DOMESTIC VIOLENCE REPORT™

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Risk Assessment in Context

by D. Kelly Weisberg

This Special Issue of **Domestic Violence Report** is the first of two issues devoted to the subject of risk assessment. These two issues of **DVR** with Guest Editor Jill Messing explore risk assessment in the context of domestic violence across various settings and substantive areas. Professor Messing and her mentor, Dr. Jacquelyn Campbell, work at the forefront of research on risk assessment, and innovative, collaborative interventions for survivors of domestic violence.

What Is Risk Assessment?

As a preliminary matter, it is helpful to address the question: What is risk assessment? The field of risk assessment measures characteristics of a person, his or her relationships, and his or her conduct to assess that person's level of dangerousness in order to make better decisions about a variety of issues. In the criminal justice system, risk assessment occurs in many stages of the criminal process including bail, sentencing, probation, and parole. Risk assessment also is considered in treatment decisions for offenders. Many different professionals (including police, prosecutors, judges, and service providers) are called upon to make informed decisions that assess an offender's level of dangerousness. These decisions are useful for two primary purposes: accountability (to gauge the most appropriate punishment) and protection (to safeguard the victim

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The Use of Lethality Assessment in Domestic Violence Cases

by Jill Theresa Messing and Jacquelyn Campbell

Various forms of intimate partner violence (IPV) risk assessment predict different outcomes (re-assault, re-arrest, homicide), are intended to be used within different systems (criminal justice, social service), and require different information to complete (victim interview, offender interview, criminal justice case files).[1] Common IPV risk assessments intended to predict re-assault or re-arrest are the Spousal Assault Risk Assessment (SARA), the Ontario Domestic Assault Risk Assessment (ODARA), the Domestic Violence Screening Instrument (DVSI), and revisions of each of these (DVSI-R, B-SAFER, DV-RAG).[2] There are also risk assessment tools that have not been developed specifically for IPV cases, such as the Arnold Foundation Public Safety Assessment. And, more recently, machine learning approaches which forecast outcomes (recidivism, no recidivism) without specifying particular risk factors have been used in domestic violence cases.[3]

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About This Issue . . .

We are pleased to present this special issue on lethality assessment with Jill Messing, Associate Professor in the School of Social Work at Arizona State University, as the Guest Editor. As a social worker and a researcher, she is moving the field forward by testing and developing versions of the Danger Assessment for specific interventions and populations, including culturally appropriate risk assessments.

This issue is dedicated to Jacquelyn Campbell, the developer of the Danger Assessment (see p. 74), a groundbreaking contribution to the field of lethality assessment. The articles in these two special issues demonstrate the impact that her work has had on the field of intimate partner violence, on domestic violence jurisprudence, and on the lives of domestic violence victim-survivors.

D. Kelly Weisberg, Editor, *Domestic Violence Report*

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and the public from a recurrence of violence).

The law first relied on risk assessment in the context of mental health in the 1970s. In the first generation of research on risk assessment, studies focused on institutionalized individuals in psychiatric, forensic, and correctional settings to determine whether mental illness placed a patient or others in imminent risk of harm.[1] The impact of this research reverberated in the courts. For example, courts relied heavily on clinical assessment of risk in making decisions about involuntary commitment.[2] Such determinations were necessitated by state statutes that included the term "dangerousness to self or others" as the standard for involuntary hospitalization and by the 1974 **Tarasoff** case (**Tarasoff v. U.C. Regents**, 551 P.2d 334 (Cal. 1976)), upholding the liability of mental health professionals to warn individuals who were threatened with bodily harm by a patient.

By 1981, there was so much interest in risk assessment that psychology Professor John Monahan authored a famous article reviewing the burgeoning literature.[3] His review concluded by noting the potential of risk assessment while, at the same time, expressing skepticism about the ability of forensic psychologists to make accurate predictions about future dangerousness.

Despite this skepticism, the U.S. Supreme Court gave its blessing to risk assessment in two cases in the 1980s. In **Barefoot v. Estelle**, 463 U.S. 880 (1983), the Supreme Court stated that, although expert testimony on dangerousness may not always be correct, it is admissible evidence and the adversarial process should evaluate it. The following year, in **Schall v. Martin**, 467 U.S. 263 (1984), the Supreme Court again gave its imprimatur to risk assessment when it upheld the practice of preventive detention for juvenile criminal suspects, reasoning that the practice is based on a prediction that the accused poses a serious risk of future criminal conduct.[4] Forensic psychologists relied on these judicial decisions to emphasize the reliability and validity of predictions of dangerousness. In response, risk assessment took root in a variety of other contexts.

Soon, risk assessment began to play an important role in the field of domestic violence. Some psychologists contended that risk assessment had particular utility and accuracy in the field of intimate partner violence.[5] As rationale for this view, they cited: (1) the base rates for repeated physical assaults by intimate partners are relatively high which serves to reduce the rate of false predictions; (2) evaluators who make risk assessments in partner assault cases often have access to the victim who is able to provide a rich source of information about the perpetrator; and (3) several risk factors exist which are uniquely related to dangerousness in the domestic violence context.[6]

Risk assessment became increasingly useful in the context of domestic violence in two overlapping areas: to determine the risk of an offender's recurring violence and also to determine the lethality of that violence. That is, researchers pointed out that some risk factors are tailored specifically to gauge the recurrence of intimate partner violence (IPV) and others are associated with one specific form of IPV: domestic homicide. This latter form of risk assessment is called "lethality assessment." Lethality assessment measures the risk that specific acts of domestic violence will culminate in a lethal or near-lethal assault.

Currently, risk assessments have become so pervasive in the field of domestic violence that they are used not only in the criminal justice system but also in civil cases. For example, assessment of dangerousness exists in protection order proceedings, child welfare proceedings, and child custody determinations.

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The Use of Risk Assessments in Judicial Decision-Making

by Liberty Aldrich*

Questions concerning the use of risk assessment tools in domestic violence cases have been circulating for several decades. Dr. Campbell's Danger Assessment was—and continues to be—a major milestone in the response to the perpetration of domestic violence, helping both survivors and those assisting them to identify and respond to the threat of lethal violence. Since then, many tools have been designed. In some jurisdictions, these assessments are being used in both the criminal and civil justice response systems. In others, their use is much more circumscribed.

For those leading the drive to implement risk screening, the research is compelling. Multiple studies have supported the validity of actuarial risk assessments and have shown that attention to risk may reduce the incidence of future violence and death. At this point, it seems clear that victims may suffer additional harm if system responses fail to identify highly lethal cases and respond accordingly. But many questions still remain: What is the relationship between risk assessment, statutory and evidentiary frameworks, the presumption of innocence, and victim confidentiality? How do we balance individualized responses with data-driven knowledge? Will these tools be used to deny or grant inappropriate orders? Both advocates for victims and defendants have legitimate concerns.

These persistent questions about where, when, and how risk-related information can be introduced in legal proceedings are coming of age, as the articles in this issue by Julie Saffren and Jamie Balson demonstrate. Saffren reviews and considers the implications of the **Pettingill** decision from Kentucky (**Pettingill v. Pettingill**, 480 S.W.3d 920 (Ky. Sup. Ct. 2015). In this recent landmark case, the Kentucky Supreme Court upheld the trial court's decision granting a protection order which relied in part on the judge's knowledge of lethality factors.

The Kentucky Supreme Court held that the trial court had appropriately employed knowledge of domestic violence risk factors to inform its judgment as to whether the facts indicated the likelihood of a recurrence of domestic violence.

In contrast, Balson's article highlights a different judicial view of risk assessment in the context of domestic violence. In the course of her discussion on the use of assessments in the prosecution of domestic violence incidents, she reviews several court decisions that consider how and when this information can be introduced. Her article reveals that not all courts hold favorable views of risk assessment in the context of domestic violence. For example, Arizona case law (**State v. Ketchner**, 339 P.3d 645 (Ariz. 2014)) limits a prosecutor's ability to utilize the information in a lethality assessment and serves as a warning to the prosecution to proceed with caution when attempting to admit such evidence. Saffren's and Balson's articles reveal that while comparatively few decisions have tackled important questions about how risk-related information can be introduced in legal proceedings in the domestic violence context, this body of case law is growing.

Decisions allowing evidence of risk predictors have been more common in other, non-domestic violence related contexts. Many of these decisions allow the use of non-actuarial information during criminal proceedings and are cause for concern. See, for instance**, Jurek v. Texas**, 428 U.S. 262 (1976), which upheld the use of testimony to predict future dangerousness as a basis for a sentence to death.

More recent court decisions focus on the admissibility of predictors based on validated tools and are more limited in scope. In **Malenchik v. Indiana**, 928 N.E.2d 564 (Ind. 2010), for example, the Indiana Supreme Court upheld the use of a validated risk assessment score during sentencing but stressed that it was doing so because the court relied on numerous factors in making its decision. In **Wisconsin v. Loomis**, 872 N.W.2d 670 (Wisc. 2015), the Wisconsin Supreme Court recently certified two interesting questions for review concerning the use of a risk assessment and introduction of risk factors by a prosecutor during trial. In granting review, the Wisconsin court expressed concern about the use of a score from a proprietary tool that is not transparent or subject to review.

Although the cases described by Saffren and Balson, as well as those mentioned above, involve different screening instruments, it seems that a consistent theme is emerging. Tools are simply that—one factor that may be used only for particular purposes. It is unlikely that civil and criminal courts will uphold the use of risk assessment during the "fact finding" process. Each state or locality must follow the specific statutory and evidentiary rules of that jurisdiction and case type in making the required findings of fact *before* using a tool to inform the appropriate sentence, terms and conditions, or modifications. Additionally, even at sentencing, risk scores may not be determinative.

