

**WHAT TO DO WHEN  
YOUR FAMILY LAW  
CASE INVOLVES  
DOMESTIC  
VIOLENCE**

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# DOMESTIC VIOLENCE: WHAT IS IT?

- A pattern of behavior where one partner uses physical violence, coercion, threats, intimidation, isolation, emotional, sexual, or economic abuse to control their current or former partner.
- Abusiveness has little to do with psychological problems and everything to do with values and beliefs.
- Domestic violence is also commonly called “intimate partner violence.”

# A BRIEF LEGAL HISTORY OF DOMESTIC VIOLENCE

- Until well into the 1800s, it was expressly legal for a man in the English-speaking world to physically abuse his wife. She had no recourse to the police or the courts.
- If she chose to divorce her husband because of his abusiveness, he was legally entitled to custody of their children.
- In the late nineteenth century, some legal consequences were finally legislated in the U.S., but rarely enforced until the 1970s (and not enforced consistently until the 1990s).
- Remember: this legal history plays an important role in shaping today's cultural views among males—and females—about the abuse of women.
- It will likely take generations to overcome the accumulated impact of hundreds of years of destructive social attitudes towards women.\*

\*LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN, pp. 320-321 (2002)

# DOMESTIC VIOLENCE: WHAT IS IT NOT?

- NOT just physical abuse. It is a PATTERN of coercive control.
- NOT a one-time incident. It is ongoing power and control.
- NOT caused by substance abuse or mental health illnesses.
- NOT an anger management problem.
- Oregon Judge's opinion piece on DV:  
[http://www.oregonlive.com/opinion/index.ssf/2014/11/hearts\\_ick\\_elias-case\\_judge\\_tak.html](http://www.oregonlive.com/opinion/index.ssf/2014/11/hearts_ick_elias-case_judge_tak.html)



# DOMESTIC VIOLENCE JUST HAPPENS TO 'THOSE PEOPLE,' RIGHT?

- DV is indiscriminate. DV victims and perpetrators are of all ages, races, ethnicities, social, religious, and economic backgrounds.
- DV happens in same sex and heterosexual relationships.
- DV happens when the parties are married, cohabitating, dating, separated, divorced.

# WHY DOESN'T SHE JUST LEAVE?

- Instead of asking “Why doesn’t she just leave?” we should be asking “What are the conditions he created to cause her to feel that she has no choice but to stay?”
- Leaving is the most dangerous step a victim can take.
- DV victim knows best.
- 65% of DV victims who are murdered were separated from their abusers.

# LETHALITY ASSESSMENTS AND SAFETY PLANNING

- Domestic violence lethality factors are used to assess whether a victim is at an increased risk for extreme danger or homicide.
- Lethality assessments are not necessarily predictive, but when you see certain factors clumped together, you should advise your client that there is an increased risk of danger and even homicide.
- Examples of DV lethality factors include: strangulation, forced sex, threats to kill/maim pets, stalking, threats to use weapons or using weapons against victim, constant and irrational jealousy, and abuse during pregnancy.
- Listen for lethality factors when meeting with your client.

# SAMPLE LETHALITY ASSESSMENT

Jacquelyn C. Campbell, PhD, RN

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Several risk factors have been associated with increased risk of homicides (murders) of women and men in violent relationships. We cannot predict what will happen in your case, but we would like you to be aware of the danger of homicide in situations of abuse and for you to see how many of the risk factors apply to your situation.

