

CHAPTER 5-5 DOMESTIC AND FAMILY VIOLENCE CODE

GENERAL PROVISIONS

5-5-1 Legislative Purpose

In enacting this Chapter, it is the intent of the Colville Business Council to honor the traditions of the Colville Tribes by securing the safety of victims, protecting the community from the effects of violent acts and ensuring that whenever a crime involving domestic violence occurs, the offender incurs an obligation to repair the harm done to the community, and takes responsibility for his or her actions.

The Tribes recognize that its strength is founded on healthy families. Violence against family or household members is not in keeping with traditional Tribal values, which hold all people sacred. Thus, incidents of domestic violence must be met with immediate intervention by law enforcement, prosecution, counseling, education and other appropriate services. These responses will allow offenders and victims the opportunity to make positive changes and strengthen tribal culture in their lives.

The purpose of this Chapter is to stop all family violence on the Colville Reservation, to promote the healing of families and the Tribes where possible, and to promote cultural teachings and traditional Tribal values so as to nurture non-violence and respect within families. Domestic violence is a serious crime against our people and this Chapter seeks to guarantee the victims of domestic violence the maximum protection from abuse which Colville Tribal law can provide.

5-5-2 Legislative Findings

The Tribes, in accordance with the unique and distinct attributes and values of our culture, find that domestic violence is contrary to the interests of our people, our traditional values, and a sense of wellbeing and growth. In order to promote healthy communities within our Tribes, we need to understand and embrace our traditional understandings of familial relationships which do not condone violence.

Traditionally, women and men were equal in social status. Both had important and flexible economic and social roles. These roles complimented each other and enabled partners to provide abundantly for the families' economic and emotional needs. There was no imbalance of power between men and women. They each had the ability and resources to live well with or without a spouse. As equals, either partner had the right to end a relationship. If partners separated, either partner had all rights in developing new relationships and marriages. A large network of relatives and friends helped to meet any special or unmet needs, and were always active in rearing of the communities' children. In all cases, parents had responsibility to their children.

Various events and processes have weakened the framework of traditional culture. The long-honored values of generosity, respect for all things, and high regard for peace have devolved into individual gain, indifference, and aggression. The criminalization of our spiritual and cultural practices, and our languages, have affected our perceptions of the world and of ourselves. The deterioration of the roles of men, women, and the extended family have isolated and fractured our once lively societies. The displacement of our children into formalized educational institutions has stifled the transmission of culture to the point that the inherent meanings developed over millenia have often times been lost. Because of these and other factors, many social ills previously uncommon to the people are commonplace today. Alcoholism, sexual abuse, and drug abuse are examples of the effects these changes have had over several generations.

Another manifestation of this is domestic violence, which detrimentally affects generations of members of our community. Domestic violence comes in many forms, including, but not limited to, physical, verbal, psychological, spiritual, emotional, and sexual abuse of our children, spouses, siblings, parents, or elders.

In addition, Tribal families and communities are not made up exclusively of tribal members. Non-members and non-Indians frequently become a part of our families and community. Domestic violence occurs against persons who are not members of the Tribes. Within these consensual relationships, including marriage and cohabitation, domestic violence may occur. Non-Indians committing domestic violence will be subject to all civil remedies available under this chapter, including exclusion. As with all inherent rights

and authorities the Tribes possess, the political integrity of the Tribes and the welfare and safety of the Reservation's residents is of the utmost importance.

The Tribes must address domestic violence within its communities. Service providers, policy makers, legal service and justice departments acknowledge that domestic violence is harming our communities. State and Federal agencies do not always have the resources or willingness to prosecute crimes in which they may have concurrent jurisdiction. In response to concerns expressed by the community and various tribal programs dealing with the effects of domestic violence, we have mandated tribal programs to collaboratively draft and seek input in developing this domestic violence code. This Chapter is a product of that collaborative process.

Statistics specific to domestic violence in Indian communities are difficult to find. However, the frequency of battering in Indian country is believed to be much higher than the national norm in keeping with the higher statistical trend of other social problems.

5-5-3

Definitions and Requirements

(a) "Advocate" means an employee of, or a volunteer for, a program for victims of domestic violence who:

(1) Has a primary function of giving information, referrals, counseling or assistance to victims of domestic violence, supervising the employees or volunteers of the program, or administering the program; and

(2) Has undergone 30 hours of training as an Advocate for victims of domestic violence and continues to receive ongoing training as available and deemed necessary by the program.

(b) "Child Welfare Agency" means the Tribal governmental agency to which the Court grants custody of minors when the Tribes intervenes in a family's life.

(c) "Court" means all courts of the Confederated Tribes of the Colville Reservation.

(d) "Domestic Violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense or culturally appropriate discipline of a child:

(1) Attempting to cause or causing physical, mental or emotional harm to another family or household member;

(2) Placing a family or household member in reasonable fear of physical harm to him or herself or another family or household member. This fear may be produced by behavior which induces fear in the victim, including, but not limited to, harassment, stalking, destruction of property, or physical harm or threat of harm to household pets;

(3) Causing a family or household member to engage involuntarily in sexual activity, which includes, but not limited to, through coercion, intoxication, force, threat of force, or duress; or

(4) Attempting to commit or committing any criminal offense under Colville Tribal law against another family or household member.

(e) "Dominant Aggressor" means the person whose actions are primarily responsible for initiating or triggering the domestic violence throughout the course of the relationship.

(f) "Ex Parte" in this Chapter means that only the requesting party is heard by the Court, and that notice and an opportunity to contest the facts are not available to the party adversely affected at that hearing.

(g) "Family or Household Members" include:

(1) Persons who are current or former spouses;

- (2) Persons who live together or who have lived together;
- (3) Persons who are dating or who have dated;
- (4) Persons who are engaged in or who have engaged in a sexual relationship;
- (5) Persons who are related by blood or adoption;
- (6) Persons who are part of the extended family of the victim or abuser and who commonly interact with the victim or abuser;
- (7) Persons who have a child in common, regardless of whether they have been married or lived together;
- (8) Persons who have a biological, legal, or step parent-child relationship;
- (9) Indian Custodians; or
- (10) Minor children, either biological, legal, or step of a person in a relationship that is described in subparts (1) through (9) above

(h) “Perpetrator” means a person who commits a crime.

(i) “Public Official” means a person elected, appointed or hired who has discretionary authority to carry out some portion of a government’s sovereign powers for a fixed period.

(j) “Shelter” means a safe home/shelter home that provides temporary refuge and adequate food and clothing offered on a twenty-four (24) hour, seven (7) day per week basis, to victims of domestic violence.

LAW ENFORCEMENT RESPONSE AND DUTIES

5-5-10

Duties of Law Enforcement Officer to Victim of Domestic Violence

(a) A law enforcement officer who responds to an allegation of domestic violence shall use all reasonable means to protect the victim, family or household member or witnesses and to prevent further violence, including, but not limited to:

- (1) Taking necessary actions to provide for the safety of the victim and any family or household member or witnesses including arresting an alleged perpetrator or dominant aggressor.
- (2) Confiscating any weapon as provided in section 5-5-15.
- (3) Obtaining transportation for a victim and any child to a shelter or other place of safety at the victim’s request.
- (4) Assisting a victim and any child in obtaining medical treatment, including obtaining transportation to a medical facility.
- (5) Assisting a victim in removing essential personal effects, at the victim’s request.
- (6) Giving a victim immediate and adequate written notice of the rights of victims and of the remedies available as well as the name, address, and telephone number of local services available to victims, family or household members, or witnesses of domestic violence.

(b) As part of the notice required in subsection (a)(6) above, the law enforcement officer shall give a written

notice to the adult victim which substantially informs him or her that:

(1) “If you believe that law enforcement protection is needed for your physical safety, you have the right to request that the officer assist in providing for your safety. The officer can assist you to:

(A) Ask for an Emergency Order of Protection.

(B) Gather up essential personal effects.

