EVERYTHING YOU EVER WANTED TO KNOW ABOUT DOMESTIC VIOLENCE AND FAMILY LAW

By Forrest L. Wagner

Domestic violence is a serious social problem intersecting many professional disciplines. Over the years, the legal system's approach to the issue has evolved from ignorance, to denial, to minimization, to recognition, to vigilance, and occasionally, hyper-vigilance. These days domestic violence is regarded as one of the most urgent threats affecting women and children in family court. Parties have also begun to realize that a claim of domestic violence can be wielded as a powerful weapon in parenting disputes, profoundly impacting custody and visitation decisions. In some extreme cases, domestic violence findings can also impact property allocation, perhaps in dramatic fashion.

Domestic violence issues interplay with family law in the following types of actions:

1. Criminal prosecutions;
2. Domestic Violence Protection Orders;
3. Limiting factors in a parenting dispute; and
4. As a claim for damages which affects property distribution.

This overview will examine the multi-dimensional impact of domestic violence issues on typical family law litigation.

But First, a Word about Personal Security

First and foremost is personal safety and security. When dealing with a party who may be a domestic violence victim, the first order of business should be their safety going forward. All the legal knowledge and all the best lawyering in the world will be for naught, if the client does not prioritize her personal security. Statistically speaking, the most dangerous time for a woman is separating from a male partner. If the client has been assaulted, or if circumstances reasonably cause her to believe she will be assaulted, then a Domestic Violence Protection Order (DVPO) should be seriously considered. These orders can be obtained by parties without counsel on an ex-parte basis. This means that a victim of domestic violence can visit the family court and obtain an immediate temporary order for protection without notice to the other party. By law, the clerk's office will have various brochures and other sources of information available to the party seeking protection. The process of obtaining a temporary domestic violence protection order will be made as easy and as comfortable as possible. In almost every instance a person applying for a temporary DVPO will be granted such an order. A temporary DVPO will direct law enforcement to immediately remove the respondent from the family home (if it was requested by the petitioner) and banish him therefrom. A temporary DVPO will also mandate that the respondent have no contact with the protected party, and most likely any minor children, pending a full hearing.

Domestic violence allegations are serious. DVPO's have dramatic and immediate consequences. They should never be obtained merely to gain strategic advantage in a custody case or to secure the immediate occupancy of the family home in lieu of a hearing. If there is a legal basis for a DVPO. the litmus test on whether to obtain one is whether the client is genuinely fearful for her safety and security. If so, then all efforts should be directed to obtaining full protection for the client. If there is no genuine fear, then there is certainly nothing wrong with declining to obtain a DVPO even though the legal elements can be satisfied.

Obtaining a temporary DVPO is pretty simple. A party will be asked to fill out some forms. Then she is ushered in to see the judge. In the vast majority of cases, the other side will not be given any notice that this ex-parte request is being made. The court will sometimes attempt to notify the other party if there is already a parenting plan or custody order in place which the temporary DVPO will usurp. In other words, if mom has been designated the primary parent under a final parenting plan, and six months later the father applies for a temporary DVPO which includes the children, granting that temporary order will turn the parenting plan on its head and make the father the new, albeit temporary, custodian. Providing notice to the other parent in that type of situation is appropriate, but even in those circumstances it is not mandatory or universally provided. Temporary DVPO's, quite frankly, are handed out like hot dogs at a picnic. The policy seems to be one of approving any temporary application on the theory that it can all get sorted out at the final adjudication.

However, just because these orders are handed out readily doesn't mean they should regularly be sought. A DVPO should be obtained when personal safety and

security require it. If a party's safety is compromised, if there has been assaultive behavior or if the client reasonably fears an assault, a party should not hesitate to seek a DVPO, notwithstanding its drastic impact on the other party. Safety is paramount. Generally, individuals are the best judges of whether a DVPO is needed. Nobody knows their partner or their situation better. But sometimes people are not prudent protectors of their own personal safety. In fact, some of the more significant domestic violence victims are often the most reluctant parties to seek protection. The reasons for their reticence are understood by people conversant with the pathology of domestic violence, but it can seem counter-intuitive to people who have not lived through the experience. However, every victim's choice should be respected. Parties should be thoroughly advised of their rights and their legal options, but they should not be pressured or compelled towards any particular action. It is difficult to know what course of action will provide the most protection, and sadly, some victims feel they would be more endangered by obtaining a protection order. These cases must be handled with the utmost care, but ultimately the individual must be empowered to make decisions she believes are in her best interests. Any party coming out of a relationship involving domestic violence should be referred to a counselor trained in the dynamics of domestic violence. For a victim, part of their healing and recovery may be the empowerment to reclaim their autonomy and assert control over their personal destiny. Neither lawyers nor well-meaning friends or family can make those decisions for them. At the end of the day, people with the delicate and dangerous task of disentangling themselves from unhealthy relationships must be able to make their own intelligent decisions.

Criminal Assault Charges

Couples who end up in divorce or other family law litigation invariably experience a prelude of marital conflict. Sometimes that conflict escalates, and occasionally to the point that law enforcement gets involved. Unfortunately, it is not uncommon that family law litigation is affected by some concurrent criminal prosecution of a party for domestic violence. If the police are called to a residence because of conflict, there is a high probability that somebody will go to jail. And if a party goes to jail he or she is likely to be prosecuted with a crime.

