

# Family Law Toolkit for Domestic Violence Advocates

## The Domestic Violence & Mental Health Collaboration Project

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### When Protective Behaviors are Seen as Harmful

As a domestic violence advocate, you may have seen the harm that is done when domestic violence survivors' protective behaviors are used against them in protection order or family law cases. This handout will provide you with information about Parental Alienation, Abusive Use of Conflict, and related concepts, and will describe how they are used to control and harm survivors and their children. This handout also provides suggested strategies for helping survivors refute these unjustified claims.

*I really struggle when the abusive partner or their attorney claim that because a survivor is trying to protect their child, the survivor is being vindictive and alienating. It feels like a lose/lose situation, but this document helped me understand the legal terms and allowed me to better prepare a survivor for her family law case.*

- A domestic violence advocate

#### What are Protective Behaviors?

In the context of domestic violence, protective behaviors are actions taken by the non-abusive parent in an attempt to prevent or mitigate harm to their children. See the left column of [Table 1](#) on page 9 for examples.

While this handout describes ways in which people sometimes reframe protective behaviors as harmful, we are not suggesting that you dissuade survivors from protecting their children. By educating survivors about how others may view their actions, you can help them to make more informed choices and to be better prepared to explain their actions to evaluators or the court, if needed. We provide this information in the hopes of increasing the safety and wellbeing of survivors and their children.

#### Balancing Children's Wellbeing against their Relationship with the Other Parent

Survivors may receive mixed messages about their responsibilities and obligations as parents, particularly when it comes to protecting their children. The family law system reflects this ambiguity. On one hand, parents are supposed to make sure that their

children's needs are met and that they are safe. On the other hand, parents are supposed to ensure that their child has a good relationship with the child's other parent. In a healthy family, these objectives are congruent. In a family with domestic violence, these objectives are often contradictory.

Understandably, many survivors believe that the best way to ensure that their children are safe and well is to stop or limit the children's contact with the abusive parent. As an advocate, you are likely to agree with this perspective. Of course, there is also research to substantiate that being abused or witnessing domestic violence is indeed quite harmful to children.<sup>1</sup>

People who are abusive are more likely to prioritize their own relationship with the child, or the control that relationship gives them, over the safety and wellbeing of the child. Of course, they may believe that the child is better off with them than with the other parent. Either way, it is common for people who are abusive to allege that survivors' actions to protect their child are actually harmful, alienating, or the result of mental illness.

### **Failing to Recognize the Child's Best Interests**

Under Washington State law, the court is required to focus on the best interests of the child<sup>2</sup> when making parenting plan decisions. Ideally, the court would see protective behaviors as supporting the best interests of the child. However, there are many reasons why the family law system sometimes fails to protect domestic violence survivors and their children. These include:

- A lack of education, training, and experience regarding domestic violence by professionals and volunteers involved in the system;
- A narrow legal definition of domestic violence that fails to encompass the various forms of power and control used by people who are abusive;
- The imbalance of power when a survivor is not represented by an attorney and the abusive partner is represented; and
- Biases held by those whose recommendations or decisions can influence the outcome of a protection order or family law case including judicial officers, parenting evaluators, Child Protective Services workers, etc.

The presence of one or more of these factors can lead to a survivor's protective behaviors being seen as harmful.

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<sup>1</sup> Kalmakis K.A. & Chandler G.E. (2014) Adverse childhood experiences: towards a clear conceptual meaning. *Journal of Advanced Nursing* 70(7), 1489–1501.

<sup>2</sup> This is a legal concept. If you are not familiar with it, we suggest reading [Parenting Resources](#).

## **Personal Beliefs Influence Custody Recommendations and Decisions**

While those involved in the family law system may work hard to be objective, research indicates that personal beliefs influence custody recommendations and decisions.