(C) Locate a safe place and take you there. The officer may take you to a shelter, the residence of a friend or family member, any other place of safety, or a meeting place where someone else can transport you to a safe place.

(D) Receive medical treatment.

(E) Receive a copy of the officer’s report, from the Colville Tribal Police Department at no cost.

(F) Contact advocate services for immediate assistance.

(2) “You also have the right to file a petition in the Colville Tribal Court requesting an Order of Protection from domestic or family violence. An Order of Protection may include specific orders of the court, to your abuser or for your welfare, including any of the following:

(A) Order to not commit or threaten to commit further acts of domestic violence;

(B) Order to not contact, harass, telephone you or otherwise communicate with you, either directly or indirectly;

(C) Order removing the alleged perpetrator from your residence, regardless of who owns the residence;

(D) Order to stay away from your residence, school, place of employment, or any other specific place you or another family or household member frequently go;

(E) Order prohibiting the possession or use of any firearm or other weapon specified by the court, and requiring that such weapon be turned in to law enforcement;

(F) Order granting you possession and use of an automobile and other essential personal items and property, regardless of ownership;

(G) Order granting you custody of your child or children;

(H) Order denying the alleged perpetrator visitation with your child or children;

(I) Order making specific requirements for visitation, including supervised visitation;

(J) Order requiring the alleged perpetrator to pay certain costs and fees, such as rent or mortgage payments, child support payments, medical expenses or to maintain existing medical insurance coverage, expenses for shelter, court costs and attorney’s fees; or

(K) Any other relief the Colville Tribal Court deems necessary.

(3) “The forms you need to obtain an Order of Protection are available from the clerk at the

Colville Tribal Court. No fees are required for an Order of Protection.

(4) “You also have the right to request payment for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or financial support, and other expenses for injuries sustained and damage to your property. This request can be made, without an attorney, by filing a petition in Colville Tribal Court.

(5) “If you have a protection order from another jurisdiction you may file the order with the Colville Tribal Court to have it enforced as a Colville Tribal Court order. However, even if you do not have this foreign protection filed with the Colville Tribal Court, we will honor and enforce it.” Law enforcement officers shall encourage victims to file their foreign protection orders with the Court. Nothing within this section precludes law enforcement officers from enforcing foreign protection orders under 5-5-103.

5-5-11

Duty of Law Enforcement Officer to Ensure Evidence Preserved—Purpose

(a) The purpose of this section is to assist in the prosecution of perpetrators of alleged crimes involving domestic violence recognizing that victims are often reluctant to press charges or testify at subsequent hearings for many reasons, including but not limited to economic, emotional, or psychological factors.

(b) All law enforcement officers who respond to an allegation of a crime involving domestic violence shall write a report and take reasonable steps to collect sufficient evidence to enable the prosecutor to secure a conviction of the perpetrator without the testimony of any victim. Reasonable steps include, when appropriate, photographs of injuries to any victim, of damage to property and of the location and surroundings of the alleged incident. Reasonable steps also include at a minimum, gathering statements and interviewing all known witnesses including medical personnel and all responding law enforcement officers. However, in order to preserve evidence and not taint the testimony or induce additional trauma, an interview of a child shall be conducted by someone trained and qualified to interview children.

(c) A law enforcement officer who responds to an allegation of a crime involving domestic violence shall encourage any victim to make a sworn statement concerning the incident and shall take one from the perpetrator, if possible. Said statements shall be admissible in Tribal Court as probative evidence.

(d) A law enforcement officer who responds to an allegation of a crime involving domestic violence shall insure that the victim is made aware of the importance of preserving evidence of the incident. In addition, upon responding to said allegation the law enforcement officer shall make diligent efforts to preserve a chronology of events in written form.

5-5-12

Mandatory Arrest for Crimes Involving Domestic Violence— Purpose Determination of Dominant Aggressor—Required Report

The purpose of mandating arrest of perpetrators is to provide victims with immediate protection from the current violence, to afford them an opportunity to consider legal options, to provide victims with time to safely relocate or obtain an order of protection, and to insure an adequate and prompt law enforcement response to domestic violence.

(a) A law enforcement officer shall, without a warrant, arrest a person and charge him or her with the appropriate crime if the officer has probable cause to believe that the person has committed a crime involving domestic violence within four (4) hours of the time when the victim first has the ability to report the incident. The officer must make an arrest upon probable cause regardless of the express wishes of the victim.

(b) If a law enforcement officer receives a complaint alleging a crime involving domestic violence from two or more opposing persons, the officer shall evaluate each complaint separately to determine who was more likely to have been the dominant aggressor. In determining whether a person was the dominant aggressor, the officer shall consider:

(1) Prior complaints of domestic violence;

(2) The relative severity of the injuries inflicted on each person;

(3) The likelihood of future injury to each person; and

(4) Whether one of the persons acted in self-defense.

(c) A law enforcement officer who does not make an arrest, or who arrests two or more persons, after investigating a complaint of a crime involving domestic violence must submit a detailed written report stating why the officer either did not make an arrest, or arrested two or more parties.

(d) All reports of alleged crimes involving domestic violence shall be forwarded to the appropriate Prosecutor's Office within five (5) days.

(e) Persons arrested shall be taken to jail and shall not be released prior to arraignment.

5-5-13 Law Enforcement Officer's Duty to Request and Upon Receiving Telephonic Emergency Order of Protection

(a) When a law enforcement officer has probable cause to believe that domestic violence has occurred, and the victim requests immediate protection, and a judge is not available to hear a request for an emergency order of protection in person, the officer may contact the judge by telephone to hear the request, and the officer shall state the grounds for making the request.

(b) A law enforcement officer who receives authorization from the court by telephone, to carry out an emergency order of protection shall:

(1) Write and sign the order as directed by the court;

(2) Immediately provide the petitioner with a copy of the order, and assist the petitioner in securing any items of property he or she is entitled to under the terms of the order;

(3) Serve or arrange a timely service of a copy on the respondent; and

(4) Provide the order to the court by the end of the next judicial day.

(c) When an alleged victim of domestic violence presents a law enforcement officer with a foreign order of protection and requests immediate protection and enforcement of such order, and a judge is not available to hear a request for an emergency order of protection in person, the officer shall contact the judge by telephone to hear the request, and the officer shall state the grounds for making the request. In all cases, the officer's duty to enforce said foreign order shall be in accordance with section 5-5-103.

5-5-14 Law Enforcement Officer's Duty to Expedite Service for Orders of Protection

The Colville Tribal Police Department shall insure that law enforcement officers provide expedited service for orders of protection.

5-5-15 Authority of Law Enforcement Officer to Seize and Hold Weapons

(a) Incident to arrest for a crime involving domestic violence, a law enforcement officer shall seize all weapons that are alleged to have been involved, or were threatened to be used, in the commission of the crime.

(b) The law enforcement officer may also seize a weapon that is in the plain view of the officer or that was discovered pursuant to a consensual search or a search incident to arrest as necessary for the protection of the officer or other persons.

(c) Law enforcement officers are authorized to confiscate weapons from a person who is prohibited from

possessing or using them.

5-5-16 Mandatory Arrest for Certain Violations of Civil or Criminal Orders of Protection

When a law enforcement officer has probable cause to believe that a respondent has violated one of the following orders of a court, and the officer has determined the existence of an order, the officer shall, without a warrant, arrest the alleged violator. This section applies to all violations of any order of protection whether civil or criminal. Arrest shall be mandatory where the violation is of one of the following:

- (a) Order to not commit or threaten to commit further crimes involving domestic violence.
- (b) Order to not contact, harass, stalk, telephone or otherwise communicate with the petitioner either directly or indirectly.
- (c) Order removing the respondent from a residence.
- (d) Order to stay away from a residence, school, place of employment, or any other specific place petitioner or another family or household member frequently go.
- (e) Order prohibiting the possession or use of any firearm or other weapon specified by the court.
- (f) Order prohibiting the destruction of property.

5-5-17 Mandatory Arrest for Violations of Conditions of Release

If a law enforcement officer has probable cause to believe that a person has violated a condition of release from arrest or detention the officer shall, without a warrant, arrest the alleged violator.

