



# GEORGIA COMMISSION ON FAMILY VIOLENCE

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## A MODEL JUDICIAL PROTOCOL FOR FAMILY VIOLENCE INCIDENTS

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### PRELUDE

The following model judicial protocol for Georgia's Court System is an adaptation of the 1990 Recommendations from the Family Violence Project of the National Council of Juvenile and Family Court Judges. Although subtle changes have been made to conform to Georgia's legal and procedural framework, overall the protocol represents an adoption of the Council's Recommendations in their entirety. Judges are urged to follow these recommendations as their implementation will significantly increase the effectiveness of court intervention in family violence cases.

### INTRODUCTION

Family violence is abuse that occurs between family members or unmarried partners. One person in the relationship gains power and control over the other by using physical, sexual and/or emotional force. Family violence can occur between husbands and wives, ex-spouses, dating partners, adult children and aging or ailing parents, same-gender couples, parents and children or caregivers and clients. The vast majority of victims are women.

### I. DEFINITIONS

A. Family Violence is defined in Official Code of Georgia Annotated § 19-13-1 as one or more of the following acts between past or present spouses, persons who are parents of the same child, parents and children, step-parents and step-children, foster parents and foster children, or other persons living or formerly living in the same household:

- 1) any felony; or
- 2) commission of the offenses of battery, simple battery, simple assault, stalking, criminal damage to property, unlawful restraint or criminal trespass. The term "family violence" shall not be deemed to include reasonable discipline administered by a parent to a child in the form of corporal punishment, restraint, or detention, (Acts 1993 p. 1534, effective April 27, 1993).

B. A protective order, relating to acts of family violence, is described in Official Code of

Georgia Annotated § 19-13-4 as follows:

- 1) The court may, upon the filing of a verified petition, grant any protective order or approve any consent agreement to bring about a cessation of acts of family violence. The orders or agreements may:
    - a) Direct a party to refrain from such acts;
    - b) Grant to a spouse possession of the residence or household of the parties and exclude the other spouse from the residence or household;
    - c) Require a party to provide suitable alternate housing for a spouse and his or her children;
    - d) Award temporary custody of minor children and establish temporary visitation rights;
    - e) Order the eviction of a party from the residence or household and order assistance to the victim in returning to it, or order assistance in retrieving personal property of the victim if the respondent's eviction has not been ordered;
    - f) Order either party to make payments for the support of a minor child as required by law;
    - g) Order either party to make payments for the support of a spouse as required by law;
    - h) Provide for possession of personal property of the parties;
    - i) Order a party to refrain from harassing or interfering with the other;
    - j) Award costs and attorney's fees to either party; and
    - k) Order either or all parties to receive appropriate psychiatric or psychological services as a further measure to prevent the recurrence of family violence.
  - 2) A copy of the order shall be issued by the clerk of the superior court to the sheriff of the county wherein the order was entered and shall be retained by the sheriff as long as that order shall remain in effect.
  - 3) A protective order issued pursuant to this Code section shall apply and shall be effective throughout this state. It shall be the duty of every superior court and every sheriff, every deputy sheriff, and every state, county, or municipal law enforcement officer within this state to enforce and carry out the terms of any valid protective order issued by any court under the provisions of this Code section. Ga.L. 1993, p. 788, S 1.
- C. Penalties are provided for violation of protective orders issued by the Court. According to Official Code of Georgia Annotated § 19-13-6(b), "[a]ny person who violates the provisions of a domestic violence order which excludes, evicts, or excludes and evicts that person from

a residence or household shall be guilty of a misdemeanor."

## **II. COURTS**

### **A. Judges must provide leadership in their courts and in their communities to ensure that family violence cases are effectively managed and that adequate resources are available.**

The court is a unique and vital institution within the American system of government. Judges have a mandate to assert leadership to ensure that their courts respond swiftly and fairly to victims of family violence. Judicial leadership should begin by examining and changing where necessary the practices of the court system itself. However, it should also involve all of the major systems within the community in order to develop a comprehensive, coordinated approach to the complex social, legal, health, safety, and behavior issues associated with family violence.

