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Domestic Violence [1]

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Folder Title	Domestic Violence	OA Number	8290	Box Number	
Description of Item(s)	Five (5) VHS tapes on domestic violence: Oprah Winfrey aircheck, 18 March 1996; Public Service Announcements "Stairs"; "It's Not Okay, Let's Talk About Domestic Violence"; American Bar Association "It's Not Ok"; and Disney/Domestic Violence				

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FIVE WAYS TO FIGHT DOMESTIC VIOLENCE

1) Know What Domestic Violence Is.
When spouses, intimate partners, or dates use physical violence, threats, emotional abuse, harrassment, or stalking to control the behavior of their partners, they are committing domestic violence.

2) Develop a Safety Plan.
If you, a relative, a friend, or a neighbor are experiencing domestic violence, think about ways to make yourself safer, including a safe place to go to once you leave your home.

3) Get Help Immediately.
If you are being battered -- or you know that a relative, friend, or neighbor is being battered by a spouse or intimate partner -- call the police or 911 right away for help, if you can safely get to a phone.

4) Exercise Your Legal Rights.
Anyone experiencing domestic violence in one of the fifty states, Puerto Rico, or the District of Columbia has the right to go to court and petition for an order of protection.

5) Get Help For Your Family So That The Violence Will Stop. Look in the phone book for the number of your state or local domestic violence coalition or crisis hotline to help find the resources needed to break free of domestic violence.

CURRENT PROJECTS:

- * **Multidisciplinary Blueprint** outlining model domestic violence programs throughout the country that participate in community coordinated efforts to eradicate domestic violence.
- * **Children's video** addressing the impact of domestic violence on children.
- * **Lawyer's Manual** providing information and tools that lawyers need when addressing domestic violence in their practices.
- * **Programming for the Midyear and Annual ABA meetings** to alert members to the latest developments in the field.
- * **Regional Conferences on Family Violence** in conjunction with the American Medical Association.

MORE INFORMATION:
Internet World Wide Web Site
<http://www.abanet.org>
E-mail: abacdvt@attmail.com

American Bar Association

COMMISSION ON DOMESTIC VIOLENCE

MAKING DOMESTIC VIOLENCE EVERYBODY'S BUSINESS

Lawyers, doctors, judges, teachers, police officers, military officers, victim advocates, psychologists, and leaders in the media and business communities working together to end the violence.

**740 15th Street, N.W.
Washington, D.C. 20005
202/ 662-1737/1744**

Recently, the nation has been awakened to the fact that, every year, millions of women are abused by men who supposedly "love" them.

"They are run over by cars and trucks. They have their teeth knocked out with hammers. They are stabbed with screw drivers, ice picks, and knives. They are beaten, choked, and strangled. They are beaten in public. They are beaten in the privacy of their own homes, often in front of their children." Sarah Buel, Norfolk County District Attorney's Office, Quincy, MA

Domestic violence is now recognized as one of the leading causes of injury to women and a problem requiring increasing intervention by victim service programs, courts, social service agencies, health care providers, and the police.

"It's easy for busy people to think that because they're not directly involved in domestic violence cases they're not really affected by them. As a nation however, we can't afford to have homes that are not havens." ABA President Roberta Cooper Ramo

The legal and law enforcement systems have been struggling to end domestic violence. Victim service programs have made great strides in providing shelter and transitional services to victims of domestic violence and their children, but the demand continues to grow. Society pays a huge price as domestic violence continues.

The broad-ranging effects of this epidemic cost business \$4 billion a year in absenteeism, reduced productivity, and reduced safety in the workplace. Yet too often the victims-- rather than the perpetrators--pay the price.

"Business forces employees to live a schizophrenic existence. Victims cannot reveal the secrets of family violence for fear of termination and being labeled as a detriment to management." Jim Hardeman, Director, Employee Assistance, Polaroid Corporation

Children are victims of domestic violence, too. Witnessing domestic violence, children develop cognitive, behavioral, developmental and emotional problems. Their ability to succeed in school and to become effectively functioning members of society is impaired.

"Families that are filled with domestic violence are crime factories, turning out violent offenders that we see in the criminal justice system year after year after year after year." Sergeant Mark Wynn, Metropolitan Police Department, Nashville, TN

Domestic violence affects everyone. Every time we blame a victim instead of holding a batterer accountable, every time we say it's not our business, we add a little more to the cost domestic violence.

"Every woman that we're talking about who is assaulted by her partner or raped--that woman is somebody's sister, somebody's daughter, somebody's mother, somebody's friend." Jackson Katz, Mentors in Violence Prevention, Northeastern University, Boston, MA

We all have an interest in--and responsibility for--ending domestic violence. As a result, many communities are searching for the model which will effectively end this epidemic.

"Government can't do it alone. We must work with leaders in communities to change societal perceptions and to spread the message consistently that violence against women is unacceptable." Bonnie Campbell, Associate Attorney General, Violence Against Women Act Office, U.S. Department of Justice

The American Bar Commission on Domestic Violence has joined together doctors, lawyers, judges, teachers, police officers, military officers, victim advocates, psychologists, and leaders in the media and business communities and government to combat the national epidemic of domestic violence. The Commission is dedicated to developing community-based programs and national resources which will effectively address domestic violence.



FAMILY LAW QUARTERLY

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Summer 1995

Special Issue on Domestic Violence

Addressing Domestic Violence:
The Role of the Family Law Practitioner

Family Violence in Child Custody Statutes:
An Analysis of State Codes and Legal Practice

Supervised Visitation and Family Violence

Full Faith and Credit:
Interstate Enforcement of Protection Orders
Under the Violence Against Women Act of 1994

Recognizing and Protecting the Privacy and Confidentiality
Needs of Battered Women

With No Place to Turn:
Improving Legal Advocacy for Battered Immigrant Women

Legal Responses to Teen Dating Violence

Child Abuse and Domestic Violence:
Legal Connections and Controversies

American Bar Association Section of Family Law

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Please forward your manuscript to:

PROFESSOR LINDA D. ELROD, *Editor*
Family Law Quarterly
Washburn University School of Law
1700 MacVicar
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Editor's Note

Family violence issues have long been present in divorce and custody cases as well as in child neglect and dependency proceedings, even though not always discussed openly. Today, partly because of the year long Simpson case, partly because of the amount of new research being conducted, and partly because the Violence Against Women Act passed last fall, domestic violence has become a "hot" topic. I am pleased with the quality and variety of articles in this issue of the *Family Law Quarterly* and feel that they will add significantly to the legal literature. Although there is some threshold information about "battered women," the topics move far beyond the basics. Articles range from an analysis of state custody statutes, supervised visitation, full faith and credit to protective orders, confidentiality issues, special problems faced by abused immigrant women, teen dating violence, and connections between child abuse and domestic violence.

Special thanks for help with this issue to Roberta Valente, the staff director of the ABA Commission on Domestic Violence, who served as issue editor. Howard Davidson, one of the drafters of the ABA report on domestic violence for then ABA President William Ide, put me in touch with Roberta. Within a month she submitted the authors and potential topics for nine articles. Five months later, she had read first drafts of all but three articles and only one had washed out. By the end of April, we had all but two of the articles ready for the student cite and sourcing. If all of the issues could run so smoothly, this would be a much easier task!!

This volume marks the first issue for the new student staff. I thank Laura Smithson-Corl who served as the student editor for two years for computerizing our operations, for developing in-house training sessions on bluebook and computer research, and for getting the *Quarterly* on a schedule during this formative period. The transition of student editors and staff has been relatively painless because of the system Laura established and because of the competent new editors. Mike Montero, who also serves as ABA/LSD 10th Circuit governor, is the new student editor-in-chief and Jamee Fritzeimer, the new managing editor. Based on their work on this issue, I have full confidence in their ability to continue the tradition of excellence.

ABA President-Elect Announces Domestic Violence Initiative

Three years ago I thought that domestic violence was rare, that it occurred mainly among the poor, that it was well-handled by our legal system, and that it had nothing to do with me as a lawyer or as a citizen. I was wrong on all counts.

In fact, domestic violence crosses all economic and ethnic barriers; lawyers and the legal system are not doing enough to protect the victims of domestic violence and their children. Most importantly, the problem and its solutions extend far beyond the legal system, encompassing all aspects of society that deal with families and children.

We cannot afford to continue to overlook the costs of this national tragedy. Children first seen in court as victims in domestic violence cases often return years later as juvenile offenders and adult criminal defendants. Law enforcement officials are overwhelmed by the number of domestic violence calls they must answer. Businesses are facing enormous economic costs domestic violence levies in the form of absenteeism and reduced employee productivity.

All of society has an interest in ending domestic violence. But it will never end unless we all accept responsibility for recognizing the symptoms, providing useful intervention, and finding ways to help batterers stop their behavior. It will take the coordinated efforts of judges, lawyers, physicians, nurses, advocates from state and local domestic violence coalitions, mental health specialists, law enforcement professionals, military personnel, and members of the media and the business communities to have an impact on the broad effects of domestic violence.

The American Bar Association is spearheading a broad-based national campaign to help communities forge these professional links. As its first step, the Association has formed a Commission on Domestic Violence. The Commission's co-chairs are Christopher L. Griffin of Tampa, Florida, and Marna S. Tucker of Washington, D.C. Commission members include the presidents of the American Medical Association, the National Education Association, and

the Legal Services Corporation; a representative of the American Psychological Association; the executive director of the National Resource Center on Domestic Violence; the chief judge of New York State; the superintendent of the Chicago Police Department; the commanding general of the U.S. Army Community Family Support Center; the executive vice president of corporate affairs for the Walt Disney Company; national experts on domestic violence; and representatives of the ABA Sections of Family Law, Criminal Justice, and Individual Rights and Responsibilities, the Judicial Administration and Young Lawyers Divisions, and the Commission on Women in the Legal Profession and the Standing Committee on Legal Aid and Indigent Defendants.

The ABA Commission on Domestic Violence has the following projects underway:

- On August 5, 1995, at the Association's Annual Meeting in Chicago, the Commission will hold public hearings on domestic violence. Sen. Joseph Biden, author and leader in the fight to pass the landmark Violence Against Women Act of 1994, heads the list of national experts testifying before the Commission. A published report on these hearings will follow.
- This fall, the Commission will publish an attorney's handbook, which will provide interested practitioners with the information they need to help end this national problem.
- Recognizing that prevention and intervention are essential to ending domestic violence, the Commission will identify successful batterer treatment programs for replication in communities across the country.
- The Commission is also beginning the work of developing and disseminating the blueprint of a multidisciplinary domestic violence program, which will help all communities—urban and rural, diverse and homogeneous, rich and poor—address and solve this urgent problem. The fruits of this unique national effort will become available at the Association's 1996 Annual Meeting in Orlando.

I urge you to join in this national campaign by learning more about the effects of domestic violence in your own communities and practices. This special issue of *Family Law Quarterly*, organized by the Commission on Domestic Violence, will give you a good start. When we all join together to ensure that victims of domestic violence and their children receive the most innovative and effective remedies and solutions, we will finally see a chance for "home" to mean "haven."

Roberta Cooper Ramo
President-Elect
American Bar Association

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For more information about the Commission and its activities, contact:

Roberta L. Valente
Staff Director
ABA Commission on Domestic Violence
740 15th Street, N.W., 9th Floor
Washington, DC 20005-1009
202/662-1737/1744
fax: 202/662-1762
E-mail: abacdvt@attmail.com

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We've Come a Short Way, Baby, and We Still Have Work to Do

The concept of a *Family Law Quarterly* issue devoted strictly to domestic violence was just a dream in 1976 when I began representing women in domestic violence situations. As a young lawyer looking to involve myself in the community, I called the women's shelter in my community and offered to give one-half hour free advice to any woman who had been a victim of domestic violence. The Commonwealth of Pennsylvania had just become the second state in the United States to pass a domestic violence statute—The Protection from Abuse Act. The women's shelters were the only source of relief for any of these women, as domestic violence was an unknown concept in the United States. Police did not wish to get involved in "domestic situations" and there was no place to hide for many of these women.

As a result of my conferences with these women, many of them became clients of mine in their protection from abuse actions. This gave me an excellent opportunity to get trial experience in cases with unpopular causes requiring me to hone my trial advocacy skills.

In 1978, I went to then Chair of the American Bar Association Family Law Section (ABA/FLS), Leonard Loeb, and suggested that domestic violence was very much a part of family law practice. Leonard made me chair of the new Committee on Domestic Violence and we introduced the first program on domestic violence in the ABA, which took place in Dallas in August of 1978. One of the speakers was a victim from a local shelter who looked out at the crowd of 100 well-dressed, middle class men and women and said, "I know I don't seem important, but if one of you could help just one of us, it would bring new meaning to my life and yours." This statement brought tears to the eyes of many and created new motivation in the Family Law Section to bring about change in this arena. Throughout the years, the Family Law Section has been the leader in the ABA to bring about changes for these victims. Now, with the help of other sections, such as Individual Rights and Responsibilities and the Young Lawyers Division, and especially with the creation of the Commission on Domestic Violence, it is hoped that we will bring this problem to the forefront of public consciousness.

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Many changes have taken place, making a difference for the women, and now some men, who have come forward as victims of domestic violence. Statutes have been adopted throughout these United States and shelters are now available as safe havens for many of these victims, though more are needed. Enough has not yet been done. Many communities, like Duluth, Minnesota, have established programs to help not only the victims but also the perpetrators to stop this vicious cycle. Dade County, Florida, now has a unified Domestic Relations Court. The Chicago Police Department has a special program to help the victims when their abusers are members of the police force. Albuquerque, New Mexico, has a twenty-four hour hotline to pick up these victims and take them to shelters. The new federal Violence Against Women Act of 1994 will bring even more help to communities in the form of police and judicial training.

Now, as a result of the passage of a resolution by the American Bar Association, insurance companies that had previously discriminated against women who came forward and reported their domestic violence are covering women who were previously denied insurance benefits. Every individual can make a difference. Representation of these victims is critically important in all areas. You can make a difference, as each individual member of the ABA who works to represent these victims has done. We are moving ahead in the fight against domestic violence but the fight is not over. Please join the ABA in working toward the elimination of America's dirty little secret.

Lynne Z. Gold-Bikin
Chair
Section of Family Law

Addressing Domestic Violence: The Role of the Family Law Practitioner

ROBERTA L. VALENTE*

Many family law practitioners make a conscious decision not to take domestic violence cases. Violence in the family, however, may complicate divorce, separation, child custody, and child support cases unseen by the practitioner unfamiliar with domestic violence issues. The sheer number of incidents of domestic violence in this country¹ make it clear that attorneys who ignore family violence issues may profoundly harm their clients and violate their professional and ethical obligations.

Understanding the dynamics of domestic violence can improve an attorney's practice. For example, a lawyer who does not understand the significance of domestic violence in a "simple" divorce case will not understand why a property settlement is so difficult to negotiate. A family law practitioner who does not understand the ongoing problems caused by domestic violence in child custody or child support cases may expose his or her client to further emotional trauma or increased physical danger.

One difficulty even the most sympathetic attorney faces is that victims are not always comfortable admitting to the violence in their homes.² They have good reason to be mistrustful because our society has not

* Roberta Valente, J.D., is the Staff Director of the ABA's Commission on Domestic Violence.

1. Anywhere from 1.8 to 4 million women each year will become victims of domestic violence. Antonia C. Novello, *From the Surgeon General, U.S. Public Health Service*, 23 JAMA 267, 313 (1992). Richard Gelles, whose twenty years of research in the field of family violence commands national recognition, recently confirmed the accuracy of these numbers. WASH. POST, Mar. 27, 1995, § A, at 1ff.

2. "Because terms such as 'domestic violence' and 'marital rape' are recent entrants into our language, women have historically lacked a social definition that allowed them to see the abuse as anything more than a personal problem." Raquel K. Bergen, *Surviving Wife Rape: How Women Define and Cope With the Violence*, 1 VIOLENCE AGAINST WOMEN 117, 130 (1995) (footnotes omitted).

yet shown it is willing to offer consistent support to victims of domestic violence. For instance, well-meaning friends, after hearing a victim recount her³ experiences, may ask in exasperation, "Why don't you just leave?" Family members, struggling with their own problems, may tell the victim seeking refuge for the fourth or fifth time, "It's time for you to take responsibility for yourself." Finally, an attorney, irritated when a client fails to show up at a hearing or suddenly refuses to testify in court, may demand, "Are you serious about this?"

Perhaps the more important questions to ask are: *How can we stop the batterer from harming the victim and her children?* and *What resources are available to ensure that the victim and her children can live safely and independently?* Accordingly, the purpose of this special issue of the *Family Law Quarterly* is to help attorneys become more effective in assisting clients who are victims of domestic violence.

I. Underlying Issues and Dynamics

A. What Is Domestic Violence?

Domestic violence is not simply one partner hitting another. Understanding the context in which the abuse occurs is crucial to defining this problem. Psychological, social, and familial constructs create the climate in which battering occurs. There is no one physical act, no single type of batterer, or no characteristic of a victim which can fully define domestic violence. Consequently, domestic violence is best defined as that combination of factors and behaviors by which a batterer forces an intimate partner to live "with a constant sense of danger and expectation of violence."⁴

For example, a man who beats his wife or intimate partner brutally every day is committing domestic violence. Equally, a man who *threatens* to harm his wife or intimate partner—in a context which makes

3. Victims of domestic violence are overwhelmingly female and batterers are overwhelmingly male. Russel Dobash, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 74-75 (1992); CAROLINE W. HARLOW, U.S. DEP'T OF JUST., FEMALE VICTIMS OF VIOLENT CRIME 1 (1991); PETER FINN & SARAH COLSON, U.S. DEP'T OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 4 (1990) [hereinafter CIVIL PROTECTION ORDERS]; PATSY A. KLAUS & MICHAEL R. RAND, FAMILY VIOLENCE: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (1984). For that reason, I use the pronoun "she" in reference to victims and the pronoun "he" in reference to batterers throughout this article.

4. Jeffrey L. Edleson et al., *Men Who Batter Women*, 6 J. FAM. ISSUES 229, 231 (1985).

her fear he will carry out his threats—is committing domestic violence.⁵ Domestic violence exists in a context where an intimate partner uses threatening, manipulative, aggressive, violent, or otherwise coercive behavior to maintain power and control over his victim.⁶ A batterer may abuse a victim by tightly controlling her behavior: forbidding her to have contact with friends and family who might support her; stalking her to prevent even casual social contacts; preventing her from working or, if she does work, acting in ways that make it difficult, if not impossible, to keep her job; and controlling financial assets so the victim cannot access them. Finally, the batterer may further attempt to maintain his power over the victim by threatening to hurt or kill her if she tries to leave or divorce him; he may also threaten to take or hurt the children if the victim does not comply with his demands.

The family law practitioner whose clients report such behavior should not ignore these warning signs. Domestic violence is not simply a "private matter" between intimate partners; it is one of the leading causes of violent victimization for women in this country.⁷ This violence has been growing more deadly for women over time.⁸

B. Risk Factors for Domestic Violence

Why are women most often the victims of domestic violence? Researchers have found no particular personality traits in women that make them susceptible to battering; rather, the most identifiable risk factor for becoming a victim of domestic violence is being female.⁹ At the same time, the cultural background of the victim of domestic violence may be a complicating factor, but not a predictor, since battered women come from all racial, ethnic, and socioeconomic back-

5. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 859-63 (1993) (analysis of range of threats providing sufficient basis for the issuance of a protection order in most states).

6. MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 27-28 (1994).

7. The U.S. Department of Justice's Bureau of Justice Statistics has found that women experience more than ten times the rate of violent victimization by an intimate partner than do men. Over 90% of intimate violence is directed at women. U.S. DEP'T OF JUST., BUREAU OF JUSTICE STAT., SELECTED FINDINGS, DOMESTIC VIOLENCE: VIOLENCE BETWEEN INTIMATES 2-3 (Nov. 1994).

8. In 1977, 54% of the murder victims who were killed by intimates were female. By 1992, the ratio of female to male victims had changed, with 70% of the victims being female. *Id.* at 3.

9. Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 VIOLENCE & VICTIMS 101, 111, 118 (1986).

grounds.¹⁰ For males, however, the greatest risk factor for growing up to become a batterer is being raised in an abusive home.¹¹ Considering that anywhere from 3 to 10 million children each year are unwilling witnesses to or secondary targets of domestic violence,¹² it is clear why experts demand that we begin to address the growing national epidemic of domestic violence before the next generation is trained to perpetuate the problem.

Whether or not they grow up to become batterers or victims, children who witness domestic violence suffer from behavioral, emotional, and cognitive problems.¹³ Equally important, researchers have found increased severity of child abuse in families experiencing domestic violence and marital rape.¹⁴

C. *Accurately Understanding Domestic Violence*

The most important service an attorney can provide a victim of domestic violence is to acknowledge the real issues and problems underlying these cases. There are many myths about victims of domestic violence; the attorney who believes these misconceptions will find it hard to successfully represent a client victimized by domestic violence.

Many attorneys, for example, are uncomfortable representing a battered woman who still expresses love for her abusive partner because they believe her response is a sign of an emotional sickness. Yet research shows that most abusers batter their victims *after* a strong emotional relationship has developed.¹⁵ An attorney must understand that, at the

10. Klein & Orloff, *supra* note 5, at 807.

11. Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J. OF L. AND PUB. POLICY 221, 236-37 (1994); Koss, *supra* note 6, at 23-24.

12. Murray A. Straus, Children as Witnesses to Marital Violence: A Risk Factor for Lifelong Problems Among Nationally Representative Sample of American Men and Women (unpublished paper, 1991) (estimates 10 million children a year impacted by domestic violence); Bonnie E. Carlson, *Children's Observations of Interparental Violence*, in BATTERED WOMEN AND THEIR FAMILIES 147-67 (A.R. Roberts ed., 1984) (estimates 3 million children a year impacted by domestic violence); ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 3-4 (Einat Peled et al. eds., 1995) (children harmed by witnessing domestic violence); Evan Stark & Anne Flitcraft, *Women-Battering, Child Abuse, and Social Heredity: What is the Relationship?*, in MARITAL VIOLENCE 147-71 (N. Johnson ed., 1985) (children experiencing domestic violence in their homes are at increased risk of being abused themselves).

13. PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN (Susan K. Wilson ed., 1990); L. H. Bowker, *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 162 (Kirsten Yllo & Michelle Bograd eds., 1988).

14. Fields, *supra* note 11, at 223.

15. Koss, *supra* note 6, at 36.

start of the relationship, a victim of domestic violence has not chosen to live with a violent partner, but she has chosen to live with someone she learned to love. Once the battering begins, however, remaining with her batterer and supporting his behavior may be her only means of survival.¹⁶ Understanding this real psychological dynamic and rejecting the myth of masochism allows the attorney to respect the victim's quandary and proceed with the case in a manner that lessens emotional trauma and enhances the victim's safety.

Another damaging myth is that women allege that domestic violence has occurred in divorce and child custody cases because they believe it will give them an advantage in court. Judicial experience indicates this myth is unfounded:

The initial step in representing a battered woman is to believe her. She has been subjected to prolonged, serious physical and psychological abuse. Her story may seem fantastic, but is likely to be entirely true. Her judgment should be trusted. She is an expert concerning her husband's behavior patterns, although she may err on the side of attributing too much power to her husband.¹⁷

Clinical researchers in the field are in agreement with this view, and professionals in batterers' intervention programs report that violent men

tend to rationalize, minimize, or outright deny their own very real violence against women . . . [while] battered women often are excellent proxies concerning details about violent men and fairly accurate observers about violent episodes. In this sense, the reliability of female victims lends them a certain credibility as persons whose accounts of violence should be accepted.¹⁸

Rather than fabricating allegations of violence, victims are more likely to adopt their batterers' perception of the situation, to the point of minimizing or denying the abuse, as a survival strategy. If they cannot manage the violence by placating the abuser, victims may "begin to question their judgments and perceptions of reality," which can lead to a loss of self-esteem.¹⁹ Further, victims suffering severe abuse "often

16. Barbara J. Hart, *Battered Women and the Criminal Justice System*, 36 AM. BEHAV. SCI. 624, 625-26 (1993) ("battered women are most often killed when attempting to seek legal redress or when leaving an abusive relationship").

17. Marjory D. Fields, *Trial of Family Offenses: A Practice Guide For Lawyers*, in LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM 5 (Anne D. Lopatto & James C. Neely eds., 1995).

18. WILLIAM A. STACEY ET AL., THE VIOLENT COUPLE 50 (1994).

19. Raquel K. Bergen, *Surviving Wife Rape: How Women Define and Cope with the Violence*, 1 VIOLENCE AGAINST WOMEN 117, 129-30 (1995), citing T. Mills, *The Assault on the Self: Stages in Coping with Battering Husbands*, 8 QUALITATIVE SOC. 103-23 (1985).

come to trust their husbands' definitions. This is exacerbated when a woman is kept relatively isolated by her partner and fails to have her perceptions validated by outsiders."²⁰

Attorneys who suspect the motives of domestic violence victims help neither the parties nor themselves. As a result, the victims' legal representatives must have an accurate understanding of the psychological dynamics at work or their representation will be less than zealous. Even attorneys representing alleged batterers must adopt a realistic view of these psychological dynamics, or they may help to perpetuate recidivist behavior by resisting legal outcomes needed to minimize or end real battering behavior.

II. Responsibilities in Representation

The goal in every domestic violence case must be to stop the violence. When assisting victims in obtaining legal protection through the family court system, attorneys must make a commitment to seek the most comprehensive panoply of remedies available. While all fifty states and the District of Columbia and Puerto Rico make protection orders available to victims of domestic violence,²¹ none of these orders is worth the paper it is written on if their provisions fail to provide *all* the remedies needed to preserve the victim's safety. Nor will these orders deter further violent behavior on the part of batterers if there are no effective means of enforcing the orders.

Therefore, the role of the attorney is absolutely crucial in helping victims obtain complete remedies.²² To ensure that their clients are fully protected, attorneys representing victims should seek a protection order which addresses *all* of the following issues:

1. the safety of victims at home, school, work, and other places where the victim might be harassed, stalked, or potentially hurt by the batterer, including prohibitions against telephone threats and harassment;
2. child custody and supervised visitation to protect both the victim and the children from the possibility the batterer will use conflicts about the children as a proxy to further manipulate the victim or as an opportunity to harm the victim or her children;

3. requiring the batterer to vacate the home, in addition to making appropriate financial and safety provisions to allow the victim and her children to continue living there; and
4. requiring the batterer to surrender any weapons in the home or in his possession.²³

Enforcement of protection orders is the weakest link in the system designed to protect victims of domestic violence.²⁴ The family lawyer can be of greatest help to the victim at this stage by quickly and vigorously seeking enforcement once the protection order is violated. Not only does a swift and punitive response impress the batterer with the resolve of the system, it also gives the victim confidence that she will have both justice and support as she fights to break free of violence.

At all stages of representation, victims of domestic violence should have a safety plan. Family lawyers should help their clients prepare the following:

1. a plan for getting out of their homes or worksites safely;
2. a safe place for storing important documents, such as birth certificates, financial documents, immigration papers, ready cash, and any legal papers; and
3. a list of places to call for help in an emergency.

Although the family lawyer's role is one of the most important in ending domestic violence, the responsibility for fighting this national epidemic rests on many other shoulders as well. The American Bar Association's recently created Commission on Domestic Violence²⁵ has spent the past six months researching successful domestic violence programs across the country to understand why they work. The Commission's findings clearly reveal that only those programs which draw on the broad resources of the community—the judges, lawyers, doctors, nurses, social workers, psychiatrists, psychologists, shelter workers, victim services professionals, law enforcement personnel, probation officers, military personnel, members of the business community, and the media—have been able to begin the process of change that will end domestic violence in families.

There is no mystery as to why these programs work so well. Domestic violence is not simply a legal problem. Although the legal system is one of many tools needed to address domestic violence properly, the

20. Bergen, *supra* note 19, at 129.

21. Klein & Orloff, *supra* note 5, at 810.

22. *Id.* at 812 ("Women who appear in court with legal representation are much more likely to receive civil protection orders than those women who appear *pro se*, and those orders are much more likely to contain more effective and complete remedies. [Citations omitted.]").

23. STEPHEN B. HERRELL & MEREDITH HOFFORD, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 12 (1990).

24. U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE, FAMILY VIOLENCE: INTERVENTIONS FOR THE JUSTICE SYSTEM 15 (1993); CIVIL PROTECTION ORDERS, *supra* note 3, at 49.

25. For more information about the Commission and its work, call 202/662-1737.

system is by no means capable of addressing all of the issues which arise in these cases. Therefore, family lawyers handling domestic violence cases must ensure that their clients receive appropriate treatment for their emotional and psychological issues by psychotherapists or counselors properly trained to handle domestic violence cases. In addition, attorneys must establish links with doctors, nurses, teachers, and police in their communities. Victims in crisis often turn to these professionals first; therefore, the legal community must inform these helping professionals that legal help is available for victims of domestic violence. Family lawyers also should develop connections with the business community so that they are available when victims and batterers turn to their companies' employee assistance programs for help. In conclusion, the legal community must work in conjunction with all of these programs to help families suffering from violence find psychological help, physical safety, and economic security. Domestic violence will cease when the justice system and the community join forces to help the victim and hold the abuser accountable.²⁶

III. Articles in This Issue

The articles which follow will help the family lawyer inexperienced in domestic violence identify the significant issues, understand the revolutions in law which have taken place in this field, seek appropriate remedies and resources to end the violence, and, most importantly, ensure that every step taken is one which will increase the safety of victims and their children. The articles address significant "hot topics" in this field. These issues are not always discussed in pro bono manuals or training programs on domestic violence law. Therefore, these articles analyze some of the thorniest problems victims of domestic violence and their legal representatives may face and introduce attorneys to the newest and most far-reaching changes in the field.

The staff of the Family Violence Project of the National Council of Juvenile and Family Court Judges provides a comprehensive analysis of state codes and legal practice relating to domestic violence in child custody cases. Heralding recent increases in legislation requiring courts to consider domestic violence in child custody and visitation cases, the authors discuss current law across the country. They also inform attorneys about the great dangers and complicated issues which domestic violence creates in child custody and visitation cases.

26. See Herrrell & Hofford, *supra* note 23, at iv; see also Hart, *supra* note 16, at 628 (some battered women have found the best protection against further violence is the protection and support offered by the community).

Robert Straus explores the relatively recent development of supervised visitation programs and the need for supervised visitation in domestic violence cases. His article defines this service, illustrates when it is needed and by whom, explains the consequences which result for children and victims of family violence when supervised visitation is not available, and discusses approaches to developing this important service.