The **Pettingill** case that is discussed in Julie Saffren's article, in particular, provides a guidepost. As Saffren explains, the trial court did not rely on the risk information as though it were evidence in order to make the required statutory finding that abuse had occurred. Instead, the judge used his knowledge about lethality factors to inform his analysis of whether future abuse may occur (as was required in this jurisdiction) and to consider the appropriate terms of the order as allowed by the statute. That is, the judge made the finding that DV had occurred based on the evidence he had heard, and once he believed that the abuse had happened, he used his judicial knowledge on lethality factors to make the finding that the abuse might occur again. Thus, Kentucky uses a two-part standard, and the judge's knowledge on lethality

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A lethality assessment is a type of IPV risk assessment that is intended to predict intimate partner homicide. The Danger Assessment (DA; *www.dangerassessment.org*; see p. 74) is unique in that it is the only IPV risk assessment that is intended to predict lethality and gathers data from only the victim-survivor of violence. Yet, as is demonstrated in this special issue, the reach of the DA is much broader than informing services for victim-survivors. In this issue, for example, we address lethality assessment in the context of civil and criminal court decisions.

We have furthered the research on the DA by examining risk and protective factors for severe and near lethal IPV. Recently, we incorporated multiple strangulation into an 11-item version of the DA called the Danger Assessment for Law Enforcement (DA-LE). Multiple incidents of strangulation are associated with risk factors for homicide and appear to increase risk for attempted homicide over attempted strangulation. The DA-LE was developed in collaboration with the Jeanne Geiger Crisis Center for use with Domestic Violence High Risk Teams (DV-HRT), a risk-informed collaborative intervention that brings together criminal justice and social service practitioners to enhance victim-survivor safety and increase offender accountability. We recently completed a National Institute of Justice funded evaluation of the Lethality Assessment Program (LAP), a risk-informed collaborative intervention that provides high-risk women at the scene of a police-involved IPV incident with access to telephone advocacy services. We found that the LAP increased women's help-seeking and decreased violent victimization.[4] Through this same study, we found that the Lethality Screen, a shortened version of the DA, has high sensitivity for screening women into the brief risk-informed intervention.[5] We recently received a grant from the National Institutes of Health to create and test culturally competent versions of the DA for immigrant, refugee, and Native American survivors of IPV. Throughout this work, we maintain a focus on the empowerment of women and the well-being of survivors.

Assessing risk, and making practice decisions based on those assessments, should be done within an evidence based practice framework where a risk assessment tool is treated as the best evidence of future risk of re-assault or homicide, and is considered within the context of survivor self-determination and practitioner expertise. Within this framework, IPV interventions should incorporate risk into their design and application to better tailor interventions for survivors. Education and survivors' autonomy are essential components of risk-informed interventions. As risk assessment becomes more common, it is important to recognize that domestic violence is not the same as other crimes and to listen to survivors' assessments of risk and safety in their relationships. When survivors' decision-making is respected, information from risk assessments has the ability to provide women with access to information and resources across the spectrum of possible decisions that they may make about their intimate relationships.

End Notes

1. Messing, J.T. & Thaller, J. (2015). Intimate partner violence risk assessment: A primer for social workers. *British Journal of Social Work, 45(6),* 1804-1820.

2. Messing, J.T. & Thaller, J. (2013). The average predictive validity of intimate partner violence risk assessments. *Journal of Interpersonal Violence, 28(7),* 1537-1558.

3. *See* Berk, R.A., Sorenson, S.B. & Barnes, G. (2016). Forecasting domestic violence: A machine learning approach to help inform arraignment decisions. *Journal of Empirical Legal Studies, 13(1),* 94-115.

4. Messing, J.T., Campbell, J., Webster, D.W., Brown, S., Patchell, B. & Wilson, J.S. (2015). The Oklahoma lethality assessment study: A quasi-experimental evaluation of the Lethality Assessment Program. *Social Service Review, 89(3),* 499-530.

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informed his analysis on the *likelihood* of future abuse as well as what *types* of protection orders should be made.

One point bears reiterating. Courts must stick to statutory requirements. Risk tools are not evidence, and they should not be used either to grant or deny protective orders or determine guilt or innocence. But a judge's knowledge of risk factors and use of bench tools about risk can help with the decisions that accompany DV findings.

In keeping with this framework, the Center for Court Innovation, a nonprofit organization headquartered in New York which seeks to help create a more effective and humane justice system, has developed a guide for courts interested in developing a tool that starts with an examination of their statutory requirements. Additionally, as printed on the tool itself, it is meant to operate in context with assistance from advocates and others. For those interested in learning more about this guide, developed with support from the State Justice Institute, contact *info@courtinnovation.org*.

The hard work of correctly implementing these tools will continue by jurisdiction and case type, including criminal, civil protection, child custody, and access proceedings. Advocates' perspectives and experiences will be critical to making sure that these tools are used to enhance safety for survivors and their children rather than as a means of triaging cases by busy courts. As the article in this issue by Jill Messing and Jackie Campbell points out, we have made tremendous progress. Domestic violence risk assessments can help reduce lethality and are a critical piece of the puzzle in any coordinated response. Saffren's and Balson's articles provide important grounding to ensure that we are doing so within an appropriate legal context as we move forward. ■

Using Judicial Knowledge of Lethality Factors in Civil Domestic Violence Matters

by Julie Saffren*

Like their brethren in the criminal system, civil judges, particularly those on the family court bench, need information and training to assist them to recognize dangerousness. Once they are sufficiently informed, they can make orders that are more safe, fair, and appropriate concerning parents and children. In cases of heightened danger, such as requests for expedited domestic violence relief, family judges are particularly in need of guidance related to questions of risk and lethality. What kind of information do our family court judges need and what's the best way to provide it? Should civil judges routinely assess lethality based on the facts and evidence they have seen and heard, and if they do, how should they properly use that assessment?

Thanks in large part to the pioneering work of Dr. Jacquelyn Campbell, lethality assessment is now nationally considered a best practice to be conducted by a wide number of professionals who deal with victims of abuse, including DV advocates, law enforcement, and healthcare professionals. Given the variety of ways that danger may be assessed by different professionals and how the resulting information is used and by whom, this article asks: What do civil judges need to know about dangerousness and lethality and how can that information properly be used? The Kentucky Supreme Court published a unanimous decision in October 2015 that helps answer that question.

Pettingill v. Pettingill

The **Pettingill** case started in early July 2013, when Sara Pettingill filed a domestic violence petition against her husband, Jeffrey, from whom she had recently separated.[1]

Allegations of Abuse

Sara made numerous allegations concerning Jeffrey's violent conduct, including an incident where he abused the family pet in the presence of Sara and their young daughter. Sara had grown extremely afraid in light of what she saw as Jeffrey's increasingly unstable behavior. She alleged that Jeffrey had installed surveillance cameras in her home, broken her cell phone, locked her out of bank accounts, and accessed her private email and social media accounts. In addition to those examples of controlling behavior, she was afraid for her safety and that of their infant daughter because Jeffrey had bragged about being "ex-CIA" and having hidden a firearm in the house (even though he was a convicted felon). She had photos to prove he had obtained ammunition but she did not know where the gun was located. She alleged he had threatened to "put hits on" his previous wife who had filed domestic violence charges against him in Tennessee. She stated that she was intending to file for divorce and was very scared of what he might do when he found out.

In cases of heightened danger, such as requests for expedited domestic violence relief, family judges are particularly in need of guidance related to questions of risk and lethality.

Sara obtained a temporary emergency order with a hearing date set soon after. The Jefferson County Sheriff had difficulty serving Jeffrey; the record shows they believed Jeffrey was evading service. Ultimately, service was accomplished and on July 11, 2013, Jeffrey appeared with counsel. The matter was heard before Judge Jerry Bowles of the Jefferson County Circuit Court in Louisville. Both parties testified at the hearing, with Jeffrey stressing he had never laid a hand on his wife and Sara confirming that was true.

Standard to Obtain Order of Protection

Under Kentucky Revised Statutes §403.750, a court may issue a civil domestic violence order (DVO) after a hearing if the court finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred *and* may again occur.[2] Note this definition of abuse is two pronged; in addition to finding that an act or acts occurred, the court has a second, more prospective finding to make, namely, that abuse may occur again.

In §403.720, Kentucky defines domestic violence and abuse as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple."[3] Thus, given that Jeffrey had not physically abused her, Sara needed to show the court Jeffrey's conduct (1) inflicted fear of imminent physical injury, serious physical injury, sexual abuse, or assault *plus* (2) further conduct causing fear that injury, abuse, or assault may occur in the future.

Trial Court Decision

After a contested hearing, Sara met her burden to obtain a DVO. To document the order, the judge completely and accurately filled out the standard statewide form 275.3 commonly used to issue orders in DV matters. Under the "Additional Findings" header of that form, the judge checked the box corresponding to his required finding "for [Sara] against [Jeffrey] in that it was established, by a preponderance of the evidence, that an act(s) of domestic violence or abuse occurred and may again occur." Judge Bowles then hand-wrote a number of

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DANGER ASSESSMENT

Jacquelyn C. Campbell, Ph.D., R.N.

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.

Using the calendar, please mark the approximate dates during the past year when you were abused by your partner or ex partner. Write on that date how bad the incident was according to the following scale:

1. Slapping, pushing; no injuries and/or lasting pain
2. Punching, kicking; bruises, cuts, and/or continuing pain
3. "Beating up"; severe contusions, burns, broken bones
4. Threat to use weapon; head injury, internal injury, permanent injury
5. Use of weapon; wounds from weapon

(If **any** of the descriptions for the higher number apply, use the higher number.)

Mark **Yes** or **No** for each of the following. ("He" refers to your husband, partner, ex-husband, ex-partner, or whoever is currently physically hurting you.)

____ 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?
3a. (If have *never* lived with him, check here___)
____ 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 did not wish to do so?
____ 10. Does he ever try to choke you?
____ 11. Does he use illegal drugs? By drugs, I mean "uppers" or amphetamines, “meth”, speed, angel dust, cocaine, "crack", street drugs or mixtures.
____ 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. Have you ever been beaten by him while you were pregnant? (If you have never been pregnant by him, check here: ____)
____ 16. Has he ever threatened or tried to commit suicide?
____ 17. Does he threaten to harm your children?
____ 18. Do you believe he is capable of killing you?
____ 19. Does he follow or spy on you, leave threatening notes or messages, destroy your property, or call you when you don’t want him to?
_____ 20. Have you ever threatened or tried to commit suicide?
_____ Total "Yes" Answers

Thank you. Please talk to your nurse, advocate or counselor about what the Danger Assessment means in terms of your situation.