In their leadership roles, judges should advocate protection of victims and children from violent homes, elimination of gender bias which affects the court's response to these cases, strict accountability and treatment for offenders, and the provision of adequate resources to assist victims and family members.

Judges should encourage statewide, as well as community-level organization for the provision of needed services. They should seek two levels of planning: immediate provision for prevention and intervention programs and resources; and long-term, multi-generational strategies to eliminate family violence from society as a whole.

### **B. All judges must be trained in the dynamics of family violence and how to address it fairly and properly.**

Education courses on family violence should be required for all judges hearing civil or criminal aspects of these cases in order to provide effective intervention and to prevent further injury to victims and other family members in family violence cases. The judiciary must be proactive in insisting that this training be made available on an ongoing basis.

Specifically, the judiciary needs to be trained in the:

- dynamics of family violence;
- battered spouse and child syndromes;
- courtroom treatment of victims, offenders and witnesses;
- impact of personal attitudes, gender bias and courtroom demeanor;
- available sanctions and treatment standards for offenders;
- elements of a good protection order;

- effectiveness of coordinating or consolidating civil, criminal and domestic cases involving members of the same family;
- available shelter and support services for victims; correlation between spouse abuse, child abuse and juvenile delinquency; and
- sentencing procedures and alternatives.

Training will enable judges to understand these complex issues, become more sensitive to the barriers facing victims, and eliminate any gender bias which contributes to the judicial system's failure to afford the protection of the law to the victims of family violence.

### **III. CRIMINAL**

#### **A. Arrests may be made with and without warrants in cases involving acts of family violence.**

An arrest for a crime may be made by a law enforcement officer either with or without a warrant if the officer has probable cause to believe that an act of family violence has been committed.<sup>1</sup> The specific consent of the victim or a request by the victim to drop charges shall have no bearing on the issue of probable cause.<sup>2</sup> Persons who are arrested without a warrant for acts of family violence pursuant to Code Section 17-4-20, shall not be eligible for bail prior to the arresting officer or other law enforcement officer taking the arrested person before a judicial officer pursuant to Code Section 17-4-21.<sup>3</sup>

#### **B. At the preliminary hearing or other first appearance proceedings, the judicial officer should ensure that protective orders are made, maximizing protection of the victim including but not limited to:**

- 1) **Setting bail appropriate to the totality of the underlying offense;**
- 2) **Releasing the alleged offender conditioned upon having no contact with the victim;**
- 3) **Imposing other special conditions of release which protect and maintain victims and family members;**
- 4) **Ensuring diligent effort to notify the victim;**

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<sup>1</sup>See O.C.G.A. § 17-4-20(a) (Supp. 1994).

<sup>2</sup>O.C.G.A. § 17-4-20.1(a) (Supp. 1994).

<sup>3</sup>See O.C.G.A. § 17-6-1(b)(2)(B) (Supp. 1994).

## 5) Ensuring appropriate steps or action when a violation occurs.

Safety of the victim and other family members should be one of the court's utmost concerns. Prior to a defendant's release, the judicial officer should consider the nature of the offense, the victim's injuries, prior criminal history, and children as victims or witnesses. If at the initial hearing of a felony case the judge believes a victim or other family member to be in danger, bail should be denied.<sup>4</sup> Similarly, in felony cases bail may also be denied if the judge determines that the defendant poses a significant risk of flight, threat or danger to persons or property in the community, risk of committing another felony, or a risk of intimidating witnesses or otherwise obstructing justice.<sup>5</sup> Although a defendant charged only with a misdemeanor cannot be refused bail,<sup>6</sup> in all cases involving an act of family violence, the schedule of bail provided by Code Section 17-6-1, shall require increased bail.<sup>7</sup> In all family violence cases involving serious injury to the victim, a defendant should not be deemed bailable until the judge or arresting officer is of the opinion that the danger of further violence or harassment or intimidation of the victim will be effectively prevented by the imposition of the special and additional conditions of release provided by Code Section 17-6-1(f)(2)(3).<sup>8</sup> The term "serious injury" means bodily harm capable of being perceived by a person other than the victim.<sup>9</sup>

Given the likelihood that threats or additional violence will occur, if the defendant is released on bail or on his or her own recognizance, the judge should impose special conditions of release. Specifically, these should include no-contact orders, confiscation of all weapons, allowing the victim to remain in the family home if the residence was shared, and adequate financial support for victim and other family members. The victim must be contacted prior to the defendant's release. Conditions of bail must be monitored, and violations brought to the immediate attention of the court. Defendants should be warned that violations of the conditions may constitute a felony and will result in revocation of release. Mechanisms for monitoring and enforcing the conditions may be a function of pre-trial services or pre-trial probation.

