

Chapter C17

DOMESTIC VIOLENCE: ASSESSMENT OF INTIMATE PARTNER VIOLENCE BY THE CHILD AND FAMILY INVESTIGATOR

William G. Austin, Ph.D.

Northwest Colorado Psychological Services

Shirley Thomas, Ph.D.

Alice P. Arnold, J.D.

Family Law International Center

SYNOPSIS

- § C17.1 CAVEAT ON THE CFI ROLE
- § C17.2 DOMESTIC AND PARTNER VIOLENCE IN CHILD CUSTODY EVALUATION
- § C17.3 CLARIFICATION OF TERMS
- § C17.4 STATUTORY FACTORS AND CASE LAW
- § C17.5 EXPERT'S ROLE AND FUNCTION
- § C17.6 IMPORTANCE OF INVESTIGATION FOR THE INVESTIGATOR
- § C17.7 EXPOSURE OF CHILDREN TO DOMESTIC AND PARTNER VIOLENCE
- § C17.8 SEPARATION AND PARTNER VIOLENCE
- § C17.9 INCIDENCE OF PARTNER VIOLENCE AND ISSUE OF GENDER
- § C17.10 DIFFERENTIATION OF SUBTYPES OF PARTNER VIOLENCE
- § C17.11 PHYSICAL AND PSYCHOLOGICAL AGGRESSION
- § C17.12 RELEVANCE TO PARENTING TIME AND DECISION-MAKING
- § C17.13 ASSESSMENT OF CREDIBILITY OF ALLEGATIONS

§ C17.14 FUNDAMENTALS OF VIOLENCE RISK ASSESSMENT**§ C17.15 PROTOCOL FOR ASSESSMENT OF IPV****§ C17.16 PRACTICE TIPS: A CAUTIONARY NOTE****§ C17.1 • CAVEAT ON THE CFI ROLE**

The role of the child and family investigator (CFI) is coming under scrutiny in the state of Colorado.¹ A role originally called special advocate (SA) has evolved into something equivalent to a full or partial child custody or parental responsibility evaluation (PRE). The original intention of the SA/CFI role was to provide economical, timely, and focused assessment of a problem or issue of limited complexity. It was not intended for use in a broad-ranging, complex parental dispute.

Prior to creation of the special advocate role, there existed an appropriate statute for complex evaluations (C.R.S. § 14-10-127) that probably could serve as a model for other states. The brief and very general CFI statute (C.R.S. § 14-10-116.5), in combination with a directive from the Colorado Supreme Court and accompanying CFI Standards,² has allowed the role to gradually change in a way that is unique to Colorado. The outcome is that non-mental health professionals and attorneys are appointed to conduct complex evaluations of mental health matters. The net result can only be interpreted as forensic mental health evaluations being conducted (according to the statute) by anyone who has completed the required 40 hours of training. Essentially, mental health non-experts are providing expert testimony about the mental health of family members on a routine basis for the courts.

No other state has attorneys conducting what are essentially child custody evaluations. The authors anticipate that this problematic situation will be scrutinized in coming years and appropriately addressed by the legislature. Relating to this Chapter, the authors believe that when complex issues such as domestic/partner violence are encountered, it will be most helpful to the court to appoint a fully qualified mental health professional to conduct a parental responsibility evaluation. For this reason, this Chapter is intended for professionals who may encounter the domestic/partner violence in either the CFI or PRE roles.

§ C17.2 • DOMESTIC AND PARTNER VIOLENCE IN CHILD CUSTODY EVALUATION

The matter of domestic violence (DV) or intimate partner violence (IPV) is found in child custody or parenting disputes with considerable frequency. IPV is one of the special or complex issues that evaluators need to be prepared to investigate and assess for the court, and understanding the problem requires specialized training and knowledge. Evaluators need to take a sys-

tematic approach in these cases, just as they would for other complex issues such as relocation, high and enduring parental conflict, substance abuse, alcohol dependency, child sexual abuse, or child alienation.

The evaluator is advised to use forensic models for assessing credibility of allegations and risk assessment, and to determine the type of partner violence using recently developed frameworks. All types of partner violence are not alike, and the relevance to a parenting plan can differ according to the type and severity. The bottom-line task for the evaluator is to translate the data on violence into specific implications for parenting time and decision-making recommendations. In some instances, the issue of the violence will be very relevant and be dominant. In other cases — for example, where there is a dispute to modify an existing parenting plan that has been in place for years — the history of violence in the marriage may not be terribly relevant unless there are continuing violence-related behaviors such as harassment and intimidation.

It is important to note that parents who find themselves before the court in the context of a parenting dispute are an extreme population in a number of ways. First, the vast majority of divorcing parents settle their cases — about 90 percent. Among the remaining disputing parents, only a small percentage choose to utilize an evaluator or CFI. Statistically, therefore, this is an extreme group. Second, evaluators find that among litigating parents it is not uncommon for one or both parents to have a major mental disorder, often a personality dysfunction or disorder. Third, this group is extreme by the high percentage of parents who report a history of partner violence in the marriage, as estimates range from 50 to 70 percent.³

As a final note, the most frequent forms of partner violence reported are relatively minor and interactive in nature, such as pushing, grabbing, holding, or throwing household objects, with only one or several incidents.⁴ It may be, then, that in some cases the violence will have been part of the marital issue, but not a primary presenting concern of the parents or others involved with the family. This kind of situation would be appropriate for a CFI investigation. In other cases, though, where the type of violence has been more severe and ongoing, we believe it is more appropriate that a qualified mental health professional conduct a thorough PRE.

§ C17.3 • CLARIFICATION OF TERMS

The professional literature on intimate violence contains a variety of terms that are used in overlapping ways. “Domestic violence” (DV) is the most common term and seems to encompass both violence between marital or non-married intimate partners, and also child abuse. The term refers to both physical aggression by one or more physically intimate adults and to abuse by a parent toward a child. The focus of this Chapter is on physical aggression between partners who have children together. The terms “domestic violence” and “family violence” represent the broad spectrum of all types of violence within a family system and between intimate partners who do not cohabit.

The authors point out that the current scholarly literature consisting of commentary and scientific research has evolved to use the term “partner violence” to describe physical aggression between parents and physically intimate adults. More recently, the term of choice appears to be “intimate partner violence,”⁵ and thus we will use this term (IPV) in this Chapter. The Colorado statute uses the term “spouse abuse” to refer to IPV in the domestic relations context. In the Colorado statute concerning best interests of the child, C.R.S. § 14-10-124(4), “spouse abuse” is defined as “the proven threat of or infliction of physical pain or injury by a spouse or a party on the other party.” Spouse abuse encompasses a narrower range of behaviors than the term “domestic violence” in the Colorado law. Note also that spouse abuse is not limited to spouses, but includes reference to the parties to the litigation, regardless of their marital relationship. The focus in the statutory definition of spouse abuse is on physical aggression, whereas the definition of domestic violence includes behaviors that would also include psychological aggression such as coercion and control.

At C.R.S. § 18-6-800.3(1) in Colorado’s criminal code, the term “domestic violence” is also used and defined as

an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. “Domestic violence” also includes any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

“Intimate relationship” is defined in C.R.S. § 18-6-800.3(2) as “a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.”

For purposes of civil protection orders (restraining orders), the definition of DV in C.R.S. § 13-14-101(2) is broader than the definition of spouse abuse, and in fact is broader than the criminal code definition of DV. In the protection order context, it is defined as

any act or threatened act of violence that is committed by any person against another person to whom the actor is currently or was formerly related, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship. “Domestic abuse” may also include any act or threatened act of violence against the minor children of either of the parties.

The civil protection statute, in C.R.S. § 13-14-102(1)(b)(I), goes on to state that “[d]omestic violence is not limited to physical threats of violence and harm but includes financial control, document control, property control, and other types of control that make a victim more likely to return

to an abuser due to fear of retaliation or inability to meet basic needs.” It seems that the legislature is using the terms “domestic violence” interchangeably with “domestic abuse” in the civil protection statute. Again, this means that intimidation or control, which comprise psychological aggression, should not be investigated as relevant to a best interests determination under the factor of spouse abuse. It will be relevant, though, to the issue of cooperation and co-parenting between the parents. The existence of a civil protection order should always be considered, and the underlying facts that led to the protection order should be reviewed. The evaluator should not equate the existence of a protection order as dispositive evidence that spouse abuse occurred unless there was a full evidentiary hearing on the matter.

