

I. What is the role of a guardian ad litem in family law cases involving family violence?

- A. If appointed, the guardian ad litem **shall consider**, but not be bound by:
 - 1. The wishes of the minor child. § 767.407(4).
 - 2. The positions of others as to the best interest of the minor child. §767.407(4).
 - 3. Custody studies under § 767.405(12). § 767.407(4).
- B. The guardian ad litem **shall consider** the best interest of the child factors under s. 767.41 (5) (am). When the court finds a parent has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the safety and well-being of the child and the safety of the parent who was the victim of the battery or abuse **shall be** the paramount concerns in determining legal custody and periods of physical placement.
- C. If appointed, and unless the child otherwise requests, the guardian ad litem **shall communicate** to the court the wishes of the child as to the child's legal custody and physical placement so that the court **may consider** the wishes of the child as a factor in determining custody and placement under § 767.41(5)(am)2. § 767.407(4).
- D. The guardian ad litem **shall review and comment** to the court on any mediation agreement and stipulation made under § 767.405(2), and the guardian ad litem shall review and comment to the court on any parenting plan filed under § 767.41(1m).
- E. The guardian ad litem also shall investigate whether there is evidence that either parent has engaged in interspousal battery, or domestic abuse, and shall report to the court on the results of the investigation. § 767.407(4).

II. Practice Guidelines for WI Guardians Ad Litem: Decision-making in Domestic Abuse Cases Related to Custody, Placement and Safety Issues

An important resource for guardians ad litem in these cases is entitled **Guidelines for WI Guardians Ad Litem: Decision-making in Domestic Abuse Cases Related to Custody, Placement and Safety Issues**. The Guidelines include an overview of a four-part framework developed by the Battered Women's Justice Project [BWJP], in consultation with National Council of Juvenile and Family Court Judges [NCJFCJ] and representatives from the Association of Family and Conciliation Courts, with support from the U.S. Department of Justice Office of Violence Against Women. The material and practice guides were informed by researchers, scholars, expert practitioners, and battered and battering parents across the country. The

BWJP framework is at: <http://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf>

The framework is the result of a national study which **conducted a safety audit** at the request of judicial officers in Henry County, Ohio. The national 5-year project **reviewed all literature** on child custody, domestic abuse and parenting, conducted extensive **focus groups/interviews**, and **reviewed all evaluator reports** including those done by guardians ad litem. Conclusion: a disconnect exists between what is learned about abuse and recommendations made to court.

Their five years of comprehensive research found:

- **Domestic violence is often not detected in disputed child custody cases.¹**
- **Screening for physical violence alone is insufficient to detect coercive controlling abuse.²**
- **Practitioners who do not use systematic screening methods tend to under-detect IPV [intimate partner violence] between custody-disputing parents.³**
- **Even when IPV is detected, cases often proceed without accommodations for safety or power differentials.⁴**
- **Evaluators' beliefs are more closely associated with their parenting recommendations than the actual nature, context and severity of abuse they observe.⁵**

¹ Johnston, J. R., Lee, S., Olesen, N. W., Walters, M. G. (2005) "Allegations and Substantiations of Abuse in Custody-Disputing Families." *Family Court Review*, 43, 283–294. See also: Johnson, N. E., Saccuzzo, D. P., & Koen, W. J. (2005). "Child custody mediation in cases of domestic violence: Empirical evidence of a failure to protect Violence Against Women, 11 (8), 1022-1053. See also: Ballard, Holtzworth-Munroe, Applegate & Beck (2011). "Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening.

² Beck & Raghavan (2010). "INTIMATE PARTNER ABUSE SCREENING IN CUSTODY MEDIATION: THE IMPORTANCE OF ASSESSING COERCIVE CONTROL." *Family Court Review*.