Daniel Saunders, PhD conducted a research study<sup>3</sup> that found the following:

- Judges, private attorneys, and custody evaluators were more likely than domestic violence workers and legal aid attorneys to believe that mothers make false allegations of domestic violence and child abuse.
- Evaluators “supported” the allegations of domestic violence in approximately half of their cases alleging domestic violence.
- Evaluators reported that, when recommending visitation for a parent who was “clearly the perpetrator,” they recommended no supervision in nearly one third of the cases. In response to a vignette depicting serious domestic violence, 47% recommended unsupervised visitation.
- Among evaluators and judges, the belief that allegations of domestic violence by mothers are false was strongly related to these 4 beliefs:
  1. Domestic violence survivors alienate children from the other parent;
  2. Domestic violence is not an important factor in making custody decisions;
  3. Children are hurt when survivors are reluctant to co-parent; and
  4. Domestic violence survivors falsely allege child abuse.
- Beliefs in patriarchal norms (i.e. women have reached equality with men), and that the world is already a just place, also correlated with the 4 beliefs listed above.
- Evaluators who use general personality-psychopathology instruments (e.g., the MMPI) were more likely to believe that false domestic violence allegations are common.

## **Beliefs Influence the Information Considered Regarding Custody**

Psychological research has shown that we are all susceptible to “confirmation bias.” Confirmation bias is a problematic tendency to interpret information or evidence in ways that confirm one’s previously established beliefs. It can be an unconscious or

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<sup>3</sup> Daniel G. Saunders, PhD, et al., *Child Custody Evaluators’ Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations*, National Institute of Justice, U.S. Department of Justice. (2011) [www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf).

conscious process of case building. For example, once a parenting evaluator or judicial officer starts viewing a parent through the lens of parental alienation, any protective behavior is likely to be viewed as additional justification for believing there is parental alienation.

If an evaluator thinks that mothers are likely to make false allegations of child abuse during contested custody cases, then the evaluator may look for evidence to support their belief that the mother's actions are not really to protect the child, but are a result of psychopathology or attempts to alienate the child from the other parent. An example of this can be seen in the documentary *No Way Out But One*.<sup>4</sup> The mother depicted in the film lost custody of her children after it was alleged that she had a mental illness called Munchausen Syndrome by Proxy, a disorder where a person intentionally causes an illness in a person they are caring for in order to get attention. The court believed this explanation for the children's problems over the evidence of domestic violence and child abuse despite medical records and expert opinions.

### **Some Believe that Domestic Violence and Child Abuse Allegations are often Untrue**

It is difficult to prove that survivors are not lying about domestic violence and child abuse. Most do not have concrete evidence and many do not feel safe sharing that they or their children have been abused until they are ready to part ways with the person who is abusive. Often, the allegations are not made until someone files for a protection order or begins a family law case. Evaluators and judicial officers may not be familiar with the barriers to disclosing domestic violence and child abuse that exist prior to leaving and may think people make these claims during protection order or family law cases merely to gain an advantage.

It can be particularly difficult for people to believe survivors when they claim that the abusive parent sexually abused their child. The notion that a parent would sexually abuse his or her own child is profoundly upsetting. As a result, people may be motivated to believe that survivors are lying. That may be easier for them to accept than the reality of incest. A protective parent who states that their child has been sexually abused may be more likely to lose custody of that child.<sup>5</sup>

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<sup>4</sup> Participants in the Domestic Violence and Mental Health Collaboration Project may borrow a DVD of this documentary from the Coalition Ending Gender-Based Violence. Information about the documentary is available at [www.nowayoutbutone.com](http://www.nowayoutbutone.com).

<sup>5</sup> Faller, K.C., & DeVoe, E. (1995). Allegations of sexual abuse in divorce, *Journal of Child Sexual Abuse*, 4(4), 1-25.

## **Frameworks Used to Perpetuate Idea that Protective Behaviors are Harmful**

There are a variety of problematic legal concepts that have been used to make the case that protective behaviors are harmful to children because they undermine the relationship the child has with the other parent. These frameworks tend to reinforce the beliefs that domestic violence and child abuse allegations are false; it is common for the person alleging abuse to try to turn their child against the other parent; co-parenting is preferable, and domestic violence is not a significant consideration in custody determinations. These frameworks include:

- Parental Alienation Syndrome
- Parental Alienation
- Friendly Parent
- Gatekeeping
- Abusive Use of Conflict

### **Parental Alienation Syndrome (PAS)**

Richard Gardner, a psychiatrist who was misogynistic and pro-pedophilia, created this bogus concept that went on to become very popular. *“Gardner claimed that when children reject their father and they or their mother makes abuse allegations, this behavior is most likely the product of PAS rather than actual experiences of abuse.”* The idea is that the mother (Gardner’s analysis is gendered), due to a vendetta against the father or due to her pathology, turns the child against the father thereby creating alienation. The child’s hostility toward the father or fear of the father is seen as proof of PAS. Evidence that there has been abuse is also seen as further evidence of PAS.<sup>6</sup>

Family law professionals who have been exposed to this theory may jump to the conclusion that a child dislikes the abusive parent because of alienation, ignoring actual reasons for the child to have negative feelings about that parent. Fortunately, Washington courts have not recognized PAS in any published cases.