5-5-18 Law Enforcement Records on Domestic Violence to be Identifiable

The Colville Tribal Police Department shall maintain written records of arrests, incident reports, and initial contacts in such a manner as to allow tracking and identification of them as related to domestic violence.

5-5-19 Liability of Law Enforcement Officers

A law enforcement officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of any court order, or any other action or omission made in good faith under this Chapter arising from an incident of alleged domestic violence.

5-5-20 Officials who Batter, Including Law Enforcement Officers; Procedure

No special treatment by policy makers or law enforcement officials shall be given to any person because of their official capacity as a law enforcement officer, public official, or because of their connections to or influence over policy makers, public officials, law enforcement officers or the community. All procedures and duties set out in this Chapter shall be strictly adhered to, regardless of any administrative, interagency, or departmental investigation and sanctions.

- (a) Upon receiving notification that a law enforcement officer is a possible perpetrator:
 - (1) The dispatcher shall immediately notify the Supervisor. The Supervisor or an appropriate designee shall respond and investigate the alleged incident. Every effort shall be made to ensure that the investigation is handled impartially.
 - (2) No officer of equal or lesser rank shall act as primary investigator for an incident involving another officer.
 - (3) Any officer determined by the investigating officer to be a perpetrator shall immediately surrender all police issued weapons to the investigating officer. No weapons shall be returned without the written consent of the Chief of Police.

(4) Investigation and prosecution for a crime involving domestic violence will proceed independent of administrative, interagency, or departmental investigation and sanctions.

(b) Upon receiving notification that a public official is a possible perpetrator the dispatcher shall notify the Supervisor. The Supervisor or an appropriate designee shall respond and investigate the alleged incident.

ORDER OF PROTECTION—CIVIL PROCESS

5-5-30 Purpose of Authorizing Civil Orders of Protection

(a) The purpose of authorizing civil orders of protection is to provide victims of domestic violence with a process for obtaining orders of protection independent of contacting law enforcement officers to report a crime. Petitioners applying for orders of protection should be referred to law enforcement in the event that an unreported crime has been committed.

(b) The purpose of authorizing orders of protection to be issued without prior notice to the respondent is to insure the immediate protection of the petitioner and any family or household member. Prior to issuing, modifying or extending, an ex parte order the Court shall determine whether prior notice is likely to increase the danger to the petitioner or other family or household member and shall only issue the order if prior notice is likely to increase the danger.

5-5-31 Filing a Petition for an Order of Protection Without a Complaint Allowed – No Fees Required

No complaint or underlying action need be filed in order to obtain a civil protection order. No filing fees are required for an Order of Protection, either civil or criminal.

5-5-32 Filing a Petition for an Order of Protection—Who May File

(a) Any person who alleges that he or she is or has been a victim of domestic violence may file a petition for an order of protection. A Guardian Ad Litem shall be appointed for any minor who individually files on his or her own behalf a petition for an order of protection.

(b) Family or household members, including adults, may jointly file a single petition.

(c) A person may petition for relief on his or her own behalf, and on behalf of any family or household members under the age of eighteen (18) years.

(d) An adult or child welfare agency or a child's spokesperson may petition for an order of protection on behalf of others for whom they are responsible.

5-5-33 Filing a Petition for an Order of Protection or to Modify an Existing Order—Contents

(a) A petition for an order of protection from domestic violence, or to modify an existing order of protection shall include:

(1) The name and address where the petitioner would like to receive notices from the court.

(2) An allegation that domestic violence or a crime involving domestic violence has taken place.

(3) The names and ages of all persons known to the petitioner to be in need of protection.

(4) The name, address, approximate physical address and age of the alleged perpetrator, and his or her relationship to each victim.

(b) A signed statement, or separate affidavit filed with the petition, stating in the petitioner's own words, the specific facts and circumstances of the alleged domestic violence, including whether the petitioner believes him or herself to be in immediate danger of further domestic violence, and if applicable, what modifications to the existing order the petitioner is requesting, and why the changes are necessary.

(c) A statement listing each civil or criminal action or proceeding, past and present, involving both parties, the court of record for the action or proceeding, and any additional identifying information which may enable the Court to access court dockets, charges, pleadings, outcomes and the issuance of any civil or criminal protection orders.

5-5-34

Emergency Order of Protection—When Available—Issuing—Contents—Expiration

(a) The Court shall insure that a judge or other authorized person designated by the Court is available to hear petitions or requests for an emergency order of protection twenty-four (24) hours a day, seven (7) days per week.

(b) The Court may issue a written or telephonic emergency order of protection, without notice to an alleged perpetrator when the Court finds reasonable cause to believe:

(1) that the petitioner is in immediate danger based on competent testimony; and

(2) that prior notice is likely to increase the danger to the petitioner or other family or household member.

(c) The Court may issue, upon its own motion, a written or oral emergency order of protection, without notice to an alleged perpetrator when it appears upon review of a petition for an order of protection that the Court has reasonable cause to believe:

(1) that the petitioner is in immediate danger; and

(2) that prior notice is likely to increase the danger to the petitioner or other family or household member.

(d) The Court may grant the following relief in an emergency order of protection:

(1) Order the respondent to not commit or threaten to commit further acts of domestic violence;

(2) Order the respondent to not contact, harass, stalk, telephone or otherwise communicate with the petitioner, either directly or indirectly;

(3) Order removing the respondent from a residence, regardless of ownership of the residence;

(4) Order the respondent to stay away from a residence, school, place of employment, or any other specific place petitioner and any designated family or household member frequently go;

(5) Order granting the petitioner possession and use of an automobile and other essential personal items and property, regardless of ownership, and direct law enforcement to accompany the petitioner to the residence of the parties to insure that the petitioner is able to safely retrieve such items, or to supervise the respondent or petitioner in removing personal property;

(6) Order granting temporary custody of a child or children; or

(7) Order such other relief as the Court deems necessary to protect and provide for the safety of the petitioner and any designated family or household member.

(e) An emergency order of protection expires twenty (20) days after issuance, unless the Court orders otherwise.

(f) Following entry of an ex parte emergency order of protection, the Court shall:

(1) Set a date for a hearing to be held within three (3) days after entry of an emergency order.

- (2) Cause the order to be delivered to the Colville Tribal Police Department for enforcement purposes and for service upon the respondent.
- (3) Transmit a copy of the order to any additional, appropriate law enforcement agencies or other agencies designated by the petitioner.
- (4) The Court shall explain the contents of the order to the petitioner.

5-5-35 Order of Protection—Issuing—Contents—Expiration

(a) If it appears from a petition for an order of protection or a petition to modify an order of protection that domestic violence has occurred, or that modification of an order is required, the Court may:

(1) Immediately issue or modify an order of protection ex parte, without notice or a hearing, as deemed necessary to protect the petitioner or other family or household member where the Court determines that prior notice is likely to increase the danger to the petitioner or other family or household member; or

(2) Upon notice to the parties and after a hearing, issue or modify an order of protection whether or not the respondent appears.

(b) The Court may, without notice and a hearing, issue or modify an order of protection ex parte and grant the relief as set forth in sections 5-5-34 (d)(1) through (7) above, and also order that the respondent's possession or use of any firearm or other weapon specified by the Court is prohibited, and that the respondent is required to turn such items in to law enforcement for safekeeping.