Unlike some states (*e.g.*, California) the statute in Colorado does not include the term “emotional abuse” (EA). According to our law, the definition of spouse abuse is limited to acts of physical aggression. Specific behaviors that might be defined as EA could certainly be relevant to a CFI/PRE evaluation, however. This would especially be the case if those behaviors were continuing in the context of a high-conflict divorce and parenting dispute. The problem with including EA in a statutory scheme may be that it is such a broad and pejorative construct that it could describe behaviors experienced by virtually every divorcing couple. Nonetheless, in some cases, the behaviors by one or both spouses could accurately be described as psychological aggression, and similarly, such behaviors as harassment, intimidation, and control could accompany the more severe subtypes of IPV.

It is important for evaluators to be clear about what specific behaviors they are referring to when they label a parent as responsible for spouse abuse or IPV. Researchers have been addressing this need by conducting survey studies on family violence since the 1980s⁶ and using instruments such as the Conflict Tactics Scale.⁷ This latter instrument is sometimes used by evaluators to measure the specific violent behaviors (as opposed to patterns of violence), and the more recent version⁸ allows for the measurement of psychological aggression (isolating, cursing, threats, stalking).

§ C17.4 • STATUTORY FACTORS AND CASE LAW

In Colorado, in domestic relations matters, determinations of custodial arrangements, parenting time, access, decision-making, or parental responsibility follow from the best interests of the child (BIC) legal standard and statutory criteria (C.R.S. § 14-10-124(1.5)(a)). Spouse abuse and child abuse are both statutory factors that must be considered by the court for allocating parenting time and decision-making.

With regard to child abuse, C.R.S. § 14-10-124(1.5)(a)(IX) directs the court to consider “whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S., or under the law of any state, which factor shall be supported by credible evidence.” In allocating decision-making under C.R.S. § 14-10-124(1.5)(b)(IV), if the court makes a finding of fact that one of the parties has been a perpetrator of child or spouse abuse, “then it shall not be

in the best interests of the child to allocate mutual decision-making with respect to any issue over the objection of the other party or the legal representative of the child.” In this context, the definition of child abuse in C.R.S. § 18-6-401(7)(e)(IV) is a “continued pattern of acts of domestic violence committed by such person, as that term is defined in section 18-6-800.3, in the presence of the child.” Again, this is the broad definition of domestic violence defined above, which encompasses acts or threatened acts of violence upon a current or former intimate partner and any other crime against a person, property, or animal when used as a method of coercion, control, punishment, intimidation, or revenge directed against that intimate partner. The definition means that exposing the child to acts of IPV would constitute child abuse. Note that the intimate partner need not be the child’s other parent. It could be an intimate partner and not necessarily a cohabitating partner. Credible evidence of child abuse or neglect is likely to be relevant to an evaluator’s conclusions and recommendations about a parenting plan, but there should be ways in the post-separation life of the family to insulate the child from being exposed to further acts of IPV. As with domestic violence, there will be levels of severity and there may or may not have been formal investigation by human services with respect to child abuse. The evaluator should consider the context.

For purposes of determination of parenting time and decision-making, the term used in the statutes is “spouse abuse,” as defined above. It needs to be considered for allocation of parenting time under C.R.S. § 14-10-124(1.5)(a)(X). It is a rebuttable presumption for the allocation of shared or joint parental responsibilities or decision-making under C.R.S. § 14-10-124(1.5)(b)(V). The extent to which this factor is weighted in determining decision-making authority will depend on the facts of the case and the context of the spouse abuse.

With regard to parenting-time determination, the court must make provisions for each parent to have parenting time in a proportion that the court finds are in the child’s best interests, unless the court finds that parenting time by one party would endanger the child’s physical health or significantly impair the child’s emotional development, and then that parent’s parenting time may be “restricted.” This could mean supervised or no parenting time. The definition of “restricted” can be problematic, though clearly if it is supervised or suspended, this would be a restriction on the parent’s access to the child.⁹

The spouse abuse determination requires, under C.R.S. § 14-10-124(1.5)(a)(X), consideration of “[w]hether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence.”

Therefore, the investigator must (1) assess whether there has been proven spouse abuse or an allegation of spouse abuse that could be proven to be credible, and (2) determine whether parenting time by the abusive party would endanger the child’s physical health or significantly impair the child’s emotional development.

In determining the best interests of the child for purposes of allocating decision-making responsibilities, C.R.S. § 14-10-124(1.5)(b)(V) states:

If the court makes a finding of fact that one of the parties has been a perpetrator of spouse abuse, then it shall not be in the best interests of the child to allocate mutual decision-making responsibility over the objection of the other party or the legal representative of the child, unless the court finds that the parties are able to make shared decisions about their children without physical confrontation and in a place and manner that is not a danger to the abused party or the child.

Therefore, the CFI/PRE must (1) assess whether there is a credible threat of spouse abuse, (2) ask the parties if they object to mutual decision-making, and (3) determine whether shared decisions can be made safely.

Colorado followed the model statute on domestic violence proposed by the National Council of Juvenile and Family Court Judges (NCJFCJ)¹⁰ by including the rebuttable presumption on joint legal custody. Our experience is that judges routinely will waive the presumption based on the evidence in the case of a fact pattern involving relatively minor incidents of partner violence, and parents themselves will stipulate to waiver as part of an agreement for shared decision-making. Case law demonstrates that spouse abuse will not necessarily preclude joint decision-making or even sole custody/decision-making.

There is relatively little case law in Colorado that has specifically addressed the issue of spouse abuse in parental responsibility disputes. In 2004, the court of appeals reviewed for the first time the “spouse abuse” portion of the best interests statute in *In re Marriage of Bertsch*.¹¹ In this case, the trial court found that the wife had presented credible evidence of spouse abuse by the husband (and there were also findings of child abuse).¹² The importance of this decision lies in the ruling that the father, even though the perpetrator, was allocated primary parental responsibility and sole decision-making responsibility. The court reviewed the legislative history, ascertained the legislative intent, interpreted the statute accordingly, and held that the statute did not preclude the abusing parent from being allocated sole decision-making or primary parental responsibilities. It is worth noting that two parenting-time evaluators, the guardian *ad litem*, and the children’s therapist agreed that this was in the children’s best interests.

CFI/PREs should be cognizant that history/allegations of abuse must be put in the proper context. As the court of appeals in *Bertsch* stated:

Past abuse severely impedes the parents’ ability to work with one another to exercise mutual decision-making responsibility. However, a person’s past abuse of a child or spouse does not necessarily and inevitably mean that history is doomed to repeat itself or that the person is incapable of becoming a fit, or even the more fit parent of a child.¹³

When one of the authors uses this example in a workshop he presents, there is a predictable negative reaction because the mindset is one of a “batterer” being awarded custody and decision-making. The facts in *Bertsch* showed that with good evidence and expert testimony about how a parent is acting at the current point in time, a history of perpetrating violence is not dispositive of how much parenting time and responsibility that parent should be given.

Bertsch was followed six months later by *In re Marriage of Ohr*, in which the appellate court stated that the existence of credible evidence of spouse abuse is not “necessarily determinative of the best interest of the child.”¹⁴ In *Ohr*, the trial court was required to determine which of two men would be determined as the child’s legal father: the man to whom her mother was married at the time of the child’s birth and who raised her for 33 months as his own, or her biological father, who had limited contact with her until the year prior to the hearing. In this case, there was credible evidence that both men had been perpetrators of spouse abuse, and ultimately based on the totality of the circumstances, the trial court found that the husband/father was the child’s legal father, but that the biological father was entitled to parenting time as well. There was an evaluator’s report that supported the court’s findings. The appellate court reversed the finding that the biological father was entitled to “parenting time” because once the trial court determined paternity to vest with the husband, the biological father no longer had standing to assert parenting time rights. Perhaps the most instructive part of this opinion is that the investigator should know that his or her recommendations are often incorporated whole into the trial court’s finding of fact and ultimate opinion. Investigators must be cognizant of their authority and power.

Two years later, the Colorado Court of Appeals again affirmed the finding in *Bertsch*, holding that a mother who had been convicted of felony menacing of her husband by threatening him with a knife, and of related misdemeanor child abuse for doing so in front of the couple’s child, was found to be the better choice of primary parent.¹⁵ The court reiterated the *Bertsch* court’s holding that a finding that “a parent has been a perpetrator of child abuse or spouse abuse does not bar an award of parenting time or decision-making responsibilities to that parent. Such factors are but two, albeit important, factors in assessing the best interests of the child.”¹⁶ Again, salient facts that went to the weight (importance) of this factor were that the mother/perpetrator had received counseling, she appeared to be benefitting from the therapy, and there had been no further incidents of abuse. The fact that both the CFI (then called the “special advocate”) and the parental responsibilities evaluator concurred on their recommendations presumably enabled the court to comfortably make its findings of fact. In addition, both the experts reported that the husband’s anger toward the mother was harmful; specifically, the evaluator stated that the father would not be able to encourage the sharing of love and affection and contact between the child and the mother. We see here, then, an interplay between the spouse abuse factor set forth in C.R.S. § 14-10-124(1.5)(a)(X) and factor (VI) of the same subsection (“The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party”).

