of Appeal said that the party seeking a temporary injunction without notice must file a verified pleading or affidavit that alleges specific facts showing immediate and irreparable harm and must detail any efforts made to give notice and the reasons why notice should not be required. Florida Rule of Civil Procedure 1.610(a). The appellant's motion was not verified because she did not file an affidavit, and she did not detail any efforts made to give notice or state why notice should not be required. *Vargas v. Vargas*, 816 So. 2d 238 (Fla. 2d DCA 2002).

        - **Note**: this does not preclude a party from reapplying for injunctive relief in accordance with the requirements of Florida Rules of Civil Procedure, Rule 1.610.

**Denial of Petition for Temporary Injunction: Mandatory Requirements of Judiciary When Petition for Temporary Injunction is Denied**

- If the court finds no basis for the issuance of an injunction, the petition may be denied without a return hearing. A denial shall be by written order noting the legal grounds for denial. § 741.30(5)(b). *See also* Florida Supreme Court Approved Family Law Form 12.980(b)(2).

- The petition for an ex parte temporary injunction may be denied when the only ground for denial is no appearance of an immediate and present danger of domestic violence, but the court shall set a full hearing on the petition with notice

at the earliest possible time. § 741.30(5)(b), Florida Supreme Court Approved Family Law Form 12.980(b)(1).

- Case Example: The trial court did not abuse its discretion in denying the entry of a temporary injunction for protection against domestic violence where the allegations in the petition did not demonstrate the existence of an "immediate and present danger of domestic violence" as required by § 741.30(5)(a). Furthermore, although the appellate court in *Cuiksa* did not rule on the issue of whether the trial court erroneously dismissed the petition without a hearing, due to the fact that such an order was not provided as part of the case on appeal, the opinion noted that, in accordance with § 741.30(5)(b), a hearing on the allegations of the petition would clearly be required before the case could be dismissed. *Cuiksa v. Cuiksa*, 777 So. 2d 419 (Fla. 1st DCA 2000).

- Likewise, Florida Family Law Rule of Procedure 12.610(b)(3)(A) requires the denial of a petition to be by written order noting the legal grounds for denial. Additionally, when the only ground for denial is no appearance of immediate and present danger of domestic violence, the court must set a full hearing on the petition, with notice, at the earliest possible time.

- Mandatory Requirements if Petition is Denied:

  - Order must be in writing and noting the legal grounds for denial; OR

  - If the petition is dismissed because there is no appearance of an immediate and present danger of domestic violence, a full hearing must be scheduled at the earliest possible time.

- Cases

  - The Fourth District Court of Appeal held, in these consolidated opinions, that it was error for the trial court to summarily deny a facially sufficient petition for ex parte injunction against domestic violence without a hearing and without explanation for the reason for summarily denying the petition. The trial court provided as its sole reason for denying the petition that the petitioner "failed to allege facts sufficient to support the entry of an injunction against domestic violence or repeat violence," but the trial court did not specify how the allegations were insufficient. Additionally, the denial of the petitioner's facially sufficient petition without a hearing was a departure from the essential requirements of the law. The Fourth District Court of Appeal also held that it was erroneous for the trial judge to summarily dismiss an ex parte injunction for protection against domestic violence issued by a duty judge the previous day and to cancel the hearing which had been set by the duty judge. Before the denial of a petition and prior to dismissal of an injunction where the trial court's action is based on a finding of insufficient allegations, the trial court

must have a specific basis for that finding. *Sanchez & Smith v. State*, 785 So. 2d 672 (Fla. 4th DCA 2001).

- **Please note**: some jurisdictions have begun using a waiver form (Petitioner's Waiver or Non-Waiver on Return Hearing). This form allows petitioners the opportunity to waive the right to an injunction hearing if the judge determines that the only ground for denial is no appearance of an immediate and present danger of domestic violence. In such an instance, the respondent is not served with any paperwork related to the denied petition for protection. The petitioner's waiver does not affect the right to amend the denied petition. This form is not a Florida Supreme Court Approved Family Law Form.

**Continuance of the Hearing, & Extension of Temporary Injunction**

- The court may grant a continuance of the hearing and an extension of the temporary injunction when "good cause" is shown by any party or on the court's own motion for "good cause," including failure to obtain service of process. Florida Family Law Rule of Procedure 12.610(c)(4)(A); § 741.30(5)(c).

- Therefore, the court can sua sponte extend a temporary injunction when it has "good cause" or when it finds it "necessary" due to the fact the hearing is being continued. There does not appear to be a time limit to an extension of a temporary injunction when it is made according to the above procedures. However, due process concerns would still apply. *Kopelovich v. Kopelovich*, 793 So. 2d 31 (Fla. 2d DCA 2001). *See also, Sanchez v. Saenz*, 320 So. 3d 926 (Fla. 3d DCA 2021), in which the appellate court held that good cause did not exist for extension of temporary, ex parte domestic violence injunction against husband and the continuance of the final hearing, despite alleged discovery issues. Both parties were ready for final hearing on permanent injunction for protection of children, the ex parte injunction had been extended and the final hearing had been continued eight times, and, as a result, the husband had not seen his children in over 17 months.

    - Section 741.30(5)(c) states that a request for an extension of a hearing on a petition must be made before or during the hearing on the petition for injunction. When a hearing on a petition is continued, the court can extend the temporary injunction, if necessary, during any period of continuance. § 741.30(5)(c).

    - Motions regarding the extension of a temporary injunction may be served by certified mail. Florida Family Law Rule of Procedure 12.610(c)(3)(A).

**Service of Temporary Injunction; and Notice of Hearing on Final Injunction**

- The respondent shall be personally served by a law enforcement officer with a copy of the petition, temporary injunction, or order denying the petition, notice

of hearing, and the following additional forms: a financial affidavit and UCCJEA, if applicable; unless the respondent was present at the ex parte hearing or had reasonable notice. § 741.30(4), Florida Family Law Rule of Procedure 12.610(c)(3)(A).

- Service should be made as soon as possible and may be obtained any day of the week, at any time. § 741.30(8)(a)(1).

## G. RELIEF GRANTED IN TEMPORARY DOMESTIC VIOLENCE INJUNCTIONS

**Judgment of Ex Parte Temporary Injunction**

If the court determines that there is an immediate and present danger of domestic violence, the court may grant a temporary injunction ex parte and may grant such relief as the court deems proper, including an injunction:

- Restraining the respondent from committing any acts of domestic violence.

- Awarding the petitioner temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.

- Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in Chapter 61. § 741.30(5)(a)(1)-(3).

- Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

- Restrain the respondent from contact with the petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

- Exclude the respondent from the petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

- Exclude the respondent from knowingly coming within 100 feet of the petitioner's automobile at any time. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and (c)(2).

- Exclude the respondent from places frequented regularly by the petitioner. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and 12.980(c)(2).

- Order the respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(c)(1) and 12.980(c)(2).

## H. FINAL INJUNCTIONS

**A "Full Evidentiary Hearing" is Required Before a Final Injunction Can Be Entered. Florida Family Law Rule of Procedure 12.610(c)(1)(B).**

- It was error to enter a final injunction and award the wife temporary custody of the children without providing an adequate hearing as required by the domestic violence statute and Florida Family Law Rules of Procedure. The law requires custody to be addressed at the final injunction hearing on the same basis as provided in Chapter 61. The domestic violence statute requires a full evidentiary hearing prior to issuing a final injunction. The trial court erred in not allowing any testimony from witnesses who were present or cross-examination of the parties. *Miller v. Miller*, 691 So. 2d 528 (Fla. 4th DCA 1997).

- In a final hearing, the trial court violated the petitioner's due process rights when it did not swear either witness and did not permit the appellant to call a witness who could have offered testimony to support her version of the incidents that had occurred between the parties. *Ohrn v. Wright*, 963 So. 2d 298 (Fla. 5th DCA 2007).

- In a final hearing, the trial court began the hearing by informing the parties that they had a limited amount of time to present their cases. The court then conducted all questioning of the parties and virtually all questioning of the other witnesses that testified. The court was aware the attorneys might wish to conduct direct and cross examination, as it made two comments dismissing any request based on time constraints. The court also dismissed the appellant's request for a "quick hearing"; denied his request to present the relevant noncumulative testimony of a pertinent witness; and did not allow him to "object to," or cross-examine the opposing party's expert witness. Because the trial court entered the injunction without conducting a full evidentiary hearing pursuant to § 741.30(5), its actions constituted a due process violation. The appellate court therefore reversed and remanded the case. *Furry v. Rickles*, 68 So. 3d 389 (Fla. 1st DCA 2011).

- Court Must Ensure that the Parties Understand the Terms:

- The court must "ensure that the parties understand the terms of the injunction, the penalties for failure to comply, and that the parties cannot amend the injunction verbally, in writing, or by invitation to the residence." § 741.2902(2)(b).

**Recording**

- All proceedings shall be recorded which may be by electronic means as provided by the Rules of Judicial Administration. § 741.30(6)(h).

**Defenses**

- Reasonable Parental Discipline

- The former wife filed a petition on behalf of their minor child after the father administered a single spank on the child's buttocks in response to the child's disrespectful and defiant behavior. The appellate court noted that the common law recognized a parent's right to discipline his or her child in a reasonable manner, and that, in both civil and criminal child abuse proceedings, a parent's right to administer reasonable and non-excessive corporal punishment to discipline their children is legislatively recognized. The court held that, under established Florida law, this single spank constituted reasonable and non-excessive parental corporal discipline and, as a matter of law, was not domestic violence. The court also stated that reasonable parental discipline is available as a defense against a petition for an injunction against domestic violence. *G.C. v. R.S.*, 71 So. 3d 164 (Fla. 1st DCA 2011).

**Grounds for Relief**

- When it appears to the court that the petitioner is a victim of domestic violence or has reasonable cause to believe he or she will become a victim, the court may grant such relief as the court deems proper. § 741.30(6)(a).

**It is Error to Grant Relief Not Requested Unless It Falls Within the Statutory Language Regarding Domestic Violence.**

- The trial court granted an injunction in favor of the former husband (the petitioner), awarded custody of the parties' minor children to the former husband, and denied the wife contact for one year. The husband filed for protection against domestic violence using Florida Family Law form 12.980(b). In section III, which detailed the parties' case history and reason for seeking a petition, the husband concluded by stating: "I think and hope your Honor sees that in the best interest of the kids (4) that your Honor would grant me temporary full time custody. I feel that it is detrimental to their safety and their mental wellbeing." Section V, which addressed temporary custody of the minor children, expressly instructed the petitioner to include a UCCJA Affidavit; the husband did not complete one. Additionally, in section VII – prayer for relief – the husband failed to mark the lines that would prohibit the wife from having contact with the petitioner or children and the lines that would grant the husband "temporary exclusive custody" of the minor children. The record showed the wife was not served with the petition, temporary injunction, or notice of hearing until the day of the final hearing. As to the issue of custody, the appellate court found that, "in light of [the husband's] failure to mark the blanks that were specifically provided for requesting temporary exclusive custody and a prohibition of visitation, the ambiguous language which the former husband set forth outside the section concerning his prayer for relief was insufficient to put the former wife on notice that the trial court could award custody of the children to the former husband and prohibit all visitation at the final hearing." Additionally, the failure to file a UCCJA Affidavit was reversible error on its own. *Ryan v. Ryan*, 784 So. 2d 1215 (Fla. 2d DCA 2001).

- Do not give exclusive use of marital home if not requested. *Montemarano v. Montemarano*, 792 So. 2d 573 (Fla. 4th DCA 2001).

**An Injunction for Protection Against Domestic Violence Should Not Be Used as a Substitute for an Order Regarding Issues Which Should Be Addressed in Dissolution of Marriage or Paternity Proceeding.**

- Although custody matters may be decided in a domestic violence proceeding, "better practice, in such case, would be for the trial court to enter temporary order, such as order adopting general master's report, and direct parties to litigate their subsequent custody and visitation disputes in proper paternity proceeding where orders entered would remain in effect beyond temporary lifespan of most injunctions." *O'Neill v. Stone*, 721 So. 2d 393 (Fla. 2d DCA 1998).

- The Court Must Use the Florida Supreme Court Approved Forms that Apply to Domestic Violence.

- Florida Family Law Rule of Procedure 12.610(c)(2)(A).

**Period of Effectiveness**

- Injunctions Generally: Section 741.30 provides that the terms of an injunction are to "remain in effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. No specific allegations are required. Such relief may be granted in addition to other civil or criminal remedies."

- Permanent Injunctions: Florida Family Law Rule of Procedure 12.610(c)(4)(B) states that a final injunction must be issued "for a fixed period or until further order of the court." See also *Miguez v. Miguez*, 824 So. 2d 258 (Fla. 3d DCA 2002).

    - A final judgment of injunction for protection against domestic violence may be effective indefinitely, until modified or dissolved by the judge at either party's request, upon notice and hearing, or expire on a date certain at the judge's discretion. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2). The court has discretion to determine the length of time for which the injunction will remain in effect. See *Amendments to the Florida Family Law Rules,* 713 So. 2d 1 (Fla. 1998). Therefore, the duration of the injunction is not subject to any time limits by statute. *Id.*

**Judicial Error Entering and Vacating Final Injunction**

- The First District Court of Appeal held that the trial court erred in entering a final injunction for protection against domestic violence where the entry of the order was inconsistent with the judge's statement that he intended only to extend the temporary injunction for 90 days, and the trial court denied the respondent an opportunity to present evidence in opposition to the entry of the injunction. *Oravec v. Sharp*, 743 So. 2d 1174 (Fla. 1st DCA 1999).

- The trial court erred in denying the respondent's post judgment motions to vacate the final injunction where a stipulation was entered into to enter the final injunction and the final injunction was inconsistent with the terms of the stipulation. The denial of the post judgment motion to vacate was reversed and remanded instructed the trial court to hold a hearing on the merits of the motion. *Lee v. Delia*, 827 So. 2d 368 (Fla. 2d DCA 2002).

- The petitioner appealed a final judgment of injunction for protection against domestic violence entered in favor of his former wife. The parties were also involved in a divorce and custody dispute being heard by the same judge. The appellate court reversed the order granting the petition because it was entered based on evidence from the custody hearing that was not a part of the injunction hearing record. *Coe v. Coe*, 39 So. 3d 542 (Fla. 2d DCA 2010).

    - In essence, the court's decision was based on impermissible extrajudicial knowledge.

    - **Note**: this case demonstrated that trial judges assigned to dissolution proceedings who also handle interrelated petitions for domestic violence must exercise care in ensuring that their rulings are supported by an adequate record.

- The respondent appealed after the trial court permitted the petitioner to testify to substantial acts of domestic violence that were not included in the petition over objection. Since the respondent was not aware that these issues would be brought up and didn't have time to prepare, the appellate court ruled that the admission of this evidence violated the respondent's due process rights. The court vacated the permanent injunction, reinstated the temporary injunction, and remanded the case for the trial court to conduct a new final hearing. *De Leon v. Collazo*, 178 So. 3d 906 (Fla. 3d DCA 2015).

## I. RELIEF GRANTED IN FINAL DOMESTIC VIOLENCE INJUNCTIONS

**Final Judgment of Injunction for Protection Against Domestic Violence**

- After notice and hearing, if the court determines that the petitioner is either a victim of domestic violence, as defined by § 741.28, or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence, the court may grant such relief as the court deems proper, including an injunction:

    - Restraining the respondent from committing any acts of domestic violence against the petitioner.

    - Awarding the petitioner temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.

- Granting the petitioner temporary custody of a minor child or children, on the same basis as provided in Chapter 61.
- Establishing temporary support for the petitioner (temporary alimony) and/or minor child or children (temporary child support), on the same basis as provided in Chapter 61.
- Ordering the respondent to participate in a treatment, intervention, or counseling services to be paid for by the respondent.
- Referring a petition to a certified domestic violence center.
- Ordering such other relief as the court deems necessary for the protection of a victim of domestic violence, including injunctions or directives to law enforcement agencies. § 741.30(6)(a)(1)-(7).
- Restraining the respondent from contact with the petitioner. Florida Supreme Court Approved Forms 12.980(d)(1) and (d)(2).
- Ordering provisions relating to minor children. Florida Supreme Court Approved Family Law Form 12.980(d)(1).
- Excluding the respondent from the petitioner's place of employment or school. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
- Excluding the respondent from places frequented regularly by the petitioner and/or the petitioner's minor child(ren). Florida Supreme Court Approved Forms 12.980(d)(1) and (d)(2).
- Ordering the respondent to surrender any firearms and ammunition in his/her possession to the specified sheriff's office pending further order of the court. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).
- Ordering a substance abuse and/or mental health evaluation for the respondent and ordering the respondent to attend any treatment recommended by the evaluation(s). § 741.30(6)(a)(5).
- Specifying the type of contact/visitation the noncustodial parent may have with the minor child(ren). Florida Supreme Court Approved Family Law Form 12.980(d)(1).

**Participation in a Parenting Class May Be Court Ordered.**

- A parenting class can be required as a condition of a domestic violence injunction. *Roman v. Lopez*, 811 So. 2d 840 (Fla. 3d DCA 2002). Section 61.13(4)(c)(3) authorized a court to "order the parent who did not provide time-sharing or did not properly exercise time-sharing under the time-sharing schedule to attend a parenting course approved by the judicial circuit."

- The court must provide a list of certified domestic violence centers, if applicable.

- If the court refers the petitioner to a domestic center, the court must provide the petitioner with a list of domestic violence centers in the circuit, which the petitioner may contact. § 741.30(6)(a)(6).

**Batterers' Intervention Programs**

- Under Certain Circumstances, Respondents Must Be Court Ordered to Attend Batterers' Intervention Programs (BIPs) – §741.30(6)(e):

    - The court MAY order the respondent to attend a batterers' intervention program as a condition of the injunction; however,

    - The court SHALL order the respondent to attend a batterers' intervention program if the any of the following circumstances exist:

        - The court finds that the respondent willfully violated the ex parte injunction;

        - The respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence; OR

        - At any time in the past, in this state or another state, an injunction has been entered against the respondent after a hearing with notice, UNLESS the court makes written factual findings in its judgment or order which are based on substantial evidence, stating why batterers' intervention programs would be inappropriate.

- A List of BIPs Must Be Provided to the Respondent if Participation is Court Ordered.

- When the court orders the respondent to participate in a BIP, the court, or any entity designated by the court, must provide the respondent with a list of all BIPs from which the respondent must choose a program in which to participate. § 741.30(6)(a)(5).

- The Court May Not Order the Petitioner to Undergo Psychological Evaluations.

- Although § 741.30(6)(a) allows the court to order a respondent to participate and pay for treatment, intervention, or counseling services, there was no authority under the statute to order the petitioner to undergo an evaluation. The court also noted that the statute is designed to protect victims of domestic violence, and "requiring a victim of domestic violence to undergo a psychological evaluation would impose a substantial financial and emotional burden on the victim and would have a chilling effect on victims of domestic violence seeking the protection of the courts." *Touchet v. Jones*, 135 So. 3d 323, (Fla. 5th DCA 2013).

## J. FACTORS THE COURT MUST CONSIDER WHEN ENTERING AN INJUNCTION

**Time-Sharing**

- The court must consider evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to § 741.30 and evidence of domestic violence or child abuse when making a temporary determination in a domestic violence proceeding regarding parental responsibility and designating the primary residential parent. §§ 61.13(3)(m) and (n).

- Time-Sharing Must be Properly Pled in Domestic Violence Petition.

    - The Second District Court of Appeal held that it was error for the trial court to grant an injunction for protection against domestic violence in favor of the petitioner where the injunction also awarded temporary custody of the parties' minor children to the former husband and denied the former wife any contact with the children for one year. The former wife's rights of due process were violated when her rights of custody and visitation were terminated based upon pleadings that did not request such relief and did not provide notice that the court could take such action. The former husband did not mark appropriate boxes on the face of the petition to indicate he was seeking temporary exclusive custody or to determine visitation rights, nor did the former husband, in the narrative portion of the petition, seek temporary exclusive custody of the children or exclusion of visitation by the former wife. Additionally, the husband did not file a Uniform Child Custody Jurisdiction Act Affidavit (UCCJA), despite the petition form clearly stating that a UCCJA was required if the petitioner was requesting the court to determine issues of temporary custody. § 741.30(3)(d). Finally, the best interests of the children were not addressed at the hearing for the injunction. *Ryan v. Ryan*, 784 So. 2d 1215 (Fla. 2d DCA 2001).

    - The petitioner filed for a domestic violence injunction against the respondent but failed to appear at the final hearing. The court granted the respondent (the father) custody of the children and reset the case for final hearing. The order awarding custody to the father was quashed because the father did not properly plead for custody, and the mother was not sufficiently notified of the custody issue. *Blackwood v. Anderson*, 664 So. 2d 37 (Fla. 5th DCA 1995).

        - **Note**: See Judge Antoon's concurring opinion for an interesting discussion on jurisdiction and the frustration trial judges can experience in dealing with domestic violence injunction cases.

- Relocation of a Child

    - A relocation issue arose in the domestic violence proceeding involving unmarried parents, where no paternity or judgment had been obtained. The

parties appeared before a general master who issued a report recommending that custody, visitation, and support be awarded as part of the domestic violence injunction. Prior to the trial court entering an order adopting the report, the petitioner left the state with the minor child of the parties, who were unmarried. At a hearing where the petitioner was present, the trial court granted a motion filed by the respondent to transfer custody to him and ordered law enforcement to pick up the minor child. The petitioner then filed a motion to set aside this order. The appellate court held that the trial court abused its discretion by ordering the petitioner to return to Florida with the child when it failed to conduct a full hearing and take testimony to consider the statutory factors regarding relocation. Note: The dicta in this opinion contains strong language to the effect that it is contrary to the intent of the legislature for domestic violence injunction proceedings to be the primary forum for custody, visitation, and child support issues to be addressed. *O'Neill v. Stone*, 721 So. 2d 393 (Fla. 2d DCA 1998).

- The restriction prohibiting either party from removing the children from the county without a prior court order or written agreement of the parties was premature where neither party sought to relocate, and the court made no findings to support such a residential restriction. *Young v. Young*, 698 So. 2d 314 (Fla. 3d DCA 1997). But see *Leeds v. Adamse*, 832 So. 2d 125 (Fla. 4th DCA 2002) where the court certified conflict and held that a trial court has the discretion to include a residency restriction clause in a final judgment, even absent evidence that the custodial parent intends to move.

**Court Must Consider the Existence of Any Domestic Violence (Child or Spousal Abuse) as Evidence of Detriment to the Child.**

- Under § 61.13(2)(c)(2), if the court finds that shared parental responsibility would be detrimental of the child . . . the court may base an award of sole parental responsibility on evidence of child or spousal abuse.
    - The trial court abused its discretion in awarding custody to the husband where it made no determination regarding the credibility of either party, failed to apply § 61.13, and where the final judgment was devoid of all but the most "minimal mention" of the husband's established pattern of domestic violence. The court noted that the record from the six-day trial was replete with testimony regarding domestic violence, which was the "central focus" of the case. The final judgment stated: "[t]he court has considered everything that each side has accused the other side of as well as all the good things that each side has presented about themselves." The appellate court found that failure to give the domestic violence evidence the proper consideration and weight mandated a reversal of the custody award to the father and restoration of custody to the mother. *Ford v. Ford*, 700 So. 2d 191 (Fla. 4th DCA 1997).

- **Note**: The 1997 amendment to § 61.13(2)(b)(2) mandates the court's consideration of the existence of any child abuse or spousal abuse as evidence of detriment to the child.

- Felony conviction of domestic violence is not an absolute bar to being a primary residential parent. *Monacelli v. Gonzalez*, 883 So. 2d 361(Fla. 4th DCA 2004).

- A misdemeanor conviction of the first degree or higher involving domestic violence creates a presumption of detriment to the child, which can be rebutted by the abuser to persuade the court that shared parental responsibility should be ordered. § 61.13(2)(c)(2).

    - Although § 61.13(2)(c)(2) provides that a felony conviction is a rebuttable presumption of detriment to a child, the court held that the evidence supported the award of primary residential custody of four minor children to the ex-husband; although there was a history of domestic violence towards the ex-wife, emotional ties were significantly greater towards the ex-husband: he had greater capacity and disposition to provide the children with necessities, they would maintain a stable environment in the home of their paternal grandmother, the children preferred to be with their father, the ex-wife suffered from bipolar disorder, and the ex-wife refused to accept treatment or medication for her illness. *Monacelli v. Gonzalez*, 883 So. 2d 361 (Fla. 4th DCA 2004).

- Visitation Between Inmate and Minor Child

    - The trial court exceeded its authority by entering a post-conviction order requiring the Department of Corrections to allow visitation between the inmate and minor child during the inmate's incarceration. The statutory provision permitting the trial court to grant permission for special visitation where visiting was restricted by court order did not apply in the case where the trial court was not eliminating the restriction it had earlier imposed. *Singletary v. Bullard*, 701 So. 2d 590 (Fla. 5th DCA 1997).

**Visitation**

- Although shared parental responsibility is the statutory preference under § 61.13(2)(c), this determination can set up a dangerous situation for abuse victims and their children.

    - Consequently, when making a visitation determination, the court must be cognizant of the situation and prevent giving the perpetrator access to the home for visitation with the children. See *Burke v. Watterson*, 713 So. 2d 1094 (Fla. 1st DCA 1998); M. Sharon Maxwell and Karen Oehme, Referrals to Supervised Visitation Programs, A Manual for Florida's Judges (2004).

- But see *Andrade v. Dantas*, 776 So. 2d 1080 (Fla. 3d DCA 2001). The court erred in granting a temporary order denying the father the right to overnight visitation with his twenty-two-month-old child. There is nothing about overnight visitation which permits its treatment as an exception to the doctrine that both parents of children of any age must be treated equally. In *Andrade*, there was a lack of substantial competent evidence that would prevent more extensive visitation between the father and minor child. Thus, there was no basis to deny it.

**Support**

- Support should be paid by an income deduction order and through the State Disbursement Unit or court depository in order to eliminate control issues and to avoid further contact between the victim and the abuser. Florida Supreme Court Approved Family Law Forms 12.980(d)(1) and (d)(2).

- Payments for the victim's future medical expenses may be included in the support order. This requirement can remain effective subsequent to remarriage by the victim. *See Garces v. Garces*, 704 So. 2d 1106 (Fla. 3d DCA 1998).

- Where a conviction of domestic violence results in incarceration, said incarceration is not a valid reason to deny setting an amount of support attributable to convicted party based on imputed income.

  - See *McCall v. Martin*, 34 So. 3d 121 (Fla. 4th DCA 2010). The appellate court noted that a child's best interest is not served by refusing to set an initial amount of support based on imputed income for a parent about to be imprisoned. The court held that income should have been imputed to the father so that the arrearages can accumulate until he is able to earn an income. When release occurs, the court should establish a payment plan to reduce arrearages according to his earning ability and set a payment plan. But see *Department of Revenue v. Llamas*, 196 So. 3d 1267 (Fla. 1st DCA 2016), where the court certified conflict and held that imputation of income was not required when the father was going to prison shortly after the hearing and lacked the present ability to pay.

**Alimony**

- An individual who petitions for an injunction against domestic violence can request temporary support as a term of the injunction. § 741.30(6)(a)(4). The same standard for awarding alimony in a family law case under Chapter 61 must be applied in determining whether to award temporary support in an injunction case. *Id*.

- Section 61.071 permits the court to award a "reasonable sum" of alimony when a temporary request for support is made.

- Section 61.08(2) sets forth the factors for the court to consider when making an alimony award in a dissolution proceeding.

    - Both permanent and rehabilitative alimony can be awarded under this section. Rehabilitative alimony, including bridge-the-gap alimony, is temporary in nature and, therefore, could likely be awarded as a term of a domestic violence injunction.

        - **Rehabilitative Alimony** - Rehabilitative alimony requires the court to make specific findings including whether the petitioner has a specific rehabilitation plan; the costs of rehabilitation; the stated purpose of the rehabilitation; and the duration of the award. *Collinsworth v. Collinsworth*, 624 So. 2d 287 (Fla. 1st DCA 1993). This type of support is awarded to enable a spouse to become self-supporting. *Shea v. Shea*, 572 So. 2d 558 (Fla. 1st DCA 1990).

        - **Bridge-the-Gap Alimony** - Whereas rehabilitative alimony is to help a spouse become self-supporting, bridge-the-gap alimony is to ease the transition from married to single life. *Murray v. Murray*, 374 So. 2d 622 (Fla. 4th DCA 1979) (stating bridge-the-gap alimony may be appropriate for a period of six months to transition the wife from a high standard of living during the marriage to a modest standard of living); Bridge-the-gap alimony is "to assist a spouse with any legitimate, identifiable, short-term need . . . when the other spouse has the ability to pay the award." *Borchard v. Borchard*, 730 So. 2d 748 (Fla. 2d DCA 1999).

        - Therefore, in injunction cases, bridge-the-gap alimony could be awarded to a petitioner to make the transition from married to single life.

**Marital Home and Marital Property**

- Damages to Marital Property

    - When distributing marital assets, reimbursements should be figured in for damaged property, such as broken windows, doors, furniture, etc. § 741.31(6).

    - The petitioner must request exclusive use and possession of the home: without background, the court held that, in domestic violence cases where the petitioner did not seek exclusive use and possession of the marital home, it is an error to include in that order a requirement that the respondent vacate the premises. Due process requires that a party have proper notice of hearing and the opportunity to be heard before such an order is entered requiring the party to vacate the marital home. *Montemarano v. Montemarano*, 792 So. 2d 573 (Fla. 4th DCA 2001).

## K. ADDITIONAL PROVISIONS WHICH MUST BE INCLUDED IN BOTH TEMPORARY AND FINAL INJUNCTIONS

**A Temporary or Final Injunction Should Indicate on Its Face**

- The injunction is valid and enforceable in all counties in Florida.
- Law enforcement officers may use their arrest powers pursuant to § 901.15(6) to enforce the terms of the injunction.
- The court had jurisdiction over the parties and matter.
- Reasonable notice and opportunity to be heard was given to the respondent sufficient to protect that person's rights to due process.
- The date the respondent was served with the temporary or final order, if obtainable. § 741.30(6)(d)(4).

**Firearms Violation**

- It is a violation of § 790.233 and a first-degree misdemeanor for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition. §741.30(6)(g).
- Florida's Firearm Prohibition
    - Section 741.31(4)(b)(1): Possession of a firearm or ammunition is prohibited when a person is subject to a final injunction against committing acts of domestic violence.
    - Therefore, according to § 741.31(4)(b)(1), possession of a firearm or ammunition is prohibited when a person is subject to a final injunction against committing acts of domestic violence. It is a first-degree misdemeanor to violate the firearms provision of an injunction and punishable as provided in § 775.083. However, this provision is consistent with federal law, and, therefore, the active law enforcement exception applies in Florida. This provision does not apply to active law enforcement officers who possess firearms and ammunition for use in performance of their job, unless the law enforcement agency finds that possession of firearms should be denied. § 741.31(b)(2*)*. See also *Martinez v. Izquierdo*, 166 So. 3d 947 (Fla 4th DCA 2015).
- State's Evidence in Criminal Contempt Proceedings for Proof of Firearm Violation Must Rebut Reasonable Hypothesis of Innocence.
    - The Fourth District Court of Appeal held that it was error for the trial court to deny a motion for judgment of acquittal where the defendant was charged with indirect criminal contempt for possession of a firearm in violation of an injunction for protection against domestic violence, and the evidence that the

defendant possessed a firearm prior to the issuance of the injunction, coupled with circumstantial evidence relating to current possession of the firearm, was insufficient to rebut a reasonable hypothesis of innocence. *Fay v. State*, 753 So. 2d 682 (Fla. 4th DCA 2000).

- FDLE form requiring gun purchasers to disclose prior conviction for domestic violence is unconstitutional. *Randall v. State*, 805 So. 2d 917 (Fla. 2d DCA 2001).

- Federal Firearm Prohibition

  - 18 U.S.C. § 922(g)(8) prohibits any person under a final domestic violence injunction from possessing a firearm.

    - Penalty: Up to ten years' incarceration.
    - Statute is not unconstitutional on its face under Second Amendment. *U.S. v. Emerson,* 270 F.3d 203 (5th Cir. 2001).

  - 18 U.S.C. §922(g)(9) prohibits any person convicted of domestic violence from possessing a firearm.

    - Penalty: up to ten years' incarceration.

    - A trial court has no power to authorize a respondent to possess firearms in violation of federal law. *Weissenburger v. Iowa Dist. Court for Warren County*, 740 N.W. 2d 431 (Iowa 2007).

## L. SERVICE OF FINAL INJUNCTIONS

- Proper Procedure to Effectuate Service is Set Out in § 741.30(8)(a)(3) and Florida Family Law Rule of Procedure 12.610(c)(3)(B)(i).

**Obtaining Personal Service at the Hearing**

- To effectuate service, a certified copy of the injunction must be provided to the parties at the full hearing. The party must acknowledge receipt of the injunction in writing on the original order. If the respondent will not acknowledge receipt, the clerk should make note on the original order that service was made. If the parties are present but are not provided with copies at the hearing, the clerk will make service by certified mail. Service by mail is complete upon mailing. The clerk must certify in writing how service was made for the court file. § 741.30(8)(a)(3); Florida Family Florida Family Law Rule of Procedure 12.610(c)(3)(B)(i).

**Service Subsequent to Hearing**

- "Within 24 hours after the court issues, continues, modifies, or vacates an injunction for protection against domestic violence, the clerk must forward a copy of the injunction for service to the sheriff with jurisdiction over the residence of the petitioner for service." § 741.30(8)(c)(1); Florida Family Law Rule of Procedure 12.610(c)(3)(B)(ii). However, § 741.30(8)(a)(3) allows for service to be effectuated by mail.

## M. ADDITIONAL REMEDIES

**Mutual Orders of Protection Are Prohibited.**

- Section 741.30(1)(i) prohibits the court from issuing mutual orders of protection. Likewise, mutual restraining orders or similar restrictive provisions based on domestic violence should not be incorporated into orders which address issues under chapter 61. § 61.052(6).

    - However, the court is not precluded from issuing separate injunctions for protection for each party where each party has complied with the provisions of § 741.30.

- The trial court erred in entering a mutual restraining order without proper testimony or pleading by the petitioner and over the respondent's objection. *DeMaio v. Starr*, 791 So. 2d 1116 (Fla. 4th DCA 2000).

    - But see *Brooks v. Barrett*, 694 So. 2d 38 (Fla. 1st DCA 1997). In a contempt proceeding, it was error to sua sponte amend a previously entered mutual injunction against domestic violence by either the husband or wife, on the ground that the mutual injunction was prohibited by statute, and to enter in its place an injunction against domestic violence as to the husband only, without notice or hearing. The court of appeal reversed the amended injunction against the husband and remanded the case for further proceedings to address the initial mutual injunction, which was prohibited by statute.

**Confidentiality of Information**

- Address Confidentiality can be Requested.

    - The petitioner can request that his or her address be kept confidential and omitted from the Petition for Protection Against Domestic Violence and other required forms by filing Florida Supreme Court Approved Family Law Form 12.980(h). Florida Family Law Rule of Procedure 12.610(b)(4)(B); § 741.30(6)(a)(7).

- The ultimate determination of a need for address confidentiality must be made by the court as provided in Florida Rule of General Practice and Judicial Administration 2.420. Florida Family Law Rule of Procedure 12.610(b)(4)(B).

- **Address Confidentiality Program**: In accordance with § 741.408, the Attorney General shall designate state and local agencies and nonprofit agencies that provide counseling and shelter services to victims of domestic violence to assist persons applying to be program participants in the Address Confidentiality Program. *See* § 741.403.

- The addresses, corresponding telephone numbers, and social security numbers of program participants in the Address Confidentiality Program of Victims of Domestic Violence held by Office of the Attorney General are exempt from § 119.07(1). § 741.465.

- Legislative Intent and Program for Victims of Domestic Violence: §§ 741.401 – 741.409 enable state and local agencies to respond to requests for public records without disclosing the location of a victim of domestic violence.

  - **Practical note**: The confidentiality provisions of Chapter 741 are not distinctly cross referenced to other statutes that cover related areas of a Unified Family Court. The clear intent and language used to create the confidentiality program indicates that information made confidential under its provisions must remain confidential regardless of the context in which the information is kept. If this was not true, then a respondent to a domestic violence injunction could simply initiate an additional court matter in order to discover the whereabouts of the petitioner.

  - Likewise, any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of the crime of sexual battery, as defined in Chapter 794, is exempt from public record disclosure. § 119.071(2)(h)1.b.

- **Victim and Domestic Violence Center Information Exempt from Public Record**: Information received by the department or a domestic violence center about clients and location of domestic violence centers and facilities is exempt from the public records provisions of § 119.07(1) and unable to be disclosed without the written consent of the client. § 39.908.

## N. SUBSEQUENT ACTIONS

**Modification of Injunctions**

- Either party may file a motion to modify an injunction. § 741.30(10); Florida Family Law Rule of Procedure 12.610(c)(6).

- Motion for Modifications Must Be Filed and a Hearing Held with Opposing Party Properly Notified.

    - It was error for the trial court to modify a final injunction for protection against domestic violence without the filing of a motion for modification, without a hearing, and without notice to the opposing party. *Mayotte v. Mayotte*, 753 So. 2d 609 (Fla. 5th DCA 2000).

    - The movant must show a change in circumstances to be successful on a motion to modify or dissolve a domestic violence injunction. *Reyes v. Reyes*, 104 So. 3d 1206 (Fla. 3d DCA 2012).

        - But see *Ribel v. Ribel*, 766 So. 2d 1185 (Fla. 4th DCA 2000). Extensions of temporary injunctions may be done ex parte.

    - If the motion is legally sufficient, the trial court cannot summarily deny the motion without a hearing or explanation. *Bennett v. Abdo,* 167 So. 3d 522 (Fla. 5th DCA 2015).

    - Courts have broad discretion regarding injunction modifications. The appellant sought review of a trial court order denying her motion to dissolve a final injunction against domestic violence. Since courts have broad discretion regarding injunctions, the appellant could not prevail without demonstrating that there was an abuse of discretion. *Reed v. Giles*, 974 So. 2d 624 (Fla. 4th DCA 2008).

- Service of an Order Modifying an Injunction

    - Service of an order modifying an injunction must be made in the same manner as an injunction. Florida Family Law Rule of Procedure 12.610(c)(3)(B)(i).

        - The expiration of an injunction for protection against domestic violence is one of the recognized exceptions to the dismissal of a moot case. Injunctions for protections against domestic violence are exempt from the usual rule of mootness because of the collateral legal consequences that may result from the injunction. *Jacquot v. Jacquot*, 183 So. 3d 1158 (Fla. 5th DCA 2015).

**Extension of Final Injunctions**

- To extend an injunction, no new violence is necessary, but a continuing fear that is reasonable based on the circumstances must exist.

- Although § 741.30(6)(b) does not specifically require any allegation of a new act of violence, the moving party must prove to the trial court that a continuing fear exists and that such fear is reasonable based on the circumstances. *Sheehan v. Sheehan,* 853 So. 2d 523 (Fla. 5th DCA 2003).

        - *See also Giallanza v. Giallanza*, 787 So. 2d 162 (Fla. 2d DCA 2001). The trial court erred in extending the injunction against domestic violence against the respondent because the petitioner did not establish sufficient facts. The statutory definition of domestic violence requires some showing of violence or a threat of violence. General harassment does not constitute domestic violence under the statute. Here, the petitioner never alleged any further actual violence or threats of violence, nor showed any fear of domestic violence. Rather, the allegations reflected that she was upset by the respondent's dealings with their children and that she believed he was using the children to harass her.