Using Danger Assessment in the Prosecution of Domestic Violence Cases

by Jaime Balson*

Lethality assessments are a valuable tool for prosecutors who charge and try cases involving domestic violence (DV). The assessment can be used to help the prosecutor develop insight into the relationship and the type of control an abuser has over a domestic violence victim, and to provide information to more effectively use the court process to help keep the victim safe. Such assessments can forewarn the prosecutor of issues that may arise as a result of the abusive relationship, allowing the prosecutor to adjust his or her approach to a domestic violence case, and making the probability of securing a conviction much more likely. There are limits, however, on how a prosecutor can use this information in the "case in chief,"[1] and on whether the information is admissible at all.

How Prosecutors Obtain Lethality Assessments

Prosecutors do not conduct lethality assessments with DV victims; the prosecutor obtains the assessment by way of the police report or otherwise from the responding officer, or the initial police officer who responds to the scene of a domestic violence incident. In Maricopa County, Arizona, the domestic violence protocol manual developed by the county attorney's office and used by many departments states "police departments should develop and use domestic violence risk assessments to gain greater insight into the nature, frequency, and severity of violence in the relationship."[2]

The level of detail included in the lethality assessment varies across police departments and police officers. The amount of attention given to obtaining an accurate and thorough assessment, with the appropriate follow up inquiry into each question, falls to the officer completing the assessment. This is largely a product of the culture of the particular police department, the level of training of that police department, the training officer that taught the responding officer, and the degree of importance placed on DV cases.

The guidance to develop and use risk assessment is interpreted differently across police departments. One police department in Maricopa County, Arizona uses what they term a "course of conduct overview":

1. How frequently and seriously does your partner intimidate you or threaten you? Describe.
2. How frequently does your partner demand you do things and verify that you did them? Describe.
3. Describe the most frightening or worst event involving your partner.
4. Have you ever made it known to your partner that you wanted to leave? How did your partner react?

Contrast this with another Maricopa County police department's assessment:

DV Lethality Assessment Card:

1. Has your partner ever used/threatened the use of a weapon against you?
2. Has he/she threatened to kill you, your children or your pets?
3. Do you think he/she might try to kill you?
4. Does your partner have a gun?
5. Has your partner ever tried to kill himself/herself?
6. Is your partner jealous or does he/she try to control you?
7. Has your partner ever forced you to have sex when you did not want to?
8. Do you feel the violence against you is escalating in severity?
9. Have you tried to leave/end your relationship?
10. Are there children in the home?
11. Is your partner unemployed?
12. Does your partner use drugs or alcohol?
13. Does your partner monitor your phone calls, e-mail, social media?

A detailed lethality assessment allows advocates working in the police department or prosecutor's office to better identify victims in need of advanced safety planning and to provide assistance doing so.

This second assessment follows more closely the Danger Assessment developed by Jacquelyn Campbell,[3] and provides more information that the prosecution can utilize to build its case. The more detailed assessment also allows advocates working in the police department or prosecutor's office to better identify victims in need of advanced safety planning and to provide assistance doing so.

As with any witness in a criminal investigation, the victim is in control of what information is shared with the police. It is not uncommon for victims who are fearful of their abusers—or for another reason—to refuse to participate in a lethality assessment. There is little an officer can do to obtain the information sought by the

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assessment if the victim is unwilling to provide it.

How Prosecutors Can Most Effectively Use Lethality Assessments

Prosecutors charge cases based upon a "reasonable likelihood of conviction" or another similar standard. This decision to charge a case is based upon victim credibility, the victim's reluctance/refusal to prosecute, physical evidence, the availability of witnesses and whether they are credible, and the confession/denial of the abuser, among other things. Prosecutors look at the totality of the available evidence at the time the case is submitted for their review to make the charging decision.

In DV cases, it is common for victims not to want to prosecute or to recant their initial story for a variety of reasons, including their safety and well-being.[4] When a victim recants, the prosecutor has to make a decision whether to proceed with the case—and if a reasonable likelihood of conviction exists—without the victim. In Maricopa County, Arizona, the county attorney has set forth the following regarding charging DV cases: "Based on the nature of domestic violence cases, the likelihood of recidivism, and the ongoing danger to the victim and others, a domestic violence case will be charged (if it meets the criteria) even if the victim does not wish to proceed with prosecution."[5]

When this occurs, the prosecution can use an evidence-based prosecution[6] approach to successfully obtain a conviction in the case.

Courts have recognized that an abuser may induce the victim to be unavailable for trial. In such instances, the prosecutor can use the information contained in a lethality assessment to combat this issue. For example, if through a lethality assessment a prosecutor learns that the abuser employs excessively controlling behaviors towards the victim and that such behavior is likely to result in the victim being unavailable for trial, the prosecutor can anticipate and seek out information to support a forfeiture by wrongdoing motion from the very beginning of a case.[7] If granted, this would permit the prosecution to introduce statements made by the victim through other witnesses. The lethality assessment can help the prosecutor in other ways at different points throughout the prosecution of the case as well. For instance, the information obtained in the lethality assessment can be used not only in making a decision to charge the case, but also in response to motions to modify release conditions, for impeachment at trial, to aggravate the defendant's sentence, at bail hearings to support no bond or a high bond amount, and for support in probation revocation and/or termination hearings.

Courts have recognized that an abuser may induce the victim to be unavailable for trial. In such instances, the prosecutor can use the information contained in a lethality assessment to combat this issue.

Arizona legislatures, recognizing the dangers that violent criminals—including DV offenders—pose by being released into the community while new criminal charges are ongoing, have officially sanctioned the prosecutor's use of the lethality assessment at bond hearings,[8] and have made it mandatory that judges consider information obtained through a lethality assessment in A.R.S. 13-3967, which states: "In determining the method of release or amount of bail, the judicial officer, on the basis of available information *shall* take into account all of the following: ". . . 5. The results of a risk or lethality assessment in a domestic violence charge that is presented to the court" (emphasis added) This provision was added to Arizona's law in 2015.[9]

The information contained in the lethality assessment is especially important if the prosecutor cannot get in touch with a victim early on—or at all—in the case. Often, the victim has left his or her home to seek safety. This renders useless the contact information provided to the police at the scene of the crime. The provision in A.R.S. 13-3967 is also important when the victim wants the abuser released from custody. The prosecutor, using the lethality assessment to determine the history between the victim and the abuser, can use the information to keep the defendant in custody in an effort to protect the victim. In cases such as this, the prosecutor has no way of knowing whether the victim truly wants the defendant to be released or if the defendant is pressuring the victim to make statements in support of his or her release to the court. Abusers often use jail calls, jail mail, third parties or other means to message the victim to do "whatever it takes" to get them out of custody.

In one instance in Maricopa County, the defendant instructed his sister to bring the victim to court so the victim could tell the court to release the defendant. The defendant's sister brought the victim to court, and the victim told the court that she wanted the defendant released. Later it was learned that that victim felt pressured to make the statement and appreciated that the prosecutor successfully argued to keep the defendant in custody. For prosecutors handling DV cases, a constant struggle exists to balance the wishes of the victim and keeping the victim—and the community—safe.[10]

Limitations of Lethality Assessments

When taking a domestic violence case to trial, there are significant limitations on how much, if any, of the information contained in the lethality assessment will be admissible. For example, Federal Rule of Evidence 404, after which most state rules of evidence including Arizona's are based, addresses the admissibility of character evidence and the admissibility of crimes and/or other acts at trial. The rule states that evidence of a person's character, and evidence of a crime, wrong, or other act is *not* admissible to prove that on a particular occasion the person acted in accordance

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Summaries of Cases

Impact of Domestic Violence on Custody and Parental Rights

by Anne L. Perry

New York: Father's Domestic Violence Against Girlfriend Was "Change in Circumstances" and Established Basis for Mother to Seek Modification of Custody Arrangement

The Facts. Christina and Joseph Fountain are the parents of a child born in 2009. Following their separation, they entered into a custody order on consent that granted them joint legal custody and shared physical custody of the child. While the child was at her father's residence, an act of domestic violence occurred between the father and his live-in girlfriend. The child did not witness the incident, but was present at the home when police officers arrived and took the father into custody. When the mother arrived to pick up the child the same night, the house was in disarray, multiple police officers were still on the scene, and the child's hair was checked by an officer to ensure there was no broken glass in it. The father spent the night in jail and later pleaded guilty to harassment in the second degree.

An order of protection was entered against him and he was ordered to attend a domestic violence intervention program. As a result of the violence, the father was required to move out of the girlfriend's residence, and he spent time moving between family members before eventually reconciling with the girlfriend and moving back in with her. After this incident, the mother sought modification of custody, seeking sole legal and physical custody. The Family Court granted the mother's petition in its entirety, providing the father with visitation two out of every three weekends. The father appealed.

The Appeal. The Appellate Division of New York considered whether the mother had established a "change in circumstances reflecting a real need for change in order to insure the continued best interests of the child." The court found that here, the record reflected that although the child did not witness the domestic violence incident, she witnessed the father's arrest and was visibly upset when the mother arrived to retrieve her that same night. The court also found that the father and the girlfriend "downplayed the domestic violence incident," claiming that the father merely threw the girlfriend's phone and pushed her. The court deferred to the Family Court's determination that these claims were not credible. The court also agreed with the Family Court that a change in circumstances occurred based on the domestic violence incident and the father's lack of stable housing.

Finally, the court also found a substantial basis for the Family Court's determination that "an award of primary physical custody to the mother was in the child's best interest based on the stability offered by the mother's living situation, the father's history of domestic violence, and his failure to attend the violence intervention program." Joint custody was therefore "inappropriate and not in the child's best interests," and the judgment was affirmed. **Fountain v. Fountain**, 12 N.Y.S.3d 641 (N.Y. App. Div. 2015).