There are not many published appellate opinions that review this part of the statute, but the few that there are make it clear that (1) this is but one factor the court will consider in its “best interests analysis,” (2) the existence of spouse abuse will be put into the larger context, and (3) the court will rely heavily on the investigator’s report in making the legal “findings of facts” necessary to underpin the court order. Therefore, it is critical for the investigator to fully understand the dynamics and type of IPV that occurred, as discussed below.

§ C17.5 • EXPERT'S ROLE AND FUNCTION

Sound mental health work product and testimony, as with other types of forensic expert work, is based on scientific or specialized knowledge with the purpose of being helpful to the court on specific issues. To the extent possible, CFI/PRE evaluators should be scientifically informed about research on relevant issues and use reliable data-gathering methods. Evaluators should be mindful of the legal standard for admissibility of expert testimony,¹⁷ which expects techniques and procedures to be reliable and valid. To be helpful, the evaluator who is conducting a CFI/PRE as the court's expert should "get it right" for the court on ultimate issues and on practical recommendations. Evaluators are in the position of making predictions about the child's future adjustment and developmental outcomes. Conclusions and predictions will be more accurate if the evaluator chooses reliable methods, collects the necessary and sufficient data on the main issues, and is cognizant of the possibility of making errors of conclusion and prediction.

On an issue as serious as domestic violence, the evaluator needs to be mindful of the possibility of making false positive conclusions (concluding that violence occurred when it did not) and false negatives (accepting that violence did not occur when it did), or of overestimating or underestimating the potential negative effects on the child associated with documented IPV. The expert can be most helpful to the court by using multiple methods of data collection and educating the court on the most important issues. The educative function of the CFI or PRE may consist of describing relevant research or simply providing ample descriptive data about the basis of good investigation.

To be helpful to the court, the appointed evaluator needs to be vigilant about objectivity and neutrality. This is a challenging ethical duty because the parties can be very difficult in this extreme group. The issue of IPV, along with relocation, seems to bring out the worst in evaluators on the issue of neutrality and bias.¹⁸ Evaluators can easily fall into a "counter-transference" type of trap,¹⁹ though it is probably better thought of simply as negative bias about specific and offensive behaviors by one or both of the parties.²⁰

Case Vignette 1: The Hairdryer Incident

A young married couple separated after the last of several partner violence incidents. The mother alleged past incidents where police had been called, but no arrests were made. There were two very young children, and they probably were exposed to all of the incidents. There were police narrative reports to review, including the present incident. Past reports revealed yelling matches and some physical contact, but it was unclear who initiated the contact. There were no physical injuries. The mother may have been hitting the husband, who may have tried to block her exit from the residence. There were no witnesses to any of the incidents, but the mother had discussed the situations with her own mother.

In the present case, the father was arrested and pleaded guilty to a misdemeanor offense. The parents did not dispute the facts, and the police narrative confirmed that the father was angry because the mother had been socializing with a male neighbor. He wanted to talk about it, and the wife ignored him while she blew her hair dry after a shower. The father wanted her to communicate, while the wife ignored him. To get her attention, the husband started pouring her makeup into a sink. The wife became furious and started pummeling the father with her fists.

In this case, the father was the instigator but the mother responded with violence. The judge did not give much weight to the issue when he awarded the father primary residence and decision-making with temporary orders. The mother did not show up for one hearing, was not coping well with the separation, and was living a questionable lifestyle. A CFI evaluation placed weight on the past partner violence and recommended equal parenting time and shared decision-making. It was felt the mother had gotten her life in order and was being an involved parent, and the evaluator seemed to accept the mother's assertions about past domestic incidents at face value.

A supplemental evaluation fully investigated the partner violence incidents with the law enforcement documents and discovered the mother really had not been exercising her parenting time. It also seemed likely she was involved with a methamphetamine lifestyle, which turned out to be true. The mother was arrested for subsequently assaulting the father in a parking lot and also someone else in a restaurant. The father proved to be a responsible parent and was moving on with his life.

§ C17.6 • IMPORTANCE OF INVESTIGATION FOR THE INVESTIGATOR

The above case vignette highlights the need for evaluators to do thorough investigations into issues and facts by moving well beyond the surface level of the presenting data.²¹ Collaterals need to be interviewed, documents reviewed with a discriminating eye, and alternative hypotheses considered in a vigilant manner.²² The CFI/PRE needs to operate much like an investigative journalist might operate in trying to uncover the facts for the court.²³ Only in this manner will the expert be helpful to the court and get it right. The special issue of IPV is one of those areas where careful investigation is especially necessary. Rigor is essential to assess the credibility of allegations according to a systematic approach,²⁴ to describe the subtype and severity of partner violence that occurred, and to address issues of ongoing risk of harm and safety concerns in a parenting plan.²⁵

§ C17.7 • EXPOSURE OF CHILDREN TO DOMESTIC AND PARTNER VIOLENCE

Research has demonstrated that exposure of children to domestic violence is harmful,²⁶ just as exposure to severe parental conflict without violence is associated with poor adjustment in the children.²⁷ It will not be uncommon for the evaluator to encounter cases where the children have been present during violent episodes. Exposure of children should be considered a risk factor in assessing risk and harm in a CFI/PRE evaluation, and it should be part of any risk assessment undertaken by the evaluator.²⁸

In making recommendations about a parenting plan, the evaluator needs to consider how children can be shielded from exposure to conflict associated with past violence. Usually, the evaluator can make recommendations that will minimize the likelihood of the children being exposed to conflict and violence. Research shows when children can be shielded, even if there is continuing conflict between the parents, then the children's adjustment can be positive and similar to children in low-conflict families.²⁹ It is when the children continue to be caught in the middle that conflict is most damaging.³⁰ In making recommendations, evaluators should look for ways to shield children from the risk of exposure to parental conflict and to any post-separation violence.

§ C17.8 • SEPARATION AND PARTNER VIOLENCE

It is often asserted that the risk of violence is highest around the time of separation,³¹ but the research is quite limited. This hypothesis stems in part from the clinical belief that separation breeds stalking behavior,³² but it can be difficult for any family evaluator to sort out the causation of violence that surrounds separation. One of several main subtypes of partner violence described below is separation-engendered violence. Research from a limited sample supports its inclusion as a subtype,³³ and clinical experience also documents the existence of isolated incidents of violence accompanying separation. A very recent conceptualization includes this subtype³⁴ as well.

Experience shows that following separation, a psychologically wounded spouse may act out violently in response to rejection and narcissistic injury, and this could be true for either spouse. There also are rare and dramatic cases described in newspapers of post-divorce homicides.³⁵ More often, however, there are incidents that result in separation, or what could be described as violence-engendered separation and divorce. The Hairdryer Incident described above would fall into this category. When an incident of physical aggression triggers the separation, it may be the proverbial last straw in a troubled relationship.

Case Vignette 2: The Pathological Chiropractor

The parents divorced, and the mother subsequently filed a motion for relocation with their five-year-old son in a post-decree action. The mother reported incidents of domestic violence in the marriage, consisting of being held down in a closet and on stairs in another incident. She reported her head being beaten while in a shower and showed photos of bruises she took with a cell phone, but there was no police involvement. The father denied all the allegations.

The data showed a pattern of post-divorce harassing phone calls and e-mails from the father, or ongoing, residual behaviors from IPV. The data also showed that the father was extremely jealous and was stalking the mother. There was an incident just before trial of the father following the mother's car, and she had a credible witness-passenger. A TRO was issued and the father was arrested.

Investigation revealed harassment of the mother of the father's other child while she was in the hospital to give birth as well as incidents before and after the birth. A restraining order had been applied for. The father's recent girlfriend described verbal harassment and an incident of IPV as the reason she left. The father's first wife would not consent to be interviewed out of fear. Her attorney provided court records showing allegations of violence and a restraining order. The father had threatened to kill the stepfather in a phone conversation with his daughter. Investigation revealed an arrest for assaulting another professional who shared common office space. The father had lost his professional license for five years for making threats toward the state chiropractic board. Psychiatric records showed residential treatment for professional rehabilitation with diagnoses of antisocial and narcissistic personality disorders and impulse control disorder.