    - The court may consider the circumstances leading to the imposition of the original injunction, as well as subsequent events. *Patterson v. Simonik*, 709 So. 2d 189 (Fla. 3d DCA 1998).

- Florida Statutes Permit an Extension Hearing to Be Set Ex Parte.

    - In *Ribel v. Ribel*, 766 So. 2d 1185 (Fla. 4th DCA 2000), the trial court did not err in extending the temporary injunction for two weeks and rescheduling the hearing by entering an order without a motion or notice of hearing, based solely on the ex parte communication of the wife's attorney with the judge's office. The Florida Statute permits an extension hearing to be set ex parte. The petitioner did not demonstrate how an order resetting the noticed hearing on a petition for temporary injunction for protection would present the possibility of any harm, let alone irreparable harm.

- Court's Discretion to Extend a Final Injunction

    - The appellate court affirmed the trial court's decision granting the petitioner a second domestic violence injunction five days before the expiration of the petitioner's one-year previous injunction. The Third District Court of Appeal held that the seven-year duration of the second injunction was not defective and could only be challenged as an abuse of discretion. Regardless of its duration, the lower court can modify or dissolve a permanent injunction at any time where "the circumstances, and circumstances of the parties, are shown to have so changed as to make it just and equitable to do so, and especially where the decree itself reserves the right." *Miguez v. Miguez*, 824 So. 2d 258 (Fla. 3d DCA 2002).

**Dissolving Injunctions**

- Either party may move to dissolve the injunction at any time. § 741.30(6)(c); Florida Family Law Rule of Procedure 12.610(c)(6).

- Change in Circumstances Must Be Alleged.

- The appellant, the respondent, moved to modify or dissolve a domestic violence injunction entered against him but failed to allege any change in circumstances. The trial court denied his motion without hearing. In affirming the trial court's decision, The Fifth District Court of Appeal held that, for a movant to be entitled to obtain relief on a motion to modify or dissolve a domestic violence injunction, the movant must prove a change in circumstances. For a movant to be entitled to receive a hearing on such a motion, the motion must allege a change in circumstances. *Reyes v. Reyes*, 104 So. 3d 1206, 1207 (Fla. 5th DCA 2012).

- The party against whom the injunction is entered against must demonstrate that the scenario underlying the injunction no longer exists so that continuation of the injunction would serve no valid purpose. *Alkhoury v. Alkhoury*, 54 So. 3d 641 (Fla. 1st DCA 2011). See also *Moriarty v. Moriarty*, 192 So. 3d 680 (Fla. 4th DCA 2016).

- Respondent filed a motion to dissolve an injunction issued against him seventeen years ago, alleging that there had been a substantial change and circumstances and the parties had not had contact with each other since the entry of the final injunction. Petitioner objected to respondent's motion, alleging that respondent had violated the injunction on three separate occasions approximately in 2004 or 2005. The trial court denied the motion, noting the contact after the issuance of the injunction. The appellate court found that the petitioner did not have an objective fear of becoming a victim of domestic violence and that the respondent satisfied the requisite change in circumstances. *Labrake v. Labrake*, 335 So. 3d 214 (Fla. 1st DCA 2022).

- Service of the motion to dissolve must be made on the other party to provide notice and an opportunity to be heard. Florida Family Law Rule of Procedure 12.610(b)(2)(C).

  - The Second District Court of Appeal held that it was error to dismiss the final injunction against domestic violence where there was no motion, notice, or evidentiary hearing. By dismissing the injunction without motion, notice, or evidentiary hearing, the court failed to accord the appellant due process in this matter." *Snyder v. Snyder*, 685 So. 2d 1320 (Fla. 2d DCA 1996).

- Court's Authority Subsequent to Dismissal

  - It was incorrect to order compliance with counseling subsequent to the dismissal of the petition or domestic violence injunction. *Tobkin v. State*, 777 So. 2d 1160 (Fla. 4th DCA 2001).

  - The order of dismissal removed the court's jurisdiction: An unmarried mother, who had previously received a domestic violence injunction against the father, petitioned to have her injunction dissolved. The trial court complied. However,

the father failed to comply with the terms of the injunction, and the original judge that ordered the injunction vacated the order dissolving the injunction and pursued indirect criminal contempt charges against the respondent. The father appealed, and the appellate court held that, once the injunction was dissolved, the father was no longer required to comply with the terms of the injunction. Therefore, the successor judge was not allowed to reinstate it sua sponte or hold the father in contempt for failing to comply or failing to attend the compliance hearings. *Berrien v. State*, 189 So. 3d 285 (Fla. 1st DCA 2016).

## O. CROSSOVER CASES/RELATED CASES

- The Family Law Rules of Procedure are "intended to facilitate access to the court and to provide procedural fairness to all parties, to save time, and expense through active case management, setting timetables, and the use of alternatives to litigation, and to enable the court to coordinate related cases and proceedings to avoid multiple appearances by the same parties on the same or similar issues and to avoid inconsistent court orders." Florida Family Rule of Procedure 12.010(b).

- All related family cases must be handled before one judge unless impractical. Florida Family Rule Procedure 12.003(a)(1).

- "If it is impractical for one judge to handle all related family cases, the judges assigned to hear the related cases involving the same family and/or children may confer for the purpose of case management and coordination of the cases. Notice and communication shall comply with Canon 3.B.(7) of the Code of Judicial Conduct. The party who filed the notice of related cases or the court may coordinate a case management conference under rule 12.200 between the parties and the judges hearing the related cases. In addition to the issues that may be considered, the court shall:

    - Consolidate as many issues as is practical to be heard by one judge;

    - Coordinate the progress of the remaining issues to facilitate the resolution of the pending actions and to avoid inconsistent rulings;

    - Determine the attendance or participation of any minor child in the proceedings if the related cases include a juvenile action; and

    - Determine the access of the parties to court records if a related case is confidential pursuant to Florida Rule of General Practice and Judicial Administration 2.420. Florida Family Rule Procedure 12.003(a)(2).

**The Court May Order Joint Hearings or Trials of Any Issues in Related Family Cases. Florida Family Rule Procedure 12.003(b)(1).**

- "For joint or coordinated hearings, notice to all parties and to all attorneys of record in each related case shall be provided by the court, the moving party, or other party as ordered by the court, regardless of whether or not the party providing notice is a party in every case number that will be called for hearing." Fla.Fam.R.Pro 12.003(b)(2).

**Judicial Access and Review of Related Family Files. Florida Family Rule Procedure 12.004**.

- A judge hearing a family case may access and review the files of any related case, either pending or closed, to aid in carrying out his or her adjudicative responsibilities. Authorized court staff and personnel may also access and review the file of any related case. Fla.Fam.R.Pro 12.004(a).

**Chapter 39 Orders Pertaining to Custody, Visitation, Etc.**

- Orders entered pursuant to Chapter 39 take precedence over similar orders in other civil cases. A court of competent jurisdiction in any other civil action may modify such an order if the dependency court has terminated jurisdiction. § 39.013(4).

- Final Orders and Evidence from a Dependency Case are Admissible in a Subsequent Civil Case that Deals with Custody and Visitation Issues. § 39.0132(6)(d-e).

**The Provisions of Injunctions Dealing with Custody, Visitation, and Child Support Remain in Effect Until the Order Expires or an Order on Those Matters is Entered in a Subsequent Civil Case. § 741.30(6)(a)(3-4).**

- An injunction should not be used as a substitute order for issues which should be addressed in dissolution of marriage or paternity proceedings.

    - Although custody matters may be decided in a domestic violence proceeding, "better practice in such case would be for the trial court to enter a temporary order, such as an order adopting general master's report and directing parties to litigate their subsequent custody and visitation disputes in proper paternity proceeding where orders entered would remain in effect beyond the temporary lifespan of most injunctions." *See O'Neill v. Stone*, 721 So. 2d 393 (Fla. 2d DCA 1998).

    - Evidence: The respondent appealed the trial court's entry of final judgment of injunction for protection against domestic violence. The record showed that the trial court, which also presided over three other cases involving the parties, relied primarily on non-record evidence from those cases to support the final judgment of injunction; however, it did not take judicial notice of the records as required in § 90.204(1). Therefore, the appellate court reversed because there was no competent, substantial evidence in the record to support

the trial court's findings. *Carrillo v. Carrillo*, 204 So. 3d 985 (Fla. 5th DCA 2016).

**Types of Crossover Cases: Issues in Dissolution of Marriage/Domestic Violence Crossover Cases**

- Domestic Violence Injunctions in Dissolution Cases
    - In a dissolution action under Chapter 61, injunctions for protection against domestic violence must be issued under § 741.30. An injunction under § 741.30 is the exclusive remedy at law for a domestic violence injunction.
    - The Fifth District Court of Appeal held that the trial court erred in not conducting an evidentiary hearing on the issuance of an injunction for protection against domestic violence filed by the wife against the husband, and in entering a mutual injunction in the dissolution action, under Chapter 61, without any testimony that the husband had committed any conduct deserving such action. In reversing the lower court's ruling and remanding the case for further action, the Fifth District Court of Appeal clearly maintained that § 741.30 was the appropriate vehicle for a domestic violence injunction, as opposed to Chapter 61 proceedings. *Shaw-Messer v. Messer*, 755 So. 2d 776 (Fla. 5th DCA 2000).
    - Injunctions against domestic violence may not be issued as part of a final judgment of dissolution; they must be made in a separate order. *Campbell v. Campbell*, 584 So. 2d 125 (Fla. 4th DCA 1991). *See also* § 61.052(6).
        - However, there does not appear to be any prohibition against issuing an injunction under Florida Rule of Civil Procedure 1.610 in a dissolution action if threatened behavior would not qualify for an injunction under § 741.30. Therefore, it would seem a "no contact" order could be issued in a dissolution action if it was not based on circumstances supporting an injunction against violence.
- Domestic Violence and Dissolution Case with a Foreign Order in a Pending Action
    - The husband could not be held in contempt of the order awarding temporary child custody to the wife where the husband was precluded from removing his son from foreign country by foreign administrative and judicial orders until his custody claim filed there was resolved. *Abuchaibe v. Abuchaibe*, 751 So. 2d 1257 (Fla. 3d DCA 2000).
- Trial Court must Make Findings Regarding Domestic Violence or Child Abuse in Dissolution Action when Ruling on the Issue of Primary Residential Custody.
    - In making a ruling on the issue of primary residential custody in the divorce action, the trial court was required to make a finding regarding alleged

domestic violence or child abuse by the husband; evidence indicated that alleged domestic abuse appeared to be serious with an incident involving the wife making distraught 911 call to local police. Appellate review could not be meaningfully conducted without trial court explicitly addressing allegation. *Collins v. Collins*, 873 So. 2d 1261 (Fla. 1st DCA 2004).

- Ancillary Relief is Limited when Child Files Domestic Violence Petition by and through her Mother.

    - The Fifth District Court of Appeal found it improper for the trial court to award custody, child support, and alimony for the petitioner's mother and sister in a domestic violence action where the petitioner was a minor child filing by and through her mother as "next best friend." The mother was only a party to the case as a representative of the child, and the statute did not authorize awards of custody, child support, or alimony in the absence of an action for dissolution of marriage. Consequently, the Fifth District Court of Appeal held that the trial court did not have jurisdiction to award custody, child support, and alimony absent dissolution of marriage proceeding as § 741.30 (1997), does not authorize such awards. *Rinas v. Rinas*, 847 So. 2d 555 (Fla. 5th DCA 2003).

- Trial Court Cannot Dismiss Domestic Violence Injunction in Dissolution Where Parties Did Not Move to Vacate and Were Not Notified the Matter Would Be Considered.

    - The trial court erred in dismissing an injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered, thus failing to provide due process on the issue. Additionally, the court struck the trial court's order setting a motion for a rehearing as the court had lost jurisdiction on the matter when the wife filed an appeal. *Farr v. Farr*, 840 So. 2d 1166 (Fla. 2d DCA 2003).

- Trial Court Can Dismiss Temporary Injunction at a Related Hearing but the Requirements of Due Process Must Be Observed.

    - The trial court erred in dismissing a temporary injunction for protection against domestic violence at a hearing on the husband's emergency motion for visitation by claiming that whether a restraining order should or should not be granted must be determined by the court in the parties' dissolution of marriage. The matter may be handled by one circuit judge, § 741.30; however, the requirements of due process must be observed. *White v. Cannon*, 778 So. 2d 467 (Fla. 3d DCA 2001).

- Pending Dissolution Action Does Not Prevent Court from Issuing Domestic Violence Injunction (DVI).

- Dismissal of a request for an injunction against domestic violence solely on the basis that there was a pending divorce action between the parties is contrary to § 741.30(1)(b) and constitutes error. *Knipf v. Knipf*, 777 So. 2d 437 (Fla. 1st DCA 2001).

- Trial Judges Assigned to Dissolution Proceedings Who Also Handle Interrelated Petitions for Domestic Violence Must Exercise Care in Ensuring That Their Rulings Are Supported by an Adequate Record.

  - The petitioner appealed a final judgment of injunction for protection against domestic violence entered in favor of his former wife. The parties were also involved in a divorce and custody dispute being heard by the same judge. The appellate court reversed the order granting the petition because it was entered based on evidence from the custody hearing that was not a part of the injunction hearing record. In essence, the court's decision was based on impermissible extrajudicial knowledge. *Coe v. Coe*, 39 So. 3d 542 (Fla. 2d DCA 2010).

- Judge Hearing Dissolution Erred in Requiring Husband to Pay Attorney's Fees in a Separately Filed DVI case.

  - The Second District Court of Appeal held that the trial court hearing the dissolution case erred in requiring the husband to pay attorney's fees incurred by the wife in a separately filed domestic violence injunction case. *Belmont v. Belmont*, 761 So. 2d 406 (Fla. 2d DCA 2000).

- Provisions in Chapter 61 Orders Trump Conflicting Temporary Provisions Set out in Chapter 741 DVI Orders.

    - When parties are involved in both an injunction and a dissolution case, matters governed by Chapter 61 are controlled by the judge hearing the dissolution case, without regard to whether the family court action was filed before or after the injunction case. *Cleary v. Cleary*, 711 So. 2d 1302 (Fla. 2d DCA 1998).

**Florida Case Law**

- Sufficient Evidence to Adjudicate Child as Dependent

  - The Third District Court of Appeal upheld the trial court's adjudication of the child as dependent as to the mother based on finding that domestic violence in the house adversely affected the child even though there was insufficient evidence to conclude the child witnessed the physical altercations between both parents. *D.R. v. Department of Children and Families*, 898 So. 2d 254 (Fla. 3d DCA 2005).

- The Fifth District Court of Appeal affirmed the trial court's ruling that evidence supported adjudication of the father's two children as dependents based upon the children being aware of an act of domestic violence. The children had been awoken from sleep by the screams of their father and his girlfriend, who was yelling for the father to keep the knife away from her and her infant child. *T.R. v. Dept. of Children and Families*, 864 So. 2d 1278 (Fla. 5th DCA 2004).

- Competent substantial evidence supported the conclusion that there was a pattern of domestic violence in presence of the child, warranting finding of abuse. *W.V. v. Department of Children and Families*, 840 So. 2d 430 (Fla. 5th DCA 2003).

- Dependency adjudication was affirmed based on a holding that it is not necessary for a child to witness violence in order to be harmed by it, as children may be affected and aware that the violence is occurring without actually having to see it occur. *D.W.G. v. Department of Children and Families*, 833 So. 2d 238 (Fla. 4th DCA 2002).

  - **Note**: This case may be applied when determining whether visitation or custody is appropriate where domestic violence is committed against a parent.

- The adjudication of dependency was affirmed but remanded for entry of written findings consistent with the trial court's oral announcement. The Fifth District Court of Appeal provided specifically, "[t]he children's health was in danger of being significantly impaired by the acts of domestic violence that took place in the children's presence and by the mother's refusal to end her troubled relationship with the paramour." *E.G. v. Department of Children and Families*, 830 So. 2d 212 (Fla. 5th DCA 2002).

- The father appealed the trial court order finding his five-year-old child dependent. The court found that evidence that the child witnessed the father's abuse of the mother, together with evidence indicating that the parents would more likely than not resume their relationship in the future and resume the cycle of domestic violence in the presence of the child, established prospective neglect sufficient to support finding of dependency, even in absence of medical or other expert testimony. Pursuant to § 39.01(30), *amended by* § 39.01(35) (2019) defining harm, the court can make a finding that the child is neglected and adjudicate a dependent when the state has presented sufficient evidence that the child is living in an environment which causes mental, physical, or emotional impairment. Additionally, the court found that it is not necessary for a finding of dependency that the court make a finding that there is no reasonable prospect that the parents can improve their behavior. The appellate court affirmed the decision. *D.D. v. Department of Children and Families,* 773 So. 2d 615 (Fla. 5th DCA 2000).

- Insufficient Evidence to Adjudicate Child as Dependent

- Dependency adjudication based on domestic violence between the father and former wife and the father's alleged substance abuse was not supported by competent substantial evidence. The two instances of domestic violence, in the presence of the child more than a year and a half prior to the dependency petition, were too remote in time to support dependency adjudication. *B.C. v. Department of Children and Families*, 846 So. 2d 1273 (Fla. 4th DCA 2003).

- It is an error to adjudicate the child dependent based on the finding that she was at substantial risk of imminent abuse and neglect where the trial court's finding was based upon a single instance of abuse inflicted on a sibling and evidence failed to establish a nexus between the abuse of the sibling and a risk of prospective abuse to the child. *J.B.P.F. v. Department of Children and Families*, 837 So. 2d 1108 (Fla. 4th DCA 2003).

- The evidence was insufficient to support the finding that the child suffered from abuse as a result of domestic violence between the mother and her boyfriend where there was no evidence that the child was present at the time of the act of domestic violence. *E.B. v. Department of Children and Families*, 834 So. 2d 415 (Fla. 2d DCA 2003).

- The dependency adjudication reversed where no findings were made that the three-month-old child was aware of the incident or was physically or mentally harmed. "Instead, the trial court found that, because a child may be harmed by witnessing violence, this child was actually harmed. Significantly, the record contained no evidence that the child comprehended the incident, sustained any physical or mental injury, or was cognizant in any way of the parents' poor behavior toward one another." *C.W. v. Department of Children and Families*, 10 So. 3d 136 (Fla. 1st DCA 2009).

**Dismissal of Injunctions in Crossover Cases**

- The appellate court found, inter alia, that the trial court committed reversible error by entering an order dismissing the wife's petition for a final injunction for protection against domestic violence at the end of its hearing on the petition for dissolution of marriage. Due process required that a hearing for the issuance of the final injunction occur; the trial court erred when it dismissed the petition based solely upon its observations at the final hearing of the dissolution of marriage. *Sumner v. Sumner*, 862 So. 2d 93 (Fla. 2d DCA 2003).

  - *See also White v. Cannon*, 778 So. 2d 467 (Fla. 3d DCA 2001). Trial court erred in dismissing a temporary injunction against domestic violence in the final judgment dissolving the parties' marriage where the petitioner did not move to vacate the injunction and where the parties were not noticed that the matter would be considered, thus failing to provide due process on the issue.

- Parties must have notice that dismissal will be considered. *Farr v. Farr*, 840 So. 2d 1166 (Fla. 2d DCA 2003).

- The petitioner's voluntary dismissal of an action for injunction for protection against domestic violence and an action for dissolution of marriage divested the trial judge of authority to continue with further proceedings on the wife's attorney's motion to withdraw, the husband's motion to disqualify the wife's counsel, and enforcement of the previously ordered requirement of counseling and attendance at the spouse batterers' program. No final injunction requiring counseling or attendance at the Glass House was ever entered. A voluntary dismissal does not divest the court of jurisdiction to conclude ancillary matters involved in the case such as outstanding and unresolved motions for the attorney's fees and costs, and similar issues. The trial court's decision was reversed. *Tobkin v. State*, 777 So. 2d 1160 (Fla. 4th DCA 2001).

**International Implications of Domestic Violence**

- When one parent abducts a child and flees to another country, the other parent may petition for the return of the child pursuant to the Hague Convention. If the petition is filed within one year of the child's removal, the court shall generally order the return of the child. If the petition is filed after one year, the court shall order the child's return unless the child has settled in his/her environment. The 1-year period in Article 12 of the Hague Convention is not subject to equitable tolling. *Lozano v. Alvarez*, 572 U.S. 1 (2014).

## P. HOUSING - FEDERAL HOUSING PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING

**The Violence Against Women Act (VAWA, 34 U.S.C. § 12471 et seq. (2022))**

- Protects tenants and family members of tenants who are victims of domestic violence, dating violence, or stalking from being evicted or terminated from housing assistance based on such acts of violence against them. These provisions apply to public housing and Section 8 programs. VAWA was reauthorized in March of 2022 and became effective on October 1, 2022. As part of that reauthorization, Congress required the U.S. Department of Housing and Urban Development to implement and enforce the housing provisions of VAWA consistent with and in a manner that provides the same rights and remedies as those provided for in the Fair Housing Act.

**Who is Covered**

The protections cover victims of domestic violence, dating violence, and stalking who are tenants in the federal Public Housing and Section 8 voucher and project-based programs. The protections also cover members of the victim's immediate family such as a spouse, parent, sibling, or child of that individual, or an individual to whom that individual stands in loco parentis. 34 U.S.C. § 12491(a)(1)(A) (2022). Key Provisions:

- Provides that an individual's status as a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of admission or denial of housing assistance. 34 U.S.C. § 12491(b)(1) (2022).

- Provides that criminal activity directly relating to domestic violence, dating violence, or stalking does not constitute grounds for termination of a tenancy. 34 U.S.C. § 12491(b)(3)(A) (2022).

- Provides that a Public Housing Authority (PHA) or Section 8 landlord may bifurcate a lease in order to evict, remove, or terminate the assistance of the offender while allowing the victim, who is a tenant or lawful occupant, to remain. 34 U.S.C. § 12491(b)(3)(B)(i) (2022).

- If a public housing agency or owner or manager of housing assisted under a covered housing program evicts, removes, or terminates assistance to an individual found to have committed domestic violence, and the individual is the sole tenant eligible to receive assistance under a covered housing program, the public housing agency or owner or manager shall provide any remaining tenant or resident an opportunity to establish eligibility for the covered housing program. If a tenant or resident described in the preceding sentence cannot establish eligibility, the public housing agency or owner or manager of the housing shall provide the tenant or resident a reasonable time, as determined by the appropriate agency, to find new housing or to establish eligibility for housing under another covered housing program. 34 U.S.C. §12491(b)(3)(B)(ii) (2022).

- States that PHAs and Section 8 landlords have the authority to honor civil protection orders and other court orders from domestic violence and family court judges that address rights of access to or control of the property. 34 U.S.C. §12491(b)(3)(C)(i)(l) (2022).

- Allows the PHA or Section 8 landlord to evict a victim if the PHA or Section 8 landlord demonstrates an actual and imminent threat to other tenants or those employed at or providing service to the property if that tenant's tenancy is not terminated. 34 U.S.C. §12491(b)(3)(C)(iii) (2022).

- Allows but does not require a PHA or Section 8 landlord to request documentation that the individual or family members have been a victim of domestic violence, dating violence, or stalking. Under 34 U.S.C. § 12491(c)(3) (2022), a victim may satisfy a PHA's or Section 8 landlord's request for documentation by presenting:

    - A certification form approved by the agency that states that the applicant is a victim of domestic violence, dating violence, sexual assault or stalking, that such incident is grounds for protection, and identifies the individual who committed the criminal act if known;

    - A document that is signed by an employee, agent, or volunteer of a victim service provider, an attorney, a medical professional, or a mental health

professional from whom an applicant or tenant has sought assistance relating to domestic violence, dating violence, sexual assault, or stalking, or the effects of the abuse; and the applicant or tenant; and states under penalty of perjury that the individual described believes that the incident of domestic violence, dating violence, sexual assault, or stalking that is the ground for protection meets the requirements;

- A record of a Federal, State, tribal, territorial, or local law enforcement agency, court, or administrative agency; or

- At the discretion of a public housing agency or owner or manager of housing assisted under a covered housing program, a statement or other evidence provided by an applicant or tenant.

- After a PHA or Section 8 landlord has requested the documentation in writing, an individual has 14 business days to respond to the request. If an individual does not provide the documentation within 14 business days, the PHA or landlord may bring eviction proceedings against the tenant. However, the PHA or Section 8 landlord also may extend this timeframe at its discretion. 34 U.S.C. § 12491(c)(2)(A) (2022).

## Q. ANCILLARY MATTERS

**Attorney's Fees in Domestic Violence Proceedings**

- Neither Rule of Appellate Procedure 9.400 nor Chapter 741 Provide Authority to Grant Attorney's Fees

  - The wife's request for the appellate attorney's fees was denied. Neither the domestic violence statute nor Florida Rule of Appellate Procedure 9.400 provides authority for granting attorney's fees in domestic violence proceedings. Section 61.16(1) providing for attorney's fees for maintaining or defending proceedings under Chapter 61, does not apply to Chapter 741 proceedings, as domestic violence proceedings are independent of dissolution of marriage proceedings. Note: The court stated, "we are not unaware that the public policy reasons for granting attorney's fees in a Chapter 61 proceeding exist in a domestic violence proceeding. This is a matter, however, that should be dealt with by the Legislature rather than the courts." *Lewis v. Lewis*, 689 So. 2d 1271 (Fla. 1st DCA 1997).

  - An award of attorney's fees pursuant to section 57.105 is permissible in an action under § 784.046 *Lopez v. Hall*, 233 So. 3d 451 (Fla. 2018).

    - See also *Harrison v. Francisco*, 884 So. 2d 239 (Fla. 2d DCA 2004). The husband was entitled to a hearing on his motion for costs, after the wife voluntarily dismissed her domestic violence injunction. "Although an award of costs is a matter largely left to the discretion of the trial court,' the holding in Coastal Petroleum requires 'the trial court, in an appropriate

hearing, after argument and presentation of appropriate evidence by both sides to determine exactly which expenses would have been reasonably necessary for an actual trial." Quoting *Coastal Petroleum Co. v. Mobil Oil Corp.*, 583 So. 2d 1022, 1025 (Fla. 1991).

**Compensatory and Punitive Damages**

- A victim of domestic violence who has suffered repeated physical or psychological injuries over an extended period of time, as a result of continuing domestic violence, has a cause of action for compensatory and punitive damages against the perpetrator responsible for the violence. § 768.35.

**Disqualification and Recusal of Judge**

- The Fifth District Court of Appeal held that the trial court erred in not granting the husband's motion for recusal where the trial judge showed strong disapproval of calling the children as witnesses of domestic violence occurring in their presence for purposes of determining custody issues. *Tindle v. Tindle*, 761 So. 2d 424 (Fla. 5th DCA 2000).

- The motion to disqualify judge based on judge's membership on domestic violence task force was legally insufficient. *Yates v. State*, 704 So. 2d 1159 (Fla. 5th DCA 1998), *concurring opinion*.

## R. APPELLATE REVIEW

**Appellate Record**

- Trial Court Must Make Findings for the Record Regarding Alleged Domestic Violence.

  - In making a ruling on the issue of primary residential custody in divorce action, the trial court was required to make a finding regarding alleged domestic violence or child abuse by the husband; evidence indicated that the alleged domestic abuse appeared to be a serious incident involving the wife making distraught 911 call to local police, and appellate review could not be meaningfully conducted without trial court explicitly addressing the allegation. *Collins v. Collins*, 873 So. 2d 1261 (Fla. 1st DCA 2004).

- Issue Must be Raised by Objection for the Record.

  - Where the appellant and appellee were half-brothers who each filed for an injunction for protection against domestic violence against one another, the Third District Court of Appeal held that the issue of whether the trial court should not have taken judicial notice of testimony presented in the appellee's case without making such testimony a part of the record was not preserved for

appellate review based on the fact that the issue was never raised as an objection before the trial court. *Wehbe v. Uejbe*, 744 So. 2d 572 (Fla. 3d DCA 1999), *concurring opinion*.

**Standard of Review**

- The petitioners requested a review of the circuit court's order denying their motion to dismiss a domestic violence injunction. The petitioners based their motion on the grounds that there was a pending dependency action in Palm Beach, in which a custody award was granted that was contrary to the custody award given during the domestic violence injunction hearing. The Fourth District Court of Appeal found that no certiorari review is necessary where a party has failed to show that a denial of a motion to dismiss a domestic violence injunction caused irreparable harm. The Fourth District Court of Appeal found that the petitioners' argument claiming that the Palm Beach award had precedence over the domestic award was not sufficient harm to mandate certiorari review. *S.E.R. v. J.R.,* 803 So. 2d 861 (Fla. 4th DCA 2002).

    - **Note:** The test for irreparable harm is set forth in *Bared & Co., Inc. v. McGuire*, 670 So 2d. 153 (Fla. 4th DCA 1996).

- The former wife appealed the trial court's amended final judgment of injunction against domestic violence in favor of the former husband. The court did not reverse the order and stated that "(t)he trial court is afforded broad discretion in granting, denying, dissolving, or modifying injunctions, and, unless a clear abuse of discretion is demonstrated, an appellate court must not disturb the trial court's decision." *Duran v. Duran*, 208 So. 3d 291, 2016 (Fla. 3d DCA 2016).

**Transcripts**

- The appellate court affirmed the entry of an injunction as the moving party failed to provide the court with a transcript of the proceedings and failed to provide the court a record of the proceedings pursuant to Florida Rule of Appellate Procedure 9.200(b)(4). *Squires v. Darling*, 834 So. 2d 278 (Fla. 5th DCA 2002).

- The respondent appealed a repeat violence injunction as the next best friend of her son. Because no record or transcript was provided, the Second District Court of Appeal could not find error in the trial court's decision, as evidence had to be provided to the lower court for the injunction to be issued. The case was remanded only to correct scrivener's errors regarding the correct parties and to remedy an error on the pre-printed form. *Stevens v. Bryan*, 805 So. 2d 881 (Fla. 2d DCA 2001).

- No transcripts were made available to determine whether an error was committed, therefore injunction preventing the appellant from contacting the ex-husband is affirmed. *Ricketts v. Ricketts*, 790 So. 2d 1265 (Fla. 5th DCA 2001).

- The Fifth District Court of Appeal affirmed the ruling of the trial court where the appellant/respondent contended that the evidence of record did not support the trial court's entry of a final injunction for protection against repeat violence but failed to provide the appellate court with either a transcript of trial court proceedings or stipulated statement of facts. Accordingly, the appellate court was prevented from reviewing the validity of the claim and held that no error of law was apparent. *Pollock v. Couffer*, 750 So. 2d 659 (Fla. 5th DCA 1999).

## S. ENFORCEMENT

**Enforcement of Injunctions in Florida**

- Florida Injunctions
    - Injunctions for protection against domestic violence entered by the judiciary of Florida are valid and enforceable in all counties of the state. § 741.30(6)(d)(1).
- Foreign Protection Orders
    - Protection orders entered by state courts other than Florida, which are issued in accordance with the Violence Against Women Act (VAWA), are enforceable by Florida's local law enforcement authorities as if they were entered by the judiciary of Florida. Record and registration of the order in Florida is not a prerequisite for enforcement. However, entry of the initial foreign protection order must be legally valid – the issuing court must have had jurisdiction over the parties and subject matter, and the respondent must have been provided reasonable notice and opportunity to be heard, as defined by the law of the foreign court. 18 U.S.C. § 2265.
        - Violation of Foreign Protection Order is a First-Degree Misdemeanor. § 741.31(4)(a).
        - Police have Warrantless Arrest Powers for Violations of Foreign Orders of Protection. § 901.15(6).
        - "Court of a Foreign State" is defined in § 741.315(1) as follows:
            - Court of competent jurisdiction of a state of the United States, other than Florida;
            - The District of Columbia;
            - An Indian tribe; or
            - A commonwealth, territory, or possession of the United States.

- Residency and Registration of Foreign Protection Orders is Addressed in § 741.315(3)(a):
    - Foreign protection orders need not be registered in the protected person's county of residence to be valid.
    - Venue is proper throughout the state.
    - Residence in Florida is not required for enforcement of an injunction for protection against domestic violence.

- Registration of a Foreign Order
    - To register a foreign order, the petitioner must present a certified copy to any sheriff in Florida and request that it be entered into the system.
        - "The protected person must swear by affidavit, that to the best of the person's knowledge and belief, the attached certified copy of the foreign order . . . is currently in effect as written and has not been superseded by any other and that the respondent has been given a copy of it." § 741.315(3)(a).
        - "If not apparent from the face of the certified copy of the foreign order, the sheriff shall use best efforts to ascertain whether the order was served on the respondent" [and] "shall assign a case number and give the protected person a receipt showing registration of the foreign order in this state." § 741.315(3)(b).
        - FDLE "shall develop a special notation for foreign orders of protection." § 741.315(3)(b).
        - It is a first-degree misdemeanor to intentionally provide police with a false or invalid foreign protection order. § 741.315(5).

**Courts' Power to Enforce through Civil or Criminal Contempt Proceedings**

- The court may enforce a violation of an injunction for protection against domestic violence through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under § 741.31. The court may enforce the respondent's compliance with the injunction through any appropriate civil and criminal remedies, including but not limited to, a monetary assessment or fine. § 741.30(9)(a).

- Violations of provisions, such as child support or visitation, may be enforced through civil contempt sanctions since the purpose of a civil contempt proceeding is to mandate compliance with the injunction, not to impose punishment. § 741.30(9)(a).

**Legislative Intent**

- According to § 741.2901(2), it is the intent of the legislature that domestic violence be treated as a crime, and, for that reason, "criminal prosecution shall be the favored method of enforcing compliance with injunctions for protection against domestic violence." However, that provision does not preclude the court from using indirect contempt to enforce the order. But, if the violation is punishable by criminal contempt and incarceration, the court must comply with the provisions of Florida Rule of Criminal Procedure 3.840.

**Inherent Power of Contempt**

- The Legislature has no authority under the doctrine of separation of powers to limit the circuit court in exercise of its constitutionally inherent powers of contempt.

- The statutory directive that domestic violence injunctions "shall" be enforced by civil contempt is directory rather than mandatory. The legislature cannot eliminate the court's inherent indirect criminal contempt power. The portion of the statute expressing legislative intent that indirect criminal contempt may not be used to enforce compliance with injunctions for protection against domestic violence is construed in a manner consistent with the constitution and is therefore directory rather than mandatory. *Steiner v. Bentley*, 679 So. 2d 770 (Fla. 1996).

- The statutory directive that domestic violence injunctions "shall" be enforced by civil contempt is permissive rather than mandatory. *Ramirez v. Bentley*, 678 So. 2d 335 (Fla. 1996).

- To the extent that statute would limit the circuit court's jurisdiction to use civil contempt to enforce compliance with a domestic violence injunction, it is unconstitutional as violative of the doctrine of separation of powers. The court's power to enforce an injunction through a civil contempt proceeding is discretionary rather than mandatory and, thus, does not prohibit the use of indirect criminal contempt by the circuit court. *Walker v. Bentley*, 660 So. 2d 313 (Fla. 2d DCA 1995).

- Trial court has inherent power to enforce an injunction for protection against "domestic/repeat violence" through indirect criminal contempt proceedings. *Lopez v. Bentley*, 660 So. 2d 1138 (Fla. 2d DCA 1995).

**Contempt = Willful Violation of an Injunction for Protection Against Domestic Violence**

- It is a first-degree misdemeanor to willfully violate an injunction for protection against domestic violence or a foreign protection order that is given full faith and credit pursuant to § 741.315. Violation of the injunctions above is punishable as provided in § 775.082 or § 775.083. § 741.31(4)(a).

- The essential inquiry in a contempt proceeding is whether the defendant intentionally failed to comply with the subpoena or other court orders.

  - It was error to deny the motion for judgment of acquittal on a charge of the violation of a domestic violence injunction where the state failed to establish that the defendant knew a final injunction had been entered against him, either through proof that the defendant had been served with the injunction or proof that defendant had some other notice. *Robinson v. State*, 840 So. 2d 1138 (Fla. 1st DCA 2003).

  - The respondent was ordered to successfully complete a batterer intervention program as part of an injunction. The respondent enrolled and attended eight classes before being terminated by the program for failure to pay the provider fee or provide proof of community service hours. The respondent was sentenced to ninety days in jail for indirect criminal contempt for violating the injunction. The respondent testified that, because he was sentenced to prison on an unrelated offense, he did not have any income and wanted to complete the community service but could not because of his asthma. Furthermore, the batterers' program issued a trespass warning against him because he had failed to pay the provider fees. The Second District Court of Appeal held that the respondent demonstrated a willingness to attend the class but, because of his indigency and disability status, he could not. Furthermore, the state failed to prove an intentional violation of the injunction. *Hunter v. State*, 855 So. 2d 677 (Fla. 2d DCA 2003).

  - Fear of retaliation is not a valid defense for failing to comply with a lawful order to appear at a court proceeding. *Villate v. State*, 663 So. 2d 672 (Fla. 4th DCA 1995).

    - "While we sympathize with Villate's plight, the courts simply cannot conduct orderly business where individual witnesses take it upon themselves to decide when, and if, they should respond to a court order." Id.

  - Where a law enforcement officer reasonably believed that he had been excused from the subpoena by an assistant state attorney, there was no intent to disobey the order. *Scimshaw v. State*, 592 So. 2d 753 (Fla. 3d DCA 1992).

- Actions which Constitute a Willful Violation

  - A person is guilty of a first-degree misdemeanor who intentionally violates an injunction for protection against domestic violence by:

    - Refusing to vacate the dwelling that the parties share;

- Going to, or being with 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;

- Committing an act of domestic violence against the petitioner;

- Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;

- Telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly, unless the injunction specifically allows indirect contact through a third party;

- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;

- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or

- Refusing to surrender firearms or ammunition if ordered to do so by the court. § 741.31(4)(a).

- The respondent may be charged with burglary or trespassing for entering the residential property in violation of an injunction.

  - The husband, who shared a house with the wife but was restrained by an injunction from entering the property, was charged with burglary for entering the premises with the intent to commit a crime. *State v. Surez-Mesa*, 662 So. 2d 735 (Fla. 2d DCA 1995), review denied, 669 So. 2d 252 (Fla. 1996).

  - The domestic violence injunction had the effect of giving notice to the defendant against entering the victim's property. *Jordan v. State*, 802 So. 2d 1180 (Fla. 3d DCA 2001).

- Violation of Injunction by Indirect Contact Includes:

  - Mailing letters to the victim; the circuit court could revoke probation based upon the defendant's indirect contact with the victim through a third party, as the order of probation mandated that the defendant was to have no association with victim in any way. *Arias v. State*, 751 So. 2d 184 (Fla. 3d DCA 2000).

    - But see *Seitz v. State*, 867 So. 2d 421 (Fla. 3d DCA 2004). Even though the defendant's actions did not involve direct or indirect contact with the victim, he still could be convicted of stalking. (The defendant disseminated pharmaceutical records of the victim to various persons in the county. The state alleged that this action served no legitimate purpose and that it caused the victim to suffer emotional distress.)