(c) The Court may grant the following relief in an order of protection or modification of an order of protection, after notice and a hearing, whether or not the respondent appears:

(1) Grant the relief as set forth in sections 5-5-34 (d)(1) through (7) above, and also order that the respondent's possession or use of any firearm or other weapon specified by the Court is prohibited, and that the respondent is required to turn such items in to law enforcement for safekeeping;

(2) Specify arrangements for visitation of any minor child by the respondent, and require supervision of that visitation by a third party, or deny visitation if necessary to protect the safety of the petitioner or child;

(3) Order the respondent to make the following payments to the petitioner, the Court or to another party:

(A) Rent or mortgage on the petitioner's current residence, regardless of ownership;

(B) Support of the petitioner and minor child, if under the circumstances, the respondent is found to have a duty to support the petitioner or minor child;

(C) Reimbursement for any expenses associated with the domestic violence, including but not limited to medical expenses, counseling, shelter, and repair or replacement of damaged property;

(D) Costs and fees incurred by the petitioner in bringing the action, including attorney's fees; or

(4) Order any other relief deemed necessary and consistent with the purposes of this Chapter and subsection 5-5-57, Traditional Cultural Disposition, in such a way as will reinforce the customs and traditions of the community.

(d) If the Court issues or modifies an order of protection under this section the Court shall:

(1) Cause the order to be delivered to the Colville Tribal Police Department for expedited service to any of the parties who were not present. If the Colville Tribal Police Department cannot personally serve the respondent, the Court shall complete service by certified mail, return receipt requested, to any address the petitioner believes may reasonably insure notice to the respondent, and by posting as defined in section 5-5-78;

(2) Make reasonable efforts to insure that the order of protection, or modified order of protection is understood by the petitioner and the respondent, if present; and

(3) Transmit a copy of the order of protection, or modified order of protection to any additional, appropriate law enforcement agencies or other agencies designated by the petitioner.

(e) An order of protection issued pursuant to this section is effective for up to one (1) year, or until further order of the Court, and may be renewed or rescinded by the Court prior to expiration, upon the petitioner's request and upon notice to the parties and after a hearing, whether or not the respondent appears.

5-5-36 Request to Modify Order by Respondent

(a) Respondent may request modification of an order of protection where he or she can show by a preponderance of the evidence that he or she did not receive adequate notice of the hearing for an order of protection.

(b) Upon receiving the respondent's request, the Court shall set a hearing as soon as practicable, but not later than fourteen (14) days after the next day on which Court is in session following the filing of the respondent's request. The Court shall order the court clerks, to send notice to the petitioner that the respondent is seeking a modification of the order.

(c) The purpose of the hearing shall be for the Court to consider whether any less restrictive alternatives may be appropriate under the circumstances. The Court may modify an order where the order causes an unreasonable hardship upon the respondent, provided that the safety of the victim or any family or household member protected by the order is not jeopardized and remains the primary consideration.

TRIBAL PROSECUTOR'S RESPONSE, DUTIES, ETC.

5-5-40 Duty of Prosecutor to Inform Victim of Rights—Victim's Rights in Legal Proceedings

(a) Any person prosecuting a crime involving domestic violence shall make reasonable efforts to notify the victim of his or her rights as set forth below.

(b) A victim of a crime involving domestic violence is entitled to all rights granted to victims of crime including, but not limited to, the right to:

(1) Be timely informed of all hearing dates and continuances;

(2) Not be required to testify in person at any proceedings related to the incident, however, the victim may be present at sentencing and address the court, either in person or by a written statement;

(3) Provide the Court with a statement either in person or in writing, on the impact that the incident or crime has had on the victim's health, welfare and the emotional impact of the incident or crime, a statement on the victim's opinion regarding the frequency of domestic violence which involved the perpetrator, and the perceived risk of further harm;

(4) Advise the Court on appropriate counseling and any other conditions of probation and parole that the victim believes should be required of the perpetrator in order to insure the safety and

welfare of the victim and other family and household members;

(5) Request restitution for losses directly caused by any criminal conduct by the perpetrator;

(6) Be informed of how to apply for victims' compensation, and to apply for such funds; and

(7) Receive notice from the prosecutor:

(A) when an alleged perpetrator will not, be prosecuted for any reason for alleged domestic violence or for violating an order of protection;

(B) when the disposition of the case involves an agreement reached during plea bargaining. The prosecutor shall make reasonable efforts to notify the victim before entering into the plea bargain; and

(C) of the final disposition of the case.

5-5-41 Reasons for Dismissal Required in Court File

(a) When a prosecutor moves to dismiss charges against a defendant accused of a crime involving domestic violence or when the Court dismisses such charges, the specific reasons for the dismissal must be recorded in the Court file.

(b) If the motion for dismissal, or dismissal, is based on the unavailability of the alleged victim or any witness, the prosecutor shall indicate the specific reason why such person(s) are unavailable, and why the case cannot be prosecuted.

5-5-42 Duty of Prosecutor and Law Enforcement to Refer Non-Indians to Appropriate Agency

Law enforcement and the prosecutor have a duty to refer a non-Indian perpetrator to the appropriate federal or state agency for criminal prosecution immediately upon learning that the perpetrator is not subject to the criminal jurisdiction of the Tribes. The fact that the Tribes refers these cases to another agency does not diminish the Tribes jurisdiction to impose civil dispositions.

5-5-43 Duty of Prosecutor—Charging Document

To invoke the provisions of this Chapters, the prosecutor shall expressly state in the charging document that the perpetrator is being accused of a crime involving domestic violence.

TRIBAL COURT RESPONSE AND DUTIES

5-5-50 Conditions of Pretrial Release—Written Orders

(a) When considering pretrial release of a person who is under arrest for, or being charged with, a crime involving domestic violence, the Court shall review all available facts and reports concerning the arrest and detention of the person, and make a determination, on the record, if possible, on whether to release the person. The Court shall consider whether the person:

(1) Is a threat to the alleged victim or other family or household member, including any history of violations of any protection orders;

(2) Is a threat to the safety of the community; and

(3) Is reasonably likely to appear in court for a subsequent proceeding.

(b) Before authorizing release of a person under arrest for, or charged with, a crime involving domestic violence, the Court shall consider imposing conditions of release or bail on the person to protect the alleged victim, and to insure the appearance of the person arrested or charged at a subsequent court proceeding.

Conditions of release or bail may include:

- (1) An order to not commit or threaten to commit acts of domestic violence against the alleged victim or other family or household member;
- (2) An order to not contact, harass, stalk, telephone or otherwise communicate with the alleged victim, either directly or indirectly;
- (3) An order to vacate and/or stay away from the residence of the victim, even if it is a shared residence, or principally owned by the alleged perpetrator, and to stay away from any specific place the alleged victim or another family or household member frequently go;
- (4) An order prohibiting the possession or use of any firearm or other weapon specified by the Court, and to turn such weapon in to law enforcement for safekeeping;
- (5) An order prohibiting the person from possession or consumption of alcohol or controlled substances; or
- (6) Any other order the Court believes is reasonably necessary to protect and insure the safety of the alleged victim or family or household member, or to insure the appearance of the person at a subsequent court proceeding.

(c) If conditions of release are imposed, the Court shall:

- (1) Issue a written order for a conditional release;
- (2) Immediately distribute a copy of the order to the Colville Tribal Police Department, or any other entity having custody of the arrested or charged person;
- (3) Waive any requirement that the alleged victim's location be disclosed to any person upon a showing that there is a possibility of further violence. If disclosed, the Court may order the person to whom disclosure is made not to release the information; and
- (4) Not allow a person charged with a crime involving domestic violence to be released under a personal assurance agreement.

(d) The written order releasing the person arrested for or charged with a crime involving domestic violence shall contain the conditions of release imposed by the Court and shall contain a prominent annotation, in either boldfaced type or capital letters, which substantially informs the released person that:

“Violation of this order is a criminal offense and will subject you to arrest. You can be arrested even if any person protected by the order invites or allows you to violate it. You have the sole responsibility to fully comply with all of the order's provisions. Only the court may change the order.”

(e) The Court shall direct the Colville Tribal Police Department, or any other entity having custody of the arrested or charged person, to provide a copy of the conditions of release to the arrested or charged person upon his or her release. Failure to provide the person with a copy of the conditions of release does not invalidate the conditions if the arrested or charged person has notice of the conditions.

(f) When a person who is arrested for or charged with a crime involving domestic violence is released from custody, the Court shall direct the Colville Tribal Police Department, or any other entity having custody of the arrested or charged person to:

- (1) Use all reasonable means to timely (i.e. prior to release if practicable) notify the victim of the

alleged crime that the person is being released; and

(2) Furnish the victim of the alleged crime a copy, at no cost, of any conditions of release.