There is no legitimate research supporting PAS. PAS has been rejected by the American Psychiatric Association, the National Council of Juvenile and Family Court Judges, the National Center on Domestic Violence, Trauma & Mental Health, and the Domestic Violence and Mental Health Collaboration Project.

For more information about PAS, we recommend the article that is cited in the footnote on this page (or the summary on pages 20-21 of the article). However, we caution you that the information is disturbing and some may find it triggering.

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<sup>6</sup> Parental Alienation Syndrome and Parental Alienation: A Research Review by Joan S. Meier. September 2013. Available at [www.vawnet.org/summary.php?doc\\_id=3969&find\\_type=web\\_desc\\_AR](http://www.vawnet.org/summary.php?doc_id=3969&find_type=web_desc_AR).

## **Parental Alienation (PA)**

This concept evolved from resistance to Parental Alienation Syndrome. Despite the “Syndrome” being discredited, the notion caught on that the overall concept was based on some truth. The PA theory relies less on scientific concepts and more on common-sense type observations that some children may be alienated from a parent based on the behavior of one or both parents and/or their own vulnerabilities. While the proponents of PA do not appear to push for the child to be handed over to the abusive parent, in reality PA is implemented in courts in much the same fashion as PAS.

Whether or not PA exists, it does tend to shift focus away from the presence of domestic violence and child abuse, which we know to be truly harmful. This in itself can harm the protective parent and the child, and it can lead to family law professionals unwittingly colluding with the abusive parent.

The irony of this, of course, is that it is abusive parents who frequently try to “alienate” their children from their abused parents. They do this, in part, by denigrating and humiliating the survivor in front of the child.

## **Friendly Parent**

The idea behind this concept is that the parent who is most likely to foster the relationship between the child and the other parent, is the parent who should have primary custody. The parent who is “friendliest” in the court’s eyes is the one who gets custody. Generally, “friendly” parents do not make allegations against the other parent or engage in any of the protective behaviors listed on page 9. People who are abusive may appear to be the “friendlier” parent to the court while survivors may be viewed as “unfriendly” due to their protective behaviors. While advocates have been successful in preventing this concept from becoming law in Washington State, it is unfortunately sometimes alleged or considered in family law cases.

## **Gatekeeping**

*“Gatekeeping has been used as a theory to describe family dynamics in separation and divorce. Originally focused on maternal behaviors that facilitate or restrict the involvement of fathers with the children, attention has shifted toward a more gender neutral framework for assessing how parents’ attitudes and actions affect the involvement and quality of the relationship between the other parent and child. Rather than a set of hardline rules that govern behaviors, gatekeeping requires working hypotheses to consider the various factors that may contribute to both adaptive and maladaptive gatekeeping responses.”<sup>7</sup>*

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<sup>7</sup> This quotation is from a pre-symposium institute description at the Association of Family and Conciliation Court’s 11<sup>th</sup> Symposium on Child Custody Evaluations in 2014.

Gatekeeping appears to be yet another iteration of Parental Alienation Syndrome. However, this version's cloak of gender neutrality may make it more palatable to family law professionals who are mindful of sexism. A focus on gatekeeping unfortunately distracts from domestic violence and child abuse.

### **Abusive Use of Conflict**

Here in King County, survivors may be most likely to encounter allegations that they are engaging in Abusive Use of Conflict. This can be used as yet another variation of Parental Alienation Syndrome, but this one is part of Washington State law. The law specifies circumstances when the court *must* place limitations on a parent's residential time with their child, and when the court *may* place limitations based on the best interests of the children. The court *may* place limitations on a parent's residential time when the court determines that the parent has engaged in Abusive Use of Conflict.<sup>8</sup>

The law does not make the definition of Abusive Use of Conflict very clear. It refers to "the abusive use of conflict which creates the danger of serious damage to the child's psychological development." A finding of Abusive Use of Conflict does not require a showing of *actual* damage to the child's psychological development, only a *danger* of such damage.