Catherine F. Klein discusses revolutionary changes in federal law created under the Violence Against Women Act of 1994 (VAWA). Addressing the complex issues of implementation and enforcement arising from the Full Faith and Credit Provision (which requires all states to recognize and enforce their sister states' protection orders), the VAWA's strong bias against the issuance of mutual protection orders, and the creation of new federal crimes of domestic violence, Ms. Klein describes how the landscape of domestic violence law has changed and offers innovative and practical suggestions for attorneys who want to learn more about applying VAWA to family law practice.

Joan Zorza addresses the privacy and confidentiality needs of battered women. Discussing the importance of preserving victims' safety, Ms. Zorza identifies the information which must be kept from the batterer to effectively protect the victim and her children and analyzes state and federal laws which family law practitioners can use to help protect the privacy, confidentiality, and safety of battered women and their children.

Leslye E. Orloff, Deena Jang, and Catherine F. Klein address the unique problems faced by battered immigrant women. Discussing immigration issues, cultural and linguistic differences, the high likelihood of international parental kidnapping, and economic considerations peculiar to battered immigrant women, Ms. Orloff, Ms. Jang, and Ms. Klein suggest creative remedies in these cases while simultaneously challenging family law practitioners to combine forces with immigration lawyers as both groups seek the most effective solutions for battered immigrant women.

Stacy L. Brustin addresses an issue which only recently has been recognized as an emerging problem in the field: teen dating violence. As Ms. Brustin observes, while the phenomenon is as old as human nature, our awareness of its ramifications is very new. Her article analyzes current rights and remedies and offers proposals for necessary legal reform.

Howard A. Davidson takes on child abuse and neglect, family violence problems all too often intertwined with domestic violence. Against backdrop of changing legislation and declining funding, Mr. Davidson

analyzes the controversies within the current system and proposes realistic reforms that prioritize children's safety and a child-centered system for child protection intervention.

The choice of these innovative topics is deliberate because domestic violence law has become a sophisticated and creative field. These articles will give the family lawyer a taste of the intellectual complexities domestic violence law can introduce into regular practice. It is also my hope, as editor of this special issue, that lawyers who have not recognized the importance of domestic violence issues will be challenged to gain expertise in a new area of law.

Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice

**THE FAMILY VIOLENCE PROJECT*
OF THE NATIONAL COUNCIL OF JUVENILE
AND FAMILY COURT JUDGES**

I. Historical Perspective

Removal of fault from divorce codes in the 1970s shifted the focus of family law from economic protection of the dependent spouse to equitable distribution of property. Also during this period, state legislatures amended custody codes to encourage joint custody and participation by fathers in parenting of children. Consequently, many family law attorneys moved their aggressive advocacy on behalf of battered spouses and their children away from divorce and custody proceedings and into civil protection order proceedings. But in the past twenty years, we have learned that domestic violence is a pervasive, complex, and frequently lethal problem that challenges all family law attorneys whether they represent a victim, a perpetrator, or a child from a violent

* The following staff members and consultants of the Family Violence Project are responsible for researching and writing this article: Merry Hofford, M.A., Director; Christine Bailey, M.A., J.D., Project Attorney; Jill Davis, J.D., Legal Associate; and Barbara Hart, M.S.W., J.D., consultant to the Family Violence Project and Legal Director for the Pennsylvania Coalition Against Domestic Violence. In addition, our thanks to Linda McGuire, Visiting Professor at the University of Iowa, College of Law, who assisted in the research.

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family.¹ We now know that family violence does not end when the battered spouse leaves, and the time of separation and divorce is dangerous not only for the family members but for the attorneys involved.² Social scientists³ and legal researchers⁴ have documented the detrimental impact of family violence not only on the children who are victims of physical abuse in violent homes but also on children who witness violence that occurs between their parents.

The good news is that an examination of current state statutes reveals a dramatic increase in legislation concerning child custody in cases

1. See generally Mary Ann Dutton & Catherine L. Waltz, *Understanding Domestic Violence*, 17 FAM. ADVOC. 14 (1995); Catherine F. Klein & Leslye E. Orloff, *Representing a Victim of Domestic Violence*, 17 FAM. ADVOC. 24 (1995); Barbara Salomon, *Guilty Until Proven Innocent: Representing the Alleged Abuser*, 17 FAM. ADVOC. 30 (1995); Marvin R. Ventrell, *The Child's Attorney*, 17 FAM. ADVOC. 72 (1995).

2. Salomon, *supra* note 1, at 30; Joan M. Cheever & Joanne Naiman, *The Deadly Practice of Divorce*, NAT'L L. J., Oct. 12, 1992, at 1, 28-29; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 2 (1991).

3. See generally Maura O'Keefe, *Predictors of Child Abuse in Maritally Violent Families*, 10 J. OF INTERPERSONAL VIOLENCE 1, 3 (1995) (compared to normative samples, children who are exposed to marital violence are at an increased risk for both internalizing and externalizing behavioral problems, and children who both witness marital violence and who are victims of abuse are at an even higher risk for behavior problems); Mildred Daley Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE AND VICTIMS 1, 69 (1993) (the research shows that children who live in households where their fathers beat their mothers are victims of domestic violence whether the abuse is direct or indirect); Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 1, 51 (1994) (subjecting children to the victimization of their mothers is a severe form of psychological maltreatment, even a single episode of violence can produce post-traumatic stress disorder in children); and Susan Schechter et al., *Domestic Violence and Children: What Should the Courts Consider?*, 1 JUV. & FAM. JUST. TODAY 4, 10 (1993) (recent research suggests a continuum regarding the association between violence and mental health problems for children, with those children who witnessed violence standing in between those from nonviolent homes and those who were abused).

4. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 4, 1041, 1055-58 (1991) (children who witness family violence showed more aggression, impaired cognitive and motor abilities, and delayed verbal development compared to a control group); HOWARD A. DAVIDSON, A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN 1 (1994) (there is no doubt that children are harmed in more than one way—cognitively, psychologically, and in their social development—merely by observing or hearing the domestic terrorism of brutality against a parent at home); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 964 (1993) (citing cases where courts considered evidence of spousal abuse in custody determinations even where abuse was not directed against the children).

involving family violence. Currently, forty-four states and the District of Columbia have enacted custody statutes which contain some provisions concerning domestic violence to guide judges who determine child custody and visitation.⁵ Five years ago less than sixteen states had such statutes.⁶

The bad news is that the rapid pace of state legislative reform in the area of child custody and family violence makes it difficult for attorneys to keep up with statutory amendments. Gender bias reports have criticized lawyers and judges for ignoring or minimizing the issue of domestic violence, or disbelieving parties' reports concerning family violence in custody disputes.⁷ Some legal scholars and advocates have recently censured some family law attorneys for their lack of education on the dynamics of family violence and for such inappropriate practices as failing to present evidence of abuse at trial, entering into mediated agreements that may be dangerous to victims of family violence, encouraging clients to trade protection for money, or making other inappropriate settlements.⁸

This article analyzes state custody statutes that refer to domestic violence in the context of separation and divorce; addresses the dynamics of family violence as it relates to legal practice in child custody disputes; and reviews various evidentiary considerations, safety provisions, and unique statutory provisions. To heighten awareness of the custody laws and the considerations required of courts in deciding child custody, the article provides a critical examination of legal practice in states with statutory presumptions involving family violence. The article concludes with a call to action for family law attorneys to return to aggressive advocacy for battered spouses and children in divorce and child custody cases.

II. Statutory Analysis

A. Best Interest of the Child

In thirty-five states, the law mandates that courts consider domestic violence when determining the best interest of a child.⁹ In two other

5. See the chart of state statutes at 225-27 for an analysis of provisions concerning domestic violence in state custody statutes.

6. Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 3, 29 (1992).

7. Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L. Q. 247, 255-57 (1993).

8. Klein & Orloff, *supra* note 4, at 814, 958.

9. See column 1 of the chart at 225-27.

custody codes, judicial consideration of domestic violence as a "best interest" factor exists as a grant of authority rather than as a requirement.¹⁰

Although including domestic violence as a factor to be considered under a best interest standard is not the simple solution to a complex problem,¹¹ it is a sound statutory basis for aggressive legal argument in custody cases involving family violence. Some national organizations advocate amending state statutes to require courts to consider spousal abuse as a significant factor when determining custody awards.¹² Section 402 of the Model Code on Domestic and Family Violence was constructed to elevate the safety and well-being of the child and abused parent above all other best interest factors when there has been a finding of abuse by one parent of the other.¹³

B. Joint Custody

While joint custody theoretically may enhance gender equity and fathers' involvement with their children, in cases involving family violence, researchers have found that children living under joint custody orders in high conflict families are more emotionally troubled and behaviorally disturbed than those in sole custody.¹⁴ Moreover, legal and psychological researchers do not recommend an award of joint custody in families where there is an inability to agree on child rearing, family disorganization, imbalances of power, financial inequities, coercion, and intimidation—all characteristics found in violent families.¹⁵

Eleven state statutes reflect this cautionary note by mandating that a court either consider domestic violence as contrary to the best interest of a child or to a stated preference for joint custody or expressly prohibit an award of joint custody when a court makes a finding of the existence

of domestic violence.¹⁶ For example, a finding by a Montana court that one parent physically abused the other parent, or the child, is a sufficient basis for finding that joint custody is not in the best interest of the child.¹⁷ Although the New Hampshire statutes contain a presumption that joint legal custody is in the best interest of minor children, the statute also requires a court to consider family abuse as harmful to children and as evidence in determining whether joint legal custody is appropriate.¹⁸ The Arizona statute prohibits joint custody if a court finds the existence of significant domestic violence or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.¹⁹

Whether a statute prohibits joint custody when a court makes a finding of family violence or directs the court to consider family violence with the authority to deny joint custody, the trend is to recognize the complexity of domestic violence cases. The legislatures are granting broader authority to courts so that they may make appropriate custody orders.

C. Parental Rights and Responsibilities

1. FRIENDLY PARENT PROVISIONS

Ten state child custody statutes include a public policy statement concerning a parent's abilities to allow an open, loving, and frequent relationship between the child and the other parent.²⁰ Eighteen states include such provisions in their list of factors that a court is required to consider when determining the best interest of the child.²¹ Battered women's advo-

10. OR. REV. STAT. § 107.137 (1993) and MINN. STAT. ANN. §§ 257.025, 518.17 (West 1995).

11. Cahn, *supra* note 4, at 1070-1071.

12. STEPHEN B. HERRELL & MEREDITH HOFFORD, NAT'L. COUNCIL OF JUV. & FAM. CT. JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE (1990).

13. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 402, at 33 (1994) [hereinafter MODEL CODE].

14. Janet R. Johnston et al., *Ongoing Post Divorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AMER. J. ORTHOPSYCHIATRY 576 (1989); Judith S. Wallerstein & Janet R. Johnston, *Children of Divorce: Recent Findings Regarding Long-Term Effects and Recent Studies of Joint and Sole Custody*, 11 PEDIATRICS IN REV. 197 (1990).

15. Adele Harrell, *A Guide to Research on Family Violence, published for Courts and Communities: Confronting Violence in the Family* (Mar. 1993).

16. ARIZ. REV. STAT. ANN. § 25-332 (1994); COLO. REV. STAT. ANN. § 14-10-124 (West 1994); FLA. STAT. ANN. § 61.13 (West 1995); IDAHO CODE § 32-717 (1994); ILL. ANN. STAT. ch. 750, para. 5/602 (Smith-Hurd 1994); MONT. CODE ANN. §§ 40-4-212, -222, -224 (1993); N.H. REV. STAT. ANN. § 458:17 (1993); N.D. CENT. CODE § 14-09-06.2 (1993); R.I. GEN. LAWS § 15-5-16 (1994); TEX. FAM. CODE ANN. § 14.021 (West 1994); WYO. STAT. §§ 20-2-112, -113 (1994).

17. MONT. CODE ANN. § 40-4-224 (1993).

18. N.H. REV. STAT. ANN. § 458:17 (1993).

19. ARIZ. REV. STAT. ANN. § 25-332 (1994).

20. CAL. FAM. CODE § 3020 (West 1995); COLO. REV. STAT. ANN. § 14-10-124 (West 1994); FLA. STAT. ANN. § 61.13 (West 1995); GA. CODE ANN. § 19-9-3 (1994); IOWA CODE ANN. § 598.41 (West 1994); MO. ANN. STAT. § 452.375 (Vernon 1994); MONT. CODE ANN. § 40-4-222 (1993); NEV. REV. STAT. § 125.460 (1993); N.J. STAT. ANN. § 9:2-4 (West 1995); and TEX. FAM. CODE ANN. § 14.021 (West 1994).

21. ALASKA STAT. §§ 25.20.090, 25.24.150 (1994); ARIZ. REV. STAT. ANN. § 25-332 (1994); COLO. REV. STAT. ANN. § 14-10-124 (West 1994); FLA. STAT. ANN. § 61.13 (West 1995); ILL. ANN. STAT. ch. 750, para. 5/602 (Smith-Hurd 1994); IOWA CODE ANN. § 598.41 (West 1994); KAN. STAT. ANN. § 60-1610 (1994); ME. REV. STAT. ANN. tit. 19, §§ 214, 581, 752 (West 1994); MICH. COMP. LAWS ANN. § 722.23 (West 1994); MINN. STAT. ANN. § 518.17 (West 1995); MO. ANN. STAT. § 452.375 (Vernon 1994); OHIO REV. CODE ANN. § 3109.04 (Anderson 1994); OKLA.

cates vehemently oppose such "friendly parent" provisions in cases involving family violence believing that the justice system frequently punishes the victims of violence for their seeming lack of cooperation.²² Their concerns include the use of children to control the abused spouse, the continued danger and threat to the victim and children, and gender bias issues.²³ Recently, the ABA's Center on Children and the Law stated that friendly parent provisions are inappropriate in domestic violence cases and proposed that state legislatures amend such laws.²⁴

When a statute lists a friendly parent provision as a factor for the court to consider when determining the best interest of a child, there usually are other statutory provisions that an attorney can use in a case involving domestic violence. For example, the Minnesota custody statute has a lengthy list of factors that a court must consider when determining the best interest of a child including each parent's disposition to encourage and permit frequent and continuing contact by the other parent with the child. But the statute also provides an exception for cases in which there is a finding of domestic violence. In addition, the statute directs the court to consider the effect the actions of an abuser will have on a child if domestic abuse has occurred between the parents.²⁵

Although Arizona statutes require a court to consider which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent, the court must also consider the nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.²⁶ When the statute requires a court to consider all the factors listed, the attorney can use a finding of domestic violence or coercion by one parent against the other to balance the "friendly parent" provision, thereby allowing the court to award custody as best protects the child and the adult victim of family violence.

2. PARENTAL RESPONSIBILITIES

All the state statutes that refer to a parent's right to frequent and continuing contact also have in the same provision a reference either to parental responsibilities or mitigating language.²⁷ Statutory language

referring to parental responsibilities ensures that a court consider each parent's ability to be responsible for the child's health, safety, and welfare. For instance, a Missouri statute declares that the public policy of the state is to ensure that a child has frequent and meaningful contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share decision-making rights and responsibilities of child rearing.²⁸ The section also requires a court to determine the custody arrangement that will best assure both parents share such decision-making responsibility and authority and such frequent and meaningful contact between the child and each parent as is indicated in the best interest of the child under all relevant circumstances.

The statutes in Maine refer to awards of allocated, shared, or sole parental rights and responsibilities.²⁹ In addition to the capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, the statutes require a court to consider the motivation of the parties involved and their capacities to give the child love, affection, and guidance; and the capacity of each parent to cooperate or to learn to cooperate in child care.

3. CHILD-FOCUSED PROVISIONS

There is a growing movement in both the legal sphere and human services sector to advocate for children's rights and interests within their family independently of parental rights.³⁰ Some state legislatures have drafted statutory provisions with the child as the focus.³¹ For example, the Iowa code requires a court, insofar as is reasonable and in the best interest of the child, to award custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.³² The statute also requires a court that is determining the best interest of the child to consider whether each parent can support the other parent's relationship with the child. Other factors which the court must consider include

STAT. ANN. tit. 43, § 112 (West 1995); TEX. FAM. CODE ANN. § 14.012 (West 1994); UTAH CODE ANN. § 30-3-10.2 (1994); VT. STAT. ANN. tit. 15, § 665 (1993); VA. CODE ANN. § 20-124.3 (Michie 1994); and WIS. STAT. ANN. § 767.24 (West 1994).

22. Joan Zorza, "Friendly Parent" Provisions in Custody Determinations, 1992 CLEARINGHOUSE REV. 921.

23. *Id.* at 923-24.

24. DAVIDSON, *supra* note 4, at 15.

25. MINN. STAT. ANN. § 518.17 (West 1995).

26. ARIZ. REV. STAT. ANN. § 25-332 (1994).

27. See statutes cited *supra* note 20.

28. MO. ANN. STAT. § 452.375 (Vernon 1994).

29. ME. REV. STAT. ANN. tit. 19, §§ 581, 752 (West 1994).

30. Carla Garrity & Mitchell A. Baris, *Custody and Visitation: Is It Safe?*, 17 FAM. ADVOC. 40 (1995); Ventrell, *supra* note 1, at 73. See *Domestic Violence Bibliography*, 17 FAM. ADVOC. 84 (1995).

31. See IOWA CODE ANN. § 598.41 (West 1994); TEX. FAM. CODE ANN. § 14.012 (West 1994); UTAH CODE ANN. § 30-3-10.2 (1994); and VT. STAT. ANN. tit. 15, § 650 (1993).

32. IOWA CODE ANN. § 598.41 (West 1994).

whether the parents can communicate with each other regarding the child's needs; whether both parents have actively cared for the child before separation; whether a parent is opposed to joint custody; and whether the safety of the child, other children, or the other parent will be jeopardized by an award of joint custody or by unsupervised or unrestricted visitation.

Instead of the typical phrase concerning the parents' rights to have frequent contact with the child, the Family Code of Texas provides a policy statement with the children's rights as its focus.³³ The section is drafted to assure that *children* (emphasis added) will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child. Also, the section requires courts to provide a stable environment for the child to encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage. Finally, the section prohibits a court from appointing joint conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or any child.

Child-centered provisions focus first on what is best for the child rather than on what is best for the parents. Such progressive legislation truly promotes the "best interest" of the child principle that a majority of states embrace.

D. Safety and Other Unique Provisions

While the general public, judges, attorneys, and other justice system personnel are frequently impatient with battered spouses for not leaving the abuser, often assuming that the victim and children will be safer after separation, data reveal that leave-taking is fraught with danger. In fact, the abuse may escalate at the time of separation and often continues after legal interventions.³⁴ Nationally, the Model Code on Domestic and Family Violence provides a statutory scheme based on the protection and safety of all victims of family violence and the prevention of future violence in families.³⁵

33. TEX. FAM. CODE ANN. § 14.021 (West 1994).

34. Hart, *supra* note 6, at 33; Mahoney, *supra* note 2, at 63.

35. MODEL CODE, *supra* note 13, at 1.

Section 101. The Model Code on Domestic and Family Violence must be construed to promote:

1. The protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; and
2. The prevention of future violence in all families.

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Several state custody statutes include innovative provisions that address safety concerns of family members in domestic violence cases. Currently, twenty-eight states have provisions related to safe custody or visitation arrangements, absence or abandonment of the family residence by a victim of family violence, and confidentiality of records and the address of victims of family violence.³⁶

1. SAFETY OF CUSTODY OR VISITATION ARRANGEMENT

Based on the statutory preference for joint custody of children and frequent and continuing contact with both parents, many family law attorneys engage their clients in divorce planning that maximizes the child's time with both parents. Researchers now emphasize that a parent's right to visitation cannot take precedence over a child's exposure to danger or the threat of harm. In addition, researchers stress that attorneys must balance a child's need for protection from psychological and physical harm with the child's need to maintain a positive, supportive relationship with both parents.³⁷

The most prevalent statutory provision concerning the safety of family members mandates a court to make awards of custody or grants of visitation, or both, that best protect the child and the abused spouse from harm. For example, the state laws of Michigan include a section that provides guidance for a court determining the frequency, duration, and type of visitation.³⁸ The factors the court must consider include the reasonable likelihood of abuse of the child or a parent resulting from the exercise of visitation, and the threatened or actual detention of a child with the intent to retain or conceal the child from the other parent. Arizona state law provides that the person who has committed an act of domestic violence has the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development.³⁹

Other state statutes broaden a court's authority to address the safety of other family members.⁴⁰ The purpose of such "safety" legislation is to limit the parent's and child's exposure to potential domestic conflict or violence and to ensure the safety of *all* family members.⁴¹

36. See column 6 of the chart at 225-27.

37. Garrity & Baris, *supra* note 30, at 40.

38. MICH. COMP. LAWS ANN. § 722.27a (West 1994).

39. ARIZ. REV. STAT. ANN. § 25-332 (1994).

40. See, e.g., HAW. REV. STAT. § 571-46 (1994); N.H. REV. STAT. ANN. § 458:17 (1993); R.I. GEN. LAWS § 15-5-16 (1994); and WYO. STAT. §§ 20-2-112 to -113 (1994).

41. CAL. FAM. CODE § 3100 (West 1995). See generally IOWA CODE ANN. § 596.41 (West 1994); and MO. ANN. STAT. § 452.375 (Vernon 1994).

2. ABANDONMENT OR ABSENCE FROM RESIDENCE

Some state statutes recognize that the time of separation is difficult and dangerous for a battered spouse, and that courts should not punish the victim of abuse for any self-protective measures taken.⁴² For instance, Kentucky law provides that the court must not consider abandonment of the family residence by a custodial party if the party was physically harmed or was seriously threatened with physical harm by his or her spouse.⁴³

Similarly, Michigan provides that courts shall not construe a custodial parent's temporary residence with the child in a domestic violence shelter as evidence of the custodial parent's intent to retain or conceal the child from the other parent.⁴⁴ These provisions are in accord with the national perspective that attempts by victims to flee an abuser and time spent at a shelter should not create any presumption of parental negligence.⁴⁵

3. CONFIDENTIALITY OF RECORDS/ADDRESS

Experts recognize that disclosure to the abuser of certain records and the address of a child and parent leaving a violent home can endanger the victim, the child, and the people sheltering them. As a result, the ABA's Center on Children and the Law recently called for amendments to the Uniform Child Custody Jurisdiction Act's affidavit requirement that discloses past and current addresses of the child.⁴⁶ Some states have incorporated provisions concerning confidentiality of certain information.⁴⁷ For example, if a party is staying in a shelter for victims of domestic violence or other confidential location, the Family Code of California requires a court to design custody and visitation orders that prevent disclosure of the location of the shelter or other confidential

42. See generally COLO. REV. STAT. ANN. § 14-10-124 (West 1994) (absence of a spouse or leaving home by a spouse because of spouse abuse is not a factor in determining the best interest of the child.); ME. REV. STAT. ANN. tit. 15, §§ 214, 581, 752 (West 1994) (abandonment of the family residence shall not be considered as a factor in determining parental rights and responsibilities when the abandoning parent has left the residence at the request or insistence of the other parent).

43. KY. REV. STAT. ANN. § 403.270 (Michie/Bobbs-Merrill 1994).

44. MICH. COMP. LAWS ANN. § 722.27a (West 1994).

45. DAVIDSON, *supra* note 4, at 14, and MODEL CODE, *supra* note 13, § 402, at 33.

46. DAVIDSON, *supra* note 4, at 14.

47. See generally ME. REV. STAT. ANN. tit. 15, §§ 214, 581, 752 (West 1994) (court may deny access to records and information if the access is not in the best interest of the child or access is sought for the purpose of causing detriment to the other parent); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1994) (a court may prohibit disclosure of the address of a child or a party if it is necessary to ensure the health, safety, or welfare of the child or party).

location.⁴⁸ Missouri authorizes a court to delete the address of the custodial parent or the child from any reports and records made available to the noncustodial parent if the court has granted the noncustodial parent restricted or supervised visitation because he or she has abused the custodial parent or the child.⁴⁹ Provisions concerning confidentiality allow a court to award custody in cases involving family violence without unduly jeopardizing the safety and well-being of the parent, child, and others involved.

4. OTHER PROVISIONS

The growing concern of the justice system for the safety, autonomy, and protection of victims of family violence is reflected by several other statutory provisions. The Arizona statute contains a provision which requires a court to consider the nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.⁵⁰ Similarly, the Vermont statute requires a court to reject an agreement between parents concerning child custody if the court finds that the agreement is not in the best interest of a child or the parents did not reach the agreement voluntarily.⁵¹ The Family Code of California allows spouses to meet investigators and mediators separately if there is a history of domestic violence or a protective order is in effect between the parties.⁵²

Pennsylvania law requires a court when making an award of custody, partial custody, or visitation to a parent convicted of certain crimes to appoint a qualified professional to provide counseling to the offending parent and to take testimony from the professional before issuing any order of custody or visitation.⁵³ The counseling must include a program of treatment or individual therapy designed to rehabilitate the parent, and the therapy must address but is not limited to issues regarding physical and sexual abuse, domestic violence, the psychology of the offender, and the effects of abuse on the victim. The court is given

48. CAL. FAM. CODE § 3031 (West 1995).

49. MO. ANN. STAT. § 452.375 (Vernon 1994).

50. ARIZ. REV. STAT. ANN. § 25-332 (1994).

51. VT. STAT. ANN. tit. 15, § 666 (1993).

52. CAL. FAM. CODE §§ 3113, 3181 (West 1995). For statutory provisions concerning mediation of cases involving family violence, see N.M. STAT. ANN. § 40-4-8 (Michie 1994) and N.C. GEN. STAT. § 50-13.1 (1994). For guidelines for mediators, see ACADEMY OF FAMILY MEDIATORS, MEDIATION OF FAMILY DISPUTES INVOLVING DOMESTIC VIOLENCE, REPORT OF THE AFM TASK FORCE ON SPOUSAL AND CHILD ABUSE (1995). A brief review of debate over mediation of cases involving domestic violence may be found in LISA NEWMARK ET AL., DOMESTIC VIOLENCE AND EMPOWERMENT IN CUSTODY AND VISITATION CASES (1994).

53. 23 PA. CON. STAT. ANN. § 5303 (1994).

broad authority by the statute to require subsequent counseling and reports and to schedule hearings for modification of any order to protect the well-being of the child.

As state legislatures add provisions in their custody codes that authorize courts to address the protection and safety of all victims of family violence and the prevention of future violence, it is imperative that judges and family law attorneys become cognizant of the complexity and subtlety of each case involving family violence so that they can craft the most appropriate custody award under the circumstances.

E. Presumptions Related to Domestic Violence

Custody codes in eight states establish rebuttable presumptions related to domestic violence.⁵⁴ The codes in four states create rebuttable presumptions against the award of sole or joint custody of children to perpetrators of domestic violence.⁵⁵ The codes in the other four states incorporate presumptions related to joint custody by providing a rebuttable presumption against joint custody if a court determines that a parent is a perpetrator of domestic violence.⁵⁶ Also, the codes in three states articulate a presumption against unsupervised visitation when a court finds that the noncustodial parent has perpetrated domestic violence.⁵⁷ Finally, two statutes include an additional presumption that a child not reside with a perpetrator of domestic violence.⁵⁸

A provision in the Louisiana code stating the court cannot deny the abused parent custody based on the adverse effects experienced because

54. DEL. CODE ANN. tit. 13, § 705A (1994); FLA. STAT. ANN. § 61.13(2)(b)(2) (West 1995); IDAHO CODE § 32-717B(5) (1994); LA. REV. STAT. ANN. § 9:364(A) (West 1994); MINN. STAT. ANN. § 518.17 subd. (2)(d) (West 1995); N.D. CENT. CODE § 14-05-22.3 (1993); OKLA. STAT. ANN. tit. 10, § 21.1(D) (West 1995); WIS. STAT. ANN. § 767.24(2)(b)2.c (West 1994). See also MODEL CODE, *supra* note 13, §§ 401, 403, at 33-34.

55. DEL. CODE ANN. tit. 13, § 705A (1994); LA. REV. STAT. ANN. § 9:364(A) (West 1994); OKLA. STAT. ANN. tit. 10, § 21.1(D) (West 1995); N.D. CENT. CODE § 14-05-22.3 (1993).

56. FLA. STAT. ANN. § 61.13(2)(b)(2) (West 1995); IDAHO CODE § 32-717B(5) (1994); MINN. STAT. ANN. § 518.17 subd. (2)(d) (West 1995); WIS. STAT. ANN. § 767.24(2)(b)2.c (West 1994).

57. LA. REV. STAT. ANN. § 9:364 (West 1994); OKLA. STAT. ANN. tit. 10, § 21.1(D) (West 1995); N.D. CENT. CODE § 14-05-22.3 (1993).

58. DEL. CODE ANN. tit. 13, § 705A(b) (1994); FLA. STAT. ANN. § 61.13(2)(b)(2) (West 1995). MODEL CODE, *supra* note 13, § 403, at 34 is similar and provides that:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by a 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.

of domestic violence is in effect a presumption.⁵⁹ The Louisiana code also specifies that the presumption fails when the court finds that both parents have committed domestic violence, and directs the court to award sole custody to the parent "who is less likely to continue to perpetrate family violence."⁶⁰

Only Oklahoma's statute requires that domestic violence be established by clear and convincing evidence before the presumption is operative.⁶¹ Other codes trigger the presumption only upon conviction of serious crimes.⁶² The Wisconsin statute requires only evidence of a crime of interspousal battery or abuse, as defined in the civil protection order statute, to activate the presumption.⁶³ North Dakota requires credible evidence of domestic violence.⁶⁴ The remaining codes merely specify that if a court determines there has been domestic violence, the

59. LA. REV. STAT. ANN. § 9:364(A) (West 1994). The statute suggests that the adverse effects of domestic violence on the abused parent may be a basis for an award to the perpetrator only if the battering parent has successfully completed a specialized batterer treatment program, refrained from the abuse of illegal drugs or alcohol, demonstrated the absence or incapacity of the abused parent and proved that an award to the perpetrator would be in the best interests of the child.

Other state codes create preclusions. For example, the Texas Family Code precludes an award of joint custody in the context of domestic violence. TEX. FAM. CODE ANN. § 14.021(h) (West 1994). The Pennsylvania statutes requires that a parent who has been convicted of designated crimes of domestic violence or child abuse may not be awarded either custody or visitation until a qualified professional offers the court testimony that the perpetrator has participated in specialized counseling and does not pose a risk of harm to the child. 23 PA. CONS. STAT. ANN. § 5303 (1994). The Washington code directs that if limitations on access will not adequately protect a child from harm or abuse, the court must deny access. WASH. REV. CODE ANN. § 26.09.191 (2)(d)(i) (West 1995).