### C. At arraignment, prior to and during trial, judges should:

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<sup>4</sup>See O.C.G.A. § 17-6-1(e) (Supp. 1994).

<sup>5</sup>Id.

<sup>6</sup>See O.C.G.A. § 17-6-1(b)(1) (Supp. 1994); see also Ga. Const., Art. I, § 1, & 17 (1983); Ried v. Perkerson, 207 Ga. 27, 60 S.E.2d 151 (1950) (holding that a defendant in all cases less than capital felonies is entitled to bail, as a matter of right, at least twice).

<sup>7</sup>O.C.G.A. § 17-6-1(f)(2) (Supp. 1994).

<sup>8</sup>O.C.G.A. § 17-6-1(f)(3) (Supp. 1994).

<sup>9</sup>See id. (providing examples of serious injuries).

- 1) Expedite and prioritize family violence cases;**
- 2) Establish and utilize Victim Witness Assistance Coordinators whenever possible, to help mitigate and counteract victim/defendant contact and intimidation;**
- 3) Assure victim safety to and from court during the trial phase of family violence cases by increasing inside and outside courthouse security.**

Judges must be sensitive to the specialized characteristics of family violence cases. This awareness should affect the setting and the conduct of the trial. Whenever possible, priority should be given to setting family violence cases for trial to expedite resolution of the case. Security in the courtroom and the safety of the victim attending court during the trial should be assured. Whenever possible, victim/witness coordinators should mitigate and counteract any intimidation or deleterious contact between the victim and the defendant.

During the course of the trial, if the spousal immunity privilege is invoked by the victim, judges should be sensitive to the factors that may have led to the invocation of this privilege. This can include fear of further violence; pressure from other family members to curtail further embarrassment to the family; and the victim being influenced during the honeymoon phase of the cycle of family violence to reconcile with the batterer while believing assurances that the violence will never happen again.

**D. Judges should not accept civil settlements, deferred prosecutions, reduced charges or dismissals where justice is not served by these devices.**

Alternative dispositions and diversion in family violence cases are usually inappropriate, and send a message to both the victim and the offender that the crime is less serious than comparable crimes against non-family members. When these alternatives are proposed, judges should ascertain that they are in the interest of justice and not simply devices for docket management or unsuitable use of diversion. When a victim withdraws the complaint or is reluctant to testify, the judge should inquire about coercion and intimidation. In cases where the victim refuses to testify, it is often possible to prove the case with other evidence. Sometimes the judge should deny motions for dismissal and schedule the case for trial.

The availability of civil redress should have no impact on the criminal disposition of a family violence case. That is, civil battery and other personal injury actions are intended to provide economic compensation for tortious conduct. These actions, however, do not hold the defendant accountable for their criminal acts and do not acknowledge the criminal nature of family violence. As such, to ensure criminal accountability and acknowledgement, judges should not consider civil redress during the sentencing or dispositional phases of family violence cases.

**E. At the time of sentencing or disposition the judge should have the following information available:**

- 1) The facts of the case;**

- 2) **The offenders' criminal history;**
- 3) **Victim impact and input;**
- 4) **History of abusive behavior;**
- 5) **Evidence of stalking;**
- 6) **Drug, alcohol and mental health evaluations where appropriate;**
- 7) **History of prior court contacts with the family;**
- 8) **Information about children and others living in the home who may be affected by the abuse.**

The primary goals of family violence sentencing are to stop the violence, protect the victim and family members and hold the offender accountable. An effective disposition calls for a substantial amount of information and a pre-sentence report may be necessary whether the offense is a felony, misdemeanor or restraining order violation. Specifically, the judge should insist on:

**a) information on the offenders' criminal history.**

Though there is frequently a history of past arrests, criminal records will often reflect a small percentage of the true violence occurring.