None of these records were reviewed as part of the original parenting plan, which was an agreement by stipulation because of the continuing control and intimidation at the time of divorce. The past incidents of violence were the result of investigation and digging around. There were three ex-partners, one girlfriend, and the ex-spouse who were afraid of the man. There were data on threats or violence in other settings. There was convergent validity from multiple sources to reveal the subtype of IPV of coercive control, a major mental illness, and even erotomania, a form of stalking. The allegations were credible, and the violence risk assessment showed substantial risk of continuing residual behaviors of psychological aggression, as well as a risk of physical aggression. The court granted a permanent restraining order and ordered supervised parenting time. Because the mother's job offer and promotion with her current company in another state were withdrawn, the judge felt relocation was not appropriate, but this raises the issue of how IPV should be treated in the context of a proposed relocation. With this type of fact pattern, IPV and ongoing, residual behaviors probably should be a sufficient basis to grant relocation.

**§ C17.9 • INCIDENCE OF PARTNER VIOLENCE AND
ISSUE OF GENDER**

A number of states passed so-called mandatory arrest statutes in response to concern that police discretion was resulting in a significant percentage of male harmdoers not being prosecuted and being held responsible. These laws require an arrest for domestic violence if an investigating officer finds there is probable cause, and Colorado is one of these states.³⁶ If two or more opposing persons complain to law enforcement that domestic violence has occurred, the officer shall consider the following factors in determining whether more than one person should be arrested:

- 1) Any prior complaints of domestic violence;
- 2) The relative severity of the injuries inflicted on each person;
- 3) The likelihood of future injury to each person; and
- 4) The possibility that one of the persons acted in self-defense.³⁷

An unintended result of these new laws has been a dramatic increase in the number of females arrested for domestic violence.³⁸ This is not surprising in light of research from the past 20 years that has shown an approximate symmetry in gender instigation of violence³⁹ in large representative samples. The finding is replicated by the high-quality research on violence risk assessment among released psychiatric patients.⁴⁰

Not surprisingly, this issue has been hotly debated, as it goes against the tradition of a one-dimensional view of IPV and the politicized and polemical debate that is often found in the domestic violence literature.⁴¹ Recently, as part of the Association of Family and Conciliation Courts (AFCC)/NCJFCJ Wingspread Conference, a call was issued for collaboration among domestic violence professionals, family courts, and custody evaluators.⁴² In years past, there has been an active clash among science, advocacy, and child custody practitioners, and most professionals are pleased that the Wingspread Conference has triggered change.

No doubt there will continue to be a professional debate on issues of gender symmetry on IPV regarding frequency/incidence, severity, and co-occurrence with child abuse. On this issue, the reader is referred to the excellent intellectual debate between prominent researchers.⁴³ The important point for CFI/PRE evaluators is that it will not be unusual, and, in fact, it will be just as common, to encounter female-initiated as well as male-initiated violence. Most situations that are investigated will have an interactive component. The evaluator's investigation needs to follow from a mindful approach to the issue of IPV and openness to consider alternative hypotheses. The professional also needs to be on guard for confirmatory bias⁴⁴ — not just in his or her own evaluation, but in the way data was gathered in previous assessments conducted by other professionals or agencies.

If an evaluator or CFI is involved in a parenting dispute involving same-sex partners, it will not be unusual for IPV to be an issue. Evaluators are advised to be familiar with the literature

with this scenario and issues.⁴⁵ In general, concerns that are relevant in families with heterosexual parents are the same as those in families with gay, lesbian, or bisexual parents, and the best interest standards apply.

§ C17.10 • DIFFERENTIATION OF SUBTYPES OF PARTNER VIOLENCE

The professional mental health literature began to address systematically the social and family problem of domestic violence in the 1970s, eventuating in the establishment of battered women's shelters and advocacy groups across the country. Then developed a singular view of family violence as "one size fits all." The literature was characterized by a conceptual umbrella where instigators were uniformly labeled "batterers"⁴⁶ after only indiscriminating assessment and grouped under the "power and control" wheel or heuristic⁴⁷ for understanding the interpersonal dynamics. For many years, there has been no interactive view of domestic violence, but rather analysis only of male-instigated violence.

The literature slowly evolved to address different types of violence, but often these attempts focused solely on variations within the severe type or gradations among "batterers." Sometimes pejorative labels were assigned, such as "pit bull" and "cobra,"⁴⁸ "intimate terrorism,"⁴⁹ and "patriarchal terrorism."⁵⁰ In the background, however, was a research literature in sociology on family violence that employed survey research of high scientific quality and large community samples.⁵¹ The data that emerged was starkly different from reports of clinical samples of residents in shelters.⁵² Not surprisingly, the data on prevalence rates and gender of the instigator was quite a contrast.⁵³ The base rate for IPV in community samples of intact marriages was 10 to 12 percent and was evenly distributed on gender instigation.⁵⁴

Within the context of child custody evaluation, there now has emerged a more sophisticated conceptual differentiation of subtypes of IPV, and the push toward not treating all instances of domestic violence alike has gained momentum. From a California sample of high-conflict and violent families involved in litigation, Johnston and Campbell⁵⁵ proposed an initial and pioneering typology of partner violence:

- Ongoing or episodic male battering;
- Female-initiated violence;
- Male-controlling interactive violence;
- Separation-engendered violence/post-divorce trauma; and
- Psychotic and paranoid reactions leading to violence.

This bold typology broke away from the black-and-white view of IPV and introduced shades of gray, including the politically unpopular hypothesis of female-initiated violence. The theoretical scheme of the authors pointed out that there is an interactive component, but still the core was male initiated and "battering." Other treatments of IPV within the child custody evaluation context persisted in presenting the one-size-fits-all view.⁵⁶

Austin's approach⁵⁷ linked the extensive literature on violence risk assessment with the role of the parenting evaluator to make predictions for the court and for the parenting plan. A six-dimensional scheme included factors known to be prominent risk factors for future violence and for the court to understand the family context. The model combines violence risk assessment with a description of the pattern of IPV:

- Pattern of violence over time: Enduring? Reactive? Interactional?;
- Pattern of who has instigated the violence;
- Severity of harm;
- Psychological versus physical aggression;
- Major risk factors present: Major mental disorder? Substance abuse? History of violence in other relationships?;
- Children exposed?

The movement toward "differentiation" culminated with the Wingspread Conference sponsored by the AFCC and NCJFCJ in 2007. Several articles followed the conference that attempted to show a consensus on theoretical formulation and practical application for child custody evaluators. These articles presented a synthesis of research and conceptualizing on subtypes of IPV and addressed how an evaluator might translate this analysis to assessment in the child custody evaluation. CFI/PRE evaluators are advised to learn the new typology and utilize it in their evaluations, not as a "cookbook" approach but as a guide to sound investigation and analysis. There are inherent difficulties in making specific behavioral predictions from typologies, but it will help the court to know what type of IPV has characterized the family. Kelly and Johnson and Jaffe, *et al.*⁵⁸ describe the current consensus on a typology of IPV:

- 1) *Coercive Controlling Violence*: Formerly referred to by a variety of names and the type of IPV known as the "batterer." This type (CCV) is often found in shelters or in agency contacts. It reflects more severe types of physical violence and injury. The psychological dynamics are manifested as control and domination, intimidation, restricting access to others, intrusiveness into private aspects of the partner's life, and continuing harassment. These are the behaviors likely to be found in post-divorce situations such as the Pathological Chiropractor vignette described above. This type has also been recently described by Jaffe, *et al.* as "abusive-controlling violent" (ACV).⁵⁹
- 2) *Violent Resistance*: This new category (VR) reflects situations or a pattern where the female partner acts violently in defense against male-initiated violence. In states that have laws requiring an arrest if there is probable cause, this will produce a higher number of female arrests, but if the law requires an arrest only of a "primary aggressor," then this will not be the case. Research shows that this type of violence is the most common form among female arrestees.⁶⁰ It is part of an interactive or reciprocal type that has been identified in contrast to the one-dimensional view of IPV.⁶¹ It is also presumably a less severe level of violence, since there will be an interactive and defensive nature in some incidents that fall into the situational category of violence, as described below. It is noted that there can be scenarios where the female partner may be the instigator and the male will be resistant,⁶² which is consistent with a large number of studies that show females instigate violence at least as frequently as males.⁶³

- 3) *Situational Couple Violence*: This category (SCV) is by far the most common type of IPV included in community or representative survey studies and will also be the most frequent type encountered by CFI/PRE evaluators. It has been previously labeled common couples violence⁶⁴ and conflict-instigated violence.⁶⁵ In this category, situational conflict can escalate into some degree of IPV. The level of severity of SCV is expected to be lower, with pushing and shoving, grabbing a phone, holding in response to a push, etc. Often there are isolated incidents — for example, three or fewer over a long time period — but the pattern could be chronic and intermittent. The important point in distinguishing this subtype from coercive control is that there is less psychological aggression present. In SCV, one does not expect to see psychological control, intrusiveness, and domination to the extent that one sees these elements with CCV.
- 4) *Separation-Associated Violence*: We use this term (SAV) instead of separation-instigated, as noted above, because it will be more often the case that an incident of violence causes the separation rather than the reverse. This category refers to violence that occurs around the time of separation, and the scenario is often similar to SCV, but an SAV situation could escalate into horrendous violence, even homicide in a post-divorce fit of narcissistic rage. More typically, though, it will be a minor incident that has great psychological significance for the couple and is a final commentary on a failed intimate relationship.