Editor's Note: Unless abuse is remediated, it often occurs with the abuser's next partner. This creates the risk of exposure to DV for children with unsupervised visitation with their abusive parent who is in a new relationship. This decision recognizes that common reality and protects the children.

New York: Grandmother Whose Son Stabbed Mother Did Not Have Standing to Seek Visitation With Grandchildren

The Facts. The mother and father had two children, one born in 2003 and the other in 2007. In 2014, the father allegedly stabbed the mother four times in the presence of the children. A no-contact order was immediately issued, and the related child protective proceedings prohibited the father from having any contact with the children. At the time of the instant case, there were pending criminal, matrimonial, and personal injury proceedings.

The children's paternal grandmother filed a petition for visitation with her two grandchildren, alleging that the children's mother had not allowed her to see the children since the assault.

The grandmother alleged that she previously had an excellent relationship with the children, had visited them regularly and was actively involved in their lives. She also asserted that she had not had contact with the children in more than a year because she feared it would be seen as a violation of the father's no-contact order. The mother opposed the grandmother's petition for visitation, arguing that the grandmother did not have standing to file for visitation because she lacked a current relationship with the children and because the situation failed to rise to the level of circumstances in which equity would see fit to intervene. The mother further argued that visitation was not in the best interests of the children because the grandmother lives with her son, helps him financially, and has a "symbiotic relationship" with the son, who "committed a horrific assault" on the mother in the presence of the children.

The Decision. The New York Family Court determined that the issue of standing could be decided on the motion papers without a hearing, as the parties did not essentially dispute the factual allegations. The parties' disagreement focused on whether the grandmother had standing to bring her visitation petition based on equitable considerations, and whether visitation between the paternal grandmother and the children was in the children's best interest.

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The court concluded that the grandmother lacked standing to bring her petition, as she had "failed to demonstrate that 'circumstances show conditions in which equity would see fit to intervene.'" While it was undisputed that the grandmother had an ongoing relationship with the children prior to the father's assault, she had not seen the children since that time. The grandmother admitted that she did not try to see the children after the no-contact order was issued and that she waited nearly a year to bring her petition. "Because she had no contact with her grandchildren for almost a year, she did not have a current relationship with her grandchildren at the time she filed her petition." Prior case law has established that if grandparents have "done nothing to foster a relationship or demonstrate their attachment to the grandchild, despite opportunities to do so, then they will be unable to establish" that equitable conditions exist. Moreover, the court expressed concern about the grandmother's "very close relationship with and affinity with her son" which has continued in the aftermath of serious domestic violence. Accordingly, the mother's motion to dismiss was granted and the grandmother's petition for visitation was dismissed. **Matter of MJM v. MM**, Nos. V-8742-15 and V-8743-15 (N.Y. Fam. Ct. 2015).

Editor's Note: Had the grandmother brought her petition for visitation sooner, when her relationship with the children was still considered "current," she may have met the equitable conditions threshold and this case would have focused on the grandchildren's best interests instead of standing. Grandmother's choice to have a supportive relationship with a son who committed such a violent assault in the presence of the children would have likely been deemed inconsistent with the best interests of her grandchildren. However, it could be an open question whether grandmother's symbiotic relationship with her violent son was in fact a choice grandmother made or if she represents a different generation of victim.

New York: Mother Granted Custody Despite Removal of Child From State

The Facts. The mother, Linda Akatsu, and father, Edward Brown, are the parents of a child born in 2010. The parents lived together until May 2012, at which point the mother took the child to California without notifying the father or advising him of the child's whereabouts. In September 2012, the father's investigator located the mother and child in California and the father then commenced custody proceedings. The mother returned to New York as directed and filed her own petition for custody. At a hearing, the father focused on the mother's unilateral removal of the child to California, which deprived the father of any contact with the child for four months. The mother acknowledged that this action had been taken to separate the child from the father, but testified that she left New York because she was afraid of the father as a result of his angry and sometimes violent behavior. The Family Court awarded sole legal and primary physical custody to the mother, with shared parenting time for the father. The father appealed.

This enlightened decision reflects an appropriate and nuanced assessment of protective parental conduct in the face of abuse. The court did not condone removal–but neither did it abdicate its responsibility to protect the child once she was returned.

The Appeal. The New York Appellate Division, in considering the best interests of the child, found that the Family Court had considered and refused to condone the mother's unilateral removal of the child, which it characterized as "extreme." However, the Family Court had also credited the mother's testimony about the father's "longstanding pattern of dealing with conflict in an aggressive way," including jealous confrontations, expletive-laden outbursts, and incidents in which he kicked the family pets. The father offered different versions of events which minimized his behavior.

The Family Court determined that the father had engaged in acts of domestic violence against the mother. In addition, the Family Court found that the mother had expressed remorse for her actions, had promptly relocated and resettled in New York, and cooperated to facilitate the father's contact with the child following her return. The court held that these considerations supported the award of sole, rather than joint, custody to the mother. The order was affirmed. **Brown v. Akatsu**, 4 N.Y.S.3d 325 (N.Y. App. Div. 2015).

Editor's Note: This enlightened decision reflects an appropriate and nuanced assessment of protective parental conduct in the face of abuse. The court did not condone removal–but neither did it abdicate its responsibility to protect the child once she was returned.

South Dakota: Mother's Assault Did Not Raise Presumption Against Custody

The Facts. The mother, Kacie Jo Nickles, and father, Patrick Nickles, each had a son from a previous relationship when they married. They had two additional children together and adopted each other's children. The family lived an extravagant lifestyle until financial losses created conflict and forced the family to move back to mother's hometown. The mother began abusing alcohol and was convicted of driving under the influence of alcohol.

The couple separated and Patrick filed for divorce, although they continued to live together. In April 2013, the mother, in an intoxicated state, was arrested for assaulting the father and two of her family members. She was indicted for simple assault/domestic violence, but pleaded guilty to disorderly conduct. The father obtained a one-year order of protection against the mother and took custody of all four children. Shortly

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thereafter, the mother entered and completed treatment at a residential alcohol treatment facility. At the time of the trial on dissolution, custody, and property division, alcohol was not an issue for the mother. Two experts made opposing custody evaluations. One recommended that the mother have primary physical custody of the children because of her "better emotional bond" with the children, while the other recommended that the father's "structure, routine, and stability" made him the better parent to receive physical custody. The trial court ordered joint legal custody with primary physical custody awarded to the mother, subject to liberal parenting time for the father. The father appealed, arguing that the court did not make explicit findings regarding the presumption that awarding custody to the abusive parent is not in the best interests of the children.

The Decision. The Supreme Court of North Dakota considered the father's contention that the court erred in failing to make an express determination whether the mother rebutted the presumption against her having custody because she had been convicted of domestic abuse. The court stated that the mother was convicted of disorderly conduct, which was not a conviction for domestic abuse within the meaning of the statute. For the presumption to have arisen, the father must have proven a "history of domestic abuse" within the meaning of the statute, and he did not meet this burden. The single incident of assault did not rise to the level of documented domestic abuse and therefore the presumption did not arise.

The court was satisfied that the trial court evaluated the best interests of the child standard on numerous factors, including whether harmful parental misconduct had been committed in the presence of the children. The court found that the trial court did consider the events on the night of the mother's arrest, but found these outweighed by the mother's steady presence in the children's lives, her ability to address their emotional needs, her role as primary caretaker, and a strong interest in not separating the four siblings. Accordingly, the court affirmed the decision on child custody. **Nickles v. Nickles**, 865 N.W.2d 142 (S.D. 2015).

Editor's Note: Reading this case with the gender roles reversed would cause one to ask why an assault against a mother that resulted in a disorderly conduct conviction for a father would not be properly deemed domestic violence for purposes of the state's custody presumption. Perhaps a more satisfying outcome would have been for the trial court to have concluded that Mother's prior conviction for disorderly conduct against the father indeed raised the statutory presumption that she perpetrated domestic violence, but the presumption could be rebutted by the weight of evidence that showed she had addressed the problems that led to the conduct and that her parenting capacity was superior.

Arkansas: Termination of Abusive Father's Rights Reversed to Consider Less Drastic Alternatives

The Facts. The father, Jonathan Lively, and mother, Kayla Lively, were married and had two minor children. The father was a military veteran who, since returning from combat in Iraq, had suffered from post-traumatic stress disorder (PTSD) and struggled with substance abuse. The Arkansas Department of Human Services (DHS) filed for an emergency order placing the two children in the custody of the mother. The order was granted based on findings that the father had a history of substance abuse, had been violent toward mother, and had an unsubstantiated allegation of sexual abuse against their daughter.

The children were later adjudicated dependent/neglected by the father due to his continued drug use, PTSD, and domestic violence in the home. The court ordered that the father have no contact with the children. The father entered a residential treatment facility and was expected to have supervised visitation after his completion of the program. The mother brought the children to visit the father on two occasions while he was in the program. The father completed the program, but relapsed and returned to the program a second time. The couple officially separated after this treatment and the father attempted to resume visitation.

However, following positive drug tests and an arrest for public intoxication, the DHS filed a petition to terminate the father's rights. The court terminated the father's parental rights based upon findings that he had not had custody of the children for more than a year, he continued to use illegal drugs and have unstable mental health issues, and there was domestic violence in the home to which the children had been subjected. The father had also been sentenced to 120 months of incarceration, which the court held was "a substantial period of the children's lives" during which he could not be a parent to them. The father appealed the termination of his parental rights, contending that the termination was not supported by the evidence and was not in the children's best interests.

The Decision. The Court of Appeals of Arkansas first noted that the trial court found the evidence warranted termination on three separate statutory grounds. The father challenged the sufficiency of the evidence on only two of those grounds. The court had previously held that when a parent does not challenge all of the statutory grounds for termination, "the unchallenged ground is sufficient to affirm the order." Therefore, there was no basis to reverse the order on this argument.