**b) impact of the violence on the victim and the victim's desires as to the disposition.**

It is important to know the extent of physical and emotional damage to the victim, and to allow victims to submit opinion statements and statements to dispute facts in the record or the pre-sentence report.

**c) history of abusive behavior.**

This information is important because it may not be reflected in the criminal record. Judges should particularly look for an escalation of the violence and multiple victims.

**d) drug, alcohol, and mental health evaluation.**

The coincidence of substance abuse problems with family violence is extremely high. Alcohol and/or drug treatment will not solve the problem, but may be a necessary prerequisite to treatment for the violence. A small but critical percentage of cases are extremely violent, seriously mentally disturbed individuals from whom society needs to be protected.

**e) history of prior court contacts by the family.**

Many of these families are seriously dysfunctional and have had a variety of interaction with the court. Some will have current cases pending. The judge should know about all other court contacts and the existence of any other court orders.

**f) information about children and others living in the home.**

Children who are bystanders to the violence are seriously victimized. The judge must take care to fashion a disposition which will protect all the family or household members.

**F. Every sentence in a family violence case should hold the offender accountable, and:**

- 1) In appropriate cases order offender involvement in activities such as domestic violence intervention programs which are specifically designed to reduce future violence;**
- 2) Require an alcohol and drug evaluation where appropriate, mandate successful completion of treatment, and provide for mandatory chemical testing;**
- 3) Provide for formal supervision and monitoring of compliance.**

Key to this recommendation is the principle that all three of the items must be a part of every sentence or court order. Offender accountability may be accomplished in a variety of ways. Restitution, supervised probation or jail time are some common examples. Treatment programs should be designed specifically to deal with battering and violent behavior. Individual or couples counseling does not address these issues or remediate the problems of violence, power and control. Alcohol and drug evaluations are also usually appropriate. While treatment for the alcohol and drug problems will not solve the violence problem, it is often a necessary prerequisite. Urine testing for alcohol and drug abuse as a condition of probation is absolutely necessary to monitor compliance. Provision should be made for formal supervision and monitoring of the offender's behavior. Non-reporting probation is not appropriate unless there is a mechanism for monitoring whether probation should be revoked for noncompliance. In addition to offender accountability, formal supervision provides a measure of protection for the victim who will have an officer of the court to turn to in the event of subsequent threats or assaults.

Enhanced sentences may be called for in a number of circumstances such as the presence of children; use of a dangerous weapon; elderly, pregnant, youthful or handicapped victim; sexual assault; serious injuries requiring hospitalization; and threats of death or serious bodily injury; or repeated offenses.

**G. All repeat violations of family violence should result in substantial additional sanctions or penalties for the offender.**

Offenders will violate court orders and diversion agreements with impunity if they believe nothing will happen to them. Law enforcement officers, district attorneys and probation officers are strongly encouraged to arrest and return to court any family violence offender who violates either a civil or criminal court order. The message must be very clear that repeat violence will not be tolerated. Judges can do their part in this scheme by taking the cases seriously, and by always ordering some sort of additional penalty for those found guilty of the violation. Additional sanctions might include fines, a greater jail sentence,



community service work, additional time on probation, and restitution to the victim.

Courts should develop means of monitoring compliance and identifying violations of both civil and criminal orders. Judges may wish to set cases for periodic review whether or not a violation has been reported. Ultimately, accountability requires that each infraction be noted in the record and responded to appropriately by the judge.