60. LA. REV. STAT. ANN. § 9:364(B) (West 1994). The Delaware code provides that when a court determines there has been domestic abuse by both parents against each other, prior to deciding custody and the residence of the child, the court must refer the case to the child protective services agency for investigation. DEL. CODE ANN. tit. 13, § 705A(d) (1994).

61. OKLA. STAT. ANN. tit. 10, § 21.1(D) (West 1995).

62. The presumptions are narrowly crafted in Delaware, Florida, and Idaho. For example, in Delaware, the presumption against a joint or sole custody award to a batterer applies only to those parents who have been criminally convicted of crimes, any felony and serious misdemeanors, involving domestic violence or criminal contempt of a civil protective order; in Florida, the presumption is applicable only where a parent has been convicted of a felony of the second degree or higher involving domestic violence; in Idaho, the presumption applies only when the batterer is "a habitual perpetrator." Statutes were drafted in this fashion to account for the possibility that abused parents who use violence in self-defense or to protect children might face and have to overcome the rebuttable presumption. The line was thus drawn so that only parents who inflict serious violence would be burdened with the adverse presumption.

63. WIS. STAT. ANN. § 767.24(2)(b)2.c (West 1994). *Bertram v. Killian*, 394 N.W.2d 773 (Wis. Ct. App. 1986).

64. N.D. CENT. CODE § 14-05-22.3 (1993).

presumption arises.⁶⁵ Furthermore, while there is little case law interpreting the "domestic violence presumption" codes, recently published and unpublished cases have tended to limit the circumstances in which the presumption is activated.⁶⁶ Finally, some codes delineate the standard of proof⁶⁷ or the type of evidence that must be adduced⁶⁸ to overcome the presumption or to obtain modification of an order entered pursuant to the presumption.

III. Analysis of Practice

A. Evidentiary Considerations

An emerging trend in a minority of state statutes is for the state legislature to draft a list of relevant evidence for a court to consider when making determinations of child custody in cases involving family violence.⁶⁹ Such lists serve as valuable guidelines for a family law attorney who suspects his or her client may be a victim or perpetrator of family violence.

65. LA. REV. STAT. ANN. § 9:364(A) (West 1994); MINN. STAT. ANN. § 518.17 subd. (2)(d) (West 1995).

66. *Brown v. Brown*, 867 P.2d 477 (Okla. Ct. App. 1993); *Schestler v. Schestler*, 486 N.W.2d 509 (N.D. 1992).

67. North Dakota provides that the presumption may be rebutted by "clear and convincing" evidence. N.D. CENT. CODE § 14-05-22.3 (1993). Louisiana sets the standard by a preponderance of the evidence. LA. REV. STAT. ANN. § 9:364(A) (West 1994).

68. The Delaware code specifies that the presumptions may be overcome where there are no further acts of domestic violence and the perpetrator has completed a specialized batterer treatment program, any drug or alcohol program deemed necessary by the court, and the award to the perpetrator of custody or visitation would be in the best interest of the child. A perpetrator may also overcome the presumption by demonstrating extraordinary circumstances that show there is no significant risk of continuing violence against any family or household member. DEL. CODE ANN. tit. 13, § 705A (1994). Similarly, the Louisiana statute provides that the perpetrating parent may overcome the presumption by successful completion of a batterer treatment program, by refraining from the abuse of illegal drugs or alcohol, or by demonstrating the absence or incapacity of the abused parent and that an award to the perpetrator would be in the best interests of the child. LA. REV. STAT. ANN. § 9:364(A) (West 1994). The North Dakota code permits the perpetrator unsupervised visitation if he can show that unsupervised visitation will not endanger the child's physical or emotional health. N.D. CENT. CODE § 14-05-22.3 (1993). The Wisconsin statute provides that the perpetrating parent may overcome the presumption against joint custody by adducing "clear and convincing evidence that the abuse will not interfere with the parties' ability to cooperate in . . . future decision making [related to shared custody]." WIS. STAT. ANN. § 767.24(2)(b)2.c (West 1994).

69. ARIZ. REV. STAT. ANN. § 25-332 (1994); CAL. CODE § 3011 (West 1995); and HAW. REV. STAT. § 571-46 (1994).

For instance, the Arizona statute requires courts to consider all relevant factors in determining the existence of domestic violence, including, but not limited to, a finding from another court of competent jurisdiction, police reports, medical records, child protective services records, domestic violence shelter records, school records, and witness testimony. The Family Code of California allows courts to require substantial independent corroboration of abuse by one parent against another, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private non-profit organizations providing services to victims of sexual assault or domestic violence.

The Hawaii statute broadens the general mandate, and a court must consider evidence of family violence in determining the best interest of a child when establishing custody and visitation rights. The court must consider evidence of spousal abuse, determine who was the primary aggressor, and the frequency and degree of family violence. The issues of primary aggressor and frequency and degree of violence in the family are important evidentiary considerations in child custody cases involving family violence, especially if both parties claim to have been victims of spousal assault. Reports from law enforcement agencies and medical facilities are crucial evidence when determining primary aggressor and frequency and degree of violence.

B. Practice Under Presumption Statutes

States have enacted the presumption statutes outlined above within the last five years. In order to assess the impact of these provisions on custody practice and to evaluate whether they have remedied the failure of prior custody laws, a preliminary investigation of the current practice in "domestic violence presumption states" was undertaken.⁷⁰ The investigation evaluated whether "domestic violence presumption" provisions have remedied the failure of prior custody laws⁷¹ to adequately address domestic violence and safeguard adult victims and children from continuing or escalating violence. Several themes emerged.

70. Linda A. McGuire and Barbara J. Hart interviewed a limited number of judges, attorneys, advocates, court administrators, court services personnel, and law professors in the eight "presumption" states. The report on practice in these jurisdictions is thus preliminary, at best. Further investigation and discussion is warranted.

71. Thirty-four states and the District of Columbia have enacted custody statutes which require courts to consider domestic violence when fashioning custody and visitation awards. Only eight include rebuttable presumptions related to domestic violence. See Hart, *supra* note 6, at 29. See also chart at 225-27.

1. THE PRIVATE BAR IS REMARKABLY UNINFORMED ABOUT DOMESTIC VIOLENCE, AND THE QUALITY OF REPRESENTATION AFFORDED VICTIMS BY THE BAR IS UNEVEN.

A number of those interviewed suggested that removing fault from the divorce codes in the 1970s shifted the focus of family law from remediation of marital misconduct and protection of the dependent spouse against future economic peril to equitable, but fault-free, distribution of marital property and allocation of alimony awards with little, if any, consideration of the economic losses occasioned by domestic violence or other marital conduct. Since fault became largely irrelevant, many family law attorneys stopped inquiring about intimate violence and eliminated marital misconduct from claims for economic relief.

Concurrently, states modified custody codes to facilitate post-divorce participation by fathers in the parenting of children. As a result, the controlling legal principle in custody litigation, "the best interest of the child," expanded to incorporate "friendly parent" and "frequent and continuing contact with both parents" provisions. Joint legal and physical custody became the preferred custodial award in many states. Mediation gained popularity as the method of dispute resolution which would best facilitate post-separation cooperation between parents and paternal access to the children. Courts offered mediation as a way to reduce animosity between parents and to assist them in constructing parenting plans for the future without dwelling on the past.

As a consequence of the changes in attitudes and laws, some attorneys do not consider domestic violence germane to the issues they must address in divorce or custody proceedings. Rather, many family lawyers see the civil protection or restraining order proceeding as the appropriate, and exclusive, venue for dealing with violence by one adult partner against another. This legal attitude creates strong impediments to aggressive advocacy on behalf of battered women and children.

Participants in the inquiry believe that many in the private bar are not aware that domestic violence is a pervasive social problem that affects the well-being of battered parents and children;⁷² that members of the private bar do not identify those among its clients who are victims of abuse; that they do not fully comprehend the violence inflicted by

72. Klein & Orloff, *supra* note 4, at 958-59; Saunders, *supra* note 3, at 51-59; ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN (Einat Peled et al. eds., 1995); DAVIDSON, *supra* note 4, at 21. Cf. *Taking Domestic Violence Seriously*, FLA. B.J., Oct. 1994, at 68. The Florida Bar Association has distinguished itself in dedicating a special issue to domestic violence.

the perpetrator or the risk of continuing abuse;⁷³ that they do not understand the nexus between domestic violence and child maltreatment;⁷⁴ that they do not adduce evidence at trial to fully inform the court about the danger and detriment posed by the perpetrator's violence both to the other parent and the child;⁷⁵ and that they do not craft custodial recommendations that adequately safeguard the child and the abused parent from future violence.⁷⁶

73. Hart, *supra* note 6, at 23.

[Those] crafting the statutes were clear that domestic violence was intentional, instrumental behavior dedicated to control of the family. [D]omestic violence is not impulsive, abnormal, anger-driven bursts of violence that dissipate with a short period of "cooling off." [It does not] disappear if wives accommodate husbands' demands perfectly. [B]attered women may be at the most acute risk of lethal retaliation from the moment they decide to separate from the perpetrator until the time that the abuser decides not to further retaliate against the battered woman for leaving the relationship or the abuser concludes that he no longer is interested in a relationship with or control over the battered woman.

CAROLINE W. HARLOW, U.S. DEP'T OF JUST., FEMALE VICTIMS OF VIOLENT CRIME 13 (1991) (Separated and divorced women are fourteen times more likely than married women to report having been a victim of violence by a spouse or ex-spouse, and although separated or divorced women comprised 10% of all women in the study, they reported 75% of the domestic violence.).

74. Susan Schechter & Jeffrey L. Edleson, In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies (June 8-10, 1994) (briefing paper presented at the conference on Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, Wingspread, Racine, Wisconsin); Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. OF HEALTH SERVICES 97-118 (1988) (Since abuse by husbands and fathers is instrumental, directed at subjugating, controlling, and isolating, when a woman has separated from her batterer and is seeking to establish autonomy and independence from him, his struggle to dominate her may increase, and he may turn to abuse and subjugation of the children as a tactic of control of their mother.).

75. Hart, *supra* note 6, at 33. "Abuse of children by batterers may be more likely when the marriage is dissolving, the couple has separated, and the husband and father is highly committed to continued dominance and control of the mother and children." HARLOW, *supra* note 73. Spousal abuse in metropolitan Toronto: Research report on the response of the criminal justice system, Solicitor General of Canada Rep. No. 1989-02 (1989) (One quarter of the women in the study reported threats against their lives during custody visitation.).

76. Saunders, *supra* note 3. One participant reported that she has developed a standard list of the responsibilities of custody supervisors which she asks that the judge incorporate in orders. Items often included in supervision directives are: The supervisor shall at all times be able to see and hear the child. The supervisor shall accompany the parent during transportation. The supervisor shall interact respectfully with the custodial parent. The supervisor shall advise the custodial parent or counsel for the custodial parent of any violations of the visitation provisions. Should the supervisor conclude that the visiting parent plans to abduct the child or commit a violent criminal act, the supervisor shall immediately inform law enforcement.

Participants also noted that attorneys too often fail to introduce relevant evidence on domestic violence in custody cases. Moreover, participants complained that attorneys do not thoroughly identify and preserve for trial documentary evidence, including, but not limited to, protection orders, both civil and criminal; 911 tapes; voice mail tapes; police reports; medical records; criminal histories; conviction records; letters written by the perpetrator; journals kept by the victim or children; and pictures of the abused woman and children. Similarly, participants disapprovingly believe that attorneys do not interview or depose witnesses early enough in the case to properly preserve evidence and enhance negotiations. Attorneys also fail to call in experts in cases that require highly knowledgeable testimony.

Furthermore, there are disincentives related to domestic violence practice. Some participants noted that battering husbands are highly litigious.⁷⁷ Courts often protract domestic violence custody cases, which can exhaust the resources of attorneys in solo practice or in small firms. The emotional drain of representing battered women may also be high, especially when courts are unresponsive to the risks posed by domestic violence.⁷⁸ On the other hand, exposure to malpractice is increasing for attorneys who fail to address issues of domestic violence in custody and divorce representation.⁷⁹

Study participants also noted that law schools and continuing legal education programs often do not incorporate domestic violence in the curricula on custody dispute resolution.⁸⁰ Core courses on custody infrequently address domestic violence. Those which do often employ faculty who are not expert on the subject and who offer perspectives that undercut the protective mandates of the codes.

77. See Marsha B. Liss & Geraldine Butts Stahly, *Domestic Violence and Child Custody, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* 175, at 181 (Marsali Hansen & Michele Harway eds., 1993).

78. One participant noted that five children of the abused women she represents have been killed by batterers in the last month. State law makes it a crime to relocate with the children even prior to the entry of a custody order. Few judges are receptive to requests for removal, even when independent risk assessment is presented which suggests the children or mother are in danger of lethal assault.

79. LEONARD KARP & CHERYL L. KARP, *DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE* § 1.28A (1993).

80. This conclusion of the participants in this preliminary investigation is supported by legal commentary and other studies of legal practice. Klein & Orloff, *supra* note 4. However, law schools around the country have begun to incorporate domestic violence into their curricula, both in core courses and clinics. See Mithra Merryman, *A Survey of Domestic Violence Programs in Legal Education*, 28 *NEW ENG. L. REV.* 383 (1994); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 *HOFSTRA L. REV.* 1295 (1993).

2. LEGAL SERVICES ATTORNEYS ARE RELATIVELY WELL-INFORMED ABOUT DOMESTIC VIOLENCE.

Because legal services attorneys in many jurisdictions are knowledgeable about domestic violence, the quality of representation afforded low-income victims is better than that offered by the private bar. Numbers of legal services programs have developed specialized practice for custody cases in the context of domestic violence.

While the funding for legal services programs has sharply diminished in the last decade, slashing the numbers of poor clients that can be served, a significant number of legal services programs in "domestic violence presumption" states have prioritized domestic violence cases, including both protection order and custody matters.⁸¹ These offices have facilitated the development of pro bono pools to supplement family law representation.⁸² Several offer continuing legal education courses on custody in the context of domestic violence. Training is free to those who commit to taking one contested domestic violence custody or divorce case a year. Legal services staff provide supportive services to pro bono counsel, including mentoring and service as co-counsel in complex cases. Finally, many legal services programs work closely with local domestic violence programs.⁸³

3. FEW JURISDICTIONS HAVE COURT SYSTEMS THAT ARE "USER-FRIENDLY" TO PRO SE CUSTODY LITIGANTS.

Increasingly, abused women are proceeding pro se in custody matters.⁸⁴ They seem to fare best in judicial districts that have adopted

81. Legal Services in Oklahoma has prioritized family law, and Legal Services of Eastern Oklahoma estimates that as many as 95% of the divorce cases they handle involve domestic violence. See also legal services in Florida and Minnesota. However, in Idaho, cuts in legal services funding for civil litigation was terminated custody representation and pro bono services are very limited.

82. See Legal Aid programs in Miami and Jacksonville, Florida, and throughout Oklahoma. The availability of representation in family law matters in Oklahoma is particularly important because battered parents are not able to achieve temporary custody orders under the civil protection order statute. Specialized pro bono pools are being developed on domestic violence family law matters and enhanced supportive services will be offered. Plans are in the offing to institute custody and divorce clinics to inform pro se litigants and to assist in pleadings development.

83. For example, in Tulsa the legal services program does intake at the shelter once a week. Priority is given to emergencies referred by the domestic violence program.

84. This is not universally true throughout the "presumption" states, and the practice is less apparent in jurisdictions with accessible options for quality representation. Participants identified three reasons for this trend: waiting periods for legal services or pro bono representation are too long, the women are above the legal services income guidelines but financially not able to retain counsel, or the women cannot find counsel informed about domestic violence and willing to advocate for critical protections.

special programs to assist with preparation of the pleadings, risk assessment, safety planning and development of an access plan.⁸⁵

Divorce kits have been crafted in several of the "presumption" states. While these facilitate access for battered women, most participants noted that unrepresented battered women confront enormous difficulties in custody litigation.⁸⁶

4. THE JUDICIARY IS LARGELY UNINFORMED ABOUT DOMESTIC VIOLENCE AND JUDICIAL PRACTICE IS INCONSISTENT.

Judges, like lawyers, have strong biases that conflict with the protective intent underlying "presumption" codes. Many judges are reluctant to impose limitations on visitation awards to batterers. Participants advise that practice varies from judge to judge, and variance within a single judicial district may be as wide as variance between districts. Few judges impose protective limitations on visitation in the context of domestic violence, and fewer limit access to supervised visitation. Protective conditions incorporated into custody orders are often boilerplate provisions that are not crafted to the particular circumstances of the parties.⁸⁷ Furthermore, judges almost never deny abusive parents access to their children. The paucity of case law related to these relatively new statutes and the inexperience of many custody judges must surely account for the variances in protective provisions.⁸⁸

85. Such programs are available in Broward and Dade counties in Florida. One is court-based and the other is in the legal aid office. The office of the family court psychologist for the state of Delaware assists pro se litigants in completing forms and seeking fee waivers, but does not offer legal advice or education to applicants.

86. In Florida, the bar developed divorce kits to facilitate pro se practice. Participants noted that divorce lawyers are beyond the financial reach of many battered women and too many middle income parents are not able to pay counsel once retained. The kits were crafted to assure access to the courts without imposing a financial liability on the bar.

87. MODEL CODE, *supra* note 13, § 405, at 34. Participants most often complained that the lack of supervised visitation facilities eliminated any real capacity to protect children and abused parents during visitation. However, even where specialized batterer education or treatment services are offered in a judicial district, only a handful of judges mandate participation by batterers. This appeared ironic to participants since in an increasing number of jurisdictions both parents in all divorce cases with custody components are being mandated to participate in parenting courses.

88. For example, in Oklahoma, the custody judges are specially appointed and sit at the will of the trial courts. Many have been recently appointed and have no judicial experience. The custody judiciary falls at the low end of the hierarchy of judicial prestige. External incentives for upgrading practice are few. Caseloads are heavy. Opportunities for expanding critical knowledge are limited.

Judges are no less captives of the dominant discourse on appropriate custodial arrangements than are attorneys. The "friendly parent," "frequent and continuing contact," and "joint custody preference" provisions in custody law and the social science literature about the post-separation needs of children have shaped judicial beliefs, as well as practice, for the past two decades. These stand in sharp contrast to the statutes and social science literature on domestic violence and the post-separation well-being of children and abused parents.⁸⁹ Although a learning curve problem is apparent,⁹⁰ bias also operates.⁹¹

89. Hart, *supra* note 6, at 34.

[R]esearch confirms that the post-separation adjustment of children is not facilitated by joint custody or frequent visitation arrangements when there is chronic conflict and violence between the divorced parents. The more frequent the access arrangement between children and the noncustodial parent, the greater the level of physical and emotional abuse and conflict between the parents. The more severe the parental conflict, the greater the child's distress and dysfunctional behavior.

90. *Id.* Participants reported that a substantial number of judges conclude that violence directed toward the mother, even in the presence of the children, does not adversely effect children to a degree that limitations on access should be imposed. Nor do many judges apprehend the risks posed to the children during custodial access. An even greater number believe that the risks posed to the abused mother during visitation are not sufficient cause for imposing limitations or supervised visitation.

One participant reported that judges in her district deemed battered mothers "unfit" because they removed the children from the violent home and took them to shelter for protection. Another stated that attorneys in the jurisdiction advise clients against introducing the issue of domestic violence in the custody proceeding because the judges are inflamed by allegations of abuse, believing them to be specious and raised only for strategic advantage. Another participant said that judges will not admit evidence of domestic violence in divorce and custody proceedings if they have not been litigated elsewhere previously.

91. Participants reported that while judges now admit evidence on domestic violence, they often consider it of marginal import even when the rebuttable presumption is operative. Courts offer spontaneous commentary on the importance of children having a strong relationship with their fathers or assert fathers have equal rights to children, implying that the preservation of relationship and the securing of fatherhood are social mandates that supersede the rights of the children and abused parent to safety and well-being. Gender bias studies reveal that as many as half of the sitting judiciary are resistant to consider domestic violence as a factor in custody adjudications. Klein & Orloff, *supra* note 4, at 958.

An exploratory study of women who utilized domestic violence services in California found that when a court was cognizant of allegations that a father physically or sexually abused his children, the court was more likely to award the father full custody than when such allegations were not made. LISS & STAHLY, *supra* note 77. However, the bias of judges is not singular; it mirrors bias in the culture. One participant reported that a state representative in leadership in the judiciary committee considering the "presumption" code queried, "You mean if I shoot my wife in the head and kill her, you'd call me a bad father?" In another state the private bar initially lobbied hard against the reform, firmly convinced that violence by perpetrators was marginal and that, in balance, contact with a battering father was better for children than no paternal relationship.

Judicial education on domestic violence and its implications for crafting custody and visitation awards is uneven.⁹² In most jurisdictions, it is optional and the quality of the courses offered is variable.⁹³

Participants reported that family courts have not developed administrative rules, bench guides, or practice protocols on domestic violence custody cases.⁹⁴ However, in states that have instituted unified family courts, judges are better able to manage domestic violence cases and are more conscientious about protecting abused parents and children.⁹⁵

5. SPECIALIZED COURT SERVICES RELATED TO DOMESTIC VIOLENCE CUSTODY CASES ARE SORELY WANTING.

Unfortunately, few jurisdictions have instituted specialized court services for domestic violence custody cases. The exceptions are notable and worthy of replication.⁹⁶ Court services staff members are not avail-

92. In Delaware and Florida, judicial education was offered to the bench immediately after passage of the "presumption" provision. In Florida there is mandatory judicial training on domestic violence every two years. A core curriculum and supplementary courses are offered.

Participants advise that much of the judicial education on domestic violence and its nexus to custody awards is undertaken by domestic violence programs and legal services organizations rather than by the administrative offices of the courts. Participants felt that the amount of time and the content of judicial training provided by community agencies is more appropriate to the task of abbreviating the learning curve than that offered by the courts.

93. One problem identified about course development on domestic violence is that experts in the field are not well utilized. Instead, courses are sometimes crafted by those skeptical about code reforms or unaware of the dangers posed by battering parents to children and to abused parents after separation.

94. Cf. Superior Court, State of California, County of Santa Clara, *Santa Clara County Family Court Services Policy and Procedure Regarding Domestic Violence Issues* (1993).

95. In many jurisdictions in Florida, the movement to a unified family court has reduced forum shopping and resulted in fewer conflicting orders (i.e., previously entered custody awards in civil protection orders, custody orders, neglect and dependency orders involving the parties are readily available to the judiciary who are both informed and persuaded, if not bound, by previously issued awards).

96. In Broward County, Florida, the office of family court services provides comprehensive support to the courts related to domestic violence cases. There is no income guideline for the services. The program employs investigators and court psychologists. In cases where the parties make cross-allegations of domestic violence the court will order a custody evaluation and psychological screens. The children are also interviewed and evaluated. Although it is not an advocacy program, case managers do accompany battered women to custody court. All staff are trained on domestic violence and most receive upwards of four days of training each year. Internal office protocols give direction to the work. These support services make the court user-friendly and significantly inform judicial deliberations.

The London Family Court Clinic in London, Ontario, has provided advocacy for children and abused parents involved in the justice system. This includes assessment, counseling, and prevention services, as well as training for the bar, bench, and community.

able in most jurisdictions to undertake risk assessment related to abduction or recurring violence toward the abused parent or child during visitation.⁹⁷ Thus, courts are usually not able to make informed judgments based on independent risk assessment.

6. DOMESTIC VIOLENCE CUSTODY CASES ARE NOT MANDATED TO MEDIATION IN MOST "PRESUMPTION" STATES.

Whether by statute, court rule or practice guidelines, when a custody case is identified as one involving domestic violence, courts in "presumption" states do not mandate battered adults attend mediation.⁹⁸ However, the methods of identifying domestic violence cases are flawed. Most identification is attained by pleadings. While some identification is by screening performed by court staff or mediators, the screening techniques appear unsophisticated. Most jurisdictions allow battered adults who affirmatively elect mediation to use mediation services. Yet few court-annexed mediators are specially trained on domestic violence, and specialized practice procedures and facilities are not yet available.⁹⁹

Study participants noted that there is no data available to the bar or the advocacy community on the outcomes of mediated custody cases. They fear that the further custody cases are removed from judicial proceedings and public scrutiny, the less likely the rule of law will apply, the more battered adults will have to compromise their legal rights for safety, and the greater the risk posed to children in the context of domestic violence.

97. In New Jersey, pursuant to implementation of the civil protection order statute, the Administrative Office of the Supreme Court and the Attorney General promulgated a procedures manual. It contains a "Visitation Risk Assessment Interview Sheet," which is utilized by court services staff before any award of visitation is made, but only in those cases where the custodial parent requests such assessment. *DOMESTIC VIOLENCE PROCEDURES MANUAL*, App. 10 (N.J. 1994).

98. Ada County, Idaho, is an exception to this trend. With legal services not providing civil representation and with only a small pro bono program, mediation is the primary method for resolution of contested custody cases. Screening is employed; informal standards for practice have been implemented; a protocol for practice is in process; and parties are referred to trained, specialized mediators when deemed appropriate for mediation despite the violence.

But when a custody case is "waived out of mediation" because of domestic violence in Wisconsin, the same mediator is often assigned to do a custody evaluation. The waiver may not occur until well after mediation has begun. Abused women are not advised that they are entitled to an independent custody evaluator. There is no required training on domestic violence for mediators or evaluators.

99. In Illinois, not a "presumption" state, the custody mediation program in Cook County utilizes specialized procedures. Mediators are required to participate in domestic violence training. The Administrative Office of the Courts has undertaken extensive education of mediators about domestic violence.

7. EVALUATORS AND GUARDIANS AD LITEM UTILIZED BY THE COURTS HAVE MINIMAL SPECIALIZED TRAINING ON DOMESTIC VIOLENCE.

Participants noted that custody evaluators and guardians ad litem were the professionals least trained about domestic violence of any actors in the civil justice system.¹⁰⁰ While guardians ad litem are not used routinely in most "presumption" states, many judicial districts employ custody evaluators. Evaluators and guardians are heavily influenced by the social and legal policies that facilitate contact with the noncustodial parent without regard to the risks attendant upon contact or relationship. They, like mediators, are not guided as much by law as by their training and predilections about appropriate post-separation custodial arrangements. Many appear to marginalize domestic violence as a factor with significant import for abused adults and children in custodial outcomes.

Finally, participants noted that the greater the role of custody evaluators and mediators, the less courts take responsibility for decision-making in custody cases. Consequently, they assert that decision-making deferred to nonjudicial personnel works to the detriment of battered women and children.

8. THE AWARD OF A PROTECTION ORDER TO AN ABUSED PARENT IN MOST "PRESUMPTION" STATES IS NOT DISPOSITIVE OF THE CLAIM OF DOMESTIC VIOLENCE IN CUSTODY PROCEEDINGS.

Courts enter many protection orders by agreement of the parties; as a result, the court does not make findings of fact about the abuse. Thus, the fact that a court has entered a protection order carries little weight in many custody proceedings. But if there has been a violation and a conviction or plea, the order is deemed dispositive of the claim of domestic violence. Criminal convictions on domestic violence typically compel the same conclusion. Moreover, since custody courts have independent jurisdiction over custody claims, the custody adjudicator may set aside the custody awards in protection orders. However, many judges view custody awards in protection orders with significant deference when the parties have independently reached an agreement on the

100. Minnesota may be the exception to this trend. Guardians are offered a formal course of training, which includes specific instruction on domestic violence. A protocol for guardian practice, containing guidelines on domestic violence, is now in process. Court services custody evaluators are also trained on domestic violence. The domestic violence community has not participated in the planning or development of the training curricula and question the efficacy thereof. In Florida, a domestic violence manual has been devised for guardians and training has begun in several circuits. GOVERNOR'S TASK FORCE ON DOMESTIC VIOLENCE, THE FIRST REPORT OF THE GOVERNOR'S TASK FORCE ON DOMESTIC VIOLENCE (1994).

custody provisions in the protection order or when the court has found that the perpetrator abused the children.

9. THE LACK OF SECURE SUPERVISED VISITATION FACILITIES JEOPARDIZES THE PROTECTIVE MANDATES IN STATE CODES.

Participants reported that there is a dearth of secure supervised visitation facilities. As a result, the judiciary must ration these scarce resources carefully. In some communities, courts are able to employ the services of the child protective services agency. Participants reported, however, that child protective service agencies typically offer supervision only when a child is abused and the subject of a juvenile proceeding is related to that abuse.

As a consequence, if supervised visitation is ordered, the court places the responsibility for identifying a supervisor, arranging the visitation and sometimes underwriting the costs on the battered woman. If she is unable to produce a plan for supervision, the chances increase that the court will approve an unsupervised visitation or authorize a member of the perpetrator's family to provide supervision. Participants in this investigation concluded this default arrangement neither protects the child nor the abused parent.

10. IT IS NOT YET CLEAR THAT THE "DOMESTIC VIOLENCE PRESUMPTIONS" HAVE EFFECTED AMELIORATIVE AND PROTECTIVE OUTCOMES FOR CHILDREN AND ABUSED PARENTS.

Evidence of domestic violence is more often adduced and more readily admitted in custody proceedings now than before statutory reform made domestic violence relevant. The impression of participants is that, where courts are persuaded that domestic violence has occurred and the risk is continuing or escalating, the courts often award abused women sole physical custody. Yet courts do not routinely place protective conditions to safeguard women and children.

Furthermore, participants noted that an adverse presumption now confronts abused parents who have used violence in self-defense or to protect children. The numbers of abused parents required to overcome the presumption, however, are few because most codes require a showing of ongoing or serious violence before the presumption is activated. For instance, the Louisiana code contains an explicit exception for self-defense or protection of the child.¹⁰¹

In some judicial districts and states there has been specialized training of the bar, court services employees, legal services attorneys and advocates for battered women on domestic violence and the changes in

101. LA. REV. STAT. ANN. § 9:362(2) (West 1994).

custody laws thereon. Participants reported that in those judicial districts and states where there has been specialized training of the bar, the "presumption" has shaped judicial decision-making and has produced custody awards designed to safeguard children and abused parents. In fact, the anticipated changes in practice have been most noticeable in those jurisdictions where the courts and legal services programs developed specialized programs.

Participants gave mixed answers on the question of whether "presumption" codes better protect abused parents and children than "best interest of the child" codes that contain domestic violence as a factor courts must address in custody deliberations. Participants do believe that attorneys have litigated the issue of domestic violence more since the enactment of "presumption" codes. There is consensus among the legal community that the reformed codes that contain domestic violence as a "best interest" factor better protect abused parents and children than previous codes that did not contain such language. But it is unclear whether the reformed codes protect the victims in "presumption" states better than reformed codes protect victims in "best interest" states. The success of the battered parent in custody proceedings is a function of informed and vigorous advocacy; therefore, abused women and children fare as well under codes with a "domestic violence best interest" factor provision as under "presumption" codes. In the future, the legal community should make more assessments of both types of codes.