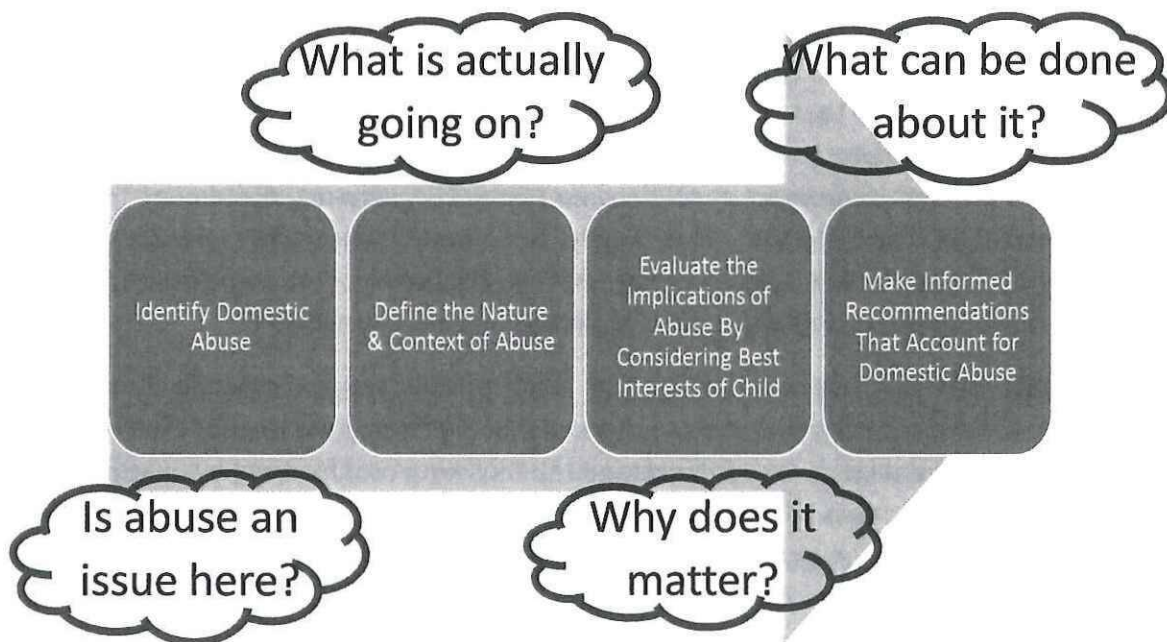
³ Holtzworth-Munroe, Beck & Applegate (2010) "THE MEDIATOR'S ASSESSMENT OF SAFETY ISSUES AND CONCERNS (MASIC): A SCREENING INTERVIEW FOR INTIMATE PARTNER VIOLENCE AND ABUSE AVAILABLE IN THE PUBLIC DOMAIN." *Family Court Review*. Ballard, Holtzworth-Munroe, Applegate & Beck (2011). "Detecting Intimate Partner Violence in Family and Divorce Mediation: A Randomized Trial of Intimate Partner Violence Screening.

⁴ See Kernic, Monary-Ernsdorff, Koepsell, & Holt (2005) "Children in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence." *Violence Against Women*, Sage Journals. See also Bow (2006) *Journal of Child Custody: Review of Empirical Research on Child Custody Practice*.

- Mothers' *demeanor* is more closely associated with evaluators' recommendations than the severity (mild v. severe), type (conflict v. coercive control), or documentation of violence.⁶
- Evaluators' *knowledge* about domestic violence (awareness of risk factors and application of a power and control model) is more predictive of their parenting recommendations than: (1) the severity of abuse, or (2) the thoroughness of their investigations.⁷

The national workgroup concluded that evaluators will all benefit from a uniform approach to these cases. As a result, the workgroup created a four-part framework to allow systematic, consistent and adequate reporting of domestic abuse by guardians ad litem in family law cases.

II. Overview of Four Part Framework for Guardians ad Litem



III. Step One: Identifying Domestic Abuse

⁵ Daniel G. Saunders, et al., Custody Evaluators' Beliefs About Domestic Abuse in Relation to Custody Outcomes, National Institute of Justice (2011) <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf>

⁶ Jennifer Hardesty, et al., (2011) "The Effect of Domestic Violence Allegations on Custody Evaluators' Recommendations." University of Illinois at Urbana Champaign.