Summary: There now has emerged a consensus in the field on a meaningful differentiation of subtypes of IPV. This development occurred within the context of the field of child custody evaluation in an interdisciplinary effort with contributions by researchers and practitioner-scholars. It should be kept in mind that the framework described above is a categorical analysis and there will be variations within each category, or sub-categories within each subtype. These variations can be further differentiated along continua with one quantitative scale being severity on the level of physical aggression and the other being frequency of incidents, how enduring, and how chronic the violent behaviors are found to be. Behaviors associated with psychological aggression and control will vary by degree as well.

Johnson's work has proposed hypotheses about other categories that await further research, but evaluators would be wise to consider these possibilities. First, there may be a small percentage of couples in highly dysfunctional relationships where both partners could be described as coercive and controlling, with mutual violent control.⁶⁶ Second, Johnson suggests there is the incipient coercive control form where there may not be physical violence, but one dominating partner uses the triad of psychological techniques of control, intimidation, and isolation.⁶⁷ This process of psychological control may be just as disabling on daily functioning for the victim as the experience of physical aggression. It is also described by Stark,⁶⁸ who coined the term "coercive control" and suggests the deprivation of liberty in a relationship is the core of the abuse process. Johnson suggests the nonviolent, coercive harmdoer may become violent after a separation, hence the term "incipient,"⁶⁹ but this seems to us to be an exercise in conceptual speculation.

§ C17.11 • PHYSICAL AND PSYCHOLOGICAL AGGRESSION

The literature describes the dimensions of psychological aggression that accompany subtypes of IPV and, most noteworthy, those that accompany the coercive control subtype. In addition to the higher level of severity and frequency of physical aggression or violence, a hallmark of the behavioral pattern is the psychological control that is exerted by the abusive partner. Intimidation and harassment, intrusiveness, and unrelentingness, as well as jealousy and obsessiveness, are part of this subtype. These behaviors are difficult for the harmdoer to give up after divorce and may be observed in the volatile post-separation period and long after. They also may motivate re-litigation. They may characterize those high-conflict situations where one party wants to move on with life while the other keeps instigating conflict, so that the cause of an enduring pattern of conflict lies with just one parent.⁷⁰ Behaviors that could be described under the descriptive label of psychological aggression represent the “emotional abuse” that is found in the literature. The literature has also described “psychological violence.”⁷¹ We prefer to use the term “aggression” because it is more easily defined and measured.

Johnson proposes a hypothesis and subtype of incipient coercive control where there may not be physical aggression prior to the separation and during the marriage, but where coercion and control dominate the relationship.⁷² Or, there may be a relatively small amount of physical aggression, perhaps a few incidents of a low level of severity, but a high level of psychological aggression with control and intrusiveness, as the primary instigator tries to dominate the partner.

Straus, a pioneer in research on family violence, pointed out that the psychological aggression component in IPV may actually be more important than the physical aggression in terms of how it affects the victim’s emotional functioning.⁷³ Johnson’s term of “incipient” means the violent potential is latent and ready to be released, and he hypothesizes the marital break-up may be the stressor that commences the violence. Johnson’s hypothesis is plausible, but we suggest there are a group of emotionally abusive men who have not been violent and will not be violent after the separation and divorce, but they nevertheless show the psychological aggression and characteristics found in the CC subtype of IPV before and after divorce. These are the “as-if coercive control” group who will display residual psychologically aggressive behaviors post-divorce. We suggest such harmdoers should be treated as if they had been physically aggressive in the past in considering the relevance of past and present behaviors for the parenting plan because of the salience and relevance of the coercive behaviors for parenting and co-parenting.

When behaviors of harassment, intimidation, and actions designed to make life miserable continue after the separation and sometimes long after the divorce, they are residual behaviors or the residue from the subtype of IPV. The emotional aggressor probably has a personality disorder and seemingly just cannot seem to keep himself or herself from acting in a controlling manner. The term “control freak” is overused in everyday vernacular, but the components as defined in the coercive control or abusive-controlling subtype are residual behaviors that can become the focus of an evaluation immediately after separation or for years afterward.

In cases where it is not possible to document allegations of physical aggression, there may be data to support the contention of psychological aggression. In the case of the Pathological Chiropractor, there was reason to conclude that there were incidents of mild to moderate physical aggression with several partners, but a high level of psychological aggression, including stalking, with the last partner. Evaluators will encounter cases where it is not possible to form an opinion on physical aggression, but where there will be evidence of psychological aggression that would be consistent with Johnson's subtype of incipient coercive control. Such a conclusion would be highly relevant to parenting plan arrangements. In a post-decree case, the residual behaviors will be equally relevant to the proposed changes to the parenting plan, including changing from joint to sole decision-making. Residual behaviors also could be a basis for arguing for relocation if they are disrupting the life of the parent requesting the move and causing harm to the child.

§ C17.12 • RELEVANCE TO PARENTING TIME AND DECISION-MAKING

The legal context and differentiation of the subtype of violence directs the relevance of the IPV for crafting a parenting plan. The facts of the case in combination with subtype analysis point the way for making specific recommendations about parenting time, whether decision-making could be shared, and what type of co-parenting arrangements make most sense. In a pre-decree context, the data (*i.e.*, facts) concerning IPV are more likely to be “fresh” (or recent) and therefore relevant. There may have been a violent incident that led to the separation and divorce action, and there may be a temporary restraining order still in effect. If the data show it was an isolated incident or if the subtype analysis points to situational couples violence, then it is important for the evaluator to see the forest through the trees and see that the larger picture would indicate that the IPV may not be terribly relevant to parenting even if it involved a “bad scene” and the children were present.

With coercive control and even incipient coercive control, the violence should be considered very relevant, and joint decision-making likely would be contraindicated. The residual behaviors of control, harassment, and intimidation will probably continue in the post-separation context. The male spouse with this behavioral pattern will be the one least likely to acquiesce to the idea for sole decision-making by the mother. It would not be unexpected in this subtype for the male to demand joint or sole decision-making, ask the court to be a majority time parent, or fight for equal parenting time. Feminist writers⁷⁴ addressing the issue often assert that this is a common scenario — *e.g.*, the “batterer” trying to seek custody as a way to perpetuate control — and they assert that the harmdoer is sometimes successful.⁷⁵ There does not seem to be any research to support a conclusion, however, that they are often successful in gaining primary custody. It may be more often that abusive husbands may threaten to use the legal system to gain custody as a way of trying to keep the wife from leaving the marriage.⁷⁶

When all types of IPV are grouped into one category regardless of severity, *e.g.*, “spouse abuse,” then it will be the case that a perpetrator parent (male or female) sometimes will be awarded primary custody in the best interests of the children, usually when the IPV subtype was

situational couple violence. The Colorado cases, *Bertsch* and *Ohr*, reviewed above concern outcomes of this type. Sometimes the facts will dictate that a parent who has been convicted of domestic violence will overcome the statutory presumption against joint parental responsibilities/decision-making or to have substantial parenting time, through the exercise of judicial discretion or by stipulation by the parties. When there are data to support a conclusion of coercive control, especially if there was criminal conviction, then it is probably an easy case for the CFI/PRE evaluator on the ultimate issue of decision-making and whether there should be equal parenting time. What will be difficult are the violence risk assessment and safety concerns in recommending the parenting time arrangements. Commentators have voiced general concerns that courts simply do not take the issue of IPV seriously enough even when required to do so by statute.⁷⁷

When the case is post-decree and calling for modification, and when a stable parenting plan has been in place for a long time, then the data on violence are likely to be “stale” (or remote) and are less likely to be relevant. If there have been continuing residual behaviors, such as harassment and intimidation, then the IPV issue will be more relevant. If the data point to coercive control, then even at post-decree the issue is more likely to be relevant. At post-decree, the relevancy depends on the facts and whether there have been residual behaviors that have been problematic. It would not be unusual to encounter a chronic high-conflict case where there had been IPV in the parents’ marital history that was more than a transient incident or two of minor severity.