**Contempt Remedies**

- Civil Contempt
    - Civil contempt is a remedy of a court "to coerce obedience to its orders which direct a civil litigant to do or abstain from doing an act or acts. . ." *Dowis v. State*, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).
    - A civil contempt adjudication is intended to operate in prospective manner to coerce, rather than to punish. *Featherstone v. Montana,* 684 So. 2d 233 (Fla. 3d DCA 1996).
    - The preponderance of the evidence burden of proof applies to civil contempt proceedings. *Kramer v. State*, 800 So. 2d 319, 320 (Fla. 2d DCA 2001).
- A Court Order Must Be Obeyed until Vacated or Reversed.
    - The defendant cannot defend contempt by claiming that the order violated was wrong. *McQueen v. State*, 531 So. 2d 1030, (Fla. 1st DCA 1988).
        - **Note**: A defendant cannot complain, after revocation of probation, of the illegality of a sentence placing him on probation, because he accepted the benefits.
    - "[S]entences imposed in violation of statutory requirements, which are to the benefit of the defendant and to which he agreed, may not be challenged after the defendant has accepted the benefits flowing from the plea, but has failed to carry out the condition imposed on him." *Bashlor v. State*, 586 So. 2d 488, 489 (Fla. 1st DCA 1991).

**Civil Contempt Orders Must Contain a Purge Provision.**

- In these consolidated cases, two men sought habeas corpus relief based upon their confinement as a result of being found in civil contempt of court for failure to comply with the trial court's order in final judgments for injunctions in domestic violence cases. The 3d District Court of Appeal noted that the last orders issued by the trial court found each respondent to be in civil contempt of court and sentenced each to incarceration without containing a purge provision. Without this provision, the contempt orders were criminal rather than civil and required that the contemnors be afforded the same constitutional due process protections afforded criminal defendants. *Jones v. Ryan*, 967 So. 2d 342 (Fla. 3d DCA 2007).
- A petition for habeas corpus was granted when Ms. Sando was sentenced for civil contempt after violating a domestic violence injunction. The trial court ordered Ms. Sando jailed for six months with a purge that stated she would be released upon completion of a 60-day domestic violence class which was unavailable where she was incarcerated. The appellate court found that the sentence represented a

criminal contempt sanction, not a civil contempt sanction and that Ms. Sando was not properly noticed or provided with the due process requirements necessary in criminal contempt proceedings. *Sando v. State*, 972 So. 2d 271 (Fla. 4th DCA 2008).

**Indirect Criminal Contempt**

- Indirect criminal contempt concerns conduct that has occurred outside the presence of the judge. *Gidden v. State*, 613 So. 2d 457 (Fla. 1993).

- Indirect criminal contempt is a criminal matter with the object of punishment. *Featherstone v. Montana*, 684 So. 2d 233 (Fla. 3d DCA 1996).

- Rule of Criminal Procedure 3.840

  - The prosecutorial procedure for indirect criminal contempt is governed by Florida's Rule of Criminal Procedure 3.840.

    - The Fifth District Court of Appeal reversed the defendant's conviction for indirect criminal contempt for violating an injunction against repeat violence. The court held, inter alia, that: (1) the affidavit of violation was insufficient as it was not based on personal knowledge, and (2) the trial court committed reversible error by not having the proceeding transcribed, preventing the appellate court from reviewing the defendant's additional due process claims. The District Court of Appeal reversed without prejudice to new proceedings being initiated in conformity with Florida Rule of Criminal Procedure 3.840. *Hagan v. State*, 853 So. 2d 595 (Fla. 5th DCA 2003).

    - The First District Court of Appeal granted a writ of habeas corpus where the trial judge hearing the petition for final injunction learned of a violation of the temporary injunction and, in addition to entering the final injunction, held the respondent in indirect criminal contempt and sentenced him to thirty days in the county jail. The First District Court of Appeal held that the trial court failed to comply with the procedural safeguards set forth in Florida Rule of Criminal Procedure 3.840 when instituting the contempt action. *Lapushinsky v. Campbell*, 738 So. 2d 514 (Fla. 1st DCA 1999).

  - Indirect criminal contempt begins with the judge issuing an order to show cause. *Tschapek v. Frailing*, 699 So. 2d 851 (Fla. 4th DCA 1997).

  - Motion for order to show cause on which a contempt order is based must be sworn or supported by affidavit. *Judkins v. Ross*, 658 So. 2d 658 (Fla. 1st DCA 1995).

- All the procedural aspects of the criminal justice process must be accorded to a defendant in an indirect criminal contempt proceeding.

- Appropriate charging document;
- An answer;
- An order of arrest;
- The right to bail;
- An arraignment;
- A hearing;
- Representation by counsel;
- Process to compel the attendance of witnesses; and
- Right to testify in his/her own defense.
    - *Gidden v. State*, 613 So. 2d 457 (Fla. 1993).

- State must Produce Non-Hearsay Testimony.
    - In order to justify a holding that the defendant violated an injunction for protection, the state must produce non-hearsay testimony. *Torres v. State*, 870 So. 2d 149 (Fla. 2d DCA 2004).

- Subject to Speedy Trial
    - Indirect criminal contempt is subject to the speedy trial rule, whether the proceeding is initiated by an arrest or service of an order to show cause. Where the defendant had been arrested for violation of an injunction, the state filed a nolle prosse in county court after the defendant filed a motion for discharge, and the state subsequently filed a motion for an order to show cause in the circuit court, the speedy trial period for the circuit court action commenced with the defendant's initial arrest rather than with service of the show cause order. *Washington v. Burk*, 704 So. 2d 540 (Fla. 5th DCA 1997).
        - But see *Burk v. Washington*, 713 So. 2d 988 (Fla. 1998). Indirect criminal contempt initiated by the court is not subject to the speedy trial rule.

- Right to Jury Trial
    - A defendant charged with indirect criminal contempt for the violation of an injunction was not entitled to a jury trial; denial of a jury trial merely limited the maximum term of jail to six months. *Wells v. State*, 654 So. 2d 146 (Fla. 3d DCA 1995).

- The Standard to Support Conviction for Criminal Contempt is beyond a Reasonable Doubt.

    - In criminal contempt proceedings, the court must require proof of the defendant's guilt beyond a reasonable doubt before shifting the burden to the defendant to go forward. "Thus, to prove indirect criminal contempt, 'there must be proof beyond a reasonable doubt that the individual intended to disobey the court.'" *Tide v. State*, 804 So. 2d 412 (Fla. 4th DCA 2001).

    - The trial court erred in finding that the defendant had violated the 500-feet provision of the injunction as the state failed to prove the exact distance the defendant was from the petitioner. The court held that the state's burden of proof in an indirect criminal contempt case is to prove every element beyond a reasonable doubt. *Hoffman v. State*, 842 So. 2d 895 (Fla. 2d DCA 2003).

- Notice of Prohibited Conduct Must Be Provided in an Injunction.

    - The defendant, a respondent in a civil case, was convicted of a violation of the injunction for sending cards to the petitioner's residence and for allegedly violating the 500-feet provision of the injunction. The trial court erred in finding that the defendant had violated the injunction as the cards were addressed to other residents of the petitioner's household and as the injunction did not specifically prohibit this. *Hoffman v. State*, 842 So. 2d 895 (Fla. 2d DCA 2003).

        - The order holding the husband in indirect criminal contempt for violating a temporary restraining order against harassing the wife by failing to pay her health insurance premiums in a timely fashion was reversed. Neither the final judgment of dissolution nor the temporary restraining order adequately apprised the husband of conduct that was prohibited regarding the timeliness of payments of the wife's health insurance premiums. The husband's payment of premiums after the due date had passed but within the grace period did not constitute indirect criminal contempt. *Zelman v. State*, 666 So. 2d 188 (Fla. 2d DCA 1995).

**Direct Criminal Contempt**

- Criminal contempt proceedings are subject to Florida's Rules of Criminal Procedure 3.830 and 3.840 and to the "constitutional limitations applicable to criminal cases including due process requirement of a burden of proof 'beyond a reasonable doubt.'" *Dowis v. State*, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).

- The Defendant Must be Allowed to Show Cause as to Why He/She Should Not Be Found Guilty.

    - Rule 3.830, Florida's Rules of Criminal Procedure.

- Direct Criminal Contempt Occurs When the Court Sees or Hears the Conduct which Constitutes the contempt. *Tchapek v. Frailing*, 699 So. 2d 851 (Fla. 4th DCA 1997).

    - The defendant's "contemptuous behavior occurred in the presence of the trial court, frustrated an ongoing proceeding, and is apparent on the face of the record." *Jackson v. State*, 779 So. 2d 379 (Fla. 2d DCA 2000).

- The Burden of Proof to Support a Conviction for Criminal Contempt is Beyond a Reasonable Doubt.

    - In criminal contempt proceedings, the court must require proof of the defendant's guilt beyond a reasonable doubt before shifting the burden to the defendant to go forward. *Kramer v. State*, 800 So. 2d 319, 320 (Fla. 2d DCA 2001).

- The Purpose of Criminal Contempt is to Punish.

    - A judge cannot hold a person in direct criminal contempt of court for a profanity-laced tirade that takes place away from the courtroom and has nothing to do with the judge's official duties. *Kress v. State*, 790 So. 2d 1207 (Fla. 2d DCA 2001).

    - Failure to appear is indirect contemptuous behavior. *State v. Diaz de la Portilla*, 177 So. 3d 965 (Fla. 2015).

**FDLE Statewide Verification System**

- The Florida Department of Law Enforcement has established and maintains a Domestic and Repeat Violence Injunction Statewide Verification System capable of electronically transmitting information to and between criminal justice agencies relating to domestic violence injunctions issued by the courts throughout the state. Such information must include but is not limited to information as to the existence and status of any injunction for verification purposes. § 741.30(8)(b).

    - **Note**: Mutual restraining orders, if granted as part of a Chapter 61 as a dissolution of marriage action, are not included in this registry.

**Law Enforcement's Role in Domestic Violence Proceedings**

- Law enforcement officers must assist the victim of domestic violence to obtain medical attention and advise the victim that there is a domestic violence center from which the victim may receive services. Additionally, law enforcement must immediately notify the victim of his or her legal rights by providing the victim with the Legal Rights and Remedies Notice, which is developed by the Department of Children and Families and shall include the statutory language in § 741.29(1)(a-b).

- Law enforcement officers are required to prepare reports of each act of alleged domestic violence, give the report to the officer's supervisor, and file it with the law enforcement agency "in a manner that will permit data on domestic violence cases to be compiled." § 741.29(2).

- The court may order a law enforcement officer "to accompany the petitioner and assist in placing the petitioner in possession of the dwelling or residence, or otherwise assist in the execution or service of the injunction." § 741.30(8)(a)(2).

- Law enforcement officers may arrest the alleged abuser regardless of the consent of the alleged victim. § 741.29(3).

- Law enforcement officers may not be held liable in a civil action because of arrests, enforcement, or service of process under chapter 741. § 741.29(5).

- Law Enforcement Must have the Defendant Sign a Notice to Appear (NTA) for the Court to have Jurisdiction over the Defendant:

    - Conviction was reversed on jurisdictional grounds where the defendant was issued a NTA and was booked into the county jail. The court held that where a defendant is booked into jail, the defendant does not sign the NTA and the officer does not fill in the court information, the NTA was no longer an NTA, thus there was no charging document before the court. The court, therefore, lacked any jurisdiction over the defendant. Jurisdiction can never be waived; any information must be filed whenever someone is booked into jail. *Mallard v. State*, 699 So. 2d 797, 798 (Fla. 4th DCA 1997).

    - *But see* Florida Rule of Criminal Procedure 3.170(a): "If the sworn complaint charges the commission of a misdemeanor, the defendant may plead guilty to the charges at first appearance . . . and the judge may thereupon enter judgment and sentence without the necessity of any formal charges being filed."

**Procedures Subsequent to a Violation of the Injunction**

- Three Ways Enforcement of a Violation Can Be Initiated

    - The victim may contact local law enforcement.

    - If the court has knowledge, on its own, that the petitioner, the petitioner's children, or another person is in immediate danger if the court fails to act before the decision of the state attorney to prosecute, the court may take one of two actions:

        - The court may issue an order of appointment of the state attorney to file a motion for an order to show cause why the respondent should not be held in contempt, OR

- If the court does not issue an order of appointment of the state attorney, it shall immediately notify the state attorney that the court is proceeding to enforce the violation through criminal contempt. §741.31(3).

- The victim may contact the clerk of the court's office and receive assistance from the clerk's office in filing an "affidavit in support of the violation." §§ 741.31(1) and 741.30(2)(c).

    - Once an Affidavit in Support of the Violation is Completed: The affidavit must be immediately forwarded to the state attorney's office, the designated judge, and, if the affidavit contains allegations that a crime has been committed, it shall be forwarded to the appropriate law enforcement agency to complete an investigation within 20 days and forward an investigative report to the state attorney.

    - The state attorney must determine within 30 working days whether it will file criminal charges or prepare a motion for an order to show cause as to why the respondent should not be held in criminal contempt, or both, or file notice that the case is under investigation or still pending. § 741.31(2).

**Obligations of the State Attorney in Prosecuting Domestic Violence Cases**

- Each state attorney shall develop special units or assign prosecutors, who are trained in domestic violence, to specialize in the prosecution of domestic violence cases. § 741.2901(1).

- State attorneys are required to adopt a "pro-prosecution policy" for acts of domestic violence. The consent of the victim is not required to prosecute; the state attorney possesses prosecutorial discretion. § 741.2901(2). A respondent can be prosecuted for specific acts such as assault, battery, or stalking which constituted violation of the injunction. See *State v. Suarez-Mesa*, 662 So. 2d 735 (Fla. 2d DCA 1995); *Jordan v. State*, 802 So. 2d 1180 (Fla. 3d DCA 2001).

- Preparation for First Appearance Subsequent to Arrest for Violation of an Injunction

- If the respondent is arrested by law enforcement for violation of an injunction under Chapter 741, law enforcement must hold the respondent in custody until their first appearance when court will decide bail in accordance with Chapter 903. § 741.30(9)(b). See *Simpson v. City of Miami*, 700 So. 2d 87 (Fla. 3d DCA 1997). Sovereign immunity did not bar wrongful death action against the city arising from the death of a woman killed by a violator of domestic violence injunction after he was released from a police cruiser; if an officer's action of securing a violator in a cruiser after having responded to a call about injunction violation constituted "arrest" of the violator, then statute left the officer no discretion under sovereign

immunity principles to release the violator, but required him to take the violator before a judge.

- Prior to a first appearance, the State Attorney's Office shall perform a thorough background investigation on the respondent and present the information to the judge at first appearance, so he/she will have all pertinent information when determining bail. § 741.2901(3).

**Damages and Costs for Enforcement of Injunction**

- Economic Damages
    - The court may award economic damages to any person who suffers an injury and/or loss due to a violation of an injunction for protection against domestic violence. § 741.31(6).
- Compensatory and Punitive Damages
    - A victim of domestic violence who has suffered repeated physical or psychological injuries over an extended period of time as a result of continuing domestic violence has a cause of action for compensatory and punitive damages against the perpetrator responsible for the violence. § 768.72.

## DOMESTIC VIOLENCE COURT: CRIMINAL PROCEEDINGS (JUNE 2023)

## A. JURY INSTRUCTIONS AND JURORS

- **JURY INSTRUCTION 8.25:** To prove the crime of a violation of a condition of pretrial release from a domestic violence charge, **the state must prove the following four elements** beyond a reasonable doubt:
  - (The defendant) was arrested for an act of domestic violence.
  - Before [his][her] trial, (the defendant's) release on the domestic violence charge was set with a condition of (insert condition of pretrial release in § 903.047).
  - (The defendant) knew that a condition of [his][her] pretrial release was (insert condition).
  - (The defendant) willfully violated that condition of pretrial release by (insert the manner in which the defendant is alleged to have violated pretrial release).

- A person who willfully violates a condition of pretrial release provided in § 903.047, when the original arrest was for an act of domestic violence as defined in § 741.28, commits a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083, and shall be held in custody until his or her first appearance. § 741.29(6).

- **Where Standard Jury Instructions Are Misleading, it May Be Fundamental Error.**
  - *Talley v. State*, 106 So. 3d 1015 (Fla. 2d DCA 2013). The standard jury instructions given were fundamentally erroneous because they were misleading and eviscerated Talley's only defense. He points out that there is a comma after the phrase "including deadly force" in the standard jury instruction, emphasized above, but not in the statutory section upon which the instruction is based. § 776.013. This additional comma is erroneous because, under the rules of grammatical construction, it makes the phrase "including deadly force" a nonessential part of the sentence and, thus, changes the meaning by indicating that a defendant has no duty to retreat and has the right to stand his ground and meet force with force only if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony. The State further misled the jury by relying on the erroneous instruction in closing argument. Here, the justifiable use of nondeadly force was Talley's only defense, and any confusion caused by the instruction may have deprived Talley of a fair trial because his defense was plausible. The decision was reversed and remanded for a new trial. See also *Neal v. State*, 169 So. 3d 158 (Fla. 4th DCA 2015), and *Sims v. State*, 140 So. 3d 1000 (Fla.1st DCA 2014).

- *Tindle v. State*, 832 So. 2d 966 (Fla. 5th DCA 2002). It was reversible error for the trial court to deny the defendant's motion to dismiss the amended information, and it was fundamental error to instruct the jury in a way permitting the jury to find that one alleged victim was threatened while the other had a well-founded fear that violence was imminent as the crime of aggravated assault requires that the victim must both have been threatened and have a well-founded fear that the violence is imminent.

- **For a defendant to receive a sentence for battery with a domestic violence designation, the jury must be instructed to make findings relating to the relationship of the defendant and victim and, for the minimum mandatory jail sentence, whether the defendant intentionally caused bodily harm.**
  - See Fla. Stat. § 741.283(1)(a); *Bethea v. State*, 319 So. 3d 666 (Fla. 4th DCA 2021); and *Navarez v. Florida*, 335 So. 3d 721 (Fla. 4th DCA 2022)(holding that the jury instructions on a charge of battery failed to mention domestic violence in any way and the defendant was entitled to resentencing).

- **A juror is not impartial when one side must overcome a set opinion in order to prevail. If a juror is not impartial, he or she should be excused. Where there is uncertainty, resolve the case in favor of excusing the juror. Failure to excuse is an error and may require reversal.**
  - *Rodriguez v. State*, 816 So. 2d 805 (Fla. 3d DCA 2002). Appellant Carlos Rodriguez appealed his conviction by the circuit court for felony battery in a domestic violence case following a jury trial challenging that the trial court erred in denying his challenge for cause to a potential juror. It was found that, during voir dire, the trial court did not allow defendant Rodriguez to strike a potential juror who had revealed that she had been exposed to domestic violence in her past. The Third District Court of Appeal held that a juror is not impartial when one side must overcome a set opinion in order to prevail. If a prospective juror's statements raise reasonable doubts as to that juror's ability to make an impartial verdict, the juror should be excused. Note that when it is not completely clear whether or not the juror should be dismissed, then those cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality. This error made by the trial court was irreversible, and, as a result, the conviction was reversed and remanded.
  - *Henry v. State*, 756 So. 2d 170 (Fla. 4th DCA 2000). The Fourth District Court of Appeal held that, where the defendant was convicted for violating an injunction for protection against domestic violence, a new trial was required based on the fact that the trial court erroneously failed to excuse a juror for cause. The juror, who, in his capacity as a paramedic and firefighter, regularly worked with the police department and had responded to a number of domestic violence cases, gave answers which demonstrated reasonable doubt as to his ability to lay aside a bias in favor of law enforcement.

## B. WARRANTLESS ARREST POWERS

- **Arrest Powers under § 901.15, Florida Statutes: A Law Enforcement Officer May Arrest a Person Without a Warrant When:**
  - § 901.15(6) - There is probable cause to believe that the person has committed a criminal act according to § 790.233 or according to § 741.31, § 784.047, or § 825.1036 which violates an injunction for protection entered pursuant to § 741.30, § 784.046, or § 825.1035 or a foreign protection order accorded full faith and credit pursuant to § 741.315, over the objection of the petitioner, if necessary.
  - § 901.15(7) - There is probable cause to believe that the person has committed an act of domestic violence, as defined in § 741.28, or dating violence, as provided in § 784.046. The decision to arrest shall not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to strongly discourage arrest and charges of both parties for domestic violence or dating violence on each other and to encourage training of law enforcement and prosecutors in these areas. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection, under § 741.31(4) or § 784.047, or pursuant to a foreign order of protection accorded full faith and credit pursuant to § 741.315, is immune from civil liability that otherwise might result by reason of his or her action.
  - § 901.15(8) – There is probable cause to believe that the person has committed child abuse, as defined in § 827.03, or has violated § 787.025, relating to luring or enticing a child for unlawful purposes. The decision to arrest does not require consent of the victim or consideration of the relationship of the parties. It is the public policy of this state to protect abused children by strongly encouraging the arrest and prosecution of persons who commit child abuse. A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection is immune from civil liability that otherwise might result by reason of his or her action.
  - § 901.15(13) – There is probable cause to believe that the person has committed an act that violates a condition of pretrial release provided in § 903.047 when the original arrest was for an act of domestic violence as defined in § 741.28, or when the original arrest was for an act of dating violence as defined in § 784.046.
  - But see *Espiet v. State*, 797 So. 2d 598 (Fla. 5th DCA 2001). The courts generally agree that a law enforcement officer may not make a warrantless entry into a person's home to arrest the person for a misdemeanor offense. The provisions of § 901.15(7), which allow a law enforcement officer to arrest a person for an act of domestic violence without a warrant, do not permit the forcible entry into the person's home to effectuate the arrest based on a misdemeanor offense. The decision of the trial court was reversed and remanded.

- See also *Davis v. State*, 834 So. 2d 322 (Fla. 5th DCA 2003). The court held that warrantless entry is premised on the notion that law enforcement may enter and investigate an emergency, without the accompanying intent to seize or arrest. "The sine qua non of the exigent circumstance exception is 'a compelling need for official action and no time to secure a warrant.'" (citing *Michigan v. Tyler*, 98 S.Ct. 1942 (1978).) While there is no list of exigencies that are appropriate for warrantless entry, precedent suggests that emergencies relating to the safety of persons or property may support a warrantless entry into the home.
- See also *Seibert v. State*, 923 So. 2d 460 (Fla. 2006), which affirmed the exigent circumstances exception as a basis for a warrantless entry.

- **Arrest Powers Under § 741.29(3):** Whenever a law enforcement officer determines upon probable cause that an act of domestic violence has been committed within their jurisdiction, the officer may arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime. The decision to arrest and charge shall not require the consent of the victim or consideration of the relationship of the parties.

- **Warrantless Misdemeanor Arrest in Private Residence**
  - **Invalid**
    - *State v. Eastman*, 553 So. 2d 349 (Fla. 4th DCA 1989). The arrest was held as invalid where the trooper chased the defendant three miles with lights flashing and siren on, followed the defendant into his home, and arrested him for fleeing. The subsequent DUI arrest based upon facts obtained after entering the home was also invalid.
    - *Drumm v. State*, 530 So. 2d 394 (Fla. 4th DCA 1988). No exigent circumstances existed to justify warrantless entry into the home of a hit-and-run suspect where, at the time of entry, the police only had knowledge that the car parked in front of the home had been involved in the incident.
    - *Guerrie v. State*, 691 So. 2d 1132 (Fla. 4th DCA 1997). A LEO may not enter a private residence to perform a warrantless misdemeanor arrest even when the crime was committed in the LEO's presence.
    - *Espiet v. State*, 797 So. 2d 598 (Fla. 5th DCA 2001). The Defendant attempted to strangle his wife in their home, and she fled to the neighbor's house across the street. Defendant barricaded himself in his home but agreed to speak with police through his front window. While the window was open, the deputy jumped in halfway to effectuate an arrest for domestic violence. The court held that the deputy made an improper warrantless entry into the defendant's home.
    - *Conner v. State*, 641 So. 2d 143 (Fla. 4th DCA), rev. denied. 649 So. 2d 234 (Fla. 1994). Police observed the defendant strike his mother while standing in his garage with the door open. When officers attempted to arrest the

defendant, he resisted and ran into his home. The court held that the officer's entry into the home based on these facts was improper.

- *Johnson v. State*, 253 So. 2d 732 (Fla. 2d DCA 1971). "Officer had no probable cause to justify search and seizure of gun and the consequent arrest since defendant was in his own home at night, had committed no affirmative act involving violation of law had not threatened anyone and was at time of search and arrest cooperating with officer."

- **Valid**
  - *Gasset v. State*, 490 So. 2d 97 (Fla. 3d DCA), rev. denied, 500 So. 2d 544 (Fla. 1986). Warrantless arrest of defendant in his garage was valid following a hot pursuit where officers had engaged in a high-speed chase with defendant after observing him driving erratically and officers arrived at defendant's home immediately after him. The court found that the defendant waived his expectation of privacy through his conduct.
  - *Hawxhurst v. State*, 159 So. 3d 1012 (Fla. 3d DCA 2015). Although primarily a criminal case revolving around a charge of possession of cocaine, the court noted that § 901.15(6) authorizes law enforcement to perform an arrest without a warrant when there is probable cause to believe that the person has committed a criminal act which violates an injunction for protection against domestic violence.

- **Dual Arrest Policy** – § 741.29(4)(b) created a dual arrest policy for police. If a law enforcement officer has probable cause to believe that two or more persons have committed a misdemeanor or felony, or if two or more persons make complaints to the officer, the officer shall try to determine who the primary aggressor was. An arrest is the preferred response only with respect to the primary aggressor and not the preferred response to a person who acts in a reasonable manner to protect or defend oneself or another family or household member from domestic violence.

## C. IMMUNITY OF LAW ENFORCEMENT UNDER FLORIDA STATUTES

- **§ 901.15(7)** –A law enforcement officer who acts in good faith and exercises due care in making an arrest under this subsection, under § 741.31(4) or § 784.047, or pursuant to a foreign order of protection accorded full faith and credit pursuant to § 741.315, is immune from civil liability that otherwise might result by reason of his or her action.

- **§ 741.29(5)** – No law enforcement officer shall be held liable, in any civil action, for an arrest based on probable cause, enforcement in good faith of a court order, or service of process in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

- **§ 741.315(4)(f)** – A law enforcement officer acting in good faith under this section and the officer's employing agency shall be immune from all liability, civil or criminal, that might otherwise be incurred or imposed by reason of the officer's or agency's actions in carrying out the provisions of this section.
- But see *Brown v. Woodham*, 840 So. 2d 1105 (Fla. 1st DCA 2003). The court concluded that the sheriff had a special duty of care as it was reasonably foreseeable that the individual, who was visiting the defendant's wife at the time of the murder, would be in danger if the defendant was released from custody without sufficient warning. The sheriff released the individual from custody despite a court order of no bond and failed to notify his wife of his release despite having intercepted multiple letters written by the defendant expressing his intentions to harm his wife.

## D. VICTIM'S RIGHTS

- **Article I, Section 16(b), Florida Constitution. Every victim is entitled to the following rights, beginning at the time of his or her victimization:**

    - The right to due process and to be treated with fairness and respect for the victim's dignity.
    - The right to be free from intimidation, harassment, and abuse.

    - The right, within the judicial process, to be reasonably protected from the accused and any person acting on behalf of the accused. However, nothing contained herein is intended to create a special relationship between the crime victim and any law enforcement agency or office absent a special relationship or duty as defined by Florida law.

    - The right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim's family.

    - The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.

- A victim shall have the following specific rights upon request:

    - The right to reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct, including, but not limited to, trial, plea, sentencing, or adjudication, even if the victim will be a witness at the proceeding, notwithstanding any rule to the contrary. A victim shall also be provided reasonable, accurate, and timely notice of any release or escape of the defendant or delinquent and any proceeding during which a right of the victim is implicated.

- The right to be heard in any public proceeding involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole and any proceeding during which a right of the victim is implicated.

- The right to confer with the prosecuting attorney concerning any plea agreements, participation in pretrial diversion programs, release, restitution, sentencing, or any other disposition of the case.

- The right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any presentence investigation or compiling any presentence investigation report, and to have any such information considered in any sentencing recommendations submitted to the court.

- The right to receive a copy of any presentence report and any other report or record relevant to the exercise of a victim's right, except for such portions made confidential or exempt by law.

- The right to be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender, any scheduled release date of the offender, and the release of or the escape of the offender from custody.

- The right to be informed of all postconviction processes and procedures, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. The parole or early release authority shall extend the right to be heard to any person harmed by the offender.

- The right to be informed of clemency and expungement procedures, to provide information to the governor, the court, any clemency board, and other authority in these procedures and to have that information considered before a clemency or expungement decision is made; the right to be notified of such decision in advance of any release of the offender.

- It is the duty of any law enforcement officer who is investigating a domestic violence case to advise the victim that there is a domestic violence center where the victim may receive services. Additionally, the officer will give the victim immediate notice of the legal rights and remedies available to him/her on a standard form that the Florida Department of Law Enforcement has developed. § 741.29.

- See Generally, § 960.001, Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems.

- Victim's Right to be Present in Court During Trial

- Here, the trial court heard the arguments of counsel before deciding whether the sequestration rule would be applied to the victim's next of kin. Key to the decision was the fact that the witnesses' testimony had been memorialized in prior depositions. Under these circumstances, the trial court did not err in denying the defense counsel's request to apply the rule of sequestration to the victim's next of kin. *Beasley v. State*, 774 So. 2d 649 (Fla. 2000).
- The mother of a child victim had a statutory and constitutional right to remain in the courtroom in the penalty phase of a capital murder prosecution in the absence of a showing of prejudice. *Rose v. State*, 787 So. 2d 786 (Fla. 2001).
- Excluding a murder victim's great-niece from the courtroom during the defendant's case before she testified as a defense witness violated her constitutional right to be present as the next of kin of a homicide victim; since the constitutional right to be present did not conflict with the right to a fair trial, the constitutional right prevailed over the rule of sequestration in the penalty phase of a capital murder prosecution. *Booker v. State*, 773 So. 2d 1079 (Fla. 2000).
- Where a victim's right to be present at a defendant's trial might conflict with the defendant's right to received fair trial, doubts should be resolved in favor of the defendant receiving a fair trial. *Martinez v. State*, 664 So. 2d 1034 (Fla. 4th DCA 1995), *Cain v. State*, 758 So. 2d 1257 (Fla. 4th DCA 2000).
- The victim is entitled to be present at all proceedings, including the trial, as long as it does not prejudice the defendant. *Gore v. State*, 599 So. 2d 978 (Fla. 1992). See also *Beasley v. State*, 774 So. 2d 649 (Fla. 2000).

- **Victim's Right to be Properly Notified of Court Hearing Defendant's Pleas**
  - *Ford v. State*, 829 So. 2d 946, 948 (Fla. 4th DCA 2002). Victims received insufficient notice of a change of plea and restitution hearing and sought to vacate pleas and for a rehearing on the issue of restitution. The State acknowledged that the victims' rights to notice were violated but noted that double jeopardy protections precluded the vacating of pleas. The appellate court agreed and granted relief only as to the restitution order, noting "although we are sensitive to this victim's rights, those rights must 'not interfere with the constitutional rights of the accused'".

- **Prosecutor Disciplinary Action for Violating Victim's Rights**
  - *In re: Disciplinary proceedings Against Lindberg*, 494 N.W.2d 421 (Wis. 1993). Failure by the prosecutor to contact the victim in a timely manner regarding a preliminary proceeding was grounds for disciplinary action.
  - *The Florida Bar v. Buckle*, 771 So. 2d 1131 (Fla. 2000). Lawyer misconduct: "An attorney was publicly reprimanded for sending a letter to the alleged victim of a battery that insinuated that the attorney would take her away from her job and her children and expose her to ridicule, contempt, and hatred." The letter was sent after the attorney had spoken with the alleged victim by phone and

told not to contact her. The Supreme Court of Florida found that the letter was a clear attempt to have the alleged victim drop the charges against the attorney's client, and the contents of the letter violated Rule of Professional Conduct 4-4.4 and 4-8.4(d).

- **Withholding the Victim's Address and Current Place of Employment from the Defendant Was Within the Trial Court's Discretion. *Deluge v. State*, 710 So. 2d 83 (Fla. 5th DCA 1998).**

- **The Court Did Not Err By Imposing A Sentence Greater Than That Recommended By the Victim. *Pandolph v. State*, 710 So. 2d 577 (Fla. 4th DCA 1998).**

- ***Yesnes v. State*, 440 So. 2d 628 (Fla. 1st DCA 1983) (concurring opinion).** "We should be grateful that this great country of ours has perfected the greatest justice system known to mankind. We should continually strive to better it. But, while doing this, should we ignore the rights of the lawful, should we ignore the rights of victims, should we ignore the rights of taxpayers? No! Should we consider only the rights of criminals who have shown no respect for their victims, for the law of the land, for the constitution of our country and state? No."

## E. BURGLARY

- **A Domestic Violence Injunction Does not Convert a Business Open to the Public into a Place not Open to the Public, for the Purposes of the Burglary Statute.**

  - *State v. Byars*, 804 So. 2d 336 (Fla. 4th DCA 2001). The defendant was charged with first degree murder and armed burglary of an occupied structure with assault and battery. The defendant had an injunction against him, preventing him from entering the structure where the victim was killed. The defendant successfully moved that the second count of armed burglary be dismissed based on *Miller v. State*, 733 So. 2d 955 (Fla. 1998), in which the court held that a complete defense to burglary is established when the defendant can prove that the premises were open to the public. *The state challenged the dismissal because of the domestic violence injunction, which encompassed the victim's workplace*. The Fourth District Court of Appeal ruled that the intent of *Miller* must be upheld because of the statutory wording of § 810.02(1). Because the defendant entered a store which was open to the public, a charge of burglary cannot stand. Affirmed by *State v. Byars*, 823 So. 2d 740 (Fla. 2002).

- **But Where the Injunction Enjoins the Person from Entering His or Her Home, it May Allow that Person to be Subject to a Burglary Charge**.

  - See *State v. Suarez-Mesa*, 662 So. 2d 735 (Fla. 2d DCA 1995). The husband, who had shared the house with his wife but was restrained by court order (an injunction) from entering the property, was subject to a burglary charge when he entered the premises with the intent to commit a crime.

## F. PARENTAL DISCIPLINE/BATTERY ON A CHILD

- **Child Abuse Defined § 827.03(1)b** – the intentional infliction of physical or mental injury upon a child; an intentional act that could reasonably be expected to result in physical or mental injury to a child; or active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.

- **Over a century ago the Florida Supreme Court Reaffirmed the Right of a Parent to Moderately Chastise or Correct a Child under their Authority. *Marshall v. Reams*, 32 Fla. 499, 14 So. 95 (1893). However, that Power is not Absolute.**
  - *Raford v. State*, 828 So. 2d 1012, (Fla. 2002). The court held that a parent or one standing in loco parentis has no absolute immunity and may be convicted of the lesser offense of felony child abuse under § 827.03(1).
  - *Brown v. State*, 802 So. 2d 434 (Fla. 4th DCA 2001). "Even if the evidence in the present case had established a 'typical spanking', the parental privilege to administer corporal punishment is an affirmative defense which is waived if not asserted."
  - *Nixon v. State*, 773 So. 2d 1213 (Fla. 1st DCA 2000). The defendant waived his right to assert privilege for battery on child by a parent by requesting instruction on lesser-included offense of simple child abuse.
  - *State v. McDonald*, 785 So. 2d 640 (Fla. 2d DCA 2001). "[A] father's 'privilege' to reasonably discipline a child does not bar prosecution for simple child abuse when the beating results in bruising severe enough to require the child's treatment at a hospital." Common law recognizes a parent's right to discipline a child, "in a reasonable manner", and prevents prosecution for simple battery; however, no such privilege exists as to the separate statutory crime of child abuse." "Our current child abuse statutes attempt to define the boundary between permissible parental discipline and prohibited child abuse."
  - *G.C. v. R.S.*, 71 So. 3d 164 (Fla. 1st DCA 2011). The father appealed a final judgment of injunction for protection against domestic violence. The petition for injunction was filed by his former wife on behalf of their minor child after the father administered a single spank on the child's buttocks in response to the child's disrespectful and defiant behavior. The appellate court confirmed that a spouse has standing to seek an injunction against domestic violence against a former spouse on behalf of the parties' children. However, the court also noted that the common law recognized a parent's right to discipline his or her child in a reasonable manner, and that in both civil and criminal child abuse proceedings, a parent's right to administer reasonable and non-excessive corporal punishment to discipline their children is legislatively recognized. The court held that under established Florida law this single spank constituted reasonable and non-excessive parental corporal discipline and, as a matter of law, was not domestic violence. The court also stated that reasonable parental

discipline is available as a defense against a petition for an injunction against domestic violence.

## G. CHARGING AND PROSECUTING

- **Obligations of the Attorney**
  - Each state attorney shall develop special units or assign prosecutors to specialize in the prosecution of domestic violence cases, but such specialization need not be an exclusive area of duty assignment. These prosecutors, specializing in domestic violence cases, and their support staff shall receive training in domestic violence issues. § 741.2901(1).
  - State attorneys are required to adopt a "pro-prosecution policy" for acts of domestic violence. The consent of the victim is not required to prosecute; the state attorney possesses prosecutorial discretion. § 741.2901(2). A respondent can be prosecuted for specific acts such as assault, battery, or stalking which constituted violation of the injunction. See *State v. Suarez-Mesa*, 662 So. 2d 735 (Fla. 2d DCA 1995); *Jordan v. State*, 802 So. 2d 1180 (Fla. 3d DCA 2002).

- **State Attorney Has Discretionary Executive Function**
  - The State Attorney has Complete Discretion in the Decision Whether to Charge and Prosecute.
    - *Valdes v. State*, 728 So. 2d 736 (Fla. 1999).
    - *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982).
  - The Decision to Prosecute Does Not Lie with the Victim of a Crime.
    - *State v. Wheeler*, 745 So. 2d 1094 (Fla. 4th DCA 1999).
    - *McArthur v. State*, 597 So. 2d 406 (Fla. 1st DCA 1992). "The thrust of [the] appellant's argument is that he should not have been charged in a domestic dispute where the victim advised the state attorney's office that she did not wish to prosecute. Since the decision to charge was the prerogative of the prosecutor, the argument is unavailing."
  - The Judiciary Cannot Interfere with this Discretionary Executive Function.
    - *Valdes v. State*, *supra*.
    - *State v. Bloom*, 497 So. 2d 2 (Fla. 1986).
  - State, Not Trial Court, Makes Decisions Whether to Prosecute.
    - *State v. Bryant*, 549 So. 2d 1155 (Fla. 3d DCA 1989).
    - *State v. Jogan*, 388 So. 2d 322 (Fla. 3d DCA 1980). The state attorney has sole discretion to either prosecute or nolle prosse a defendant.
    - *In the Interest of S.R.P.*, 397 So. 2d 1052 (Fla. 4th DCA 1981). The decision to file nolle prosse is vested solely in discretion of the State.

- *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982). "[The] State attorney has complete discretion in making the decision to charge and prosecute."
- *State v. Wheeler*, 745 So. 2d 1094 (Fla. 4th DCA 1999). "Notwithstanding the court's belief that the best interest of the public and the parties would be served by dismissal, it is the state attorney 'who makes the final determination as to whether prosecution will continue.'"