#### **IV. Civil**

**A. Civil restraining orders and protective orders provided by Code Section 19-13-4, must be available to all, and issued ex parte upon proper request when family violence has occurred or is threatened. Protective orders provided by Code Section 19-13-4, should be clear and specific and should address:**

- 1) The safety of victims at home, school, work and other places where the victim is subject to harassment or potential violence;**
- 2) Child custody and visitation;**
- 3) Telephone threats or harassment;**
- 4) Removal of the perpetrator from the home;**
- 5) Financial support and maintenance for the victim and family members;**
- 6) Weapons in the home or in the possession of the offender;**
- 7) Physical description of the offender;**
- 8) Expiration date;**
- 9) Method of modification;**
- 10) Provision for service upon offender together with notice and an opportunity for a speedy hearing.**

Protective orders have emerged during the past decade as an accessible and effective justice system response to family violence. Protective orders under Code Section 19-13-4, are available to past and present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household.<sup>10</sup>

At times when the court is closed, some provision should be made for issuing emergency

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<sup>10</sup>Cf. O.C.G.A. § 19-13-1 (Supp. 1994).

protection orders. To be effective, orders must be comprehensive. Judges should provide all of the relief that the victim needs given the particular circumstances of the case.

Judges may be uncomfortable issuing *ex parte* orders which evict the offender from the family home, require the payment of spousal or child support, or award custody of the children to the petitioner. Without such provisions, however, the victim cannot be protected. Economic dependence is frequently the reason the victim returns to the offender. Such *ex parte* relief is strongly supported by both case law and statute. Property, custody, and due process rights of persons who have jeopardized the physical safety of others should yield until an expedited hearing. When the court is petitioned pursuant to Code Section 19-13-4, to grant a temporary protective order to prevent family violence, defendants must be provided notice and opportunity for a full hearing as soon as possible, but no later than 30 days. At the time of its expiration, the court in its discretion may convert any temporary protective order granted under Code Section 19-13-4, into a permanent order upon the motion of a petitioner, notice to the respondent, and a hearing by the court.<sup>11</sup>

Comprehensive provisions of restraining orders are only as good as their enforcement. To improve enforcement, courts should develop, publicize, and monitor a clear, formal policy regarding violations. This might include follow-up hearings, promoting the arrest of violators, incremental sanctions for violations, treating violations as criminal charges, and establishment of procedures for modification of orders.

**B. Georgia's temporary protective orders allow for the removal of the offender from the home and allow the victim and children to remain with appropriate protection, safety plans, and support.**

In most cases, the just course of action is to remove the perpetrator from the home, leaving the victims with at least the security of a familiar roof over their heads. This practice is recommended even if the home or its occupancy legally belongs to the perpetrator. Such an order gives a clear message to the offender that such behavior will not be tolerated regardless of who holds legal title, and that the state intends to protect victims from further abuse.

Many victims reunite with the perpetrator of family violence because of economic pressures. Providing for adequate financial support for the children and the victim will facilitate self-sufficiency and help to end the "cycle of violence." Judges should ensure that necessary financial support is provided, and that adequate safety plans are in place for both the victimized spouse and the children.

**C. Judges should not routinely or summarily issue mutual protection or restraining orders.**

Issuance of mutual restraining orders raises issues of due process, enforcement, and

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<sup>11</sup>O.C.G.A. § 19-13-4(c) (Supp. 1994).

gender bias; this practice has emerged as a major problem.

Frequently mutual orders of protection are issued even when the respondent has filed no cross petition nor alleged any violence by the petitioner. Thus, both parties are labeled as abusers and are treated as equally blameworthy. The message to the batterer is that such behavior is excusable, was perhaps provoked, and he or she will not be held accountable for the violence. Victims who have not engaged in violent behavior are confused, humiliated, and stigmatized when such orders are issued against them.

Mutual restraining orders may create due process problems as they are issued without prior notice, written application, or finding of good cause. The petitioner of the original request for restraining order now finds himself or herself a subject of the order of protection, having had no opportunity to prepare a response or consult with an attorney.

Mutual restraining orders create significant problems of enforcement which render them ineffective in preventing further abuse. They are confusing to law enforcement and unenforceable. When an order is violated, police have no way of determining who needs to be arrested. Often, they will arrest both parties further victimizing the real victim.

If both parties are alleged offenders, there should be two separate applications, hearings, findings of good cause, and separate orders issued.

**D. Civil restraining orders and protective orders should be monitored and enforced fully.**

Civil restraining orders and protective orders only have meaning and provide protection if they are enforced. Because certain batterers will not be deterred by an order requiring them to cease and desist violent or threatening behavior, judges must be prepared to give validity to their orders and protection to victims by enforcing orders of protection. Methods of enforcement may include: scheduling mandatory compliance hearings which require the batterers to show compliance with the restraining or protective orders; requiring batterers attend violence counseling and substance abuse therapy or to preform community service; and incarcerating violators.

