Analysis of Proposed Changes in SB 5205

I. Executive Summary

The proposed changes to SB 5205 do far more than merely "clean-up" the existing statute. In fact, SB 5205 contains many substantive changes that risk placing children in the custody of unsafe and abusive parents, undermining our Legislature's ongoing efforts to enact greater protections for survivors of domestic violence, inclusive of the recent addition of Coercive Control to the definition of Domestic Violence.

Overall, SB 5205 removes language that requires a judge to protect victims and their children and replaces it with discretionary language. Where the existing statute contains language that requires a judge to protect the victim, the bill often replaces it with discretionary language – and everywhere it allows discretion for a judge to create a safer parenting plan, it requires more lenient limitations.

It does so while leveling the field for mandatory and discretionary findings. It allows the court to give abusers more control in decision-making, lightens the burden of proof required for sexual predators to have visitation with victim children, creates a pathway for physical, sexual, and emotional abusers to have nonprofessional visitation, removes valuable references to other protective statutes, disadvantaging pro se survivor parents, among other substantive changes as detailed below.

The bill's effect of elevating discretionary findings to the level of mandatory ones is arguably the most concerning change to the existing statute and presents the greatest risk to children and survivor parents. The reorganization of the existing statute strongly suggests that a judge can treat "discretionary findings" like mental health as seriously as they can treat "mandatory" findings like domestic violence. It does this by lumping mandatory and discretionary factors in one section and then providing the judge with the same set of limitations it can apply to either or both set of findings. In contrast, the existing statue separates mandatory factors from discretionary ones by an entire section. For discretionary factors like mental health, the existing statute does not suggest limitations a court may impose, while the bill expressly allows a judge to consider No Contact and Completion of a court-ordered Evaluation or Treatment as limitations it can apply for findings like mental health and "abusive use of conflict." While court orders to place children in the care of an abuser based on findings of a protective parent's mental health or "abusive use of conflict" remains a very real problem in our family court systems today, this bill tips the scale against survivors of domestic violence by an even wider margin by its language that further assists the probability of that dangerous outcome.

This effect is exacerbated by the changes addressed herein and is further by the introduction of the bill's new Subsection (6) – Weighing Limitations. This section does not require a judge to consider mandatory findings like domestic violence more seriously than the findings a judge makes for mental health or physical impairment, findings often found against a protective, non-abuser parent based on allegations of abusers made in their attempt to distract and confuse the court away from their abusive history and behavior. The bill only requires that a judge consider whether one parent caused or contributed to the factors requiring limitations. This language is additionally problematic because it invites the abuser to argue that he/she/they are the victim.

This bill transforms areas of the existing law that are safe harbors for victims, usually stay-at-home mothers, and gives more power to the party with more money, usually the abuser, to maintain control over their victims. To add to the list of concerns, the procedural history of this bill presents a red flag – this bill

attempts to weaken protections for domestic violence survivors and their children, yet its intent and changes have not been well tracked or presented at the Legislature or to the public, and no members or organizations from the domestic violence advocacy community have been invited to provide input or support on substitute bill 5205.

The analysis presented below shows how SB 5205 risks placing more children with unsafe and abusive parents and can be anticipated to cause further harm and abuse for survivors. For these reasons, we are strongly opposed to SB 5205 and request our Legislature oppose the same.

II. Analysis

1. SB 5205 Broadens Court's Discretion to Apply Limitations on Residential Time and Decision-Making Including Supervised Visitation, Evaluation and Treatment, and No Contact for Discretionary Findings.

Existing section **(2)(m)(i)** provides the court with discretion to apply limitations to findings under (2)(a) and (2)(b), **mandatory factors**:

- (a) (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iv) the parent has been convicted as an adult of a sex offense under:
- (b)… if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in RCW 7.105.010 or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

The statute also provides that limitations the court may impose include, but are not limited to:

- Supervised contact between the child and the parent or completion of relevant counseling or treatment, and
- No contact: if the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child form the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

The above limitations language comes immediately before section (3), **discretionary** factors[1] for which a court may preclude or limit any provisions of a parenting plan. This section unambiguously relates to **mandatory** findings under sections (2)(a) and (b).

[1] Neglect or substantial nonperformance; Long term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004; A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions; The absence or substantial impairment of emotional ties between the parent and the child; The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.