⁷ Michael S. Davis, et al., (2011) "Custody Evaluations When There are Allegations of Domestic Violence." <http://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf>

The first step of the framework is to identify domestic abuse. The WI Practice Guidelines contain these definitions of both domestic abuse and child abuse to apply the law to the facts:

- Domestic Abuse, as defined in the family law code
- Interspousal Battery, as defined in the criminal code
- Abuse of a Child, as defined in criminal code and included in both civil and criminal laws
- Primary Physical Aggressor as referred to in family law referring back to criminal law
- Predominant Aggressor as updated in criminal law to refer to previous term
- Domestic Abuse, as defined in the criminal law code

One complication is that the term “domestic abuse” in the criminal context is slightly different than the definition of domestic abuse referenced throughout the family law code. Because an abusive parent might be involved in the criminal justice system for domestic abuse, a guardian ad litem should also be familiar with the definition of domestic abuse in the criminal code.

In *all family cases*, guardians ad litem must identify whether domestic abuse is present.

Domestic abuse is a crucial area of inquiry in addressing custody and physical placement even if it is not yet known whether there is a dispute between the parents. ***Recommending ongoing contact between children and a violent ex-spouse may create increased opportunities for domestic abuse through exchanges of children and periods of physical placement.***⁸ In extreme cases, domestic abuse may be lethal. The lethality of domestic abuse often increases when the abuser believes that the victim is leaving or has left the relationship.⁹ In some cases, children themselves may become victims or be involved as witnesses to homicide.¹⁰

Step One starts with the use of a screening tool. It is important for guardians ad litem to know what they are looking for and why – and to use tools that are designed to get at the needed information. The national study group developed the following tool for use by guardians ad litem to detect domestic abuse. In **all family law cases**, GALs are to start by using this initial screening tool: <http://www.bwjp.org/assets/documents/pdfs/practice-guides-for-family-court-decision-making-ind.pdf>, Pages 7-10. IF, after initial screening, the GAL determines there are several “red flags” which might indicate that domestic abuse is occurring in this home, the GAL moves on to a series of questions to continue the identification of abuse.

⁸ M. Sheeran & S. Hampton, Supervised visitation in cases of domestic violence, *Juvenile and Family Court Journal* 50, 13-25 (1999).

⁹ N. Websdale, Reviewing Domestic Violence Deaths, *National Institute of Justice Journal*, 250, 26-31 (2003); J. Campbell, D. Webster, J. Koziol-McLain, C.R. Block, D. Campbell, M.A. Curry, et al, Assessing Risk Factors for Intimate Partner Homicide, *National Institute of Justice Journal*, 250, 14-19 (2003) and Campbell, J. et al (2003) *Risk factors for femicide in abusive relationships: Results from a multi-site, case-control study*. American Journal of Public Health, 93(7), 1089-1097.

Campbell, J et al. (2003) Risk factors for femicide in abusive relationships: Results from a multi-site, case-control study. American Journal of Public Health, 93 (7), 1089-1097.

¹⁰ K. Starr & J. Fawcett, *If I Had One More Day... Findings and Recommendations from Washington State Domestic Violence Fatality Review*, 30-31 (2006)).

The WI Practice Guidelines contain suggested questions, methods of investigation, interview tips and resources to corroborate whether domestic abuse exists. It contains an explanation as to what is **not** domestic abuse. It also contains a critical segment entitled Distinguishing between domestic abuse, high conflict, and normal conflict of separating couples.

IV. Step Two - Defining the Nature and Context of Abuse

While identifying domestic abuse is an important first step, guardians ad litem need to know more specifically what is actually going on – what is the nature and context of the abuse?

Guardians ad litem need to know who is doing what to whom, why, and to what effect?

To understand the nature and context of the abuse, a guardian ad litem must explore:

- ***Abuse of the victim***, including interference with the victim's access to resources, decision-making authority, and freedom from unwanted intrusion.
- ***The child(ren)'s experience of the violence***, including direct harm from the abuse, direct observation of the abuse, intervention of abuse, and the impact/effects of witnessing/experiencing the abuse.
- ***The ability of the abusive parent to appropriately parent***, including the ability to provide emotional support to the child(ren), protect the child(ren) from emotional or physical harm, respond to the child(ren)'s needs, and support the child(ren)'s relationship with and support the parental authority of the non-abusive parent.