When there has been IPV with coercive control, evaluators should recommend a parallel parenting form of co-parenting (as discussed in the following paragraph), just as this form is recommended for parents trapped in enduring high conflict.⁷⁸ The authors believe joint decision-making, as recommended by prominent authorities and researchers,⁷⁹ is not likely to be viable or in the best interests of the children when there is enduring, chronic high conflict, or that a parenting coordinator will make joint decision-making viable. The same is true when there has been IPV with coercive control or incipient coercive control.

With parallel parenting, there is very little direct communication between the parents. It is on an “as-needed basis,” and may be entirely by e-mail. Each parent makes day-to-day decisions when the child is in his or her physical care. If there is joint decision-making, then direct communication will occur orally or electronically. A parenting coordinator will be most effective when there are low or moderate levels of conflict. A large percentage of divorced parents naturally gravitate to a parallel form of parenting regardless of the level of conflict,⁸⁰ and most parents (about 85 percent) are at a low level of conflict after two years.⁸¹

§ C17.13 • ASSESSMENT OF CREDIBILITY OF ALLEGATIONS

When IPV is an issue, the CFI/PRE evaluator should investigate the credibility of allegations. If the IPV is undocumented (no criminal conviction), the investigator should strive to clarify the context and specific events that have occurred. It may happen that at times, the evaluator will not be able to confirm or disconfirm allegations that have not already been documented by

convincing data. The evaluator may then be left with “he said/she said” data only. Also, it will not be unusual for allegations to surface in the context of litigation, and in these instances there will not have been an arrest or conviction. Finally, abuse may not be disclosed for a myriad of reasons endemic to the intimate relationship and its dynamics.

Jaffe, *et al.*⁸² recommend using Austin’s⁸³ six-factor model for assessing credibility of IPV allegations. The model is designed for those cases where IPV has not been documented. It poses questions of whom did the alleged victim tell, what did he or she say, and when did he or she disclose it? The term “credibility” is used here to mean the weight the evaluator will give to the issue and allegation, or believability about what occurred. We are not implying that the court should at all defer to the evaluator as the one to determine the credibility of fact witnesses.

The Austin model suggests the evaluator gather data on the following six factors:

- *Objective Verification*: Police reports, arrest, conviction; medical evidence injuries; direct observation of physical and psychological aggression by credible third parties;
- *Pattern of Abuse Complaints*: A long pattern of complaints even without arrest or conviction is more plausible than allegations that surface for the first time during litigation. “Secret” or hidden IPV is a known phenomenon,⁸⁴ but reality is that there is a strategic advantage to one party when an abuse allegation surfaces within litigation;⁸⁵ allegations need to be investigated with an open mind.
- *Corroboration by Credible Others*: Unaligned third parties provide more useful information, but it is difficult to find neutral collateral sources in parenting disputes; *e.g.*, children may be aligned with a parent. One irony is that biased collaterals will have had more opportunity to receive useful information. Even though collaterals are aligned and expected to be biased (*i.e.*, a sister), it is important to confirm whether the alleged victim disclosed the incidents in the past on a timely basis, or did the alleged victim tell the persons you would expect him or her to confide in? An exception is that male victims may be less likely to disclose IPV to confidants to avoid embarrassment.
- *Absence of Disconfirming Verbal Reports by Credible Third Parties*: When collaterals who have had an expected opportunity to observe conflict and aggression cannot confirm the allegations, it raises questions of credibility. Older children who ostensibly are not aligned are one such source. If the children would have been expected to have observed conflict and physical aggression, but they contradict the allegation, then it is relevant. If a mother who alleges abuse did not tell her best friend, it raises a question of why not?
- *Psychological Status of Alleged Harmdoer and Past History of Violence*: This is a risk assessment component, so the presence of major mental disorder, substance abuse, or past violence serve to enhance credibility of current allegations. If a spouse was violent in previous relationships, such as in the vignette of the Pathological Chiropractor, the hypothesis becomes more plausible. Psychological testing may be helpful, but the evaluator is cautioned about over-interpreting a test profile such as the MMPI-2. There are not just one or two profiles associated with violence; “normal” profiles can be found with a coercive controlling parent.

- *Psychological Status of the Alleged Victim/Partner:* Evidence of serious psychological disturbance is relevant to the issue of credibility; if the partner has a major mental disorder involving reality testing issues, paranoia, a personality disorder, or history of manipulative behavior, it calls into question the current allegations. The psychological functioning may suggest hypotheses about an interactive component to the alleged IPV. Psychological testing is relevant, but caution is again indicated; victims of IPV can show many kinds of profiles on the MMPI-2 and on average may look similar to those who can be violent.

Evaluators are encouraged to familiarize themselves with the large amount of literature on deception detection and recognize that they have no particular skill in deciphering truth-telling.⁸⁶ Without other sources of data, the accuracy of the evaluator's decision on who is telling the truth will be no greater than chance. This is the main reason for using collateral and multiple data sources.⁸⁷ By taking a systematic approach to the assessment of allegations of IPV, such as the six-factor model, the evaluator will be in a better position to have an informed opinion on the issue. He or she may be able to communicate to the court with a reasonable amount of certainty about what really occurred in the intimate relationship. The evaluator will run into trouble when he or she relies on clinical impressions and does not ground the opinions on multiple source data that converge. In a recent case, the judge's opinion noted that the evaluator's bias was evident when convergent data were ignored in favor of clinical impressions.

§ C17.14 • FUNDAMENTALS OF VIOLENCE RISK ASSESSMENT

When IPV is an issue, the CFI/PRE evaluator should investigate the risk of future violence to the other parent and children, develop a safety plan if it is determined there is significant risk, and describe how the issue of IPV has been considered in making specific recommendations. There have only been a few articles in the child custody context designed to assist the evaluator in taking a systematic approach to the issue of IPV and violence risk. Fortunately, there is a vast, research-based literature in forensic psychology on violence risk assessment to draw upon.

Jaffe, *et al.*⁸⁸ recently analyzed IPV and pointed out that a small percentage of cases start, continue, or escalate after separation so that it is almost always necessary to assess the potential for violence, or the risk. They propose a "potency, pattern, and primary perpetrator" (PPP) screening assessment to determine the relevance of IPV and how to translate it to parenting plans. Within each component of PPP are specific questions for the evaluator to follow. This approach is essentially a practical, experience-based forensic assessment model.

The PPP test should be cast against a research-based framework and background for risk assessment.⁸⁹ Questions should cover a wide spectrum, ranging from presence of a major mental disorder; history of violence; presence of weapons; life stress; and history of coercive behaviors not just in the relationship, but across situations and relationships. The questions also should be aimed at understanding the interactive component of past aggression. Jaffe, *et al.* (2008) deal with the issue of assessing credibility of allegations.⁹⁰ One strength of the approach is the behavioral

focus. The questions allow an evaluator to measure specific acts in the present and past. The model⁹¹ combines assessment of credibility, risk assessment, and risk management. The PPP assessment involves the need for evaluators to address all relevant safety issues based on the facts of the case.⁹²

A final assessment approach to IPV within the context of parenting evaluations is set forth by Drozd.⁹³ This method presents the domestic violence in child custody (DVCC) protocol. The tool is a detailed interview to address either IPV allegations or documented cases. DVCC is worthy of consideration by evaluators inclined to be exceptionally comprehensive in looking at the IPV issue.

§ C17.15 • PROTOCOL FOR ASSESSMENT OF IPV

Domestic and partner violence is a complex problem commonly encountered by court evaluators. With this Chapter, the authors attempt to provide a framework for evaluators to follow in order to be helpful to the court and provide a sophisticated and accurate assessment of the issue. The bottom line for the evaluator is to help the court determine the relevancy of partner violence for the parenting plan and to make specific recommendations while considering the subtype, credibility of allegations, and violence risk/safety. The following is a suggested protocol for the CFI/PRE evaluator:

- 1) Careful investigation of allegations or documented incidents of IPV. Assessment should involve interviews with the parties on the details of incidents; interviews with third parties; and careful examination of relevant documents, such as police documents or medical records.
- 2) Evaluators need to be mindful that it is not uncommon for incidents of IPV, including behaviors associated with more severe subtypes, to go unreported. Conversely, when allegations surface within the context of a parenting dispute, there are incentives to fabricate, exaggerate, deny, or minimize by both of the parties.
- 3) A systematic approach to the assessment of the credibility of allegations needs to be followed.⁹⁴
- 4) The subtype of partner violence needs to be differentiated⁹⁵ with an eye toward educating the court that all types of partner violence are not alike and that they differ in severity, residual behaviors, and implications for parenting.
- 5) When a subtype of IPV is documented, then the evaluator needs to conduct a violence risk assessment⁹⁶ or the PPP model.⁹⁷ With a more severe subtype, psychological testing is highly recommended. As part of the risk assessment, the evaluator should draw conclusions about safety issues for the parent and children and be prepared to make recommendations on what steps the court can take to reduce the risk of violence. The evaluator can play an important role in facilitating how the court can manage the risk. It will be helpful to the evaluator to think of this challenge as similar to managing the problem of high conflict in families so children are protected from exposure, as with limited opportunity for direct interaction between the parents.