5-5-51 Dismissal of Criminal Case Because of Civil Compromise Prohibited

The Court shall not dismiss a criminal case involving domestic violence for the sole reason that a civil compromise or settlement is offered or reached.

5-5-52 Tribal Court Records on Domestic Violence to be Identifiable

The Court shall identify by any reasonable means, on docket sheets, those criminal actions arising from acts of domestic violence.

5-5-53 Tribal Court Records on Domestic Violence—Confidentiality

The Court shall take whatever steps are necessary to insure that any information related to the victim's safety is kept confidential, and to prevent release of such information except at the victim's request, or with his or her prior written consent.

5-5-54 Penalties for Crime Involving Domestic Violence

This section provides for the enhancement of penalties applicable for the underlying crime when the crime involves domestic violence. The Court shall direct that the trier of fact find a special verdict, based on a preponderance of the evidence, that the crime is a crime involving domestic violence.

(a) In all cases, upon conviction of a crime involving domestic violence, the perpetrator shall be evaluated for domestic violence perpetrator's treatment and shall follow and complete the recommendations of the evaluation.

(b) If a person commits a crime involving domestic violence, the penalties for the underlying crime shall be increased as provided in subsections (1), (2), and (3) that follow.

(1) If the underlying crime is a Class C offense, the revised maximum fine and sentence shall be that of the next higher Class and in no case shall the sentence be less than forty-five (45) days;

(2) If the underlying crime is a Class B offense, the revised maximum fine and sentence shall be that of the next higher Class and in no case shall the sentence be less than ninety (90) days; or

(3) If the underlying crime is a Class A offense, the sentence shall be no less than one hundred and eighty (180) days.

(c) The Court shall impose traditional cultural disposition as provided under section 5-5-57.

5-5-55 Penalties for Violation of a Court Order in Domestic Violence Cases

Consistent with CTC § 3-1-123 the following are the penalties for violating court orders in cases involving domestic violence:

(a) If a person involved in a crime involving domestic violence is found to have violated the protection order entered by the Court against him or her, upon each such finding, the Court shall impose a sentence of no less than fifteen (15) days on persons with no prior convictions for crimes involving domestic violence and no prior violation of a domestic violence protection order, and no less than thirty (30) days in all other cases.

(b) If a person convicted of a crime involving domestic violence is found to have violated his or her judgment, sentence, or orders of release for such crime, to have failed to follow the batterer's or domestic violence perpetrator's treatment recommendations or failed to complete such treatment, upon each such finding, the Court shall impose a sentence of no less than fifteen (15) days on persons with no prior convictions for crimes involving domestic violence and no less than thirty (30) days on persons with prior

convictions for crimes involving domestic violence.

(c) Any sentence imposed under the above sections shall not be served concurrently with any other sentence.

(d) The Court shall impose traditional cultural disposition as provided under section 5-5-57.

5-5-56 Enhancement of Penalty for Second or Subsequent Crime Involving Domestic Violence

(a) When a defendant makes a judicial admission, pleads guilty to, or has been found guilty of a second or subsequent crime involving domestic violence within ten (10) years of disposition, sentencing, or dismissal of the prior case involving domestic violence, the sentence to be served and paid shall be greater than previously served and paid.

(b) This section shall apply to any offense committed after the enactment of this section, but any conviction of a crime involving domestic violence committed before enactment of this section may be considered in determining whether the sentence should be enhanced as provided in this section.

(c) The Court shall impose traditional cultural disposition as provided under section 5-5-57.

5-5-57 Traditional Cultural Disposition

The purpose of this section is to revitalize and use tribal culture and tradition when dealing with domestic violence.

(a) In addition to the other civil and criminal penalties imposed under this Chapter, the Court shall impose traditional forms of disposition that are culturally appropriate and relevant. In making this determination, the Court shall consider the needs of and harm to the victim(s) and the community, the resources of the perpetrator, and any prior similar offenses of the perpetrator. In all cases, the harm to the community shall be addressed.

(b) Examples of traditional forms of disposition include but are not limited to: exclusion, various forms of shaming, compensation through providing for material or subsistence needs, assuming relevant responsibilities for the victim or the community, or other culturally relevant reparations.

(c) Any disposition ordered under this section shall not diminish any penalty imposed under this Chapter, and shall be used in both criminal sentencing and civil proceedings.

5-5-58 Reduction in Sentence for Good Time Prohibited

A reduction in sentence for good time served is expressly prohibited.

5-5-59 Liability of Tribal Court Staff

No Judge, Court Administrator, or Court Clerk shall be held liable in any civil action for any action or omission made in good faith under this Chapter arising from an incident of alleged domestic violence.

5-5-60 Stays

The trial court shall have discretion in determining whether to grant a stay of any or all provisions of its orders under this chapter pending the outcome of an appeal (of such orders) with the exception that provisions aimed at protecting victims shall not be stayed. The trial court shall provide written findings and conclusions in support of its decision on granting or denying a request for a stay.

5-5-61 Filing Fees Not Required in Cases Involving Domestic Violence

Filing fees shall not be required in any cases, whether civil or criminal, involving domestic violence.

SPECIAL RULES OF COURT AND LAW APPLICABLE IN DOMESTIC VIOLENCE CASES

5-5-70 Expedited Service of Process in Cases Involving Domestic Violence

In any case where a perpetrator of alleged domestic violence cannot personally be served any type of notice required by this Chapter, and service of process must be effected by mail or posting, service shall be complete:

(a) Upon delivery of the mail, for any form of mail requiring a return receipt signed by the addressee, unless returned by postal authorities because of the addressee's refusal to accept, in which case service is complete fourteen (14) days after mailing notice to the same address by first class mail.

(b) Posting in domestic violence cases shall mean placing a copy of the order or petition in the four (4) community centers in each district and in the Colville Tribal Administration building.

5-5-71 Secure Waiting Area

Whenever practical, the Court shall provide a secure waiting area during court proceedings for a victim and family or household members or witnesses that does not require them to be in close proximity to defendants and families or friends of defendants.

5-5-72 Mediation in Cases Involving Domestic Violence

In any proceeding concerning the custody of, or visitation with a child, the court shall not order mediation or refer either party to mediation if an order of protection is in effect unless:

(a) Mediation is requested by the victim of the alleged domestic violence;

(b) Mediation is provided by a certified mediator, who is trained in domestic violence in a specialized manner intended to protect the safety of victims; and

(c) The victim is permitted to have a supporting person of his or her choice, including but not limited to an attorney or advocate, in attendance at the mediation.

5-5-73 Self-Defense

Under this Chapter a defendant has the burden to prove self-defense by a preponderance of the evidence.

5-5-74 Spousal Privileges Not Applicable in Criminal Proceedings Involving Domestic Violence

The following evidentiary privileges do not apply in any criminal proceeding in which a spouse or other family or household member is the victim of domestic violence perpetrated by the other spouse:

(a) The privilege of confidential communication between spouses.

(b) The privilege to not testify against a spouse.

5-5-75 Advocate—Victim Privilege Applicable in Cases Involving Domestic Violence—Circumstances Where Privilege not Available

(a) A victim of a crime involving domestic violence may refuse to disclose, and may prevent an advocate from disclosing, confidential oral communications between the victim and the advocate, and written records and reports concerning the victim when:

(1) The victim claims the advocate-victim privilege.

(2) The person who was the advocate at the time of the confidential communication claims the advocate-victim privilege.

The privilege extends to all oral and written communications between and by either the advocate or the victim, and encompasses all communications made in the course of the advocacy relationship, including those made in the presence of third parties also participating in the advocacy or other victim services.

(b) An advocate may not claim the privilege if the privilege has been waived by the victim, or if the victim

is deceased.

(c) The advocate-victim privilege does not relieve a person from any mandatory duty imposed by federal or tribal law to report child abuse. A person may not claim the privilege when providing evidence in proceedings concerning child abuse.