IV. Call to Action

Legal doctrine regarding parents' rights and responsibilities within a family has evolved as psychological and sociological theories concerning family structure that were popular ten years ago have given way to new knowledge. Consequently, laws concerning child custody in cases involving family violence are changing rapidly. Only an informed attorney can argue the various innovative provisions in child custody laws concerning family violence. Likewise, only an informed attorney can see the relevance of family violence to the issue of child custody and can articulate it well to the court. Because of the general lack of mandated, formal training for attorneys in the area of family violence, individual practitioners must seek out continuing education in this area. Local and state bar associations must take the lead in drafting protocols and training manuals for their members.¹⁰²

102. MODEL CODE, *supra* note 13, § 512, at 48. Such courses must be prepared and presented by multidisciplinary groups including public and private agencies that provide programs for victims of family violence and programs of intervention for perpetrators, advocates for victims, and statewide coalitions. The courses must include

Custody and visitation cases that involve family violence increasingly call for the following: (1) complex hearings and findings of fact where abuse is alleged; (2) use of child witnesses and expert testimony; (3) considerations of the fitness of a parent who abuses his or her spouse as well as the impact of family violence on the battered spouse's capacity to parent; (4) presumptions against joint custody; and (5) more thorough consideration of the best interest of the child. But, in a majority of divorce and contested custody cases, the abused spouse is a pro se litigant. The ABA Center on Children and the Law has called for attorneys to make the assistance of legal counsel more readily available and affordable to victims of domestic violence and their children.¹⁰³ Attorneys must seek a variety of solutions to provide for the unmet legal needs of such litigants.

Increased emphasis on court personnel, custody evaluators, child protective service workers, and guardians ad litem in cases involving family violence has led to less reliance on attorneys and also has been problematic for battered women with children.¹⁰⁴ National standards and recommended practices are available for courts and court-related agencies such as court administrators, probation officers, advocates, children's protective services workers, custody evaluators, mediators, and other treatment providers who work with cases involving family violence.¹⁰⁵ The Model Code on Domestic and Family Violence calls for continuing education for judges, lawyers, probation officers, workers in children's protective services, social workers, court appointed special advocates, mediators, and custody evaluators.¹⁰⁶ In order to ensure a high quality of legal education and training in family violence, family law attorneys should collaborate with judges and various court-related agencies in continuing education programs.

Domestic violence is a pervasive problem that devastates all family members and challenges society at every level. It violates our communities' safety, health, welfare, and economy by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity, and intergenerational violence. Therefore, leadership,

the nature, extent, and causes of family violence, practices designed to promote safety of the victim and other family and household members, available resources for victims and perpetrators, sensitivity to gender bias and cultural, racial, and sexual issues, and the lethality of family violence.

The Florida Bar Association is preparing a Manual for Attorneys for Domestic Violence Cases. The manual will be ready for distribution in June 1995.

103. DAVIDSON, *supra* note 4, at 9.

104. Mahoney, *supra* note 2, at 74.

105. DAVIDSON, *supra* note 4, at 21; HERRELL & HOFFORD, *supra* note 12, at 33.

106. MODEL CODE, *supra* note 13, § 511, at 47.

communication, and coordination are critical among legislators, law enforcement officers, social service agency personnel, judges, attorneys, health-care personnel, advocates, and educators. Attorneys should encourage the development of and should participate in a coordinated community response to family violence such as family violence councils.¹⁰⁷

Data indicate that women and children are at elevated risk for violence during the process of and after separation. National judicial and bar organizations have recently emphasized safety in their efforts for victims of family violence and their children.¹⁰⁸ Some communities are providing programs to carry out court-ordered supervised visitation in a safe and responsible manner.¹⁰⁹ Attorneys should be leaders in their communities and encourage the development of resources such as supervised visitation centers which promote the safety of parents and their children and provide appropriate access and interaction between parents and children.

In conclusion, when there is domestic violence in a divorce or custody case, family law attorneys are in a pivotal position to ensure a safer future for their clients and thereby a safer community. The highest caliber counsel the family bar can offer must fill the vacuum of representation and advocacy for victims and children of domestic violence.

107. See MODEL CODE, *supra* note 13, ch. 5, at 39; DAVIDSON, *supra* note 4, at 21.

108. MODEL CODE, *supra* note 13, Introduction, at v, and § 406, at 35; DAVIDSON, *supra* note 4, at 4, 21.

109. See Brockton Family and Community Resources, Massachusetts; Family Connection Center of the Visiting Nurses Association, Marion County, Indiana; Ethical Culture Society, New York, New York; Creative Visitation YWCA, San Diego, California; Innovations, Women's Resource and Crisis Center, Amsterdam, New York. Contact the National Center on Women and Family Law for information concerning how to contact the programs listed above.

Appendix

An Analysis of Provisions Concerning Domestic Violence in State Custody Statutes

Column Number and Explanation

1. The statute *requires* courts to consider evidence of domestic violence or abuse of a spouse when making child custody or visitation determinations.
2. The statute contains a declaration of public policy concerning frequent contact with both parents and encouraging shared parental responsibilities, or a statutory preference or presumption for joint or shared custody, or both.
3. The statute provides that domestic violence is contrary to the best interests of a child or to a stated preference for joint or shared custody, or the statute prohibits an award of joint custody if there is evidence of domestic violence.
4. The statute contains "friendly parent" provisions requiring courts to consider which parent is more likely to encourage frequent and continuing contact with the other parent.
5. The statute contains one or more presumptions concerning family violence; for example, a presumption that joint custody is not in the best interest of the child if there is evidence of family violence or a rebuttable presumption that no perpetrator of domestic violence shall be awarded custody.
6. The statute contains a provision that addresses safety concerns of family members, for example, placing the burden of proof on the person who has committed an act of domestic violence to prove that visitation will not endanger the child.

States	Section	# 1	# 2	# 3	# 4	# 5	# 6
Alabama	ALA. CODE § 30-3-2 (1994)						✓
Alaska	ALASKA STAT. § 25.24.150 (1994)	✓			✓		
	ALASKA STAT. § 25.20.090 (1994)	✓			✓		
Arizona	ARIZ. REV. STAT. ANN. § 25-332 (1994)	✓		✓	✓		✓
California	CAL. FAMILY CODE §§ 3000-3399 (West 1995)	✓	✓				✓
Colorado	COLO. REV. STAT. ANN. § 14-10-124 (West 1994)	✓	✓	✓	✓		✓
	COLO. REV. STAT. ANN. § 14-10-129 (West 1994)						✓
Connecticut	CONN. GENN. STAT. § 46b-56a (West 1994)		✓				
Delaware	DEL. CODE ANN. tit. 13, § 705A (1994)					✓	
	DEL. CODE ANN. tit. 13, § 706A (1994)	✓					

States	Section	#	#	#	#	#	#
		1	2	3	4	5	6
District of Columbia	D.C. CODE ANN. §16-914 (1994)	✓					✓
Florida	FLA. STAT. ANN. § 61.13 (West 1995)	✓	✓	✓	✓	✓	✓
Georgia	GA. CODE ANN. §§ 19-9-1 to 19-9-5				✓		
Hawaii	HAW. REV. STAT. § 571-46 (1994)	✓					✓
Idaho	IDAHO CODE § 32-717 (1994)	✓					
	IDAHO CODE § 32-717B (1994)		✓	✓		✓	
Illinois	ILL. ANN. STAT. ch. 750, para. 5/602 (Smith-Hurd 1994)	✓		✓	✓		
Iowa	IOWA CODE ANN. § 598.41 (West 1994)	✓			✓		✓
Kansas	KAN. STAT. ANN. § 60-1610 (1994)	✓	✓		✓		
Kentucky	KY. REV. STAT. ANN. § 403.270 (Michie/Bobbs-Merrill 1994)	✓					✓
Louisiana	LA. REV. STAT. ANN. § 364 (West 1994)	✓				✓	✓
Maine	ME. REV. STAT. ANN. tit. 19, §§ 214, 281 & 752 (West 1994)	✓			✓		✓
Massachusetts	MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1994)	✓					✓
Michigan	MICH. COMP. LAWS ANN. §§ 722.23, 722.26a & 722.27a (West 1994)	✓			✓		✓
Minnesota	MINN. STAT. ANN. § 518.17 (West 1995)	✓	✓	✓	✓	✓	
	MINN. STAT. ANN. § 257.025 (West 1995)	✓					
Mississippi	MISS. CODE ANN. § 9305-24 (1993)		✓				
Missouri	MO. ANN. STAT. § 452.375 (Vernon 1994)	✓	✓		✓		✓
	MO. ANN. STAT. § 452.400 (Vernon 1994)						✓
Montana	MONT. CODE ANN. § 40-4-212, 40-4-222 & 40-224 (1993)	✓	✓	✓			
Nebraska	NEB. REV. STAT. § 42-364 (1995)	✓					
Nevada	NEV. REV. STAT. §§ 125.460, 125.480 & 125.490 (1993)	✓	✓				
New Hampshire	N.H. REV. STAT. ANN. § 458:17 (1993)	✓	✓	✓			✓
New Jersey	N.J. STAT. ANN. tit. 9, § 9:2-4 (West 1995)	✓	✓		✓		✓
New Mexico	N.M. STAT. ANN. § 40-4-8 (Michie 1994)						✓

States	Section	#	#	#	#	#	#
		1	2	3	4	5	6
New York	N.Y. DOM. REL. LAW § 240 (McKinney 1995)						✓
North Carolina	N.C. GEN. STAT. § 50-13.1 (1994)						✓
North Dakota	N.D. CENT. CODE § 14-09-06.2 (1993)	✓		✓		✓	✓
	N.D. CENT. CODE § 14-09-06.2 (1993)						✓
Ohio	OHIO REV. CODE ANN. § 3109.04 (Anderson 1994)	✓			✓		
	OHIO REV. CODE ANN. § 3109.051 (Anderson 1994)						✓
Oklahoma	OKLA. STAT. ANN. tit. 10, § 21.1 (West 1995)	✓	✓			✓	✓
	OKLA. STAT. ANN. tit. 43, §§ 112 & 112.2 (West 1995)				✓	✓	
Pennsylvania	23 PA. CONS. STAT. ANN. § 5303 (1994)	✓			✓		✓
Rhode Island	R.I. GEN. LAWS § 15-5-16 (1994)	✓		✓			✓
Texas	TEX. FAM. CODE ANN. §§ 14.021, 14.07 & 14.081 (West 1994)	✓	✓	✓	✓		
Utah	UTAH CODE ANN. §§ 30-3-10 & 30-3-10.2 (1994)				✓		
	UTAH CODE ANN. §§ 30-3-34 (1994)						✓
Vermont	VT. STAT. ANN. tit. 15, §§ 650, 665 & 666 (1993)		✓		✓		✓
Virginia	VA. CODE § 20-124.3 (Michie 1994)	✓			✓		
	VA. CODE § 20-124.4 (Michie 1994)						
Washington	WASH. REV. CODE ANN. § 26.09.191 (West 1995)	✓					✓
	WASH. REV. CODE ANN. § 26.10.160 (West 1995)	✓					✓
West Virginia	W. VA. CODE §48-2-15 (1994)						✓
Wisconsin	WIS. STAT. ANN. § 767.24 (West 1994)	✓		✓	✓	✓	
Wyoming	WYO. STAT. § 20-2-112 (1994)	✓		✓			✓
	WYO. STAT. § 20-2-113 (1994)	✓		✓			✓

Supervised Visitation and Family Violence

ROBERT B. STRAUS*

I. Introduction

In August of 1994, *The Impact of Domestic Violence on Children, A Report to the President of the American Bar Association*, recommended that "State laws should direct the establishment of appropriate supervised visitation programs." With this recommendation, the relevant committees¹ of the American Bar Association joined family court judges, child protective service agencies, and advocates for abused children and battered women in calling for supervised visitation services.

Supervised visitation is contact between a child and adult(s), usually a parent, that takes place in the presence of a third person who is responsible for ensuring the safety of those involved. Supervised visits are necessary when contact with the adult(s) may present a risk to the child or to a parent.²

Providers of supervised visitation operate at the intersection of legal and social services by performing a rapidly evolving set of functions with which courts and family lawyers are becoming increasingly familiar.

* Robert B. Straus, D.M.H., J.D., Director, Meeting Place: Supervised Child Access Service, Cambridge, MA.

1. The ABA Steering Committee on the Unmet Legal Needs of Children, The ABA Young Lawyers Division, Children and the Law Committee, The ABA Section of Family Law, Domestic Violence Committee, The ABA Litigation Section Task Force on Children, The ABA Criminal Justice Section, Victims Committee.

2. Many noncustodial parents object to the commonly used terms "visitation" and "supervised visitation" because they imply that the "visiting" parent is in a peripheral role. They prefer the phrase "child access" which maintains focus on the perspective of the child's interest in contact. In this article the phrases "supervised visitation" and "supervised child access" are used interchangeably.

This article explains the development and use of supervised visitation services. The first part gives an overview of supervised visitation by describing the needs of children, families, and the courts that supervised visitation addresses; what supervised visitation is in practice; and the current state of services and funding. The second part of the article focuses on supervised visitation and family violence by identifying different approaches to supervising visits. The article discusses the use of supervised visitation when families have a history of family violence with special attention to practical implications for family law practitioners. A brief concluding section addresses the directions in which supervised visitation needs to move.

II. An Overview of Supervised Child Access

A. *The Need for Supervised Visitation*

Child protective agencies have been supervising contact between a child and one or more of the child's family members for years. When a child has been removed from the home because of abuse or neglect, regular visits are essential to maintain the child's relationships with his or her parents while interventions are made to reunify the family, or, if necessary, pending termination of parental rights. When a child's contact with a parent presents an ongoing risk, visits must be supervised.³

Over the past decade, however, the major impetus for the growth of services for supervised child access has come from a rapidly expanding need for services for separated and divorced parents. The increase in divorces from the 1960s through the 1980s,⁴ the popularity of no-fault divorce and joint custody, the indeterminate nature of the "best interests" standards for decisions about children, the increase in out-of-wedlock births, initiatives to increase enforcement of child support,⁵ and counter-initiatives demanding enforcement of visitation⁶

3. For a review of the limited literature on supervised visitation and a more complete overview of the origins of the service, see Robert B. Straus & Eve Alda, *Supervised Child Access: The Evolution of a Social Service*, 32 *FAM. & CONCILIATION CTS. REV.* 230, 232 (1994).

4. NEIL KALTER, *GROWING UP WITH DIVORCE: HELPING YOUR CHILD AVOID IMMEDIATE AND LATE EMOTIONAL PROBLEMS 1* (Collier MacMillan ed., 1990).

5. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). See also 42 U.S.C.A. § 651 (West 1988).

6. ROBERT HOROWITZ & DIANE G. DODSON, *CHILD SUPPORT, CUSTODY AND VISITATION, A REPORT TO STATE CHILD SUPPORT COMMISSIONS, AMERICAN BAR ASSOCIATION NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SUPPORT PROJECT 3-6* (1985).

have all contributed to a vast increase in the amount of litigation over child access.⁷

The issues presented have also become more complex. The importance for a child's development of continued contact with both parents⁸ has to be balanced against the negative effects of contact if there is intractable conflict between his or her parents.⁹ Serious allegations of abuse and risk are matched by denial and counterclaims of interrupted access. Many of these cases urgently need a protected setting in which contact can occur.

Specifically, situations which require supervision for safe access include: when a noncustodial parent is impaired by alcohol or drug abuse, mental illness, or retardation; when there is a risk of abduction; when a child is refusing to visit; when a custodial parent is denying access; when there has been no prior contact or an extended interruption; or when there are contested allegations that a child is at risk for any of these reasons. Availability of supervised visitation allows contact between the parent and child to continue temporarily while the court assesses conflicting allegations or when risk to a child is proven and ongoing.

B. *Family Violence Cases*

Family violence¹⁰ raises issues of child access for both separated and divorced families and for families involved with child protective agencies. When allegations of physical or sexual child abuse occur, careful supervision of contact with the alleged abusive parent is necessary until a determination about the validity of the abuse has been made. If child abuse is confirmed and access is still considered useful for the child, long-term supervision is likely to be the only way to allow safe contact to continue.

The central focus of this article, however, is the special risks associated with contact between children and parents when there is

7. Straus & Alda, *supra* note 3, at 235.

8. See, e.g., JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAK-UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

9. Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 *AM. J. OF ORTHOPSYCHIATRY* 576 (1989).

10. In this article, "family violence" is used as a general term, referring to any form of abuse by any member of a household towards another member of the household. The descriptive terms "partner abuse" and "child abuse" are used whenever possible. "Domestic violence" is used with its popular, but often confusing, connotation of male abuse of a woman partner which may also include abuse of their child. "Violence" and "abuse" are used pragmatically to include concern about any form of harm toward a household member that causes a court or referring agency to consider that supervised visitation is necessary.

and recently opened.¹⁸ Parallel growth has occurred in Canada,¹⁹ Australia, New Zealand, and Europe. Providers and others interested in the service have formed an international organization, the Supervised Visitation Network.²⁰ The Network provides information and support to existing and new supervised visitation programs and is developing standards and guidelines for practice.

1. SUPERVISED VISITATION SERVICES

Supervised visitation is actually a range of services which vary according to the degree of closeness of the observation, the training of the observer, and the site for the contacts. "One-on-one" supervision with an observer present at all times is necessary when issues of safety or parental manipulation of a child are compelling. Supervision can be less close, intermittent, or conducted in a group when the risk is lower. "Exchange supervision" is observing the transfer of child(ren) at the start and end of visits. This supervision can protect the safety of parents when a history of abusive behavior is present or when a child is upset by transfers. In "off-site" monitoring, a supervisor accompanies the noncustodial parent and child(ren) as they spend time together away from a program center. Visits supervised off-site can serve as a transition as parents move toward unsupervised access.

Virtually all supervised visitation programs provide some form of documentation of parent-child contacts. The courts or referring agencies frequently ask supervisors of visits for reports on the progress of contacts. Documentation varies from minimal recording of attendance to standardized checklists to detailed observation notes. Programs, particularly those dealing with children removed from the home, may also provide transportation of children between the custodial (or foster) home and the visiting site. Education and support groups and referrals to mental health, legal, or other social services are common ancillary services.

In most cases, the visiting parent comes to the center first and is taken to the space where the visit will occur to avoid contact with the other parent. The custodial parent and child arrive later. A supervisor, who

18. More comprehensive data will be available from the first national survey of supervised visitation programs, begun in January 1995 by Jessica Pearson et al., at the Center for Policy Studies in Denver under a grant from the State Justice Institute.

19. Cathy Carroll, *Information on Supervised Access Programs in Canada and the United States* (1990) (available from Supervised Access Pilot Project, Ministry of the Attorney General, Policy Development Division, 720 Bay Street, 7th Floor, Toronto, Ontario).

20. The Supervised Visitation Network, 1690 N. Stone Ave., Suite 111, Tucson, AZ 85705.

has usually met the child, brings the child from the custodial to the visiting parent. The supervisor remains present throughout the visit to observe and intervene if necessary. Visits usually last one to two hours. At the end of the visit, the process is reversed with the custodial parent and child leaving first. Then, the observer writes up observation notes.

Supervisors in different programs range from licensed mental health professionals to paraprofessionals. The only specific educational requirement usually is completion of a training program for supervising visits. In addition, a majority of programs train volunteers or student interns to supervise visits. However, training varies greatly in scope and content with each supervised visitation program.

Supervised visitation is not an evaluation to determine the appropriateness of future arrangements for child access.²¹ It is not psychotherapy.²² Supervised visitation is also not a substitute for difficult decisions by the family court or by an agency charged with protecting a child.

2. FUNDING OF SUPERVISED CHILD ACCESS SERVICES

Virtually all supervised visitation programs operate as nonprofit entities. Fees for service support only part of these programs. While individual practitioners may provide supervised visitation services for a substantial fee to wealthy individuals, programs who accept referrals from the courts or public agencies must deal with a predominantly economically disadvantaged population. Therefore, all programs rely on some form of subsidy, usually a combination of support from a parent agency, foundation grants, individual contributions, or contracts with state agencies. In the absence of public funding, most programs around the country are small and struggling. In the long term, more public funding is essential to make supervised visitation services widely available.

Today, there are signs that government support for supervised visitation is moving in the right direction. While only three states (Arizona,²³ Illinois,²⁴ and Minnesota²⁵) currently provide specific funding for supervised visitation, a number of states are currently considering legislation or budget initiatives for this purpose.²⁶ On the federal level, the Child

21. Some supervised visitation programs provide evaluation services, but, as discussed further below, supervised visitation is not by itself an evaluation, which requires different skills and procedures.

22. A trained clinician may provide "therapeutic supervision," but this is actually a form of parent-child psychotherapy with the unique characteristic that the sessions may be the only contact between the parent and child(ren) involved.

23. ARIZ. REV. ST. ANN. § 25-338 (1987).

24. ILL. ANN. STAT. ch. 20, para. 505/5 (Smith-Hurd 1991).

25. MINN. STAT. ANN. § 256F.01-.08 (West 1992).

26. *E.g.*, California, Massachusetts, and New York.

a history or allegations of violence between parents.¹¹ Here is a frequent scenario:

Six year old Christine's father has hit her mother as long as she can remember. Two weeks ago, when her father began slapping and shoving her mother, Christine tried to get in the middle and was hit by her father. Following the outburst, her mother left the house with Christine and her four year-old brother. Unable to find a shelter that would take children, she returned to her parents' home. Now, Christine's father has gotten a temporary court order for alternate weekend visitation. Regardless of the existence of an outstanding restraining order against Christine's father, the visitation order has no provision for safety at transfers. Because of the restraining order, Christine's father demands that the mother bring the children to his home.

This scenario is not unusual. Yet the highest risk of violence is the period immediately following an abused woman's move to end the relationship.¹² Other than court appearances, the drop-off and pick-up of the children for each visit is the only time a batterer has access to his former partner. Children are traumatized by screaming fights at these points. Worse, these times are also when children and their parents are injured or killed. Therefore, there exists an urgent need for protected settings for the safe transfers of children between the parents.

Risk during transfers is only one of the dangers. There is also a high degree of overlap between partner abuse and child abuse.¹³ When both child and partner abuse have occurred, the contacts with the children as well as the transfers need to be protected. Even without a history of child abuse, an abusive partner may still try to use the children manipulatively to force the abused partner to return or try to retaliate through the children. Therefore, if contact with the abusive partner is granted, the children and the custodial parent need to be protected from these manipulations.

C. *The Need for Services*

The volume of cases requiring supervised visitation is just beginning to be clear. Practitioners running programs know their services are

11. Mildred D. Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, in *GENTLE JEOPARDY: THE FURTHER ENDANGERMENT OF BATTERED WOMEN AND CHILDREN IN CUSTODY MEDIATION* 347, 348 (1990).

12. E.g., Janet R. Johnston & Linda Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 *FAM. AND CONCILIATION CTS. REV.* 282, 287 (1993).

13. Mary McKernan McKay, *The Link between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, 73 *CHILD WELFARE* 29 (1994) (citing W. STACEY & A. SHUPE, *THE FAMILY SECRET* (1983)).

swamped and have long waiting lists. Only a few formal assessments have been conducted. One is a survey of family court judges in New York City conducted by the New York City Bar Association.¹⁴ Over the period of one week, the judges polled saw a need for supervised visitation in 106 new cases. The eight existing visitation programs in the city can provide supervision for a total of nearly 100 cases. Most families, however, remain in a supervised visitation program for a minimum of twelve weeks. Therefore, the weekly referral estimate of 106 new cases a week means a "demand" for supervision services over the twelve weeks of roughly 1,200 cases with programs that can only provide supervision for only 100 families at a time! Of the families referred to supervised visitation programs 50 percent involve issues of partner abuse.¹⁵

Without the availability of supervised child access services, judges face untenable choices. Judges can either cut off contact between a parent and child or order continued access with the risk of physical and/or emotional abuse to the parent or child. In the New York survey, denial of visits was the most common result when supervised visitation services were not available. The second common result was unsupervised contact. Either alternative is unacceptable and dangerous.

D. *The Growth of Supervised Visitation Services*

The growth of supervised visitation services has been slow despite the pressing need.¹⁶ These families are difficult to work with. The expertise needed falls between the professional competencies of psychotherapists, attorneys, or mediators. Most significantly, supervised visitation is not a money-making proposition and there has been little or no public funding.

Starting with just a handful of programs in 1982 and even despite numerous obstacles, the pressure of the need has resulted in substantial growth of supervised visitation services. There are fifty-six known supervised visitation programs operating in twenty-eight different states.¹⁷ These statistics probably represent about a third to one-half of the existing programs. Many of these programs are small, part-time,

14. ANNE REINIGER ET AL., *THE ASS'N OF THE BAR OF THE CITY OF N.Y., COURT ORDERED SUPERVISED VISITATION: DOCUMENTING AN UNMET NEED* (1994).

15. Based on informal review of records of Meeting Place: Supervised Child Access Service, Cambridge, MA. This estimate parallels the findings of Johnston and Campbell that three-quarters of their sample of high-conflict families referred by the court had a history of recent domestic violence. Johnston & Campbell, *supra* note 12, at 285.

16. Straus & Alda, *supra* note 3, at 237.

17. Based on the membership list of the Supervised Visitation Network, November 1994.

Safety Act became part of the Crime Bill.²⁷ Supervised visitation centers were designated as one of fourteen prevention programs authorized to share \$75.9 million annually.²⁸ Unfortunately, since the November 1994 elections, the appropriation of those authorized funds appears unlikely. However, the legislation marks recognition at the federal level of the need for supervised visitation services.

Public awareness of family violence has brought about these legislative gains. Advocates for battered women have become a potent political force promoting the need for supervised visitation services. However, responding to the risks of contact with batterers is only one of the historical functions of supervised visitation services. As discussed in the next section, the current emphasis on family violence as the primary reason for supervising visits has been the source of some tension in the development of public policy.

III. Differing Approaches to Supervised Visitation

Supervised visitation programs have developed different approaches to providing service. Programs differ on when visits should be allowed, whether a provider should have a "neutral" stance between the parents, and how fees should be allocated. In the absence of public funding, small groups of individuals have independently developed ways of providing services in response to the needs of different groups of clients, resulting in program variations. A number of programs have grown out of services for battered women.²⁹ Other programs were developed by agencies with a mission of protecting abused children.³⁰ Still other programs were started by individuals experienced in working with family courts.³¹

For those of us who have worked with battered women or whose lives have been touched by domestic violence, the fundamental importance of the victim's perspective is compelling and primary. Those of us who are advocates for children or who have personal experience with child abuse cannot imagine any group that needs more attention. Tension between child and victim advocates has been exacerbated because child protective agencies must investigate the parents of abused children.

27. Child Safety Act, S. 870, H.R. 2573, 103d Cong., 1st Sess. (1993).

28. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 30201(a)(2)(J), 108 Stat. 1796 (1994) (to be codified at 42 U.S.C. § 13751) (authorization for funding of supervised visitation centers).

29. Examples are: the Domestic Violence Action Program, Brockton, MA, and APNA GHAR Inc., Domestic Violence Victim Assistance, Chicago, IL.

30. The New York Society for the Protection of Cruelty to Children and the Rochester Society for the Protection of Cruelty to Children are two examples.

31. Two examples are Meeting Place: Supervised Child Access Service, Cambridge, MA, and the Judicial Supervision Program, Tucson, AZ.

When a family has partner abuse and child abuse, these agencies must question the care and the adequacy of protection afforded by a woman who was battered by the same man who abused the children. In these cases, women feel unfairly blamed for the actions of an abusive partner. Better understanding of family violence should lead to more sensitive assessments of battered mothers.

Supervised visitation providers need to develop inclusive approaches which balance the needs of abused women and at risk children. Attorneys and judges, aware of these differences in perspective and the issues discussed below, will choose better supervisors and craft appropriate visitation orders.

A. Contact with Abuser?

A threshold question is whether to allow contact between a parent who has abused a partner and their child. Well-documented evidence has shown the negative impact on children who are living in a home with a parent who is abused. First, there is a high correlation between abuse of a spouse and abuse of children. A spousal batterer, most often the father, tends to abuse his children. Forty-five to 70 percent of battered women in shelters report concurrent child abuse in the homes they left.³² Even children who are not abused are harmed by living in a home with spousal abuse. Children exposed to destructive models of relationships learn dysfunctional ways of handling conflict.³³ These exposed children show symptoms of post-traumatic stress³⁴ and tend to develop negative character traits.³⁵ They also are at a higher risk for suicide, substance abuse, and crime.³⁶

The first priority must be to stop the abuse. Women who are battered must be protected. Children must be removed from a situation in which abuse, either of a parent or of the children, is occurring. No contact

32. McKay, *supra* note 13, at 29 (citing Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. OF HEALTH SERVICES 97 (1988)).

33. Judith Lennett et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, paper prepared by the Domestic Violence Project, Cambridge and Somerville Legal Services, Cambridge, MA 18 (1995) (citing P. Berman, *Impact of Abusive Marital Relationships on Children*, in BATTERING AND FAMILY THERAPY 139 (M. Hansen & M. Harway, eds. (1993))).

34. PETER JAFFE ET AL., *CHILDREN OF BATTERED WOMEN* 72 (1990).

35. Lennett et al., *supra* note 33, at 18 (citing L. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407, 419 (1985)).

36. *Id.* (citing GUARINO, BOSTON DEP'T OF YOUTH SERVICES, PUB. NO. 14,020-200-74-2-86-CVC, *DELINQUENT YOUTH AND FAMILY VIOLENCE: A STUDY OF ABUSE AND NEGLECT IN HOMES OF SERIOUS JUVENILE OFFENDERS* (1985)).

should occur between a child and an abusive parent unless safety is assured. Even after the partner abuse has been stopped, there is a question whether the continuation of contact with the abusive parent even in a secure setting may still damage the child.

Some have made powerful assertions that supervised visitation with an abusive parent is inherently damaging because the structure of supervised visitation with a supervisor acting as though things are normal during a visit implies approval of the batterer and destroys a child's sense of reality about the abuse.³⁷ These are important risks if supervision is not handled well. Procedures can and should be included regularly during intake into a program, which explain the purpose of supervision for children and support their feelings and perceptions. Meanwhile, there is a need for good clinical research in this area to understand what happens during supervised visits and how the children fare.