The proposed changes in SB 5205 makes Limitations (1)(d) appliable for both conduct for which a court **shall** limit residential time and conduct for which a court **may** limit residential time[2]. In other words, it lumps all findings for mandatory and discretionary limitations into the same section 1, and provides the court to impose the following restrictions for either or both:

- (d)(i) **Supervised Visitation**
    - New presumption that visitation will be professionally supervised;
    - Prohibits court approval of nonprofessional supervisor for contact between a child and a parent who has engaged in physical, sexual, or a pattern of emotional abuse **unless** a court finds, based upon the evidence, that the supervisor acknowledges that harmful conduct occurred and is willing and capable of protecting a child from harm. This may be accomplished by requiring an oath of supervisor attesting to:
        - The supervisor's acknowledgement of the harmful conduct;
        - Willingness to protect a child; and
        - Willingness to enforce any limitations contained in the parenting plan.
- (d)(ii) **Evaluation or Treatment.**
    - The court has the discretion (may)to order a parent to undergo evaluations for such issues as substance abuse, mental health, anger management, or domestic violence perpetration *with collateral input from the other parent.*
    - The court also has the discretion to require that a parent complete treatment for these issues *if* the need for treatment is supported by the evidence and the evidence supports a finding that the issue interferes with parenting functions.
    - The court also has the discretion to condition a parent's residential time and decision-making on completion of court-ordered evaluation or treatment.
- (d)(iii) **No Contact.** If based on evidence the court expressly finds that limitations on residential time will not adequately protect a child from the harm or abuse that could result if a child has contact with the parent requesting residential time, the court is required to restrain the parent requesting residential time from all contact with the child.

Regarding limitations, the existing statute explicitly relates limitations to sections (a) and (b), the conduct or factors for which a court *shall* apply restrictions on residential time. Section (m)(i) provides the following:

- **Supervised Visitation**. The limitations the court may impose include: supervised contact between the child and the parent, or…;
- **Evaluation or Treatment**. …completion of relevant counseling or treatment.
- **No Contact**.

While the existing statute *does* implicitly authorize a court to apply limitations under section (3) discretionary findings, the statute does not articulate what those limitations may be, does not mention supervised visitation as a reasonable limitation for section (3)(a-g) (section (c)(i-vii) factors in SB 5205), does not directly relate court-ordered evaluation or treatment to those discretionary factors, and does not mention No Contact as a requirement if those limitations fail to adequately protect a child from harm or

[2] **Conduct requiring limitations**: willful abandonment, physical abuse and a pattern of emotional abuse, a history of acts of domestic violence or an assault or sexual assault that causes grievous bodily harm or the fear of such harm **with conduct that might support limitations.**

abuse that might result from contact with a parent that is found to have any of the discretionary (3)(a)-(g) factors.

Rather, the existing RCW prefaces the discretionary factors and conduct section (3)(a-g) with the following: "[a]parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist[.]"

In contrast, SB 5205 authorizes a court to impose specific limitations for both mandatory and discretionary findings, effectively conflating discretionary factors with mandatory ones, and directing the court to use its broad discretion to impose the same limitations for discretionary findings as it would for mandatory ones. The statute does seem to consider the implications of its intent to broaden the court's discretion by its inclusion of new section (6), addressed below.

2. **SB 5205 Gives the Court the Discretion to Weigh Limitations – As If Equal - Against Both Parents.**

New Section (6) requires a court to make findings regarding the comparative risk of harm to the child posed by each parent, requires the court to explain the limitations imposed on each parent, including decisions to not impose and award time or decision-making limitations to a parent subject to mandatory or discretionary limitations. Further, this section directs the court to consider "whether one parent caused or contributed to the basis for the other parent's conduct that is the basis for the restrictions."

While the language of the statute does require a court to make and explain its findings for discretionary and nondiscretionary limitations and requires the court to explain its decision, the language does not require the court to give more weight to mandatory findings when balanced against discretionary findings. This could mean that a non-abuser's mental health issue can be determined to pose more of a risk to a child than the other parent's actual domestic violence, especially given that the bill provides even more discretion to the court to weigh the existence of a protection order by separating that discretionary language relating to previous findings of domestic violence into a new subsection.

The language does require the court to consider whether the mandatory or discretionary finding for limitations against one parent was caused or contributed to by the other. This language invites the abuser to argue the victim.