- The Court Improperly Dismissed Information Where the State Attorney Was Determined to Prosecute:
  - *State v. Greaux*, 977 So. 2d 614 (Fla. 4th DCA 2008). A victim in a criminal domestic violence case stated that she wanted to drop the charges against the defendant, and the court dismissed the case sua sponte. The appellate court held that only the prosecutor has the authority to decide whether to go forward with the prosecution and that the trial court erred in dismissing the case.
  - *State v. Rubel*, 647 So. 2d 995 (Fla. 2d DCA 1994). The State shall make the final determination as to whether the prosecution shall continue.
  - *State v. Conley*, 799 So. 2d 400 (Fla. 4th DCA 2001). The State appealed an order dismissing a felony battery. An adversarial hearing occurred, but the state had neglected to subpoena the witnesses to the events. The victim was present and claimed that she instigated the argument and that the injuries she sustained were a result of her own actions, directly contradicting the eyewitness account. The victim claimed she never wanted charges brought against the defendant. The judge dismissed the charges despite the state's objection. In relying on both Florida Rule of Criminal Procedure 3.133(b), and on *State v. Hollie*, 736 So. 2d 96 ( Fla. 4th DCA 1999), the Fourth District Court of Appeal held that, because the hearing was an adversarial hearing where the defendant never motioned the court for dismissal and because probable cause was clearly established, a dismissal was clearly in error. Judge Warner concurred in a separate opinion, finding that the lower court made an additional error in finding that consent to a battery was a defense. Consent is only a defense in cases of sexual battery, NOT domestic violence. Judge Warner continued by noting that consent as a defense to domestic violence is in complete contravention to § 741.2901(2), in that the intent behind creating the statute is to make domestic violence a criminal act, as opposed to a "private matter."

- **Severance/Joiner of Offenses**
  - Joiner of Offenses: Florida Rule of Criminal Procedure 3.150(a) --
  - Two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense when the offenses — whether felonies, misdemeanors, or both — are based on the same act or transaction or on two or more connected acts or transactions.

- Trying the defendant for both a battery LEO and a DUI together was not error when the battery charge occurred while the defendant was in-route to a breath-testing facility. *Hamilton v. State*, 458 So. 2d 863 (Fla. 4th DCA 1984).

- **Prosecution and Conviction of Stalking**
  - *State v. Gagne*, 680 So. 2d 1041 (Fla. 4th DCA 1996). Double jeopardy does not bar a subsequent prosecution for aggravated stalking where the defendant had previously been convicted for violating an injunction based on the same conduct.
  - *State v. Johnson*, 676 So. 2d 408 (Fla. 1996). The defendant was properly convicted of aggravated stalking where he had previously been convicted of contempt for violating an injunction based on the same conduct. Each of the offenses contained an element not contained in the other offense.

- **The Victim's Lack of Consent to a Battery Can Be Proven with Circumstantial Evidence.**
  - *State v. Clyatt*, 976 So. 2d 1182 (Fla. 5th DCA 2008). The defendant was charged with felony battery pursuant to § 784.03(2) for repeatedly striking the victim. The victim refused to testify, but the state attorney's office pursued the case. To prove the case pursuant to § 784.03 (1)(a)(1), the State was required to prove that the defendant touched or struck the victim against her will. Because the State could not produce a Florida case stating that a purported battery victim's lack of consent could be proved circumstantially without the victim's testimony, the trial court did not allow the State's witnesses to testify regarding their observations. Although no Florida court has directly held that lack of consent can be established by circumstantial evidence in a simple battery case, Florida courts have recognized circumstantial evidence as sufficient to support a lack of consent finding in other types of criminal prosecutions. Additionally, Florida courts have routinely found circumstantial evidence sufficient to prove a victim's or defendant's state of mind on issues other than consent. Generally, the test for admissibility of evidence is its relevance. Because the State's evidence was clearly relevant to the issue of the victim's lack of consent and because there is no rule or law barring the State from using circumstantial evidence to prove lack of consent, the appellate court held that the trial court should have allowed the witnesses to testify.

## H. DOUBLE JEOPARDY

- **Double Jeopardy Clause Applies to All "Crimes."**
  - *Ex Parte Lange*, 85 U.S. 163 (1873). "(N)o man shall be twice punished by judicial judgments for the same offence." This applies to both criminal and civil cases.
  - Criminal contempt is a crime in every fundamental respect.

- *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974).
- *Attwood v. State*, 687 So. 2d 271 (Fla. 4th DCA 1997).
- Civil and criminal sentences served distinct purposes, one coercive, the other punitive and deterrent; the fact that the same act may give rise to both of these distinct sanctions presents no double jeopardy problem. *Yates v. U.S.,* 355 U.S. 66 (1957), *Featherstone v. Montana*, 684 So. 2d 233 (Fla. 3d DCA 1996).

o It may be generally said that the Double Jeopardy Clause has no application in non-criminal cases.

- An award of punitive damages in a civil lawsuit does not bar subsequent criminal prosecution for the offense. *Smith v. Bagwell*, 19 Fla. 117 (1882).
- *Helvering v. Mitchell*, 303 U.S. 391 (1938). "[C]ongress may impose both a criminal and civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."
- A defendant may be convicted of indirect criminal contempt even though there has previously been a civil contempt adjudication based on the same noncompliance with court orders.
- A prior arbitration rewarded under a collective bargaining agreement where a postal employee was suspended for thirty (30) days did not bar a subsequent prosecution for misappropriating postal funds involving the same conduct. *U.S. v. Reed*, 937 F.2d 575 (11th Cir. 1991).

- **The Guarantee Against Double Jeopardy Consists of Three Protections: *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994).**
  - Against a second prosecution for the same offense after acquittal,
  - Against a second prosecution for same offense after conviction, and
  - Against multiple punishments for the same offense.

- **A Defendant May Properly Be Convicted of Aggravated Stalking Where He/She Had Previously Been Convicted of Contempt for Violating an Injunction Based on the Same Conduct:**
  - *State v. Johnson*, 676 So. 2d 408 (Fla. 1996). The defendant was properly convicted of aggravated stalking where he had previously been convicted of contempt for violating an injunction based on the same conduct. Each of the offenses contained an element not contained in the other. See also *Williams v. State*, 673 So. 2d 486 (Fla. 1996).
  - *State v. Gagne*, 680 So. 2d 1041 (Fla. 4th DCA 1996). Double jeopardy does not bar a subsequent prosecution for aggravated stalking where the defendant had previously been convicted for violating an injunction based on the same conduct. See also *State v. Miranda*, 644 So. 2d 342 (Fla. 2d DCA 1994).

Approved; *State v. Johnson*, 676 So. 2d 408 (Fla. 1996) held that the rule against double jeopardy did not bar a prosecution for aggravated stalking even though defendant had previously been convicted of criminal contempt for violating an injunction based on the same conduct because each offense contained at least one element that the other did not.

- *Richardson v. Lewis*, 639 So. 2d 1098 (Fla. 2d DCA 1994). The defendant may properly be charged with indirect criminal contempt for violating an injunction prohibiting the defendant from committing battery on or entering the residence of his former girlfriend even though he had previously been convicted of armed trespass aggravated battery arising out of the same incident.

- **Where the Defendant Pointed a Gun at the Victim and Stabbed the Victim After the Gun Had Been Taken Away, Both Acts Occurring in Uninterrupted Sequence are Properly Viewed as Being but a Single Act; Thus, Attempted Second Degree Murder By the Gun and Aggravated Battery By the Knife are Barred By Double Jeopardy.**

  - *Gresham V. State*, 725 So. 2d 419 (Fla. 4th DCA 1999). But see *Davis v. State*, 892 So. 2d 1084 (Fla. 2d DCA 2004), in which the appellate court declined to follow the holding in *Gresham* and held that convictions of attempted second-degree murder and aggravated battery did not "violate the prohibition against double jeopardy because each of the offenses contains an element the other does not."

- **Where Multiple Criminal Offenses Occur over the Course of a Single Criminal Episode or Transaction, Courts Must Employ the Test set forth in § 775.021(4)(a), Florida Statutes, to Determine Whether Receiving Separate Punishments for each Offense Violates Double Jeopardy**.

  - The statute states: "Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. Exceptions to this rule of construction are:

    - Offenses which require identical elements of proof.

    - Offenses which are degrees of the same offense as provided by statute.

    - Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense."

      - *Tambriz-Ramirez v. State*, 248 So. 3d 1087 (Fla. 2018).

- **Double Jeopardy Attaches after the Entry of a Sentence.**

  - An increase in a sentence after the sentence has been imposed and the defendant has begun serving his sentence runs afoul of double jeopardy. *Story v. State*, 174 So. 3d 1109 (Fla. 2d DCA 2015).

- **Sentencing of the Defendant on Both Battery and Violation of Domestic Violence Injunction Counts Violated Double Jeopardy Clause. *Doty v. State*, 884 So. 2d 547 (Fla. 4th DCA 2004).**

  - See also *Young v. State*, 827 So. 2d 1075 (Fla. 5th DCA 2002). Double Jeopardy bars conviction for both battery AND violation of injunction (here, for repeat violence) where the violation consists of the battery itself: "Young was convicted of violating the injunction by committing a battery. Because the crime of battery did not contain any elements distinct from the elements of a violation of § 784.047 [prohibiting willfully violating an injunction for protection against repeat violence], the crimes are not separate under the Blockburger test."

- **Multiple Convictions from Single Episode Generally Prohibited.**

  - Double jeopardy prohibits multiple homicide convictions for a single death. *Barnes v. State*, 528 So. 2d 69 (Fla. 4th DCA 1988).

  - HOWEVER: Although a defendant cannot be *convicted* of multiple homicide offenses based on a single death, he can be *charged* with multiple crimes. *State v. Lewek*, 656 So. 2d 268 (Fla. 4th DCA 1995) (emphasis added).

    - See also *State v. Miller*, 700 So. 2d 1253 (Fla. 1st DCA 1997). Double jeopardy principles did not preclude multiple charges, even though charges arose from single DUI violation.

    - THUS: The State can charge a defendant with domestic battery and a violation of an injunction with the same information regardless of double jeopardy considerations, although double jeopardy bars conviction for both.

## I. PREPARATION FOR FIRST APPEARANCE SUBSEQUENT TO ARREST FOR VIOLATION OF AN INJUNCTION

- **The goals of the defendant's first appearance in court include, appointing an attorney for the defendant, ensuring there was probable cause for the defendant's arrest, setting conditions for the defendant's release, and enacting a stay away order to protect the victim. Both the public defender and state attorney are present at first appearances.**

- **It is the intent of the Legislature that, with respect to domestic violence cases, at the first appearance, the court shall consider the safety of the victim, the victim's children, and any other person who may be in danger if the defendant is released and exercise caution in releasing defendants. §741.2902.**

- **If the respondent is arrested by law enforcement for violation of an injunction under Chapter 741, law enforcement must hold the respondent in custody until first appearance when the court will decide bail in accordance with Chapter 903. §§ 741.30(9)(b) & 741.2901(3).**

    - The Third District Court of Appeal held that sovereign immunity did not bar suit against the City of Miami in a claim that arose from a murder that was committed by a person who was the subject of a domestic violence injunction, who was placed in a police cruiser by a law enforcement officer dispatched to the victim's home after the victim called the police department, and who was subsequently released after he promised the officer he would leave the victim alone. It was error to dismiss the complaint with prejudice. On remand, the plaintiff was given leave to amend her complaint to allege that the officer had effectuated an arrest since the officer would have had no discretion under sovereign immunity principles to release a violator who had been arrested. *Simpson v. City of Miami*, 700 So. 2d 87 (Fla. 3d DCA 1997).

- **Prior to first appearance, the State Attorney's Office shall perform a thorough background investigation on the defendant and present the information to the judge at first appearance, so he/she will have all pertinent information when determining bail. § 741.2901(3).**

## J. DOMESTIC VIOLENCE PRETRIAL RELEASE/DETENTION

- **For considerations for issuing a standing no contact order *see* § 741.2902.**

- **The defendant shall be informed in writing of the order of no contact.** The defendant must also understand what the order entails. The specific terms must be explained. Language barriers must be taken into account, and translators used when necessary. The defendant should acknowledge his/her understanding of the terms on the record. "No contact" may include:

    - Communicating in any form with the victim.
    - Having physical or violent contact with the victim.
    - Being within 500 feet of the victim's residence.
    - Being within 500 feet of the victim's vehicle, place of employment, etc.
    - Communicating through any social media platform.

        - No contact through available technology such as texting, sending photos, etc.

- **Non-Monetary pretrial release**

    - No bond until first appearance. § 741.2901(3).

    - Section 741.29(6): A person who willfully violates a condition of pretrial release when the original arrest was for an act of domestic violence commits a first-degree misdemeanor and shall be held in custody until his or her first appearance.

    - An officer may effectuate a warrantless arrest when there is probable cause to believe that the person has committed an act that violates a condition of pretrial release provided in § 903.047 when the original arrest was for an act of domestic violence as defined in § 741.28, or when the original arrest was for an act of dating violence as defined in § 784.046. § 901.15(13).

        - State attorney offices should have a victim advocate contact the victim before the first appearance hearing.

        - Counties should have the availability for victims to obtain an injunction for protection at the first appearance hearing.

- Section 741.30(6)(a)(5) authorizes courts issuing an injunction to order the respondent to participate in treatment, intervention, or counseling services.

- Judicial Discretion Regarding Arrest Warrant Issued by Another Judge: A first appearance judge has the authority and duty to consider the appropriate conditions of release for a defendant arrested on a warrant issued by another judge. *State v. Norris*, 768 So. 2d 1070 (Fla. 2000).

- **Pretrial Detention**

    - Section 907.041(4)(a)(18) classifies domestic violence as a "dangerous crime."

    - Section 907.041(4)(c)(1-2,6) authorizes a court to order pretrial detention if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria in § 903.046 and any other relevant facts, that any of the following circumstances exist:

        - The defendant has previously violated conditions of release and that no further conditions of release are reasonably likely to assure his/her appearance at subsequent proceedings;

- The defendant, with the intent to obstruct the judicial process, has threatened, intimidated, or injured any victim, potential witness, juror, or judicial officer, or has attempted or conspired to do so, and that no condition of release will reasonably prevent the obstruction of the judicial process;

- The defendant was on probation, parole, or other release pending completion of sentence or on pretrial release for a *dangerous crime* at the time of the current arrest.

    - Where the defendant is held without bond on an offense which is not designated a "dangerous crime", the State must prove that there are no reasonable conditions of release that would secure the defendant's appearance at trial.

    - *Martinez v. State*, 715 So. 2d 1024 (Fla. 4th DCA 1998).

    - *Dupree v. Cochran*, 698 So. 2d 945 (Fla. 4th DCA 1997).

- Arguments for Detention or High Bond -

    - <u>Prior criminal record:</u>

        - NCIC/FCIC

        - Local records check

        - Input from victim or police.

    - <u>Ties to the jurisdiction:</u>

        - Family

        - Property

        - Employment

        - Passport

        - Pilot license

    - <u>Victim safety:</u>

        - Statements by the defendant, referencing future harm to the victim or witnesses.

        - Seriousness of the instant offense.

- Prior violent offenses or harm to the victim.

- Recommended conditions for pretrial release:

  - No contact (or violent contact) with the victim;
    - Consider having the victim obtain caller ID and call block,
    - Have the victim consider changing their phone number to unlisted and change the locks on the house,
    - Issue and explain safety plan to the victim,
    - No possession of dangerous weapons;
    - No possession or consumption of alcohol;
    - Random alcohol/drug testing;
    - Geographical restrictions;
    - Counseling – violence and/or substance abuse;
    - Electronic monitoring;
    - Home detention (house arrest).
    - Note: These same pretrial conditions would be valid special conditions of probation.

- Witness tampering would violate the conditions of pretrial release and disrupt the integrity of the court. *Arcia v. Manning*, 680 So. 2d 1146 (Fla. 3d DCA 1996).

- The court, on its own motion, can revoke a bond if it finds there is probable cause to believe the defendant has committed a new crime while on pretrial release. § 903.0471.

- The trial court lacks the inherent authority to deny a subsequent application for bond based solely on a defendant's violation of a bond condition. The court's discretion is limited by the pretrial detention statute §907.041. *State v. Paul*, 783 So. 2d 1042 (Fla. 2001).

- If there is an alleged violation of felony probation or community control, bail or any other form of pretrial release *shall not* be granted prior to the resolution of the probation-violation hearing or the community-control-violation hearing unless the alleged violations are only financial. § 903.0351.

- Pretrial release may be modified if good cause is shown and the interests of justice so require. Florida Rules of Criminal Procedure, Rule 3.131(a).

## K. BAIL

- **Purpose of Bail**
  - To ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant. § 903.046(1).
  - To assure the integrity of the judicial process. § 907.041(3)(a).

- **Initial Determination and Bail Modification**

  - The court shall consider the following when determining bail:

    - The safety of the victim,

    - The victim's children, and

    - Any other person who may be in danger if the defendant is released. § 741.2902(1).

  - Once bail is set, the state may move to modify it "by showing good cause," with notice to the defendant. Florida Rule of Criminal Procedure 3.131(d)(2).

  - The court in which the cause is pending may direct the arrest and commitment of the defendant who is at large on bail when there has been a breach of the undertaking, or if the court is satisfied that the bail should be increased or new or additional security required. Florida Rule of Criminal Procedure 3.131(g)(1,3).

  - In contrast, there is no requirement of showing good cause when a defendant moves to reduce bond. Florida Rule of Criminal Procedure 3.131(d)(2).

    - The defendant has the burden of proof when seeking a bail reduction to adduce evidence sufficient to overcome the presumption of correctness of the trial court's order. *Mesidor v. Neumann*, 721 So. 2d 810 (Fla. 4th DCA 1999).

  - A bond can be denied or revoked to assure the integrity of the judicial process.

    - § 903.0471.

    - *Ex Parte McDaniel*, 86 Fla. 145, 97 So. 317, 318 (Fla. 1923).

    - A trial court may not increase a bond on its own motion.

- *Cousino v. Jenne*, 717 So. 2d 599 (Fla. 4th DCA 1998).

- It is error to increase a bond without giving the defendant the required notice, and increasing a bond is improper unless the state demonstrates it is justified by information not previously available to the judge who set the initial bond. *Mongomery v. Jenne*, 744 So. 2d 1148 (Fla. 4th DCA 1999).

- *Welch v. Jenne*, 770 So. 2d 731 (Fla. 4th DCA 2000).

- **Denial of Bail**

  - To deny an accused the right to bail in a capital case under our constitution, the state must present proof that guilt is evident or the presumption of guilt is great.

    - *State ex rel. Van Eeghen v. Williams*, 87 So. 2d 45 (Fla. 1956). Specifically, the court held that the state is held to an even greater degree of proof than that required to establish guilt beyond a reasonable doubt.

    - *State v. Arthur*, 390 So. 2d 717 (Fla. 1980).

    - *Mininni v. Gillum*, 477 So. 2d 1013 (Fla. 2d DCA 1985).

  - Proof Required:

    - The State must rely on something more than the indictment and the probable cause affidavit to have bailed denied. *State v. Arthur*, 390 So. 2d 717 (Fla. 1980). *See Young v. Neumann*, 770 So. 2d 205 (Fla. 4th DCA 2000).

  - Admissible Hearsay:

    - *State v. Arthur*, 390 So. 2d 717 (Fla. 1980).

    - "The state can probably carry this burden by presenting the evidence relied upon by the grant jury or the state attorney in charging the crime."

    - "This evidence may be presented in the form of transcripts or affidavits."

    - *Mininni v. Gillum*, 477 So. 2d 1013 (Fla. 2d DCA 1985).

    - *Kinson v. Carson*, 409 So. 2d 1212 (Fla. 1st DCA 1982).

  - Proof Beyond a Reasonable Doubt:

    - The burden of proof is on the State even when the defense moves for bail.

    - *Gomez v. McCampbell*, 701 So. 2d 412 (Fla. 4th DCA 1997).

  - Circumstances valid for the denial of bail:

- *Martin v. State*, 700 So. 2d 809 (Fla. 4th DCA 1997).
- Lack of ties to the community;
- Lack of regard for the orders of the courts;
- Expressed intent of leaving jurisdiction.

- Appellate remedy:
  - Through writ of mandamus.
  - *Martin v. Circuit Court of the Fifteenth Judicial Circuit*, 690 So. 2d 674 (Fla. 4th DCA 1997). Mandamus will lie to compel the timely performance of a purely ministerial duty, such as entering a ruling on a bond motion.
  - *Kramp v. Fagan*, 568 So. 2d 479 (Fla. 1st DCA 1990).
  - The review of an order relating to post-trial release shall be by the court on motion. Florida Rule of Appellate Procedure 9.140(h)(4).
  - Writ of Hebeas Corpus.
  - *Flemming v. Cochran*, 694 So. 2d 131 (Fla. 4th DCA 1997).

## L. PRETRIAL INTERVENTION

- **Batter Intervention Programs:** If a person is found guilty of, has had adjudication withheld on, or has pled nolo contendere to a crime of domestic violence, as defined in § 741.28, the COURT MUST ORDER -
  - A minimum term of 1 year's probation, and
  - Attendance at a batterer intervention program as a condition of probation; UNLESS the court determines not to impose attendance and states on the record why a batterer intervention program might be inappropriate. § 741.281.

- **Plea and Pass Diversion Program:** The following are guidelines for a State Attorney "plea & pass" program: (Available in some circuits. Please check your local website.)
  - "Plea & pass" is a form of diversion to be utilized for cases where the State is unable to proceed with the prosecution. (Alternatively, in cases where there is a cooperating victim or the case is otherwise provable, probation with counseling or incarceration will be the standard disposition)
  - "Plea & pass" should be considered in the following type cases:

- Where the victim will not cooperate and the case cannot otherwise be proven. (Proceed with caution)
- For first offenders, where victim agrees and is concerned with the effect of a criminal record on the family.
- For mutual combatants where the primary aggressor cannot be determined.

  - The victim must agree with a "plea & pass" disposition.
  - A standardized office "plea & pass" form may be utilized.
  - All defendants will be required to participate in and complete a Batterer Intervention Program (BIP) as a standard condition; otherwise, there will be a written explanation by the court.
  - An administrative order should set out program specifics. For example, when a status check should be scheduled (45 days after the plea and 90 days after the plea).

- **It was an Error to Dismiss the Case after the Defendant Successfully Completed a Pretrial Intervention (PTI) Program Where the State Objected to the Original Placement of the Defendant in PTI.** *State v. Turner*, 636 So. 2d 815 (Fla. 3d DCA 1994). Section 948.08(2) specifically requires the consent of the State to recommend placement in PTI program.

- **A PTI Diversion Decision of the State Attorney is Prosecutorial in Nature and, Thus, Not Subject to Judicial Review.**
  - *Cleveland v. State*, 417 So. 2d 653 (Fla. 1982).
  - *State v. Turner*, 636 So. 2d 815 (Fla. 3d DCA 1994).
  - *Virgo v. State*, 675 So. 2d 994 (Fla. 3d DCA 1996).
  - *State v. Winton*, 522 So. 2d 463 (Fla. 3d DCA 1988). A trial court cannot second-guess the State's decision to withhold consent to a defendant's entry into a PTI program.

- **The State, Not Trial Court, Makes the Decision Whether to Prosecute.**
  - *State v. Bryant*, 549 So. 2d 1155 (Fla. 3d DCA 1989).
  - *State v. Jogan*, 388 So. 2d 322 (Fla. 3d DCA 1980). The state attorney has sole discretion to either prosecute or nolle prosse a defendant.
  - *In the interest of S.R.P.*, 397 So. 2d 1052 (Fla. 4th DCA 1981). The decision to file nolle prosse is vested solely in discretion of the State.

- The court improperly dismissed information where the State attorney determined to prosecute.
  - *State v. Brown*, 416 So. 2d 1258 (Fla. 4th DCA 1982).
  - *State v. Rubel*, 647 So. 2d 995 (Fla. 2d DCA 1994). The state attorney shall make the final determination as to whether the prosecution shall continue.
  - Section 948.08(5).
- HOWEVER: A trial court has discretion to dismiss charges against a substance abuse-impaired offender, over objection by the State, where the offender has successfully completed a court referred drug treatment program.
  - *State v. Dugan*, 685 So. 2d 1210 (Fla. 1996).
    - A trial court is empowered "to dismiss the charges against a substance-abuse impaired offender who successfully completes a drug treatment program when the offender is referred to the program by the court."
    - A trial court is authorized to close a case by dismissing the charges against the offender once the offender successfully completes the drug treatment program.
    - See also *State v. Upshaw*, 648 So. 2d 851 (Fla. 3d DCA 1995). The court properly dismissed the case over the State's objection where the defendant successfully completed a PTI type program offered with the consent of the State under the theory of specific performance of a settlement agreement.
    - *See also supra* section IV.G. Charging and Prosecuting

## M. PROBATION

- **A Batterer Intervention Shall be Ordered in Conjunction with Probation.**
  - "If a person is found guilty of, has had adjudication withheld on, or has pled nolo contendere to a crime of domestic violence, as defined in § 741.28, that person shall be ordered by the court to a minimum term of 1 year probation, and the court shall order that the defendant attend a batterer intervention program as a condition of probation. The court must impose the condition of the batterer intervention program for a defendant under this section, but the court, in its discretion, may determine not to impose the condition if it states on the record why a batterer intervention program might be inappropriate. The court must impose the condition of the batterer intervention program for a defendant placed on probation unless the court determines that the person

does not qualify for the batterer intervention program pursuant to § 741.325." § 741.281.

- **Trial Court Generally Without Jurisdiction to Revoke Probation**
  - *Young v. State*, 739 So. 2d 1179 (Fla. 4th DCA 1999). The Fourth District Court of Appeal held that the trial court was without jurisdiction to revoke probation where the warrant charging the defendant with probation violation was delivered to the sheriff's office after the expiration of the probationary period. It was error to find that the defendant had absconded from supervision by failing to file monthly reports with her probation officer where the defendant was not hiding, nor had departed the jurisdiction of the state and that the probationary period was thereby tolled.
  - *Paulk v. State*, 733 So. 2d 1096 (Fla. 3d DCA 1999). The Third District Court of Appeal held that in order to invoke jurisdiction of the court, not only must a timely affidavit of violation of probation be filed (within the period of probation), but the judge must sign and issue an arrest warrant, and that warrant must be delivered to the proper officer for execution within that same time period. The Third District Court of Appeal rejected the trial court's conclusion that a probationer absconds by failing to sign-up for intake and by the fact that the defendant failed to appear at a duly noticed hearing.
  - **General Conditions of Probation**
    - General Conditions are Contained within the Statutes and may be Imposed in Written Order without Oral Pronouncement.
      - *State v. Hart*, 668 So. 2d 589 (Fla. 1996).
      - *Fernandez v. State*, 677 So. 2d 332 (Fla. 4th DCA 1996).
    - Florida Rule of Criminal Procedure 3.800(b) gives defendants a procedural method to object to the imposition of special conditions of probation that have not been orally pronounced.
    - "'The legal underpinning of this rationale is that the statute provides 'constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process.'" Quoting *Tillman v. State*, 592 So. 2d 767 (Fla. 2d DCA 1992). General conditions set forth in statute need not be orally pronounced.
    - "All persons are presumed to know the contents of criminal statutes and the penalties provided within them." *State v. Ginn*, 660 So. 2d 1118 (Fla. 4th DCA 1995), *review denied*, 669 So. 2d 251 (Fla. 1996).

- Defendants have notice of all probation conditions contained in the statutes.
  - *Tillman v. State*, *supra*.
  - *State v. Green*, 667 So. 2d 959 (Fla. 2d DCA 1996). All persons have constructive notice of Florida's criminal statutes.
  - *State v. Beasley*, 580 So. 2d 139 (Fla. 1991).
- Random testing is a General Condition of Probation:
  - Urinalysis, Breathalyzer, and blood testing are statutorily authorized as "random testing." *Fernandez v. State*, 677 So. 2d 332 (Fla. 4th DCA 1996).
  - Section 948.03(1)(l), authorizes the imposition of this condition.
- Conditions contained in the approved Probation Order under Rule of Criminal Procedure 3.986 are general conditions, which do not require oral pronouncement. *State v. Hall*, 668 So. 2d 600 (Fla. 1996).
- A defendant may object to the imposition of statutory conditions on ground of relevancy. *Fernandez v. State*, 677 So. 2d 332 (Fla. 4th DCA 1996).

- **Special Conditions of Probation**
  - Special conditions must be related to the offense or rehabilitation of the defendant.
    - *Grubbs v. State*, 373 So. 2d 905 (Fla. 1979).
    - *Hussey v. State*, 504 So. 2d 796 (Fla. 2d DCA 1987), *review denied*, 518 So. 2d 1275 (Fla. 1987). The trial court improperly restricted probationer's employment in a way that was not reasonably related to the defendant's rehabilitation.
    - *Goldschmitt v. State*, 490 So. 2d 123 (Fla. 2d DCA 1986). DUI bumper sticker valid special condition.
    - A court may impose a condition of probation that is reasonably related to the offense or future criminality. *Biller v. State*, 618 So. 2d 734 (Fla. 1993).
      - The condition of probation in CCF that the defendant could not use alcohol was improper, as there was nothing connecting any use of alcohol with the offense and nothing in the record to suggest that the defendant had a propensity toward alcohol abuse.

- Condition of probation is invalid if it:
    - Has no relationship to the crime of which the offender was convicted;
    - Relates to conduct which is not itself criminal; and
    - Requires or forbids conduct which is not reasonably related to future criminality.
- See also *Rogriquez v. State*, 378 So. 2d 7 (Fla. 2d DCA 1979); *Grate v. State*, 623 So. 2d 591 (Fla. 5th DCA 1993).

- **A Probation Order Must Specify the Period Within Which the Probationer Must Complete Special Conditions. *Young v. State*, 566 So. 2d 69 (Fla. 2d DCA 1990).**

- **Illegal Conditions of Probation: Conditions which are too vague to advise the probationer of the limits of his/her restrictions and could be easily violated, unintentionally, are illegal.**
    - *Hughes v. State*, 667 So. 2d 910 (Fla. 4th DCA 1996). The condition prohibiting the probationer from coming within 250 miles of the victim was too vague and, thus, illegal.
    - *Huff v. State*, 554 So. 2d 616 (Fla. 2d DCA 1989). The condition prohibiting the probationer from being within three blocks of a high drug area was stricken as being illegal.
    - *Almond v. State*, 350 So. 2d 810 (Fla. 4th DCA 1977). The condition that the probationer reside elsewhere other than Central Florida was illegal.
    - HOWEVER: The condition prohibiting the probationer from traveling to Tallahassee, Florida was not illegal. *Larson v. State*, 572 So. 2d 1368 (Fla. 1991). A condition prohibiting a defendant from living in an area clearly identified with street names was also acceptable. *Baker v. State*, 609 So. 2d 167 (Fla. 2d DCA 1992).

- **No Contemporaneous Objection is Required to Contest an Illegal Condition of Probation.**
    - *Hughes v. State*, *supra*.
    - *Larson v. State*, *supra*.

- **Problems with Representation: Uncounseled Plea and Inadequate Waiver of Right to Counsel**

- *Tur v. State*, 797 So. 2d 4 (Fla. 3d DCA 2001). The defendant in this case was sentenced to a term of probation after an uncounseled plea pursuant to Florida Rule of Criminal Procedure 3.111(b)(1). The defendant later violated his probation for driving under the influence of alcohol. The Third District Court of Appeal looked at whether a defendant, sentenced to a term of probation pursuant to Florida Rules of Criminal Procedure, may be sentenced to incarceration after violating that probation. The Third District Court of Appeal held that, as the trial court could not impose a jail sentence on this defendant for his uncounseled plea to the charges, it cannot later impose a jail term for a violation of the terms of probation. The case was reversed and remanded for resentencing without incarceration.
- *Harris v. State*, 773 So. 2d 627 (Fla. 4th DCA 2000). The defendant was charged with a crime allowing imprisonment for up to one year. The state represented that they would not seek jail time. Knowing this, the defendant was tried without a jury and without counsel but never formally waived those rights on the record. The defendant subsequently violated the probation and was sentenced to 60 days in jail. The defendant appealed, alleging that there was a denial of his right to a jury trial and appointed counsel at the original sentencing. In its appellate capacity, the circuit court found that because jail time was a possibility at sentencing, jail time for a violation was permissible. On appeal, the Fourth District Court of Appeal found that the defendant was entitled to a jury trial, as well as counsel. The court also held that the trial court could not impose jail time for either the original charge or the probation violation. The case was reversed and remanded with instructions that the defendant was to be resentenced without any jail time.

## N. JAIL

- **Consecutive Sentences – (Stacking multiple misdemeanors)**
  - Valid for misdemeanors:
    - *Armstrong v. State*, 656 So. 2d 455 (Fla. 1995).
    - *State v. Troutman*, 685 So. 2d 1290 (Fla. 1996). Consecutive county jail sentences exceeding one year for the defendant convicted of two or more misdemeanors are valid, unless the defendant is also convicted of a felony along with the misdemeanors.
    - Thus: domestic battery + stalking + trespass after warning + violation of injunction = four (4) years county jail.
  - Section 741.281 – "The imposition of probation under this section shall not preclude the court from imposing any sentence of imprisonment authorized by § 775.082." (§ 775.082 – Penalties; applicable of sentencing structures; mandatory minimum sentences for certain re-offenders previously from prison.)

- Jail credit: A court cannot give jail credit for house arrest. *McCarthy v. State*, 689 So. 2d 1095 (Fla. 5th DCA 1997). "There is simply no statutory authority for 'crediting' such time."

## O. SENTENCING

- **Minimum Term of Imprisonment for Domestic Violence:** If a person is adjudicated guilty of a crime of domestic violence and the person has intentionally caused bodily harm to another person, the court SHALL order the person to serve a minimum of 5 days in the county jail as part of the sentence imposed, unless the court sentences the person to serve a non-suspended period of time in a state correctional facility. The court may also sentence the person to probation, community control, or additional period of incarceration. § 741.283.

- **Upon Revocation of Probation, the Court Shall Adjudicate the Probationer.**

  - Section 948.06(2)(b). "If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control."

    - *State v. Gloster*, 703 So. 2d 1174 (Fla. 1st DCA 1998).

      - A judge may withhold adjudication of guilt only if the defendant is placed on probation.

      - Florida Rule of Criminal Procedure, 3.670.

      - Section 948.01(2).

  - *Amendment to Florida Rules of Criminal Procedure 3.704(d)(23)*, 763 So. 2d 997 (Fla. 1999). Sentencing guideline scoresheets (Rule 3.704(d)(23)) amended to reflect that the use of a sentencing multiplier for crime involving domestic violence in the presence of a child is no longer in the trial court's discretion.

- **Lawful Suspended Sentences**

  - "In a case of prior disposition of a felony commitment, upon motion of the offender or the department or upon its own motion, the court may, within the period of its retained jurisdiction following commitment, suspend the further execution of the disposition and place the offender in a community control program upon such terms as the court may require." § 948.01(3).

    - *McGuirk v. State*, 382 So. 2d 1235 (Fla. 2d DCA 1980). The court may suspend some of a defendant's entire sentence in order to place him/her on probation.

- If the defendant is a youthful offender, the court, upon motion of the defendant or upon its own motion, may within 60 days after imposition of sentence suspend the further execution of the sentence and place the defendant on probation in a community control program upon such terms as the court may require. §958.06.

- Split Sentences:

  - A trial court may impose a true split sentence in which the period of community control and probation is shorter than the suspended portion of incarceration. In a true split sentence, the defendant's exposure to prison upon violation of probation is limited to the amount of time suspended.

  - Suspending a sentence and placing the defendant on probation constitutes a split sentence. *Lawton v. State*, 711 So. 2d 142 (Fla. 2d DCA 1998).

- Hearings on Revocation of Suspension of Sentences are Informal:

  - Hearings on the question of revocation of the suspension of a sentence for violating the conditions of the suspension are informal and do not take the course of a regular trial.

  - *Brill v. State*, 159 Fla. 682, 32 So. 2d 607 (1947).

    - Evidence adduced at such hearings does not have the same objective as that taken at a criminal trial;

    - That its first purpose is to satisfy the conscience of the court as to whether the conditions of suspension have been violated;

    - The second purpose is to give the accused an opportunity to explain away the accusation as to violation of the conditions of suspension.

  - *State ex rel. Ard v. Shelby*, 97 So. 2d 631 (Fla. 1st DCA 1957). The latitude of inquiry is such that even though evidence upon which the revocation is based would be inadmissible upon trial of the accused of a crime, it is competent for the trial court to consider it on the issue of compliance with the conditions under which suspension of the sentence was granted.

  - *Caston v. State*, 58 So. 2d 694 (Fla. 1952).

- **Unlawful Suspended Sentences**

  - An order suspending a sentence from day to day and term to term is illegal.

    - *Coleman v. State*, 205 So. 2d 5 (Fla. 3d DCA 1967).

    - *State v. Bateh*, 110 So. 2d 7 (Fla. 1959).

- *Hunter v. State*, 200 So. 2d 577 (Fla. 3d DCA 1967).

- But see *Miller v. Aderhold*, 288 U.S. 206 (1933). "Such an order is a mere nullity without force or effect, as though no order at all had been made; and the case necessarily remains pending until lawfully disposed of by sentence."

  - The court cannot withhold adjudication or suspend a sentence in use of a firearm conviction. § 775.087(2)(b).

- **Sentencing Multiplier for Domestic Violence Cases**

  - Florida Rule of Criminal Procedure 3.704(d)(23) provides for a domestic violence multiplier of one-and-a-half times when a domestic battery is committed in the presence of a child under the age of 16.

  - *Lane v. State*, 973 So. 2d 654 (Fla. 1st DCA 2008). The trial court imposed a domestic violence multiplier of one-and-a-half times on the appellant's sentence for aggravated battery, based upon the state's argument that the child of the appellant and the victim resided in the home. The appellate court reversed because Florida Rule of Criminal Procedure 3.704(d)(23) requires that the domestic battery be committed in the presence of a child under the age of 16; however, no evidence was presented by the state on this issue or on the issue of whether the child was present during the domestic violence. In fact, the victim's affidavit, which was accepted into evidence without objection, stated that the child was not in the home at the time of the battery.

## P. VIOLATION OF PROBATION OR INJUNCTION

- Cases should be monitored through **compliance calendars** to ensure defendant accountability and keep judges informed as to treatment progress and compliance with diversion or probation.

- Law enforcement can perform a warrantless arrest when there is probable cause to believe that the person has committed a criminal act which **violates an injunction** for protection against domestic violence. § 901.15(6*). Hawxhurst v. State*, 159 So. 3d 1012 (Fla. 3d DCA 2015).

- There can be no contempt based on a domestic violence injunction that has **lapsed**.

  - *Ardis v. Ardis*, 165 So. 3d 844 (Fla. 1st DCA 2015). Contempt charges were based on a DV order that had lapsed (upon entry of a 2012 dissolution of marriage). As the dissolution did not prohibit contact between the petitioner and the respondent, there was no basis for the indirect criminal contempt.

- **Where There is Reversal, any Sentence Imposed Based on that Conviction Must Be Vacated.**

- *Gaspard v. State*, 845 So. 2d 986 (Fla. 1st DCA 2003). When a conviction for aggravated stalking has been reversed, any sentence imposed after revocation of probation based solely on the conviction must also be vacated. This, however, does not preclude the state from seeking revocation of probation on other grounds.

- **The State's Burden of Proof in Indirect Criminal Contempt is Proof beyond a Reasonable Doubt.**

  - *Hoffman v. State*, 842 So. 2d 895 (Fla. 2d DCA 2003). The defendant, a respondent in a civil case, was convicted of violation of the injunction for sending cards to the petitioner's residence and for allegedly violating the 500-foot provision of the injunction. The trial court erred in finding that the defendant had violated the injunction as the cards were addressed to other residents of the petitioner's household and as the injunction did not specifically prohibit this. Additionally, the trial court erred in finding that the defendant had violated the 500-foot provision of the injunction as the state failed to prove the exact distance the defendant was from petitioner. The court held that the state's burden of proof in an indirect criminal contempt case is to prove every element beyond a reasonable doubt.

- **A Charge of Violation of Injunction Is Invalid if it is Not Established That the Defendant Knew of the Injunction.**

  - *Robinson v. State*, 840 So. 2d 1138 (Fla. 1st DCA 2003). The court reversed the trial court's conviction for violation of a domestic violence injunction for failing to grant the appellant's motion for judgment of acquittal. The court held that the State failed to establish that the appellant knew the final injunction had been entered against him. The appellant's conviction for aggravated battery was upheld, however.