What about indirect negative effects? Evidence shows that children experience indirect negative effects from contact with an abusive parent because of the stresses on the custodial parent who is usually the mother. A primary factor in predicting post-divorce outcome for children is the emotional well-being of the custodial parent.³⁸ After separation of an abusive couple, threats and abuse may continue if contact between the parents is maintained through child visitation.³⁹ Abusive fathers use threats to litigate custody and access as instruments of control to prevent a battered partner from leaving the relationship, or to maintain control after separation. Concerns about real physical dangers to the custodial parent at transfers and the safety of the children during visits add to the stress.

Supervision of visits has its most clear impact precisely on these indirect effects. Visits occurring in a safe setting remove or greatly reduce a custodial parent's anxiety. First of all, supervised visitation protects the children against physical harm. Negative comments about the custodial parent cannot be made because of the supervision. Drop-offs and pick-ups are safe and on time. If the abusive partner attempts manipulation, threats, or aggressive behavior, the supervisor can intervene and document the incident. In addition, supervision of visits virtu-

37. Jack Stratton, *What is Fair for Children of Abusive Men?*, 5 J. OF THE TASK GROUP ON CHILD CUSTODY ISSUES OF THE NAT'L ORGANIZATION FOR MEN AGAINST SEXISM 1, 9-10 (1993).

38. Robert D. Hess & Kathleen A. Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 J. SOCIAL ISSUES 79 (1979).

39. Melanie Shepard, *Child-Visiting and Domestic Abuse*, 71 CHILD WELFARE 357, 357 (1992).

ally eliminates the risk of physical danger at transfers. Experience shows that battered women feel supported and less anxious after supervised visits begin to occur. This effect is one of the stronger arguments in favor of supervised contacts.

The potential costs of maintaining contact must be balanced against the impact on the children of losing contact with the abusive parent. Children in most situations want the abuse to stop; they don't want to lose a parent. Children, particularly young children, tend to blame themselves for the loss of contact with an abusive parent. Children, both boys and girls, with a battering father who have little or no contact with him tend to repress memories of violent incidents and to long for and idealize their father.⁴⁰ If one long-term goal is to interrupt an inter-generational cycle of dysfunction, maintaining safe contact will help a child gain a realistic assessment of his or her parent. It may also guard against identification and repetition of the abusive behaviors in the child's later adult relationships.

The impact of maintaining contact on abusive partners varies because abusers and types of abuse differ.⁴¹ For some abusive parents, the prognosis may be better than for chronic batterers. Anecdotal experience from supervised visitation providers is that men who are only interested in contact with their children for manipulative purposes are not able to tolerate the restrictions of an adequately run supervised visitation program. They drop out. Those abusive parents who do remain appear to have a genuine connection with their children. For these men, the connection may provide an incentive for change, particularly if the contact with their children occurs in a context that will not tolerate abuse.

There are some situations in which contact following partner abuse should not be allowed. If a parent is so impulsive and unable or unwilling to follow program guidelines that assure safety, then there should be no contact. Despite a custodial parent's support for contact, a child may remain repeatedly distressed by visits with a parent even in a protected setting. At this point, therapeutic supervision should be attempted. If that fails, contact should stop. If these conditions are not present, unless new research indicates otherwise, supervised visitation is an appropriate alternative to no contact.

The discussion of whether or not contact *should* continue between an abusive parent and the children is to some degree academic. Overwhelming evidence from the way courts currently operate show that

40. Johnston & Campbell, *supra* note 12, at 290.

41. *Id.* at 283.

contact *will* take place. Courts regularly order visitation even when partner abuse has clearly occurred. Therefore, it is important for practitioners to understand the differences in approaches to making contact safe.

B. *Neutrality of Visitation Programs*

Battered women have been abused, disempowered, controlled, and demeaned physically and emotionally by their batterers. An abused woman needs to sever all connections with the abuser and distance herself from his distorted perceptions which justify the abuse. Female custodial parents may feel that the views of the abusive partner are harmful to the children. In contrast, abusive men have a different reality. A characteristic of most batterers is denial and minimization of their abuse. They externalize blame and justify their abuse by the victim's behavior. Their efforts at control extend to controlling the views and beliefs of family members.

Because each parent has an entirely different perception of the reality of the couple's relationship, children going from an abused to a previously abusive parent during a visit must make a transition which is far greater than the physical distance they cross. They must move from one world view and set of perceptions to another which is vastly different and contradictory. Generally, children are tuned in to their parents' opinions and perceptions. However, when violence has occurred in a family, this awareness is fine-tuned to an exquisite sensitivity as a matter of self-preservation. Even a very young child will be aware of what each parent thinks and wants.

Thus, the child visiting an abusive parent faces an immensely difficult dilemma of maintaining loyalty to one parent without losing contact with the other. For the child to feel safe during contact, the visiting parent must be able to show a willingness to care about the child no matter what the child says or believes. At a minimum, the visiting parent must not do anything that threatens a child or contradicts the child's perceptions. Meanwhile, the custodial parent needs to accept that the contact with the other parent may benefit the child. The minimum condition is that the custodial parent must not threaten a withdrawal of love if the child sees or even enjoys seeing the abusive parent. However, the question arises whether a supervised visitation program stance of neutrality between the parents is useful in promoting parental behaviors which will support the child.

Neutrality in this context does not mean that the views of each parent have equal merit. Instead, the intent is to empathize with the child's experience and to support the child's development of his or her own perceptions and feelings. A supportive program stance for the child

acknowledges that the child has to maintain contact with two parents who have different views. The program prevents either parent from being negative about the other in front of the child. The visiting parent is prohibited from denying anything the child says and may not threaten the child in any way. At the same time, the program encourages the custodial parent to at least minimally support the contacts. This stance can be maintained without implying approval of prior violence. The message is that whatever has happened, things are going to work differently and safely here.

In contrast, when a program openly supports the battered parent and condemns the abuser, it is likely to recreate for the child the family conflict and the loyalty pulls. A stance of criticism of the visiting parent will also tend to have a negative impact on the quality of the visit. An authoritarian and punitive setting is likely to make abusers more defensive. It will also distract the visiting parent from paying primary attention to the interaction with the children. In addition, when a program is openly hostile to abusive parents, it can cause more dangerous reactions and risks to both staff and clients.

Nevertheless, it may turn out that children who have lived with an abusive parent do not need neutrality, but an active support of views that challenge the abuser's perceptions. From this perspective, visits that occur in a program that actively supports the abused partner and condemns the behavior of the abuser may benefit the child and allow the child to move from a compliant relationship with a feared abusive parent toward a more healthy relationship in which the child can express his or her distress at how the abusive parent has behaved. Until research provides clearer indications that either a stance of neutrality or one of advocacy for victims leads to better outcomes, policies and guidelines for practice should be broad enough to allow the development of programs with different philosophies. Therefore, courts and attorneys, before making referrals, need to be aware of the approach taken by the local supervised visitation program.

C. *Role of Programs in Evaluation*

Families are often referred to supervised visitation programs with unidentified issues or contested allegations of partner abuse. No determination has been made of whether partner abuse has occurred nor has a payment of the fee been arranged. This situation places a supervised visitation program in a bind. The abused partner may come to a supervised visitation program expecting the program to assess the abuse or to accept any allegation as true until determined otherwise. The issue crystallizes around payment with victims feeling that any alleged abuser should pay all fees for supervision.

If the program determines whether abuse has occurred, then it has taken a position in advance of a court or child protective agency. If a program assigns the fee to an alleged abuser without formally making a determination of abuse, the parties will view the program as having taken a position on the issue. Therefore, one parent almost inevitably perceives the program as having lost its neutrality and safety.

Similar issues arise in deciding whether a supervised visitation program should make statements of opinion about the future course of parent-child access. Recently, formulated standards in Australia take the view, which I share, that supervised visitation programs are best designed to provide factual material in the form of notes of observations of the parent-child contacts but should not offer opinions about future contact.⁴² Because supervised visitation is relatively inexpensive compared to an evaluation by a trained clinician, there is a real danger that attorneys, the courts, and the families will pressure programs to assume the role of evaluator.

Courts can help by making specific efforts to identify issues of partner abuse. Whenever abuse appears as an issue and a judge makes a referral for supervised visitation, the judge should include in the order provisions for the allocation of fees. Judges can also anticipate that program reports will be factual and not request opinions about prior abuse or future access.

Attorneys can guard against the inappropriate use of reports from supervised visitation programs in several ways. First, they can avoid the temptation to use supervised visitation program reports as though they were evaluations. Second, if an opposing attorney or a supervised visitation program on its own submits a report with opinions about future access or the competency of a parent based only on the observations made during supervised visits, the opinion statements can probably be kept out of court on the grounds that the supervisor is not adequately trained to qualify as an "expert." If the supervisor is adequately trained, it can be argued that supervision of visits by itself is not an adequate procedure for a competent evaluation. Currently, a number of groups are working actively on developing standards for custody and access evaluations.⁴³ These future standards should help clarify the limitations

42. AUSTRALIAN AND NEW ZEALAND ASS'N OF CHILDREN'S ACCESS SERVICES, DRAFT STANDARDS FOR CHILDREN'S ACCESS SERVICES (1994).

43. See PHIL BUSHARD & DOROTHY A. HOWARD, ASS'N OF FAM. AND CONCILIATION CTS., RESOURCE GUIDE FOR CUSTODY EVALUATORS: A HANDBOOK FOR PARENTING EVALUATIONS (1995); ASS'N OF FAM. AND CONCILIATION CTS., Proceedings at the First International Symposium on Child Custody Evaluations in Tucson, AZ (Nov. 5-7, 1994) (in cooperation with the ABA Family Law Section).

of opinions based only on observations during supervised visitation and the appropriate role of such observations in a complete evaluation.

D. *Paying for Supervision*

If a court or child protective agency formally determines that partner abuse has occurred, then should the abuser pay for the supervised visitation fee? From a victim's perspective, the need for the service occurred because of the abuser's actions. Requiring an abused partner to pay further victimizes that parent. Therefore, the abuser should pay all fees. From a child-centered perspective, however, the only valid reason for having supervised visitation is to benefit the child. If the service is for the child, then both parents should pay based on their ability to pay. A parent should not pay a punitive amount based on relative fault. Punishment or liability of an abuser should be kept separate from intervention for the benefit of the child.

On the issue of fees, there is ongoing debate and no consensus.⁴⁴ In the absence of articulated public policy, programs remain free to set their own guidelines. Therefore, courts, referring agencies, and attorneys will want to be aware of the guidelines of the particular programs to which they refer.

E. *Funding Policy*

Public funding for supervised visitation may be prioritized for battered women because of the urgency of the need, the current public attention, and the realities of funding in an era of diminishing resources for social services. If this priority occurs, any designation of funds for battered women or domestic violence should apply to *clients served* not to *programs*. In other words, when funds are earmarked to serve battered women and their children, they should not be restricted to specialized programs serving only this population. Programs serving a broader population should also be eligible to receive funds for serving those families with a history of partner abuse. Therefore, programs could continue to serve children whose parents have not been abusive to each other by using funding from nonrestricted sources such as private charities and fees for service. This approach will allow the continued viability of existing programs to serve a broad population while also allowing priority to services for battered women.

44. For example, because of lack of consensus, provisions concerning fees that were in early versions of the Child Safety Act, *supra* note 27, were dropped in later drafts.

IV. A Practical Summary

After examining the differences in approaches of supervised visitation programs, I offer a practical summary for providers and consumers of procedures for supervising visits of families with a history of violence. This discussion will suggest alternatives when there is disagreement about accepted procedure and will identify ways in which attorneys can assist their clients through the process.

A. *Program and Staff Qualifications*

Any supervised visitation program must be prepared to deal with issues of family violence. Staff and volunteers should have adequate training. At a minimum, staff should have specific training in the different types of family violence and appropriate intervention strategies during visits. Staff and volunteers should also be screened for prior criminal records.

Supervised visitation programs which specialize in serving victims of family violence may serve an important function in a community. However, since supervised visitation services are so limited, any new program will immediately get referrals of a broad range of cases. Referred cases will include not only family violence, but also cases with parental dysfunction having no concern about partner abuse, and cases with the goal of reunifying the family. Therefore, a program needs either to have very strict guidelines to limit the families it accepts to fit with the competencies of its staff, or to have staff adequately trained for the broad range of cases that will be referred.

B. *Referral by a Court or Agency*

When making a referral for supervised visitation, the referring agency or court should consider whether partner abuse or child abuse is currently an issue in the family or has been previously. If there are allegations of family violence, then the referring agency must specify the expected frequency of visits and apportion the fee, if any, between the parents. Attorneys can help their clients by having the court or referring agency include these essential elements in the plan for supervised child access. When an evaluation of family violence is pending, a court should resolve the fee issue by ordering a temporary allocation.

C. *Intake into a Supervised Visitation Program*

The following are considerations for intake into a supervised visitation program:

1. Programs should refuse to accept, and attorneys should challenge, certain referrals if they believe the referred family is too dangerous or the staff or program is not adequately trained or equipped to handle the situation.
2. The court should order that copies of any outstanding restraining orders or criminal actions against either parent be sent to the supervised visitation program.
3. When there are safety concerns, a program should keep identifying information, addresses, and telephone numbers separate from the rest of the client file to prevent unintentionally revealing where an abused partner or child lives.
4. If the court refers a family for supervised visitation after a determination of partner abuse without making an order allocating the fee, the program should have written guidelines about how fees will be allocated which it can show the parents. At least, this will put the conflict on the level of policy rather than a personal decision in each case. Furthermore, attorneys and clients should ask to see these guidelines as soon as the referral has been made.
5. If the court has neither made an order establishing a fee, nor a determination of whether the abuse occurred, several alternatives are:
 - a. The supervised visitation program may proceed on the basis of the allegations and require the alleged abuser to pay the entire fee.
 - b. The program itself may undertake to do an evaluation of the issue of abuse, but only if the program has staff qualified to do such an evaluation. The program must follow adequate procedures and keep the parents informed in advance that this is happening. The parents should also know that the results of the evaluation will be accessible by discovery in future court proceedings. Therefore, the personnel evaluating should probably not also be providing the ongoing supervision.
 - c. A program can refuse to take the case until a determination about family violence has been made by a court order or agency determination which includes allocation of fees. Adopting this position, however, will leave families without resources during the difficult and often extended period while a determination about the allegations is being made.
 - d. The program can maintain its usual fee policy, i.e., by allocating the cost according to ability to pay, but inform the parents that they may return to court for a determination on the allocation of the fee. In the meantime, if the victim refuses to pay,

then the alleged abuser can agree to pay the full fee and begin visits while he returns to court to seek relief. This may seem unsatisfactory, but it works practically to allow services to begin.

6. Whether or not family violence has been identified as an issue, the program should conduct an intake process with questions which would adequately identify the presence of family violence. This intake inquiry does not need to achieve a determination of whether abuse occurred. Either a positive response to questions about violence or an explicit allegation is enough to identify the family as having an issue involving partner abuse.
7. On acceptance into a program both parents should be given copies of written program guidelines. These guidelines should include any special conditions during visits such as any restrictions on physical contact, bringing food or presents, or taking photographs. In addition, parents should sign an agreement to abide by the guidelines and conditions.
8. Attorneys can help protect their abused clients by reviewing a provider's security measures. A program should have security procedures which are adequate to provide safety in cases of family violence. These procedures should apply to all families including both custodial and noncustodial adults without implying judgment.
 - a. The program guidelines should describe parental behavior which is expected and behavior which is not acceptable. Unacceptable behavior includes threatening staff, hanging around the visitation center when not on a visit, lateness, and failing to follow the guidelines or a supervisor's instructions during visits.
 - b. Custodial and visiting parents should be required to arrive and leave at different times. Generally, the visiting parent arrives at least fifteen minutes before the visit so the child does not have to wait. At the end of the visit, the custodial parent and the child leave first while the visiting parent waits fifteen minutes to avoid any confrontations or stalking.
 - c. Unless explicitly agreed, both parents should be kept physically and visually separate.
 - d. The program should maintain a relationship with the local police department which will facilitate rapid response.
 - e. Some programs disguise the identity of volunteer and staff supervisors.
 - f. A security guard is an important safety measure.
 - g. Metal detectors are also useful.

These last two measures are expensive and will depend on the availability of adequate program funding. Security measures should not substitute for clinical assessment and care. Furthermore, the stance toward and relationship with a potentially dangerous client are also important protections.

D. *Conducting the Visits*

1. EXPLAINING THE PROGRAM

A significant concern is the potential for harm to the child of supervised visits with an abusive parent if the arrangement suggests to the child that the contact with that parent is safe or that the past abuse and the child's fear, anxiety, or anger do not matter. To address the danger of undermining the child's reality and appearing to support the abuser, the staff should explain the reason for the supervision to the child during the intake into a program.

For example, if abuse of either the child or a parent has been confirmed, the staff should explain in front of the child and the custodial parent that they know about the past abuse by the visiting parent. The supervisor should also emphasize that his or her role is to assure the child's safety during contact with the visiting parent. Depending on the visiting parent's acceptance or denial of the abuse and tolerance level, this same discussion should be repeated in the presence of the visiting parent. If this is done, the visiting parent should know in advance about it and agree not to deny the supervisor's statement to the child.

During the visit and its transition periods, neither parent should be allowed to contradict a child's statements or expressions of feeling about the other parent. Therefore, the staff should review with the custodial parent the importance of affirming for the child that it is all right to go on the visit. The staff should observe custodial parents to guarantee that they do not overtly or covertly undermine a child's willingness to see the other parent. Moreover, supervisors should be trained to intervene at any time when either parent denies a child's reality. In any situation, if a child becomes acutely distressed, the visit should be stopped.

2. SUSPICION OF ABUSE

If there is any question of physical or sexual abuse of a child, then both parents and the child are informed before the first visit that physical contact is to be initiated only by the child. Where the abuse has been confirmed, a clearly stated acknowledgment to the child in the presence of at least the custodial parent should occur. This acknowledgment

should explain that the contact is supervised because of what the visiting parent has done and is to protect the child.

With evaluation of sexual abuse pending, supervised visitation should not start without consultation with the evaluator to prevent the contact with the alleged abuser from interfering with the evaluation or from traumatizing the child. If no evaluation has yet begun, then at the very least, the child should be in psychotherapy. Therefore, contact with the alleged abuser should first be reviewed by the therapist.

3. CONFIDENTIALITY

If the abused parent's address is confidential for protective reasons, then no questions are allowed during visits that might give clues such as where a child lives or plays, where the child goes to school, or how they got to the visit.

E. Reports

Generally, an agency or court that refers a family for supervised visitation will expect some form of report on the progress of the parent-child contacts. Therefore, families may return on their own to the family court to seek modification on the conditions of contact and may request or subpoena records for that purpose. Child protective agencies will want input from the supervised visitation program to aid in the decisions of returning children home. Supervised visitation programs can assist families by providing careful, objective reports of observations. In fact, these observation notes may be adequate records to submit to the court should information be subpoenaed. These observation notes may also prevent the necessity for preparing a separate report.

Advocates for abused children and for battered women are justifiably concerned that courts will take the reports of supervised visits as indications that an abusive parent has "changed" and is ready for unsupervised contact. A parent's behavior with a third person in the room for a maximum visit of two hours is not enough basis to predict how that parent will behave with a child during an extended, unsupervised contact. To diminish this risk, a program should preface any report or observation note submitted to a referring agency with a large print CAUTION. This warning will note that the observations were conducted in a highly structured setting and that inferences should not be made from the notes alone about the appropriateness of future arrangements for parent child contact. If applicable, the caution should include notice that the observers were volunteers or were not licensed mental health professionals.

Programs should include in their written guidelines a statement of additional charges if staff are required to come to court. Since few supervised visitation programs exist and are struggling for survival, the added cost of staff frequently appearing in court can spell the end of a program. However, by charging significant fees for court appearances, attorneys will not subpoena staff unless absolutely necessary. The fees will also help cover expenses if court appearances are required. If it is necessary to bring program records to court, attorneys can help by stipulating to the program's observation notes and reports as evidence in court or agency proceedings, rather than requiring staff to appear.

F. Lack of Organized Program

Without detracting from the need for supervised visitation programs, courts, attorneys, child protective agencies, and families must still make arrangements for child access when no organized services⁴⁵ exist. The following are some ideas for arranging for supervised visits when no supervised child access program is available.

1. SELECTION OF SUPERVISOR

Parents are often left by the court to come up with names of supervisors. Someone other than the parents, however, either the court or the attorneys, should exercise oversight of the selection. In particular, a battered spouse should not be left in the position of coming up with names or objecting on her own to her former partner's selections. At a minimum, a supervisor should be independent enough from the parent being supervised to properly monitor the parent's behavior. The custodial parent should have some trust in the supervisor while the visiting parent should not consider the supervisor to be antagonistic to him or her.

Accordingly, while family members are the most likely to be willing to provide the least expensive supervision, they are often inappropriate. A grandparent who is the father or mother of a visiting parent should not be used if the custodial parent has concerns. The grandparent may not report accurately, may allow the visiting parent to do whatever he or she wants, or may not be present during the whole visit. A grandparent who is the parent of the custodial parent should not be used if there

45. "Organized services" as used here is intended to include any professional or paraprofessional individual provider with experience and training in supervised visitation.

is animosity between the grandparent and the visiting parent, or the grandparent is afraid of the visiting parent. Similar considerations also apply for brothers, sisters, other relatives, and friends. Supervision in the presence of a grandparent or other relative respected by both parents can work very well. However, this is unlikely to be the situation where there are concerns about family violence.

Sources of "neutral" supervisors include churches and community groups. Sometimes, they may provide supervision for free for another church or group member. Child-care facilities, schools, and child protective agencies may also have workers who will be available for a fee to supervise when off-duty. Victim services programs in some jurisdictions have been enlisted to provide supervision services. If a family has money, it could possibly hire a mental health professional for short visits at least. Child protective agencies which are inadequately staffed for supervising visits can consider training foster parents for this role.

2. UNTRAINED VOLUNTEERS

If the proposed supervisor is an untrained volunteer, the court or attorneys should investigate the person and see if this individual is adequately neutral and mature. A volunteer may be unwilling to write up observation notes of each visit. If there are no observation notes, communication between the supervisor and the parents or the attorneys about what happened during visits needs to be discussed. It should probably be assumed and stated in advance that the supervisor will talk to the custodial parent about what happened on the visit.

Volunteer supervisors are most likely to be available irregularly and for a limited number of visits. This consideration is important in drafting an access order which will avoid unnecessary difficulty when the volunteer is not available. If the parents are unable to communicate, the attorneys will need to be available to help schedule visits, often a recurrent and time-consuming task.

3. WRITTEN ARRANGEMENTS

In all cases, the arrangements for the visits and the responsibility of the supervisor should be written down, and the supervisor and the parents should have a copy. Although it may seem obvious, the supervisor should be informed of the reason for concern about contact with the visiting parent, particularly if family violence of any kind is alleged or proven. Furthermore, the supervisor's authority to intervene and to end visits should be stated clearly. If these arrangements are not included in the court order, then the attorneys should draft an agreement for signature by both parents detailing the conditions for contact.

4. VISITATION EXCHANGES

In the absence of a program center, exchanges can still be arranged so the parents do not have to have contact. The visiting parent can pick a child up directly from or return a child directly to day care or a school. Exchanges can occur at the home of a friend of the custodial parent with whom the child is comfortable. However, the day care center, school, or friend should know of and approve of the arrangement. This arrangement is not appropriate if a visiting parent has a history of being late for pick up or return.

Visitation exchanges can also occur in a public location. Courts often order exchanges in front of or at a police station. However, there are several disadvantages. Having the exchange at a police station can be scary for a child. Also, police personnel may object to having the station used this way. In fact, unless the police are supportive and aware of the arrangements, the security may not be real. At a minimum, the person making the arrangements should first check with the senior officer at the proposed police station.

If there is any history of partner abuse, exchanges should not occur unless there is a third person present. Thus, the parents can be kept physically, and preferably visually separate. If the exchange occurs at a parent's home, one parent can remain inside while the supervisor transfers the child. At a public location, the parents can be required to maintain an agreed on distance from each other.

Finally, and fundamental to all the above ideas, if supervised visitation is arranged outside an organized program, safety must be the primary criteria for whether to proceed. If there is confirmed or believable evidence of family violence, the court or other referring agency must feel that the arrangements for supervision are adequate to protect the child and parents. The unfortunate, but necessary alternative is no contact.

V. Future Directions for Supervised Visitation: Standards, Funding, and Cooperation

Supervised visitation is a new social service. At present, there are no established guidelines for practice, no licensure, and no standards for training or qualifications for providing service. My discussion and proposals for practice are based on acquaintance with programs around the country. However, they are proposals only. There is an urgent need for guidelines and standards for the whole range of supervised visitation programs. These guidelines should cover everything from training to observation notes to the handling of family violence cases. The Super-

vised Visitation Network is actively working on preparing guidelines for practice. Launched at the 1994 annual meeting of the Network, there has been a year-long process of debating guidelines, examining the experience of Australia and New Zealand. At the Network's 1995 meeting, draft guidelines were presented. These will be circulated for discussion and further revision, moving towards adoption of guidelines by the spring of 1996. Involvement in this process by the family law bar will also be invaluable.

Guidelines will be of little use, however, if there are no supervised visitation programs. Therefore, the most urgent need is for federal and state funding of supervised visitation services. Existing programs tend to be small, open for relatively few hours each week, and unable to afford optimal security. While new programs are opening each month, almost as many are closing for lack of funds. Attorneys and court personnel can join advocates for children, for battered women, and for noncustodial parents in supporting initiatives for public funding.

Finally, in this era of drastically reduced resources for social services, advocates for children and advocates for battered women may be pitted against each other. Their differences could reduce the chances for funding supervised visitation programs of any kind. If supervised visitation is to become more widely available, providers and advocates will have to overcome differences and develop common stances for mutual support.

Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994

CATHERINE F. KLEIN*

I. Introduction

In August of 1994, Congress passed the controversial Crime Bill.¹ Amidst the controversy, however, there was one act incorporated into the Bill that received bipartisan support: the Violence Against Women Act of 1994 (VAWA).² The VAWA is one of the Crime Bill's largest crime-prevention programs, providing \$1.6 billion to confront the national problem of gender-based violence.³ The Violence Against Women Act attempts to make crimes committed against women considered in the same manner as those motivated by religious, racial, or political bias. "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious

* Associate Professor and Director, The Families and the Law Clinic, Columbus School of Law, The Catholic University of America's clinical domestic violence program. The author wishes to express her gratitude to her research assistants, Erin O'Keefe and Julie Sippel.

1. Pub. L. No. 103-322, 108 Stat. 1796. The Crime Bill provides for \$30 billion for punishment and prevention programs.

2. The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C.A., 18 U.S.C.A., & 42 U.S.C.A.) [hereinafter VAWA].

3. See MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 103D CONG., 1ST SESS., *THE RESPONSES TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE*, at 14 (Comm. Print 1993) [hereinafter *EQUAL JUSTICE*]. "The Violence Against Women Act recognizes that there is no place—home, street, or school—where women are spared the fear of crime. This bill seeks above all to address the vital necessity and right of women to be free from violence." *Id.*

than other crime and to the resulting failure of our criminal justice system to address such violence."⁴

The VAWA addresses the problems of gender-based violence under five titles. Title I, *Safe Streets for Women*, increases sentences for repeat offenders who commit crimes against women.⁵ Title II, *Safe Homes for Women*, focuses on crimes of domestic violence.⁶ Title III, *Civil Rights for Women*, creates the first civil rights remedy for violent gender-based discrimination.⁷ Title IV, *Safe Campuses*, grants funds to be spent on problems faced by women on the nation's college campuses. Title V, *Equal Justice for Women in the Courts*, provides training for state and federal judges to combat widespread gender bias in the courts.

This article focuses on Title II, *Safe Homes for Women*, specifically, interstate enforcement of protection orders. Prior to the enactment of VAWA, the majority of states did not afford full faith and credit to protection orders issued in sister states.⁸ This was a serious breach in

4. STAFF OF SENATE COMM. ON THE JUDICIARY, *THE VIOLENCE AGAINST WOMEN ACT OF 1994*, S. REP. NO. 138, 103d Cong., 1st Sess., at 38 (1993).

5. Title I also expands evidentiary protection for sexual assault victims, allocates moneys to states for the purpose of targeting these crimes as a top priority, takes steps to increase safety for women in public parks and transit systems, and creates a Justice Department task force on violence against women.

6. Title II provides for a national, toll-free hotline to assist victims of domestic violence, creates a federal remedy for interstate crimes of abuse, requires states to recognize protection orders issued by sister states, provides more resources to fight domestic violence, and gives states incentives to treat domestic violence as a serious crime.

7. *EQUAL JUSTICE*, *supra* note 3. Senator Joseph Biden commenting on the new civil rights remedy in the Violence Against Women Act,

I believe that this provision is the key to changing the attitudes about violence against women. This provision recognizes that violent crimes committed because of a person's gender raise issues of equality as well as issues of safety and accountability. Long ago, we recognized that an individual who is attacked because of his race is deprived of his rights to be free and equal; we should guarantee the same protection for victims who are attacked *because* of their gender. Whether the violence is motivated by racial bias or ethnic bias, or gender bias, the laws protection should be the same.

See generally, W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 *IND. L.J.* 577, 585 (1993):

Women, and almost exclusively women, of every race, economic class, and ethnic group are the targets of such crime. Since women, because of their very status as women, remain the primary target for sexual assault by men, sex crimes can be considered a form of sex discrimination.

8. Seven jurisdictions have state statutes that accord full faith and credit to foreign protection orders. *See* KY. REV. STAT. ANN. § 426.955 (Baldwin 1993); NEV. REV. STAT. ANN. § 33.090 (1986); N.H. REV. STAT. ANN. § 173B:11-6 (1993); N.M. STAT. ANN. § 40-13-6 (Michie Supp. 1993); OR. REV. STAT. § 24.185 (1993); R.I. GEN. LAWS § 15-15-8 (1994); W. VA. CODE § 48-2A-3(e) (Supp. 1993). New Mexico affords full faith and credit to orders of tribal courts. N.M. STAT. ANN. § 40-13-6(D) (Michie 1994). Nevada accepts a foreign protection order as evidence of the facts on which it was based to issue its own civil protection order. NEV. REV. STAT. ANN. § 33.090 (1993).

the protection afforded victims of domestic violence. Without full faith and credit statutes, a state only has the power to protect victims of domestic violence within its boundaries, limiting the protection afforded to victims if they are forced to move or flee to another state.

Prior to the VAWA, in order to receive protection in the foreign state, a victim had to petition the foreign state's court for a new protection order. Because of due process requirements, the batterer had to be served with notice regarding pending protection proceedings, thus revealing the victim's whereabouts and putting the victim in a dangerous situation. In the absence of a full faith and credit statute, jurisdictional problems could arise. A state may not have jurisdiction to issue a new protection order unless abuse takes place within its boundaries. In addition, there are other problems that arise out of the requirement of refiling for a protection order including: additional filing fees; language barriers; the difference in each state's domestic violence laws regarding availability, duration, and scope of protection; inadequate transportation; access to legal assistance; and child care facilities.