- 6) When there are indications of violence risk and safety issues, the evaluator needs to make recommendations about a safety plan and risk reduction strategies.
- 7) The evaluator needs to be mindful of prediction errors or errors of conclusion, false positives, and false negatives. The evaluator needs to acknowledge that it may not be possible to hold an opinion on the issue of IPV. In such situations, the evaluator should describe the data and let the court draw its own conclusions on the issue, which the court ultimately does in any case.
- 8) When IPV did occur in a family and is “fresh” at the time of dissolution, it may be highly relevant to parenting and the parenting plan, especially if it is something more than situational violence or an incident associated with the separation. In other contexts, such as post-decree, where the past IPV is “stale,” then it is likely not to be as relevant to a modification of the parenting plan. Facts of a relocation case might fall into this category, but if there are ongoing, residual behaviors, these data are “fresh” and relevant.
- 9) Evaluators need to examine both the psychologically and physically aggressive behaviors that are involved in some IPV subtypes. Johnson’s hypothesis⁹⁸ of an “incipient coercive control” subtype should alert evaluators to look for residual behaviors that will make co-parenting virtually impossible. When harassment, intimidation, and control continue into the post-separation phase and even into the context of a modification action, residual behaviors will be very relevant to a parenting plan. The issue of continuing coercive behavior toward the other parent and/or children will often be more salient and relevant than incidents of past violence. This mindset may be the most important contribution of the feminist point of view⁹⁹ and also the conclusion by prominent researchers.¹⁰⁰

§ C17.16 • PRACTICE TIPS: A CAUTIONARY NOTE

The authors suggest a number of cautions for the evaluator. First, the differentiation of IPV into subtypes is important, but there are potential problems with a categorical analysis. There will be many shades of gray within each category. The evaluator is advised to always be grounded in specific behaviors and function so that past and present behaviors always need to be linked to parenting behaviors. Commentators with a staunch advocacy position point out that some violent individuals can parent quite effectively and can be attuned to the child’s needs or have a value structure that becomes protective when it comes to the children.¹⁰¹

Second, the use of a classification scheme such as those described here for IPV can create images and meaning that are unintended. Just as diagnostic labels used in a forensic setting can be inflammatory, caution also should be exercised in using an IPV categorical analysis. The evaluator always needs to direct the court back to specific behaviors and context, and explain how they pertain to the functions of parenting.

Third, the evaluator needs to be mindful about making prediction errors of both the false positive type (over-predicting risk and harm) and the false negative type (downplaying risk and relevance of behaviors to the parenting plan). The effects of both kinds of errors can be dire, albeit of a qualitatively different nature.¹⁰² The aversive aspects of concluding a person has committed violence, or that there is sufficient risk to diminish parenting time, can have profound effects on a child or parent's life. Not heeding risk factors or red flags that attach to a parent's conspicuously scary behaviors can place the children at risk and can be lethal to children and ex-partners. If evaluators "miss it" for the court, the consequences can be extreme when the errors go in either direction. For this reason, we suggest that only highly trained evaluators should take on the responsibility of a parenting evaluation where IPV is the prominent issue.

NOTES

1. W. G. Austin and J. Gould, "Expertise, Ethics and Helpfulness to the Court: Promises and Perils in the Role of CFI" (Boulder IDC Conference, Arvada, Colo., March 6, 2009).
2. Chief Justice Directive 04-08, fully reproduced in Appendix A to this book.
3. L. Newmark, A. Harrell, and P. Salem, "Domestic Violence and Empowerment in Custody and Visitation Cases," 33 *Family and Conciliation Court Review* 30-62 (1995); L. C. Neilson, "Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases," 42 *Family Court Review* 411-438 (2004).
4. Newmark, *et al.*, *supra* n. 3.
5. J. B. Kelly and M. P. Johnson, "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions," 46 *Family Court Review* 476-499 (2008).
6. M. A. Straus and R. J. Gelles, *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (New Brunswick, N.J.: Transaction Publishers, 1990).
7. M. A. Straus, "Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales," 4 *Journal of Marriage and the Family* 75-88 (1979).
8. M. A. Straus, S. L. Hamby, S. Boney-McCoy, and D. B. Sugarman, "The Revised Conflict Tactics Scales (CTS2)," 17 *Journal of Family Studies* 283-316 (1996).
9. *See In re Marriage of West*, 94 P.3d 1248 (Colo. App. 2004).
10. *Model Code on Domestic and Family Violence* (Reno, Nev.: NCJFCJ, 1994).
11. *In re Marriage of Bertsch*, 97 P.3d 219 (Colo. App. 2004).
12. This part of the opinion is instructive because the father had pleaded guilty to third-degree assault for striking his son, which did *not* qualify as child abuse under the statute; however, "for purposes of resolving this case, the [trial] court assumed that this was sufficient evidence of child abuse under the statute." *Id.* at 221.
13. *Id.* at 222.
14. *In re Marriage of Ohr*, 97 P.3d 354, 356 (Colo. App. 2004).
15. *In re Marriage of Yates*, 148 P.3d 304 (Colo. App. 2006).
16. *Id.* at 308.
17. *People v. Shreck*, 22 P.3d 68 (Colo. 2001); *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).
18. See Chapter D2, "Dealing with the CFI's/CLR's Potential Biases," and Chapter C8, "Dealing with Difficult Parents, Attorneys, and Collaterals."
19. D. Pickar, "Countertransference Bias in the Child Custody Evaluator," 4 *Journal of Child Custody* 45-68 (2007).
20. D. A. Martindale and J. W. Gould, "Countertransference and Zebras: Forensic Obfuscation," 4 *Journal of Child Custody* 69-76 (2007).

21. W. G. Austin and H. D. Kirkpatrick, "The Investigation Component in Forensic Mental Health Evaluations: Considerations in the Case of Parenting Time Evaluations," 1 *Journal of Child Custody* 23-43 (2004).
22. W. G. Austin, "Guidelines for Utilizing Collateral Sources of Information in Child Custody Evaluations," 40 *Family Court Review* 177-184 (2002).
23. K. Heilbrun, *Principles of Forensic Mental Health Assessment* (N.Y.: Kluwer Academic/Plenum Publishers, 2001).
24. W. G. Austin, "Assessing Credibility in Allegations of Marital Violence in the High-Conflict Child Custody Case," 38 *Family and Conciliation Courts Review* 462-477 (2000).
25. W. G. Austin, "Partner Violence and Risk Assessment in Child Custody Evaluations," 39 *Family Court Review* 483-496 (2001); C. Dalton, L. M. Drozd, and F. Q. F. Wong, *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* (Reno, Nev.: National Council of Juvenile and Family Court Judges, 2005).
26. G. W. Holden, R. Geffner, and E. N. Jouriles, eds., *Children Exposed to Marital Violence* (Washington, D.C.: American Psychological Assoc., 1998).
27. J. B. Kelly and R. Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives," 52 *Family Relations* 352-362 (2003).
28. Austin, *supra* n. 25; P. G. Jaffe, J. R. Johnston, C. V. Crooks, and N. Bala, "Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans," 46 *Family Court Review* 500-522 (2008).
29. E. M. Hetherington, "Should We Stay Together for the Sake of the Children?" in E. M. Hetherington, ed., *Coping with Divorce, Single Parenting, and Remarriage: A Risk and Resiliency Perspective* (Mahwah, N.J.: Erlbaum, 1999) at 93-116.
30. E. E. Maccoby, C. M. Buchanan, R. H. Mnookin, and S. M. Dornbusch, "Post-divorce Roles of Mothers and Fathers in the Lives of Their Children," 7 *Journal of Family Psychology* 24-38 (1993).
31. M. A. Fineman, "Domestic Violence, Custody, and Visitation," 36 *Family Law Quarterly* 211-225 (2002); R. Geffner and M. D. Pagelow, "Mediation and Child Custody Issues in Abusive Relationships," 8 *Behavioral Sciences and the Law* 151-159 (1990).
32. M. Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Boston: Northeastern University Press, 2008).
33. J. R. Johnston and L. E. G. Campbell, "A Clinical Typology of Interpersonal Violence in Disputed-Custody Divorces," 63 *American Journal of Orthopsychiatry* 190-199 (1993).
34. Kelly and Johnson, *supra* n. 5.
35. A. Browne and K. R. Williams, "Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides," 23 *Law and Society Review* 75-94 (1989).
36. C.R.S. § 18-6-803.6(1).
37. C.R.S. § 18-6-803.6(2).
38. C. D. Maxwell, J. H. Garner, and J. A. Fagan, *The Effects of Arrest on Intimate Partner Violence: New Evidence from the Spouse Assault Replication Program* (Washington, D.C.: National Institute of Justice, 2001).
39. M. A. Straus and R. J. Gelles, *supra* n. 6; M. J. Kwong, K. Bartholomew, and D. G. Dutton, "Gender Differences in Patterns of Relationship Violence in Alberta," 31 *Canadian Journal of Behavioral Science* 150-160 (1999); and J. Archer, "Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review," 126 *Psychological Bulletin* 651-680 (2000).
40. J. Skeem, C. Schubert, S. Stowman, S. Beeson, et al., "Gender and Risk Assessment Accuracy: Underestimating Women's Violence Potential," 29 *Law and Human Behavior* 173-186 (2005).
41. Fineman, *supra* n. 31; L. Bancroft and J. G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks, Calif.: Sage, 2002).
42. P. Salem and B. L. Dunford-Jackson, "Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals," 46 *Family Court Review* 437-453 (2008); N. Ver Steegh and C. Dalton, "Report from the Wingspread Conference on Domestic Violence and Family Courts," 46 *Family Court Review* 454-475 (2008).