- **Where the Probation Specifies Only that a Defendant Complete a Program by the End of the Probationary Period, Probation Cannot Be Revoked for Failure o Complete the Program While Sufficient Time Remains in Probationary Period to Complete Program.**

  - *Dunkin v. State*, 780 So. 2d 223 (Fla. 2d DCA 2001). The defendant was placed on probation for a period of three years and ordered to complete an outpatient sex offenders' treatment program until he was officially discharged by the program administrator. A probation officer violated the defendant, finding that he was absent from the sex offenders' program without permission by missing three separate meetings without notification to the therapist as to why he missed the sessions. The defendant contended that the missed appointments were due to illness. The terms of his probation did not specify that the defendant successfully complete the program on the first try, just that the program be completed within the three years of probation. The circuit court revoked the defendant's probation, but the Second District reversed and

remanded on the grounds that the defendant's termination from the sex offenders' program was insufficient to establish a "willful and substantial" violation of probation and did not, therefore, warrant a revocation. But see *Lawson v. State*, 941 So. 2d 485, 490 (Fla. 5th DCA 2006) where the court noted "…conditions of probation do not have to be precise to the point of obtrusiveness in order to afford fair notice to the probationer, and, therefore, it is not necessary for the sentencing court to catalog each and every detail or circumstance that may form the basis of a violation. In essence, conditions of probation should be written and read with a measure of common sense so that the fair notice requirement does not provide refuge for defendants who deliberately turn a blind eye to, or eagerly profess ignorance of, the obvious consequences of their actions or inactions."

- **Failure to Follow Terms of Probation (e.g. Failure to Pay Restitution) is not Sufficient for Revocation of Probation where the Court Never Specified the Date for Completion.**

    - *Murtha v. State*, 777 So. 2d 1067 (Fla. 3d DCA 2001). The Appellate court held that the trial court abused its discretion when it found that the defendant had violated the terms of and revoked probation for failing to pay restitution and perform community service hours. The court reversed the probation revocation on the grounds that the original order never specified a schedule for this sentence to be completed by, and there was still sufficient time in the probationary period for the terms to be completed. The court also held that a violation can't be deemed willful where a defendant, as this one, was incarcerated on unrelated charges for the first three months of the probationary period.

- **A Person Cannot be Charged with Violating an Injunction if they Have not Been Served with the Injunction.**

    - *Suggs v. State*, 795 So. 2d 1028 (Fla. 2d DCA 2001). The defendant appealed a denial of her motion to dismiss an aggravated stalking charge. The court reversed and remanded on the grounds that a defendant cannot be charged with a violation of a final injunction unless the defendant was served with the injunction. In this case, there was no service on the defendant; therefore, the court found that she could not be charged with a violation. But see *Garcia v. State*, 276 So. 3d 895 (Fla. 3d DCA 2019) where the defendant claimed that the temporary injunction had expired, yet the court upheld the conviction for violating it. In this case, the court held that the temporary injunction was still valid since the very order itself included an extension of the effectiveness of the temporary injunction after the permanent injunction has been entered but before it has become effective via service on the respondent.

- **Failure to Comply with Intake Procedure may be Enough to Justify Revocation of Probation.**

- *Brown v. State*, 776 So. 2d 329 (Fla. 5th DCA 2001). The defendant failed to complete an intake interview with the probation officer, as court ordered, and was asked to call back and provide the information requested by the officer. The defendant failed to do so, and the court held that the defendant's failure to complete intake procedure was a substantial enough violation to justify the revocation of the probation.

- **Courts Must be Clear about Whether Alleged Counts, if Proven, are Sufficient to Revoke Probation.**
  - *Meadows v. State*, 747 So. 2d 1043 (Fla. 4th DCA 2000). Where the state agreed at the beginning of a probation violation hearing not to proceed on a count alleging aggravated battery and domestic violence but did proceed on a second count alleging accessing 911 for a non-emergency purpose, the case was reversed and remanded by the Fourth District Court of Appeal. Because the revocation of probation was based upon two violations, it was not apparent whether the trial court would have revoked the defendant's probation based on the single violation of accessing 911 for non-emergency purposes.

- **Any Violation of Probation Charges must be Delivered Before Probationary Period Expires, or the Court is Without Jurisdiction.**
  - *Young v. State*, 739 So. 2d 1179 (Fla. 4th DCA 1999). The Fourth District Court of Appeal held that the trial court was without jurisdiction to revoke probation where the warrant charging the defendant with probation violation was delivered to the sheriff's office after expiration of the probationary period. It was error to find that the defendant had absconded from supervision by failing to file monthly reports with her probation officer where the defendant was not hiding, nor had departed the jurisdiction of the state and that the probationary period was thereby tolled.

- **The Time Period for Completion of a Batterer Intervention Program can be Implied in other Dictates Imposed by the Court Order, and Failure to Demonstrate Completion within the Time Frame may Constitute a Violation of Probation.**
  - *Mitchell v. State*, 717 So. 2d 609 (Fla. 4th DCA 1998). The claim that the trial court erred in finding the defendant in violation of probation because the order of probation did not specify the time frame for completion of a domestic batterer intervention program was not preserved for appellate review. The appellate court found that there was no merit to the claim due to the fact that the time period for completion of the program was implicit in other dictates imposed by the court order and supported the trial court's revocation of probation.

- **Multiple Unexcused Absences may Constitute a Violation of Probation.**

- *Rawlins v. State*, 711 So. 2d 137 (Fla. 5th DCA 1998). Two unexcused absences from a substance abuse treatment program amounts to a material probation violation. The probation officer lacked the authority to substitute a program different from that ordered by the court.

- **An Appearance via Satellite at Probation Revocation Hearing of Otherwise Unavailable Victim is not a Denial of the Sixth Amendment's Confrontation Clause.**

  - *Lima v. State*, 732 So. 2d 1173 (Fla. 3d DCA 1999). The Third District Court of Appeal held that in a probation revocation hearing for the commission of a domestic violence-related battery, it is not a denial of the Sixth Amendment's Confrontation Clause to present the victim's testimony via satellite transmission, so long as there is a showing that the victim "was unable to attend." This holding will also apply to the trial itself, as opposed to a probation violation hearing. But see, *Knox v. State*, 98 So. 3d 679 (Fla. 4th DCA 2012), which held that an out-of-state victim's economic hardship which made her "unable to attend" was insufficient to establish an exception to the Confrontation Clause.

## Q. EXPUNCTION OF CRIMINAL HISTORY IN DOMESTIC VIOLENCE CASES

- **Domestic Violence Cases are Statutorily Ineligible for Expunction under § 943.0585(2).**

  - *Williams v. State*, 879 So. 2d 77 (Fla. 3d DCA 2004). The defendant, who was convicted of battery and false imprisonment with charging instrument stamped "domestic violence," was not eligible for expunction of criminal history records; expunction statute did not permit the expunction of criminal offenses involving domestic violence.

## R. PROSECUTOR'S RESPONSIBILITY DEALING WITH A THREAT OF PERJURY OR CONTEMPT

- **Prosecutors must be Cautious when Attempting to get Reluctant Witnesses to Testify (e.g., by Threatening Perjury of False Affidavit).**

  - Merely advising witness of what the consequences would be if she failed to testify or if she failed to tell the truth is appropriate. *Coleman v. State*, 491 So. 2d 1206 (Fla. 1st DCA 1986).

  - The prosecution correctly informed the victim that if she attempted to change testimony or affidavit statements in order to achieve her desire to have the battery charges against her husband dropped, she would be held in contempt for perjury. *Coleman v. State*, 491 So. 2d 1206 (Fla. 1st DCA 1986).

- An admonition to a witness to "tell the truth," if such admonition does not suggest to the witness exactly what testimony to give, is appropriate and will not be cause for discipline.

- A prosecutor may be disciplined by The Florida Bar for telling a witness not to speak with the defense counsel at all unless the prosecutor was present.

- Appellate Review Due to Prosecutorial Error: "Prosecution error alone does not warrant automatic reversal of conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984). "The correct standard of appellate review is whether the error committed was so prejudicial as to vitiate the entire trial."

- Conclusive Summary:

  - A prosecutor suggesting which version of testimony = misconduct, and

  - Misconduct = discipline action

  - However, misconduct is not equal to per se reversal.

## S. PROMISING PRACTICES

- The criminal court should notify the civil court each time a criminal case is opened that involves a family with an open case.

- Judges should be alerted of any pending criminal cases involving one of the parties when a family or juvenile case is opened.

- Judges on family, juvenile, and criminal benches should communicate with each other regarding orders which may conflict—especially with regard to firearms.

- Each circuit or county should determine the best method of communication between its civil and criminal courts, and the written policy should be institutionalized in writing.

- Circuits should have a criminal domestic violence division or calendar to ensure that the criminal cases are addressed promptly and should also generate compliance calendars.

- Court staff should have access to the NCIC database to be able to conduct national background searches on all domestic violence cases.

- All circuits should create a policy that streamlines the referral and resolution of any post-judgment contempt or violation motions.

- Before each stage of the proceeding, judges should become familiar with any related cases between the parties, including but not limited to paternity, dissolution, criminal, and juvenile dependency proceedings.

- Judges should understand the boundaries of Fifth Amendment issues and should exercise their discretion when moving forward with an injunction proceeding when there is a pending criminal matter against the respondent. Judges should consider the impact on the petitioner and witnesses. *Speegle v. Rhoden*, 236 So.3d 498 (Fla. 1st DCA 2018).

- Judges should inquire into each petitioner's circumstances to avoid adding to the trauma he or she has already experienced. Incarceration of or contempt charges against petitioners who fail to cooperate should be viewed as a last resort.

- Judges should allow petitioners and witnesses to utilize certified therapy dogs while testifying, if requested.

- All circuits should collect data regarding the types and number of domestic violence and other injunctions filed as well as data regarding criminal domestic violence cases.

## DOMESTIC VIOLENCE: EVIDENCE (JUNE 2023)

## A. PRIVILEGES APPLICABLE TO DOMESTIC VIOLENCE

**Domestic Violence Advocate-Victim Privileges - § 90.5036.**

- Section 90.5036(1)(d) - Any communication between a domestic violence advocate and a victim is "confidential" if it is related to the incident of domestic violence for which the victim is seeking assistance and if it is not intended to be disclosed to third persons other than:
    - Those persons present to further the interest of the victim in the consultation, assessment, or interview.
    - Those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted.
- Section 90.5036(2) - A victim has a privilege to refuse to disclose and the privilege to prevent any other person from disclosing a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim.

**Clergy-parishioner privilege – § 90.505.**

- Any communication between a member of the clergy and a person is "confidential" if made privately for the purpose of seeking spiritual counsel and advice from the member of the clergy in the usual course of his or her practice or discipline and not intended for further disclosure except to other persons present in furtherance of the communication. § 90.505.
    - The court held that the clergy communication privilege statute contains no exceptions. *Nussbaumer v. State*, 882 So. 2d 1067 (Fla. 2d DCA 2004).
        - Further, the 2d DCA held that courts must be careful when examining the nature of the communication – specifically whether the clergy person is engaging in "spiritual counsel" – so as not to run afoul of the ecclesiastical abstention doctrine. Pursuant to the ecclesiastical abstention doctrine, courts do not interpret religious doctrine or otherwise inquire into matters involving religious dogma. See *Southeastern Conference Ass'n of Seventh-Day Adventists, Inc. v. Dennis*, 862 So. 2d 842, (Fla. 4th DCA 2003).

**Attorney-Client Privilege - § 90.502.**

- Attorney-client privilege is relatively limited in scope and, thus, does not require exclusion of evidence voluntarily submitted by an attorney in violation of that privilege. *State v. Sandini*, 395 So. 2d 1178 (Fla. 4th DCA 1981).

**Spouse Privilege - § 90.504.**

- No privilege "prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited." *Trammel v. U.S.*, 445 U.S. 40 (1980); *State v. Grady*, 811 So. 2d 829 (Fla. 2d DCA 2002).

- Statements of a spouse that would be privileged at trial can be used to establish cause to obtain a search warrant or to investigate a suspect based on those statements. *State v. Grady*, 811 So. 2d 829 (Fla. 2d DCA 2002).

- Husband-wife evidentiary privilege does not apply to criminal acts by one spouse.

    - A spouse has a privilege, during and after the marital relationship, to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.

    - Section 90.504(3)(b). There is no privilege in a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse or the person or property of a child of either. *Valentine v. State*, 688 So. 2d 313 (Fla. 1996).

## B. ALLOCATION OF DECISION MAKING/FINDER OF FACT

**Question of Fact for the Trier**

- **Emotional Distress:** The court looked to the 1st District Court of Appeal *in McMath v. Biernacki*, 776 So. 2d 1039 (Fla. 1st DCA 2001), agreeing with the First DCA's finding that in deciding whether an incident or series of incidents creates substantial emotional distress that distress should be judged on an objective, not subjective, standard and, even if a subjective standard is used, a person does not need to be reduced to "tears or hysteria in order to be considered substantially emotionally distressed." *D.L.D., Jr. v. State*, 815 So. 2d 746 (Fla. 5th DCA 2002).

- **Stalking:** The court's finding regarding whether following and repeatedly telephoning the victim fell within the statutory definition of stalking under the domestic violence statute so as to permit the issuance of an injunction was a question of fact for the trier of fact and was not clearly erroneous. The stalking statute (§ 784.048) was found not to be unconstitutionally vague or overbroad. *Biggs v. Elliot*, 707 So. 2d 1202 (Fla. 4th DCA 1998).

## C. CONFIDENTIAL RECORDS

- A Petitioner's Place of Residence May Be Kept Confidential for Safety Reasons. § 741.30(3)(b). *See also* Family Law Form 12.980(h), Request for Confidential Filing of Address, and § 119.071(2)(j)1.

## D. DISCOVERY

- The court may not bar the opportunity for discovery but may limit the time in which a party may engage in discovery.

- "The court must balance the need to expedite the hearing and the need to ensure that the parties' due process rights are not violated. The trial court is imbued with discretion to limit the time frame and nature of discovery in such cases and can do so by examining individual discovery requests on a case-by-case basis." *Nettles v Hoyos*, 138 So. 3d 593 (Fla. 5th DCA 2014).

## E. JUDICIAL NOTICE

**It is Improper for the Court to Take Judicial Notice of Service which is an Essential Element that the State is Required to Prove.**

  - *Cordova v. State*, 675 So. 2d 632 (Fla. 3d DCA 1996).

- Notice of injunction is an essential element of charge of violating its provisions.

- Return of service, while hearsay, was admissible in evidence under public records exception.

- Trial courts may not take judicial notice of fact that the defendant was served with an injunction.

- The fact that the defendant was served was not generally known within territorial jurisdiction of the court.

- It was not the type of fact that was not subject to dispute because it was capable of being determined by a source whose accuracy could not be questioned.

  - However: Trial courts may allow the State to use "permissive inference" to establish that the defendant was served with an injunction.

    - Permissive inference allows, but does not require, the trier of fact to infer elemental fact upon proof of a basic fact and places no burden on the defendant.

      - Such inference passes the rational connection test, as fact of service more likely than not flowed from the return of service.

- The District Court of Appeal held that the defendant was entitled to a judgment of acquittal on the charge of violating a domestic violence injunction, as the trial court could not properly take judicial notice of an essential element that the State was required but failed to prove for conviction. *Hernandez v. State*, 713 So. 2d 1120 (Fla. 3d DCA 1998).

**Court Records**

The court can take judicial notice of a record from any Florida or U.S. Court when imminent danger to persons or property has been alleged and when it is impractical to give prior notice to the parties of the intent to take judicial notice. An opportunity to present evidence relevant to the propriety of taking judicial notice may be deferred until after judicial action has been taken. If judicial notice is taken, the court shall file a notice in the pending case of the matters judicially noticed within 2 business days. § 90.204(4).

## F. BATTERED SPOUSE SYNDROME (BSS) or (BWS)

**Admissible Against Batterers to Bolster Credibility of Victim**

- "Where relevant, evidence of BWS may be admitted through a qualified expert to enlighten jurors about behavioral or emotional characteristics common to most victims of battering and to show that an individual or victim-witness has exhibited similar characteristics." *Commonwealth v. Goetzendanner*, 679 N.E. 2d 240 (1997).

- The Iowa Supreme Court allowed the use of expert testimony on BWS with respect to the victim's recantation. The expert did not offer an opinion on the specific victim's credibility but instead testified concerning the medical and psychological syndrome present in battered women generally. *State v. Griffin*, 564 N.W.2d 370 (Iowa 1997).

- BWS is admissible to bolster the credibility of a victim who recants their story. *People v. Morgan*, 58 Cal.App.4th 1210 (Cal. Ct. App.1997).

- The defendant was convicted in a jury trial in the circuit court, Miami-Dade County, of second-degree murder of her live-in boyfriend. The defendant appealed. On motion for rehearing, the District Court of Appeal held that the testimony of the victim's ex-wife that the victim never abused her in 29 years of marriage was relevant to battered woman's syndrome defense. *Gonzalez-Valdes v. State*, 834 So. 2d 933 (Fla. 3d DCA 2003).

**BSS is Admissible as a Defense by Those Suffering from the Condition.**

- *State v. Hickson*, 630 So. 2d 172 (Fla. 1993).

- But see *Trice v. State*, 719 So. 2d 17 (Fla. 2d DCA 1998). There was no error in prohibiting BSS relating to the victim where the expert could not testify that the victim was suffering from such at the time of the homicide.

## G. STATEMENTS BY WITNESSES: FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(b)(1)(B)

**The State Must Disclose Prior Statements of Prosecution Witness.**

- The State's failure to disclose exculpatory statements made by the witness who testified to the contrary at trial was reversible error. *Roman v. State*, 528 So. 2d 1169 (Fla. 1988).

**The State Must Disclose Defense Witness Statements.**

  - The prosecutor's failure to disclose an oral statement given by a defense witness to a police officer prejudiced the defendant as the witness' trial testimony was seriously impeached and the trial strategy of the defense would likely have been impacted had they been aware of the statement either in the decision to not call the witness or in preparation for the impeachment. *Sun v. State*, 627 So. 2d 1330 (Fla. 4th DCA 1993).

**The Reference to "Statements" Is Limited to Written Statements or Contemporaneously Oral Statements.**

- *Watson v. State*, 651 So. 2d 1159 (Fla. 1994).

- The expert's oral statement was not discoverable; however, the State must disclose a witness's oral statement if that statement materially alters a prior written or recorded statement previously provided to the defendant. *State v. Evans*, 770 So. 2d 1174 (Fla. 2000).

**State Is Not Charged with Knowledge of Defendant's Statement to State Witness.**

- "We agree with the trial court that none of the rules of criminal procedure relating to discovery require the State to disclose information which is not within the State's actual or constructive possession." *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995).

- *Limited by implication*: Where there was no evidence on the record that the State did not have knowledge before the trial of a witness's information; and where the State did not notify the defense of the witness's information before trial, the court is required to hold a Richardson hearing to determine whether the State had actual or constructive knowledge of the information before trial. The court found the State failed to inform the defense, thus triggering a reversal. *McCray v. State*, 640 So. 2d 1215 (Fla. 5th DCA 1994) (citing *Richardson v. State*, 246 So.2d 771 (Fla. 1971).

**Prosecutor's Trial Preparation Notes, Work Product, Not Subject to Disclosure**

Where the prosecutor's trial preparation notes did not reflect verbatim statements of any witness interviewed, had not been adopted or approved by the person to whom they were attributed, and included interpretation of remarks made by witnesses, they were not subject to disclosure. *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994).

**Expert Witness Testimony; Examined Using the *Daubert* Standard**

- In 2019, the Florida Supreme Court adopted the *Daubert* standard when it amended §§ 90.702 and 90.704 of the Florida Evidence Code, replacing the *Frye* standard for admitting certain expert testimony. See *In re Amendments to Florida Evidence Code*, 278 So. 3d 551 (Fla. 2019), reh'g denied, SC19-107, (Fla. Aug. 30, 2019).

- The Court retreated from its prior rejection of the *Daubert* standard finding "the *Daubert* amendments remedy the deficiencies of the *Frye* standard." Id. at 6.

- "Whereas the *Frye* standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, *Daubert* provides that 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" Id. (citing *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993)).

**The test to determine the admissibility of an expert's opinion is codified under section 90.702 as follows:**

- **"Testimony by experts**—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

  - The testimony is based upon sufficient facts or data;

  - The testimony is the product of reliable principles and methods; and

  - The witness has applied the principles and methods reliably to the facts of the case." § 91.702.

- "Under *Daubert*, a trial judge has a gatekeeping role to 'ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.' The trial judge is charged with this gatekeeping function 'to ensure that speculative, unreliable expert testimony does not reach the jury' under the mantle of reliability that accompanies the appellation 'expert testimony." *Kemp v. State*, 280 So. 3d 81, 88 (Fla. 4th DCA 2019), review denied, SC19-1931, 2020 WL 1066018 (Fla. Mar. 5, 2020) (citation omitted).

- "[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1318 (9th Cir. 1995).

- However, an expert's opinion must be based upon "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590.

- "Nothing in *Daubert* requires a court 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' and "[a] court may conclude

that there is simply too great an analytical gap between the data and the opinion proffered." *Kemp v. State,* 280 So. 3d 81, 88 (Fla. 4th DCA 2019).

**Basis of opinion testimony by experts - § 90.704**

- "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." § 90.704

- **Practice Note**: It is not necessary, however, for the proponent of an expert witness to show that the facts supporting the opinion of the witness are admissible in evidence. For example, the opinion of an expert witness can be based in part on hearsay evidence. The opinion is admissible even though the supporting hearsay evidence is not. § 19:10. Expert testimony, 5 Fla. Prac., Civil Practice § 19:10 (2022 ed.); *see also Coddington v. Nunez,* 151 So. 3d 445 (Fla. 2d DCA 2013), holding that expert should have been permitted to testify as to his opinion about the speed and movement of plaintiff's body in a car crash at issue despite the fact that the simulation upon which he had based his opinion had been ruled inadmissible. *And see Vega v. State Farm Mutual Automobile*, 45 So. 3d 43 (Fla. 5th DCA 2010), holding that appellant's expert witness was permitted to rely on consultations with knowledgeable people and sources concerning sales and market trends to valuate property at issue.

## H. STATEMENTS BY VICTIMS

**Reluctant v. Recanting Victim**

- Fairness of Opposing Party and Counsel

    - A lawyer must not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act. Florida Rules of Professional Conduct Rule 4-3.4.

**Cross Examination of Victim; Fundamental Right**

- The defendant, charged with aggravated stalking and violation of the restraining order, filed a writ of prohibition after the trial court denied his motion for disqualification. The Fourth District Court of Appeal granted the defendant's request and remanded the case back to the trial court for the assignment of a new judge. The appellate court held that the trial court's denial of the basic

fundamental right of cross-examination of the victim would give a "reasonably prudent person a well-founded fear of judicial bias." The Fourth District Court of Appeal noted the fact that the state was allowed to use the victim's testimony in its opposition to the motion to reduce bond. *Zuchel v. State*, 824 So. 2d 1044 (Fla. 4th DCA 2002).

## I. HEARSAY

**Definition: A statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. § 90.801(1)(c).**

**Conviction May Stand Solely on Hearsay**

- "We decline to enunciate a blanket rule that no conviction can stand based solely on hearsay." *Anderson v. State*, 655 So. 2d 1118 (Fla.1995)(holding that hearsay statements of a child found incompetent to testify without corroborating evidence or a determination of the statement's reliability were insufficient to sustain a conviction); *see also State v. Moore*, 485 So. 2d 1279, 1281 (Fla. 1986), which noted that "the risk of convicting an innocent accused is simply too great when the evidence is based entirely on prior inconsistent statements."

- When the Declarant Testifies During the Hearing and Is Subject to Cross-Examination, the Confrontation Clause is Satisfied.

- See *U.S. v. Owens*, 484 U.S. 554 (1988); *Crawford v. Washington*, 541 U.S. 36 (2004), *U.S. v. Spotted War Bonnett*, 933 F.2d 1471 (8th Cir.1991), *cert. denied*, 112 S.Ct. 1187 (1992).

**Satisfaction of the Confrontation Clause Where the Declarant Does Not Testify**

- If a hearsay statement is non-testimonial in nature and is admissible under any of the hearsay exceptions included in the Evidence Code, with the exception of § 90.803(23) (hearsay exception; statement of a child victim), admission of the statement will not infringe upon the defendant's confrontation rights. *Ehrhardt, 1 Fla. Prac., Evidence* § 802.2 (2022 ed.).

- Where a witness is unavailable to testify at a subsequent hearing, prior testimony is admissible, despite the confrontation clause, if the opponent can show that testimony was given under circumstances that indicate its content is probably true. *State v. Kleinfeld*, 587 So. 2d 592 (Fla. 4th DCA 1991).

    - But see *Mathieu v. State*, 552 So. 2d 1157 (Fla. 3d DCA 1989). The defendant's right to confrontation was violated when there was testimony from which an inescapable inference was drawn that two eye-witnesses who did not testify had identified the defendant as the person who committed the robbery.

- See also *Crawford v. Washington*, 541 U.S. 36 (2004), which, regarding "testimonial" hearsay, overruled the Roberts decision, which held that reliability could be inferred if the hearsay statement falls within a firmly-rooted exception or if there are particular guarantees of trustworthiness. *Ohio v. Roberts*, 448 U.S. 56 (1980).

- **Note**: The *Crawford* opinion applies to "testimonial" hearsay, and *Roberts* analysis applies to "non-testimonial."

- In *Crawford*, the U.S. Supreme Court held that when hearsay statements of an unavailable witness are "testimonial" in nature, the 6th amendment requires that the accused be afforded a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36 (2004). However, the Supreme Court did not set out a definition of "testimonial." *Id.* A few years later, in *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court provided guidance as to what constitutes testimonial and nontestimonial statements with the following standard:

    - "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822.

- Later, in Michigan v Bryant, 562 U.S. 344 (2011), the Court explained that this is a "context-dependent inquiry" and set out a "primary purpose test". Id. at 1156.

    - "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan*, 562 U.S. at 1156.

- **Testimonial Statements**

    - Breath test affidavit prepared by non-testifying breath test technician. Florida v. Belvin, 986 So. 2d 516 (2008).

- Physician's statements to police detectives about a victim's injuries made in response to questioning about an already completed crime with no ongoing emergency. Franklin v. State, 965 So. 2d 79 (2007).

- **Non-Testimonial Statements**

  - Statements made in multiple 911 calls regarding an armed robbery and highway pursuit. *Petit v. State*, 92 So. 3d 906 (Fla. 4th DCA 2012).

  - Inmates statements during recorded jail call describing a flight that he was witnessing. *Jackson v. State*, 188 So. 3d 133 (Fla. 4th DCA 2016).

## J. HEARSAY EXCEPTIONS - § 90.803

**Availability of Declarant Immaterial**

- The provision of § 90.802 (hearsay rule) to the contrary notwithstanding, the following are admissible as evidence, even though the declarant is unavailable as a witness:

- **Spontaneous Statement** – § 90.803(1) A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

  - "The spontaneity of the statement negates the likelihood that declarant engaged in reflective thought or conscious misrepresentation and provides the necessary circumstantial guarantee of trustworthiness to justify the introduction of the evidence." *Ehrhardt, 1 Fla. Prac., Evidence* § 803.1 (2022 Ed.).

  - The defendant's companions' statement to the store manager should not have been admitted under spontaneous statement exception to hearsay rule because their statements revealed that they had engaged in reflective thought. *Fratcher v. State*, 621 So. 2d 525 (Fla. 4th DCA 1993).

  - The victim's statement to a friend immediately after a sexual battery incident was admissible. *McDonald v. State*, 578 So. 2d 371 (Fla. 1st DCA 1991), *review denied*, 587 So. 2d 1328 (Fla. 1991).

  - The testimony was inadmissible where the record did not reflect that statements were spontaneous and made without engaging in reflective thought. *Sunn v. Colonial Penn Ins. Co.*, 556 So. 2d 1156 (Fla. 3d DCA 1990).

- "There was no error in permitting the investigating police officer to testify as to victim's spontaneous statements at the time of the incident." *Cadavid v. State*, 416 So. 2d 1156 (Fla. 3d DCA 1982).

- The spontaneity is lacking if more than a "slight lapse of time" has occurred between the event and the statement. *Cadavid v. State*, 416 So. 2d 1156 (Fla. 3d DCA 1982).

- The spontaneous statement by the two-and-one-half year old to the babysitter that the child's father had sexually molested her was not showing that the statement was made contemporaneously with the alleged act by the father. *State v. Jano*, 524 So. 2d 660 (Fla. 1988).

- The testimony by the police officer concerning the victim's version of aggravated assault, when the statement was made after the victim drove home and called the police, was not admissible. *Quiles v. State*, 523 So. 2d 1261 (Fla. 2d DCA 1988).

    - The undercover agent's statement as to whom the agent identified as a source of cocaine was not admissible under present sense impression exception to hearsay rule. *U.S. v. Cruz*, 765 F.2d 1020 (11th Cir. 1985).

- **Excited Utterance – § 90.803(2)** A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

- **Excited utterance is an <u>exception</u> to the hearsay rule.**

    - The victim of a kidnapping had called witnesses while the offense was taking place. These were considered excited utterances, and the people who were called could testify about the content of the conversations. *Viglione v. State*, 861 So. 2d 511 (Fla. 5th DCA 2003).

    - The Supreme Court rejected the State's argument that statements of the victim to a witness were admissible under the excited utterance exception to the hearsay rule where the proper predicate was not established by the state and where such a finding was not made by the trial court. An alternative argument that the witness's testimony was admissible under the state-of-mind exception to the hearsay rule was rejected because the victim's state of mind was not found to be relevant to any issue in the case. The Supreme Court also held it was an error to admit the victim's handwritten statement of a prior domestic violence case from the court record. *Stoll v. State*, 762 So. 2d 870 (Fla. 2000).

- **<u>Elements</u>**

    - There must be an event startling enough to cause nervous excitement;

- The statement must have been made before there was time to contrive or misrepresent; and

- The statement must have been made while the person was under the stress of excitement caused by the event. *State v. Jano*, 524 So. 2d 660 (Fla. 1988).

- **Time**

  - "Some out-of-court statements may be admitted as excited utterances even though they were not made contemporaneously or immediately after the event."

    - "The length of time between the event and the statement is pertinent in considering whether the statement may be admitted as an excited utterance."

    - "It would be an exceptional case in which a statement made more than several hours after the event could qualify as an excited utterance because it would be unlikely that the declarant would still be under the stress of excitement caused by the event." *State v. Jano*, 524 So. 2d 660 (Fla. 1988).

  - The lapse of time between the startling event and the statement is relevant but not dispositive. "[t]he immediacy of the statement is not a statutory requirement." *Henyard v. State*, 689 So. 2d 239 (Fla. 1997).

  - "There is no bright-line rule of hours or minutes to determine whether the time interval between the event and the statement is long enough to permit reflective thought." *Werley v. State*, 814 So. 2d 1159, 1161 (Fla. 1st DCA 2002).

  - The fact that reflective thought may be possible does not automatically exclude a statement from being classified as an excited utterance. If the evidence establishes a lack of reflective thought, the predicate is satisfied. *Rogers v. State*, 660 So. 2d 237, 240 (Fla. 1995).

  - "As long as the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements of § 90.803(2)." *Ehrhardt*, 1 Fla. Prac., Evidence § 803.2 (2022 Ed.). Cited by:

    - *Edwards v. State*, 763 So. 2d 549 (Fla. 3d DCA 2000). The was no error in admission as an excited utterance for a statement made by a bystander at an accident scene that she had been at a party with the defendant, that the defendant was drunk and had been told not to drive.

  - Excited utterance does not violate the confrontation clause. *J .L.W. v. State*, 642 So. 2d 1198 (Fla. 2d DCA 1994). **Note:** This case was decided prior to *Crawford*, 541 U.S. 36 (2004). *See Raymond v. State*, 257 So. 3d 624 (Fla. 5th

DCA 2018), which notes that the right to confront witnesses and the excited utterance hearsay exception should not be conflated. "These are two distinct analyses. Statements admitted against a criminal defendant must be both nonviolative of the Confrontation Clause and permissible under the hearsay rules." *Id.* at 627.

- Confrontation Clause: Is the statement sought to be admitted testimonial in nature? If so, then the Sixth Amendment demands both witness unavailability and a prior opportunity for cross examination. If the statement is non-testimonial, then it is outside the scope of the Confrontation Clause.

- Excited Utterance: Does the statement qualify under the three-factor test established in *Jano*, 524 So. 2d 660 (Fla. 1988)?

**911 Recordings**

Generally, 911 tapes are admissible as excited utterance or spontaneous statement exceptions to the hearsay rule. *State v. Frazier*, 753 So. 2d 644 (Fla. 5th DCA 2000).

- The First District Court of Appeal affirmed the trial court's conviction of aggravated battery with a deadly weapon and held that the trial court did not abuse its discretion in admitting 911 tapes regardless of the fact that the victim did not call the police until an hour after the alleged battery occurred as she was shaken and visibly frightened when the police arrived. *Werley v. State*, 814 So. 2d 1159 (Fla. 1st DCA 2002).

- Jamie Coley appealed from his judgment and sentence for aggravated battery, arguing that the trial court erred in failing to redact portions of a 911 tape admitted into evidence, which referred to a nonexistent restraining order. The State argued that even if the reference to the restraining order should have been redacted from the tape, its admission into evidence was harmless. The test for harmless error requires the State to prove that there is no reasonable possibility that the error complained of contributed to the verdict. Here, the State did not meet its burden and, as a result, the court reversed and remanded the judgment. *Coley v. State*, 816 So. 2d 817 (Fla. 2d DCA 2002).

- The prosecutor allowed to read a transcript of a 911 call to the jury. *Sliney v. State*, 699 So. 2d 662 (Fla. 1997).

- A 911 audio recording of the victim's ten-year-old son's telephone call was admissible under excited utterance exception to hearsay rule. *Allison v. State*, 661 So. 2d 889 (Fla. 2d DCA 1995) *reversed on other grounds*, *affirmed* by *Sliney*, *supra*.

- The defendant's argument that the statements could not be admitted as evidence identifying the defendant as the killer was rejected by the court. *Evans v. State*, 854 A.2d 1158 (Del.Supr. 2004).

    - However: The fact that a call is placed on a 911 line does not, standing alone, qualify it for admission as a hearsay exception, under § 90.803.

        - Tape containing two anonymous 911 calls was admissible under the spontaneous statement or excited utterance hearsay exception as calls were placed close to violent events. Additionally, as the calls were made to seek aid and not in response to police questioning, they were nontestimonial in nature and did not violate the Confrontation Clause. *Barron v. State*, 990 So. 2d 1098 (Fla. 3d DCA 2007).A 911 call not admissible absent firsthand knowledge of the events described under present sense impression or excited utterance exceptions. *Bemis v. Edwards*, 45 F.3d 1369 (9th Cir. 1995).

        - A transcript of a 911 call was not admissible as present sense exception because the caller was not an eyewitness. *People v. Adkinson*, 215 A.D.2d 673 (N.Y. 2d Dept. 1995) *affirmed* as modified by *People v. Vasquez*, 670 N.E. 2d. 1328 (N.Y. 1996).

        - The concurring opinion pointed out that 911 tapes do not come in under business records exception. *Franzen v. State*, 746 So. 2d 473 (Fla. 2d DCA 1998).

**Call to Third Party**

- The court recognized the rule that a victim's telephone "calls for help" to third parties made while the victim was being held against his will and threatened during a kidnapping incident are admissible under the same excited utterance or spontaneous statement exception to the hearsay rule that would permit the admission of a victim's 911 calls. *Viglione v. State*, 861 So. 2d 511 (Fla. 5th DCA 2003).

- The officer's testimony that the victim stated "the guys in the car pointed a gun at me" was admissible. *J.L.W. v. State*, *supra*.

- The testimony that the victim yelled to her daughter to "call the police because Ernest picked up a knife[,]" was admissible as an excited utterance. *Wilcox v. State*, 770 So. 2d 733 (Fla. 4th DCA 2000).

- Excited utterances on their own are sufficient to deny a Judgment of Acquittal (JOA) motion and send a case to the jury.

- Trial testimony which conflicts with excited utterance goes to the weight of the testimony; the jury has the choice of which statement to believe. *Williams v. State*, 714 So. 2d 462 (Fla. 3d DCA 1998).

- These excited utterances were, on their own, sufficient to deny the defendant's motion's for JOA and to send the case to the jury.

- Applies to violation of probation hearings. *Willis v. State*, 727 So. 2d 952 (Fla. 4th DCA 1998).

- But see *R.T.L. v. State*, 764 So. 2d 871 (Fla. 4th DCA 2000). It was an error to deny JOA where the only evidence of intent was a prior inconsistent statement from victim.

  **Note**: This holding is no new revelation. The case law has always held that prior inconsistent statements cannot be used as substantive evidence. However, an excited utterance is not a prior inconsistent statement; it is an exception to hearsay and can supply the basis for a conviction. Controlling precedent has held that exited utterances on their own are sufficient to deny JOA motion and send cases to the jury.

**Additional Case Law Regarding Excited Utterance**

- A statement made to police by the wounded victim was admissible because, "her response was spontaneous, sprang from the stress, pain and excitement of the shootings and robberies, and was not the result of any premeditated design." *Garcia v. State*, 492 So. 2d 360 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986).

- A bystander's hearsay statement to an officer, which described the assailant, was admissible because the bystander flagged down the officer and appeared visibly shaken. *Power v. State*, 605 So. 2d 856 (Fla. 1992).

- The fact that the declarant also testifies does not affect the admissibility of the excited utterance. Evidence that the victim identified the defendant to an investigating officer, which was properly admitted as an excited utterance, was sufficient to support a conviction. *Rodriguez v. State*, 696 So. 2d 533 (Fla. 3d DCA 1997).

- Although evidence was conflicting, the trial court was in the best position to weigh the credibility of the witnesses. *Willis v. State*, 727 So. 2d 952 (Fla. 4th DCA 1998).

- Being stabbed and beaten was a sufficiently startling event. *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996).

- The statement was made to the police while the victim was still bleeding and in a distressed state. *Pedrosa v. State*, 781 So. 2d 470 (Fla. 3d DCA 2001).

**Practical Points When Dealing with Excited Utterances**

- Establish the victim's emotional condition and demeanor at the time of the statement.

- Establish whether the statement was made pursuant to detailed questioning (reflective thought), the product of a general "what happened question," or was it spontaneous.

**Medical Statement – § 90.803(4).**

Statements made for the purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe the medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar, as reasonably pertinent to diagnosis or treatment. *White v. Illinois*, 502 U.S. 346 (1992).

- **Elements**:

  - The statements were made for the purpose of diagnosis or treatment; and

  - The individual making the statements knew the statements were being made for medical purposes. *Lazarowicz v. State*, 561 So. 2d 392 (Fla. 3d DCA 1990).

    - The victim's statements to physician may be admitted "only, if, and to the extent that it was knowingly made for the purpose of and was pertinent to diagnosis or treatment." *Reyes v. State*, 580 So. 2d 309 (Fla. 3d DCA 1991). See also *State v. Frazier*, 753 So. 2d 644 (Fla. 5th DCA 2000).

- Statements which are Not Necessary for Medical Diagnosis are Inadmissible.