Mark **Yes** or **No** for each of the following:

- 1. Has the physical violence increased in severity or frequency over the past year?
- 2. Does he own a gun?
- 3. Have you left him after living together during the past year?
- 4. Is he unemployed?
- 5. Has he ever used a weapon against you or threatened you with a lethal weapon?  
(If yes, was the weapon a gun? -----)
- 6. Does he threaten to kill you?
- 7. Has he avoided being arrested for domestic violence?
- 8. Do you have a child that is not his?
- 9. Has he ever forced you to have sex when you told him no or did not wish to do so?
  - 10. Does he ever try to strangle/choke you?
  - 11. Does he use illegal drugs?
  - 12. Is he an alcoholic or problem drinker?
  - 13. Does he control most or all of your daily activities? For instance: does he tell you who you can be friends with, when you can see your family, how much money you can use, or when you can take the car? (If he tries, but you do not let him, check here: -----)
- 14. Is he violently and constantly jealous of you? (For instance, does he say "If I can't have you, no one can")
- 15. Does he follow or spy on you, leave threatening texts or messages, destroys your property?
- 16. Have you ever been beaten by him while you were pregnant? (If you have been pregnant by him, check here: -----)
- 17. Have you ever threatened or tried to commit suicide?
- 18. Has he ever threatened or tried to commit suicide?
- 19. Does he threaten to harm your children?
- 20. Do you believe he is capable of killing you?

----- Total **"Yes"** Answers (01/05)

# REPRESENTING THE VICTIM

- Recognize and understand the dynamics of DV relationships.
- Provide competent representation.
- Client-centered lawyering = Client knows best. Make appropriate referrals.
- Safety Plan, safety plan, safety plan. Do this thoroughly and frequently.
- Prepare victim for court.
- Explain procedure.

# DOMESTIC VIOLENCE AND MEDIATION

- *Hendershott v. Westphal*, 360 Mont. 66, 74 (2011).
  - Holding: in family law proceedings, district courts are explicitly prohibited from authorizing or continuing mediation where there is a reason to suspect emotional, physical, or sexual abuse.
- 2013 House Bill 555 changes Montana Code Annotated §40-4-301 to allow victims to opt-in to mediation:
  - “Unless each of the parties provides written, informed consent, the court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party. A mediation conducted under this subsection may be conducted by a mediator who is trained in mediating domestic violence cases.” M.C.A. § 40-4-301(1).

# CHILDHOOD EXPOSURE TO DOMESTIC VIOLENCE: VISIBLE EFFECTS

- More aggressive towards peers (more prone to bullying);
- More isolated and less involved in peer relationships;
- Behavioral problems: hyperactivity, anxiety, withdrawal, and learning difficulties
- Avoid home
- Take on role of protecting mother and may involve themselves in physically abusive incidents to protect mother
- Guilt from not being able to protect mother, from feelings he/she caused abuse
- “Traumatic bonding”: children seek the affection of the abuser and align themselves with the “more powerful” parent.
- Disruption of eating and sleeping

# CHILDHOOD EXPOSURE TO DOMESTIC VIOLENCE: INVISIBLE EFFECTS

- Although a child may have no conscious memories of his or her early childhood, these memories literally become the building blocks for that child's life.
- The younger the child is, the more sponge-like the child's brain is. We know the positive side of this: children quickly learn to crawl and walk, learn languages, memorize long songs and passages, and learn music.
- But this sponginess also makes younger children more vulnerable to trauma than older children.
- This is actually the opposite of commonly held beliefs about childhood exposure to trauma— we are learning that if anyone is impacted most severely by exposure to abuse, it is younger children.
- Watch: “First Impressions: Exposure to Violence and a Child's Developing Brain” <https://www.youtube.com/watch?v=brVOYtNMmKk>

# PARENTING PLANS AND BEST INTEREST OF THE CHILD FACTORS

- In parenting plan proceedings, district courts must determine parenting plans in accordance with the best interest of the child under Montana Code Annotated § 40-4-212.
- “Best interest of the child” factors include:
  - Physical abuse or threat of physical abuse by one parent against the other parent or the child. M.C.A. § 40-4-212(1)(f).
  - Developmental needs of the child. M.C.A. § 40-4-212(1)(i).
  - Whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests. In making that determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in that parent's household has been convicted of any of the crimes enumerated in [40-4-219\(8\)\(b\)](#). M.C.A. § 40-4-212(1)(l).
- Recommended reading: *Domestic Violence, Developing Brains, and the Lifespan: New Knowledge from Neuroscience*, Lynn Hecht Schafran, THE JUDGES’ JOURNAL, Vol. 53, No. 3 (Summer 2014).
  - “The most beneficial action a court can take for a child exposed to domestic violence is to end the exposure and support the protective parent.” p. 34.