#### **WA State Case Regarding Abusive Use of Conflict**

***Burrill v. Burrill***, 113 Wn. App. 863, 56 P.3d 993 (2002)

In the main case that discusses Abusive Use of Conflict in detail, the court found that the mother created a danger of serious psychological damage to her daughter by supporting allegations of her husband's sexual abuse of the child, alcohol abuse, and anger problems. Because of the allegations (which were considered unfounded), the child either did not see her father or had very limited access to him for nearly nine months. The court deemed this to be Abusive Use of Conflict, and held that evidence of actual damage is not required. Rather, one must demonstrate that a *danger of* psychological damage exists.

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<sup>8</sup> [RCW 26.09.191\(3\)\(e\)](#)

Unfortunately, Abusive Use of Conflict is frequently used against survivors<sup>9</sup>. Abusive parents may claim that survivors' protective behaviors are fostering conflict. The court does not have a specific set of criteria to determine the presence of Abusive Use of Conflict.

Conflict between the parents by itself should not meet the standard for Abusive Use of Conflict. The reality is though that conflict that does not involve danger to the child's psychological wellbeing is sometimes misconstrued to be Abusive Use of Conflict.

Unfortunately, this also perpetuates the idea that domestic violence is a form of "high conflict" rather than a form of oppression.

**Domestic Violence is not a type of "High Conflict" relationship**

Calling domestic violence "high conflict" is problematic because it suggests that there is a power symmetry between the parties involved. If a person was a victim of hate crime, we would not say that the target of the crime is in "conflict" with the bigot who attacked them. Even if the crime victim knew their attacker and had a relationship with that person, we would likely distinguish the perpetration of a crime from a dispute.

In cases of domestic violence, we should similarly make a distinction between the discord that may be a typical component of dissolutions and custody disagreements versus the pattern of oppressive behavior that constitutes domestic violence.

This distinction is not merely a matter of semantics; it can affect how information about the family is viewed and understood. If behavior is seen as being in response to a "conflict," it will be seen differently than if it is understood to be in response to the perpetration of coercive control.

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<sup>9</sup> While our focus in this document is on inappropriate allegations of Abusive Use of Conflict against survivors, it is important to note that survivors can appropriately allege Abusive Use of Conflict or Abusive Use of Litigation against abusive partners who are using this as a tactic of coercive control. For more information about this, see the Washington State Domestic Violence Manual for Judges' Appendix entitled "[Abusive Litigation and Domestic Violence Survivors](#)."



## Inappropriately Reframing Protective Behaviors as Abusive Use of Conflict

Table 1 below shows how protective behaviors are often reframed inappropriately as Abusive Use of Conflict and then used against protective parents.

<b>Table 1</b>	
<b>Protective Behaviors</b>	<b>Reframed as Abusive Use of Conflict</b>
Seeking a Domestic Violence Protection Order (DVPO) that includes the children	If DVPO is denied, that can be seen as proof that the DV allegations are false.
Contacting Child Protective Services (CPS) and making a child abuse report alleging that the other parent has harmed the children	This can be seen as making up horrible lies to hurt the other parent or to “win” a custody battle.
Taking a child to a medical or mental health professional to investigate if the child has been abused by the other parent	This can be viewed as a symptom of mental illness or as vengeful behavior that is traumatizing to the child.
Taking a child to advocacy or therapy services related to the domestic violence or abuse they have witnessed or experienced	This can be seen as deceitful parents taking advantage of or colluding with service providers.
Not taking the child to a court-ordered visit, not returning the child from a visit, or picking up the child before a visit is supposed to end – if these actions are related to a child’s distress or fear about spending time with the other parent	This can be viewed as being disrespectful of the court’s authority or of the parenting evaluator’s judgment.
Seeking changes to parenting plan arrangements in response to a child’s concerns about the other parent or worrisome signs that the child may be being harmed	This can be seen as harassment of the other parent and as a blatant disregard for the court’s time by re-litigating the same issues.
Taking safety precautions regarding communication with the other parent and child exchanges	This can be viewed as being unnecessarily difficult, manipulative and uncooperative.
Talking to the child about their safety	This can be viewed as trying to instill fear in the child or hostility toward the other parent, or talking bad about the other parent.