  - In prosecution for armed burglary and sexual battery with a deadly weapon, a doctor could testify that the victim stated that she was orally, vaginally, and anally penetrated because it was reasonably pertinent to the diagnosis or treatment of the victim's wounds. However, the "assault at gunpoint" portion of the statement was inadmissible because it was not reasonably pertinent to medical diagnosis or treatment. *Conley v. State*, 620 So. 2d 180 (Fla. 1993).

  - Statements about the victim's medical state provided by a sexual abuse counselor were unsupported by any showing of purpose for medical diagnosis and, therefore, were inadmissible hearsay. *Begley v. State*, 483 So. 2d 70 (Fla. 4th DCA 1986). *But see Williams v. State*, 865 So. 2d 17 (Fla. 4th DCA 2003) distinguishing *Begley* and ruling that a case coordinator could testify to hearsay statements made by child victim because the coordinator testified that her role was to ensure the child knows why he is having a medical examination and to obtain medical history.

- *Allison v. State*, 661 So. 2d 889 (Fla. 2d DCA 1995).
  - Where the record does not show that the statement was elicited for the purpose of treatment as opposed to investigation, the statement is not within the medical diagnosis exception.
  - Where a four-year-old witnessed her father kill her mother, the child's statement to a psychologist, who was treating her for Post-Traumatic Stress (PTS), describing the killing is not admissible under the medical diagnosis exception.
  - In sexual battery prosecution, it was an error to admit the doctor's testimony concerning statements made by the victim which related the "details of the crime", particularly those relating to a shotgun because the statements were not "reasonably pertinent to medical diagnosis or treatment." *Randolph v. State*, 624 So. 2d 328 (Fla. 1st DCA 1993).
  - A hearsay exception for statements made for purposes of medical diagnosis does not permit the admission of the victim's statement to a doctor that she was raped when she went to the doctor to determine if she was pregnant, not for treatment of injuries from the assault. *Bradley v. State*, 546 So. 2d 445 (Fla. 1st DCA 1989).

- Statements Regarding Circumstances Which Caused an Injury May be Admissible via Alternate Hearsay Exceptions.
  - *Pridgeon v. State*, 809 So. 2d 102 (Fla. 1st DCA 2002) (see concurrence suggesting that child's identification ruled inadmissible as a statement made for medical diagnosis or treatment could be admissible under the child hearsay exception).

- Statements Describing the Cause or Inception of an Illness are Admissible, but Statements of Fault are Not.
  - Statement of four-year-old daughter of murder victim that she was seeing a psychologist because her "daddy choked [her] mommy's neck. He choked her and choked her and choked her" was not admissible under the hearsay exception for statements made for a medical diagnosis since statements of fault are not admissible. The court also noted that "[s]tatements describing the inception or cause of an illness or injury are admissible if they are reasonably pertinent to diagnosis or treatment." *Allison v. State*, 661 So. 2d 889, 894 (Fla. 2d DCA 1995).
  - The testimony of a doctor who conducted a rape treatment examination that the victim stated that she was beaten with a shoe was admissible because the "information was pertinent to the treatment of her wounds." *Brown v. State*, 611 So. 2d 540 (Fla. 3d DCA 1992).

- The victim's statement to a physician that "they had been touched in the genitalia by an adult male and had experienced some pain when that happened" was admissible. *State v. Ochoa*, 576 So. 2d 854 (Fla. 3d DCA 1991).

- Statements Need Not be Made to a Medical Doctor

  - The plaintiff's statement to an emergency room nurse that she fainted or passed out and fell was admissible under exception to hearsay for statements made for medical treatment or diagnosis. *Otis Elevator Co. v. Youngerman*, 636 So. 2d 166 (Fla. 4th DCA 1994).

- The Identity of the Perpetrator is Not Pertinent to a Diagnosis and, Therefore, Seldom Admissible.

  - The details of a violent crime may be reasonably pertinent to diagnosis or treatment, but the identity of the perpetrator would seldom, if ever, be admissible as not being pertinent to either diagnosis or treatment.

  - Statements made to a child protection team doctor by victims of child sexual abuse identifying their abuser are not admissible. *State v. Jones*, 625 So. 2d 821 (Fla. 1993).

  - In murder prosecution, a statement to a doctor that he was shot was admissible because it was reasonably pertinent to the diagnosis or treatment of his wounds. But the statement that black people had tried to steal his medallion was not admissible, because it was a statement of fact "not reasonably pertinent in the medical treatment." *Torres-Arboledo v. State*, 524 So. 2d 403 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988).

  - The Fifth District Court of Appeal upheld the ruling of the trial court where the victim's statements to her treating physician identifying the defendant as her assailant were not given for purposes of medical diagnosis or treatment and were therefore inadmissible and not excepted from the hearsay rule. The Fifth District Court of Appeal held, however, that those statements on the 911 tape identifying the defendant as her assailant may be admissible if the trial court determines on remand that the statements are hearsay but qualify as excited utterances. The statements on the 911 tape may be excluded as hearsay if the trial court determines that the statements are not excited utterances or admissible on some other grounds. The Fifth District Court of Appeal also held that statements on the 911 tape were also not inadmissible as violative of the defendant's right to confrontation, as such hearsay evidence is firmly rooted in the common law, and its reliability can be inferred. *State v. Frazier*, 753 So. 2d 644 (Fla. 5th DCA 2000).

  - Statements by a child abuse victim describing the cause of an injury are admissible if reasonably pertinent to the diagnosis. A description about how the victim was assaulted is admissible. The admission of the doctor's testimony

regarding the identity of the defendant as related by the victim was error. *Lages v. State*, 640 So. 2d 151 (Fla. 2d DCA 1994).

**Former Testimony - § 90.803(22)**

- Former testimony given by the declarant which the testimony was given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to § 90.402 or § 90.403.

- The defendant's testimony in the first trial was admissible on retrial under the former testimony hearsay exception, where the defendant was the only surviving eyewitness of a homicide, the defendant voluntarily took the stand in his own defense at trial, and the testimony would not be cumulative, would not mislead the jury, and would not confuse the issues. *State v. Mosley*, 760 So. 2d 1129 (Fla. 5th DCA 2000).

    - But see *Price v. City of Boynton Beach*, 847 So. 2d 1051 (Fla. 4th DCA 2003). The psychiatrist's deposition testimony that the defendant had made threats, talked about guns, and was a danger was not admissible in a hearing on the city's motion for a temporary injunction for protection against the defendant under a former testimony exception to rule against an admission of hearsay, where the deposition was not taken in the case but in the defendant's workers' compensation case involving different issues; the rule required that the party against whom the testimony was offered had the opportunity and motive to cross-examine the witness in the prior proceeding.

    - See also *Friedman v. Friedman*, 764 So. 2d 754 (Fla. 2d DCA 2000). The court held that the admissibility of a discovery deposition of a nonparty witness as substantive evidence continues to be governed by rule 1.330(a)(3), Florida Rule of Civil Procedure. "An attorney taking a discovery deposition does not approach the examination of a witness with the same motive as one taking a deposition for the same purpose of presenting testimony at trial."

- Former Testimony Statute, as Applied in Criminal Cases is Unconstitutional

    - "It is, therefore, clear that live testimony may not be constitutionally supplanted with former testimony in criminal cases absent a showing of unavailability." *Abreu v. State*, 804 So. 2d 442 (Fla. 4th DCA 2001).

    - The court specifically declined to adopt and approve an amendment made by the legislature, which would allow the admission of former testimony when the defendant is available as a witness. *In re: Amendments to the Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000).

- Although the court did not address the former testimony statute, it held that it was an error to admit the pretrial deposition of the victim as evidence in place of live testimony where the defendant was not personally present when the deposition was taken. *Brown v. State*, 721 So. 2d 814 (Fla. 4th DCA 1998).

**Statement of Child Victim - § 90.803(23)(a)**

- "Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

  - The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate, AND

  - The child either testifies; OR

  - Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1)."

**Statement of an Elderly Person or a Disabled Adult - § 90.803(24)**

- "Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

  1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled

adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; AND

2. The elderly person or disabled adult either: testifies or is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to § 90.804(1)."

**Statements of Family History and Relationships are Admissible as an Exception to the Hearsay Rule.**

- *Brown v. State*, 473 So. 2d 1260 (Fla. 1985). See also *Cruz v. State*, 557 So. 2d 668 (Fla. 5th DCA 1990).

- Providing the identity of the victim is a material element of the proof at trial.

- The identity of the victim could not be established through "inadmissible hearsay."

- *Cruz* does not identify what is inadmissible hearsay.

**Statements Admissible as Substantive Evidence are Exceptions to Hearsay.**

- Exceptions to hearsay are substantive evidence. *J.L.W. v. State*, 642 So. 2d 1198 (Fla. 2d DCA 1994). An officer's testimony that the victim stated "the guys in the car pointed a gun at me" was admissible as substantive evidence.

- Impeachment testimony cannot be used as substantive evidence.

    - Allowing a deputy, on direct examination by the prosecutor, to read a specific question from the Domestic Violence Threat Level Assessment checklist and the victim's affirmative answers in order to impeach the victim's testimony at the hearing was permissible to show the victim's motivation to testify untruthfully about her husband's crime and was not an abuse of the court's discretion. *Izquierdo v. State*, 890 So. 2d 1263 (Fla. 5th DCA 2005).

    - The victim's recanted original statement could be used as impeachment but not as substantive evidence. *Santiago v. State*, 652 So. 2d 485 (Fla. 5th DCA 1995).

- In a criminal prosecution, a prior inconsistent statement standing alone is insufficient as a matter of law to prove guilt beyond a reasonable doubt.

- Criminal depositions pursuant to Florida's Rule of Criminal Procedure 3.220 are inadmissible as substantive evidence. *State v. Green*, 667 So. 2d 756 (Fla. 1995).

- *However*: A prior inconsistent statement introduced pursuant to § 90.801(2)(a) is admissible as substantive evidence.

  - "Under § 90.801(2)(a), (1981), the prior inconsistent statement of a witness at a criminal trial, if given under oath before a grand jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact." *Moore v. State*, 452 So. 2d 559 (Fla. 1984).

  - Depositions to perpetuate testimony taken pursuant to Florida Rule of Criminal Procedure 3.190(j) are admissible as substantive evidence. *State v. Green*, 667 So. 2d 756 (Fla. 1995).

  - § 90.801(2). A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. (Note: Depositions referred to are those taken pursuant to Rule 3.190(j). *Green, supra*.)

- Discovery depositions may not be used as substantive evidence in a criminal trial.

  - *State v. Green*, 667 So. 2d 756 (Fla. 1995).

  - *State v. James*, 402 So. 2d 1169, 1171 (Fla. 1981).

## K. NON-HEARSAY (EXCLUDED FROM DEFINITION OF HEARSAY)

**§ 90.801(2) – A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is:**

- Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at trial, hearing, or other proceeding or in a deposition;

- Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; OR

- One of identification of a person made after perceiving the person.

**Statements of Identification – Non-hearsay:**

- Statements of identification made by a witness made after the witness has perceived the individual, which identify an individual before a trial, are excluded from the definition of hearsay. *Ehrhardt, 1 Fla. Prac., Evidence* § 801.9 (2022 ed.).

    - "An identification made shortly after the crime is inherently more reliable than a later identification in court." "The fact that the witness could identify the respondent when the incident was still fresh in her mind is of obvious probative value." *State v. Freber*, 366 So. 2d 426 (Fla. 1978).

- Statements of Identification May be Admissible as Substantive Evidence.

    - "Testimony of prior extrajudicial identification is admissible as substantive evidence of identity if identifying witness testifies to fact that prior identification was made." *State v. Freber*, 366 So. 2d 426 (Fla. 1978).

        - But see *Rockerman v. State*, 773 So. 2d 602 (Fla. 1st DCA 2000). Affirmative defense cannot rest on evidence of prior inconsistent identifying statements adduced for impeachment purposes only.

- Failure of the witness to repeat the identification in court does not affect the admissibility of evidence of the prior identification:

    - Evidence of prior identification was admissible even though the witness denied making the prior identification and testified at trial that the defendant did not commit the crime. *Brown v. State*, 413 So. 2d 414 (Fla. 5th DCA 1982).

    - A prior identification is also admissible as a prior inconsistent statement to impeach the victim's recantation of the identification at trial.

        - Where the witness identified the defendant in photospread after the crime was committed and at trial denied making the identification, an FBI agent could testify at trial that the witness had made the pretrial identification. *U.S. v. Jarrad*, 754 F.2d 1451 (9th Cir. 1985), *cert. denied*, 474 U.S. 830 (1985).

- It Must be a Statement of Identification to be Admissible.

    - A robbery victim's description of a suspect to the police was not a statement of identification, and, thus, the police officer's testimony as to the victim's description was not admissible under statute providing that the statement of identification of a person after perceiving him is non-hearsay when the declarant testifies and is subject to cross examination. *Puryear v. State*, 810 So. 2d 901 (Fla. 2002).

- A Witness Must Testify for Identifying Statement to be Admissible.

- An individual who made an out-of-court identifying statement must testify during the trial for the statement to be admissible. *Valley v. State*, 860 So. 2d 464 (Fla. 4th DCA 2003).

- The statement of identification need not be made to a police officer; it may be made to a family member or other non-law enforcement person.

  - See *Henry v. State*, 383 So. 2d 320 (Fla. 5th DCA 1980). The testimony of the father who was present when his daughter identified the victim at a chance encounter.

**Caller-ID Readout: Non-hearsay**

- "The caller ID display and the pager readouts are not statements generated by a person, so they are not hearsay within the meaning of subsection 90.801(1)(c)." *Bowe v. State*, 785 So. 2d 531 (Fla. 4th DCA 2001).

- "Only statements made by persons fall within the definition of hearsay." Id.

  - But see *Schmidt v. Hunter*, 788 So. 2d 322 (Fla. 2d DCA 2001) (Polygraph results incorrectly admitted).

**Statements of Defendant: Non-hearsay**

- Police questioning of the defendant at a domestic violence crime scene does not normally require the reading of Miranda warnings in that the questioning does not involve custodial interrogations.

  - Miranda warnings are not required of a defendant questioned in the defendant's home. *Morris v. State*, 557 So. 2d 27 (Fla. 1990).

  - An admission to killing his wife to the police in response to a "what happened" type question at the crime scene found not to violate Miranda. *Melero v. State*, 306 So. 2d 603 (Fla. 3d DCA 1975).

  - Where the defendant was not "in custody" during an interview in his home, based on the presence of mitigating factors and the absence of aggravating factors, Miranda warnings were not required, and the decision granting the motion to suppress inculpated statements made by the appellant was reversed. *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

- False statements of the defendant are admissible in the State's case-in-chief as substantive evidence to prove guilt.

  - A jury instruction as to this issue should not be given. *Simpson v. State*, 562 So. 2d 742 (Fla. 1st DCA 1990).

- False statements may be used as both impeachment and substantive evidence to prove guilt. *Brown v. State*, 391 So. 2d 729 (Fla. 3d DCA 1980).

- False exculpatory statements are admissible as consciousness of guilt evidence. *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959).

**Admissions: Non-hearsay**

- Statements that are made against a party and are his own statements are admissions and therefore an exception to the prohibition against hearsay. § 90.803(18)(a). *Ehrhardt, 1 Fla. Prac., Evidence* § 90.803., (2022 ed.).

- The statement needs not be against the interest of the party-opponent either at the time the statement was made or at the time it is offered.

- Husband-wife evidentiary privilege does not apply to criminal acts by one spouse on the other.

- A corrections department's Sexual Abuse Treatment Program (SATP) does not violate an inmate's Fifth Amendment right against self-incrimination, and the SATP's admission of responsibility requirement does not violate the right to free exercise of religion. *Searcy v. Simmons*, 299 F.3d 1220 (10th Cir. August 19, 2002).

**Impeachment Testimony: § 90.608(1) Allows a Party to Impeach His Own Witness**

- Limitations:

  - The party (State) cannot call a witness solely to impeach. *London v. State*, 541 So. 2d 119 (Fla. 4th DCA 1989).

  - An impeachment testimony cannot be used as substantive evidence. *State v. Smith*, 573 So. 2d 306 (Fla. 1990).

  - The victim's recanted original statement could be used as impeachment but not as substantive evidence. *Santiago v. State*, 652 So. 2d 485 (Fla. 5th DCA 1995).

- The impeaching party must be prepared to provide the disputed evidence prior to asking the question. This concept is based on the idea that for the party to ask the question in good faith, he must be prepared to provide the answer.

  - *Marrero v. State*, 478 So. 2d 1155 (Fla. 3d DCA 1985).

    - Criticized by: *Ehrhardt, 1 Fla. Prac., Evidence* § 608.4 (2022 Edition).

      - "The logical result of the restrictive decisions is to limit any cross-examination regarding credibility to situations in which counsel has a witness-room full of witnesses prepared to give backup testimony. Such

an approach would unduly inhibit impeachment by imposing overwhelming burdens, delays, and expenses on showing good faith."

- See also *Greenfield v. State*, 336 So. 2d 1205 (Fla. 4th DCA 1976). Requiring counsel to demonstrate to the court by a "professional statement to the court" or through other evidence that counsel's belief is well-founded.

- There is no requirement that a prior inconsistent statement be reduced to writing in order to be used for impeachment.
  - *Kimble v. State*, 537 So. 2d 1094 (Fla. 2d DCA 1989).
  - "The prior inconsistent statement may be oral and unsworn and may be drawn out on cross-examination of the witness himself and, if on cross-examination the witness denies, or fails to remember making such a statement, the fact that the statement was made may be proven by another witness." *Williams v. State*, 472 So. 2d 1350 (Fla. 2d DCA 1985).
  - The court did not err in granting the State's motion in limine excluding evidence that the defendant had filed two petitions for domestic violence injunctions against the victim after the criminal incident. *Nelson v. State*, 704 So. 2d 752 (Fla. 5th DCA 1998).
  - By testifying that he had never been violent with the victim or anyone else, the defendant opened the door to the admission of impeachment evidence that the defendant had engaged in acts of domestic violence against another girlfriend. *Simmons v. State*, 790 So. 2d 1177 (Fla. 3d DCA 2001).
  - The defendant alleged, inter alia, that the trial court erred by allowing the State to elicit testimony regarding alleged prior acts of violence committed by the defendant. The court held that the trial court did not err in allowing the cross examination of defense witnesses on other crimes evidence as the evidence was admissible to explain and modify direct testimony, was relevant and probative, and its probative value was not outweighed by the prejudicial effect. *Butler v. State*, 842 So. 817 (Fla. 2003).
  - *Mills v. State*, 816 So. 2d 170 (Fla. 3d DCA 2002). The respondent appealed from a judgment of conviction for aggravated battery. The Third District Court of Appeal affirmed the lower court's decision concluding that the domestic violence final injunction and the arrest warrant issued, based upon alleged violations of the injunction, were admissible under § 90.402 and not Williams' rule of evidence. The court held that evidence of uncharged crimes, which are inseparable from the crime charged, is not Williams' rule of evidence and is admissible if it is a relevant and inseparable part of the act, which is in issue. "It is necessary to admit the evidence to adequately describe the deed."

*Coolen v. State*, 696 So. 2d 738, 742-43 (Fla. 1997), (quoting *Griffin v. State*, 639 So. 2d 966, 968 (Fla. 1994)).

- The First District Court of Appeal affirmed the trial court's conviction of aggravated battery with a deadly weapon and held evidence of prior convictions was admissible pursuant to § 90.806(1) for the purpose of impeaching statements allegedly made by the defendant at the time of the incident and offered by the wife through her testimony, and the court found that the statement made by the wife was "exculpatory hearsay" offered for the truth of the matter. *Werley v. State*, 814 So. 2d 1159 (Fla. 1st DCA 2002).

- The trial court erred in its failure to consider a police report submitted by the respondent documenting a domestic incident between respondent and petitioner which characterized the respondent as the victim of an aggravated assault perpetrated by petitioner's brother and contradicted petitioner's account during the hearing that the respondent pulled a gun on her. The trial court could have admitted the report into evidence by virtue of the respondent's failure to object, and the report was admissible either as party admission or for impeachment purposes, as it was inconsistent with petitioner's testimony and petitioner's omission in prior statement was material. *Devalon v. Sutton*, 344 So. 3d 30 (Fla. 4th DCA 2022).

**Statements from Radio Dispatch: Non-hearsay**

- The police may testify that they arrived on the scene because of a statement made to them. *Harris v. State*, 544 So. 2d 322 (Fla. 4th DCA 1989) (*en banc*), *affirmed in*: *Conley v. State*, 620 So. 2d 180 (Fla. 1993).

  - HOWEVER: The contents of the statement are inadmissible especially where they are accusatory.

    - The inherently prejudicial effect of admitting into evidence an out-of-court statement relating accusatory information only to establish the logical sequence of events outweighs the probative value of such evidence.

    - *Conley v. State*, 620 So. 2d 180 (Fla. 1993). Police dispatch is hearsay.

      - *State v. Baird*, 572 So. 2d 904 (Fla. 1990).

      - *Harris v. State*, *supra*, expressly receding from: *Freemen v. State*, 494 So. 2d 270 (Fla. 4th DCA 1986).

## L. EXCULPATORY EVIDENCE (BRADY VIOLATION)

**The State Cannot Suppress Material Evidence**

- "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment. . ." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See also *White v. State*, 664 So. 2d 242 (Fla. 1995).

- *Material Evidence* means: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

    - *U.S. v. Bagley*, 473 U.S. 667, 682 (1995).

    - *Kyles v. Whitley*, 514 U.S. 419 (1995).

- In order to establish a *Brady* violation, the defendant must prove that the State possessed evidence favorable to the defense, that the defendant did not have the evidence, nor could have obtained it through the exercise of reasonable diligence, that the State suppressed the evidence, and that a reasonable probability exists that had the evidence been disclosed, the outcome would have been different. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995), *Hegwood v. State*, 575 So. 2d 170,172 (Fla. 1991). See also *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995) (Here, the defendant failed to establish such a violation where the State made its entire file available to the defense).

    - **TEST**: The test "is whether there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990), quoting, *U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

**Searches: Exigent Circumstances which Could Justify Entry of Home**

- An officer's belief that a potential emergency was justified and their entry onto the defendant's porch was proper after a 911 hang-up call. *People v. Greene*, 289 Ill.App.3d 796, 682 N.E. 2d 354 (Ill. App.2d Dist. 1997).

- Where the victim, who had visible signs of injury, answered the door upset and crying and told police that the suspect was not there, the police were justified in making a warrantless entry of home for the safety of the victim. *State v. Gilbert*, 942 P.2d 660 (Kan. Ct.App. 1997).

- Law enforcement officials may conduct a limited, warrantless search of a private residence in response to an emergency situation reported by an anonymous 911 caller, where exigent circumstances (particularly if there is a danger to human life) demand an immediate response; any evidence in plain view is properly seized. *U.S. v. Holloway*, 290 F.3d 1331 (11th Cir. May 10, 2002).

- But see *Espiet v. State*, 797 So. 2d 598 (Fla. 5th DCA 2001). The courts generally agree that a law enforcement officer may not make a warrantless entry into a person's home to arrest the person for a misdemeanor offense. The provisions of § 901.15(7), which allow a law enforcement officer to arrest a person for an act of domestic violence without a warrant, do not permit the forcible entry into the person's home to effectuate the arrest based on a misdemeanor offense. The decision of the trial court was reversed and remanded.

**Photographs**

- To be admissible, photographs must be a fair and accurate depiction of that which it purports to be:
  - Computer generated animation. *Pierce v. State*, 718 So. 2d 806 (Fla. 4th DCA 1997).
  - Videotape admission. *Paramore v. State*, 229 So. 2d 855 (Fla. 1969), *vacated as to sentence only*, 408 U.S. 935 (1972); *Bryant v. State*, 810 So. 2d 532 (Fla. 1st DCA 2002).
  - Motion picture. *Grant v. State*, 171 So. 2d 361 (Fla. 1965), *cert. denied*, 384 U.S. 1014 (1966).
- Two methods of authenticating photographic evidence. *Dolan v. State*, 743 So. 2d 544 (Fla. 4th DCA 1999) (computer enhanced process).
  - First, the "pictorial testimony" method requires the testimony of a witness to establish that, based upon personal knowledge, the photographs fairly and accurately reflect the event or scene.
  - Second, the "silent witness" method provides that the evidence may be admitted upon proof of the reliability of the process which produced the tape or photo.
- The trial court's admission of autopsy photographs was held to be in the sound discretion of the trial judge in all of the following cases:
  - *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997).
  - *Olivera v. State*, 719 So. 2d 341 (Fla. 3d DCA 1998).
  - The fact that photographs were taken at a medical examiner's office rather than at the scene of the crime did not affect their admissibility. *Maret v. State*, 605 So. 2d 949 (Fla. 3d DCA 1992).
  - Photograph of post evisceration view of empty chest cavity. *Russell v. State*, 454 So. 2d 778 (Fla. 4th DCA 1984).

- Morgue photographs were admissible even though the manner of death was not in dispute; however, repetitious photographs should be excluded. *Mordenti v. State*, 630 So. 2d 1080 (Fla. 1994).

- The following cases held that photographs which corroborated testimony were properly admitted.

  - Photographs of victim's charred remains. *Jackson v. State*, 545 So. 2d 260 (Fla. 1989).

  - Color photographs of homicide victim's skeletal remains. *Brumbley v. State*, 453 So. 2d 381 (Fla. 1984).

  - Entry and exit gunshot wounds. *Edwards v. State*, 414 So. 2d 1174 (Fla. 5th DCA 1982).

  - Color photograph of the deceased victim's face in the early state of decomposition. *Carvajal v. State*, 470 So. 2d 73 (Fla. 3d DCA 1985).

  - Notwithstanding the defendant's offer to stipulate to murder, position of body, etc., photographs were relevant in that they corroborated testimony of certain witnesses. *Zamora v. State*, 361 So. 2d 776 (Fla. 3d DCA 1978).

- Photographs which assisted the medical examiner in explaining wounds found on murder victim are admissible.

  - Held that the trial court did not err in admitting 12" x 15" black-and-white glossy photographs of murder victim lying dead on the floor of the murder scene, taken within one hour of the commission of the crime, though bloodstain appeared, where the photograph accurately portrayed the setting and served to illustrate or explain the testimony of the witnesses. *Pressley v. State*, 261 So. 2d 522 (Fla. 3d DCA 1972).

- The test for admissibility of photographs is relevancy rather than necessity. (The fact that other witnesses can or will testify to that which is depicted in the various photographs does not make those photographs inadmissible.)

    - *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996).

    - *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990).

  - The Court rejected the defense's argument that, since the cause and nature of death had been clearly established, there were no circumstances that necessitated the introduction of the seven photographs of the victim's charred remains. *Affirmed* on this point in Jones v. State, 648 So. 2d 669, 679 (Fla. 1994).

- Photographs, although "extremely gruesome", were not "so shocking in nature" as to outweigh their relevancy. *Pope v. State*, *supra*; *Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997). Six slides of the victim's body in the alley, two slides which showed the stick protruding from the victim's vagina, and several slides of the body in the morgue were relevant.

- The Court reaffirmed its position that gruesome and inflammatory photographs are admissible if relevant to any issues required to be proven in a case. Relevancy is to be determined in the normal manner without regard to any special characterization of the proffered evidence. *Bush v. State*, 461 So. 2d 936, 941 (Fla. 1984).

- Admission of photographs appears to be reversible error only when the photographs have little or no relevance or the photographs are so shocking in nature as to outweigh their relevance.

  - The admission, during the penalty phase of a murder trial, of a 2' x 3' blowup showing in detail the bloody and disfigured head and upper torso of the victim was reversible error. *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999).

  - Photographs of victim's body, which had been ravaged by dogs and was in a severely decomposed condition, should not have been admitted. *Czuback v. State*, 570 So. 2d 925 (Fla. 1990).

  - Admission of a photograph of the victim's blood-splattered body, which depicted the results of emergency procedures performed after the stabbing, was an error. *Rosa v. State*, 412 So. 2d 891 (Fla. 3d DCA 1982).

  - Polygraph exam results were incorrectly admitted at a contempt hearing for the violation of domestic violence injunction. *Schmidt v. Hunter*, 788 So. 2d 322 (Fla. 2d DCA 2001).

    - Evidence of the respondent's character and previous criminal convictions was admitted,

      - The respondent's arrest for violating an earlier injunction not involving the petitioner, and

      - A letter that the respondent wrote to an old girlfriend apologizing for an incident that led to charges being filed.

## M. WILLIAMS RULE/SIMILAR FACT EVIDENCE

**Prior Bad Acts, Wrongs, or Crimes Committed by the Accused are Admissible Into Evidence if They are Relevant to Prove Some Material Fact In Issue.***

- See *Williams v. State*, 110 So. 2d 654 (Fla. 1959); § 90.404(2).

- **NOTE:** § 90.404(2)(b)(1) provides an exception to the use of Williams Rule Evidence being admissible only if the evidence is relevant and used to prove a material fact at issue. Pursuant § 90.404(2)(b)(1):
  - "In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant."
  - This distinction can only be applied in child molestation and sexual offense cases. *See* Florida Standard Jury Instruction in Criminal Cases 2.4
    - "To be given at the time the evidence is admitted, if requested.
    - The evidence you are about to receive concerning other crimes, wrongs, or acts allegedly committed by the defendant will be considered by you for the limited purpose of [proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident]] [(other relevant factor)] [corroborating the testimony of (victim)]* and you shall consider it only as it relates to [that] [those] issue[s].
    - However, the defendant is not on trial for a crime, wrong, or act that is not included in the [information] [indictment].
    - Editors' Notes
    - COMMENTS
    - **Evidence that is admitted in order to corroborate the testimony of a victim is allowed only in child molestation and sexual offense cases.** *See* section 90.404(2)(b), Fla. Stat., effective July 1, 2001, in child molestation cases. See 90.404(2)(c) Fla. Stat., effective July 1, 2011, for cases involving sexual offenses." FL ST CR JURY INST 2.4 (emphasis added).

- **To Prove Lack of Consent**:
  - Testimony concerning the abusive nature of the defendant's relationship with the victim, including the defendant's prior "bad acts," was relevant to prove the sexual battery victim's lack of consent and to explain why the victim did not immediately contact the police. *Boroughs v. State*, 684 So. 2d 274 (Fla. 5th DCA 1996).

- **To Prove Premeditation/Motive**:
  - Evidence was that the defendant threatened the ex-wife (victim) on a prior occasion. "[W]e hold that the prior act of aggressive conduct and the

accompanying verbal statements were admissible because they were relevant to the issue of intent which is an essential element of premeditated murder." *Goldstein v. State*, 447 So. 2d 903 (Fla. 4th DCA 1984).

- The defendant argued inter alia that the trial court erred in allowing the admission of testimony establishing that the defendant's wife prior to the shooting had obtained an order restraining the defendant from bothering, threatening, or harming her. "Before any testimony was given regarding the restraining order, the wife testified without objection concerning an occasion when her husband hit her." "The evidence was relevant to the issue of premeditation. One of defendant's defenses at trial was lack of premeditation." *Hyer v. State*, 462 So. 2d 488 (Fla. 2d DCA 1984).

  - See also *King v. State*, 436 So. 2d 50 (Fla. 1983). Evidence that the defendant severely beat the victim twenty-three days before killing her was relevant to premeditation. *Wooten v. State*, 398 So. 2d 963 (Fla. 1st DCA 1981). Evidence that the defendant previously beat or physically mistreated the one-year-old murder victim or the victim's two-year-old sister was properly admissible.

- Although no facts were given, the court held that evidence of prior incidents of domestic violence by the defendant against the victim was properly admitted in order to prove motive, intent, and premeditation in an attempted first-degree murder/armed burglary trial. *Burgal v. State*, 740 So. 2d 82 (Fla. 3d DCA 1999).

  - But see *Robertson v. State*, 829 So. 2d 901 (Fla. 2002). Landmark collateral crimes domestic violence case; it is reversible error "as a matter of law" to allow evidence "a prior threat six years earlier against a different victim and involving a different weapon" as *Williams* rule evidence to prove the absence of mistake or accident. The Supreme Court noted it was "unable to find...any cases in Florida where a prior threat against a different victim was admitted under the Williams rule to prove the absence of mistake or accident of the present offense." The court did cite with apparent approval cases allowing "prior crimes against the same victim as the charged offense."

- **To Prove Motive, Intent, and the Absence of Mistake:**

  - The testimony regarding a prior incident was admissible. The defendant appealed his conviction and sentence for second-degree murder with a deadly weapon. He argued that the trial court erred in admitting witness testimony regarding a collateral, uncharged crime because, during the trial, the victim's best friend testified about a possible domestic violence incident that had occurred between the victim and the defendant. The trial judge had given the jury specific directions on how to interpret the evidence based upon *Williams v. State*, 110 So. 2d 654 (Fla.1959), and the appellate court found that the trial

court did not abuse its discretion and that the testimony of prior incidents was admissible to prove motive, intent, and the absence of mistake or accident based upon § 90.404(2)(a). The court affirmed the conviction and sentence. *Aguiluz v. State*, 43 So. 3d 800 (Fla. 3d DCA 2010).

**Prior Bad Acts Admitted Once Defense "Opened the Door"**

- The Fourth District Court of Appeal reversed the trial court's judgment convicting the defendant of the second-degree murder of his girlfriend. Prior to the trial, the court granted the defendant's motion in limine to preclude evidence regarding the defendant's prior assault on his girlfriend. At trial, the court allowed the State to introduce evidence of the assault on the theory that the defense had "opened the door" by presenting evidence of a 10-year-old domestic violence incident involving the girlfriend's former husband. The District Court of Appeal reversed and held that in order for prior bad acts to be admitted under the "opening the door" argument, the defense must first present misleading testimony or a factual assertion which the State would have a right to correct. *Fiddemon v. State*, 858 So. 2d 1100 (Fla. 4th DCA 2003).

    - **Note**: The court did go on to discuss in a footnote that evidence of prior violence or assaults may be relevant to establish motive or intent.

- Proper and Improper use of Prior Bad Acts in Trial for Resisting Arrest

    - While responding to a domestic violence call, the defendant struggled with the officers as they intended to arrest him. The domestic battery charge was not filed. During his trial for resisting arrest with violence, the officers testified in detail about the domestic violence offense. This was error, and the defendant was entitled to a new trial. *Burgos v. State*, 865 So. 2d 622 (Fla. 3d DCA 2004).

    - It was proper to enter an injunction for protection against domestic violence into evidence on resisting with violence charge where the defendant/respondent battered law enforcement officer when trying to serve injunction. *Logan v. State*, 705 So. 2d 140 (Fla. 3d DCA 1998

**Pre-requisites to Introduce Similar Fact Evidence**

- There must be sufficient similarity between the crime charged and the evidence introduced. The evidence introduced must be relevant to a fact in issue, and the evidence must not be relevant solely to prove bad character. *Crowell v. State*, 528 So. 2d 535 (Fla. 5th DCA 1988).

**Evidence is Inadmissible if Solely Relevant to Prove Bad Character or Propensity to Commit the Crime.**

- It was improper to admit prior bad act evidence where the purpose was to show that, because of propensities, the defendant very likely did the acts for which he was charged. *Paquette v. State*, 528 So. 2d 995 (Fla. 5th DCA 1988).

- The Fifth District Court of Appeal reversed the lower court's decision to enter a final injunction for repeat violence against the respondent on the grounds that the court erred in admitting certain evidence regarding the respondent's character and previous criminal convictions. At the original hearing, the court allowed the petitioner's attorney to "1) show that LaMarr had been arrested for violating an earlier injunction not involving Lang; 2) introduce a letter that LaMarr wrote to an old girlfriend apologizing for an incident that apparently leads to charges being filed against him; 3) question LaMarr regarding prior injunctions filed against him by other people." The Fifth District Court of Appeal held that this was improper for the lower court to admit this evidence pursuant to the *Williams* rule regarding collateral evidence. Relying on *Pastor v. State*, 792 So. 2d 627 (Fla. 4th DCA 2001), the court commented that collateral crimes evidence is not admissible when its relevance goes only to prove a respondent's propensity. *LaMarr v. Lang*, 796 So. 2d 1208 (Fla. 5th DCA 2001).

    - See also *Rodriguez v. State*, 842 So. 2d 1053 (Fla. 3d DCA 2003). The trial court improperly permitted the victim's testimony regarding a restraining order she obtained subsequent to an argument she and the defendant had that resulted in the defendant's charge of aggravated assault with a deadly weapon against the victim. The Third District Court of Appeal held that the testimony should not have been admitted as it bolstered the victim's credibility.

**Collateral Crime Evidence**

- Evidence of a Collateral Crime May be Admitted to Establish the Context Out of Which the Criminal Conduct Arose:

    - The collateral offenses must not only be strikingly similar, but they must also share some unique characteristics or combination of characteristics which sets them apart from other offenses. See *Crowell v. State*, 528 So. 2d 535 (Fla. 5th DCA 1988).

    - The evidence must be relevant to a material fact in issue. See *Crowell v. State*, *supra*.

- ***Reverse Williams Rule***: When the State seeks to introduce Williams rule evidence, the defendant should have the same right to question the alleged collateral victim about the circumstances surrounding the collateral crime as he would have in questioning the alleged victim in a crime for which he stands accused. *Gutierrez v. State*, 705 So. 2d 660 (Fla. 2d DCA 1998).

- Inseparable Crime Evidence

- Inseparable crime evidence or inextricably intertwined evidence is admissible because it is relevant and necessary to adequately describe the events leading up to the crime and/or the entire context out of which the criminal conduct arose or occurred.

  - *Smith v. State*, 365 So. 2d 704, 707 (Fla. 1978).

  - *Osborne v. State*, 743 So. 2d 602 (Fla. 4th DCA 1999).

- Evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is admissible under § 90.402 because "it is relevant and inseparable part of the act which is in issue." See *Osborne v. State*, 743 So. 2d 602 (Fla. 4th DCA 1999); *Coolen v. State*, 696 So. 2d 738 (Fla. 1997).

- Inseparable crime evidence explains or throws light upon the crime being prosecuted. "Under this view, inseparable crime evidence is admissible under § 90.402 because it is relevant rather than being admitted under 90.402(2)(a). There is no need to comply with the ten (10) day notice provision." *Tumulty v. State*, 489 So. 2d 150 (Fla. 4th DCA 1986).