Step Two of the WI GAL Guidebook examines each of the above issues. It starts with an examination of the common forms of domestic abuse such as physical, sexual and financial. Any of these forms of abuse can trigger Wis. Stat. § 767.41(2)(d)1. which directs that if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.

In addition, Step Two explores ***coercive control as a form of domestic abuse***, a series of controlling and coercive tactics used by an abuser. The result is a person who is not able to make his or her own decisions. The WI Practice Guidelines give specific examples as to how ***coercive control impacts parenting by both the abusive and protective parent***.

Evidence of coercive control can trigger an important custody presumption: that the parties will not be able to cooperate in future decision making. When this presumption is combined with a request for sole custody and a finding that sole custody is in the child's best interests, it forms the basis for awarding a party sole custody under Wis. Stat. § 767.41(2)(b).

Step Two also examines the **coercive control tactics abusers use to attempt to have the guardian ad litem control the victim**. If a GAL is not aware that an abuser is often skillful at drawing others into collusion with his or her behavior, the GAL may not recognize that he or she is being used to exert more control over the victim and the proceedings.

Next, Step Two contains lengthy information as to how children are impacted by witnessing and/or experiencing domestic abuse in the home. Finally, Step Two of the WI GAL Guidelines provides guardians ad litem with multiple resources to help to determine a parent's ability to parent or co-parent. Research notes that:

- Batterers tend to view the world only from their perspective and do not consider the needs of the other parent and children equal.
- Batterers tend to use same tactics against children as against other parent

Step Two contains many pages of information to assist the GAL to **assess the impact of domestic abuse on children**. Because a GAL is making recommendations as to what is in the best interests of the children, this information is crucial to gather and present to the court to support whether each parent is able to engage in co-parenting.

Step Two also discusses at length **parenting in the context of abuse**. It examines both the risks to children when being raised by an abusive parent and the inability of a protective parent to engage in his or her best parenting when being subjected to abuse. **Perhaps the single most important issue a GAL can present to the court is why a parent is or is not able to appropriately co-parent**. Step Two provides extensive information to GALs on this issue.

V. Step Three: Evaluating the Implications of The Abuse by Assessing the Best Interests of the Child

After an identification that domestic abuse is present and a full comprehension of the nature and context of the abuse, the guardian ad litem must evaluate the implications of the abuse.

A. The Practice Guidelines remind GALs of the four overriding statutory principles that guide direct custody and placement decision making.

1. If the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under Wis. Stats. § 940.19 or 940.20(1m), or domestic abuse, as defined in Wis. Stat. § 813.12(1)(am), there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.¹¹

¹¹ Wis. Stat. § 767.41(2)(d)1.

2. Wis. Stat. § 767.41(5)(bm) directs that if the court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incidence of interspousal battery or domestic abuse, “the safety and well-being of the child and the safety of the parent who was the victim of the battery shall be the paramount concerns in determining legal custody and periods of physical placement.”
 3. The GAL must also consider whether the **parties cannot cooperate in future decision-making**. Evidence of domestic abuse can also create the ***presumption that the parties will not be able to cooperate in future decision making***. When this presumption is combined with a request for sole custody and a finding that sole custody is in the child’s best interests, a court can award a party sole custody under Wis. Stat. § 767.41(2)(b), such as in coercive control cases.
 4. The GAL must also consider whether there is evidence of child abuse which can also create the ***presumption that the parties will not be able to cooperate in future decision making***. When this presumption is combined with a request for sole custody and a finding that sole custody is in the child’s best interests, a court can award a party sole custody under Wis. Stat. § 767.41(2)(b).
- B. Once the correct statutory framework for custody and placement decision making has been identified, guardians ad litem consider all facts relevant to the best interest of the child.**

In Step Three, guardians ad litem are to connect the implications of domestic abuse by examination of all the best interest factors enumerated in Wis. Stat. § 767.41(5)(am).