Peace Officer must Arrest on Probable Cause

When peace officers are summoned to a residence pursuant to a domestic violence call, they are legally obligated to take somebody to jail if they find probable cause that an assault occurred. ***RCW 10.99.030(6)(a).*** Officers no longer have discretion to tell the parties to calm down or to take any other remedial action. If there is probable cause that an assault occurred, the responding peace officer must take the offending party into custody. On a domestic disturbance call there are usually two officers. They separate the parties and interview them. They are very observant to detect any physical signs of assault, such as red marks, cuts, etc. If a party admits to assaulting the other party, the officer will take him into custody for at least the night. If there is a denial but an officer finds corroboration—injuries consistent with the allegation, witness validation, and more and more these days, an audio recording from a cell phone—that an assault took place, an arrest will be made. If there is a denial and no corroboration, then the officer will exercise discretion as to whether probable cause

exists. The officer may conclude it is reasonable to take a party into custody as the apparent aggressor or perpetrator, or he may determine there is no basis to make an arrest. Sometimes in such situations the officers will warn both parties and instruct one of them to go elsewhere for the evening.

Domestic Violence Designation in Criminal Prosecutions

A criminal prosecution for any crime of domestic violence (and it can be any crime as long as the prosecutor is able to prove that the offense was motivated by "domestic violence) will absolutely have a significant impact on a concurrent parenting dispute in family court, particularly early on. First, the filing of criminal charges alone is a legally significant development which will affect any companion action in family court. When any prosecuting authority brings criminal charges against a party it must satisfy an immediate hurdle of "*probable cause*." Since the mere filing of criminal charges has constitutional implications for a citizen, the law states that such charges can only go forward if the prosecutor is able to establish "probable cause" before a neutral magistrate. The officer on the scene may already have determined that there was probable cause at the time he made the arrest, but that determination will later be independently examined by a judge. Before any citizen can be subjected to a prosecution the prosecutor must convince the judge that there is probable cause. This means that viewing the evidence in its totality, there is a reasonable basis to conclude that the defendant committed the crime as alleged.

Therefore, if a party in a parenting dispute in family court is simultaneously facing criminal charges in any other court, the opposing party in the parenting dispute may

argue it is more likely than not true that the accused party committed the acts as alleged because probable cause has been found for their prosecution. The burden of proof in any civil proceeding is a mere "*preponderance of evidence*" which does not equate to definitive proof, but merely a showing that the defendant *probably* committed the act or acts as alleged. The legal term of art is "*more likely true than not."* If a criminal prosecution is supported by probable cause it may equate to a preponderance of evidence in the civil case. This may be overstating it, but formal charges in criminal court at a minimum signal to the family court that the allegations have been found legally sufficient to pursue criminal charges. If there are criminal charges pending against a party it will certainly cause the family court to regard the situation with heightened concern because they are no longer just naked allegations.

Distinctions in Burdens of Proof

In the criminal justice system, a person is protected by the *presumption of innocence* which can only be surmounted by competent evidence establishing guilt beyond a reasonable doubt. But the hallowed *presumption of innocence* and *proof beyond a reasonable doubt* are prophylactic concepts only in criminal cases, not civil cases. Moreover, different burdens of proof in different types of adjudication are very important to keep in mind. In a criminal case, the prosecutor has the burden of proving the defendant's guilt beyond a reasonable doubt. In a civil case the burden of proof is quantified as a "*preponderance of the evidence*." "Preponderance" is a legal term of art meaning "superiority of weight". *Black's Law Dictionary Online [thelawdictionary.org 2015]* When something is proven by a *preponderance of the evidence* it generally means it has been shown to be *more likely true than not*. Some authorities call it a

"slight tipping of the scales." In a civil case the proponent or plaintiff bears the burden of proof. In a family law contest it is a little more ambiguous than that. Depending on the issue under discussion the burden of proof could fall on either of the parties. The best way of looking at it is that the proponent *of any legally significant fact* bears the burden of proving that fact, and the standard of proof is by a *preponderance of the evidence*. In other words, a party in family court alleging acts of domestic violence must convince the court on a more likely than not basis that the alleged acts took place. If a party alleges that the other party has committed child abuse or is a drug addict, the party making the allegation will bear the burden of proof and the standard will be a preponderance of the evidence, with a few exceptions which require "clear, cogent, and convincing evidence."

With that in mind, any criminal prosecution will ultimately be resolved at some point. Charges are resolved in one of the following ways: dismissal by the prosecutor; dismissal by the court; plea bargain; verdict of guilty after a jury or bench trial; verdict of not-guilty after a jury or bench trial; verdict of a lesser included offense after a jury or bench trial; or a hung jury after a jury trial. If a criminal charge is withdrawn by the prosecutor or dismissed by the court at some point, that is positive for the person charged, but it is not dispositive of the merits of the allegations transposed to family court. In other words, just because a person charged with domestic violence succeeds in getting the charges dropped, it does not mean that the allegations are no longer part of the family court dispute. They will continue to vex the former defendant.

When Charges are Dismissed

A criminal case could be dismissed because the prosecutor believes he cannot prove the case "beyond a reasonable doubt," because of witness recalcitrance or other reasons which do not necessarily equate to the person's actual innocence. The allegations could still be established by a "preponderance of the evidence" in any family law proceeding. The judicial officer in the family court will independently adjudicate and determine whether the allegations have been legally established in that civil proceeding. Lay people often have difficulty with these fine distinctions, but it is important that lawyers understand and impart these points to clients--whether they be alleged perpetrators or alleged victims. Even a verdict of acquittal in the criminal case does not shield the individual from the allegations being wielded again in the family court venue, where, again, the burden of proof is a mere "*preponderance of the evidence*" and not proof*" beyond a reasonable doubt."*

Declining to File Charges

Sometimes the police will arrest a person but later for whatever reason the prosecutor decides not to file charges of any kind. This is a different situation than charges being filed upon probable cause, but later dismissed. The party who is merely arrested and never charged can argue that the prosecuting authorities determined the case lacked "probable cause". That person can argue in the concurrent or subsequent family court proceeding that the failure to file criminal charges is actually exculpatory because the prosecutor determined there was no reasonable basis to file criminal

charges. On the continuum between innocent and guilty he is closer to innocent than the person whose charges were dismissed after probable cause was established.