## WHAT IS THE DIFFERENCE BETWEEN ANGER MANAGEMENT AND A CERTIFIED BATTERER INTERVENTION PROGRAM (BIP)?

Experts in the field of domestic violence have long considered BIPs to be best equipped to handle the needs of batterers. Anger management programs are sometimes utilized in place of BIP. While excellent at what they are designed to do, anger management programs do not generally meet the needs of most batterers. The following chart was provided by the Department of Children and Families (DCF) as a helpful reminder of the differences between anger management and BIP.

| | Anger Management | Certified Batterer Intervention |
|---|---|---|
| **Are programs state certified?** | No. | Yes. Certification is granted by the Florida Department of Children and Families, Office of Domestic Violence. |
| **Who is served by the program?** | Perpetrators of stranger or non-intimate violence | Specifically designed to work with perpetrators of intimate partner violence |
| **How long are the programs?** | Usually 6-20 sessions, with an average program lasting 10 sessions | Mandated by Florida Statute at 29 weeks which includes a minimum of 24 sessions, assessment, intake/enrollment and orientation |
| **Do programs contact victims?** | No. | Yes. By letter when the batterer enrolls and is discharged from the program. If the offender makes known threats toward the victim, the program will contact the victim and the proper authorities. The victim is provided with local referral information. |
| **Are programs monitored by a state agency?** | No. | Yes. By the Department of Children and Families, Office of Domestic Violence |
| **Are programs linked with a battered women's agency?** | No. | Not directly. Letters to victims contain contact information for local certified domestic violence centers. Certified batterers programs are encouraged to establish relationships with their local certified centers, and many have fostered that relationship. |

| | | |
|---|---|---|
| **Do programs assess batterers for lethality?** | No. | Yes. While not a prediction model, certified assessors conduct an assessment which includes questions which reveal how potentially lethal a batterer **may** be – such as if he owns a gun, has a history or intimate partner violence or has been convicted of other violent offenses. |
| **What is the emphasis of the intervention?** | Violence is seen as a momentary outburst of anger. | Physical violence is seen as one of many forms of abusive behaviors chosen by batterers to control their intimate partners. Other behaviors include physical, sexual, verbal, emotional, and economic abuse. Batterer intervention models hold batterers accountable for the violent and abusive choices they make. They teach batterers to recognize how their abuse affects their partners and children and to practice alternatives to abusive behaviors. |
| **Are group facilitators trained about domestic violence?** | Subject to agency discretion | Yes. State standards require that facilitators receive an initial 21 hours of state approved basic facilitator training, 8 hours of substance abuse as it relates to domestic violence, 4 hours of attendance at domestic violence court hearings, 40 hours of victim centered training and 84 hours of co-facilitating with a certified program (may not be completed in less than six months). Twelve CEU's in DV/batterer intervention are required annually thereafter. |
| **How would I address grievances with this type of program?** | Talk to the director of the program. | First, talk to the director of the program and, second, notify the DCF Office of Domestic Violence, (850) 921-2168. |

## ABUSE LATER IN LIFE (JUNE 2023)

"How beautifully leaves grow old. How full of light and color are their last days." (John Burroughs, American Naturalist and Author: 1837-1921, *Under the Maples*, Houghton Mifflin Co., 1921.)

### FACTS AND STATISTICS

Statistics underscore the need to understand abuse encountered later in life:

- Women comprise more nearly half (54.93%) of the adult population 65 and older.[1]
- It is estimated that roughly two-thirds of elder abuse victims are women.[2]
- The U.S. population is projected to increase from 339.6 million in 2023 to 404.4 million by 2060. By 2030, one in five Americans is projected to be 65 and over, and by 2060, the estimate increases to nearly one in four.[3]
- According to census projections, the proportion of Florida's population 60 and older is growing more rapidly than other components of the population, and Florida is one of the four states with the highest percentage of populations 65 and older.[4]
- It is estimated that one in ten of older adults have been victims of elder abuse in the past year.[5] Of these, more than 65% elder abuse victims are women.[6]
- It is not uncommon for an elder to experience more than one type of mistreatment at the same time.
- It is estimated that, nationwide, almost 90% of all elder abuse occurs in the community.[7] Abusers are both women and men. In almost 60% of elder abuse and neglect incidents, the perpetrator is a family member. Two thirds of perpetrators are adult children or spouses.[8]
- Elders who experienced even modest abuse have a 300% higher risk of death when compared to those who had not been abused.[9]
- The trauma of elder abuse may result in health issues such as a deterioration in health, hospitalization and increased mortality, clinical issues such as depression and suicide, social issues such as disrupted relationships, and financial loss, all leading to diminished independence and quality of life.[10]
- Historically, elders have not been perceived as victims of sexual assault, even by some judges; thus, it is often overlooked.[11]
- Older victims of sexual abuse were violated most often by spouses or intimate partners.
- Domestic violence by an intimate partner may be "domestic violence grown old" or may be "late onset of domestic violence." "So, the goal is not to answer, 'Is this domestic violence?', or, 'Is this elder abuse?' Instead, efforts should maximize the capacity of both systems by partnering to meet older victims' unique needs."[12]

- Abuse against elders is hugely under-reported; it is estimated that for every case that is reported, 24 are not.[13]
- Some jurisdictions have court programs specifically designed for seniors.[14]
- Risk factors among caregivers include depression, an inability to cope with stress, a lack of support from other possible caregivers, and substance abuse.[15]

**SYMPTOMS OF ABUSE[16]**

Physical Signs of Abuse

- Unexplained signs of injury, such as bruises, welts, or scars, especially if they appear symmetrically on two sides of the body
- Broken bones, sprains, or dislocations
- A report of drug overdose or an apparent failure to take medication regularly (a prescription has more remaining than it should)
- Broken eyeglasses or frames
- Signs of being restrained, such as rope marks on wrists
- Caregiver's refusal to allow you to see the elder alone

Signs of Self-Neglect

- Unusual weight loss, malnutrition, dehydration
- Untreated physical problems, such as bed sores
- Unsanitary living conditions: dirt, bugs, soiled bedding and clothes
- Being left dirty or unbathed
- Unsuitable clothing or covering for the weather
- Unsafe living conditions (no heat or running water; faulty electrical wiring; other fire hazards)
- Desertion of the elder at a public place

Emotional Signs of Abuse

- Threatening, belittling, or controlling caregiver behavior

- Behavior from the elder that mimics dementia, such as rocking, sucking, or mumbling to themselves

Financial or Material Exploitation

- Significant withdrawals from the elder's accounts
- Sudden changes in the elder's financial condition
- Items or cash missing from the senior's household
- Suspicious changes in wills, power of attorney, titles, and policies
- Addition of names to the senior's signature card
- Financial activity the senior couldn't have undertaken, such as an ATM withdrawal when the account holder is bedridden
- Use of an ATM without the elder's consent
- Unnecessary services, goods, or subscriptions

Sexual Abuse

- Nonconsensual sexual contact of any kind, including assault or battery, rape, sodomy, coerced nudity, or sexually explicit photographing
- Sexual abuse may be evidenced by:
    - Bruises around breasts or genitals
    - Unexplained vaginal or anal bleeding
    - Torn, stained, or bloody underclothing

**FLORIDA LAW (PLEASE ALSO REFER TO THE ELDER ABUSE BENCHCARD)**

Elder abuse is a crime in Florida. Section 825.102(1) defines elder abuse as:

- An intentional infliction of physical or psychological injury upon an elderly person or disabled adult;
- An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult; or
- Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult.

- If a domestic violence injunction petition is used in an elder abuse case, the petitioner and the respondent must be family or household members, defined in § 741.28(3) as:

    - "Spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who have a child in common regardless of whether or not they have been married."

    - "With the exception of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit."

<u>Exploitation of an elder is a crime.</u>

- Section 825.103(1) defines exploitation as:

    - "Knowingly obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult…"

- The definition also includes breach of a fiduciary duty to an elderly person.

- Pursuant to § 825.103(2), an injunction for protection against exploitation of a vulnerable adult may be filed by:

    - A vulnerable adult in imminent danger of being exploited;

    - The guardian of a vulnerable adult in imminent danger of being exploited;

    - A person or organization acting on behalf of the vulnerable adult with the consent of the vulnerable adult or his or her guardian; or

    - A person who simultaneously files a petition for determination of incapacity and appointment of an emergency temporary guardian.

- A sworn petition for an injunction for protection of a vulnerable adult must follow the format of § 825.1035(3)(a).

- The court must schedule a hearing on a filed petition at the earliest possible date. § 825.1035(3)(a).

- An order denying a petition for an ex parte injunction shall note the legal grounds for denial. If the only ground for denial is the failure to demonstrate an appearance of an immediate and present danger of exploitation, the court must set a full hearing at the earliest possible date. § 825.1035(5)(c).

- If the conditions in § 825.1035(5)(a)1 are met, the court may issue an ex parte temporary injunction for a fixed period of time not to exceed 15 days unless good cause is shown to extend the injunction. The ex parte temporary injunction may be extended one time for up to an additional 30 days. A full hearing must be set before the injunction ceases to be effective. § 825.1035(5)(d).

- An ex parte injunction may grant relief pursuant to § 825.1035(5)(a)2.

- Upon notice and hearing, the court may issue a permanent injunction with the relief it deems appropriate pursuant to § 825.1035(8).

- A petitioner, respondent, or vulnerable adult may move to modify or dissolve the injunction at any time. No specific allegations are required. The terms of the injunction remain in effect until modified or dissolved. § 825.1035(8)(c) and (13).

- The court may enforce a violation by the respondent of the injunction through a civil or criminal contempt proceeding, and the state attorney may prosecute it as a criminal violation under § 825.1036.

**ISSUES AND SOLUTIONS**

- Apart from the age difference of the petitioners, many elder abuse cases are similar to other domestic violence cases; however, additional issues arise when either or both the petitioner and the respondent are elderly.

- Options for shelter and the provision of ongoing care may be difficult for the petitioner if the respondent is the primary caregiver. As for the respondent, there may be fewer possible alternative living arrangements outside the shared home, and the respondent might also be in need of care.

- Although most batterers' intervention programs (BIPs) are focused on intimate partner or spousal violence, a batterers' intervention program is preferable to an anger management program in an elder abuse case for the same reason as in spousal/intimate partner domestic violence situations.

- Domestic violence has little or nothing to do with not being able to control one's temper; it is almost always a purposeful pattern of behavior designed to exercise power and control over another person. This holds true in elder abuse cases as well as other domestic violence cases.

- Although the majority of perpetrators of domestic violence are men, women can be perpetrators as well. There are very few BIPs designed for women. The lack of BIPs designed for women should be addressed.

- Access to the courts for the elderly is an important concern. As noted above, some states have court programs specifically designed for seniors.[17]

## CONCLUSION

- As the number of aging citizens in Florida increases, the need for Florida courts to assist in proceedings with violence perpetrated against those citizens in domestic settings and institutional settings will increase as well.

- The severity of personal losses associated with elder abuse coupled with data suggesting that victims of elder abuse have a shorter life expectancy underscore the importance of providing assistance to this fragile segment of the population.

- Injunctions for protection against domestic violence and judicial centers designed to specifically address elder abuse are important; however, much more remains to be done.

## ADDITIONAL RESOURCES

- Florida Department of Elder Affairs

- Elder Update

- Florida Courts' Information for Elders

- National Adult Protective Services Association

- National Clearinghouse of Abuse in Later Life

- National Committee for the Prevention of Elder Abuse

  Webinar: "Will you still need me, will you still feed me when I'm 64?" Presented by the Honorable Michelle Morley of the Fifth Circuit, February 29, 2019.

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14 http://www.alameda.courts.ca.gov/Pages.aspx/Elder-Dependant-Adult-Access-Program

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## PERSONS WITH DISABILITIES AND THE COURTS (JUNE 2023)

There are more than 64 million adults living with a disability in the Unites States.[1] That is equivalent to roughly 26% of the population.[2] This means that more than a quarter of the adults in this country live with at least one disability that impacts their mobility (11.1%), cognition (10.9%), hearing (5.7%), vision (4.9%), ability to live independently (6.4%), and other aspects of daily life.[3] Nevertheless, persons with disabilities remain marginalized, hidden from society's view, and largely missing from the public consciousness.

People with disabilities face many physical and social barriers as they interact with society. This includes their interactions with the judicial system. Often, when persons with disabilities access the court system, court staff, judges, and attorneys make assumptions about what these users of the legal system need rather than allowing the person with a disability to express what he or she needs. This approach can significantly limit the ability of a person with a disability to access the court system and to obtain relief.

The increased vulnerability of persons with disabilities to violence creates an urgent need for judges and court staff to ensure access. In general, persons with disabilities are at greater risk for experiencing severe violence and multiple incidents of abuse.[4] The risk of violence for women with disabilities is 40% higher than women without disabilities.[5] Children who have disabilities are twice as likely to be physically or sexually abused.[6] And domestic violence victims who have a disability tend to be dependent on caregivers and often face additional barriers to reporting and seeking services including increased vulnerability to threats by their abusers if they report.[7]

Domestic violence involving victims with disabilities can present in the typical ways one commonly thinks about abuse, such as physical abuse, unwanted sexual contact, and verbal or psychological abuse. There are also specific ways that abuse can manifest in the lives of persons with disabilities. These can include withholding medication, harming a service animal, limiting communication or transportation options, and other abusive behavior that exploits the person's disability in order to maintain power and control over that person.

Court staff and judges play a key role in ensuring that persons with disabilities have equal access, are heard, and believed. The focus of this article is to discuss the requirements of courts in ensuring access and some best practices when interacting with people with disabilities in the justice system so that they, too, can "have their day in court" and receive the protection they need.

### THE REQUIREMENTS OF COURTS

Access to the courts is a fundamental Constitutional right. Yet, for persons with disabilities, the benefit of this right has been marked by obstacles and challenges. The Supreme Court noted in *Tennessee v. Lane* that "the unequal treatment of disabled persons in the administration of justice has a long history" and that "failure

to accommodate persons with disabilities will often have the same practical effect as outright exclusion." 541 U.S. 509, 531 (2004). In enacting the Americans with Disabilities Act in 1990, Congress noted that "[the ADA] reflects the nature of our society in attempting to ensure that each American can live his or her life to the fullest extent possible, free of discrimination or artificial barriers."[8]

In *Lane*, the Supreme Court held that the ADA applies to state and local courthouses. 541 U.S. at 534. Title II of the ADA applies to state and local governments, referred to as "public entities," and includes all programs, activities, and services provided or operated by State and local governments. 28 C.F.R. § 35. As such, the requirement for courts is to ensure that all participants with disabilities in the court system's programs and services have a full and equal opportunity to participate in the same manner as those who do not have disabilities. This applies to any court program or service, whether court-ordered or voluntary.

Who is protected?

- A person with a disability, defined as:
    - A physical or mental impairment that substantially limits one of more major life activities (sometimes referred to in the regulations as an "actual disability"), or
    - A record of a physical or mental impairment that substantially limited a major life activity, or
    - When a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor

What is required?

- If a benefit or service is offered to any person by the court, the same benefit or service must be offered to the person with a disability.
- If requested, reasonable and necessary accommodations must be made to allow the person with a disability to participate fully in a program or service offered by the court.
    - Accommodations requested must be reasonable and necessary. There are several factors to consider. For example, one factor that can be considered is whether the accommodation has a nexus or connection with the disability. Additionally, the accommodation must actually assist the person participating in the court program or service, must not fundamentally alter court programs or services, and cannot cause an undue financial or administrative burden.

- Requests for accommodations are not limited to hearings but apply to all court programs and services.
- Programs must be integrated unless a segregated program is necessary.
- If a service is being provided by an outside entity, that entity is responsible for providing the accommodation. However, the court could play a role in facilitating the accommodation.

**BEST PRACTICES FOR JUDGES AND COURT STAFF INTERACTING WITH A PERSON WITH A DISABILITY**

- **Be intentional about the language used.**
  - Judges and court staff should be aware of the language they use when interacting with a person with a disability because even the terms used can promote better access and experience of the court system. One important aspect of working with people with disabilities is the language that is used to refer to them or to identify them. There are two accepted approaches: the more common is person first language and a newer trend is identity first language.
    - Person first language is when a speaker identifies the person before their disability. This way, the individual is seen as a person rather than someone defined by his or her disability. A disability should not define a person; a disability is just one component of a whole person.
    - Examples:
      - A person with a disability ☑ / A disabled person ☒
      - A person who uses a wheelchair ☑ / A wheelchair-bound person ☒
      - A person who has muscular dystrophy ☑ / A person stricken with muscular dystrophy ☒
    - Identity first language is when a person considers that their disability is at the core of their identity and, therefore, the person cannot be separated from the disability. This is especially true in the Autistic community, the Blind community, and the Deaf community. Many people use identity first language as a way of celebrating the positive identity that is associated with disability culture. Identity first language promotes the idea that someone is not disabled by their unique condition. Rather, they are limited by the societal and physical barriers that they face on

a regular basis. It is not a commentary on the person's abilities but rather a commentary on how that person navigates the world around them.

- **Recognize that the person with a disability who appears in court is in the best position to indicate the nature of the accommodation that he or she needs.**
    - Ask the person with a disability what accommodations they need at all points in the process.
    - When attempting to identify an appropriate accommodation, you could ask the person with a disability what tools they have used in the past that have assisted them.
    - Even if it takes more time, recognize the communication method preferred by the person with a disability.
- **Be mindful that disabilities often involve a personal and potentially medical issue. As much as possible, limit discussion to the information needed to facilitate the full participation of the person with a disability, provide as much privacy as the circumstances will permit, and do not conduct the discussion in an adversarial manner.**
- **Avoid speaking directly to a caregiver or interpreter rather than the person with a disability who is appearing in court.**
    - This is particularly important considering that persons with disabilities tend to be more vulnerable to threats and manipulation to prevent them from reporting violence and caregivers can often be perpetrators of abuse.
- **Do not make assumptions.**
    - For example, many Deaf people do not fully understand written English. Documents may need to be interpreted using ASL, and complex terminology must be broken down.
    - Ensure that all communication is effectively understood by persons with hearing or other disabilities to the same extent as other participants in the court's programs and services.
- **Remember that a person with a disability may not have heard all of the instructions given or a colloquy. When his or her case is called, ensure that they are equally informed.**
- **Be patient and allow additional time as needed.**

- It might take a person with a disability more time to get things done or said.

- Courtrooms are beautifully designed with many aspects that are meant to create a sense of reverence, such as heavy doors, long corridors, podiums, and columns. While these design aspects evoke images of strength and dignity, they often complicate the experience of a person with a disability with sensory, manipulatory or locomotor impairment. This often results in the person needing more time to get from one place to another, needing assistance with locating a courtroom, and even assistance entering and exiting a courtroom.

- **There are some circumstances in which only the court can grant the accommodation, such as allowing a waiver of appearance or telephonic or virtual participation in a hearing.**

- **Understand the barriers that exist when a person with a disability tries to get help. Barriers to domestic violence services may discourage a domestic violence victim with disabilities from seeking help.**

**REFERENCES AND RESOURCES**

This article is based in part on a lunch and learn curriculum developed by the Office of Family Courts in conjunction with the Disability Independence Group, Inc., "People with Disabilities and the Courts", which is available on the Florida Courts website at https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Domestic-Violence/Lunch-and-Learn-Curricula.

The Office of Family Courts has additional resources available on its website, including:

- Autism Spectrum Disorder (ASD) in Family Courts – E-Training Module, available at https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/E-Learning-Training-Modules#asdfamcourts.
- ASD in Family Courts – Webinar, available at https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Domestic-Violence/Videos#ASD.

The U.S. Dept. of Justice has also developed an ADA Best Practices Tool Kit for State and Local Government. (https://archive.ada.gov/pcatoolkit/toolkitmain.htm)

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## THE FLORIDA DOMESTIC VIOLENCE COURT INFORMATION SYSTEM (JUNE 2023)

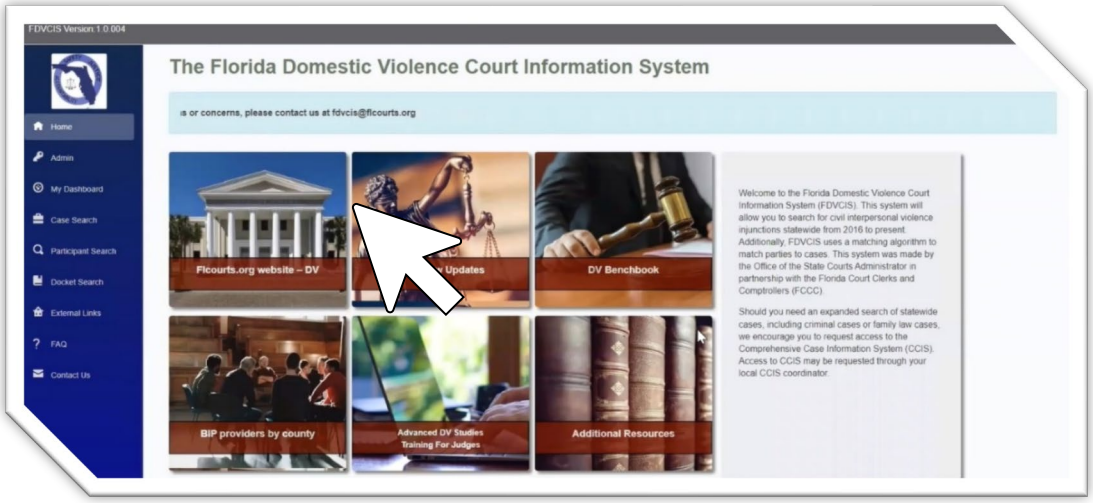
The Florida Domestic Violence Court Information System (FDVCIS) is a tool created by the Office of the State Courts Administrator's Office of Family Courts in partnership with the Florida Court Clerks and Comptrollers. It is designed to provide judges and court staff with easy access to useful information that will assist them in remaining up to date on important topics related to domestic violence and in presiding over and processing domestic violence injunction cases.

### WHO CAN ACCESS FDVCIS?

FDVCIS is only available to court staff and judges. If you would like more information about FDVCIS and to obtain access, please email vcsupport@flcourts.org.

### HOW WILL FDVCIS ASSIST ME IN STAYING UP TO DATE ON DOMESTIC VIOLENCE TOPICS?

The landing page of FDVCIS offers several options through which users can access helpful information relating to relevant law, training materials, best practices in domestic violence injunction cases, and advances in the identification and prevention of domestic violence.




When users connect to FDVCIS, they will see six resource tiles. Each one leads to a different source of information.

- The Florida Courts Website
    - This link will open the Florida courts domestic violence website in a new tab. This website contains explanations of the different injunction types and information about upcoming trainings, available webinars (most of which offer CLE credit), e-learning modules (which offer CLE and CJE credit), and other helpful resources.

- Caselaw Updates
    - This link will open the Florida courts case law updates website. Each month, the Office of the State Courts Administrator releases caselaw updates on topics such as the Baker and Marchman Acts, problem solving courts (including drug, mental health, and veterans courts), delinquency, dependency, dissolution of marriage, and interpersonal violence injunctions. Previous caselaw updates are also stored and available on this site.
- Domestic Violence Benchbook
    - Access to this Benchbook is available through FDVCIS.
- Advanced Studies for DV Judges
    - This is an 8-module training course that was created in partnership with the Florida State University Institute for Family Violence Studies. It covers topics such as the dynamics of domestic violence, the dynamics of perpetrators, domestic violence and trauma, domestic violence and animals, and secondary trauma and stress management for judges. CLE and CJE credits are available for this course.
- Additional Resources
    - This page contains an index of topics related to interpersonal violence, such as human trafficking, elder abuse, and firearms. The topical index will lead you to available resources curated by the Office of Family Courts.
- Batterers' Intervention Program (BIP) Providers by County
    - This link leads to a helpful list of BIP providers by circuit and county. A judge who plans to order a defendant, respondent, or parent to complete BIP can access information about providers across the state and provide that information in court so that participants can complete BIP in their home county.

**HOW WILL FDVCIS ASSIST ME IN PRESIDING OVER OR PROCESSING CASES?**

The initial vision of FDVCIS was to allow court staff to access information related to injunctions for protection statewide. However, since the project began, the scope has expanded to include additional case information related to dissolution of marriage, paternity, and dependency.

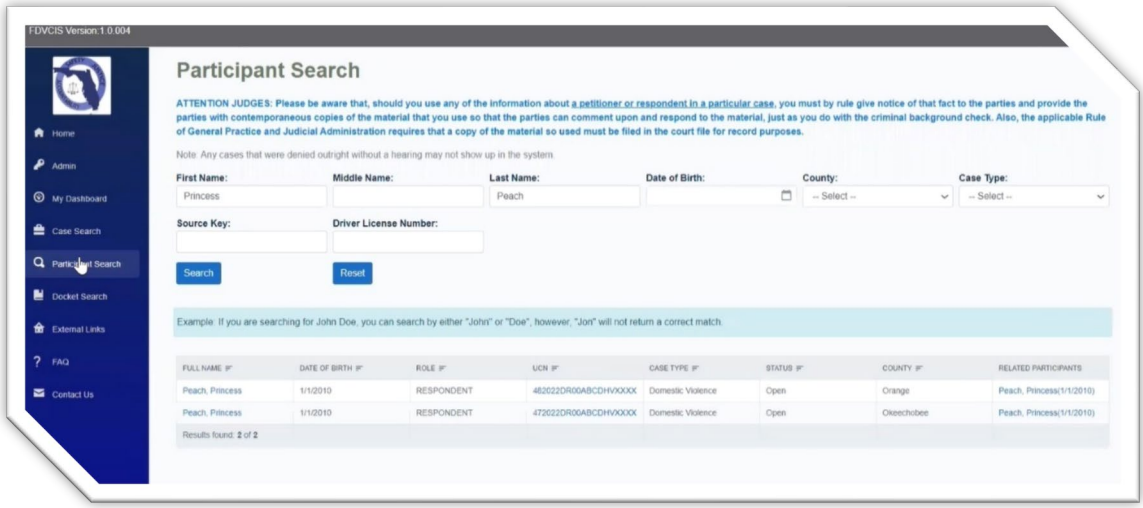
Data Source
The platform utilizes Comprehensive Case Information System (CCIS) data and is updated nightly.

Searches by Participant, Case Number, or Docket
Court staff can search for related cases using a participant's information. Additional filters allow court staff to refine results by including a date of birth, driver's license number, county, and/or case type. The platform utilizes a "fuzzy matching algorithm" as part of its search mechanism, which improves the quantity and quality of results because it accounts for the fact that related entries might not be exactly

the same. Slight differences in data entries are accounted for and results that are approximately similar are retrieved. Searches can also be conducted by case number and docket.

Search Results

Search results are based on the information available through CCIS and can include biographical information, addresses, and related cases with accompanying uniform case number, scheduled hearings, case details, and docket text. Court staff can even determine whether the participant has related cases in which firearms allegations have been noted.




My Dashboard

This section allows court staff to view the cases on their docket for a particular date. Through this feature, court staff can click on any scheduled case and determine whether any of the participants has a related case anywhere in the state.

External Links

The external links portion of the platform contains links to useful information. This includes:

- The Florida Clerk and Comptroller website – this information is helpful for obtaining contact information for a clerk's office in another county.
- The Florida Department of Corrections and a list of county jails and inmate inquiry sites – this information will assist in determining whether a participant is in custody.
- A list of certified domestic violence shelters – if a participant wants to take steps toward their independence, this link will allow court staff to find information about DV shelters by county.
- A list of law enforcement agencies – this will allow court staff to confirm the service of injunctions and notices of hearings in other counties.

- Promising Practices for Firearm, Ammunition, and/or Concealed Weapons Permit Surrender – this link has helpful forms, sample orders, and affidavits relating to firearms, ammunition, and/or concealed weapons permit surrender and return.
- The Florida Abuse Hotline and the Florida Adult Abuse Hotline contact information – this contact information can be used by judges and court staff for situations in which they are mandated to report an incident of abuse.
- Firearm Checklist for Judges – this will assist judges in ensuring that they have thoroughly considered firearms issues in a particular case.

**WHAT IF I HAVE QUESTIONS ABOUT FDVCIS OR HOW TO USE IT?**

Within FDVCIS, users can access a frequently asked questions section where the Office of Family Courts team has identified common questions and provided answers. There is also a user guide available for users to download and review. Finally, if a user still has questions, they are encouraged to contact fdvcis@flcourts.org.

**I AM READY TO CHECK FDVCIS OUT! HOW CAN I HAVE ACCESS?**

Please email vcsupport@flcourts.org!

## ANIMALS AND INTERPERSONAL VIOLENCE: WHEN THEY ARE IN DANGER AND HOW THEY CAN HELP DURING PROCEEDINGS (JUNE 2023)

### THE LINK BETWEEN ANIMAL ABUSE AND INTERPERSONAL VIOLENCE

There are two ways in which animals and interpersonal violence proceedings intersect: they are in danger in homes where domestic violence is present, yet they may help calm a witness or victim in certain proceedings. The link between animal abuse and family violence has been the subject of recent articles and studies; however, the belief that there is a correlation between how a person treats animals and how she or he treats people has a much longer history.[1] A common tactic of power and control used by domestic violence perpetrators is the use of threats to harm or kill family pets.[2] In fact, 48% of battered spouses or partners delay seeking help or leaving in abusive situations due to fear for their pets' safety.[3]

Animal cruelty is a clear sign of domestic violence; one study found that "women residing at domestic violence shelters were nearly 11 times more likely to report that their partner had hurt or killed pets than a comparison group of women who said they had not experienced intimate violence."[4] Both the American Humane Association and the Animal Legal Defense Fund point to a link between domestic violence and animal abuse. As the Animal Legal Defense Fund puts it: "People who hurt animals don't stop with animals."[5] The issue is so serious that, to date, thirty-five states, Washington D.C., and Puerto Rico have enacted legislation that includes provisions for pets in DV injunctions.[6] Florida is included in that number.

### APPLICABLE FLORIDA STATUTES

In Florida, a court must consider whether a respondent has intentionally injured or killed a family pet in determining whether the petitioner has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence. § 741.30(6)(b)4. The allegation that the respondent has "intentionally injured or killed a family pet" is found in paragraph 4e of Section III of the Petition for an Injunction for Protection Against Domestic Violence, Florida Supreme Court Approved Family Law Form 12.980(a).

In 2020, the Florida Legislature enacted legislation to award temporary custody of a family pet to petitioner when either a temporary or final injunction for protection against domestic violence is issued. Subsection § 741.30(5)(a)4 authorizes the court, when issuing an ex parte temporary injunction for protection against domestic violence, to award petitioner temporary exclusive, care, possession, or control of an animal that is owned, possessed, harbored, or kept by petitioner, respondent, or a minor child residing in petitioner's or respondent's residence or household. The court may order the respondent to temporarily have no contact with the animal and may enjoin the respondent from taking, transferring, concealing, harming, or otherwise disposing of the animal. The law does not apply to animals owned primarily for bona

fide agricultural purposes or to a service animal, defined in § 413.08, if the respondent is the service animal's handler. § 741.30(6)(a)(7).

In the same vein, § 741.30(6)(a)7 authorizes a court, when issuing a final injunction for protection against domestic violence, to award petitioner exclusive use, possession, or control of the animal and to enjoin the respondent from taking, transferring, encumbering, concealing, harming, or otherwise disposing of the animal. Again, the law does not apply to animals owned primarily for bona fide agricultural purposes or to a service animal, defined in § 413.08, if the respondent is the service animal's handler.

The Legislature has also recognized that animals can provide comfort to a victim or witness in testifying in certain proceedings. Section 92.55(5)(a) authorizes a court to allow a facility dog or therapy animal to be present when the court is taking the testimony of a minor victim or witness or a sexual offense victim or witness in any proceeding involving a sexual offense or child abuse, abandonment, or neglect.

A facility dog is one "that has been trained, evaluated, and certified as a facility dog pursuant to industry standards and provides unobtrusive emotional support to children and adults in facility settings", while a therapy animal is one which "has been trained, evaluated, and certified as a therapy animal pursuant to industry standards by an organization that certifies animals as appropriate to provide animal therapy." § 92.55(5)(b). Many circuits in Florida allow facility dogs and therapy animals to be a comforting presence for victims and witnesses as they testify in certain proceedings.

WHAT CAN THE COURT DO?

- **When reviewing the domestic violence petition for an injunction:**
    - The court should carefully examine any allegation in the petition of violence towards a family pet when considering whether the petitioner has a reasonable cause to believe he or she is in imminent danger of becoming a victim.
    - The court may temporarily award the petitioner exclusive care, possession, and control of an animal, may order the respondent to temporarily have no contact with the animal, and may enjoin the respondent from taking, concealing, harming, or disposing of the animal. The new law does not apply to animals owned primarily for bona fide agricultural purposes or to a service animal if the respondent is the service animal's handler. § 741.30(5)(a)4.
    - Cruelty to animals is also prohibited by law. A person who commits animal cruelty is can be found guilty of a first-degree misdemeanor. § 828.12(1). A person who commits aggravated animal cruelty can be found guilty of a third-degree felony. § 828.12(2).

- **At the domestic violence injunction hearing:**

The court can determine whether there has been any abuse directed toward a family pet by:

- Asking whether there is a family pet.
- Eliciting testimony from both parties about any animal abuse alleged in the petition.
- Detailing to the parties the factors the court may consider when determining whether the petitioner is in imminent danger of becoming a victim of domestic violence. The parties may be unaware that the court may consider animal abuse to a family pet in a domestic violence hearing.

- **If an injunction for protection against domestic violence is granted:**
  - The final order of injunction for protection against domestic violence lists several things that the court must include and leaves space for optional, additional provisions. (*See* forms 12.980(d)(1) and (d)(2))
  - The court may include in the 'No Contact' portion of the injunction a provision barring the respondent from interacting with the family pet if the family pet is in a place or with people not protected by the injunction.
  - If the respondent retains possession of the home, the court can authorize the petitioner to acquire the family pet when he or she goes to the home with the law enforcement officer to obtain clothes and other personal effects.
  - The court may award the petitioner exclusive care, possession, and control of an animal, may order the respondent to have no contact with the animal, and may enjoin the respondent from taking, concealing, harming, or disposing of the animal. The law does not apply to animals owned primarily for bona fide agricultural purposes or to a service animal if the respondent is the service animal's handler. § 741.30(6)(a)7.

- I**n proceedings for sexual offenses or child abuse, abandonment, or neglect:**
  - The court can allow either a facility dog or a therapy animal, as defined in § 92.55(5)(b), to be a comforting presence to a victim or witness as provided in § 92.55(5)(a).

**CONCLUSION**

Animal abuse is cruel in any form; it is especially tragic when it is done as a method of control of or abuse to another person. The statutes and steps discussed above may increase petitioner safety, reduce violence, and protect family pets from harm. They may also provide comfort to victims or witnesses testifying in certain proceedings.

**REFERENCES**

[1] DeViney, E., Dickert, J.& Lockwood, R. (1983) *The Care of Pets Within Child Abusing Families*.
[2]Ascione, F. R., Weber, C. V., Thompson, T. M., Heath, J., Maruyama, M., & Hayashi, K. (2007). Battered pets and domestic violence animal abuse reported by women experiencing intimate violence and by non-abused women. Violence Against Women, 13(4), 354-373, at 361.
[3]Carlisle-Frank, P., Frank, J. M., & Nielsen, L. (2004). *Selective battering of the family pet*. Anthrozoös, 17, 26-42.
[4] Supra note 2 at p. 365
5 https://aldf.org/article/the-link-between-cruelty-to-animals-and-violence-toward-humans-2/
[6] Wisch, Rebecca. (2020) *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, Animal Legal & Historical Center, Michigan State University College of Law.
https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders

**RESOURCES**

- Use of Facility Dogs in Judicial Proceedings (Webinar presented February 9, 2017) https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Domestic-Violence/DV-Webinars#dogs.

- Reporting Animal Abuse:
  - Animal Rights Foundation of Florida (local laws and links separated by Florida county) http://arff.org/report-abuse.

  - Charlotte Walden, *Table of Reporting Animal Cruelty in the United States*, Mich. St. Univ. College of Law, 2013. https://www.animallaw.info/topic/table-reporting-animal-cruelty-united-states.

## TEMPORARY CHILD SUPPORT IN DOMESTIC VIOLENCE CASES (JUNE 2023)

### GENERAL CONSIDERATIONS

- Pursuant to § 741.30(6)(a)4, a court may establish including temporary support for a minor child or children of the petitioner or the petitioner. An order of temporary support remains in effect until the order expires or an order is entered by a court of competent jurisdiction in a pending or subsequent civil action or proceeding affecting child support. This article will focus on temporary child support established in domestic violence proceedings.

- Generally, a parent is obligated to provide financial support for his or her minor child. A court may order one parent to pay support to the other or may order both parents to pay support to a third person who has custody under the child support guidelines. §§ 61.29(1) and 61.13(1)(a).
- In a domestic violence proceeding, the emphasis is on *temporary* child support.
- Temporary child support may only be awarded in a permanent injunction.
- The petitioner may seek temporary child support from the respondent if the respondent is the legal parent, adoptive parent, or guardian by court order, of a minor child or children. *See* §§ 741.30(6)(a)(4), 61.13(1)(a), 39.402(11)(a); section VI, paragraph 3 of Petition for an Injunction for Protection Against Domestic Violence, Florida Supreme Court Approved Family Law Form 12.980(a).
- Temporary child support must be addressed in the hearing if the petitioner requests it in his or her petition, regardless of whether a dissolution, paternity, or related case is pending. § 741.2902(2)(d). If the petitioner does *not* request it, it should not be addressed unless the respondent is present and waives notice.
- Temporary child should be put in place as soon as possible to prevent additional contact between the petitioner and the respondent.
- Temporary child support ordered in a domestic violence hearing remains in effect until the injunction expires or an order is entered in a pending or subsequent civil action or proceeding affecting child support. § 741.30(6)(a)4.
- Subsequent orders entered under Chapter 61 take precedence over any inconsistent provisions of an injunction issued under Chapter 741 addressing matters governed by Chapter 61. § 741.30(1)(c).

### INTAKE AND PRETRIAL PROCEDURES

- A petitioner who fears disclosing his or her address should understand that information may be kept confidential.

- A petitioner may write "confidential" in the space provided in Section I, number 1 of the Petition for an Injunction for Protection Against Domestic Violence, Florida Supreme Court Approved Family Law Form 12.980(a).

- The petitioner should then file a Request for Confidential Filing of Address, Florida Supreme Court Approved Family Law Form 12.980(h).

- A petitioner should understand all parts of the petition and know the person(s) from whom he or she may seek temporary child support.

- The petitioner should know whether paternity has ever been established and if he or she is already receiving child support in another case or related case.

- If paternity has never been established, the petitioner should understand that initiating a paternity case is one way to have child support established on a permanent basis.

- **Section VI of the petition should be filled out completely and accurately if petitioner desires child support. Petitioner should also complete:**

    - Family Law Financial Affidavit, Florida Family Law Rules of Procedure Form 12.902(b) or (c);

    - Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) Affidavit, Florida Supreme Court Approved Family Law Form 12.902(d);

    - Child Support Guidelines Worksheet, Florida Family Law Rules of Procedure Form 12.902(e);

    - Notice of Social Security Number, Florida Supreme Court Approved Family Law Form 12.902(j); and

    - Notice of Related Cases, Florida Family Law Rules of Procedure Form 12.900(h), if applicable.

- In addition to the required forms, the petitioner should add information such as the respondent's place of employment, address, phone number, fax number, rate of pay, pay stub information, a W-2 form, or a recent tax return. The petitioner should obtain the respondent's financial information and bring it to the hearing.

**COURT PROCEEDINGS AND ORDERS**

<u>Temporary support</u>

- Any temporary support, including child support, should be addressed during the hearing if the petitioner requests it in his or her petition; if the petitioner did not

request it in the petition, it may not be addressed unless the respondent is present and waives notice.

- The following options may aid the court in calculating child support:

  - Financial affidavits are filled out in court or ahead of time by both parties, and child support is calculated on the spot by using FinPlan, Divorce Power Analyzer, or similar software.

  - The Department of Revenue also maintains a regularly updated Excel worksheet that judicial officers, lawyers, and other court staff can utilize to calculate child support. If you are a judicial officer and need the latest version of the Excel spreadsheet to use from the bench, please contact virtual court support at vcsupport@flcourts.org. The Office of Family Courts also has a webinar available that teaches users how to properly fill in and interpret the data from the worksheet. The webinar is called "How to Utilize the Department of Revenue Child Support Excel Spreadsheet" and is available at https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Domestic-Violence/DV-Webinars#dor. The Office of Family Courts has additional child support resources available at https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Child-Support.

  - Financial affidavits are filled out in court or ahead of time by both parties, and the domestic violence case manager calculates the guidelines amount of child support manually using the Child Support Guidelines Worksheet, Florida Family Law Rules of Procedure Form 12.902(e). If the court orders child support in an amount that deviates from the guidelines by more than 5%, it must include factual findings which support that deviation in its order.