This article examines existing procedures for enforcing interstate protection orders in states that have full faith and credit statutes. It then proposes methods by which practitioners can utilize the VAWA under their state's existing systems and explores model approaches to implementing the VAWA by looking at the roles that practitioners, courts, and law enforcement officials should play. Finally, this article will address the issues of mutual protection orders and the creation of a new federal crime under the VAWA.

II. Full Faith and Credit: An Interpretation of the VAWA

The Violence Against Women Act establishes that states must grant full faith and credit to protection orders issued in foreign states or tribal courts.⁹ Any protection order issued by one state or

9. VAWA, 18 U.S.C.A. § 2265, providing in part:

(a) **FULL FAITH AND CREDIT.** Any protection order issued that is consistent with subsection (b) of this section by the court of one state or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

(b) **PROTECTION ORDER.** A protection order issued by a State or tribal court is consistent with this subsection if

(1) such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided

tribe¹⁰ shall be treated and enforced as if it were an order of the enforcing state. The Act extends to permanent, temporary, and *ex parte* protection orders. Full faith and credit is afforded during the period of time in which the order remains valid in the issuing state. Protection orders are only afforded full faith and credit under the Act, however, if the due process requirements of the issuing state were met. The Act specifies that the issuing court must have had both personal and subject matter jurisdiction, and that the respondent received reasonable notice and an opportunity to be heard. Furthermore, the full faith and credit provision applies to *ex parte* orders if notice and opportunity to be heard were provided within the issuing state's statutory requirement or within a reasonable time after the order was issued. Because the VAWA requires that due process be met before a protection order is afforded full faith and credit, it does not extend full faith and credit to mutual protection orders that do not comply with due process.¹¹

The failure to satisfy due process requirements is the only exception to the full faith and credit provision. A sister state's valid order would be accorded full faith and credit, even if the victim were ineligible for a protection order in the enforcing state. For example, a victim of abuse in a same sex relationship would be able to obtain a protection order in the District of Columbia, but might not be able to obtain one under the laws of Montana.¹² Under the VAWA, however, Montana would have to afford full faith and credit to the order issued by the District of Columbia even though the victim would have been ineligible for protection in Montana.¹³

The VAWA does not require the victim to register her foreign protection order in the enforcing state. Although there are advantages to

within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

10. For the purposes of this article the terms state and court shall also apply to Indian tribes and to tribal courts.

11. VAWA, 18 U.S.C.A. § 2265 (c)(1)(2). See *infra* notes 51-59 and accompanying text discussing mutual protection orders.

12. See MONT. CODE ANN. § 40-4-121 (1994).

13. See Barbara J. Hart, *State Codes on Domestic Violence Analysis, Commentary, and Recommendations*, 43 JUV. & FAM. CT. J. 43, n.4 (1992). Some variations in state domestic violence statutes include: the parties' eligibility for protection, offenses that give rise to protection, and the duration and scope of protection. Prior to the VAWA, these variations might preclude a victim's ability to seek protection in a sister state. See also Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (reviewing and analyzing extensively states' civil protection statutes and caselaw).

registering protection orders,¹⁴ requiring registration could leave victims unprotected and vulnerable from the time they enter a new state until the time they become aware of and satisfy registration requirements. Under the VAWA, a victim with a valid protection order receives continuous protection until the expiration of that order, regardless of which state she has entered. Furthermore, even if a victim chooses to register a protection order in a new state, the VAWA does not require the new state to provide the respondent with additional notice. These are important considerations that provide immediate protection while ensuring confidentiality of the victim's whereabouts.

Choice of law is another consideration under the VAWA. Courts have taken several different approaches when facing choice of law problems.¹⁵ The VAWA states that a foreign order is afforded full faith and credit and is "enforced as if it were the order of the enforcing state."¹⁶ If, for example, a woman obtains a protection order in Maryland and later flees to Pennsylvania, which state's law would apply is a choice of law problem. Under the language of the VAWA, it seems clear that Pennsylvania law would apply because the order "shall be enforced as if it were the order of the enforcing state."¹⁷ Thus, Pennsylvania would treat the order as if it had been issued by a court of Pennsylvania and would apply its own law.

III. Examination of Existing State Procedures for Enforcement of Foreign Protection Orders

Because the interstate enforcement provision of the VAWA is vague, states are left to their discretion as how to set up procedures to implement it effectively. Even prior to the enactment of the VAWA, there were a few state statutes that afforded foreign protection orders full faith and credit. New Hampshire, West Virginia, Kentucky, and Oregon have existing procedures to enforce their full faith and credit statutes. Section III of this article will examine the current procedures of Kentucky, West Virginia, and Oregon. This section will also discuss the New Hampshire procedures and suggest that other states use New Hampshire as a model for implementing the interstate enforcement provision of the VAWA. When examining existing state procedures

14. See *infra* note 41 and accompanying text discussing the advantages of registering of protection orders.

15. See generally Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983) (identifying and evaluating the different choice of law theories used by the courts).

16. VAWA, 18 U.S.C.A. § 2265.

17. VAWA, 18 U.S.C.A. § 2265.

for enforcing the full faith and credit provision, it is important to consider that some of the states' requirements are not in compliance with the VAWA and that the VAWA is superseding.

A. Kentucky

The full faith and credit statute in Kentucky applies to any foreign order, not just civil protection orders.¹⁸ The statute states that a copy of any foreign order may be filed with the Kentucky court and is to be treated as if it were an order of the Kentucky court.¹⁹

Prior to the VAWA, Kentucky enforced sister state protection orders under this broad full faith and credit statute by requiring the victim to file a certified copy of the foreign protection order with a Kentucky court. There is a major flaw in this procedure, however, because current Kentucky practice requires that notice of the filing be sent to the respondent. This notice requirement reveals to the batterer the new location of the victim, which may jeopardize the victim's safety.²⁰ Another problem under Kentucky's current full faith and credit statute is that it does not afford a victim complete protection unless she has filed her foreign order with the court. The police will not arrest someone for violation of a foreign protection order that has not been filed. By requiring the victim to file a copy of the foreign order, the state has left victims who have recently fled to Kentucky or who are not aware of the filing requirement extremely vulnerable. If law enforcement agencies will not enforce foreign orders until they are filed with the court, there is a serious gap in the protection afforded to the victims from the time they enter the state until the time they comply with the statute.

Because this broad full faith and credit statute is not designed specifically to address domestic violence orders, it fails to consider the special needs of a victims fleeing from their batterers. Some factors to consider are: victims who have fled their home states because of domestic violence may not be entering Kentucky during court hours; they may not have access to legal assistance, adequate transportation, or adequate child care; and they may fear that by going to court their batterers will be informed of their whereabouts.

18. KY. REV. STAT. ANN. § 426.955 (Baldwin 1993).

19. *Id.*

20. Lisa Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. LEGIS. 61 (Winter 1984):

If the wife does manage to escape, her husband often stalks her like a hunted animal. He scours the neighborhood, contacts friends and relatives, goes to all the likely places where she may have sought refuge, and checks with public agencies to track her down. . . .

Id. at 79, n.64.

The Kentucky Coalition Against Domestic Violence and the Kentucky Supreme Court have been working together to finalize a process that would prevent disclosure of the victim's new location.²¹ The proposed procedure would require the victim, upon arrival in Kentucky, to take the protection order to the local prosecutor. The local prosecutor would then verify that due process requirements had been met in the state that issued the order. After verification, the prosecutor would then make a motion to the court to have the foreign order entered as a Kentucky order.²² This proposed procedure is to take effect as policy, rather than by written rule or statute. It is presumed that a victim who has fled to Kentucky will become aware of its interstate enforcement procedure by contacting local law enforcement agencies, courts, or domestic violence advocates. The proposed procedure does not address all situations or solve all problems. First, the proposed procedure involving the prosecutor seems more onerous than the prior registration requirement. Also, it is unlikely that prosecutors will make verification of foreign protection orders a priority. It is unclear exactly how a prosecutor will verify a foreign order. Second, these procedures do not cover a victim who needs protection from the batterer, but who has not taken it to a prosecutor to have it verified. It has been suggested that in such a situation, the woman should receive an emergency protection order. Emergency protection orders are available on a twenty-four-hour basis in every county of Kentucky. This alternative would not only give rise to jurisdictional problems, but due process would require that the batterer be informed of the new order and that the batterer be served before the order would be effective. This procedure is inconsistent with the VAWA because it requires a woman who already has a protection order to obtain a new one before she will be protected in Kentucky. This undermines the purpose of the full faith and credit provision in the VAWA.

B. West Virginia

Unlike Kentucky, the State of West Virginia has a full faith and credit statute in its Domestic Relations chapter.²³ This statute provides that any foreign order "shall be accorded full faith and credit and be

21. Conversation with Sharon Currens, Kentucky Domestic Violence Association. For information regarding interstate enforcement of protection orders in Kentucky, contact Ms. Currens at 502/526-2189.

22. Conversation with Susan Clary, General Counsel to the Kentucky Supreme Court. For more information on the proposed procedures to enforce foreign protection orders, contact Ms. Clary at 502/564-4176.

23. W. VA. CODE § 48-2A-3(e) (1994).

enforced as if it were an order of this state if its terms and conditions are substantially similar" to those of West Virginia.²⁴ Under this article of the West Virginia Code, there is a subsection that provides for a registry of foreign orders. There is a proviso, however, that says that the registry subsection is not effective until a central automated computer system becomes available. Such a system is not yet available.²⁵

Although there is an absence of an automated computer system, there are current procedures in West Virginia to enforce an out of state order. A protected party entering West Virginia can take a foreign order to a local law enforcement agency. Once filed with the police, the foreign order will be treated by law enforcement as if it were an order of West Virginia. In a situation where a victim is trying to enforce a foreign order, whether it was filed with police or not, a victim can take the order to magistrate court. The magistrate decides whether the terms and conditions of the foreign order are "substantially similar" to the terms and conditions necessary to obtain and order in West Virginia.²⁶ The VAWA does not limit full faith and credit to orders that are "substantially similar" to the orders issued by the enforcing state. Under the VAWA, if due process requirements were satisfied in the issuing state, all other states must accord the order full faith and credit.²⁷

There are no fees either for filing an order with law enforcement agencies or seeking enforcement at magistrate court. It is important that states waive filing fees because the additional economic burden may discourage women from receiving the protection they deserve.

C. Oregon

Oregon also recognizes orders from sister states.²⁸ Upon the victim's arrival in Oregon, a foreign order is automatically afforded full faith and credit for thirty days.²⁹ The victim has thirty days after entering Oregon to register the order. The victim may register an order after

24. W. VA. CODE § 48-2A-3(e) (1994).

25. For further information regarding interstate enforcement procedures in West Virginia, contact the magistrate court in the county where seeking enforcement.

26. For more information on enforcement of a foreign protection order in West Virginia, contact the West Virginia Coalition Against Domestic Violence at 304/765-2250.

27. See *supra* notes 9-11 and accompanying text discussing due process requirements in the VAWA's full faith and credit provision.

28. For information regarding enforcement of a foreign protection order in Oregon, contact the Oregon Coalition Against Domestic and Sexual Violence at 503/223-7411.

29. OR. REV. STAT. § 24.185(1) (1993). A foreign protection order is treated like an order issued by Oregon "immediately upon the arrival in this state by the person protected by the restraining order and shall continue to be so treated for a period of thirty days without any further action by the protected person." *Id.*

thirty days; however, the victim will not be protected until the order is registered. The victim may file at no charge a copy of her order with a clerk of any circuit court.³⁰ After the order is filed, the clerk is required to treat the foreign order in the same manner as an order of the State of Oregon.³¹ If at the time of filing the woman provides written certification that the batterer was personally served in the proceeding that gave rise to the protection order, the clerk will forward a copy of the order to the county sheriff.³² The foreign order is enforceable until it expires under its own terms, or until it is terminated by the Oregon court.³³

An important aspect of Oregon's statute is the enforcement powers granted to law enforcement officers. A police officer may enforce a foreign protection order and make a warrantless arrest in two situations. The first situation is if there is probable cause to believe that an order was violated and the victim provides a copy of a foreign protection order and swears that she has lived in Oregon for thirty days or less. Second, the police officer may also arrest a person if there is probable cause to believe that an order was violated and the victim has filed a copy of her order with the court.³⁴ The legislature has provided qualified immunity for police officers acting on foreign protection orders.³⁵ Police officers are not subject to liability for making arrests on foreign orders as long as the police officer reasonably believes that the document presented to the officer is an accurate copy of the foreign protection order.³⁶

The Oregon statute takes important steps in protecting women from domestic violence. By allowing victims thirty days to file their orders, the statute considers that they may not be able to register their orders immediately upon arrival in the state. Also, the process for registration has been made fairly easy, and with a written certification that the batterer was personally served, a victim is able to have an order forwarded to local law enforcement agencies. Also, by permitting the police to make probable cause arrests for violations of foreign protection

30. OR. REV. STAT. § 24.185(2) (1993).

31. OR. REV. STAT. § 24.115(1) (1993).

32. OR. REV. STAT. § 24.185(3) (1993) (law also provides that after the sheriff receives a copy of a foreign order, the sheriff shall enter the order into the Law Enforcement Data System).

33. OR. REV. STAT. § 24.185(4) (1993).

34. OR. REV. STAT. § 133.310(4)(a)(b) (1993).

35. OR. REV. STAT. § 133.315(2) (1993) (an officer is immune from civil liability if the officer has a reasonable belief that the foreign order is accurate).

36. A representative from the Oregon State Sheriffs' Association suggested that unless the document is written in "Crayola crayons," the police would err on the side of intervening and enforcing the restraining order.

orders and extending qualified immunity to the police, the legislature has taken necessary steps in ensuring that law enforcement officials can play their part in protecting victims of domestic violence.

The state full faith and credit statute does not address all the problems faced by victims of domestic violence who arrive in Oregon. While it does provide victims a thirty day opportunity to register their protection orders, it does not protect women who have been in the state for longer than thirty days and have not yet filed their order. It is important to note that although registration has many advantages, the VAWA full faith and credit provision does not require any registration.

D. *New Hampshire*

Under New Hampshire state law, a foreign protection order receives full faith and credit. The New Hampshire full faith and credit statute and the procedures used to enforce it currently provide the most extensive protection to a victim with an out of state protection order. The New Hampshire protection order statute provides that any foreign protection order "shall be given full faith and credit throughout the state."³⁷ The only condition is that the foreign order be similar to a protection order issued in New Hampshire.³⁸

The procedures for enforcement under the statute provide that a victim may file a certified copy of any foreign order with any district court and swear under oath that the foreign order is still in effect.³⁹ Next, the clerk of the court must read the foreign order in its entirety to determine whether it is similar to a New Hampshire order as required by the statute. If there are questions regarding the similarity, the clerk may consult a judge. If there are questions about authenticity, however, the clerk may contact a clerk of the issuing state.

If the clerk makes the determination that the foreign order is similar, the clerk then provides the victim with an affidavit to sign, attesting to the fact that the foreign order is still in effect in the issuing state. The foreign order is then attached to the affidavit and filed with the district court.

New Hampshire has a computer generated form called the Foreign Protective Order Affidavit.⁴⁰ The form has two sections. The first section is to be completed and signed by the protected party and also is to be notarized. The second section is a checklist for court use only. The checklist serves as a record of those who have received

37. N.H. REV. STAT. ANN. § 173-B:11-b (1993).

38. *Id.*

39. *Id.*

40. See Appendix for a copy of the Foreign Protective Order Affidavit.

copies of the foreign order and affidavit. The clerk determines which law enforcement agencies should receive copies. For example, copies may be sent to the jurisdictions where the woman lives, works, or perhaps visits family members. If the woman chooses, she may deliver copies of the order and affidavit to the appropriate law enforcement agencies directly. Although the original affidavit and attached foreign order are filed in district court, the clerk is required to carefully note in the record to whom and when copies of the order and affidavit were given or sent. This serves as a method of ensuring that the appropriate law enforcement officials received copies of the protection order.

Another important aspect of the New Hampshire procedures is that foreign orders may be enforceable without any registration. Police officers may rely upon a foreign order if the victim shows the order and makes a verbal statement that the order is still in effect. New Hampshire not only allows officers to enforce foreign orders without a registration requirement but also provides the opportunity for victim's to have their orders sent to the appropriate law enforcement officials. The New Hampshire process allows for the benefits of registration without making it a condition for protection.

IV. Model Approach to Interstate Enforcement Under the VAWA

An assessment of the current applications of state full faith and credit statutes reveals certain essential elements for the successful enforcement of foreign protection orders. None of the states surveyed had fees for a victim to file a protection order in a new state. It is necessary to eliminate additional economic burdens so that all victims will have adequate access to protection.

The VAWA's full faith and credit provision does not require registration of protection orders. Thus, states may encourage registration, but cannot make registration a condition for full faith and credit. Registration can be an important method of combatting domestic violence. There are reasons why registration should be encouraged: It is an excellent method of informing law enforcement officials of existing protection orders and it can relieve law enforcement officials of the burden of assessing the validity of foreign protection orders at the scene of a domestic incident.⁴¹ However, registration should never be a condition

41. The states that currently have registries are Connecticut, Florida, Kentucky, Massachusetts, Rhode Island, South Dakota, and Oregon. See *Developments in the Law—Legal Responses to Domestic Violence: II. Traditional Mechanisms of Response to Domestic Violence*, 106 HARV. L. REV. 1505 (1993).

cite the full faith and credit provision of the VAWA as authority. Prior to having court orders changed, practitioners can put law enforcement officials and the respondent on notice by clearly stating that the order is subject to full faith and credit under the VAWA.⁵⁰ This can be achieved by handwriting or typing a statement right on the existing court protection order form that provides notice that the order is subject to full faith and credit pursuant to the VAWA.

V. Mutual Protection Orders

The VAWA addresses the types of mutual protection orders entitled to full faith and credit. A mutual protection order is an order entered against both parties, requiring both to abide by the restraints and other forms of relief in the civil protection order.⁵¹ There are three ways in which a mutual protection order can be issued. The first situation is when the batterer counterclaims or files an independent petition for a civil protection order. Both the petitioner and the respondent must demonstrate abuse that did not occur in self-defense before the judge can issue a valid mutual protection order. The second situation is when the parties agree to a mutual protection order. A third situation can occur when a judge issues an order without a request from either party or upon the request of one party and without hearing evidence as to abuse by both parties. The last two types of mutual orders are excepted from the full faith and credit provision of the VAWA. Congress recognized the problems with mutual orders and through the VAWA put a limit on their use. Mutual orders are not afforded full faith and credit unless both parties submitted a written request for a protection order and the order was issued upon a showing of mutual abuse.⁵²

50. A sample statement could read:

Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. Pursuant to the Violence Against Women Act of 1994 (Pub. L. No. 103-322, 108 Stat. 1796, 18 U.S.C.A. § 2265), this order is valid in all fifty states, the District of Columbia, tribal lands, and United States territories.

51. Two alternatives to civil protection orders are for the woman to leave her batterer without seeking legal assistance, or for the woman to file criminal charges. For many reasons these alternatives are often less attractive to victims of domestic violence. See Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1041-42 (1992).

52. VAWA, 18 U.S.C.A. § 2265 (c)(1)(2). The VAWA states that mutual orders are:

Not entitled to full faith and credit if

(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

Although some aspects of mutual orders may seem appealing,⁵³ they have been criticized as "undermin[ing] the purpose and strength of domestic violence statutes, which seek to end violence and hold batterers accountable."⁵⁴ Mutual protection orders, issued absent a showing of mutual abuse, are detrimental because they ignore "due process rights and psychological well-being of the victim, problems with enforcement, and the effect of mutual orders in future judicial proceedings."⁵⁵

Due process requirements must be met when there is a liberty or property interest at stake. Mutual protection orders seek to deny victims their liberty interest in not being restrained.⁵⁶ For a civil protection order to be issued against a batterer, due process requires that the victim show evidence of abuse or potential danger. Thus, in order for a mutual order to be issued, due process also requires the batterer to make a showing of danger or abuse by the victim. Mutual orders, issued by the court without an evidentiary hearing by both parties, deprives victims of their liberty interests in not being restrained without due process of law.

The psychological well-being of the victim is also adversely affected by the issuance of mutual orders. Mutual orders send a message from the court that somehow the actions of the victims warrant the issuance of a restraining orders against them. Furthermore, mutual orders result in problems of enforcement. Mutual orders fail to identify who is the aggressor and who is the victim which often causes confusion and leads to police arresting the victim, both parties, or no one at all.

Finally, mutual orders impact future proceedings to the disadvantage of the victim.⁵⁷ Evidence of the issuance of a mutual order can be used in future divorce proceedings, thus affecting child custody determinations. The abuser can use a mutual protection order in future civil and criminal proceedings, brought by the victim, as evidence of mutual abuse.

These concerns about the dangers of mutual protection orders are reflected in the VAWA. The VAWA specifically excepts mutual protec-

53. See Topliffe, *supra* note 51 (Stating that attorneys and judges are mistaken in their belief that mutual orders are good because the parties have agreed to it or because they are more expeditious. Victims of domestic violence only agree to mutual orders because of the dynamics of their abusive relationships and that the expeditious process may not be beneficial to victims.).

54. See Klein & Orloff, *supra* note 13, at 1074 (discussing how the legal system's focus in domestic violence cases should be upon identifying, restraining, and punishing the primary aggressor in the relationship, not the victims who are attempting to protect themselves).

55. See Topliffe, *supra* note 51 (discussing the criticisms and concerns of mutual protection orders).

56. *Id.* at 1058.

57. *Id.* at 1062.

tion orders that are granted without due process from the provision granting full faith and credit to civil protection orders.⁵⁸ Furthermore, the VAWA limits funding to states that fail to enact legislation prohibiting mutual orders without evidence of mutual abuse.⁵⁹

VI. Creation of a New Federal Crime

Two sections of the Safe Homes for Women Act create new federal crimes for domestic violence. These sections may offer victims another avenue of protection through the U.S. Attorney's Offices and the federal courts. Section 2261 makes interstate domestic violence a federal offense.⁶⁰ It is a federal crime to cross state lines with the intent of injuring a spouse or intimate party when such action results in bodily injury. Furthermore, this section states that it is also a federal crime to force a spouse or intimate partner across state lines when an injury occurs as a result of the travel.

Section 2262 makes the interstate violation of a protection order a federal offense.⁶¹ The Act prohibits a person from crossing state lines and engaging in conduct that violates a valid protection order. Proof

58. VAWA, 18 U.S.C.A. § 2265 (c)(1)(2).

59. VAWA, 18 U.S.C.A. § 2101(c)(3), states are eligible for grants if the states certify that their laws, policies, or practices prohibit issuance of mutual restraining orders or protection except in cases where both spouses file a claim, and the court makes detailed findings of fact indicating that both spouses acted primarily as aggressors and that neither spouse acted primarily in self-defense.

60. VAWA, 18 U.S.C.A. § 2261. This section provides in part:

(a) OFFENSES.

(1) CROSSING A STATE LINE. A person who travels across a state line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner. . . .

(2) CAUSING THE CROSSING OF A STATE LINE. A person who causes a spouse or intimate partner to cross a state line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner. . . .

61. VAWA, 18 U.S.C.A. § 2262, providing in part:

(a) OFFENSES.

(1) CROSSING A STATE LINE. A person who travels across a state line or enters or leaves Indian country with the intent to engage in conduct that

(A)(i) violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued; or

(ii) would violate subparagraph (A) if the conduct occurred in the jurisdiction in which the order was issued; and

(B) subsequently engages in such conduct. . . .

of specific intent is not required under the Act, rather, a showing of objective evidence is sufficient, such as a history of abuse and the timing of the travel.⁶² This is important in jurisdictions that border other states and interstate travel is frequent.

There are several factors practitioners should consider when advising clients whether to ask the U.S. Attorney's Office to bring a federal action on their behalf. First, there are additional penalties for a defendant found guilty of the new federal crimes of domestic violence.⁶³ The federal crime creates a new penalty for crossing state lines and violating a valid protection order. Second, in a federal suit there is the advantage of federal resources in investigation and prosecution. The Senate Judiciary Committee recognized that the federal crimes were "an appropriate response to the problem of domestic violence, because of the interstate nature, transcend the abilities of state law enforcement agencies."⁶⁴ In addition, section 2264 of the VAWA mandates restitution for victims of these new domestic violence crimes.⁶⁵ Under this section, victims shall receive restitution for the full amount of losses including medical expenses; physical therapy expenses; lost income; attorney fees; and travel, child care, and temporary housing expenses.⁶⁶

In January of 1995, the U.S. Attorney for the Southern District of West Virginia charged a man in the first federal domestic violence case. Christopher Bailey was indicted on January 4, 1995, by a grand jury for interstate domestic violence and federal kidnapping after bringing his unconscious wife to a Kentucky hospital. Bailey faces up to life imprisonment and \$500,000 in fines. The FBI has been involved in the investigation and has alleged that Christopher Bailey seriously injured his wife in their home in West Virginia and then traveled through West Virginia, Kentucky, and Ohio for six days with his wife sometimes tied up in the trunk. Because the federal domestic violence law is untested, Bailey is also charged with federal kidnapping since that crime is "tried and true."⁶⁷

VII. Conclusion

The Violence Against Women Act of 1994 makes an essential step toward providing more extensive protection for victims of domestic

62. S. REP. NO. 138, 103d Cong., 1st Sess., at 61 (1993).

63. *Id.*

64. *Id.* at 62.

65. VAWA, 18 U.S.C.A. § 2264 ("[t]he issuance of a restitution order under this section is mandatory.")

66. VAWA, 18 U.S.C.A. § 2264.

67. Maryclaire Dale, *Man to Face Federal Charges in Wife's Beating*, THE CHARLESTON GAZETTE, Jan. 5, 1995, at P1A.

violence. The federal approach recognizes that domestic violence is a national problem that crosses state lines. First, the VAWA mandates that states recognize and enforce foreign protection orders. The existing procedures in New Hampshire for interstate enforcement most closely correspond to the intent of the VAWA. New Hampshire provides for immediate enforcement of a foreign order without requiring registration of the order. The police are authorized to enforce a foreign order when the victim presents the order and swears to its authenticity. Moreover, New Hampshire has a system in place that allows victims to register their orders and have them sent to appropriate law enforcement agencies. The registration does not require any fees, nor does it require that any notice be sent to the batterer. Furthermore, New Hampshire has a computer-generated form that the protected party signs to certify that the foreign order is presently in effect in the foreign state. The form also serves as a record of those who have received copies of the foreign order.

Second, the VAWA discourages the use of mutual protection orders. The VAWA limits full faith and credit to mutual orders that were issued upon a showing of mutual abuse. The VAWA also extends funding to states that have laws that prohibit the issuance of mutual protection orders unless both parties file a claim, and the court makes a finding that both were primary aggressors.

Finally, the VAWA's creation of federal domestic violence crimes provides a new approach to combat domestic violence. The VAWA makes it a crime to cross state lines and injure a spouse or intimate partner. It is also a federal crime to cross state lines and violate a valid protection order. These new federal crimes provide the advantages of federal resources in investigation and prosecution. Also, under the VAWA, full restitution to the victim is mandated. For these reasons the Violence Against Women Act provides important new protection for victims of domestic violence.

CLINTON LIBRARY PHOTOCOPY

Appendix

THE STATE OF NEW HAMPSHIRE

Merrimack County

Suncook Court

_____ Docket No.

FOREIGN PROTECTIVE ORDER AFFIDAVIT

I, the undersigned, do hereby swear under oath that:

To the best of my knowledge and belief the attached certified copy of the Foreign Protective Order, Docket Number _____, issued in the state of _____, on _____, is presently in effect as written;

_____ Date

_____ Signature of Protected Party

Personally appeared the above named individual and made oath that the above affidavit by him/her subscribed is, in his/her belief, true.

In witness whereof I hereunto set my hand and official seal.

_____ Date

_____ Notary Public/Justice of the Peace

FOR COURT USE ONLY:

Pursuant to RSA 173-B:11-b, the attached order shall be given full faith and credit throughout New Hampshire and be fully enforceable in this state as long as it is in effect in the issuing state. (Check the appropriate box(es) below).

- A copy of this affidavit and the referenced foreign protective order have been mailed/delivered in hand (circle one) to the protected party, to be retained by protected party. Date _____.
- A copy of this affidavit and the referenced foreign protective order has been mailed/delivered in hand (circle one) to _____, the appropriate enforcement agency. Date _____.
- Two copies of this affidavit and the referenced foreign protective order have been delivered in hand to the protected party. The protected party agrees to deliver one copy to _____, the appropriate enforcement agency. Date _____.
- A copy of this affidavit and the referenced foreign protective order have been mailed/delivered in hand (circle one) to _____, Date _____.

_____ Date

_____ Signature of Clerk of Court

Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women

JOAN ZORZA*

I. Introduction

There is an increasing understanding that battered women¹ are at serious risk from their abusers and that their abusers spend much of their time monitoring and harassing them. Battered women must be given real protection that will keep them safe not only from the abuse, but also from their abusers' intrusion and harassment. This article will explore some of the obstacles that keep battered women from leaving, many of which derive from the failure of society and the legal system to protect women's privacy and confidentiality needs. The article urges the need for battered women to be able to keep their whereabouts confidential, examines victim-counselor confidentiality privileges and nondisclosure laws, discusses the need of battered women to be able to relocate with their children, and examines the security needs of the courthouse.

* Joan Zorza is the Senior Attorney with the New York City based National Center on Women and Family Law, where she has headed the National Battered Women's Law Project for the past five years.

1. While domestic violence can exist in same sex relationships and rarely by women against men, women are overwhelmingly the victims of domestic violence and men the perpetrators, so this article refers to all perpetrators as male and to victims as female. When women batter, it is almost always in an effort to defend themselves. Mildred Daley Pagelow, *Adult Victims of Domestic Violence*, 7 J. INTERPERSONAL VIOLENCE 109 (1992); Daniel G. Saunders, *Wife Abuse, Husband Abuse or Mutual Combat*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 90-113 (Kersti Yllo & Michele Bograd, eds., 1988).