It is a gray area, however, and the other party could argue, on the contrary, that even the individual's arrest indicates on a more probable than not basis that he acted inappropriately. In my experience, even an arrest without criminal charges can be problematic because the officers who investigated the situation in real time concluded that the arrested party was the aggressor. This conclusion by the peace officer could signal to family court that at least the initial investigators made an adverse finding regarding the arrested party which could prejudice him in litigation in that forum. The bottom line, though, is whether there are criminal charges or not, the family court judge will make the ultimate decision based on whether the allegations have been established by a preponderance of the evidence.

Pleading Guilty and 'Alford' Pleas

Criminal charges are sometimes resolved by way of a plea-bargain whereby the defendant pleads guilty to a lesser offense or admits guilt in exchange for a favorable sentence. Entering any guilty plea in criminal court means that defendant's guilt is established. It becomes a legal verity—that cannot later be repudiated in family court. Whenever a defendant enters a plea bargain it is the same as if the jury convicted him. Whatever crime he pleaded to is established beyond a reasonable doubt by the entry of the plea. The defendant cannot plead guilty in criminal court and then turn around and argue to the family court that he did not commit the act that was alleged. The doctrine of judicial estoppel (in addition to common sense) would prevent such incongruent legal

positions. A party is estopped from taking a position in one court that is incompatible with the position taken in a different court. People try to do it all of the time, particularly with the use of the so-called *Alford Plea*, which is based on an eponymous United States Supreme Court opinion which holds that a criminal defendant has a constitutional right to plead guilty without actually admitting that he, in fact, committed the crime. Basically, in an *Alford Plea,* the defendant accepts a favorable plea offer without assenting to the state's theory of the case. He stipulates to two propositions: First, that the evidence is sufficient to satisfy a court of the defendant's guilt beyond a reasonable doubt; and, second, that the defendant is entering the plea to obtain the favorable outcome promised by the government. Even in these carefully-parsed, finely-lawyered outcomes, the net result of the plea is a finding of guilt which the family court will absolutely respect as a legal verity. An Alford Plea may allow a defendant to save face with his friends and family, but he will be viewed as guilty for all official purposes, including any concurrent family court adjudications.

Any finding of guilt in a criminal prosecution will have a profound impact on the family law case because it means that the evidence met the exacting legal standard of proof beyond any reasonable doubt. This standard will necessarily subsume and satisfy the less-exacting standard of *preponderance of evidence* which governs adjudications in family court. This means that the family court will perforce find that the party convicted in criminal court has committed the "acts of domestic violence" forming the basis for the criminal charge. As soon as the family court makes a finding that domestic violence occurred, it automatically mandates that the party who committed the domestic violence be limited in his residential time with his children as well as decision-making

authority. As will be discussed in detail later, a family court statute, RCW 26.09.191, categorically mandates limitations on a party if he or she has a "*history of acts of domestic violence.*" Therefore, any party who is guilty of a crime involving domestic violence will, in all likelihood, be disqualified as a custodial parent (at least for the time being) and be subject to residential restrictions or limitations, subject to a very narrow exception which will be discussed below.

Acquittal by Jury or Judge

On the other hand, if a party facing criminal charges is acquitted by a jury--then bully! That means he is not guilty of the crime. He gets to go home. No conviction will blot his record. He will pay no fines nor suffer any other penal consequences. However, *it does not mean that he did not commit the acts as alleged.* This is a variation of the discussion we had to endure after the Mueller Report ad nauseum. The fact that no charges were referred is not synonymous with exoneration. A jury's acquittal, while the best news ever for the defendant, is still not exculpation. It is only a determination that the defendant's guilt is not established beyond a reasonable doubt in the collective opinion of those 6 or 12 jurors. The allegations of domestic violence which formed the basis for the criminal prosecution can, and likely will, still be wielded as a potential limiting factor in family court. The family court would entertain the evidence of alleged domestic violence and measure it against the lesser standard of proof— *preponderance of evidence.* If the court commissioner or family court judge finds by a preponderance of evidence that the domestic violence occurred, it is established for the purposes of that proceeding. The family court is not in any way bound by or even influenced by the jury's acquittal in criminal court.

A criminal prosecution puts the allegations of domestic violence in a much more serious light than if they were just allegations by a party. If an innocent party is charged with a crime, he must hope against hope that the charges will be dismissed as soon as the state recognizes its mistake. Barring that, the party must either enter into a plea bargain, any of which will leave his true guilt or innocence a mystery, or spending several weeks of his life and thousands of dollars to convince a jury to vote not guilty. And if successful, his actual guilt or innocence will still be legally nebulous. Once an innocent person is charged with a crime, there are virtually no positive outcomes for him.

If a guilty person is charged, it is a different proposition. If a party did commit the acts as alleged by the government in a criminal matter, then there are any number of outcomes that may be desirable from a criminal defense stand point--from outright acquittal to favorable plea bargain. However, *from a strictly family law perspective,* the absolutely best move would be to take the most advantageous plea deal available, acknowledge and apologize for the misconduct, and then energetically pursue a program of domestic violence perpetrator treatment and successfully complete the same. Then and only then will a party be able to put themselves back on reasonable footing in attempting to secure meaningful residential time and parenting rights.