The court next considered the best interests of the children. The appellate court found that the trial court erred in finding the children "adoptable" because the children had a stable, permanent home with their mother and there was no expectation they would ever be put up for adoption. Given this fact, a finding of "adoptability cannot form the basis for determining that termination is in their best interests."

Looking at other factors, the court found that the children had a stable relationship with their paternal grandparents that would be jeopardized by termination of the father's rights. Termination also served to cut off the children's ability to benefit from the father's financial support. Nor was there evidence that the father "terrorized his family with physical

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violence." By all accounts the children were thriving and the mother was continuing to take them to visit the father throughout the termination proceedings. While the trial court found a number of risk factors should the children be returned to the father's custody, "it did not address whether termination (rather than a less-drastic alternative, such as a no-contact order or supervised visitation) was in the children's best interest." The trial court's findings were clearly erroneous, so the termination of the father's parental rights was reversed and the case remanded for further proceedings. **Lively v. Arkansas Dept. of Human Services**, 865 N.W.2d 142 (Ark. Ct. App. 2015).

Editor's Note: Termination of parental rights is a last resort and if less drastic alternatives exist that still serve to protect the children, they should be employed. The case emphasizes the judiciary's reluctance to terminate parental rights, especially in this case where the father was a veteran who had served in Iraq.

Vermont: Termination Petition Denied Despite Domestic Violence and Aggression

The Facts. The mother and father had two children, J.M. and W.M. The children first came into custody of the Department for Children and Families (DCF) when J.M. was three years old and W.M. was four years old, based on reports of their parents' substance abuse, domestic violence, inappropriate physical discipline, and inadequate housing. The children were later returned home under a conditional care order.

Continued reports of alcohol abuse and domestic violence led to a transfer of custody to DCF and ultimately to petitions to terminate the rights of both parents. Mother agreed to relinquish her parental rights conditional on the court granting the petition as to father. At the time of the hearing, J.M., who was nine years old, had been living with a foster family for two years and was "well-adjusted and thriving." W.M., who was 10 years old, had a "higher level of clinical needs" and was living in a residential treatment center. "Any future community-based placement of W.M. would require highly skilled foster parents with the ability to provide the level of structure and support necessary to manage his behaviors." A DCF social worker did not support terminating contact, noting that the father had been consistent in weekly unsupervised visits with J.M. and J.M. had an important bond with his father and paternal grandparents.

The court found that the father had not made any significant progress in addressing his substance abuse and domestic violence issues and granted the petition as to W.M. However, as to J.M., the court concluded that while the father "could not resume parental responsibilities for J.M. within a reasonable time," he did provide emotional support and was J.M.'s only significant personal relationship. The court thus determined that terminating the father's parental rights was not currently in J.M.'s best interests. The State appealed.

The Appeal. The Supreme Court of Vermont considered the State's argument that denying the petition as to J.M. was inconsistent with the finding that the father could not resume parental responsibilities within a reasonable period of time, as well as with the principle that termination decisions were not to be based on the availability of an adoptive placement. The court found no basis to disturb the trial court's findings. "The evidence summarized above was sufficient to support the finding that continued contact with father was important to the child and provided some emotional support and sense of stability where it was otherwise sorely lacking."

The ruling was not simply based on the lack of a foster home but on a "balance" of factors. Moreover, the State's premise about the alternative placement was incorrect. While the availability of an adoptive alternative placement is not a precondition to terminating parental rights, the court had "never held that the absence of an alternative placement cannot be considered by the court in deciding whether a termination of parental rights is in the child's best interests." The trial court's analysis was appropriate "especially where—as here—the child's sole emotional connection resides with the parent." No single best-interests criteria is dispositive and the trial court did not abuse its discretion in concluding that the balance of factors weighed against granting the State's petition as to J.M. Accordingly, the judgment was affirmed. **In re J.M.**, No. 2015-022 (Vt. 2015).

Editor's Note: This case reflects the harms and trauma caused by the confluence of domestic violence and substance abuse: two boys losing their mother; siblings being separated; a father losing a son.

Ohio: Mother's Parental Rights Terminated for Failure to Protect Children From Domestic Violence

The Facts. The mother and father had three children together. The parents, still married, had separated but had not completed divorce proceedings. Mother also had two younger children with her new boyfriend. The youngest child was hospitalized with non-accidental injuries consistent with shaken baby syndrome. The child sustained these injuries while in the boyfriend's care. At the hospital, the baby was diagnosed with multiple brain bleeds at various stages in the healing process and a retinal hemorrhage. The boyfriend later admitted to handling the baby roughly. The Fayette County Department of Job and Family Services (FCDJFS) filed a complaint alleging that the baby was an abused, neglected, and dependent child, and moved for temporary custody.

The court granted the request and ordered that the boyfriend have no contact with the baby. The other children were placed with relatives by agreement. The relatives later relinquished the other children and FCDJFS filed separate complaints alleging that these children were neglected and dependent children based on allegations of domestic violence in the home. The court granted temporary custody to FCDJFS and the children were placed in foster care. As part of the court order, the mother was to have mental health counseling, attend parenting classes, and engage in a drug and alcohol assessment. She made progress with some, but not all, of these goals.

Meanwhile, the boyfriend was charged with criminal offenses related to his abuse of the baby. He was arrested at the mother's house while the children were visiting, despite his no-contact order. Two of the children reported that the mother was attempting

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additional findings on the docket sheet. He wrote:

> [Jeffrey] avoided service, served 7/10/13
>
> The Court finds: 9 out of 12 top lethality factors in intimate partner [violence]
>
> 1) [Jeffrey] has abused the family pet;
>
> 2) Cyber stalking [Sara];
>
> 3) Threatened the life of his ex-wife in the presence of [Sara];
>
> 4) Shown possessive—jealous behavior by monitoring [Sara]'s cell phone;
>
> 5) Damaged property ([Sara]'s cell phone) throwing it against the wall;
>
> 6) Engaged in rulemaking behaviors including not allowing [Sara] to drive her own car;
>
> 7) Has prior felony conviction;
>
> 8) Recently purchased a firearm (3/29/13);
>
> 9) Recent separation—of the parties
>
> Places [Sara] at extreme risk of physical harm.

This last finding is significant as it is where the judge's analysis satisfies the KRS 403.750 requirement to show that abuse may occur again. Among other orders, Jeffrey had to stay 500 feet from Sara and their daughter, 1,000 feet from Sara's residence and work location, and attend a batterers' intervention program.

Jeffrey's Attempts to Appeal

Jeffrey first moved to vacate the DVO. His primary argument was that the judge abused his discretion by taking judicial notice of, and basing his decision on, lethality factors, rather than the statutory standard set out in KRS §§403.720 and 403.750. That motion was denied. Jeffrey then filed his first appeal, making three arguments: (1) the court erred in issuing the DVO absent any physical abuse; (2) the court erred by using the lethality factors as its legal standard instead of the statutorily-required standard; and (3) the court erred by taking judicial notice of lethality factors.[4] Jeffrey argued that taking judicial notice of a fact "peculiarly known to the judge is wholly inappropriate and requires reversal."

In May 2014, the Court of Appeals affirmed Sara's DVO but more litigation resulted. The Court noted in its decision that its review was "severely hampered" by the lack of a complete record. The court never saw the videotape of the hearing, which should have been certified by the clerk and provided as part of the appellate record. However, the Court held it was Jeffrey's duty to ensure the record on appeal was sufficient: ". . .we cannot review the actual testimony, but rather, must assume that the omitted record supports the decision." Jeffrey then sought a rehearing, arguing that he was constitutionally entitled to a judicial review and the appellate court had failed by not obtaining the complete record.

The Court of Appeals denied Jeffrey's petition for rehearing, holding that the burden is on the appellant, not the court, to ensure the record on appeal is complete. But the Kentucky Supreme Court granted Jeffrey's motion for discretionary review and here is where the trial judge's proper use of lethality factors was conclusively affirmed.

Kentucky Supreme Court Distinguishes Judicial Notice From Judicial Knowledge

The Court of Appeals had found no merit in Jeffrey's argument that Judge Bowles took judicial notice of the lethality factors and, moreover, disagreed with Jeffrey that the lethality factors were improperly used as the basis to issue Sara's DVO.[5] At the state supreme court, Jeffrey maintained essentially the same arguments.

The Kentucky Supreme Court clarified several important points as it put this matter to rest: first, that lethality factors are not the type of facts that may be taken by judicial notice; second, the trial judge in this case did not improperly take judicial notice of lethality factors but rather employed appropriate and permissible judicial knowledge; and third, the trial court did not issue the permanent DVO using the lethality factors as its standard but correctly employed the statutory standard set out in KRS §§403.720 and 403.750.

The court noted that Kentucky Rule of Evidence 201 permits a trial court judge to take judicial notice of adjudicative facts that are not subject to reasonable dispute, such as those from unimpeachable sources.[6] This would include "encyclopedias, calendars, maps, medical and historical treatises," among others. So while the court agreed with Jeffrey that lethality factors are not the type of facts that may be properly taken by judicial notice, it distinguished facts from factors. It held "[l]ethality factors or 'lethality predictors' for intimate partner violence are not facts but risk factors used by courts, law enforcement, counselors, and social scientists to evaluate the threat of domestic violence between partners."[7]

The court held: "Lethality factors or 'lethality predictors' for intimate partner violence are not facts but risk factors used by courts, law enforcement, counselors, and social scientists to evaluate the threat of domestic violence between partners."

The court listed the following as examples of lethality factors: threats of homicide or suicide or suicide attempts; history of domestic violence and violent criminal conduct; stalking; depression or other mental illness; obsessive attachment to victim; separation of parties; drug or alcohol involvement; possession or access to weapons; abuse of pets; destruction of victim's property; and access to victim and victim's family and other supporters.[8]

The court confirmed that Judge Bowles did not take judicial notice of the lethality factors and improperly interject them into the matter. Rather, he used his *appropriate and permissible judicial knowledge of domestic*

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Bench Guide for Recognizing Dangerousness in Domestic Violence Cases

By Jacquelyn C. Campbell, PhD, RN, FAAN and
Hon. Sharon Chatman, Superior Court of California, County of Santa Clara

This tool is a research-based bench guide for use by judicial officers at all stages of judicial proceedings involving allegations of domestic violence and orders of protection in civil and criminal domestic violence cases.