II. Barriers to Leaving

The questions most often asked about battered women concern why they do not leave their abusers.² Virtually every book about domestic violence attempts to explain this enigma, often by refuting the many myths that exist about battered women.³ At least one book was written for the sole purpose of answering this question.⁴ From these books and many studies we now know that battered women do not enjoy the abuse,⁵ do not provoke it,⁶ and do not have psychopathology.⁷ Indeed, battered women have no psychological profile (at least before they are abused).⁸ Being female is what makes a woman vulnerable to being abused.⁹ There is no way to predict which women will become victims except by knowing the abusive history of their lovers.¹⁰

Furthermore, the assumption that a battered woman will be safe once she leaves her abuser is seen to be false once one examines the morbidity and mortality statistics. Domestic violence often escalates over time in frequency, intensity and duration.¹¹ But it almost always escalates when the batterer discovers or believes that the victim is about to or actually has left him.¹² Although divorced and separated women comprise only 10 percent of all women in America, they account for three-quarters of all battered women and report being battered fourteen times as often as women still living with their partners.¹³ Divorced or separated men, as opposed to husbands living with their wives, commit 79 percent of all spousal violence.¹⁴ Virtually all abusive men, regardless

2. See, e.g., ANN JONES, *NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT* 131 (1994).

3. *Id.* at 128-66; OLA W. BARNETT & ALYCE D. LAVIOLETTE, *IT COULD HAPPEN TO ANYONE: WHY BATTERED WOMEN STAY* (1993).

4. BARNETT & LAVIOLETTE, *supra* note 3.

5. CATHERINE KIRKWOOD, *LEAVING ABUSIVE PARTNERS: FROM THE SCARS OF SURVIVAL TO THE WISDOM FOR CHANGE* 9 (1993).

6. *Id.*

7. Reneta Vaselle-Augenstein & Annette Ehrlich, *Male Batterers: Evidence for Psychopathologies*, in *INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES* 139, 144 (Emilio C. Viano, ed. 1992).

8. *Id.*; Lenore E.A. Walker & Angela Browne, *Gender Victimization by Intimates*, 53 *J. PERSONALITY* 173 (1985).

9. BARNETT & LAVIOLETTE, *supra* note 3, at 13.

10. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 7 (1984).

11. KRISTINA ROSE, U.S. DEP'T OF JUSTICE, *DOMESTIC VIOLENCE STATISTICS* 12 (1989).

12. WALKER, *supra* note 10, at 25-26.

13. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, *FEMALE VICTIMS OF VIOLENT CRIME* 5 (Jan. 1991).

14. *Id.* at 2.

of their marital status, threaten their victims that they will kill or injure them,¹⁵ and many threaten to kill their children, family, loved ones,¹⁶ and even themselves.¹⁷ An abuser's threats to kill or seriously injure his partner or her loved ones if she ever leaves him are carried out far too often.¹⁸ Accordingly, a victim's fear of leaving her abuser, far from being irrational, is highly realistic based just on his threats.

If her abuser stalks her, she is at even higher risk. Although men in America abuse 3.9 million women every year, only slightly more than 200,000 people, most of whom are abusive men, are stalkers.¹⁹ At least 90 percent of battered women who are killed by their past or present lovers were known to have been stalked by them before being murdered.²⁰ Obsessiveness with the victim, a component of stalking behavior, is recognized as a major risk factor in domestic homicides,²¹ although not every battered woman killed by her abuser was first stalked by him or experienced her abuser's constant obsessiveness.

A. Preventing Victims from Becoming Homeless

Not only do battered women face the real threat of increased violence if they leave, but they face enormous economic hurdles, particularly if they have minor children. Housing is often very hard to get and is usually far too expensive.²² Women who do not work are further economically disadvantaged, so are far less likely to be able to leave their homes.²³ This is particularly true for the vast numbers of battered women whose abusers have kept them out of the work force or demoralized them into feeling little or no confidence about their abilities.²⁴

15. BARNETT & LAVIOLETTE, *supra* note 3, at 50 (reporting a study where 41 of the 43 battered women had been threatened with injury or murder if they left their abusers).

16. *Id.*

17. ELLEN PENCE & MICHAEL PAYMAR, *EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL* 155 (1993).

18. *Id.* at 155.

19. Maria Puente, *Legislators Tackling the Terror of Stalking, But Some Say Measures Are Vague*, *USA TODAY*, July 21, 1992, at 9A.

20. Joanne Furio, *Can New State Laws Stop the Stalker?* *MS.*, Jan./Feb. 1993, at 90.

21. Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women, in ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS* (Jacquelyn C. Campbell, ed. 1995).

22. KIRKWOOD, *supra* note 5, at 95; MARY ANN DUTTON, *EMPOWERING AND HEALING THE BATTERED WOMAN* 81 (1992).

23. BARNETT & LAVIOLETTE, *supra* note 3, at 30; DUTTON, *supra* note 22, at 80-81.

24. BARNETT & LAVIOLETTE, *supra* note 3, at 27.

Battered women's shelters are not the solution for housing most abused women because their space is so limited that they must turn away large numbers of women.²⁵ New York's shelters turn away 59 percent of women and children seeking their services, and Massachusetts shelters reject five women and two children for every two that they accept.²⁶ Furthermore, the few women whom the domestic violence shelters accept can only be sheltered for short periods of time, seldom more than four to eight weeks.²⁷ Half of homeless families in America's shelters, whether they are for the homeless or for battered women, have been involved with domestic violence.²⁸ Based on a report prepared for the Ford Foundation,²⁹ the United States Senate Judiciary Committee concluded that 50 percent of all homeless women and children in this country are fleeing domestic violence.³⁰ In addition, courts are often slow to act and/or unwilling to evict abusers from the residences that they shared with their victims.³¹ If the women do win possession of the shared home, they face the danger of further attacks from their abusers who then know exactly where to find them.³²

Whether the women live in the shared home or elsewhere, they still need money to survive. Alimony is not available to those who have never been married to each other. Even if the victim is or was married to her abuser, few courts will award her alimony, and what little they finally award is often for only a short duration.³³ Although courts are far more likely to award child support, the amounts they award are too low,³⁴ typically giving the mother and children less available income on which to live than the court expects the father to live on, although he typically lives alone. Moreover, batterers are far less likely than non-abusive men to pay alimony or child support³⁵ and often retaliate

25. Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 24 CLEARINGHOUSE REV. 421-29 (1991).

26. *Id.* at 421-22.

27. DUTTON, *supra* note 22, at 81.

28. DIVISION OF POLICY STUDIES, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, REPORT ON THE 1988 NATIONAL SURVEY OF SHELTERS FOR THE HOMELESS 14 (Mar. 1988).

29. ELIZABETH SCHNEIDER, FORD FOUNDATION, LEGAL REFORM EFFORTS FOR BATTERED WOMEN: PAST, PRESENT, AND FUTURE 7 (July 1990).

30. THE VIOLENCE AGAINST WOMEN ACT OF 1990: HEARINGS ON S. 2754, BEFORE THE SENATE COMM. ON THE JUDICIARY, Report 101-545, 101st Cong., 2d Sess. 37 (1990).

31. KIRKWOOD, *supra* note 5, at 94.

32. *Id.*

33. PHYLLIS CHESLER, MOTHERS ON TRIAL 140 (1986).

34. *Id.* at 143-45.

35. *Id.*; Marsha B. Liss & Geraldine Butts Stahly, *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 181 (Marsali Hansen & Michele Harway, eds. 1993); KIRKWOOD, *supra* note 5, at 99.

with further violence when their partners or the welfare system seek alimony or child support from them.³⁶

Working is effectively foreclosed to many battered women because abusers often sabotage their efforts to get to their jobs or continue to abuse them while they are at work. Seventy-four percent of battered women who work report that they are harassed on the job by their abusers. Abusive men cause over half of working battered women to be late for work at least sixty days a year, and over half to miss at least thirty-six full days of work annually.³⁷ Twenty percent of all employed battered women lose their jobs because their abusers so harass them on the telephone or in person at work.³⁸

Recent proposed welfare changes³⁹ that will create lifetime welfare limits will be especially hard for battered women, who need longer times to become financially independent. Without adequate money from her abuser or her job, and often having been driven from her home, a victim will find that homelessness is one of the most likely consequences of domestic violence. Homelessness is clearly foreseeable if it results from the abuser actually or constructively forcing his victim out of a shared residence, or not making timely mortgage, rent, spousal or child support payments, or if the court does not evict him from a shared residence. Although accepting responsibility for his abuse is the first step on the batterer's road to recovery,⁴⁰ few courts hold the abuser accountable for his abuse. Battered women seeking refuge in domestic shelters report that, prior to separation, their abusers destroyed an average of \$10,000 in family property, including furniture, clothing, photographs, and toys.⁴¹ In addition, it costs the average victim who must move \$5,000 to relocate.⁴² But almost half of domestic violence statutes, and many divorce ones, do not include any provisions for restitution, and most of those that do, only provide for attorney fees.⁴³ Domestic violence attorneys and advocates uniformly report that

36. KIRKWOOD, *supra* note 5, at 98; MILDRED DALEY PAGEDOW, FAMILY VIOLENCE 311 (1984); JENNIFER BAKER FLEMING, STOPPING WIFE ABUSE 90 (1979).

37. NEW YORK VICTIM SERVICE AGENCY REPORT ON THE COSTS OF DOMESTIC VIOLENCE (1987).

38. Susan Schechter & Lisa T. Gray, *A Framework for Understanding and Empowering Battered Women*, in ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN 242 (Martha Straus, ed. 1988).

39. *See, e.g.*, H.R. 4, 104th Cong., 1st Sess. (1995).

40. EDWARD W. GONDOLF, MEN WHO BATTER: AN INTEGRATED APPROACH FOR STOPPING WIFE ABUSE 123 (1985).

41. Barbara J. Hart, *Cost of Domestic Violence* (1991) (available from the Pennsylvania Coalition Against Domestic Violence, Harrisburg, PA).

42. *Id.*

43. BARBARA J. HART, NATIONAL COUNCIL FOR JUVENILE AND FAMILY COURT JUDGES, STATE CODES ON DOMESTIC VIOLENCE 15-16 (1994).

even when the law allows for restitution, courts almost never order it, and in the few instances when they do, rarely enforce payment of what they order.⁴⁴ Because most abusers rationally decide whether they will batter or abuse using a cost-benefit analysis,⁴⁵ not holding a batterer accountable is not only unfair to his victim, but actually encourages him and other abusers to continue their abusive conduct.

In making decisions that effectively leave a victim and her children homeless, the court further traumatizes them, and in ways which make it more likely that the abuser will get custody of the children. Domestic violence, even without making the victim and children homeless, is very damaging and disruptive to the children.⁴⁶ If homeless, the children may have to change schools,⁴⁷ making them likely to lose contact with and emotional support from their friends and relatives.⁴⁸ For security reasons, contact with their usual support network may be impossible, even if the children are not physically distant from them. Shelter security rules prevent them from seeing their friends and family at the domestic violence shelter. In rural areas, families usually must travel over a hundred miles to get to the nearest shelter.⁴⁹

Giving batterers custody of the children is a poor solution. Abusive men make very poor fathers, as at least thirty-eight states and District of Columbia⁵⁰ have concluded in making domestic violence at least a factor in custody decisions. The Congress unanimously urged every state to provide that credible evidence of violence by one parent against the other creates a presumption that batterers not get custody,⁵¹ a recom-

44. Based on reports to the National Center on Women and Family Law, which acts as a back-up center to legal services programs and domestic violence programs across the entire country, and at numerous state and national meetings of domestic violence advocates and policymakers.

45. David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 176, 181 (Kersti Yllo & Michel Bograd, eds. 1988).

46. Zorza, *supra* note 25, at 424-26.

47. The Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 42 U.S.C. §§ 11301-11472 (1987) (allows the homeless the option of attending the school where they presently live or previously resided, but many children are kept out of their prior school for security reasons or because the distance is too great).

48. *Id.*

49. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, RURAL TASK FORCE RESOURCE PACKET 23 (1991); Conversations with Kathryn Fahnestock, Project Director, Rural Justice Center (Nov. 1993).

50. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, STATE CUSTODY LAWS WITH RESPECT TO DOMESTIC VIOLENCE (1994) [hereinafter STATE CUSTODY LAWS]; PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 55, 68 (1990) (noting that domestic violence and parental conflict affect children far more than the divorce or separation per se).

51. H.R. Con. Res. 172, 101st Cong., 2d Sess. (1990).

mendation with which the National Council of Juvenile and Family Court Judges⁵² and a task force of the American Bar Association⁵³ studying the issue agree. This is not surprising, given that over half of men who batter their female partners also deliberately abuse their children⁵⁴ and most abusers learn that using the children is the best way to hurt their victims.⁵⁵ Even if abusive fathers do not intentionally batter their children, many inadvertently hurt them as a result of their reckless abusive behavior toward their partners.⁵⁶ All abusers force the children to become part of the conspiracy of covering up the violence⁵⁷ and put their sons at risk of growing up to become abusers themselves.⁵⁸ A study found that 25 percent of the abusive male partners of battered women shelter residents had kidnapped their children, 35 percent threatened to take the children in a custody action, 25 percent used visitation as an occasion to verbally abuse, and 10 percent used visitation to physically abuse the children's mothers.⁵⁹

Joint custody awards do not improve the lot of the children. In fact, most children in court-imposed joint custody (not just those with abusive fathers) do poorly⁶⁰ and are more depressed and disturbed than children in sole custody,⁶¹ even when the parents genuinely choose joint custody.⁶² Furthermore, joint custody results in lower child support awards, which fathers are no more likely to pay than awards made when the mother has sole custody.⁶³ Joint custody does not even result in the father spending any more time with his children.⁶⁴ But when the father is an abuser, joint

52. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, §§ 40-405 (1994) [hereinafter MODEL CODE].

53. AMERICAN BAR ASSOCIATION, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION 15 (1994) [hereinafter ABA REPORT].

54. WALKER, *supra* note 10, at 59.

55. DUTTON, *supra* note 22, at 138; PENCE & PAYMAR, *supra* note 17, at 148-49; BARNETT & LAVIOLETTE, *supra* note 3, at 50.

56. MARIA ROY, CHILDREN IN THE CROSSFIRE 89-90 (1988).

57. LENORE E. WALKER, THE BATTERED WOMAN 149-50 (1979).

58. Gerald Hotaling & David Sugarman, *An Analysis of Riskmarkers in Husband to Wife Violence: The Current State of Knowledge*, 2 VIOLENCE & VICTIMS 1, 11 (1988).

59. Liss & Stahly, *supra* note 35, at 182-83.

60. Gina Kolata, *The Children of Divorce: Joint Custody Is Found to Offer Little Benefit*, N.Y. TIMES, Mar. 31, 1988, at B13; Nancy D. Polikoff, *Joint Custody: Only by Agreement of the Parties*, 8 WOMAN'S ADVOC. 1, 3 (1987).

61. Sheila J. Kuehl, *Against Joint Custody: A Dissent to the General Bullmoose Theory*, 27 FAM. & CONCILIATION COURTS REV. 37 (1987).

62. *Id.*

63. Polikoff, *supra* note 60.

64. FRANK F. FURSTENBERG & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS FAIL 33-38 (1991).

custody awards frequently endanger both the abused parent and her children.⁶⁵ Granting the abusive father frequent visitation is not much better; the more contact an abuser has with the children, the more likely he is to abduct them⁶⁶ and continue to abuse the mother.

B. *Help-Seeking Behavior*

Contrary to the public misconception that battered women do little to get away from their abusers, and when they do, get themselves into other abusive relationships,⁶⁷ most survivors undertake many efforts to get away. Kirkwood's study of battered women who had recently left abusers found that the women went to enormous lengths to protect themselves, efforts that were not always successful:

One-quarter of the women created invisibility by removing all possibility that they could be tracked to their current addresses by the former partners. Family and friends were advised to claim that they had no knowledge of their whereabouts if asked by former partners. Women went to extreme measures to keep their names out of telephone directories and off post-boxes and door-plates so that their abusers could not come across any sign that they lived in a particular place. Moreover, women described how they paid phone, electricity and gas bills under aliases because they knew that their former partners would adopt extreme measures to attain confidential information from the companies concerned. In this way they essentially removed any indication of their existence from all records which might reveal their addresses. One-third created a distraction which obscured their location from their ex-partners.⁶⁸

Yet most of battered women's attempts to extricate themselves from abusive relationships are not adequately supported by police, courts, or legislators.⁶⁹

III. Keeping Location Confidential

If the victim is to be kept from being homeless, her home must be secure from her abuser, whether it is the home in which she alone has been living, the residence previously shared with her abuser, or an entirely new home. It is not enough to allow her to live somewhere and to ensure that she has adequate support to do so, including the cost

65. Polikoff, *supra* note 60.

66. Rebecca L. Hegar & Geoffrey L. Grief, *Abduction of Children by Their Parents: A Survey of the Problem*, 36 *SOCIAL WORK* 421, 423-24. (1991).

67. See, e.g., LEE ANN HOFF, *BATTERED WOMEN AS SURVIVORS* 241 (1990) (noting that five years after first interviewing battered women, none of them had put up with physical abuse after leaving a man).

68. KIRKWOOD, *supra* note 5, at 103.

69. EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 103 (1988).

to move and set up a new home. She must be allowed to have a real zone of safety where her abuser cannot harass her. This may mean far greater restrictions on where her abuser can go than most courts and laws have been comfortable with giving. In addition, we must listen to and respond to her fears based on what she knows or believes from her abuser's threats. We must also help her plan for likely contingencies based on other abusers' tactics.

Her greatest danger is if she is to continue living at an address known to her abuser. At a minimum, her safety requires that he not have access to the keys to the home. If he previously had access to the key to the home where she is to live, especially if she lacks the means to change the locks, the court should hold him responsible for paying the cost for her to have new, secure locks installed. In addition, the police must truly protect her, particularly if her abuser comes near her home, place of work, school, or wherever she goes. Similarly, police must protect the children. To be realistic, any visitation that her abuser gets should be supervised at a safe location by someone impartial.⁷⁰

Often a victim will feel so vulnerable or demoralized by her abuser's continued threats, violence, stalking behavior, and/or harassment that she will decide that she needs to move to a location unknown to her abuser. Whether she moves now or later, her safety and continued emotional well-being should be grounds for letting her move with the children to a place where she will feel, and hopefully be, safe. But, as Kirkwood found, any battered woman who considers leaving her abuser faces formidable hurdles. Many of these hurdles could be eliminated or dramatically reduced if she were given the full protection possible under our laws, and if these were enforced by the police and courts.

An abused woman must be able to keep her whereabouts confidential because many abusive and controlling men spend enormous amounts of time and effort spying on, seeking out, following, and harassing their victims. Such stalking behaviors can be especially lethal to the victim and children. Once her location is known to her abuser, he is very likely to go on battering her. And he may even kill her, and her children, as well.⁷¹

A. *Keeping Her Address Confidential*

Given that most abusive men continue to search for and abuse their prior partners, for a battered woman to be safe, she has to be able to

70. See MODEL CODE, *supra* note 52, at 405-406; ABA REPORT, *supra* note 53, at 14.

71. Michael Lindsey, *The Terror of Batterer Stalking*, 3 *CATALYST* 1, 1 (Spring 1994).

it. Furthermore, the trend toward state registries of domestic violence orders⁸⁵ has encouraged more uniform protective orders with fewer complexities⁸⁶ that are unlikely to restrict the abuser's access to school records.

Other states give the public access to students' names and attendance records⁸⁷ or attendance records and permanent records of each student's grades.⁸⁸ Tennessee allows the public access to any student's name, age, address, dates of attendance, grade level completed, class placement, and degrees awarded.⁸⁹ Restricting the abuser's access is meaningless if everyone else can obtain the desired information for him.

In addition, many states have provisions for flagging a child's school records and/or birth certificate when the child is reported missing so the parent who is left behind can be notified if one of the documents is requested to register a child in a new school or to apply for a passport.⁹⁰ Notification better equips the parent to find the missing child. Abusers, who regularly deny or minimize their abuse and often lie,⁹¹ sometimes claim that their children are missing or abused⁹² as a way to punish and control their partners or gain access to their whereabouts. Some abusers have their family members make false accusations that the

85. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C.A. § 40231 (1994).

86. But an encouraging development is that Massachusetts, the first state to create a statewide registry for orders of protection, has recently created a form, Supplemental Order: Visitation Issues, to maximize safety at visitation in cases of domestic violence. Although not entered on the registry, it suggests additional standard terms for restricted transfer of children, supervised visitation, and treatment and intervention for the abuser.

87. *See, e.g.*, N.M. STAT. ANN. § 14-2-1 (Michie 1994); Op. Att'y Gen. No. 61-137 (1961-62) (Michie 1994).

88. 65 PA. CONS. STAT. ANN. § 66.2 (West Supp. 1995); *Young v. Armstrong School Dist.*, 344 A.2d 738 (Pa. 1975).

89. TENN. CODE ANN. § 10-7-503 (Vernon Supp. 1995).

90. *See, e.g.*, ALASKA STAT. § 14.30.700 (Michie Supp. 1994); ARIZ. REV. STAT. ANN. § 15-829 (West Supp. 1994); ARK. CODE ANN. § 12-12-803 (Michie Supp. 1995); IDAHO CODE § 18-4511 (Michie Supp. 1994); ILL. ANN. STAT. ch. 325, para. 50/5 (West Supp. 1995); IND. CODE ANN. 31-6-13-6 (Michie Supp. 1994); KY. REV. STAT. ANN. § 158.032 (Michie Supp. 1994); MASS. GEN. L. ch. 22A, § 9 (West Supp. 1995); MICH. COMP. LAWS ANN. § 380.1135 (West Supp. 1995); MINN. STAT. ANN. § 123.751 (West Supp. 1995); MO. ANN. STAT. § 43.408 (Vernon Supp. 1995); MONT. CODE ANN. § 44-2-511 (1994); NEB. REV. STAT. § 43-2007 (1994); NEV. REV. STAT. ANN. § 432.205 (Michie 1995); N.J. STAT. ANN. § 18A:36-19a & § 18A:36-24 *et seq.* (West Supp. 1995); N.C. GEN. STAT. § 115C-403 (Michie 1994); N.D. CENT. CODE § 54-23.2-04.2 (1994); OHIO REV. CODE ANN. § 3313.672 (West Supp. 1993); OKLA. STAT. ANN. tit. 15, § 24A.16 (West Supp. 1995); 35 PA. CONS. STAT. ANN. § 450.404-A (West Supp. 1995); R.I. GEN. LAWS § 42-28.7-7 (Michie Supp. 1994); VA. CODE ANN. § 22.1.288.1 (Michie Supp. 1994); and W. VA. CODE § 18-2-5c (Michie Supp. 1994).

91. David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON BAR J. 23-24 (July/Aug. 1989).

92. Schechter & Gray, *supra* note 38, at 242.

victim or child is missing or that the child is abused by the victim or her new partner.⁹³ These efforts are almost always successful in getting a court to order the information turned over to the father. They also serve to shift the blame onto the mother, even when the accusation is blatantly false. When state custody laws or judges use "friendly parent" provisions, which factor in the effort made by each parent toward achieving a positive relationship with the other parent, such false accusations may further reward the abuser by resulting in a change of custody,⁹⁴ further victimizing the victim and children and reinforcing the perpetrator's abusive behavior.

2. MEDICAL RECORDS

Mothers frequently utilize doctors and medical facilities on behalf of themselves or their children. If they do not get medical attention for their children, they may well be subject to being reported for child abuse. Yet battered women must make use of these medical services at their peril. As some health-care workers become more aware that children are harmed by witnessing their mother being abused, they file more child neglect and/or abuse reports. In some states, like California, health workers must file medical reports if they know or suspect that any adult is abused. Sometimes the abuser is actually contacted about the report that he abused the woman or the child. When he is notified, he is very likely to retaliate against his victim. But even if only the victim is notified, the abuser may learn of the report, and use it against her in a custody proceeding. Because even when he is the perpetrator of the abuse, the child protective agency usually substantiates the claim against the mother for allowing herself to be abused, even though she had no ability to stop or control his abuse.⁹⁵

Furthermore, the abuser may be able to learn further information to locate or use against his victim because many states allow both parents access to their child's medical records.⁹⁶ Many states by statute⁹⁷ or

93. JEFFREY L. EDLESON & MICHAEL M. TOLMAN, INTERVENTION FOR MEN WHO BATTER: AN ECOLOGICAL APPROACH 31, 34 (1992).

94. Joan Zorza, "Friendly Parent" Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921-25 (1992).

95. DUTTON, *supra* note 22, at 40.

96. *See, e.g.*, COLO. REV. STAT. ANN. § 26-7.5-102 (Bradford Supp. 1994) (excluding venereal disease, addiction, or drug use); FLA. STAT. ANN. § 395.3025 (West Supp. 1994); GA. CODE ANN. § 24-9-40 (Michie Supp. 1994); IND. CODE ANN. § 16-4-8-3 (Michie Supp. 1994); ME. REV. STAT. ANN. tit. 19, § 905 (West Supp. 1994); MINN. STAT. ANN. § 144.335 (West Supp. 1995); and UTAH CODE ANN. § 63-2-202 (West Supp. 1995).

97. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2281 (West Supp. 1994); ARK. CODE ANN. § 16-46-302 (Michie Supp. 1995); CAL. CIV. CODE § 56.10(b) (West Supp. 1995); CONN. GEN. STAT. § 4-104 (West Supp. 1995); FLA. STAT. ANN. § 395.3025 (West Supp. 1994); GA. CODE ANN. § 24-9-40 (Michie Supp. 1994); HAWAII REV.

practice provide that a hospital must release records pursuant to a subpoena, subpoena *duces tecum*, or court order. Such orders are freely given out by most judges whenever a parent, particularly a father, alleges that a child is missing. This is true even when there is an order of protection in place that restricts his access to such data. Few courts consult even their own abuse prevention files, particularly when an emergency hearing is demanded. As previously noted, many abusive fathers make such allegations, even when they know that they are false. But few courts punish fathers who make such false allegations. Instead, most courts will treat his allegation as an emergency or a material change in circumstances and, if not give him custody, will at least order the victim not to leave the state with the children. States need to establish statewide registries for protective orders and keep such records even after orders expire. Courts should be required to check these records prior to transferring custody to any abuser, even if the victim has fled with the children.⁹⁸ And courts must hold the abuser responsible when he manipulates the court personnel and the system to maintain power and domination over his victim.

3. POSTAL SERVICE RECORDS

Domestic violence programs usually rent post office boxes to receive mail while keeping their addresses confidential. Until recently, any citizen could request for a small fee under the Freedom of Information Act the forwarding address of anyone who had recently moved, or the name and address of anyone who had rented a post office box. But, at the suggestion of domestic violence advocates, a provision was included in the Violence Against Women Act, later incorporated into the Crime Bill, that required the Postal Service to prohibit access to the public of addresses of domestic violence programs and victims of domestic violence.⁹⁹ Even before the bill was enacted, the Postal Service changed its policy, effective March 11, 1994, to prohibit the public's access to forwarding addresses and identifying information about holders of post office boxes. On January 1, 1995, the Postal Service confidentiality provisions of the Violence Against Women Act went into

STAT. § 622.52 (1985); KY. REV. STAT. ANN. § 422.305 (Michie Supp. 1994); LA. REV. STAT. ANN. § 13:3715.1 (West Supp. 1995); MASS. GEN. L. ch. 111, § 70 (West Supp. 1995); TENN. CODE ANN. § 68-11-304 (Michie Supp. 1994); and WIS. STAT. ANN. § 146.82 (West Supp. 1994).

98. See STEPHEN B. HERRELL & MEREDITH HOFFORD, FAMILY VIOLENCE: IMPROVING COURT PRACTICE: RECOMMENDATIONS FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, Recommendation II-12 (1990).

99. H.R. 3355, §§ 40281 and 40508, 103d Cong., 2d Sess. (1994).

effect. But, although the public is prohibited from access to this information, the Postal Service will still provide boxholder information and forwarding addresses upon request to law enforcement agencies, courts, and other governmental programs when a Request For Boxholder Change of Address Information Needed for Service of Legal Process form is submitted. Because batterers frequently falsify facts and manipulate courts, agencies, and police for their personal advantage or to hurt their victims,¹⁰⁰ these provisions may not adequately protect battered women, or even shelters, from disclosure of their addresses.

It is clear that tougher provisions must be put into effect to protect battered women and shelters from having their addresses disclosed. After consulting statewide registries to verify that no protective orders have ever been issued against the abuser, courts should still have to weigh the need for confidentiality of the shelter or a victim of domestic violence against the abuser's likely manipulation of the system and the need for disclosure, even before ordering the release of the information to a law enforcement agency.

4. DEPARTMENTS OF MOTOR VEHICLE RECORDS

Another section of the Crime Bill, the Driver Privacy Protection Act,¹⁰¹ was enacted to stop the widespread practice of states' registry of motor vehicles giving out or selling information about individuals or all licensed drivers or owners of registered motor vehicles. Individuals in the thirty-four states which released the names, addresses, and social security numbers of drivers and car owners, will be unable to get this information, although the restrictions do not become mandatory for three years. States have sold this information at considerable profit. According to testimony on the Driver Protection Act, New York State made more than \$125 million in the previous year from selling its Department of Motor Vehicle records.¹⁰²

Under the new law, states will have to stop releasing any "individual's photograph, social security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information."¹⁰³

100. Adams, *supra* note 91, at 23-24; Schechter & Gray, *supra* note 38, at 242; PENCE & PAYMAR, *supra* note 17, at 152, 158; EDLESON & TOLMAN, *supra* note 93, at 31, 34.

101. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 30003, 108 Stat. 1796 (1994).

102. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, UPDATE 6 (May/June 1994).

103. 18 U.S.C. § 2725 (West Supp. 1995).

5. VOTER REGISTRATION INFORMATION

As political activists and candidates generally know, voter registration lists containing the voting record and party affiliation, if any, are readily available to the public. The easy access to these lists has long prevented many battered women from registering to vote. Consequently, battered women are forced either to endanger themselves and their children if they register to vote, or to forgo their right to vote, one of the most precious and fundamental constitutional rights of America's democratic society.

At least two states will accommodate battered women who wish to vote without publicly disclosing their addresses. Rutgers Law School Professor Eric Neisser filed a suit in New Jersey on behalf of a battered woman who unsuccessfully sought to register to vote by giving her post office box number instead of her street address. She alleged that her husband repeatedly abused her, including an incident in violation of a permanent restraining order, and that she suffered permanent neck and back injuries as a result of his abuses. She also stated that she had moved to her current address in order to escape him.