Mitigating or Correcting Finding of Domestic Violence

My standing order to all clients whenever there is any allegation of domestic violence, is to sit for a domestic violence evaluation by a state-certified domestic violence treatment provider and follow through with any recommended treatment. This

is the only way to deal with allegations of domestic violence. It seems counter-intuitive to clients, and it drives criminal defense lawyers crazy. But really this move is a “heads we-win-tails-you-lose” sort of situation. If the evaluation comes back without any recommendation for treatment, then the client can put to rest the allegations of domestic violence because a state-certified professional has determined he does not have any domestic violence issues. On the other hand, if the evaluator finds that there is a need for domestic violence treatment, the client pursues treatment with alacrity and then the whole issue is pretty much neutralized. By pursuing treatment and making good progress, the client ends up in a position where he is prejudiced as little as possible by the allegations. Often the client accused of domestic violence has an instinctual reaction to fight the allegation as vigorously as possible and take no quarter. Agreeing to go to treatment goes against that grain. But in *almost every single case a client faced with allegations of domestic violence is best served by immediately submitting to an evaluation and energetically pursuing any and all recommendations*. The client can enter into domestic violence treatment without necessarily endorsing every allegation of the opposing party. The clinical definition of domestic violence encompasses a broad swath of interpersonal behavior from reproving words to homicide. A party can often plausibly admit to some behavior which falls somewhere on the continuum of domestic violence without specifically stipulating to the allegations of their partner. The simple and inescapable truth is that *the very best response*—perhaps the *only* response to allegations of domestic violence-- is to openly and honestly submit to a domestic violence evaluation and earnestly pursue whatever recommendations are made.

Although I have not seen statistics, I would be willing to wager that close to 98% of all domestic violence evaluations recommends domestic violence treatment. A party should understand that a referral for an evaluation is likely to eventuate into a recommendation for treatment. There is more than a hint of self-dealing when an evaluator can recommend that a subject be *court-ordered to participate in and pay-for* a treatment program that the evaluator just so happens to provide. Agencies which provide domestic violence treatment clearly have a mercenary interest in sending as many people to treatment as possible. This inherent conflict has given some aggrieved parties a least a patina of plausibility as they contend that an axis of legal-clinical services--an interwoven, mutually-reinforcing network of treatment providers, counselors, lawyers, and judicial personnel-- is battening off hair-trigger allegations of domestic violence [See *Divorce Corps (2014),*You Tube] My own less jaded view is that domestic violence is a frequently seen dynamic in many intimate relationships in varying shades and degrees, and clinicians are doing their best to discriminate between those relationships which are free of that dynamic and those that are affected by it. The professionals who make these evaluations must strain to discern the blurry margins separating clinically problematic relationships and relatively healthy ones. Perhaps evaluators are occasionally guilty of erring on the side of caution, but since their goal is to root out unhealthy coercive power and control in relationships, it is not unreasonable to give them the benefit of the doubt. For the client involved in this process, the point is he should be prepared to be referred to treatment.

The most common type of infraction involving domestic violence is the crime of assault 4th degree. This is a gross misdemeanor assault and what separates it from the

felonious or more serious degrees of assault would be the harm caused to the victim and whether there was any weapon used or threatened. The basic working legal definition of assault is any *non-consensual offensive touching or the threat thereof*. An assault could be anything from flick of a finger to an assault with a weapon. O.J. Simpson's double homicide was domestic violence; so is the wife's slap on her husband's cheek when his indiscretions with his secretary are discovered. If there is great bodily injury or the use of a weapon, the charge is potentially a felony. Other types of charges commonly involving domestic violence include interfering with an emergency call, unlawful harassment, which basically involves a threat to kill, unlawful imprisonment, or malicious mischief. The person accused will have to secure their own defense lawyer unless they qualify for court appointed counsel. The alleged victim is not technically represented, but often his or her voice is heard through a victim advocate employed by the prosecutor's office.

Domestic Violence Protection Orders

There is a statutory process whereby a person can obtain a domestic violence protection order (DVPO) against "family or household members" who have committed acts of "domestic violence." The cause of action for a DVPO is satisfied by a showing that the petitioner "has been the victim of domestic violence committed by the respondent." A protection order is not to be confused with a restraining order. Restraining orders are a different type of order. They can be and frequently are entered in any kind of domestic relations litigation. They will prevent people from showing up at work-places and residences or from unduly harassing or annoying each other. What we are concerned with here is a specific type of restraining order properly nominated as a

"Domestic Violence Protection Order." These orders also restrain parties from coming to a party's workplace or home or from stalking or bothering a protected party, usually a partner or spouse, but these orders are unique. They completely bar any kind of contact with the protected party—direct or indirect, whether consented to or not, in person, in writing, through third parties or otherwise.

Contact with Victim's Consent or Encouragement is Illegal

Any and all contact with the protected party is prohibited. It doesn't matter if the protected party calls the respondent or shows up at his house, he is prohibited from having any contact. It doesn't matter if the protected party consents to the contact or wants it and actively solicits it from the respondent. All contact by the respondent with the protected party is prohibited. Furthermore, the contact is prohibited on pain of arrest and criminal prosecution. If there is any violation of the order, no matter how slight or incidental, the respondent will be arrested and prosecuted. It is a misdemeanor to violate a DVPO; however, upon the third conviction it becomes a felony.

A DVPO will prevent the respondent from lawfully owning or possessing firearms under federal law. It will show up on background checks and often interfere with security clearances required for employment at sensitive positions. A DVPO will affect some types of employment, such as positions with vulnerable populations. In addition, some employers in their unbridled discretion may terminate a respondent in a DVPO. If a party is relying on child support or maintenance from the other party, this potential loss of income is certainly a consideration, even though in my experience respondents tend

to exaggerate the threat of job discontinuation as a method of deterrence. Without a doubt though, a DVPO is a very serious matter with very serious consequences.