Research has proven that there are several factors associated with an increased risk of homicides (murders) of women in intimate partner domestic violence relationships. This bench guide is not intended to predict what will happen in any given case; it is an informational tool for your consideration as you review a case and become aware of the extent to which the evidence reveals how many lethality factors (danger of homicide) are present. This bench guide is not a substitute for judicial experience, knowledge, skills, and intuition.[1]

Pending/Prior:
☐ Emergency Protective Order ☐ Criminal Protective Order ☐ Civil Protective Order
☐ Criminal History Check ☐ Registered Firearms Check

Lethality Factors

Factors in this column are given more weight in descending order.

Does the alleged **perpetrator own a gun**?	Yes	No	Does the alleged **perpetrator use any of these illegal drugs**: "uppers" or amphetamines, Meth, speed, angel dust, cocaine, "crack," street drugs, or mixers?	Yes	No
Has the physical violence increased in **severity** or **frequency** over the past year?	Yes	No	Is the alleged perpetrator an **alcoholic** or **problem drinker**?	Yes	No
Has the alleged **victim left** the alleged **perpetrator** after they lived together **during the past year**?	Yes	No	Does the alleged **perpetrator** try to **control** most or all of the alleged v**ictim's daily activities**? (i.e., tells victim when to see friends or family members or how much money to spend)	Yes	No
Is the alleged **perpetrator unemployed**?	Yes	No	Is the alleged **perpetrator violently** and **constantly jealous** of the alleged victim? (i.e., "If I can't have you, no one can.")	Yes	No
Has the alleged **perpetrator** ever **used** or **threatened** the victim with a **lethal weapon**?	Yes	No	Has the alleged **victim** been **beaten** by the alleged perpetrator **while pregnant**?	Yes	No
Has the alleged perpetrator ever **threatened to kill** the **victim**?	Yes	No	Has the alleged **perpetrator** ever **threatened** or **tried** to **commit suicide**?	Yes	No
Has the alleged perpetrator avoided being **arrested f**or **domestic violence**?	Yes	No	Has the alleged **perpetrator ever threatened to harm the alleged victim's children**?	Yes	No
Does the alleged victim have a **child** that **is not** the alleged **perpetrator's child**?	Yes	No	Does the alleged victim believe that the alleged **perpetrator** is **capable of killing** her/him?	Yes	No
Has the alleged perpetrator **forced** the alleged **victim** to have **sex** when the victim did not want to?	Yes	No	Does the alleged **perpetrator follow or spy** on the alleged victim, leave threatening notes or messages, destroy personal property or make unwanted calls?	Yes	No
Has the alleged perpetrator ever **tried** to **choke/strangle** the alleged **victim**?	Yes	No	Has the alleged **victim** ever **threatened or tried** to **commit suicide?**	Yes	No

NOTES:

[1] Please note that this checklist of lethality factors is not exhaustive. The listed factors are the ones most commonly present when the risk of serious harm or death exists. The presence of these factors can indicate elevated risk of serious injury or lethality. The absence of these factors is not, however, evidence of the absence of risk of lethality or evidence that any particular judicial action (for example, granting an Order of Protection) should not be taken.

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violence lethality factors after all adjudicative facts had been proven through testimony. "In other words, the court employed its background knowledge of domestic violence risk factors to inform its judgment as to whether the facts of this case indicated that domestic violence may occur again."

It is noteworthy that Judge Jerry Bowles happened to possess an extraordinary amount of background knowledge concerning domestic violence. He is considered a national expert in domestic violence and has served on numerous local and state task forces that address DV issues. His ability to recognize the dangerousness present in the **Pettingill** matter is applauded. The Pettingills could hardly have appeared before a more knowledgeable DV jurist.

What We Learn From *Pettingill*

Nationally, few DV matters have the benefit of being heard by judicial officers with a deep knowledge of domestic violence. In many jurisdictions, family court judicial assignments are not popular due to the stress of crowded self-represented litigant calendars, the high numbers of non-English speakers, and the increased drama of family conflict. Judges may rotate through a Family Court assignment somewhat quickly, not possessing substantial DV knowledge when they arrive and not staying long enough to learn the nuanced aspects of family violence before they are re-assigned to more prestigious judicial assignments. For that reason, judicial training on lethality factors is vital and necessary information for any judge hearing family violence matters.

Training that raises the level of judicial knowledge means more judges would be positioned as Judge Bowles was—able to discern from the facts proven via evidence that these facts, taken together, meant a situation of extreme risk was present. This enables judges to make better, safer orders, consistent with both the laws of their jurisdiction and canons of judicial ethics that dictate competence and neutrality, among other imperatives.[9]

In states like Kentucky, where the civil definition of abuse requires the court to make both backward-looking and forward-looking analyses (*e.g.,* did abuse occur and is it likely to happen in the future) judicial training on lethality factors as well as recognition of risk factors for re-offending would help inform a court's judgment when making the determination of future likelihood of abuse. Further, recognizing dangerousness in any Family Law matter where domestic violence allegations are present creates an important opportunity for court personnel to connect the protected party to services that include safety planning; to order the restrained party to services that would help remediate abuse; and to ensure that once a court has established that abuse has occurred, custody and visitation orders are made through a more protective lens.[10]

Information available to the court in the victim's petition for protection needs to be complete enough for the judge to be able to make informed analyses and findings about whether abuse has occurred, what orders should be issued and what level of danger may be present. The sufficiency of the petition is dependent on the victim's ability to convey her experiences of abuse and her fear. Some victims may not fully appreciate their danger or may be unwilling or unable to convey it onto the legal document the judge reviews. Most petitioners seeking DV orders of protection in the family court setting are self-represented and many have experienced trauma.

If victims do not provide the court enough information to convey their degree of risk (*e.g.,* underreporting key lethality indicators, including sexual abuse, threats of suicide, misuse of alcohol and substances, and threats to harm children) their protection orders could be denied or, if granted, are not sufficient to ensure protection.[11] Use of a validated tool like the Danger Assessment can guide the creation of protection order petitions and ensure that judges have the right amount of information in order to more accurately assess danger.[12]

Lastly, the ability of a judge to ask the right questions and elicit the factors that have been linked to increased risk is necessary. That requires the creation and availability of evidence-based bench tools regarding dangerousness. Bench tools are a best practice where DV is concerned and useful because they keep important information at the judge's fingertips. These tools help ensure judicial consistency, which is an aspect of fairness in the administration of justice. However, bench tools are not evidence, do not predict the future, and are not a substitute for judicial knowledge, experience or discretion in matters such as judging credibility of a witness or assigning weight to certain evidence. Bench tools assist judges to identify risk, tailor any orders that may be made (especially concerning child safety), and refer litigants for appropriate services.

In* Pettingill, *the court employed its background knowledge of domestic violence risk factors to inform its judgment as to whether the facts of this case indicated that domestic violence may occur again.

The Center for Court Innovation surveyed a number of jurisdictions to review domestic violence bench tools. Their *Domestic Violence Benchbooks: A Guide to Court Intervention* stressed the need for judges to perform lethality assessment and the usefulness of shorter bench card tools to assist them in doing so. This 2015 resource included an appendix with several examples of lethality assessment tools from different jurisdictions.[13]

What Should an Evidence-Based Lethality Bench Tool Look Like?

Reviewing lethality assessment bench tools from a variety of sources shows a degree of difference among judicial tools, with some tools including risk factors for re-offense and conflating these with lethality risk factors,

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RISK ASSESSMENT CONTEXT, from page 70

Benefits of Risk Assessment

Risk assessment has significant benefits in the context of domestic violence. These include:

1. Enabling the criminal justice system to identify which offenders deserve higher bail, specific conditions of release, various forms of supervision, and particular sanctions;
2. Formulating appropriate treatment programs for perpetrators;
3. Assisting victims and service providers to develop relevant social services, including safety plans; and
4. Educating legal and social service personnel to obtain a better understanding of the of domestic violence (*e.g.,* the dangerousness of separation).[7]

Development of Instruments

Beginning in the 1990s, scholars became increasingly interested in the development of *instruments* to measure the risk of violence. Formerly, the traditional approach to violence risk assessment was a reliance on clinical judgment. Such assessments were based on "human judgment, judgment that is shaped by education and professional experience."[8] However, such judgments were increasingly disparaged as being too subjective and difficult to replicate. In response, the 1990s witnessed the development of actuarial and structured approaches to risk assessment. In terms of mentally ill offenders, researchers diverted their efforts from improving clinicians' judgment about dangerousness to developing evidence-based tools that would inform that clinician's judgment.[9] Until that time, there were few tools that assessed the risk of future violence.

This growing emphasis on the development of instruments to measure risk was also reflected in the field of domestic violence. The next few decades witnessed efforts to develop theoretical risk assessment instruments regarding intimate partner assault. Beginning in the 1980s, social scientists identified several factors associated with partner violence. As considerable consensus emerged about the most important factors to consider in assessing the likelihood of recidivism among perpetrators, a few path-breaking scholars developed evidence-based tools that identified an offender's potential for both recidivism and lethality. These evidence-based tools differed in terms of their purpose, target setting, target practitioners who administered them, and the sources of available information about risk (criminal record, existence of protection orders, information from the perpetrator and/or victim, etc.).

The 1990s witnessed the development of actuarial and structured approaches to risk assessment.

Danger Assessment

One of the first risk assessment instruments in the field of domestic violence was the Danger Assessment (DA), created by Jacquelyn Campbell, Ph.D., RN, FAAN, who is currently Professor and Anna D. Wolf Chair at Johns Hopkins University School of Nursing. Beginning in 1980, Dr. Campbell conducted advocacy policy work and research in the areas of violence against women and women's health. Today, Dr. Campbell has a long record of scholarship, serving as Principal Investigator on 11 major NIH, NIJ or CDC research grants addressing the subject of violence against women, risk assessment, and women's health.