3. **SB 5205 Creates a New Pathway for Physical, Sexual, and Emotional Abusers to Have Visitation Without Professional Supervision.**

While SB 5205 creates a presumption for supervised visitation for parents with mandatory findings and required limitations, it allows for an abuser parent to argue for a biased supervisor (family, friend) to supervise visitation provided they take an oath.

The existing statute does not so expressly distinguish between lay and professional supervisors. Currently, a judge may order professional or non-professional supervisors and has the discretion to deny the use of non-professional supervisors.

Additionally, the presumption for professional supervision language does not appear in the sex offender section (2) of SB 5205. Instead, SB 5205 merely requires that visits between an sex offender parent and a child be supervised by a **neutral and independent adult**.

Also, SB 5205 authorizes a parent to supervise visits with a child when that parent resides with a sex offender.

In both circumstances, SB 5205 gives the judge the discretion to revoke its approval of that supervisor only *after harm has been caused to the child* or the supervisor provides that they are no longer willing or able to protect the child.

4. **SB 5205 Creates a Rebuttable Presumption for Sole-Decision Making When There is a Finding of Domestic Violence.**

SB 5205 Section 1(4)(b) states "[w]here there has been a finding of domestic violence, there is a **rebuttable presumption** that there will be sole decision making.

This is a departure from the existing RCW section (1) , which states: (1) The permanent parenting plan **shall not require mutual decision-making** or designation of a dispute resolution process other than court action if it is found that a parent has engaged in…:(c) a history of acts of domestic violence as defined in RCW 7.105.010 or an assault or sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy.

Further, the "rebuttable presumption" language for a "finding of domestic violence" appear to conflict with the language in the section immediately following, (3) Limitations on Decision Making and Dispute Resolution. In that section (3), the proposed statute states a requirement for the court to limit decision-making if a parent has (c) a history of acts of domestic violence as defined in RCW 7.105.010.

Because the statute uses the language "domestic violence" and provides a rebuttable presumption for a finding of "domestic violence", and then states that a court is required to limit decision making when there is a finding of a "history of domestic violence", SB 5205 seems to create a separate legal definition for domestic violence, i.e. domestic violence that is not a history of domestic violence and which a parent may rebut the decision-making limitation for under this statute, and a history of domestic violence for which the statute does not provide a rebuttable presumption.

5. **SB 5205 Confers Authority to the Court to Limit Residential Time and Decision-Making Pending Completion of a Court Ordered Evaluation or Treatment – Except for Sexual Abuse.**

Under the existing statute, courts have the authority to order evaluations and treatment; however, the existing statute neither requires nor suggests that time and decision-making can or must be made contingent upon the completion of treatment. The existing statute does not expressly authorize a judge to require treatment for mandatory or discretionary findings that are not sexual abuse.

Also, the evaluation and treatment language is not included or mentioned in the existing discretionary factors.

In contrast, SB 5205 evaluation and treatment language appears in the new lumped mandatory and discretionary factors section 1 and confers authority to the court to condition a parent's residential time and decision making on the completion of court ordered evaluation or treatment, Sec. 1(d)(ii).

Importantly, the language of SB 5205 does not require completion of treatment for sexual abusers, but does so for all other mandatory and discretionary findings:

Sex offender language**:** "…contact between the child and offending parent [of a sex offense] is appropriate and poses minimal risk to the child, and the…or are engaged in making progress in such treatment[.]"

All other limiting factor language: "[a] parent's residential time and decision-making may be conditioned on the parents completion of an evaluation or treatment ordered by the court [substance abuse, mental health, anger management, etc.] if the need for treatment is supported by the evidence and the evidence supports…"

6. SB 5205 Relates No Contact Limitation to Discretionary Findings.

Because SB 5205 combines mandatory and discretionary findings into one section, and includes limitations in subsection (d) of that section, of which No Contact is included as a limitation in subsection (d)(iii), the revised statute expressly authorizes a court to order No Contact for a discretionary finding if the court finds that "limitations on the residential time with a child will not adequately protect a child from the harm or abuse that could result if a child has contact with the parent requesting residential time[…]" Sec. 1(d)(iii).

7. SB 5202 Rewords Language for Abusive Use of Conflict.

The existing section 3(e) states:

- A parent has engaged in the abusive use of conflict, which creates the danger of serious damage to the child's psychological development.