Basis for Domestic Violence Protection Orders

The legal basis for DVPO's is statutory—RCW 26.50. 020 states that a party may seek a DVPO "*by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent*." The term "domestic violence" is defined in RCW 26.50. 010 as--

> ***"Physical harm, bodily injury, assault, or the infliction of fear of imminent physical injury, bodily injury or assault."***

That is the principal legal definition of domestic violence. The statutory definition also specifically incorporates sexual assault and broadens the umbrella of domestic violence to include "stalking" as defined in the state criminal code. So, if a spouse has not engaged in any violence or threats of violence but has sought to control and keep his spouse under surveillance or monitoring such conduct may come within the legal definition of domestic violence.

Past Acts can be Basis for DVPO

A person seeking a DVPO must file a petition and establish that there has been an act of domestic violence. The statute does *not* state that the act must be *recent.* No emergency is required. There is no element of temporal relevance. The incident or incidents forming the basis for the DVPO could be many years old or within hours of the petition being filed. Cases interpreting the domestic violence statutes have held that allegations of domestic violence several years old can form a basis for a protection

order as long as the petitioner has a *present fear* of the respondent. See ***Spence v. Kaminski, 103 Wn. App. 325 (2000)***

Venue

A DVPO proceeding must be initiated in the county where the petitioner resides unless the petitioner has left that jurisdiction to avoid abuse in which case it shall be initiated in the county where the petitioner has fled. **[*RCW 26.50.020(6*)].**

Commencement of Case and Temporary Orders of Protection

A domestic violence action is commenced by the filing of a petition alleging domestic violence. The clerk of the court is legally mandated to provide standardized forms and informational brochures regarding domestic violence. This process seems to be fairly user-friendly. The petition will be reviewed by a judge; a temporary DVPO will be issued; and law enforcement will attempt to serve the respondent with the temporary order of protection as well as the petition. As discussed above, this order may have far-reaching implications such as ousting the respondent from the home and depriving him of all contact with minor children. Generally, this is all done *ex-parte*, meaning no notice is provided to the other party. Accordingly, the respondent does not have an opportunity to even respond to the underlying allegations at the time the petitioner asks for a temporary DVPO.

Some judges will require notification to a party if the temporary order will usurp an existing custody or visitation order. The party who is on the receiving end of a temporary DVPO can go back to court on two days' notice to the other party to seek to dissolve the initial temporary order or limit its scope **[Civil Rule 65 (b)]**. This relief is not

frequently utilized, but in the right situation it should be considered. If a party has been the historical primary parent based on a previous adjudication and then later the non-residential parent applies for and receives a temporary DVPO which places the children in that parent's care pending the hearing, it may be very disruptive and detrimental. The respondent could seek an immediate order reversing that decision, arguing that he or she has already been awarded the primary care of the children and a temporary DVPO should not be reverse that, absent a compelling showing. If the allegation of domestic violence did not involve the children and did not suggest a manifest detriment to them, the court would perhaps be cautious about upsetting an established custody order through an ex-parte temporary DVPO.

The temporary DVPO will also set a hearing date to rule on the merits of the petition. The temporary DVPO is just an interim order which provides protection to the petitioner until there can be a final adjudication on the petition. The statute requires that the full hearing occur within 14 days of the initial temporary DVPO. In practice the hearing on the DVPO can be much longer than the 14-day window because parties often need more time to prepare for the hearing or obtain counsel. But at the hearing *both parties* are present. Each party has a limited opportunity to present evidence and make argument. The *only issue* at the hearing is whether an act of "domestic violence" occurred. The scope of the inquiry at a DVPO proceeding is very narrow. Parties often want to talk about a lot of different things at those hearings—the children, property, extra-marital affairs, substance abuse, or whatever else has led them to that unhappy point. But the only issue at the hearing is whether the respondent committed an act of domestic violence.

Hearing on the Merits

The hearing on the DVPO petition is, in most venues, an evidentiary proceeding, based on the testimony of the parties and other witnesses, along with relevant exhibits, such as photographs, police reports, text messages and often social media posts. Each party also has the right to submit sworn declarations of witnesses who are not in court. The most important feature of these proceedings is that the rules of evidence do not apply. **[Evidence Rules (ER) 101 and 1101(c) (4)].** Therefore, a lot of evidence can be considered that would ordinarily not be accepted in court. Even hearsay often comes in, but most courts will devalue the weight given to hearsay statements. If possible, offering the evidence under a traditional exception to the hearsay rule may enhance its evidentiary value. The laxity of the rules can be advantageous and can be detrimental. Social media should not be overlooked as a source of evidence. We live in an age of self-confession and people will often make statements against their interest in their social media posts, which can be offered into evidence. Although polygraph evidence is historically inadmissible in Washington courts, absent a stipulation of the parties, it could conceivable be allowed in a protection order proceeding since the rules do not apply. It could be argued that a polygraph should be considered when the issue comes down to which of two version of the facts are true.

Burden of Proof

The burden of proof at these hearings is the "preponderance of evidence" standard of "more likely true than not." The petitioner bears that burden of proof and will present his case first. After the petitioner testifies, usually in the form of some narrative

statement, but with some queries from the court for elucidation or via direct examination if the petitioner has counsel, the other party may cross examine the witness. Each party may testify, and each party may call witnesses, but the court is not reticent about disallowing witnesses if, in its judgment, they will not be probative of the issues. After the petitioner and the petitioner's witnesses testify and after the petitioner has submitted any exhibits, the respondent's case follows. When the testimony is complete and all the offered exhibits are accepted, the court may or may not solicit any argument from the parties. The ultimate issue is whether the petitioner established by a preponderance of evidence that an act of domestic violence occurred.