43. M. P. Johnson, "Apples and Oranges in Child Custody Disputes: Intimate Terrorism vs. Situational Couples Violence," 2 *Journal of Child Custody: Research, Issues, and Practices* 43-52 (2005); D. G. Dutton, "Domestic Abuse Assessment in Child Custody Disputes: Beware the Domestic Violence Research Paradigm," 2 *Journal of Child Custody: Research, Issues, and Practices* 23-42 (2005).
44. D. A. Martindale, "Confirmatory Bias and Confirmatory Distortion," 2 *Journal of Child Custody: Research, Issues, and Practices* 33-50 (2005).
45. M. J. Potoczniak, M. J. Mourot, M. Crosbie-Burnett, and D. J. Potoczniak, "Legal and Psychological Perspectives on Same-Sex Domestic Violence: A Multisystematic Approach," 17 *Journal of Family Psychology* 252-259 (2003); see also Chapter C13 in this book.
46. L. Walker, *The Battered Woman Syndrome* (N.Y.: Springer, 1984).
47. E. Pence and M. Paymar, *Education Groups for Men Who Batter: The Duluth Model* (N.Y.: Springer, 1993).
48. N. Jacobson and J. Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships* (N.Y.: Simon & Schuster, 1998).
49. M. P. Johnson and J. M. Leone, "The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey," 26 *Journal of Family Issues* 322-349 (2005).
50. M. P. Johnson, "Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women," 57 *Journal of Marriage and the Family* 283-294 (1995).
51. R. J. Gelles and M. A. Straus, *Intimate Violence: The Definitive Study of the Causes and Consequences of Abuse in the American Family* (N.Y.: Simon & Schuster, 1988); Straus and Gelles, *supra* n. 6.
52. Bancroft and Silverman, *supra* n. 41; P. G. Jaffe, N. K. D. Lemon, and S. E. Poison, *Child Custody & Domestic Violence* (Thousand Oaks, Calif.: Sage, 2003).
53. Kwong, *et al.*, *supra* n. 39.
54. *Id.*; see Dutton, *supra* n. 43, for a review.
55. Johnston and Campbell, *supra* n. 33.
56. Jaffe, Lemon, and Poison, *supra* n. 52; P. G. Jaffe and R. Geffner, "Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals," in G. W. Holden, R. Geffner, and E. N. Jouriles, eds., *Children Exposed to Marital Violence* (Washington, D.C.: American Psychological Association, 1998) at 371-408.
57. Austin, *supra* n. 25.
58. Kelly and Johnson, *supra* n. 5; Jaffe, *et al.*, *supra* n. 28.
59. Jaffe, *et al.*, *supra* n. 28.
60. S. L. Miller, *Victims as Offenders: The Paradox of Women's Violence in Relationships* (New Brunswick, N.J.: Rutgers University Press, 2005).
61. Austin, *supra* n. 25.
62. Kelly and Johnson, *supra* n. 5.
63. Kwong, *et al.*, *supra* n. 39.
64. R. A. Zibbell, "Common Couple Aggression: Frequency and Implications for Child Custody and Access Evaluations," 43 *Family Court Review* 454-465 (2005).
65. Jaffe, *et al.*, *supra* n. 28.
66. Johnson, *supra* n. 32.
67. *Id.*
68. E. Stark, *Coercive Control: The Entrapment of Women in Personal Life* (N.Y.: Oxford University Press, 2007).
69. Johnson, *supra* n. 32.
70. J. B. Kelly, "Parents with Enduring Child Disputes," 9 *Journal of Family Studies* 37-50 (2003).
71. D. J. Sonkin, D. Martin, and E. A. Walker, *The Male Batterer: A Treatment Approach* (N.Y.: Springer, 1985).

72. Johnson, *supra* n. 32.
73. M. A. Straus, "The Controversy Over Domestic Violence by Women: A Methodological, Theoretical, and Sociology of Science Analysis," in X. Arriaga and S. Oskamp, eds., *Violence in Intimate Relationships* (Thousand Oaks, Calif.: Sage, 1999).
74. L. Bancroft and J. G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks, Calif.: Sage, 2002).
75. J. Zorza, "How Abused Women Can Use the Law to Help Protect Their Children," in E. Peled, P. G. Jaffe, and J. L. Edelson, eds., *Ending the Cycle of Violence: Community Responses to Children of Battered Women* (Thousand Oaks, Calif.: Sage, 1995) at 147-169.
76. Fineman, *supra* n. 31.
77. *Id.*; K. T. Bartlett, "Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project," 36 *Family Law Quarterly* 11-25 (2002).
78. J. R. Johnston and V. Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflict and Violent Divorce* (N.Y.: The Free Press, 1997).
79. J. R. Johnston, "Domestic Violence and Parent-Child Relationships in Families Disputing Custody," 9 *Australian Journal of Family Law* 12-25 (1995); E. E. Maccoby and R. H. Mnookin, *Dividing the Child: Social & Legal Dilemmas of Custody* (Cambridge, Mass.: Harvard University Press, 1992).
80. Maccoby and Mnookin, *supra* n. 79.
81. Hetherington, *supra* n. 29; Kelly and Emery, *supra* n. 27.
82. Jaffe, *et al.*, *supra* n. 28.
83. Austin, *supra* n. 24.
84. C. Dalton, "When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System," 37 *Family and Conciliation Courts Review* 273-296 (1999).
85. The authors agree with commentators who complain about the suspicious eye that is cast on allegations of domestic violence that surface within custody litigation (Fineman, *supra* n. 31), but careful investigation is needed for documented and undocumented cases of IPV.
86. Austin, *supra* n. 24; C. F. Bond, Jr. and A. Uysal, "On Lie Detection 'Wizards,'" 31 *Law and Human Behavior* 109-116 (2007); C. A. Meissner and S. M. Kassin, "'He's Guilty!': Investigator Bias in Judgments of Truth and Deception," 26 *Law and Human Behavior* 469-480 (2002).
87. Austin, *supra* n. 25.
88. Jaffe, *et al.*, *supra* n. 28.
89. Austin, *supra* n. 25.
90. Set out by Austin, *supra* n. 24.
91. *Id.*
92. The reader can compare the safety perspective on child custody evaluation and domestic violence in the NCJFCJ publication: Dalton, *et al.*, *supra* n. 25.
93. L. M. Drozd, "DVCC Protocol," 4 *Journal of Child Custody: Research, Issues, and Practice* 19-32 (2007).
94. Austin, *supra* n. 24.
95. Kelly and Johnson, *supra* n. 5.
96. Austin, *supra* n. 25.
97. Described by Jaffe, *et al.*, *supra* n. 28.
98. Johnson, *supra* n. 32.
99. *Id.*; Stark, *supra* n. 68.
100. Straus, *supra* n. 73.
101. Bancroft and Silverman, *supra* n. 41.
102. Austin, *supra* n. 24; Jaffe, *et al.*, *supra* n. 28.