5-5-76 Child Custody Proceedings—Presumptions

(a) In every proceeding where custody of a child is in dispute, a determination by the Court that domestic violence has occurred raises a rebuttable presumption that it is detrimental to, and not in the best interest of, the child to be placed in sole custody, joint legal custody or joint physical custody with the perpetrator of domestic violence.

(b) In every proceeding where custody of a child is in dispute, a determination by the Court that domestic violence has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic violence, in the location of that parent's choice.

5-5-77 Child Custody and Visitation Proceedings—Factors in Determining Custody and Visitation

(a) In all proceedings where the Court or trier of fact has found a crime involving domestic violence to have occurred, the safety and well-being of the child and of the parent who is the victim of domestic violence is the primary consideration in determining custody and visitation. The Court shall also consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury or assault to any other person.

(b) If a parent is absent or relocates because of an act of domestic violence by the other parent, the absence or relocation shall not be a factor that weighs against the parent in determining custody or visitation.

5-5-78 Conditions of Custody or Visitation in Cases Involving Domestic Violence

(a) The Court may award visitation by a parent who committed a crime involving domestic violence only if:

(1) The Court finds that adequate provision for the safety of the child and the parent who is a victim of a crime involving domestic violence can be made;

(2) The perpetrator of a crime involving domestic violence is to attend and comply with, to the satisfaction of the Court, and as a condition of the visitation, a program of counseling for perpetrators of a crime involving domestic violence, or some other designated counseling; and

(3) Perpetrators cannot be under the influence of alcohol or drugs when they pickup the child or during any visit.

(b) In a visitation order, adequate provision for the safety of the child and the parent who is a victim of a crime involving domestic violence may include, but is not limited, to an order that:

(1) Exchange of a child is to occur in a protected setting;

(2) Visitation is to be supervised by another person or agency;

(3) The perpetrator of a crime involving domestic violence is to pay a fee to defray the costs of supervised visitation;

(4) Overnight visitation is prohibited;

(5) The perpetrator of a crime involving domestic violence is to post bond for the return and safety of the child; or

(6) The perpetrator of a crime involving domestic violence is to comply with any other condition

that is deemed necessary to provide for the safety of the child, the victim of domestic violence, or any other family or household member.

(c) Whether or not visitation is allowed, the Court may order the address of the child and the victim to be kept confidential.

(d) As a condition of receiving custody or visitation of the child, the Court may order an adult who is a victim of a crime involving domestic violence to attend counseling only when there is evidence brought before the court that the victim is living with or involved with another perpetrator of a crime involving domestic violence with whom it can reasonably be concluded that the child would be in regular contact. The Court shall not order the victim to attend counseling with any of his or her perpetrators.

(e) If the Court allows a family or household member to supervise visitation, the Court shall furnish clear guidelines to those persons regarding their responsibility and authority during supervision, so they are better able to protect the child and adult victim should the perpetrator engage in violent or intimidating conduct toward the child or adult victim in the course of visitation.

5-5-79 Change of Circumstances

After the entry of an initial custody or visitation order, a finding of domestic violence always constitutes a finding of changed circumstances in any proceeding to modify custody or visitation of a child.

5-5-80 Victims Statement

Victims statements shall be admissible as probative evidence. The trier of fact may assign whatever weight to the statement it deems appropriate.

HEALTH, SOCIAL AND ADVOCATE SERVICES RESPONSE AND DUTIES

5-5-90 Notice of Rights of Victims and Remedies and Services Available—Required Information to be Provided by Health Service Providers

(a) The Colville Tribal Health and Indian Health Service shall make available to their staff, and to all patients, a written notice of the rights of victims and of the remedies and services available to victims of domestic violence, as they are set forth in section 5-5-10(b).

(b) Any health care practitioner, who becomes aware that a patient is a victim of domestic violence, shall provide the patient with the notice in section 5-5-10(b).

(c) Written notice provided by the Colville Tribal Health and Indian Health Service, their staff or any health care practitioner, for general distribution to the public shall not include the addresses of shelters, unless the location is public knowledge.

5-5-91 Colville Tribal Health and Indian Health Service Required to Provide Certain Information to Parents—Purpose

(a) The purpose of this section, as a first step in the process of providing essential safeguards and services for families, is to avert the trauma of domestic violence and child abuse in families, by informing parents, particularly of new or young families, about domestic violence, and about the community and health care systems which are available for support and assistance.

(b) The Colville Tribal Health and Indian Health Services shall provide information concerning domestic violence to parents of both newborn infants and hospitalized minors. The information must include but is not limited to the effect of domestic violence on children, and available services for the prevention and treatment of domestic violence.

5-5-92 Child Abuse Investigatory Services Response and Duties

(a) Any person or entity performing child abuse investigatory services within the Confederated Tribes of the Colville Reservation shall follow written procedures for screening each referral for abuse or neglect of a

child to assess whether abuse or neglect of another family or household member is also occurring. The assessment shall include but is not limited to:

(1) Inquiry concerning incidents of violence in the criminal record of the parents, and the alleged abusive or neglectful person, and the alleged perpetrator of domestic violence, if such person is not a parent of the child; and

(2) Inquiry concerning the existence of orders for protection issued to either parent or any other family or household member.

(b) If it is determined in an investigation of abuse or neglect of a child that the child or another family or household member has been or is a victim of domestic violence or is threatened by acts of domestic violence, and it reasonably appears to the person conducting the investigation that the child or another family or household member is in danger of domestic violence and that removal of one of the persons is necessary to prevent the abuse or neglect of the child, the responsible person or entity, shall seek the removal of the alleged perpetrator.

(c) If a parent of the child has been a victim of domestic violence, appropriate services must be offered to the victimized parent.

5-5-93 Advocates—Present during Prosecutorial or Defense Interviews

If requested by the victim, and if practical and if the presence of the advocate does not cause any unnecessary delay in the investigation or prosecution of the case, an advocate from a local program shall be present at any prosecutorial or defense interviews with the victim, and at any judicial proceeding related to criminal acts committed against the victim.

5-5-94 Liability of Health, Social, and Advocate Services Staff

Any health, social and advocate services staff shall not be held liable in any civil action for any action or omission made in good faith under this Chapter arising from an incident of alleged domestic violence.

ENFORCEMENT OF FOREIGN ORDERS

5-5-100 Purpose of the Enforcement of Foreign Orders

The purpose of this Chapter is to insure compliance with the Full Faith and Credit provision of the Violence Against Women Act of 1994 (V.A.W.A.) as set forth in Title 18 of the United States Code, section 2265 (18 U.S.C. § 2265), as now or hereafter amended, and to insure the safety of victims of domestic violence who are located within the jurisdiction of the Confederated Tribes of the Colville Reservation, by giving effect to Orders of Protection which fall within the scope of that Act.

5-5-101 Full Faith and Credit for Foreign Orders of Protection—Definition—Review by Tribal Court—Exceptions

(a) For purposes of this chapter, an “order of protection” means any injunction or other order issued for the purpose of preventing violent or threatening acts, harassment against, stalking, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and criminal courts (other than support or child custody orders), however obtained, so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

(b) Any order of protection, except as noted in (c) below, issued by a court of any Indian tribe or State of the United States, the District of Columbia, a commonwealth, territory or possession of the United States, or Canadian or First Nations Court shall be accorded full faith and credit by the Court, and shall be enforced as if it were an order of the Court, if both:

(1) The issuing court had jurisdiction over the parties and the matter at the time the order was issued; and

(2) The issuing court gave reasonable notice and an opportunity to be heard to the person the order is issued against, sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard were given within a reasonable time after the order is issued.

(c) A foreign order of protection entered against both a petitioner and a respondent shall not be enforceable against the petitioner unless both:

(1) The respondent filed a cross or counter claim seeking such a protection order; and

(2) The issuing court made specific findings of domestic violence or a crime involving domestic violence against both the petitioner and respondent and determined that each party was entitled to such an order.