DVPO hearings are conducted in an abbreviated expedited fashion. The court tends to move the case along by cutting testimony short, preventing duplicative or uninformative witnesses, and hastening or foreclosing argument altogether. Thurston County has seemingly taken the position that these proceedings are meant to be expedited. Sometimes the tendency to expedite cases comes at the expense of the constitutional right of every litigant present a full case or a full defense. As we have already indicated above, the consequences of a DVPO are significant and more important than other proceedings where the system scruples to ensure their rights. In most DVPOs the hearing is all over in 30 to 60 minutes. Then the court makes a ruling which can have ramifications for years and in some cases for a lifetime. That's our system. Both petitioners and respondents need to be extremely brief and very much to the point, with little context or back story, which many parties frequently lapse into. The focus should be exclusively on the act of domestic violence or the lack of such an act.

Parties on the losing side of a DVPO petition will often lament that a DVPO was granted when there was "no proof." Usually what this means is that there was no additional "proof" except for the testimonial allegations of the petitioner. The evidentiary dialectic at most of these hearings is "accusation-denial" and the court must conclude which is more probable. The testimony of the petitioner is in fact "proof." Many critical criminal allegations boil down to the testimony of a single victim. The administrator for the courts probably keeps statistics, but anecdotally there appear to be more decisions granting the DVPO petition than denying it.

Consider this: if the petitioner comes to court, is sworn, takes the stand, and looks in the judge's eyes and says that the opposing party hit, struck, kicked, stalked, or threatened him, not only is that "proof" but it might by itself constitute proof by a "preponderance of the evidence." Courts would never articulate it, but there is psychologically an unspoken assumption that a person would not come to court and manufacture out-of-nothing serious allegations. This attitude tends to shift the burden of proof to the respondent to disprove the allegation or at least provide a strong rebuttal of the evidence or some material impeachment of the proponent of such evidence. In most DVPO adjudications there is no substantial corroboration of the allegations. Sometimes there are pictures of a bruise or injury or some other corroboration, but rarely are acts of domestic violence ever perpetrated in the view of other witnesses. Invariably these types of cases boil down to competing stories about what happened. A respondent to a petition for protection should never be self-deluded and believe that "there is no proof" because the testimony of the other party is in many cases all that is needed for an order to be entered.

Nonetheless, petitioners should make sure they present a cogent description of the incident or incidents and, if possible, corroboration of the domestic violence which may consist of other witnesses, photographs, police reports, emails, text messages or comments on social media. After a nasty incident there may very well be a rehashing of it via text messages whereby certain key admissions are made. This should not be overlooked.

Presenting a Defense

On the other hand, a responding party had better build a defense that is more than just a categorical denial of the allegations. A viable defense would impeach the petitioner's credibility by exposing inconsistencies in her story, by showing a motivation to fabricate allegations, or by simply pointing out a concurrent custody dispute which would be significantly impacted by a finding of domestic violence. Again, the same rule about admissions via Facebook or other social media also applies to the Petitioner who may make comments which downplay or discount domestic violence or the need for a DVPO. A respondent should also have the right to present some character witnesses who, although not present during any alleged incident, may still attest to the respondent's peaceable nature and the lack of any signs of personal anger or violence on his part. The court may discourage the use of these witnesses because they are collateral, but a respondent should politely suggest to the court that under the rules he should have the right to present character testimony and some reasonable amount should be allowed. A party also has the right to present reputation evidence in this state, but only as to reputation for truthfulness. Witnesses are simply asked if they are aware of a party's reputation for truthfulness in the community (and "community" is

simply defined as the person's circle of friends and colleagues). The witness would respond affirmatively. The questioner then asks "what is his reputation?" The witness says something like "his reputation is that he is an honest truthful person." That is the accepted script for the introduction of reputation testimony. Follow it and the evidence should be admitted. The respondent in a DVPO, needs to give the court a good reason not to believe the allegation in order to have any chance of prevailing.

Statute of Limitations and Right to Jury Trial

The respondent may also raise a couple of legal defenses. In the right case, he may argue that old allegations of domestic violence are barred by the general statute of limitations of two years. No case has directly considered this issue but it was discussed as a potential defense in ***Muma v. Muma115 Wn. App. 1 (2002)*** where the respondent raised the issue on appeal, but neglected to interpose the defense at trial, resulting in the appellate court finding the issue not ripe for appeal. In a case where the sole basis for the DVPO is older than two years it would be appropriate to raise the limitations defense.

The respondent may also allege the right to a jury trial since these proceedings can result in a substantial deprivation of liberty by restricting the respondent's ability to be in certain places and by requiring him to depart from public places should the petitioner be present. The statute also allows the court to employ electronic monitoring of the respondent. These restrictions arguably impinge on fundamental constitutional rights which warrant the protection of a jury trial. In the current legal climate, it is unlikely that either of these strategies would be successful, but they are available.

Re-aligning the Petitioner and Respondent

In the course of a DVPO proceeding, the court can re-designate the parties if the court determines that the petitioner is actually the party guilty of acts of domestic violence **[RCW 26.50.060 (4)].** If an abusive spouse takes out a protection order against the other as a preemptive strike, knowing that the party would likely seek such an order and it is better to beat him to the punch, the court can simply re-designate the petitioner as the respondent at the time of the hearing. The court can then actually issue the DVPO against the original petitioner.

Scope of Relief

The scope of the DVPO is significant. As stated, it can determine who lives in the family home and completely prohibit any kind of contact with the protected parent, but it can also do a lot more. Under the law, a court in issuing a DVPO can order the following:

- Order the respondent to participate in a domestic violence perpetrator treatment program;
- Require the respondent to submit to electronic monitoring;
- Order the respondent to reimburse the petitioner for any costs in bringing the action including reasonable attorney fees;
- Order the use and possession of personal effects;
- Order custody of any pets;
- Order the use and possession of vehicles.