**E. When the issue of family violence is found to exist in the context of a dissolution of marriage, domestic relations case of any kind, or in a juvenile court case:**

- 1) The violent conduct should be weighed and considered in making custody and visitation orders;**
- 2) Judges should be aware that there may be an unequal balance of power of bargaining capability between the parties which calls for a more careful review of the custody and financial agreement before they are approved by the court;**
- 3) Judges should not presume that joint custody is in the best interest of the children.**

Family violence is a significant factor which must be considered when deciding custody

and visitation matters. Without treatment, the propensity for continued violence remains after the divorce or separation and frequently recurs during unsupervised visitation or joint custody. Court orders which force victims to share custody with their abusers place both victims and children in danger. Further, there is near unanimity that violence in the home has a powerful negative effect on children. Continued aggression and violence between divorced spouses with joint custody has the most adverse consequences for children of any custody option. The long-term effect is intergenerational transmission of abuse, with such children becoming either victims of abuse or abusers as adults. In the shorter term, emotional and physical problems will frequently lead to poor school performance, running away and juvenile delinquency.

Supervised visitation programs, which can ensure the safety of victims of spousal abuse and their children, should be available to all persons, regardless of their income. Such programs should include facilities for visitation. If, after a thorough investigation and evaluation, the court does order joint custody or unsupervised visitation, then there is an obligation to ensure safety of the victim and the children.

Determination of custody and visitation of children are ways in which batterers frequently continue harassment and other abuse. Because of the batterer's control over the victim, the battered spouse may agree to custody provisions which are not really desirable for the victim or the children. Alternatively, the battered spouse may trade financial support or equitable distribution of assets for more protective custody or visitation. Judges should be sensitive to these dynamics and carefully review custody agreements when there is evidence of family violence.

**F. Where a custodial parent removes a child from the jurisdiction of the court judges should:**

- 1) Issue a warrant for the fleeing parent;**
- 2) Inquire as to whether family violence had any impact on the flight;**
- 3) Not change underlying child custody orders until such inquiry is complete;**
- 4) Put into place orders to protect the children until final resolution.**

One of the unfortunate results of inappropriate or uninformed custody decisions in violent families is that victims, in seeking safety for themselves and their children, refuse to allow visitation in apparent contravention of court orders. This can lead to a contempt charge with an *ex parte* award of custody to the violent parent. An instance of flight to avoid abuse should not be considered grounds for modification of custody. Particularly, when the spouse who has failed to comply with the court's custody or visitation order is not available to explain, judges should be very reluctant to alter custody orders in favor of the spouse who may be or is a known batterer.

**G. Judges should not mandate or encourage mediation in cases where family violence has occurred.**

Because assault of any kind is a serious crime and needs to be treated as such by the courts, mediation of family violence is simply not an appropriate response. Mediation is a process by which the parties voluntarily reach consensual agreement about the issue at hand. Violence, however, is not a subject for compromise. Thus, when the issue before the court is a request for an order of protection or a criminal family violence charge, mediation should not be mandated.

The victim receives no protection from the court with a mediated "agreement not to batter." And a process which involves both parties mediating the issue of violence implies, and allows the batterer to believe, that the victim is somehow at fault.

A more frequently occurring problem is the use of mediation for divorce-related issues in a family where one spouse has been the victim of violence from the other spouse. The pattern of power, control and dominance by the abusive spouse which emerges over time in such relationships, leaves the victim in a position of fear, dependence and weakness. Even if the mediator is aware of the situation, it may be impossible to overcome the power imbalance between the two such that any agreement reached will not truly have been voluntary.

Victims should be clearly informed of alternatives to mediation, and mediation should never be required when there has been family violence. Family court mediators should be trained to screen for violence and act to ensure victim's safety when it is discovered. Mediated agreements presented to the court for couples who have current or recent violence should be questioned, and questionable agreements should be reviewed by counsel.