The DA was initially developed in consultation with victims and professionals for collaborative use by health care personnel and victims of violence. Originally intended as a clinical instrument, the DA helps victims assess the likelihood of being killed to help them plan for their safety and empower them toward decisions of self-care. The DA is the only intimate partner violence (IPV) risk assessment that is intended to predict lethality and that gathers data from only the victim of violence.

Although the DA is not the sole risk assessment instrument in the field of IPV, the DA is the most widely used instrument. It is used by criminal justice professionals, health providers, and social service workers. Moreover, the DA is one of the few evidence-based measures of lethality in the context of IPV. As such, its predictive value rests on the fact that it has been scientifically validated in numerous studies conducted by Dr. Campbell, as well as independent evaluations.[10]

First developed in 1985, the DA was revised in 1988 following various studies by Dr. Campbell on its reliability and validity. In 2005, she again revised the DA to incorporate current research findings. In order to understand femicide risk, Dr. Campbell's research examined cases of IPV homicide and compared them to cases of attempted homicide and abuse. These comparisons allowed Dr. Campbell to determine which perpetrator characteristics and behaviors indicate an increased risk of homicide and create a weighted scoring system that identifies women at various danger levels (variable, increased, severe, and extreme). A multi-city case-control study of over 600 femicide and attempted femicide cases found that the risk factors in the DA are significant predictors of intimate partner homicide.[11] When examining femicides, there is a 90% chance that a randomly selected victim of homicide would have a higher score on the DA than a randomly selected victim of assault.

In response to calls to disseminate the DA to a wider audience, Dr. Campbell created a website where the DA may be downloaded for free. Information on online or in-person training and certification, and on the weighted scoring system, can also be found at the Danger Assessment website (*www.dangerassessment.org*). The DA is available to victims to help them identify their level of danger as well as to professionals who work with domestic violence survivors. Specifically, the DA is used by professionals in the criminal justice, health care, and advocacy fields to improve their responses to victims and perpetrators and for training and certification purposes to enhance the understanding of domestic violence.

The DA helps the victim of violence to recall the severity and frequency of abuse over the past year by the use of a 12-month calendar, which can also

See RISK ASSESSMENT CONTEXT, next page

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and some including factors that may not necessarily have a basis in validated research. Some tools are simple and others are multi-page and more complex.

If a court is to assess dangerousness, as Judge Bowles properly did in the **Pettingill** matter, the *Santa Clara County Bench Guide for Recognizing Dangerousness in Domestic Violence Cases* (see *http://tinyurl.com/BenchguideDangerousness*) is a straightforward one-page form that can be used in any jurisdiction without modification. The Bench Guide is included in this issue of **DVR** on p. 82.

This concise tool is based on Dr. Campbell's validated research; indeed, the order in which the factors occur in the first column correspond to which factors are more strongly associated with lethality. The tool can be used by judges in any department where family violence matters are heard, including Family, Criminal or Dependency. Consistent with the holding of **Pettingill**, this is an informational tool judges may "use as they review a case and become aware of the extent to which the evidence reveals how many lethality factors (danger of homicide) are present." Of course, further training and awareness is needed in order to take the information and craft appropriate orders, but this tool was designed for judges by the researcher herself, and is a preferable solution to the mix and variety currently existing in lethality bench tools today.

End Notes

1. *Pettingill v. Pettingill*, 480 S.W.3d 920 (Ky. Sup. Ct. 2015).
2. Ky. Rev. Stat. Ann. § 403.750.
3. Ky. Rev. Stat. Ann. § 403.720.
4. *Pettingill v. Pettingill*, Case No. 2013-CA-001 347-ME (Ky. Ct. App. 2013).
5. *Id.*
6. Ky. Rev. Stat. Ann. § 201(b)(2).
7. *Pettingill*, 2015 WL 6574654 at *3.
8. Id. (citing lethality factors listed in Janet A. Johnson et al., Death by Intimacy: Risk factors for Domestic Violence, 20 Pace L. Rev. 263, 282, n. 89 (2000)).
9. All states include safety and well-being within the broad standard of the best interests of children. Some go further by incorporating rebuttable presumptions affecting custody once a parent has been found to have perpetrated DV. Some states require judges to explicitly consider the safety of victims and children when granting or denying protection orders (see California Family Code 6340). While not specifying a judicial duty to make safe orders, judicial canons of ethics mandate neutrality, competence and diligence among a judge's many responsibilities. See ABA Model Code of Judicial Conduct Canon 2, Rules 2.3 and 2.5 (2011). Many judicial training resources properly urge judges to make safety their top consideration in DV matters that concern children. See *A Judge's Guide: Making Child-Centered Decisions in Custody Cases*, p. 88 (2d ed. 2008). Available at *http://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/judges_guide.pdf.*
10. See the Center for Court Innovation's excellent resource Domestic Violence Benchbooks: A Guide to Court Intervention, by Elizabeth Ling and Katie Crank, for ways courts can craft more appropriate protection orders. Available at *http://www.courtinnovation.org/sites/default/files/documents/DV_BenchbookFinal.pdf.*
11. See Corey Nichols-Hadeed et al., Assessing Danger – What Judges Need to Know, 50 Fam. Ct. Rev. 150 (2012). The authors suggested that victims often under-report abuse and may under-estimate lethality. They studied the use of Dr. Campbell's Danger Assessment to guide the creation of sufficient petitions for protection.
12. Id.
13. A Guide to Court Intervention, supra note 10, at 18-20. ■

RISK ASSESSMENT CONTEXT, from page 84

serve as a consciousness raising tool. The DA then asks 20 "yes/no" questions about risk factors present in the abusive relationship. The DA is included herein on p. 74. The use of risk assessment is important as victims often underestimate their risk; Dr. Campbell found that fewer than half of the women who were eventually killed by their abusers accurately perceived their risk of death.[12]

From its beginning as a risk assessment tool for use by practitioners, the use of the DA has spread enormously. Revisions of the DA have been created for women in abusive same-sex relationships and for immigrant women (these can be found on the website). The DA has also been modified for use by first responders and is available in several different languages.

Today, the DA is widely used not only by social service providers to enhance their provision of services to victims but also by legal professionals in the civil and criminal law generally. It is used in law enforcement, protection order proceedings, prosecutions, child welfare hearings, custody decision-making, criminal proceedings, batterers' intervention treatment programs, expert witness work, and asylum cases. This special issue of **DVR** and the next issue explore the legacy of Dr. Jacquelyn Campbell, a remarkable leader in domestic violence risk assessment research.

End Notes

1. Matthew T. Huss, *Forensic Psychology: Research, Clinical Practice, and Applications,* p.107 (Wiley, 2009).

2. John Monahan *et al., Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence,* p. 3 (Oxford Univ. Press, 2009).

3. John Monahan, *The Clinical Prediction of Violent Behavior* (U.S. Gov't Printing Office, DHSS, Pub. No. (ADM) 81-921 (1981).

4. Preventive detention refers to the post-arrest, pre-conviction detention of alleged criminals based upon a judicial finding that the criminal is dangerous.

5. Donald G. Dutton & P. Randall Kropp, "A Review of Domestic Violence Risk Instruments," 1(2) Trauma, Violence, and Abuse 171-181 (2000).

6. *Id.*

7. Battered Women Justice Project, Integrating Risk Assessment in a Coordinated Community Response. Available at *http://www.bwjp.org/our-work/topics/risk-assessment.html.*

8. Huss, *supra* note1, at 109.

9. Monahan, *supra* note 2, at 8.

10. Messing, J.T. & Thaler, J. (2013). "The Average Predictive Validity of Intimate Partner Violence Risk Assessments, 28(7) Journal of Interpersonal Violence 1537-1558.

11. Jacquelyn C. Campbell et al., "Risk Factors for Femicide in Abusive Relationships: Results From a Multistate Case Control Study," 93 Am. J. Pub. Health 1089, 1092 (2003).

12. Jacquelyn C. Campbell et al., "The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide," 24 J. Interpersonal Violence 654, 669 (2009).

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with that character or trait. Because much of the information elicited in a lethality assessment would fall under this category, it is highly likely that the information would be deemed inadmissible under Rule 404.

However, Rule 404(b) *does* permit evidence of "crimes, wrongs or other acts" for several other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The information contained in the lethality assessment may, in some cases, fall under one of the listed purposes. If a prosecutor can successfully argue one of these alternative purposes, some or all of the information contained in the assessment may be admitted at trial. It is important to note that other considerations regarding the use of lethality assessments by the prosecution may exist. For instance, in Arizona, in addition to Rule 404, case law also limits a prosecutor's ability to utilize the information in a lethality assessment and serves as a warning to the prosecution to proceed with extreme caution when attempting to admit such evidence.

The case in question is **State v. Ketchner**.[11] Darrell Ketchner's ex-girlfriend, Jennifer, had left him, and he was enraged. Ketchner went to Jennifer's home and violently attacked her and her minor daughter. While Jennifer survived the attack, her daughter died as a result of numerous stab wounds. Ketchner was found guilty of first degree murder and several other charges. He was sentenced to death.

During the trial, a domestic violence expert testified about risk factors for lethality in a domestic violence relationship, including the presence of a gun in the house, stepchildren in the home, prior threats to kill, drug and alcohol use, forced sex, and strangulation. The expert described how when a victim is leaving the abuser, it becomes an extremely dangerous time for the victim. The defense appealed the case based on the testimony of the domestic violence expert.

The appellate court ruled that the admission of evidence regarding the lethality indicators constituted inadmissible "profile evidence." The court explained that the evidence, although useful for different types of hearings, "may not be used as substantive proof of guilt" because it improperly invites the jury to find the defendant guilty based on other abuser's actions and, thus, the "abuser profile." Ketchner's case was remanded for a new trial on the first degree murder charge. In its decision, the court noted several similar results in courts in Wyoming, Arkansas, Georgia, Massachusetts, Maryland, and Washington. Prosecutors must carefully consider whether to use such evidence at trial, and weigh the benefits and risks of using the information contained in the lethality assessment.