5-5-102 Filing Foreign Orders of Protection—Presumption of Validity—Procedures

(a) A victim who obtains a valid order of protection from another Indian tribe or State of the United States, the District of Columbia, a commonwealth, territory or possession of the United States or Canadian or First Nations Court may file that order by presenting a certified copy of the foreign order of protection to a clerk of the Court and request that the Court grant full faith and credit to that protection order.

(b) There shall be a presumption in favor of validity where a foreign order of protection appears authentic on its face.

(c) Filing of a foreign order of protection shall be without fee or cost.

(d) Upon receipt of a foreign order of protection, the tribal court clerk shall:

(1) Immediately file such protection order and upon such filing, forward it to a judge, who shall review such filing and if it appears from the face of the protection order to meet the requirements of subsection 5-5-101(b) shall enter an order recognizing the protection order. Said order shall immediately be forwarded to an officer of the Colville Tribal Police Department;

(2) Provide the petitioner with a document bearing proof of filing with the court; and

(3) Inform the petitioner of the process for Court review of a foreign order of protection, and take steps to expedite review when the petitioner perceives a risk of further harm.

5-5-103 Enforcement of Foreign Protection Orders by Law Enforcement

If a law enforcement officer is presented with a foreign protection order, which appears valid on its face, the officer shall enforce such order as if it had been entered by the Court.

5-5-104 No Prior Filing as Prerequisite for Enforcement

As a prerequisite to according full faith and credit to a foreign protection order, the Court may not require that the order be filed in Court and will grant full faith and credit without such filing.

5-5-105 Immunity for Good Faith Enforcement of Foreign Protection Orders

Any law enforcement official of the Colville Tribes who acts in good faith in enforcing a foreign protection order and its terms shall be immune from suit for wrongful arrest or any other civil or criminal action. This immunity shall extend to a tribal officer who effects the arrest of a non-Indian for violation of a protection order.

5-5-106 Tribal Court May Enter Into Full Faith and Credit Agreements

Nothing in this Chapter shall prevent the Court from entering into agreements, or establishing procedures by which orders of protection may be filed with the Court and be entitled to full faith and credit.

5-5-110

Severability

If any provision of this Chapter or its application to any person or circumstance is held to be invalid, the remainder of this Chapter or the application of the provision to other persons or circumstances shall not be affected.

(Chapter 5-5 Adopted 6/3/04, Resolution 2004-385)

LEGISLATIVE HISTORY

Mandatory Arrest:

The provision requiring arrest is included at the express instruction of the Colville Business Council. This provision was specifically identified and discussed with the community at the May 28 and 29, 2003 conference in Keller, to which everyone in the community was invited and at which the code drafters presented the draft domestic violence code. The clear consensus of those in attendance was in support of this provision. Policy makers, law enforcement, prosecutors, defense attorneys, domestic violence advocates, perpetrator treatment providers, Indians, non-Indians, all have endorsed this provision.

In addition to the purposes stated within the code itself, the purpose of requiring arrest is to eliminate the responding officer's discretion and ensure that the alleged perpetrator is removed from the scene to allow a cooling off period. The subsection prohibiting release prior to arraignment is intended to guarantee a period of separation between the alleged perpetrator and victim. While there is some concern that this provision may be misused, criminal sanctions for false arrest (CTC 3-1-127) can and shall be used to discourage such misuse. The benefit of ensuring the alleged victim's safety outweighs the potential harm that may come from a false arrest. As this requirement is similar to other jurisdictions requirements, this provision will lead to similar treatment of Indians and non-Indians; this however is not the primary reason for enacting this provision and the elimination of such a requirement by another jurisdiction shall not be construed to affect Colville Tribal law.

Problems with Victims Testifying:

Several evidentiary problems commonly arise in criminal cases involving allegations of domestic violence. Domestic violence victims are most vulnerable to an assault when they attempt to leave or sever the relationship with the defendant. Evidentiary issues are often complicated by the fact that the victim is particularly vulnerable at this stage, and thus may be reluctant to testify or may even refuse to do so. The victim often has learned that the perpetrator will follow through with threats of retaliation for the victim's efforts to leave or seek help from the justice system. The victim may also believe from experience that the intervention of the criminal justice system will not be effective in protecting the victim, the children, or the victim's family.

Victims of all types of violent crime may be reluctant to testify against the assailant due to a number of factors. These can include fear of retaliation by the defendant; unwillingness to face the assailant again in the courtroom; a feeling of shame or guilt; fear of economic loss or emotional abandonment if the defendant is jailed or removed from the household; belief their behavior in some way caused the attack; a desire to put the whole incident behind them; and denial, ambivalence, withdrawal, and emotional swings which are the result of being a victim of severe trauma. Of course, as with any crime, victims also may make accusations they cannot later support under oath. When the reasons are based in fear or guilt, they often can be heightened for victims of domestic violence by the fact that the defendant may be living with the victim, be familiar with his/her daily routine, and have ongoing access to the victim. In addition, the victim and the defendant may have children together. Since domestic violence may not always be considered by civil courts in determining child visitation and custody, the perpetrator may have continued access to the victim through arrangements for child visitation.

It is important for those working in the criminal justice system to distinguish between victims who are reluctant to testify and those who refuse to testify. Some victims who are initially reluctant to testify will agree to do so if provided with adequate support during the criminal justice process. The court must always remain impartial and must not attempt to coax testimony from a witness who does not wish to provide testimony. On the other hand, when the court has reason to believe that the witness' reluctance to testify

arises from fear or coercion, the court may act to protect the administration of justice against improper influences. Thus the court can decrease the victim's reluctance to testify by protecting the victim through appropriate court orders, providing the victim with support through victim advocacy services, providing accurate information regarding the criminal court process, and otherwise preventing the perpetrator from using further illegal means to continue the pattern of coercive control of the victim.

Even with the efforts that can be made to encourage victims to testify, we have found that victims continue to be reluctant and unwilling to testify against alleged perpetrators in Tribal Court cases involving domestic violence. To address this, the CBC decided that the evidentiary standards should be adjusted to increase the likelihood that charges will be brought and evidence introduced in cases involving domestic violence. The weight to be assigned this evidence remains with the finder of fact; evidence however, must not be excluded simply because it may be hearsay.

Ex Parte Emergency Orders of Protection:

In allowing for ex parte orders, the intent is not to deprive defendants or respondents of due process. The intent is that the court only issue such an order if it clearly appears from specific, credible facts (referred to in the law as "competent testimony") that immediate and irreparable injury, loss or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a protection order can be issued. To emphasize the point, the intent of the law is to require the court to ensure there is reasonable cause to believe that the individual to be restrained or enjoined may commit one or more of certain violent or harassing acts and that the danger is imminent and that the delay required to notify the respondent or defendant would itself be dangerous. The law provides for an ex parte order based solely upon such exigent circumstances and provides for notice and an opportunity to be heard after an ex parte order is issued. Specific provisions guarantee that a subsequent hearing will be held within three days after entry of the emergency order, that law enforcement officers provide expedited service for such orders and that a respondent or defendant has a right to petition the court to rescind or modify the order.

While an emergency protection order is effective at the time it is signed by a judge, if an individual restrained or enjoined by an ex parte order has not received notice of the order, he or she must be given an opportunity to comply with the order before a law enforcement officer may make a custodial arrest for violation of the order. A person shall not be penalized for inadvertent violation of an ex parte order.

It is expected that the judge will make inquiries to clarify facts and test credibility at an ex parte hearing. To ensure due process, the notice provided should reflect the facts upon which the ex parte order is issued. This is particularly important where the judge has inquired of the petitioner and received facts which were not included in the original petition and which served as the basis for the court's preliminary finding.

These provisions are consistent with the Colville Confederated Tribes' guarantee of due process in criminal and civil proceedings.

Civil Jurisdiction over Non-members:

Domestic relationships are essential to the life of our community. Our culture, our values, our way of living both in private and in public, are perpetuated through these relationships.