## Arguments Survivors Can Make Against Abusive Use of Conflict Allegations

Table 2 below shows examples of how survivors can argue that protective behaviors are reasonable, necessary actions.

<b>Table 2</b>	
<b>Protective Behaviors</b>	<b>Arguments for Protective Behaviors</b>
Seeking a Domestic Violence Protection Order (DVPO) that includes the children	There is a fear for the children’s safety because of violence or a threat.
Contacting Child Protective Services (CPS) and making a child abuse report alleging that the other parent has harmed the children	The child has expressed harm and as a responsible parent the survivor is addressing the concern. Survivor has been told by a professional (e.g., doctor) to call CPS.
Taking a child to a medical or mental health professional to investigate if the child has been abused by the other parent	The survivor has seen their child’s distress, and has sought the help of professionals to support the child.
Taking a child to advocacy or therapy services related to the domestic violence or abuse they have witnessed or experienced	
Not taking the child to or returning the child from a court-ordered visit, or picking up the child before a visit is supposed to end (if these actions are related to a child’s distress or fear about spending time with the other parent)	The survivor is concerned about the safety of the child and may not be able to change the court order before court-ordered contact is supposed to take place.
Seeking changes to parenting plan arrangements in response to a child’s concerns about the other parent or worrisome signs that the child may be being harmed	The survivor is interested in getting all the support possible for the offending parent so that visitation can be safe, and is therefore requesting changes.
Taking safety precautions regarding communication with the other parent and child exchanges	The survivor seeks a safe, feasible communication plan that is clear and predictable for both parents.
Talking to the child about their safety	The survivor wants to ensure that the child is aware of safety boundaries and knows how to get help, if needed.

Below are some arguments you can discuss with survivors and/or their attorneys regarding defending themselves against allegations of Abusive Use of Conflict.

- Demonstrate to the judge why your behaviors are intended to protect yourself and your child, not to create unnecessary conflict. Be prepared to articulate with as much specificity as possible the basis for engaging in protective behavior. Describing general fear is not as helpful as being able to state specific grounds. For example, the child has reported witnessing violence in the other parent's home and being afraid when it happens.
- If necessary, explain that false allegations of domestic violence are rare.<sup>10,11</sup> If you petitioned for a domestic violence protection order and were denied, explain that that does not mean the allegations are unfounded. You may wish to let the court know why you had difficulty proving what happened to you, even though it is true.
- Describe how you tried to keep the child away from the conflict. For example, describe your efforts to de-escalate situations and deflect arguments that occurred in front of the child. Document and maintain any communications (e.g., voicemails, emails, texts) in case they are needed to prove your case.
- If you have talked to your child about the violence and their safety or have arranged for them to talk to a service provider about this, you may need to explain to the court that the child already knows about the violence and why it is important for them to be able to discuss it. You are not trying to create a negative opinion about the other parent; the other parent did that through their actions.
- Judicial officers expect court orders to be followed unless the order is changed. If you bring a motion to change a court order, be prepared to articulate new facts or information unknown to the court. Otherwise, the court is likely to believe that you are wasting court resources by re-litigating the matter.

You may want to suggest that a survivor consult with an attorney regarding taking protective action, if possible. Attorneys may be able to help frame the issues and suggest plans of action that can minimize any negative consequences.

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<sup>10</sup> Jaffe, P. G., Johnston, J. R., Crooks, C. V. and Bala, N. (2008). Custody disputes involving allegations of domestic violence: Toward a differentiated approach to parenting plans. *Family Court Review*, 46: 500–522.

<sup>11</sup> See also Kernic et al, Children in the Crossfire, Violence Against Women (2005). The study found that in many family law cases in which a history of domestic violence was substantiated by police reports, the domestic violence was either unknown to the court or described as unsubstantiated by the court.

Finally, you can make a difference simply by acknowledging survivors' reality regarding their efforts to protect their children and validating their experiences of injustice.

This handout is for educational purposes only and is not intended to constitute legal advice. The content of this handout is current as of the time of publication, but may have since changed.

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This is one piece of the Family Law Toolkit for Domestic Violence Advocates. It was developed by the Domestic Violence and Mental Health Collaboration Project of the Coalition Ending Gender-Based Violence. The Family Law Toolkit for Survivors can be found at <http://endgv.org/toolkits/family-law-toolkit-for-domestic-violence-survivors/>.

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