This analysis begins with the impact of domestic abuse on children. The presence of domestic abuse is also an indicator for the co-existence of child maltreatment. Researchers estimate that the overlap between domestic abuse and child physical or sexual abuse ranges from 30 to 60 percent.¹² Furthermore, the more severe and fatal cases of child abuse overlap with domestic abuse.¹³ Research indicates there are long-term health effects from experiences of domestic abuse during childhood.¹⁴ Child exposure to domestic abuse is considered an Adverse

¹² J. Edleson, The overlap between child maltreatment and woman battering. *Violence Against Women*, 5(2), 134- 154 (1999); L.M. Williams, Understanding child abuse and violence against women. *Journal of Interpersonal Violence*, 18(4), 441-451 (2003).

¹³ S. Schechter and J. Edleson, *In The Best Interests of Women and Children: A Call For Collaboration Between Child Welfare and Domestic Violence Constituencies* (briefing paper prepared for the Conference Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, 1994, available through the National Council of Family and Juvenile Court Judges, Reno, NV).

¹⁴ A. L. Coker, P. H. Smith, L. Bethea, M. King, R. E. McKeiwn, “Physical Health Consequences of Physical and Psychological Intimate Partner Violence,” *Archives of Family Medicine* 9, no. 5 (2000): 451-57.

Childhood Experience (ACE) and has been linked to numerous negative physical and mental health outcomes in adulthood.¹⁵

Because domestic abuse impacts the well-being of children, it is crucial that guardians ad litem have an accurate picture of the abuse perpetrated by one parent against the other parent or against a child, and to consider its implications for the best interests of the child after the parents separate. ***It is also important to understand that the impact of domestic abuse on children is often mitigated by certain protective factors, such as a supportive relationship with the non-abusive parent.***¹⁶

Next, a guardian ad litem must consider the impact of domestic abuse on parenting abilities by both parents. Most domestic abusers have not had ongoing “anger” or “out of control” problems outside of their intimate partner relationships.¹⁷ Both adult and adolescent abusers bring certain expectations of who is to be in charge and what mechanisms are acceptable for enforcing that dominance into their intimate relationships. It is those attitudes and beliefs, rather than victims’ behavior, which determine whether or not persons are violent.¹⁸

Finally, Wisconsin statutes contain a factor entitled “Other.” This factor allows the guardian ad litem to ***assess and consider the lethality risk of domestic abuse***. Campbell’s research found that women who were threatened or assaulted with a gun were 20 times more likely than other women to be murdered.¹⁹ Women whose partners threatened them with murder were 15 times more likely than other women to be killed. The top five risk factors for homicide are:

- Threats or use of a weapon (20.2x)
- Threats to kill (14.9x)
- Strangulation (9.9x)
- Perpetrator violently & constantly jealous (9.2x)
- Forced Sex (7.6x)

VI. Step Four: Making Informed Recommendations That Account for Domestic Abuse

¹⁵ O’Connor, C., Finkbiner, C., & Watson, L. (2012). Adverse Childhood Experiences in Wisconsin: Findings from the 2010 Behavioral Risk Factor Survey. Madison, WI: Wisconsin Children’s Trust Fund and Child Abuse Prevention Fund of Children’s Hospital & Health System.

¹⁶ See Peter G. Jaffe, Nancy K.D. Lemon & Samantha E. Poisson, *Child Custody & Domestic Violence: A Call For Safety And Accountability*, 21-28 (2003); at 27-28 (providing a table that identifies risk and protective factors in domestic violence cases and stating that domestic violence should be a fundamental consideration in determining the best interests of children).

¹⁷ L. Bancroft & J. Silverman, *The Batterer as Parent-Addressing the Impact of Domestic Violence on Family Dynamics* (Sage Publications) 2002.

¹⁸ L. Bancroft, *Why Does He Do That? Inside the Minds of Angry and Controlling Men*, G.P. Putnam’ Sons, New York, 2002

¹⁹ Campbell, Jacqueline, Daniel Webster, Jane Koziol-McLain, Carolyn Rebecca Block, Doris Campbell, Mary Ann Curry, Faye Gary, Judith McFarlane, Carolyn, Sachs, Phyllis Sharps, Yvonne Ulrich, and Susan Wilt, “Assessing Risk Factor for Intimate Partner Homicide”, National Institute for Justice Journal, 250 (2008): 17

Once all of the information about domestic abuse has been collected and analyzed, the final step for guardians ad litem is to make informed recommendations that account for the abuse to better guarantee the long-term safety of the children and protective (non-abusive) parent.