SB 5205 states:

- The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.

The bill's change to the abusive use of conflict language suggests that a parent *has* abusive use of conflict as an immutable characteristic or trait, rather the existing language which suggest that abusive use of conflict by a parent refers to conduct of the parent which can be shown by evidence of that conduct to support the limitation.

The existing statute supports, for example, that a parent has at one point engaged in abusive use of conflict that creates a danger to the child but allows for that parent to argue that the conduct found did not *establish a pattern sufficient for a finding for limitations.* SB 5205 appears to extinguish that "lack of pattern" or "stale" challenge to a courts' or GAL's findings by its omission of the "has engaged" language.

8. SB 5205 Requires the Court to Make Express Written Findings for Its Decision Not to Limit Residential Time.

Section 1(4)(a) Determination Not To Impose Limitations mirrors the existing statute except that it requires a court to make **express written findings** and does not apply to findings of sexual abuse (because sexual abuse is governed by new section (2) of the proposed statute.)

9. SB 5205 Weakens a Victim's Ability to Use a Protection Order in Sexual Abuse Cases.

The existing statute does not allow the court discretion to consider the weight of a protection order when subsections (c) – (m)(ii)[3] apply:

[3] Subsections that relate to sex offenders.

"The weight given to the existence of a protection order issued under chapter 7.105 RCW or former chapter 26.50 RCW as to domestic violence is within the discretion of the court. This subsection shall not apply when (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m)(ii) of this subsection apply." RCW (n)(iv)

The underlined language above is removed from SB 5205, providing abusers with another opportunity to dispute findings of sexual abuse. Because courts currently rely on previous protection order as a way to avoid relitigating the merits of domestic violence within custody disputes, this language gives the judge the discretion to determine the merits of former findings of sexual abuse in custody cases.

10. SB 5205 Removes the Requirement of the Family Court Services Evaluation.

Sb 5205 removes the requirement for an investigation by Family Court Services when there is abuse of a child or a history of domestic violence.

Existing statute requires that "in cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties."

The Family Court Services Evaluation is the only report to a judge that is performed by a professional not chosen by the parents and is therefore the most neutral party to a case. All other professionals to a case – GAL, counselors, expert witnesses – are agreed to and paid for by the parents.

11. SB 5205 Reduces the Burden of Proof Required of Sexual Predators to Gain Contact with the Child

If child was victim of sex offense committed by parent, the **existing statute requires that**: (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child.

SB 5205 would now require that: A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has **provided documentation** that they have successfully completed treatment for sex offenders or are engaged in and making progress in such treatment, if any was ordered by a court.

The underlined language of the existing statute is removed and replaced with language that allows the abuser to provide documentation of completion of treatment. This removes the other parent's ability to refute that treatment has been successfully completed and provide other documentation or evidence, including witness testimony, that the abuser has not improved.

If child was not victim of sex offense by parent, SB 5205 again adds the language that allows the abuser to submit the documentation for completion of treatment, language that appears to close the door on the other parent's opportunity to refute the success of that treatment and offer witness testimony to show the same.

12. SB 5205 Removes References to Other Protective Areas of Law That Assist Pro Se Litigants, Including the Definition of "Parenting Functions" in Section 1 (2)(c)(ii) and the Rebuttable Presumption That is Not Applicable to Children Born of Sexual Assault.

Existing section (3)(b):

- A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions **as defined in RCW 26.09.004**[4].

SB 5205 Section 1 2(c)(ii):

- A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions.

Additionally, the current statue articulates that the presumption of no contact for sex offender parents may be rebutted "only after a written finding that the child was not conceived and subsequently born as a result of a sexual assault committed by the parent requesting residential time[.]"

SB 5205 omits that language.

III. Conclusion

Without any apparent attempt to remedy the ongoing problem of the misuse of our court systems by abusers SB 5205 presents an even greater risk of harm and abuse for survivors and their children if adopted, and undermines our Legislature's efforts to enact greater protections for survivors, inclusive of the 2022 Coercive Control law. Until it can more carefully analyzed, its unintended consequences thoughtfully explored, and more meaningful input and participation provided by stakeholders in the domestic violence community, we respectfully request that our Legislature join us in opposition to SB 5205.

[4] (2) "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:
(a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
(b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
(c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
(d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
(e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
(f) Providing for the financial support of the child.