Strangulation, Lethality, and Prosecution of Strangulation Cases

Strangulation is one of the most lethal forms of violence an abuser can use on a victim. During strangulation, the abuser literally has the victim's life in his hands—a strangulation victim can be unconscious within seconds and dead within minutes.[12] Research has shown that women who experience strangulation are up to seven times more likely to become victims of homicide[13] and that more than half of female domestic violence victims will experience strangulation at least once in their lifetimes.[14]

The connection between strangulation and lethality has in recent years been gaining attention in the criminal justice system with legislatures taking action to address strangulation in their communities. In Maricopa County, Arizona, for instance, the law specifically addressing strangulation in domestic violence relationships was adopted in 2010.[15] Prior to this, DV strangulation was grouped under the general category of "assaults" and considered a misdemeanor crime. With the 2010 law, strangulation was reclassified as an aggravated assault, was directly identified in the law,[16] and became a felony in Arizona. Many other states have followed suit; currently 37 states have active laws specifically addressing strangulation.[17]

Strangulation cases historically have been difficult cases to prosecute; many times there is no visible injury present and little physical evidence exists to corroborate that the strangulation occurred.[18] Due to the prevalence and deadly nature of strangulation cases, increased attention is warranted when a victim indicates in a lethality assessment that strangulation has occurred during the present offense or in the past. In Maricopa County, prosecutors are directed to give "special attention" to DV strangulation cases.[19]

In order to identify that strangulation has occurred either in the present offense or in the past, special attention must be given by the prosecutor to responses in the lethality assessment. Paying close attention to the words a victim uses in the lethality assessment can provide the prosecutor valuable information regarding the crime. A victim may refer to strangulation as being "choked," placed in a "sleeper hold," being "arm barred" or any number of other terms. Because there are usually little to no injuries after a strangulation, a victim may not think that it is important to go into detail regarding the strangulation and may focus on the abuser's actions that caused injury. Careful review of the lethality assessment with these ideas in mind can help a prosecutor identify whether additional charges for strangulation are appropriate. In turn, actively pursuing strangulation cases will help keep victims safe and alive.

Conclusion

Lethality assessments are a valuable tool in the prosecution of DV cases. The information obtained during the assessment can provide the prosecutor with insight into the relationship and permit a more effective prosecution. However, there are limitations to how the information is used. The questions asked and the level of attention given to obtaining responses to the questions on the lethality assessment varies by police department. Once prosecutors have the information from the lethality assessment, rules of evidence, case law and other legal authority may limit the admissibility of the information.

End Notes

1. The portion of a trial whereby the party with the burden of proof in the case presents its evidence. The term differs from a rebuttal, whereby a party seeks to contradict the

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Using the Danger Assessment as a Domestic Violence Expert Witness

by Nancy K. D. Lemon

I have used the Danger Assessment (DA) tool in almost all of the cases I have worked on as an expert witness since I attend a workshop by Dr. Jacquelyn Campbell in 2001 on how to administer the DA.

My expert witness work proceeds along the following lines. After I spend several hours with the survivor exploring her life story with a focus on abuse, I ask her the 20 questions on the DA. This tool helps me make sure I have not missed any important incidents or forms of abuse (e.g., whether her abuser has a gun, strangled her, or raped her).

Before I complete the weighted scoring, I usually give the survivor feedback regarding the general level of potential danger in her case—low, medium, or high. To avoid creating more fear, I talk about "danger" instead of "lethality" or "death." Then, I think with her about a safety plan, connect her to a domestic violence agency if she is not already connected, and ask her to talk with her attorney about any safety issues. I often tell the survivor about address confidentiality programs. I also talk to the client's attorney about the weighted score on the DA. This can begin a conversation about how to help keep the client safe.

Sometimes it is not clear what date to use in completing the DA. For example, if the survivor is facing homicide charges and has been in custody for months, I will use the date of the homicide to assess how much danger she or he was in from the partner just before the homicide. In family law cases, I usually use the current date because the danger is ongoing.

If I am asked to write a formal report in the case, I may include the results of the DA with a short explanation of the tool, including information about the scientific basis citing Campbell's research.[1] I give an opinion about the level of danger the client is in. This can be relevant to the client's criminal defense (*e.g.,* a claim of self-defense), family law issues (*e.g.,* need for restraining order, sole custody, pickup and drop-off of children at a neutral location), civil suit (*e.g.,* confirming that the abuse was serious), asylum (*e.g.,* supporting my opinion that deporting the client to her home country would result in further violence). I have also testified about the results of the DA as part of the basis for my expert opinion, though to date in my own cases no judge has admitted the completed DA as evidence that the court or jury could consider separately from my opinion.

Overall, I have found the DA very helpful, because it gives an objective assessment of the level of danger the client is in and highlights the factors that are particularly relevant in assessing this danger. This is useful information for the survivor, for the survivor's attorney, and for the decision maker in the court setting (*e.g.,* judge, jury, or commissioner).

Nancy K.D. Lemon, J.D., has worked in the field of domestic violence since 1979 as an attorney, a lecturer at the UC Berkeley School of Law, and an expert witness. Her expert witness work consists of participation in hundreds of cases (including testimony in 70) involving prosecution, defense, asylum, family law, civil suits, and administrative hearings. She is the author of ***Domestic Violence Law*** *(4th ed West Academic Press, 2013).*

End Notes

1. Campbell, J. C. et al. (2003). Risk Factors for Femicide in Abusive Relationships: Results from a Multi-Site Case Control Study. *American Journal of Public Health 9,* 1089-97. ■

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to hide the boyfriend from the police. All five of the children were adjudicated neglected and dependent children, and the baby was also found to be an abused child. The mother appealed the decision.

The Appeal. The Court of Appeals of found that the juvenile court did not err in finding that the children were neglected, given the concerns with the mother's "ability to ensure the safety of the children." In addition to the non-accidental injuries to the baby, there was evidence that the boyfriend had harmed the other children and they had witnessed him harming the baby. The children also witnessed the boyfriend's domestic violence against the mother, including hitting her in the face and damaging her vehicle. Despite the danger the boyfriend's violence presented to the children, the record reflected that the mother "continued to expose them to that danger by continuing to have contact" with the boyfriend. The mother's unsupervised visits with the children were allowed on the premise that the boyfriend no longer lived with her and would not be present. While there were no findings of concern about the conditions of the mother's home when the boyfriend was not present, there was evidence of ongoing domestic violence and "the ability of Mother to protect the children from Boyfriend." Therefore, the court concluded that the juvenile court's decision was supported by the evidence that the children were neglected. The court likewise concluded that the children were dependent and affirmed the judgment. **In re: T.B., J.R., et al.**, 2015 WL 3937950 (Ohio Ct. App. 2015).

Editor's Note: This troubling decision, more than 10 years after ***Nicholson v. Scoppetta,*** *820 N.E.2d 840 (N.Y. Ct. App. 2004), reveals that victims are still losing their children to the child welfare system on the basis of their victim status. Rather than focus on the unrelenting abuse of the boyfriend, or what was needed to keep the boyfriend out of mother's home, unrealistic expectations continue as though the problem was the mother's consent to the abuse.* ■

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other party's evidence. *Black's Law Dictionary.* (Thompson West (8th ed.) 2004).

2. *http://www.maricopacountyattorney.org/pdfs/protocols/Domestic-Violence-Protocol.pdf*, p. 8.

3. *https://www.dangerassessment.org/.*

4. Buzawa & Buzawa, *Domestic Violence: The Criminal Justice Response*, 178-181 (3d ed. Sage Pub. 2003).

5. *http://www.maricopacountyattorney.org/pdfs/protocols/Domestic-Violence-Protocol.pdf*, p. 39.

6. "Evidence based prosecution" describes the process by which a prosecutor utilizes evidence to prove a case without the assistance of the victim or the victim's testimony. *See http://www.aequitasresource.org/Benefits_of_Specialized_Prosecution_Units_in_Domestic_and_Sexual_Violence_Cases_Issue_8.pdf.*

7. Forfeiture by wrongdoing is an exception to a defendant's right to confront witnesses who will testify against him or her. If the accused induces a witness to be unavailable for trial through wrongful acts, the witness's prior testimonial statements are admissible against him. *See http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.*

8. *http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/52leg/1r/summary/h.hb2164_03-25-15_astransmittedtogovernor.doc.htm&Session_ID=114.*

9. The amended bill was signed by Arizona's governor on March 30, 2015.

10. *See http://www.azcentral.com/story/news/local/scottsdale/2015/02/03/domestic-violence-preceded-scottsdale-murder-suicide/22828675/#; http://www.azfamily.com/story/28587038/mom-blames-sons-drug-use-for-attack-on-her-his-subsequent-death; http://www.cbs5az.com/story/28925743/man-killed-after-confronting-domestic-violence-suspect.*

11. *State v. Ketchner*, 339 P.3d 645 (Ariz. 2014).

12. Strack, G., et al. (2011). On the edge of homicide: Strangulation as a prelude, *Criminal Justice 26(3).* 32-33.

13. Glass, Nancy, et. al (2008), Non-fatal strangulation is an important risk factor for homicide of women, *The Journal of Emergency Medicine, 35(3),* 329-335.

14. Wilbur, L. et al. (2001). Survey results of women who have been strangled while in an abusive relationship, *The Journal of Emergency Medicine, 21,* 297-302; Berrios, D.C. et al., (1991) Domestic violence: Risk factors and outcomes, *Western Journal of Medicine, 155*, 133-135.

15. A.R.S. 13-1204B.

16. "The person intentionally or knowingly impedes the normal breathing or circulation of blood of another person by applying pressure to the throat or neck or by obstructing the nose and mouth either manually or through the use of an instrument."

17. 19(6) **DVR** 1 (Aug/Sep 2014) Law Reform Targets the Crime of Strangulation.

18. *Id.*

19. *http://www.maricopacountyattorney.org/pdfs/protocols/Domestic-Violence-Protocol.pdf*, p. 39. ■

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