Seeking an award of fees for the petitioner should be done in every case where counsel are involved. Fee awards will be granted in these actions and can provide a great deal of financial relief to the petitioning party. Counsel should prepare and present a cost bill at the final hearing so a judgment can be entered at that time.

The DVPO process often occurs in families where a divorce is imminent but not yet underway. The DVPO may be commenced because tensions have reached the boiling point and personal safety and security are being compromised. As we have discussed, getting a DVPO is fast, easy, and cheap. Consequently, they are often a legal prelude to a divorce and often betoken the same disputes and conflicts the parties will litigate in that action.

Including Children in Protection Orders

When the parties have minor children, the court issuing the DVPO can actually issue a parenting plan stating where the children shall reside. Usually, this interim parenting schedule will be superseded by a formal parenting plan subsequently issued in family court, but in the meantime the DVPO would control the custodial designation and the visitation schedule.

It is vitally important to note that in a DVPO proceeding the court also has full authority to make residential placement decisions regarding minor children. ***RCW 26.50.020(1)(a)*** provides that "*Any person may seek relief under this chapter. . . on behalf of himself and on behalf of minor family or household members* [emphasis added]." This statute clearly confers authority on a non-residential parent to seek a DVPO for the benefit of his minor children. Further, ***RCW 26.50.060(1)(d)*** states that the

court may make residential provisions for minor children on the same basis as ***RCW 26.09.*** And ***RCW 26.50.060 (1)(f)*** authorizes the court to grant "*relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected.* [emphasis added]." ***RCW 26.50.135*** specifically authorizes the court to *"direct the residential placement of children*" and to "*restrain or limit a party's contact with a child* [emphasis added]." The statutory architecture of domestic violence protection orders clearly empowers the court to craft any orders necessary to protect minor children or to make placement decisions in their best interests.

The court may even order residential provisions that are plainly contrary to an existing parenting plan. ***Marriage of Stewart, 133 Wn. App. 545 (2006)*** [*holding that the psychological harm of a child in witnessing domestic violence is an adequate basis to include the child in a domestic violence protection order*]. Finally, our state Supreme Court in ***Rodriguez v. Zavala 188 Wn. 2d. 586 (2017)*** squarely addressed the issue of protecting children in DVPO proceedings when they are *not* directly victims of domestic violence. In **Zavala,** the court of appeals declined to include the child in the protection order after finding the child had not been a victim of any domestic violence. The Supreme Court reversed, holding that the statutory framework of the Domestic Violence Protection Act (DVPA) and the policy undergirding it authorized courts to incorporate children in protection orders if the petitioning party possesses a "reasonable fear that the child *may* become a victim." But the Supreme Court went further and considered the harm inherent in a child's mere exposure to domestic violence as an alternate basis for including children in protection orders. The court concluded that such exposure was an appropriate basis for granting a protection order for the benefit of minor children:

> ***We hold that exposure to domestic violence is harmful under the DVPA. The harm caused by domestic violence can be physical or psychological. . . Ample evidence supports the view that direct and indirect exposure to domestic violence is harmful. . .Therefore, we hold that such exposure constitutes 'domestic violence' under Chapter 26.50.***
>
> ***Zavala at 593-594***

Duration of DVPO's

The duration of a protection order must be a fixed amount of time. If the order affects contact with minor children the duration of the order must be for no longer than one year. The court may order that the protection extend beyond one year if the court finds that the respondent is likely to resume acts of domestic violence without the order. The statute even authorizes the court to make a protection order permanent with no fixed terminus.

Renewing a DVPO

If a DVPO has an expiration date, the petitioner may seek a renewal of the order at any time in the three months preceding the expiration of the order. Again, the petitioner merely visits the court clerk's office, obtains the appropriate form and then the respondent is served with a notice for renewal and a hearing date. If the hearing date is beyond the original expiration date the court will issue a temporary extension pending the hearing. At the hearing date, the court considers whether it should renew the protection order or allow it to lapse. This hearing is a bit different than the initial hearing for a DVPO. At this point, the court has already found that domestic violence has occurred and a DVPO has issued for a specified period of time, probably one year. At the renewal hearing, the burden is unequivocally on the respondent. The statute states

that the "*court shall grant the petition for renewal unless the respondent proves by a preponderance of evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires."* **[RCW 26.50 060 (3)].** It is generally difficult for any party to prove *they are not going to act in a certain way* as the renewal provision requires, but one way, perhaps, is for the respondent to participate in the domestic violence perpetrator's treatment and other necessary services. If he has completed treatment and has received positive reports from his DV treatment provider and other therapists working with him all of that positive information should be provided to the court. Successfully completing treatment and illustrating mastery of the subject matter may represent a change in circumstances suggesting that it is now likely that domestic violence will not occur. Remember that a party who petitions for renewal also has a right to seek reimbursement for any attorney fees and costs.

Domestic Violence as a Limiting Factor in Family Law Disputes

Even if a party is never prosecuted with a crime or never the subject of a DVPO, allegations of domestic violence can still be raised in any family law litigation and offered as a basis to limit a parent's residential time with his children and/or decision-making authority. As stated above, the fact of prosecution or the granting of a DVPO will certainly reinforce and perhaps authenticate allegations of domestic violence but the absence of those legal procedures does not foreclose domestic violence being raised in any parenting dispute. The *rules* surrounding divorce and parenting are the civil rules of procedure **[RCW 26.09.010].** The civil rules of procedure operate on a preponderance of the evidence standard, and family court judges will make determinations consistent

with that standard. If a spouse alleges his wife has engaged in acts of domestic violence, the absence of any police reports, criminal prosecutions, or even DVPOs may be a relevant consideration but it does not disqualify the party from seeking a finding of domestic violence in the parenting case in family court.