- Pursuant to § 61.1301(1), a court is required to enter a separate order for income deduction whenever it enters an establishing, enforcing, or modifying an order for child support, other than a temporary order, if one has not been entered. A court may enter a separate order of income deduction upon entering a temporary order establishing support or a temporary order modifying or enforcing temporary support; however, it is not required to do so.

- In Title IV-D cases and in all cases utilizing an income deduction order, the judge shall order temporary child support payments to be made through the State Disbursement Unit pursuant to § 61.181.

- Income deduction orders should be used whenever possible. If payments are not being made by an income deduction order, the judge shall order that temporary child support be paid through the depository unless both parties request and the court finds that direct payments are in the best interest of the child pursuant to § 61.13(1)(d); however, direct payments to petitioner may increase the likelihood of contact between petitioner and respondent.

- Each child support order shall provide the full name and date of birth of each minor child who is the subject of the child support order. The respondent should be notified when his or her first payment is due and where the check should be sent. In addition to the court case number, the name of the person obligated to pay, the obligor, and the name of the person to whom the payment is being made, the obligee, must be included with payments. It would be helpful after a hearing for the respondent to receive a written reminder of this information. An example of this is:

    - The first payment shall be due on *(date)* and is payable to the State of Florida Disbursement Unit, PO Box 8500 Tallahassee, FL 32314-8500. Include the COUNTY, COURT CASE NUMBER, NAME of the person to whom the payment is being made and your NAME, on each payment. No credit for payment will be given to you for any payment given directly to the custodial parent.

- Both federal forms, OMB Form 0970-0154, Income Withholding for Support, and Florida Addendum to Income Withholding Order, Florida Family Law Rules of Procedure Form 12.996(a), should be used when issuing income deduction orders. Florida law requires a schedule showing how child support is reduced as each child ages out of the need for support which the federal form does not. (Note: Florida Family Law Rules of Procedure Form 12.996(d), the Addendum, has been deleted; the schedule of support contained within is now in form 12.996(a)).

- The deputy clerk or other designee should mail or fax the forms to the obligor's employer within two business days. The amount of time it takes for an obligee to receive payment varies depending upon the employer's payroll procedures; therefore, the judge should consider alternate payment methods for the initial payment(s).

- When ordering temporary child support the judge should explain the following to both parties:

    - That the child support is temporary and will end when the injunction expires or when a child support order is entered in another case;

    - The options for securing long-term child support, such as a paternity hearing;

    - That it is the petitioner's responsibility to notify the court if payments are not made;

    - How the court enforces its child support order(s); and

    - The responsibilities of the petitioner and the respondent to notify the court if the child support award needs to be modified due to a change in circumstances.

- Before leaving court, both parties should receive documentation showing the judge's decision on temporary child support. In addition, the respondent should

receive information on how to make payments. If income deduction is being used, both the respondent and petitioner should receive information on when payment will begin and how payments will be made until the deductions begin.

**FOLLOW-UP AND COMPLIANCE**

Follow-up and compliance with temporary child support can be accomplished with different methods:

- **A tickler system** – set up as either an automated electronic system or a manual case file system, which alerts the case manager to the timeframe or deadline contained in the injunction order for temporary child support payments. After the deadline passes, if the respondent has not produced documentation of payment, the case manager should alert the court and proceed according to circuit procedures.

- **Compliance review hearings** to determine if a respondent is in compliance with what he or she was ordered to do as a result of the final hearing:

    - Compliance hearings should be set for 30 days and 60 days after the issuance of the final judgment with the respondent required to attend. The petitioner should be provided with notice of the hearing but not required to attend.

    - At the compliance hearing, the respondent must provide proof and documentation that child support is being paid as ordered by the court and that he or she is complying with all the requirements of the final judgment.

    - If the respondent fails to provide proof of child support payments or other requirements at or before the scheduled review hearings, an Order to Show Cause should be issued, and a hearing date should be set before the court for no later than two weeks.

    - The respondent should have the opportunity to provide proof of compliance to either the clerk or designee prior to the scheduled review hearing. If proof is provided early, the respondent should be excused from attending the hearing and should be provided with a document indicating that he or she was excused.

    - If there is nonpayment of child support after the completion of the compliance review hearings, the petitioner should file a Motion for Enforcement with the clerk or obtain the services of the Department of Revenue Child Support Enforcement Unit to enforce compliance. The petitioner should be made aware of this responsibility in writing by the court at the end of the final hearing.

**EXTENSIONS, MODIFICATIONS, AND TERMINATION OF INJUNCTIONS**

- Either the petitioner or the respondent may request the modification or dismissal of an injunction at any time. § 741.30(10). (*See* Motion for Modification of an Injunction, Florida Supreme Court Approved Family Law Form 12.980(j)). A

petitioner may also request an extension of an injunction using Florida Supreme Court Approved Family Law Form 12.980(i). A motion for extension of an injunction must be filed before the previously entered order expires.

- If requested, domestic violence coordinators should provide information and referrals to both the petitioner and the respondent regarding changes to or termination of the injunction.

- Upon filing, a motion to extend, modify, or dissolve the injunction will be sent to the signing judge for review, and a hearing will be scheduled if necessary.

- When there is an extension, modification, or vacation of an injunction requiring temporary child support payments made to the State Disbursement Unit, the clerk's office must notify the State Disbursement Unit of any changes. In addition, if income deduction is facilitating payment, an Order to Vacate should be sent by the clerk to the employer and the State Disbursement Unit when a modification or termination is entered.

**REFERENCES AND RESOURCES**

- How to Address Economic Stability for Victims of Domestic Violence, presented by the Honorable Alice Blackwell, Circuit Judge, Ninth Judicial Circuit: **https://www.flcourts.org/economic-security/story_html5.html**

- Child Support Guidelines: Using the I.V-D Guidelines Program (Webinar 12/15)

- Current and updated guidelines program.

- For more information regarding child support on the Florida Courts website: https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/Child-Support

## DOMESTIC VIOLENCE AND THE UNITED STATES MILITARY (JUNE 2023)

While recent articles and statistics indicate some disturbing trends, there are positive steps that can be taken to counter domestic violence in the United States military.

### RECENT MEDIA COVERAGE OF DOMESTIC VIOLENCE IN THE MILITARY

- *Army domestic violence victim advocate explains importance, complexity of 'breaking the silence'*. October 4, 2022. https://www.army.mil/article/260803/army_domestic_violence_victim_advocate_explains_importance_complexity_of_breaking_the_silence

- *Military spouse fatally stabbed in Hawaii sought help for repeated abuse, mother says*, Hawaii News Now – NBC 15, July 23, 2022. https://www.nbc15.com/2022/07/24/graphic-military-spouse-fatally-stabbed-hawaii-sought-help-repeated-abuse-mother-says/

- *Military Families and Intimate Partner Violence: Background and Issues for Congress*. Congressional Research Service. December 4, 2019
  - https://fas.org/sgp/crs/natsec/R46097.pdf

- *Soldier shares domestic violence story*. October 16, 2019. https://www.army.mil/article/228558/soldier_shares_domestic_violence_story

- *Is military domestic violence a "forgotten crisis"?* Military Times, September 18, 2019. https://www.militarytimes.com/news/pentagon-congress/2019/09/18/is-military-domestic-violence-a-forgotten-crisis/

- *For the first time, domestic violence will be a crime under military law. Military Times*. August 9, 2018. https://www.militarytimes.com/news/pentagon-congress/2018/08/09/for-the-first-time-domestic-violence-will-be-a-crime-under-military-law/

- *Two women who left abusive relationships found hope at local Sexual Assault/Domestic Violence Center*-The Hutchison (Kansas) News, April 12, 2017. https://www.hutchnews.com/story/news/local/2017/04/12/two-very-different-women-who/21024674007/

### REALITY

- Cumulatively, the Army, Navy, Air Force, and Marine Corps averaged just under 8,000 domestic violence complaints per year between 2009 and 2014 from families with at least one active-duty service member.[1]
- As a result of a five-year study, the Department of Defense determined that, from 2015 through 2019, over 40,000 incidents of domestic abuse occurred, of which

74% involved physical abuse. In 2019, alone, the DOD recorded 8,055 incidents of domestic abuse. [2]

- Repeated deployments may result in post-traumatic stress disorder (PTSD) and TBI, which manifest in domestic violence, leading to an uptick in domestic violence.
- Victims may be diagnosed with PSTD or TBI after experiencing domestic violence.
- A primary focus on other issues within the military in recent years--sexual assault, combat operations, and resetting and rebuilding for warfare--have resulted in a corresponding lack of focus on domestic violence issues.

**ISSUES**

- A young workforce, including young adults 17-25, some of whom may be away from home for the first time, stationed from 10-10,000 miles from home.
- Frequent deployments and moves involving the entire family create unique stresses.
- The military provides a working environment that often involves dangerous activities and requires frequent bursts of adrenaline.
- Weapons such as machine guns are not easily accessed; however, the person who gains access to them is trained to use deadly weapons.
- Commanders in the military have many different priorities. Any given domestic violence incident may receive widely varying responses depending on the individual servicemember, their particular commander, and installation. Many small unit commanders (such as a young Captain [25-30 years old] commanding an Army Company of 100-120 soldiers) may only encounter one domestic violence incident during their entire command tour. While they are trained on their obligations, they often have little or no actual experience in handling these volatile and complex matters.

**UNDER DEPARTMENT OF DEFENSE POLICIES, A COMMANDER <u>MUST</u>:**

- Ensure that abusers are held accountable.
- Be familiar with Armed Forces Domestic Security Act-10 USC 1561(a).
- Apply DoD Instruction, (DODI), Number 6400.06 (08/07; amended 03/17 and 12/21).
- Use DODI, Number 6400.01 (02/15; amended 04/17 and 05/2019).
- Issue and enforce military protection orders (MPO). (*See DD Form 2873*)
- Enforce temporary and permanent injunctions issued by Florida courts.
- Cooperate with the local sheriff's office in serving injunctions on base.

- Establish procedures for registering a civil injunction on the military base.
- Ensure that all personnel subject to the injunction shall comply while on base.
- Discipline military personnel who fail to comply with the injunction or MPO.
- Defer to temporary or permanent injunction in the event of issuance of both a civil protection order and an MPO.
- Respond to reports of domestic violence.
- Report the domestic violence to the installation level.
- Refer the incident to law enforcement.
- Counsel the suspect—after advising suspect of his or her rights.
- Ensure the victim, abuser, and family members are referred for medical treatment.
- Ensure safe housing with a preference for sheltering the victim and requiring the abuser to leave shared quarters.
- Help provide transitional assistance for the victim and their family if the abuser does not receive his or her salary due to the incident or to confinement.
- Refer the family to the Family Advocacy Program (FAP) and ensure that a safety plan for the victim is prepared. (*See DD form 2893*). The Family Advocacy Program is analogous to the services provided in Chapter 39 Dependency proceedings in Florida court. The FAP coordinates all of the social services available on the military installation to the family in crisis.
- Consult with FAP regarding clinical intervention.
- Ensure coordinated community response to the victim.
- Report substantiated cases to the Department of Defense. NOTE: This is a mandatory report.
- Refer for Court Martial or other disposition.
- Consider having the abuser return from deployment; ensure safety upon return.

**COMPARISON OF MILITARY PROTECTIVE ORDERS (MPO) AND CIVIL INJUNCTIONS (CIVIL PROTECTIVE ORDER OR CPO)**

- MPOs apply in jurisdictions where an injunction does not, such as overseas.
- MPOs can be more restrictive than temporary or permanent injunctions.
- MPOs are issued regardless of whether an injunction has been issued.
- MPOs follow the servicemember to his or her new assignment.
- If both an MPO and an injunction are issued, the CPO supersedes the MPO.

**KEYS TO SUCCESS**

- Domestic violence is now a separate crime under the Uniform Code of Military Justice.
- Contact the Commander. Command is a unique function. Only one officer in a particular unit is the "Commander." Focus on the commander, not the senior non-commissioned officer or subordinate leaders (even if officers). If that unit's commander does not respond, elevate the matter to the next higher "Commander." Everyone in the military has a higher-level commander.
- The higher you go, the higher the likelihood that more experienced leadership will be encountered and that the leader will have a directly responsible servicing Staff Judge Advocate (attorney for the commander responsible for discipline matters).
- Contact the servicing Staff Judge Advocate Officer or Inspector General.
- Make use of the Family Advocacy Program.
- Consider a provision within a temporary or permanent injunction that requires the abuser to complete interventions and training that was ordered on base.
- Consider health care concerns in dissolutions—make sure the spouse is aware of possible loss of military health care benefits such as Tri-Care, unless the spouse is protected under the 20/20/20 rule.[3]
- Beware of unintended consequences such as the impact an abuser's confinement or discharge will have on the victim and their family.
- Consider coordination with Veterans Treatment Court (if your jurisdiction has one) if the abuser is facing criminal prosecution.

**REFERENCES WITHIN THIS ARTICLE**

[1] http://www.militarytimes.com/story/military/2014/08/27/one-third-of-domestic-violence-victims-in-active-duty-military-families-are-men/14682985/

[2] *Domestic Abuse: Actions Needed to Enhance DOD's Prevention, Response, and Oversight*, U.S. Government Accountability Office (GAO-21-289), May 06, 2021. https://www.gao.gov/products/gao-21-289

[3] In general an un-remarried former spouse of a servicemember has health care benefits if the servicemember has served 20 years before the divorce AND the marriage has overlapped military service by 20 years. The "20/20/20" refers to length of service, length of marriage and length of overlap. See generally 10 USC § 1062.

This article is based on a webinar and PowerPoint on Domestic Violence in the U.S. Military presented by then circuit Judge Howard O. McGillin, Jr., of the Seventh Judicial Circuit in July 2016. https://www.flcourts.org/Resources-Services/Court-

Improvement/Family-Courts/Domestic-Violence/Webinars. Updates to the webinar are taken from a later presentation by Judge McGillin at the FCADV Biennial Institute in Orlando, Florida, on May 11, 2017. http://www.flcourts.org/resources-and-services/court-improvement/family-courts/domestic-violence/FIIVvideo.stml. Media coverage of domestic violence in the military was updated in March 2020.

Department of Defense Forms:
DD 2873 (07/04): https://www.wv.ng.mil/Portals/22/II-10_MPO_DD%202873.pdfDD

2893 (03/05): http://www.ncdsv.org/images/VictimAdvocateSafetyPlan.pdf

DoD Instruction (DODI), Number 6400.06 (08/07; amended 03/17, and 12/21):

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Uniform Code of Military Justice

https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part2/chapter47&edition=prelim

Service Implementing Regulations

**ADDITIONAL RESOURCES**

*Understanding the Military Response to Domestic Violence-Tools for Civilian Advocates*, by Judith Beals, (05/03), updated by Patricia Erwin, Ph.D., (01/07).

*Domestic Violence: Military Response and Regulations,* by Michael Archer, Regional Legal Assistance Officer, Marine Corps East, (02/10).

Intimate Partner Violence-PTSD-National center for PTSD Webpage-
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## ELECTRONIC STALKING AND INTERPERSONAL VIOLENCE (JUNE 2023)

**DEFINITIONS**

- **Stalking** occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person. § 784.048(2).
- **Aggravated Stalking** occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person. § 784.048(3).
- **Cyberstalking** means
    - To engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person; or
    - To access, or attempt to access, the online accounts or Internet-connected home electronic systems of another person without that person's permission, causing substantial emotional distress to that person and serving no legitimate purpose. § 784.048(1)(d).
- **Harass** means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose. § 784.048(1)(a).
- **Sexual Cyberharassment** means to publish to an Internet website or disseminate through electronic means to another person a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person without the depicted person's consent, contrary to the depicted person's reasonable expectation that the image would remain private, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person. Evidence that the depicted person sent a sexually explicit image to another person does not, on its own, remove his or her reasonable expectation of privacy for that image. § 784.049(2)(c)
- **Course of Conduct** means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests. § 784.048(1)(b).
- **Credible Threat** means a verbal or nonverbal threat, or a combination of the two, including threats delivered by electronic communication or implied by a pattern of conduct, which places the person who is the target of the threat in reasonable fear for his or her safety or the safety of his or her family members or individuals closely associated with the person, and which is made with the apparent ability to carry out the threat to cause such harm. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat is not a bar to prosecution under this section. § 784.048(1)(c).

## COMMON METHODS OF ELECTRONIC STALKING

Stalkers can be creative as well as cruel. Unfortunately, they are able to practice both qualities within a world in which technology changes rapidly. As with other online services, a stalker may spoof a friend's account to gain access to the victim's profile. The havoc wreaked by electronic stalking can be devastating. In *Cyber Self-Defense* by Alexis Moore and Laurie J. Edwards, published by Lyon's Press (2014), Alexis Moore recounts that even after escaping physical abuse from the man she once considered to be her "dream man," he continued to make her life miserable for four years by electronically draining her banking accounts, canceling her credit cards, destroying her credit, and tampering with her email, until she was finally able to extricate herself from him.

Due to constant changes in technology, the common methods of electronic stalking listed below are not exclusive; rather, this list covers some of the more common methods of electronic stalking. Courts should take care to focus on the particulars of the case in front of them to be sure that one of the less common methods of electronic stalking is not overlooked.

- **Social Media Stalking**

**Facebook Stalking.** By the fourth quarter of 2022, Facebook had 2.96 billion monthly active users. Compare that to the end of the calendar year 2012, in which there were over one billion registered users.[1] The sheer number of users coupled with what some have viewed as lackadaisical privacy protections have made Facebook stalking an oft-seen form of cyberstalking.

A common form of cyberstalking on Facebook is the use of so-called "clone accounts," fake accounts of real people made by another person, not the real person him- or herself. The most common procedure for stalking via clone account is as follows:

- The stalker selects the name of someone connected to the target, creates a fake profile, and adds legitimate information about the person named, including pictures, occupation, and other personal information gleaned from a brief internet search.
- The stalker sends out friend requests to people that the clone account and the target have in common – again, determined by viewing the real profile being spoofed, or by an internet search, or by information known or gotten by offline means. The stalker can add a personal message to the friend request, an innocuous message to explain the friend request.
- Once enough common friends have accepted the friend request, the clone account sends a friend request to the target Facebook user. The profile looks authentic, and, with upwards of 130 or more friends, it may often be hard to know who one has already friended and who might have been accidentally unfriended. Once the

target accepts the request, the cyberstalker has access to every bit of information that the target has posted on Facebook.[2]

**Twitter Stalking.** Like Facebook, Twitter has experienced phenomenal growth. Begun in 2006, Twitter had over 368 million active registered users as of December 2022, making it one of the top ten most frequently visited websites on the Internet.[3] The site allows users to write small messages of 280 characters or less (called "tweets") and share them with their "followers" (accounts that have elected to see the user's posts). If an account is not following a specific user, that account will usually not be able to see the posts.

Cyberstalking a person on Twitter differs from cyberstalking someone on Facebook. While Facebook requires people to use a registered name (and relies on the idea that people will use their given names), Twitter allows for any username and does not require that a given name or personal picture be associated with a Twitter account. Thus, finding a victim's account may be somewhat difficult, especially if they do not connect the Twitter profile to any personal identifying information. However, if the user "follows" (selects to have tweets from a user automatically post on their account home page) a user or a group of users who **do** include personally identifying information, the cyberstalker may have somewhat more ease in determining which account is the victim's account.

Further, as no personal identifying information needs to be used, Twitter users often have "followers" (the category of people who automatically receive the followed person's updates on their page) that they may not recognize or have never met. As a user has no advance control over who may follow him or her (the user may block a follower after the fact) and receives no notice of a new follower, a cyberstalker may begin following the victim without the victim even knowing. Stalkers may be able to gain information as to the victim's location, mood, day-to-day habits, and other personal information with which they can then stalk and harass the victim, online or offline.

**Instagram, Google, and LinkedIn Stalking.** Like Facebook and Twitter, other social media outlets such as Instagram, Google, LinkedIn, and Tinder enable stalkers to track online by seeing where someone has been and with whom he or she is interacting.[4] In March 2020, a California resident was sentenced to more than five years in prison for cyberstalking families of the victims of the 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida. Evidence at trial showed that between December 2018 and January 2019, the twenty-two-year-old stalker used several Instagram accounts to threaten and harass the families of the victims. In some messages, he impersonated the defendant, Nikolas Cruz.[5]

**Snapchat and incorporated applications:** Snapchat has approximately 93 million users in the United States.[6] According to Snapchat, this includes 90% of all Americans from the ages of 13 to 24.[7] The appeal of the application is that messages, photographs, and

videos can be sent and are designed to automatically "disappear" from the recipient's phone after a specific amount of time. Users receive alerts if the recipient takes action to preserve the media. Another factor that leads to the appeal of the service is that users can create accounts and usernames that allow for nearly absolute anonymity. In fact, it is this feature that led to a lawsuit against Snapchat in 2021, when a teenage boy was bullied through the application and was unable to identify the aggressors. He ultimately took his life, and investigators determined that his final act prior to committing suicide was to research on Google how to reveal a username on Snapchat and its related applications of Yolo and LMK.[8]

**Grindr and other hybrid and traditional dating applications:** Applications like Grindr and Feeld "facilitate connections between users based on proximity and attraction."[9] The Grindr application targets men seeking relationships with other men. It is common for users to have sexual encounters and form relationships "to varying degrees of emotional and physical intimacy with app-met individuals, potentially placing them at risk for intimate partner violence."[10] Additionally, the FTC issued a consumer alert on June 22, 2022, warning users of these types of applications about extortion scams taking place through their platforms.[11] Typically, a scammer poses as a potential romantic partner and elicits photographs from the user. Once the photos are sent, the scammer begins his efforts to extort the user into paying money by threatening to release the photographs onto the internet or directly sharing them with high value targets to the user, such as their family or employer. This is particularly effective when a user has kept his sexual orientation private. Judges should be aware of these types of harassment and recognize that there might be stigma associated with usage of these applications.

- **Cross-Service Cyberstalking**

It is not enough that stalkers can access each of these web services separately. To increase visibility, ad revenue, and web presence, the web services discussed above can be interconnected. A user of Facebook and Instagram can choose to have Instagram auto-post to Facebook whenever the user uploads information to Instagram. Twitter, Instagram, and Facebook have become so interconnected that a stalker may not need to actually friend the victim on more than one service to gain access to enough information to make the victim's life very unpleasant.

- **Stalking Via Devices That Control the Home**

The recent popularity of digitally-controlled devices installed in homes has a downside—the devices may open the door to victims of domestic violence being controlled remotely by their abusers. Often marketed for their convenience, doorbells, locks, thermostats, cameras, and other devices are now being used as means for "harassment, monitoring, revenge, and control."[12] Although these devices are often touted as making a person feel safer in their home environment, in reality, the opposite may be true. Abusers can use apps on their smartphones to connect

electronically to these home devices and control them remotely. Even after a partner or abuser leaves a home, he or she can still control the devices to "intimidate and confuse" the person remaining in the home. According to those working with victims of domestic abuse, this type of electronic stalking has become more prevalent as of late. The disabling of a home device by the victim can also have dire consequences as it may cause or escalate a conflict with the abuser and isolate the victim.[8] It is important that courts recognize this type of electronic stalking and add terms to its injunctions to prohibit it.

Recognizing the dangers inherent within this type of electronic stalking, the Florida Legislature enacted § 784.048(1)(d), which defines cyberstalking as accessing, or attempting to access, the online accounts or Internet-connected home electronic systems of another person without that person's permission, causing substantial emotional distress to that person and serving no legitimate purpose.

- **Geo-tagged Photos**

Almost every picture-taking device available on the market is equipped with the ability to save the location at which a given picture was taken. This feature is often referred to as "geo-tagging."

The mechanism is relatively uncomplicated. All current cellphones, as well as the vast majority of smart cameras and video cameras, come with a built-in global positioning system (GPS) device. When a photograph is taken, the camera (or cell phone) automatically retrieves the GPS coordinates where the photo was taken. The software then writes the GPS coordinates into the code that creates the picture.

Whenever the photo is copied and shared or displayed, that background code, along with the GPS data, is automatically copied and shared, as well.

This geo-tagging feature is turned on by default; thus, an unsuspecting user could be broadcasting GPS coordinates without his or her knowledge. The good news is that this geo-tagging feature can be turned off. Each device has its own process, which can make turning off the geo-tag feature tricky, but there are numerous websites that can assist users in navigating through the process for their particular device.

- **Cell phone "Bugging"**

While cell phones have made communication easy and virtually instantaneous, they have also opened up the door to a variety of abuses. In particular, they make "bugging," or covertly listening in on the victim's conversations, remarkably easy and virtually undetectable unless the victim knows what to look for. Although popular cellphone spyware program "StealthGenie" was discontinued when its CEO was arrested in 2014 for conspiring to "market and sell a surreptitious wiretapping device", other programs, such as Highster Mobile (http://www.highstermobi.com/), and Hoverwatch (http://www.hoverspyapp.com/), are apps that remotely control a phone, enabling a stalker to record conversations, view texts, and turn on the phone's

microphone. Some programs, such as Highster Mobile, tout their ability to "Safely monitor your children, employees and loved ones with the top cell phone monitoring solution!" (*See* http://www.highstermobi.com/).

- **Cell phone and GPS Tracking**

In addition to bugging, cellphones can serve as location tracking devices, broadcasting GPS coordinates of the victim in real-time to a watchful abuser. Numerous programs allow a user to be made aware of the location of another user's phone; some of these programs are offered by the cell service providers themselves. Further, this GPS tracking isn't limited to cellphones. Stand-alone GPS devices have become compact, lightweight, and ultra-portable. Although they are designed with concerned parents and absent-minded people in mind, the technology can easily be abused by a stalker intent on tracking his or her victim. The size and weight of these devices make detection by the victim virtually impossible, and they appear to be designed to have a very long lifespan. An unsuspecting victim could carry around such a device for months – even years – without having any knowledge of its existence, during which time the abuser could know in real-time, any time, exactly where the victim is located. Two popular examples of these devices include Apple AirTag and Tile. AirTag is about the size of a large coin (seen in the photo above), costs around $30, and can be placed almost anywhere. Once the AirTag is synched with a phone, the user can track the tag using a network created by Apple that leverages the ubiquitous nature of Apple products. Any Apple device within range of the tag will receive information from the AirTag and relay location information to Apple servers which then transfer that information to the user on their mobile phone. In 2021, the Consumer Tech team at the Washington Post ran a test to see how AirTags could be used to stalk someone, and the results were "frightening."[13] "Along with helping you find lost items, AirTags are a new means of inexpensive, effective stalking."

- **Cellphone and Bluetooth Hacking**

The use of the Bluetooth mechanism on a cellphone is a useful tool, especially when one is connecting to peripheral devices (Fitbit, car communication equipment, etc.). When the phone has Bluetooth capability turned on, the default setting for this mode is "discoverable." If the phone is "discoverable" and is not currently "paired" with a peripheral device, certain web applications can allow intruders to "discover" the vulnerable phone and connect to it, enabling the intruder to remotely control the vulnerable phone, intercept or reroute communication, send and read text messages, and/or place or monitor phone calls. All of these actions can be taken without the intruder leaving any sign of his or her actions.

- **Telephone ID Spoofing**

Spoofing is an older technique which has been modified to be able to do a number of different things. The most basic of these is where the Caller ID spoofing service simply

fails to provide an identity, transmitting an "ID unavailable" notice to the victim's cellphone. More advanced caller ID spoofing services allow a caller to specify what name and telephone number he or she would like to appear on the recipient's caller ID so that the victim may believe he or she is getting a call from someone he or she trusts when in fact it is the abuser. The victim has no way of knowing in advance that the ID is spoofed.

As long as a victim relies on his or her cellphone to keep him or her connected to friends and family, he or she is vulnerable to caller ID spoofing. The stalker can use the spoofing services to turn the phone from a safety item into an avenue for abuse.

## CRAFTING COURT ORDERS

In addition to learning about these forms of technological abuse, the court can provide specific protections to petitioners who have evidence of such abuse. By crafting specific orders tailored to the situation at hand, the court can ensure that the abuse does not continue.

In each of the final protection orders, there is a space provided for additional provisions "necessary to protect the petitioner from domestic violence." It is here that the court can specify what forms of technology cannot be used and/or in what manner they can or cannot be used. The court can use such language as the following:

- The respondent may not personally or through a third-party use, access, purchase, or otherwise engage the services of any Caller ID spoofing service or spyware.
- The respondent shall not contact or cause a third-party to contact the petitioner via Facebook, Twitter, Instagram, or any other social media platform.
- The respondent shall not install, use, disable, or control any digitally-controlled device intended for use at or in the petitioner's home, including, but not limited to, thermostats, locks, doorbells, speakers, lights, or cameras.

The above are suggestions only; courts are encouraged to stay abreast of technological developments and to use their own language to address situations where technological abuse is present. By crafting narrowly tailored orders, the court can exercise greater control to protect the petitioner from further harm and hold the respondent accountable for any future attempts to engage in technological abuse.

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[6] https://www.latimes.com/business/story/2021-05-10/lawsuit-snap-teen-suicide-yolo-lmk

[7] *Id.*

[8] Id.

[9] A Study of Intimate Partner Violence, Substance Abuse, and Sexual Risk Behaviors Among Gay, Bisexual, and Other Men Who Have Sex with Men in a Sample of Geosocial Networking Smartphone Application Users. Duncan, et al., American Journal of Men's Health, Vol. 12, Is. 2, pp. 292 – 301 (March 2018), accessed on March 16, 2023, available at https://journals.sagepub.com/doi/10.1177/1557988316631964.

[10] *Id.*

[11] Spot extortion scams on LGBTQ+ dating apps, Consumer Alert, Federal Trade Commission, June 22, 2022. Accessed on March 16, 2023, available at https://consumer.ftc.gov/consumer-alerts/2022/06/spot-extortion-scams-lgbtq-dating-apps.

[12] *Thermostats, Locks, and Lights: Digital Tools of Domestic Abuse,* by Nellie Bowles, NY Times, June 23, 2028. https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html.

[13] Apple's AirTag trackers made it frighteningly easy to "stalk" me in a test, Geoffrey A. Fowler, The Washington Post, May 5 2021. Accessed on March 16, 2023, available at https://www.washingtonpost.com/technology/2021/05/05/apple-airtags-stalking/.

There is no law in the Florida statutes that outlines the general circumstances under which a language interpreter must be appointed by the court. The only relevant statute, § 90.606, relates to the appointment of interpreters for witnesses and for persons with hearing impairment. Caselaw establishes that criminal defendants have the right to an interpreter under due process and confrontation considerations of the Constitution. *Calana-Reinoso v. State*, 306 So. 3d 980, 982 (Fla. 3rd DCA 2020). However, in civil cases, when the court is evaluating whether to appoint an interpreter for a person of limited English proficiency, it appears that the decision is within the discretion of the trial court.

Despite the lack of specific statutes or caselaw, due process, equal protection, and civil rights considerations likely create the right to interpretation services for civil litigants.[1] The Florida Constitution provides that '[n]o person shall be deprived of any right because of race, religion, national origin, or physical disability."[2] The United States Constitution provides all persons the protections of due process and equal protection under the law.[3] And, Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq., prohibits by recipients of federal financial assistance from engaging in national origin discrimination and the administration of programs in a manner that has the effect of subjecting individuals to discrimination based on their national origin. As applied, Title VI requires courts receiving federal financial assistance to provide meaningful access to persons with limited English proficiency.[4]

Florida courts are recipients of federal financial assistance; therefore, it is clear that, while there is no specific Florida Statute that addresses the matter, courts should appoint interpreters as needed in civil domestic violence injunction proceedings at no cost to the participant.

**DUTY OF THE COURT**

Assess the Interpretation Needs of Participants

It is important for judges and court staff to proactively assess participants' needs for interpretation. Many people appearing before the court may have basic proficiency in English which permits them to communicate under ordinary circumstances and in casual conversations. However, this limited proficiency could result in their limited English proficiency going unnoticed when appearing before the court. As compared to casual conversations, the level of proficiency required for meaningful participation in court proceedings is much higher and the need is shared by all participants. For example, it is equally important for the court to be able to communicate clearly with the participant and to understand the participant and the information they are presenting to the court as it is for the participant to understand the court and its instructions. The need extends to witnesses, counsel, and others involved in the proceeding as well.

If a participant indicates that they need the services of an interpreter, the court should appoint an interpreter to assist them during the proceedings. Furthermore, because language proficiency is essential to promoting meaningful participation, "[w]hen a party does not request an interpreter but appears to have a limited ability to communicate in English, the court … should conduct a brief *voir dire* to determine the extent of the party's English comprehension."[5] A judge who is concerned that a participant might need interpretation services should proceed with a simple inquiry like the following:

Sample Colloquy[7]

- I can appoint an interpreter for you at no cost to you. Do you need an interpreter? (If the response is "no," continue.)
- What is your primary language?
- How did you learn English?
- How long have you been speaking English?
- How do you use English in your everyday life?
- How comfortable do you feel about your ability to fully understand and express yourself in court?
- If at any point, you change your mind or need assistance from an interpreter, will you agree to let me know?

Alternate Inquiry

"Before we start talking, I want to ask you about what language we should use today. Maybe we can talk in English, or maybe it's better if we talk in your language. I don't speak your language, so if we think it's better to talk in your language, I will ask an interpreter to help me." [8]

"Caution should be exercised before permitting waiver of the right to an interpreter."[9] If a court accepts such a waiver, it should be prepared at any point in the proceeding to reassess the need for interpretation.

Tips for Judges and Court Staff

- Speak clearly and at a pace that is comfortable for the interpreter.
- Be patient with limited English proficiency speakers. Avoid gestures and expressions of frustration or that convey difficulty hearing or understanding.
- Manage the volume of other activities in the courtroom and minimize distractions as much as possible.
- When possible, do not inquire about interpretation needs with "yes" or "no" questions.
- If a parent and child are appearing before the court, the inquiry should extend to both.
- Be aware that someone may decline an interpreter because they may not know what an interpreter does, may believe that they have to pay for the service, may feel shame and interpret your inquiry as a comment on the quality of their

English abilities, or they may have had a negative experience in the past with an interpreter.

**REFERENCES**


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## TRAUMA-INFORMED JUSTICE (JUNE 2023)

Family court judges often see the same families again and again—often throughout multiple generations. The focus of this article is to emphasize the importance of viewing those families and individuals through a trauma-informed lens. By reviewing a case file with an eye to spot red flags arising from past trauma and through effective communication with an individual to elicit red flags of trauma, judges are in a unique position to change the trajectory of generations by understanding what science has taught us about trauma and the impact of adverse childhood experiences upon a family.

**VIEWING THROUGH A TRAUMA-INFORMED LENS MEANS TO:**

- Presume a trauma history of the persons appearing in your courtroom.
- Learn the telltale red flags of trauma and Adverse Childhood Experiences.[1]
- Become familiar with Adverse Childhood Experiences (ACEs).[2]
- Read a case file with an eye towards spotting ACEs in *all* parties before you.
- Know that ACEs often arise from events occurring *inside* the home; the extent of damage to a child who witnesses them can be profound.
- Understand that trauma is an intense event that threatens or causes harm to a child's emotional and/or physical well-being; child traumatic stress results when those events overwhelm a child's ability to cope with the events.
- Recognize that toxic stress occurs when a child experiences strong, frequent and/or prolonged adversity without adequate adult support.[3]
- Know the factors which promote resiliency in a child.[4]
- Bear in mind that the adult appearing before you was once a child who may have experienced traumatic events without adequate adult support.
- Realize that traumatic events follow a child throughout life to adulthood.[5]
- Be cognizant that ACEs may predict adult substance abuse and may be linked to serious mental, physical, and social health issues.[6]
- Recognize that ACEs predict the 10 leading causes of death and disability.[7]
- Ensure that the court environment is safe; look for ways to reduce stress.
- Actively listen to those appearing before you. Show respect. Do not humiliate. Interact with kindness.
- Tread carefully when talking about traumatic events.
- Do not ask someone what is wrong *with* them; ask what has happened *to* them.
- Communicate effectively. Watch what you say and how you say it.

- Understand that taking a trauma-informed approach does not mean that you are letting an individual who appears before you off the hook. Balance your encouragement with your expectations. If the statute requires ordering the respondent to complete a BIP program, this should be done, even if the respondent shows red flags for ACEs.
- If there are NO signs of power and control, or coercive control, but red flags of ACEs, order a trauma assessment or screening by a qualified assessor and set for a review to go over any recommended therapy, including various trauma therapies. A Batterers' Intervention Program (BIP) would not be appropriate.
- Substance abuse evaluations may also be warranted.
- Don't overwhelm a traumatized respondent. Stagger services and seek input from the respondent as to their ability to get to court or permit appearances by phone on compliance hearings.
- Know that you have the power to intervene and alter the path an individual or family who experienced trauma is traveling. In the words of Circuit Judge Lynn Tepper—"You can change their stars."
- Lastly, take care of yourself. Learn how to cope with vicarious trauma, secondary trauma, compassion fatigue and burnout.[8]

**REFERENCES AND RESOURCES**

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[4] https://www.nctsn.org/sites/default/files/resources/resilience_and_child_traumatic_stress.pdf

[5] http://www.childwelfare.gov/pubs/factsheets/long-term-consequences/

[6] http://www.air.org/resource/trauma-informed-care-service-systems

[7] *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults,* in the American Journal of Preventative Medicine, 14(4), 245-258. http://www.ajpmonline.org/article/S0749-3797(98)00017-8/fulltext

[8] http://www.flcourts.org/resources-and-services/court-improvement/family-courts/domestic-violence/FIIVvideo.stml
This article is based on a webinar and its accompanying PowerPoint, Seeing Individuals Through a Trauma Lens: Getting from ACEs to Trauma-Informed Justice, presented by Circuit Judge Lynn Tepper of the Sixth Judicial Circuit on March 30, 2016. https://www.youtube.com/watch?v=QtlIoDXKv0A

For the Family Court Tool Kit on Trauma and Child Development, go to:
https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Family-Court-Tool-Kits/Family-Court-Tool-Kit-Trauma-and-Child-Development

## ADDITIONAL RESOURCES (JUNE 2023)

### FAMILY COURT TOOLKITS

**Trauma and Child Development Tool Kit** - This tool kit provides promising practices for moving toward a trauma-responsive court that is informed about childhood development and the architecture of the developing brain.

**Basics Tool Kit** - This tool kit contains basic information about Florida's family court. It includes: a timeline of significant family court events; a listing of case types that comprise Florida's family court; guiding principles; descriptions of the ten core components; information about the one family/ one judge model and noted benefits of the model; filings trends; process maps for dependency, delinquency, dissolution of marriage, and domestic violence injunction cases; and links to additional resources.

**Legal Issues Tool Kit** - This tool kit provides answers to legal questions that arise when coordinating cases for families involved in multiple court proceedings.

### OTHER HELPFUL RESOURCES

Florida Institute on Interpersonal Violence: https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/Domestic-Violence

Family Court Acronyms and Terms. A helpful chart with definitions for common acronyms found in Florida's family courts. https://www.flcourts.gov/Resources-Services/Office-of-Family-Courts/Family-Courts/Delinquency/Common-Acronyms-Terms2

Benchcards: https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/Domestic-Violence/Benchbooks-Court-Guides#benchcards

Case law updates: https://www.flcourts.org/Resources-Services/Court-Improvement/Case-Law-Updates

E-Learning Training Modules: https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/E-Learning-Training-Modules

Library: https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/Domestic-Violence/Library

Florida State Courts Publications Page. Includes case law summaries, benchbooks, guides, and brochures for litigant. https://www.flcourts.gov/Publications-Statistics/Publications

Webinars: https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/Domestic-Violence/Webinars