The Colville Confederated Tribes values diversity and relationships with people who are not members of the Tribes. The Tribes has a responsibility to respect and protect all domestic relationships that sustain the strength and viability of our community and government. Similarly, the Tribes has the responsibility to address behaviors that harm the health and well-being of our community. All domestic relationships involving tribal members affect the health and well-being of the community and government. The Tribes has the power to protect the community by regulating these relationships. From marriage to dissolution, from adoption to abandonment, individuals, regardless of their political affiliation, are able to use and are subject to the Tribes' domestic relations laws. The Tribes exercises its jurisdiction in these ways to promote the health and welfare of the community and to protect the political integrity of the government. It is the Tribes' intent that its laws be interpreted and applied as broadly as possible to achieve these ends under this Chapter. Regardless of whether discrete events occur on trust or fee land, domestic violence

causes harm to the community and impacts the government.

Law enforcement has historically been sparse at best on the reservation. Current law has resulted in gaps in the enforcement of the laws that are designed to protect the interests of the community, families and individuals involved in domestic relationships. In addition, the reservation has unfortunately become a haven for people taking advantage of these gaps in enforcement because of jurisdictional ambiguity. The provisions of Chapter 5-5 are intended to eliminate or bridge these gaps with the Tribes' exercise of its civil jurisdiction over all people engaging in these relationships. It is our understanding that this use of jurisdiction is also consistent with the spirit and letter of the Violence Against Women Act, which has similar purposes of ensuring that perpetrators of domestic violence not be allowed to avoid legal sanction because of jurisdictional gaps and of providing victims of domestic violence with more assurances of safety if they choose to go to another jurisdiction.

In enacting this Chapter, the CBC has taken care to ensure that the law applies evenly to both Indians and non-Indians who choose to interact in or be a part of the community.

Self-defense Provision:

In giving direction for the drafting of this chapter, the Colville Business Council made the deliberate choice to favor prosecution of crimes involving domestic violence. This choice was intended as a clear statement that this harmful behavior is not to be condoned nor tolerated and rather, shall receive a strong and certain response by the Tribes' law enforcement and justice system.

Consistent with its decision to favor prosecution, when considering claims of self-defense, the CBC carefully examined existing Colville Tribal case law and decided that a departure from prior precedent was warranted in cases involving domestic violence. The self-defense provision in this chapter has been discussed at great length within the Tribes' law enforcement and justice community as well as with the community as a whole at the 2003 Juvenile Task Force Workshop in Keller. With due deliberation and care, the CBC has decided to place the burden of proving self-defense on the defendant accused of a crime involving domestic violence. The fact that this may be contrary to other jurisdictions' allocation of the burden has been weighed in the deliberations.

At the time this chapter was drafted, Colville case law placed the burden on the Tribes (the prosecutor) to prove the absence of self-defense beyond a reasonable doubt once the defendant introduced evidence in support of self-defense. Under this chapter, the burden never shifts from defendant to prosecutor. In cases where the defendant is accused of a crime involving domestic violence and self-defense is claimed, the defendant has the burden of proving by a preponderance of the evidence that he or she was acting in self-defense. To protect against unjust results, the evidentiary threshold was lowered from beyond a reasonable doubt to a preponderance of the evidence. It should be noted that the underlying principle remains the same as always: "The law of self-defense justifies an act done in the reasonable belief of immediate danger, and if an injury was done by a defendant in justifiable self-defense, he can never be punished criminally...". Louie v. Colville Confederated Tribes, 2 CCAR 47 (1994).

As in all cases, there are valid concerns that a defendant may be wrongly accused. However, the rule of evidence in Tribal Court should allow all defendants to present all relevant evidence available in support of self-defense. Evidence of past violence by the alleged victim would clearly be admissible to support a claim of self-defense. That a defendant may choose to testify in support of the claim of self-defense does not amount to compelling the defendant to testify against himself or herself. Such testimony is not testimony against the defendant, nor would any testimony elicited in cross-examination necessarily be.

Traditional Cultural Disposition:

The Traditional Cultural Disposition provisions of this code are included to address an ongoing governmental- and community-wide concern that there is too little reinforcement of culture within the current Tribal infrastructure. In the hopes of assisting in the development and reinforcement of cultural competence and traditional values within our communities, this provision has been added as a mandatory component of the reparation process for crimes involving domestic violence. Along with the examples

listed explicitly in the code, the assumption is that some form of input from the community, elders, Tribal cultural resource management or other programs and the families of the affected will be sought when practicable so as to address the specific needs of the victim(s) and also develop skills and a sense of community responsibility within the offender(s).

Penalties and the Problem Presented by the Federal Indian Civil Rights Act:

The Federal Indian Civil Rights Act prohibits federally recognized tribes from sentencing people who have committed crimes on the reservation to more than one year in jail. This prohibition is an infringement on the Tribes right to make its own laws and be bound by them. In drafting this new Domestic and Family Violence Code the drafters struggled with the limitations this restriction placed on them. A strong message needed to be sent to perpetrators that domestic violence is not acceptable. However, the crimes associated with domestic violence, including such heinous crimes as murder, rape, etc. were limited to a one year sentence. In light of this limitation, the drafters promulgated provisions for traditional cultural disposition and penalty provisions for violations of court orders to show that domestic violence will not be tolerated.

Dominant Aggressor:

Domestic violence is comprised of a complex and often dangerous pattern of ongoing behavior that one person in an intimate relationship uses to dominate and control their partner. In addition to illegal violence and threats, domestic violence perpetrators use a variety of non-criminal forms of abuse against their victims, including social isolation, control of finances, constant criticism, degradation, humiliation and many other tactics. The perpetrator is a master manipulator, and can manipulate the victim in many different ways – even into committing domestic violence themselves. The problem of how to deal with victim-defendants is an emerging area of concern for a system that is trying to protect and serve these same individuals.

When a domestic violence victim has been accused of committing a crime involving domestic violence, it is important to investigate and record the larger context in which this crime has occurred. Thus, careful record keeping and investigation is needed to document the history of the relationship between the perpetrator and victim and whether the perpetrator has victimized other people. This history is necessary to determine who the actual dominant aggressor is which will further enable: 1) law enforcement officers to arrest the actual dominant aggressor; 2) prosecutors to more appropriately assess whether to seek the domestic violence enhancement under this Chapter; 3) service providers to determine what services may be necessary to assist the victim-defendant and 4) public defenders to establish any appropriate defenses for clients who were once victims of domestic violence and who have now become a perpetrator.

Colville Tribal Due Process:

The Colville Tribes is a distinct cultural and political governmental entity. Its power to govern arises from inherent sovereignty, which predates the formation of the United States and its Constitution. Inherently included in this cultural and political autonomy is the power to interpret, apply, and enforce individual tribal court litigants' civil rights against the actions of the tribal government.

Applicable tribal and federal laws guarantee to tribal court litigants due process and support the tribal government's sovereign authority to make its own laws and govern its affairs consistent with cultural autonomy. Tribal due process guarantees personal rights to fundamental fairness while preserving the health and welfare of the community. Fundamental fairness includes notice and opportunity to be heard. Any applicable tribal constitutional, statutory, court precedent, and traditional and cultural standards govern in cases before the tribal court.

The origins of non-Indian notions of due process markedly differ from tribal law. The colonists had been accustomed to oligarchies, unrepresentative governments that were run by a choice few. The drafters of the U.S. Bill of Rights were gravely concerned with protecting the individual's liberty interests against unjust governmental action.

In stark contrast to that history, tribal due process has its foundations in a culture that values leadership by free choice and individual freedom. At the same time, it also values contributing to the well-being of the whole community over individual gain. Traditionally, all sides in a dispute had a full opportunity to be

heard before resolving a matter. The tribal system worked and it was fundamentally fair.

The current tribal system, modified greatly by federal governmental actions, continues to employ tribal due process, as interpreted, applied, and enforced by the tribal court under tribal standards of fundamental fairness.

(Legislative History Enacted 3/3/05, Resolution 2005-128)
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