The court has a lot of discretion in determining whether domestic violence has occurred. The definition of "domestic violence" for the purposes of limiting factors in family court is the same definition that governs DVPO proceedings discussed above. Many times, there will be allegations of domestic violence which are met with denials and counter-allegations of domestic violence. The court will have great discretion in determining whether it can find that domestic violence occurred and if so, by whom. However, once the court determines that any domestic violence occurred it must impose restrictions on that parent's residential time and decision-making.

The principal statute discussing domestic violence in the context of a custody case is **RCW 26.09.191**. The statute discusses what are known as "limiting factors" which can be used to impose restrictions on a parent. Some limitations are *mandatory* and some are *discretionary*. When a court finds a "history of acts of domestic violence" the imposition of restrictions is mandatory under the statute. The statute sounds like it is requiring a history of "acts" of domestic violence as opposed to a single act, but our courts will readily impose restrictions based on a single act. Generally, when the court finds a history of domestic violence it will mean restricted, usually supervised, residential time, and sole decision-making for the other parent. The only exception is found in subsection (n) of the **RCW 26.09.191**. That section states:

> ***If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's harmful or abusive will recur is so remote that it would not be in the child's best interests to apply the limitations of . . .this section.***

The exception to the limitation is actually three-pronged. First, the court must find that contact between the parent and the child will not cause physical, sexual or emotional harm to the child; second, the court must find that the possibility of recurrence is remote; and third, that depriving the child of further contact with the parent is not in the child's best interests. Once again, it would seem that treatment for the party alleged to have limitations, would be instrumental in making the requisite findings under subsection (n).of the statute.

A mere allegation of a limiting factor, in and of itself, is not sufficient for the court to impose limitations. ***Caven v. Caven, 136 Wn.2d 800 (1998); In re Marriage of Watson, 132 Wn. App. 222 (2006).*** However, if there is a finding of a mandatory limiting factor the court has no discretion and must impose both residential restrictions and sole decision-making. ***Marriage of Mansour, 126 Wn. App. 1 (2004).*** There is some support in the legislative history for the idea that limitations should not be imposed in the case of "isolated, de minimis incidents of domestic violence." ***In Re CCM, 87 Wn. App. 84 (2009).*** But the text of the statute does not support such an approach and no case has endorsed it.

Domestic Violence and Property Distribution

In Washington spouses can sue each other for tortious activity. ***Freehe v. Freehe, 81 Wn.2d 183 (1972)***. Battery is a tort. A victim of domestic violence during

marriage has a claim against the batterer. This claim can be brought as a claim within the disposition of the divorce or it can be waged via a suit separate from the divorce. In ***Plankel v. Plankel, 68. Wn. App. 89 (1992)*** the wife sued her husband for a negligent act during the marriage which resulted in her injury, but the suit was filed after the parties had already settled their divorce. The defendant moved to dismiss on summary judgment on the theory that any tort claim was merged in the parties' divorce decree which was presumed to adjudicate all rights and responsibilities of the parties. ***Schultz v. Christopher, 65 Wash. 500 (1911).*** The trial court accepted this theory and dismissed the wife's complaint. On appeal the court of appeals reversed, finding that ***Schultz*** had been overruled *sub silentio* by ***Freehe,*** meaning that a party has leave to litigate interspousal torts even after entry of a divorce decree. The mere entry of a divorce decree does not necessarily signify that all claims arising between the parties have been merged therein. Therefore, the state of the law now is that a party can prosecute an interspousal tort against his or her former spouse even after their divorce has been finalized. It is possible that a decree of dissolution could foreclose a later claim of interspousal tort should the decree state, for example, that all claims arising from the parties have been deemed waived or some similar language. But short of an explicit waiver, claims of interspousal torts survive divorce. They would not, however, survive the statute of limitations so a good practice tip is to take care that any client with such a claim is advised in writing of their right and also of the time limitation on pursuing it.

Claims of interspousal torts can also be effective tools in the dissolution proceeding itself. This is an unused and underappreciated tactic in divorce litigation. If

there are credible claims of spousal abuse, they can be used to obtain a significantly enlarged property award for the victimized party. In my view, a credible claim would be one in which charges were filed against the perpetrator, and preferably one which resulted in a conviction or plea of some sort. Secondly, there should be some degree of severity and physical or emotional damage if any appreciable recompense can be had. If we are frank, domestic violence encompasses a significant swath of behavior, from a verbal threat, to assault with a firearm. If an assault was particularly vicious and if there are even nominal injuries, it could still translate into a lopsided property award in the divorce. Remember also that if the children were victimized, claims can be brought on their behalf as well. If a party was victimized in a significant way and there is credible documentation of the same that party should not be diffident about using that claim, either as part and parcel of the divorce or in a separate suit.

CONCLUSION

Domestic violence issues permeate the family law landscape. A practitioner is liable to encounter them in criminal prosecutions, as part of DVPO proceedings, as limiting factors in a parenting plan dispute, and as compensable claims against the other spouse in property disputes prosecuted in the divorce or as a separate tort claim. It is important that any family law practitioner be well aware of the legal definition of domestic violence, the procedure involved with obtaining a DVPO, the operation of limiting factors of RCW 26.09.191 and the often-overlooked value of interspousal tort claims based on documented acts of domestic violence. Knowledge in all of these areas will enable those of us who advise, represent, and advocate for both victims and alleged perpetrators to fulfill our duties in the most effective way possible.