- ***Wis. Stat. § 767.407(4) requires guardians ad litem to investigate whether there is evidence that either parent has engaged in interspousal battery or domestic abuse and report the results of the investigation to the court.*** Once a guardian ad litem has investigated whether there is evidence that either parent has engaged in interspousal battery or domestic abuse, Wis. Stat. § 767.407(4) ***requires the guardian ad litem to report the results of the investigation to the court.*** This is significant for two reasons:
- Wis. Stat. § 767.41(2)(d)1. directs that if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery or domestic abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party.
- Wis. Stat. § 767.41(5)(bm) directs that if the court finds by a preponderance of the evidence that one party has engaged in a pattern or serious incidence of interspousal battery or domestic abuse, “the safety and well-being of the child and the safety of the parent who was the victim of the battery shall be the paramount concerns in determining legal custody and periods of physical placement.”

After conducting an investigation, if the guardian ad litem determines that domestic abuse exists, ***the guardian ad litem should request that the court make a finding of domestic abuse under Wis. Stats. § 767.41(5)(bm) and 767.41(2)(d)1.*** This allows the court to make orders that account for the safety of the child(ren) as noted directly above.

When a guardian ad litem discovers domestic abuse, the WI Practice Guidelines note the ***guardian ad litem must create recommendations which address safety in all these categories:***

1. Custody
2. Placement
3. Supervised / monitored placement
4. Transfer of placement
5. Communication between the parents
 - Communication via online resources
 - Communication via the child(ren)
 - Communication about the other parent
 - Communication regarding the child(ren)’s annual calendar
6. Child(ren)’s welfare
 - Provisions to promote the child(ren)’s welfare

- Discipline of the child(ren)
- 7. Home environment
- 8. Internet / social media / other technology
- 9. Parental provisions
 - Child support
 - Education and treatment
 - Weapons restrictions
- 10. Other conditions for the safety and well-being of the child(ren) and non-abusive parent

Possible Provisions within Custody and Placement Orders to Enhance Safety

Courts have ample statutory guidance to make orders that enhance the safety and well-being of the child and the adult domestic abuse victim; these conditions are found at Wis. Stat. § 767.41(6)(g). When the court makes a finding of domestic abuse, the statute mandates that the court impose “one or more of the [conditions], as appropriate.” However, the statute does not limit the ability of the court to order these or similar conditions, in its discretion, in other cases.

- Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate third party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.
- Requiring the child's periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate third party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.
- Requiring the party who committed the battery or abuse to pay the costs of supervised physical placement.
- Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as a condition of exercising his or her periods of physical placement.
- If the party who committed the battery or abuse has a significant problem with alcohol or drug abuse, prohibiting that party from being under the influence of alcohol or any controlled substance when the parties exchange the child for periods of physical placement and from possessing or consuming alcohol or any controlled substance during his or her periods of physical placement.
- Prohibiting the party who committed the battery or abuse from having overnight physical placement with the child.
- Requiring the party who committed the battery or abuse to post a bond for the return and safety of the child.

- Imposing any condition not specified above that the court determines is necessary for the safety and well-being of the child or the safety of the party who was the victim of the battery or abuse.

In drafting custody and placement recommendations, *especially in cases where domestic abuse is present*, it is important to be as specific as possible. Recommendations should provide for structure, limits, and predictability. Recommendations should provide specific times and processes in each category (e.g. how long, how often, timelines for responses, consequences for failure to comply, such as calling law enforcement or asking the court to schedule an emergency hearing, etc.). Making the recommendations specific and clear can help reduce the degree of coercive control the abuser can exercise over the victim once the family case is over.

The Practice Guidelines for WI Guardians Ad Litem: Decision-making in Domestic Abuse Cases Related to Custody, Placement and Safety Issues is designed to guide guardians ad litem to apply a consistent and thorough analysis of the impact of domestic abuse on the children and the parenting abilities of both parents. It allows guardians to fully explore what is in the best interests of children and present that information to the court through informed recommendations. The Practice Guidelines can be found at [can be found at _____](#).