# DOMESTIC VIOLENCE AND FAMILIES

- Domestic violence impacts the whole family.
- Co-occurrence of intimate partner violence and child abuse
- Abusers' parenting styles
- Child custody proceedings

# ETHICS: SCREEN FOR DOMESTIC VIOLENCE!

Know whether you are representing a victim or a batterer.

- Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking.
- Margaret Drew, *Lawyer and Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 Fam. L.Q. 7 (2005).
  - “Failure to recognize when a client or opposing party is or has been abused by a partner and failure to consider abuse in making strategic decision are forms of legal malpractice.” Drew, 39 Fam. L. Q. 7, at 7.

# CASE SCENARIO

At your initial consult, Monica tells you:

- She has been married to Joe for 7 years and they have one son, Avery, age 5. Monica believes that Joe is a good dad to Avery, but she is scared for her own safety.
- During their relationship, Joe controlled their money. They had a joint checking account, but Joe wouldn't allow Monica to take money out of the account. He did give her a weekly allowance so she could buy groceries for the family, but she had to account for every penny spent.
- Joe did not allow Monica to work much during their relationship, even though she has a teaching degree. Early in the marriage, Joe made Monica quit her job because he thought she spent too much time talking to the male principal.
- When you ask Monica what really scared her the most about Joe, she tells you when Joe was really angry at her, he would make her sit at one end of the table while he cleaned his rifle at the other end of the table. Even though Joe never threatened her with the gun, she knew that she needed to do whatever Joe wanted.

# QUESTION PRESENTED:

With the facts Monica has given you, do you conclude that Monica is a victim of domestic violence?

Why or why not?

# NATIONAL, STATE, AND TRIBAL DV RESOURCES FOR ATTORNEYS

- **VAWA 2005 Guide for Attorneys:** [www.abanet.org/domviol/docs/VAWA2005forAttorneys.pdf](http://www.abanet.org/domviol/docs/VAWA2005forAttorneys.pdf)
- **Office on Violence Against Women VAWA 2013 Summary:** <http://www.ovw.usdoj.gov/docs/vawa-2013-sum.pdf>
- **National Coalition Against Domestic Violence:** <http://www.ncadv.org/>
- **American Bar Association Commission on Domestic Violence:** <http://www.abanet.org/domviol/>
- **United States Department of Justice Office on Violence Against Women:** <http://www.ovw.usdoj.gov/>
- **Domestic Violence Legal Empowerment and Appeals Project:** <http://www.dvleap.org>
- **National Crime Victim Law Institute:** [http://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/](http://law.lclark.edu/centers/national_crime_victim_law_institute/)
- **Montana Coalition Against Sexual and Domestic Violence:** [www.mcadv.com](http://www.mcadv.com)
- **Montana Domestic Violence Fatality Review Commission: Jan. 2013:** <https://doj.mt.gov/wp-content/uploads/MDVFR2013.pdf>
- **Montana Department of Justice – Victim Services:** <https://doj.mt.gov/victims/>
- **Montana Indian Law Portal:** <http://indianlaw.mt.gov/about.mcpx>
- **Indian Law Resource Center:** <http://www.indianlaw.org/>
- **Southwest Center for Law and Policy:** <http://www.swclap.org/contact.html>
- **Tribal Court Clearinghouse:** <http://www.tribal-institute.org/index.htm>

**PLEASE REACH OUT FOR TECHNICAL  
ASSISTANCE, RESOURCES, OR GENERAL  
QUESTIONS!**

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