The Superior Court of New Jersey, Monmouth County, citing the legislature's intent to assure domestic violence victims the maximum protection from abuse which the law can provide, noted that the state's Prevention of Domestic Violence Act requires the court to "waive any requirement that the victim's location be disclosed to any person" in a court pleading.¹⁰⁴ Although the act does not specifically provide for the confidentiality of the battered victim's address in other contexts, the court found that the voting rights of abused victims, as with other citizens, must be ensured. The New Jersey court held that the Superintendent of Elections is required to register the abused victim without making her address a matter of the public record.¹⁰⁵ In order to be registered, the victim must submit a voter registration form excluding her street address, submit a copy of her domestic violence restraining order, provide a mailing address such as a post office box, inform the commissioner which election district she lives in after examining a map of the town's voting districts, and promise to promptly notify the commissioner in writing if she moves.

This court decision was later codified to permit a victim of domestic violence with a permanent restraining order¹⁰⁶ to register to vote without listing the actual street address on the registration form. Instead, the

104. N.J. STAT. ANN. § 2C:25-26(c) (West Supp. 1995).

105. D.C. v. Superintendent of Elections, 618 A.2d 931 (N.J. Super. Ct. Law Div. 1992).

106. Orders in New Jersey are issued as permanent.

registrant attaches a copy of the permanent restraining order, a note indicating that she fears further violent acts by her abuser, and any address, including a post office box, where the applicant can receive mail. If she later moves, the registrant will be deemed to have informed the commissioner or board if she completes a new permanent registration form in the manner described. The State of Washington has also enacted legislation to allow battered persons to register to vote without publicly disclosing their addresses as part of the program described in the next section.¹⁰⁷

B. *The Washington State Address Confidentiality Program*

The State of Washington has made provisions to protect its abused citizens through the Washington State Address Confidentiality Program.¹⁰⁸ The program's goal is to keep secret the new location of domestic violence victims who have permanently left an abusive situation. One part of the law allows victims to use post office box addresses as their officially listed addresses. The other part stops the public's access to certain addresses. Confidentiality is given upon request in both voting and marriage records. Those in the program, which is administered by the Secretary of State's office, can submit documentation from that office in lieu of address information needed for access to various programs and assistance. The program costs its participants nothing. This program provides an ideal model to other states wishing to protect its victims, as does Florida's newly enacted law which permits victims of many crimes, including domestic violence, to request in writing that a state agency not reveal the victim's home or work address or telephone number; the request is valid for five years.¹⁰⁹

C. *Name Change*

When the victim and/or her children are at serious danger from her abuser and she wants to cut off all contact with him, she should have the ability to change her and her children's names without notifying the abuser of what their new names will be. Courts must keep such records absolutely confidential from the public and the abuser so that nobody can obtain access to their new names.

107. S.B. 5906, 52d Legislature, 1991 Reg. Sess. (1995), amending WASH. REV. CODE §§ 42.17.310, 42.17.311 & 29.01.155 (West Supp. 1995), and adding a new chapter, 26.04.

108. WASH. REV. CODE ANN. § 40.24 (West 1994); WASH. ADMIN. CODE § 434-840 (1994).

109. CS/HB 819, 1st Engrossed, 1995 (to be codified at FLA. STAT. ANN. § 119.07 (West Supp. 1995)).

In addition, every state should have provisions to terminate the right of only one parent when that parent is a domestic violence perpetrator who is seriously endangering the health and well-being of the other parent or the child.¹¹⁰ In many states the state can only file an action to terminate parental rights against both parents, even when the parents are divorced. In cases of domestic violence the mother is usually a fit parent, or becomes fit once protected from her abuser, even without therapy.¹¹¹ Terminating her rights makes little sense, given that she will almost certainly be able to recover once protected. But unless she is given adequate protection, she and the children will continue to be at risk.

If she is divorced from her abuser (or was never married to him) and the abuser's parental rights are terminated, she is free to change her and the children's names and to move, if she desires, to prevent being traced by her abuser. If she notifies her children's schools and health-care providers of the termination, the abuser should have no further access to these records. Because she is no longer married to him and he has no further parental rights, he will have no further responsibility for paying child support, even if she receives public assistance.

In the event that she is not yet divorced from her abuser, courts should seriously consider expediting her divorce. A study of over 551 battered women killed by their intimate partners in the Canadian province of Ontario over seventeen years, found that none of the women were killed after they were actually divorced from their abusers, although the time when they went through divorce proceedings was a time of very high risk.¹¹² This suggests that protracted divorce proceedings, which are all too common in domestic violence cases, may be especially dangerous to battered women. Accordingly, courts should consider expediting divorce proceedings for battered women to see if this reduces their danger.

D. *Social Security Numbers*

The Social Security Administration issues to each U.S. citizen and certain aliens a social security number. These numbers are used to identify individuals throughout their lives for social security purposes. However, the numbers are used for many other identification purposes,

110. *See, e.g.,* Marchbanks v. Ellis, No. F10-1-93 (Vt. Fam. Ct. Caledonia County, July 29, 1994) (noted in *Case Developments*, in CLEARINGHOUSE REV. 50,278A-F).

111. WALKER, *supra* note 10, at 7.

112. MARIA CRAWFORD & ROSEMARY GARTNER, WOMEN KILLING: INTIMATE FEMICIDE IN ONTARIO, 1974-1990, 42, 179 (1992).

including on records for obtaining public assistance, on tax returns, bank records, credit files, and more recently on marriage certificates and birth records of children. Often these numbers are used on driver licenses, medical insurance policies, and sometimes even on school records. These numbers are also used by abusers to track their victims.

The director of a social security office has the authority to issue a new social security number on behalf of a victim whose life, or that of a child in the victim's care, is in serious danger. Although new numbers are readily issued for people in the federal government's witness protection program, social security offices seldom issue them to battered women.

Even if the woman and her children obtain new numbers, her abuser may be able to track them down if they continue to use the same names, transfer money between bank accounts, use old credit records to obtain new ones, apply for public assistance (especially if the child support enforcement unit pursues child support on their behalf) or, after changing their names, notify schools or agencies that licensed or accredited them in any way. It is likely that the only victims who successfully escape homicidal lovers intent on tracking them, effectively had to abandon not only their friends and families, high school diplomas, credit records, medical records, employer references, and driver licenses, but also nursing degrees, beautician licenses, and other professional accreditation. Courts should order the Social Security Administration to issue new social security numbers to battered women and their children who are in serious danger, and to inform them of how they can minimize the risk that they will be located through other means.

E. *"Good Cause" to Not Cooperate with Child Support Enforcement*

An applicant or recipient of public assistance is expected to cooperate with the IV-D child support enforcement agency in her state so that child support can be obtained from the child's missing parent. However, an exception exists if the applicant/recipient is afraid that serious physical or emotional harm will come to her or her child if the agency locates the parent, takes him to court, or orders him to pay child support.¹¹³ She is entitled to receive benefits so long as her "good cause" claim is pending. If her claim is upheld, she will not have to supply any information about him (e.g., his name, address, social security number, parents' names, or place of employment) or go to court against her

113. 42 U.S.C. § 602(a)(26)(B) (West Supp. 1995).

abuser. However, she may find that she receives a temporary determination and must reapply in a few months. Furthermore, the agency is still entitled to go after her abuser using information obtained from other sources, and will very likely succeed if paternity can be presumed because of their marital status or he is listed as the father on the child's birth certificate.

F. Paternity Establishment

In many states the mother of a nonmarital child may be free to relocate with her child or deny the father visitation if paternity has never been established. However, effective December 23, 1994, all birthing centers and hospitals will encourage and assist parents in establishing paternity of children born out of wedlock before the mother and child leave the facility.¹¹⁴ The regulations make it clear that establishing paternity is voluntary.¹¹⁵ Various welfare proposals¹¹⁶ will prohibit welfare eligibility when paternity is not established. But some mothers may choose to forgo collecting welfare and/or child support in the hope of preventing further contact with an abusive partner. Yet she may find that he seeks custody, visitation, return of the child, and/or paternity, thereby defeating her efforts to protect herself and the child. Fairness requires that any welfare changes and programs to encourage establishing paternity should contain a "good cause" exemption for abused persons.

G. Telephone Technology Threat

Often, a battered woman obtains an unlisted telephone number in the hope that it will protect her from being located or harassed. Domestic violence shelters also want protection for their telephones to prevent abusers from calling staff or residents. However, new telephone technologies jeopardize what little security shelters and battered women expect from having unlisted numbers, particularly if a battered woman or her children are required to telephone her abuser, not an unusual requirement or consequence of court ordered visitation. Caller ID visually displays, and sometimes stores, the telephone number of an incoming call. In some parts of the country, Caller ID also shows the name of the caller.¹¹⁷ Some of the Caller ID equipment can store up to sixty-four telephone numbers, including unlisted and unpublished ones.¹¹⁸ Utility

114. 59 Fed. Reg. 66219 (1994) (to be codified at 45 C.F.R. § 301-305).

115. *Id.*

116. *See, e.g.*, H.R. 4, *supra* note 39.

117. Andra Brill, *Caller I.D., Round IV*, COLORADO DOMESTIC VIOLENCE COALITION 4 (Winter 1993).

118. Jan Holland et al., *ALERT! ALERT! Disconnect Caller ID and Last Call Return*, COLORADO DOMESTIC VIOLENCE COALITION 1 (Summer 1991).

commissions often require telephone companies to block the telephone lines of any domestic violence program for free, and possibly those of any subscriber who asks.¹¹⁹ Even though the entire telephone line can be blocked in those states or a particular call can be blocked by dialing in a special code, Last Call Return service and various other services allow that number to be stored and later redialed, thereby effectively enabling the abuser to have permanent access to that telephone number. Many abusers readily admit that they frequently use Caller ID as a control tactic to monitor and track their victims' activities and whereabouts.¹²⁰ Another technology they sometimes use enables them to repeatedly redial a victim's number.

Further jeopardizing a victim's safety, many telephone companies refuse to block a telephone line for Caller ID purposes if the phone service is in another person's name, most often the abuser's. Even when the victim has a court order excluding him from the home, some telephone companies refuse to transfer service to the victim unless she has her abuser's written permission and arrangements have been made to pay off arrearages, conditions to which the batterer is unlikely to agree¹²¹ and which may precipitate another beating. Some telephone companies have been known to telephone the abuser at his new listing to ask him for instructions, including whether to unblock her line, without telling her.

Errors have also foiled people who tried to block their numbers. Recently the press revealed that NYNEX, the telephone service for 90 percent of New York state lines, was unable to provide the line block protection it had promised to almost 30,000 subscribers who asked for it. NYNEX knew of the error for over a year, but did nothing until the press exposed the failure.¹²²

Battered women have also found that cellular and cordless telephones subject them to easy monitoring. Many new technologies will probably pose even greater risks to battered women.

H. Witness Protection Program

The federal witness protection program is best known for the new identities it gives to criminals who act as witnesses for the government against other criminals. These informants are known to be in great

119. *See, e.g.*, Pennsylvania Coalition Against Domestic Violence v. Pennsylvania Pub. Util. Comm'n, No. 2268 C.D. (Pa. Commw. 12/29/9).

120. Holland, et al., *supra* note 118, at 2.

121. Based on complaining telephone calls to the National Center on Women and Family Law over the last four years.

122. Martha L. Wald, *Caller ID Reaches Out a Bit Too Far*, N.Y. TIMES, Feb. 2, 1995, at B1; *Nynex Says Caller ID Problem Is Resolved*, N.Y. TIMES, Feb. 11, 1995, at 24.

danger of retaliation by the criminals against whom they testify. Some battered women desire to change their identities to escape their abusers. They and their children often face as much danger in leaving as informants do by testifying. The witness protection program should be expanded to protect these domestic violence victims and their children.

IV. Confidentiality Privileges

A number of states have enacted privileges to protect victim-counselor communications.¹²³ These privileges reflect sound public policy because counseling and shelter services offered by battered women's programs are the most effective means of protecting battered women.¹²⁴ State legislatures have recognized the importance of battered women's shelters and service programs in ending violence by funding them. The National Organization for Victim Assistance noted in 1985 that forty-nine states provided subsidies for domestic violence shelters.¹²⁵

Society has created certain privileges to protect the sanctity of certain relationships which it values, including the priest-penitent, attorney-client, and doctor-patient privileges. The victim-counselor privilege falls within this category. These privileges are justified on the theory that the societal utility of the relationship to be protected is considered more important than society's interest in having the evidence disclosed in court, and because the value of the relationship depends upon there being strict confidentiality between the parties. Professor Henry Wigmore described the four necessary conditions for the creation of these privileges:

1. The communication must originate in confidence that it will not be disclosed;
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
3. The relationship must be one which the community believes should be sedulously fostered; and
4. The injury that would inure to the relationship by the communication's disclosure must be greater than the benefit thereby gained for the correct disposal of litigation.¹²⁶

Wigmore's four necessary conditions have also been used to create or uphold a privilege to keep shelter records confidential. This need is recognized by the federal government's requirements that any domestic

123. This section relies heavily on Confidentiality Manual, *supra* note 79.

124. Lee H. Bowker & Lorie Maurer, *The Medical Treatment of Battered Wives*, 12 *WOMEN & HEALTH*, 25, 39-40 (1987); DEL MARTIN, *BATTERED WIVES* 197 (1976).

125. CONFIDENTIALITY MANUAL, *supra* note 79, at 39-40.

126. 8 J. WIGMORE EVIDENCE § 2285 (McNaughton Rev. Ed. 1961).

violence program accepting Victims of Crime Act (VOCA)¹²⁷ or Family Violence Prevention and Services Act¹²⁸ funding have a written policy in place to keep shelter records confidential. These and similar state requirements show that state and federal governments recognize battered women's programs as vital to the community.

Furthermore, battered women expect confidentiality in their dealings with domestic violence hotlines, programs, and shelters. Most victims of domestic violence have been threatened with further assault or even death if they ever reveal what their abusers have done to them. Almost all battered women are terrified of these threats. Many victims of abusive behavior are embarrassed or ashamed about the abuse they have undergone, and/or their inability to control their abusers.¹²⁹ Without assurances of confidentiality, few battered women would contact domestic violence programs or open up to battered women's counselors. Furthermore, domestic violence counselors perform many of the same functions with battered women as do clergy, attorneys, and psychotherapists, whose relationships with the victims are usually protected as confidential. But most of these other professionals have failed battered women badly in the past by not understanding the dynamics of domestic violence, minimizing the abuse, blaming the victims for being abused, not knowing how to help the victims, or frequently using approaches which actually increase the likelihood that the abuse will escalate.¹³⁰

Many states¹³¹ have created victim-counselor privileges to protect

127. 42 U.S.C. § 10601-10607 (West Supp. 1995).

128. Pub. L. No. 98-457, Title III, §§ 302-313 (West Supp. 1995) (codified as reauthorized and amended at 42 U.S.C. §§ 10401-10413 (West Supp. 1995)).

129. But battered women cannot control the abuser's violence. See DUTTON, *supra* note 22, at 40.

130. Schechter & Gray, *supra* note 38, at 245-47.

131. See, e.g., ALA. CODE § 15-23-40 to 15-23-45 (1994); ALASKA STAT. §§ 9.25.30, 12.45.049, 25.35.052-.059 (Michie Supp. 1994); ARIZ. REV. STAT. ANN. § 13-4401 *et seq.* (West Supp. 1994); CAL. EVID. CODE § 1037.1-1037.7 (West Supp. 1995); CONN. GEN. STAT. ANN. § 52-146k (West Supp. 1995); FLA. STAT. ANN. § 90.5035 (West Supp. 1994); ILL. ANN. STAT. ch. 110, para. 8-802.1-802.2 & ch. 40, para. 2312-27 (West Supp. 1995); IND. CODE ANN. § 35-37-6-1 - § 35-37-6-11 (Michie Supp. 1994); IOWA CODE ANN. § 217.30 (West 1994); KY. REV. STAT. ANN. § 422A.0506 (Michie Supp. 1994); LA. REV. STAT. ANN. § 46:2124.1 (West Supp. 1994); ME. REV. STAT. ANN. tit. 16, § 53-A (West Supp. 1994); MASS. GEN. L. ch. 233 §§ 20J & 20K (West Supp. 1995); MICH. COMP. LAWS ANN. § 600.2157a (West Supp. 1995); MINN. STAT. ANN. § 595.02(j) (West Supp. 1995); N.H. REV. STAT. ANN. §§ 17C-C:1-C:10 (1994); N.J. STAT. ANN. § 27:84A-22.14-§ 2A:84A-22:5 & § 2A:84A-29 (West Supp. 1995); N.M. STAT. ANN. § 31-25-6 (1995); N.D. CENT. CODE § 14-07.1-18 (1994); 42 PA. CONS. STAT. ANN. § 5945.1 (West Supp. 1995) & 23 PA. CONS. STAT. ANN. §§ 6102 and 6116 (West Supp. 1995); UTAH CODE ANN. §§ 78-3c-14 (Michie Supp. 1994); WASH. REV. CODE ANN. § 70.125.065 (West Supp. 1995); and WYO. STAT. §§ 1-12-116 & 14-3-210 (1994).

battered women, victims of rape,¹³² or victims generally. Other states have recognized these privileges judicially,¹³³ typically basing their decisions on some or all of the following arguments: (1) Wigmore's four conditions; (2) the similarity of the victim-counselor relationship to that of other relationships protected by other privileges; (3) extending an already existing privilege to the counselor who works under the supervision or control of someone holding a statutory privilege; (4) denying the privilege to someone unable to afford a private therapist denies the victim equal protection; (5) victim-counselor communications fall within the "zone of privacy" which state and federal constitutions protect; (6) the fact that most states require rape and/or domestic violence counselors to undergo specified training to be certified; and (7) the privilege is implied by accepting and contracting with the state agencies that distribute VOCA or Family Violence Prevention and Services Act or funding, or state programs with confidentiality requirements.

These victim-counselor privileges have been upheld in some states, even when challenged by defendants in criminal cases.¹³⁴ However, other states have required records to be turned over to the court in criminal cases for *in camera* review to determine which parts, if any, should be released after weighing whether the probative value of disclosing them outweighs the effect of its disclosure on the victim.¹³⁵ Of course, the testimony or records should be excluded if the matters are not relevant, highly prejudicial or available from other sources, or if the questioning is repetitious or harassing.¹³⁶

132. Studies of battered women indicate that large numbers of them are raped by their abusers. Walker, *supra* note 10, at 48, found that 59% were raped. Jacquelyn Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, Community Health Nursing Department, Wayne State University College of Nursing, Michigan, 1986, reports other studies showing that 59% (of nonhomicidal) to 75% (of homicidal) battered women experience marital rape.

133. *See, e.g.*, Marriage of Kern, D.R.L. No. 84-3-03105 (Super. Ct., Spokane Cty., Wash. May 9, 1986) (holding that records of a domestic violence program are entitled to a qualified privilege); *People v. Pena*, 487 N.Y.S.2d 935 (N.Y. Sup. Ct. 1985) (recognizing a rape victim-counselor privilege); and *In re Pittsburgh Action Against Rape*, 428 A.2d 126 (Pa. 1981) (recognizing a qualified rape victim-counselor privilege).

134. *See, e.g.*, State v. J.G., 52 Crim. L. Rptr. (BNA) 1460 (No. A-5595-090T4 N.J. Super Ct. App. Div. 1/6/93); *People v. Foggy*, 521 N.E.2d 86 (Ill. 1988), *cert. denied*, 486 U.S. 1047 (1988); *Commw. v. Wilson*, 602 A.2d 1290 (Pa. 1992); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

135. *See, e.g.*, State v. Shiffra, 499 N.W.2d 719 (Wis. Ct. App. 1993); Advisory Opinion of the House of Representatives, 469 A.2d 1161 (R.I. 1983); *Comm'r v. Two Juveniles*, 491 N.E.2d 234 (Mass. 1986); *Comm'r v. Stockhammer*, 570 N.E.2d 992 (Mass. 1991) (allowing defense counsel to review sexual assault records); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994).

136. CONFIDENTIALITY MANUAL, *supra* note 79, at 222-27.

A. Nondisclosure Laws

To protect personal privacy, the federal government and many states prohibit disclosure of information or records of those seeking care or help for mental health,¹³⁷ public welfare,¹³⁸ drug and alcohol abuse,¹³⁹ or domestic violence problems.¹⁴⁰ These laws prohibit disclosure in the absence of the client's formal authorization, even when there is litigation. Nondisclosure laws are often enforced by civil or criminal sanctions against the institution or person that unlawfully disclosed the information. They apply to everyone working or volunteering at the institution, not just to the specified professional. For example, under the Family Violence Prevention and Services Act, domestic violence programs must provide assurance that the address or location of any shelter facility will not be disclosed except upon written authorization from the persons responsible for operating the program and documentation that procedures have been developed and implemented, including copies of the policies and procedure, to ensure the confidentiality of records pertaining to any individual who is provided prevention or treatment services by any program assisted under the Act.¹⁴¹

At least eleven states have a statutory communication privilege for communications between the battered woman and her counselor.¹⁴² In addition, at least twenty-three states restrict disclosure of information about their shelters and their residents, clients of domestic violence programs,¹⁴³ the whereabouts of battered women, whether or not they are staying at a shelter,¹⁴⁴ or information received by clients served at

137. *See, e.g.*, CAL. WELF. & INST. CODE § 5428 (Supp. 1984).

138. *See* Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused and Neglected Children: The Need for Statutory Reform*, 18 FAM. L. Q. 143, 174 (1984).

139. *See* 21 U.S.C. § 1175 (1982); 42 U.S.C. § 4582 (1976).

140. CONFIDENTIALITY MANUAL, *supra* note 79.

141. 42 U.S.C. §§ 10408 and 10402(a)(e) (West Supp. 1995).

142. CONFIDENTIALITY MANUAL, *supra* note 79, at 236.

143. ALA. CODE § 30-6-8 (1994); ARIZ. REV. STAT. ANN. §§ 25-332 and 36-3009 (West Supp. 1994) (\$1,000 civil fine for disclosing shelter location); CAL. PENAL CODE § 273.7 (West Supp. 1995) (misdemeanor to maliciously disclose domestic violence shelter location); CONN. GEN. STAT. § 8-360 (West Supp. 1995) (public agency forbidden to disclose domestic violence shelter location); N.H. REV. STAT. ANN. § 173-C:6 (1994) (domestic violence shelter absolutely privileged); N.Y. SOC. LAW § 459h (West Supp. 1995); N.Y. DOM. REL. LAW § 75-j (West Supp. 1995) (party seeking custody and residing in shelter shall not disclose shelter location); OKLA. STAT. ANN. tit 43A, § 3-313 (West Supp. 1995) (court may not order disclosure of domestic violence shelter address); OR. REV. STAT. § 108.620 (1994) (domestic violence shelter locations confidential); 23 PA. CONS. STAT. ANN. § 6112 (West Supp. 1995) (nondisclosure of domestic violence program address in proceedings under abuse act).

144. CONFIDENTIALITY MANUAL, *supra* note 79, at 237, n.506 (lists various Arizona, Florida, Illinois, Massachusetts, New Jersey, New York, South Dakota, Texas, Utah, Washington, and Wisconsin statutes).

the shelter, often as a condition for receiving funding.¹⁴⁵ These laws, however, do not generally prohibit courts from compelling counselors to disclose records or testify about communications with battered women, although the very existence of a nondisclosure law and its legislative history may bolster the argument for the judicial creation of a battered woman-counselor communication privilege.¹⁴⁶

Statutes differ as to who holds the privilege. California, Connecticut, Illinois, New Hampshire, Pennsylvania, and Wyoming make clear that the battered woman is the sole holder of the privilege.¹⁴⁷ Alaska and North Dakota give the privilege both to the battered woman and to those working at a domestic violence program.¹⁴⁸ New Hampshire and North Dakota protect the disclosure of a domestic violence shelter's location by also prohibiting the battered woman from revealing it, even if she so desires.¹⁴⁹ Other states prohibit who may be compelled to testify.¹⁵⁰ Statutes may also clarify whether the privilege survives the client's death or disability and, if so, who holds it.

B. Child Abuse Reporting Requirements

Although battered women's program privileges also cover information about children, other statutes provide exceptions to battered women's privilege or nondisclosure statutes when the information regards reports of suspected child abuse or neglect,¹⁵¹ or children in need of aid proceedings. However, Connecticut's and Pennsylvania's battered woman-counselor privilege statutes have no exception for reporting child abuse or neglect. North Dakota's statute makes reporting and testifying optional if the counselor deems it necessary to protect a child or if compelled to disclose by a court. Several states, including Alaska,

145. ARIZ. REV. STAT. ANN. § 36-3005 (West Supp. 1994); CONN. GEN. STAT. § 46b-38c (West Supp. 1995); MINN. STAT. ANN. § 13.80 (West Supp. 1995); MISS. CODE ANN. § 93-21-107 (1994); MO. REV. STAT. § 455.230 (Vernon Supp. 1995); NEB. REV. STAT. § 42-918 (1994); NEV. REV. STAT. § 217.420 (Michie 1995); N.H. REV. STAT. ANN. § 173-B:21 (1994); OHIO REV. CODE ANN. § 3113.36 (West Supp. 1993); OKLA. STAT. tit. 43A § 3-313 (West Supp. 1995); OR. REV. STAT. § 108.620 (1994); S.D. CODIFIED LAWS ANN. § 25-10-20 (1994).

146. See, e.g., *Allred v. Alaska*, 554 P.2d 411 (Alaska 1976) (creating a social worker-patient psychotherapist testimonial privilege).

147. CONFIDENTIALITY MANUAL, *supra* note 79, at 266.

148. *Id.*

149. *Id.* at 267.

150. Pennsylvania and Wyoming prohibit the domestic violence counselor from testifying and Michigan makes the privileged information inadmissible.

151. See, e.g., ALASKA STAT. § 25.35.054 (Michie Supp. 1994); CAL. EVID. CODE § 1037.2 (West Supp. 1995); ILL. ANN. STAT. ch 40, para. 2312-27 (West Supp. 1995); MICH. COMP. LAWS § 600.2157a (West Supp. 1995); MICH. STAT. ANN. § 27A.2157(1) (West Supp. 1995); WYO. STAT. § 14-3-21a (1994).

Louisiana, Massachusetts, and New Hampshire (the latter three where the perpetrator is being prosecuted criminally), require the court to do a balancing test *in camera*, before ruling on the admissibility of testimony or records.¹⁵²

C. Waiver of Privileges

Privileges are often deemed waived when third parties are present at the conversation, even when the confidence was inadvertently overheard by a bystander. But some third parties, such as translators, are considered reasonably necessary for the communication to take place, so their presence does not waive the privilege. In some states statutes establishing privileges for battered woman's and crime victim's communications clarify that the privilege is meant to cover group counseling sessions.¹⁵³ But the presence of a police officer generally waives the privilege or confidentiality unless either the presence was unknown to the client¹⁵⁴ or the officer was required to be present.¹⁵⁵

V. Jurisdiction, the UCCJA, and Discovery

Many battered women are faced with the terrifying obstacle of having to reveal their addresses in order to get their cases into court, often the only forum which can even begin to give them the protection, custody, divorce, and/or permission to relocate with children that they need. In order for the court to ascertain whether it has jurisdiction, the person bringing the suit is expected to include his or her address right in the complaint or petition. When the complainant is not represented by counsel, this address informs the responding party where to answer the complaint or petition once served. Despite the myth that virtually all parties are represented in family court proceedings, the reality is that representation is the exception.¹⁵⁶

Although some states have court rules or statutes permitting a battered woman to keep her address inaccessible to the respondent or his attorney,¹⁵⁷ the very fact that a case is brought in a particular court frequently

152. CONFIDENTIALITY MANUAL, *supra* note 79, at 337-38.

153. These states include Alabama, Alaska, California, Louisiana, Massachusetts, Michigan, New Jersey, New Mexico and Pennsylvania, according to CONFIDENTIALITY MANUAL, *id.* at 350.

154. See *People v. Harris*, 456 N.Y.S.2d 694 (N.Y. 1982), *cert. denied*, 460 U.S. 1047 (1983); *Blackmon v. State*, 653 P.2d 669 (Alaska 1982).

155. 81 AM. JUR. 2d § 234.

156. ADAMS & GREANEY, *supra* note 81, at 88 (noting that only 25% of women were represented in domestic violence cases, and only 10% of women were represented when their abusers were not married to them).

157. See, e.g., TEX. FAM. CODE ANN. § 71.111 (Michie Supp. 1994).

tips off the abuser to his victim's general whereabouts, greatly increasing the probability that he will find her. Even the existence of mandatory rules requiring courts to keep victims' addresses confidential on request does not guarantee that courts will honor these requests.¹⁵⁸ Even when the court orders an address to be kept confidential, it is not unusual for the court to inadvertently leave a paper containing the address in a file available to the public or use an inadequate measure to conceal her address, such as, covering it up with a stick-on note.¹⁵⁹

In addition, a victim may have to disclose her address if she wants custody or a divorce, or to respond to her abuser's divorce or custody suit. This is particularly likely if she does not have an attorney who could maneuver to keep that information out of the court file throughout the litigation, and whose address the woman could use for purposes or notice. If there is a custody claim pending she may have to, and in any case should, comply with the Section 9 notice requirements of the Uniform Child Custody Jurisdiction Act (UCCJA), which provide that she has a continuing obligation to file under oath her address, every address where the child has lived for the past five years, and the names and current address of every person with whom the child has resided during the past five years.¹⁶⁰ Her failure to comply may mean that no other jurisdiction will honor and enforce her custody decree. Indeed, these very requirements may be considered jurisdictional¹⁶¹ in her state or the enforcing state, and if they are, her failure to comply results in loss of UCCJA jurisdiction. Without UCCJA jurisdiction, the court must dismiss her case and regard any order issued as void and unenforceable.

Even if the requirements are not considered jurisdictional, they are still mandatory, so that a later enforcement action could be dismissed based on her coming to court with unclean hands for having failed to

158. See discussion, *supra* notes 79 and 80.

159. Based on the author's experience of representing over 2000 battered women and from numerous stories and complaints from other attorneys and advocates. Some practitioners learned to use pink paper for any form that needed a confidential address, with the word **IMPOUNDED** or **CONFIDENTIAL** in large, bold letters at the top, on the theory that any clerk could easily see the paper, as could counsel, when checking the file when it was returned from the courtroom.

160. Parental Kidnapping and Prevention Act, 28 U.S.C. § 1738A (West Supp. 1995).

161. The section 9 requirements are considered jurisdictional in Louisiana, Maryland, Mississippi, North Carolina, Ohio, and Washington, but are not considered jurisdictional in Alabama, Alaska, Georgia, Iowa and Oklahoma. The Florida courts have split on this. See JOAN ZORZA, *GUIDE TO INTERSTATE CUSTODY: A MANUAL FOR DOMESTIC VIOLENCE ADVOCATES* 50 (1992).

comply with the requirements.¹⁶² However, she does have a number of possible options, even if her state lacks rules or laws to circumvent compliance with the section 9 requirements without disclosing an address which she needs to keep confidential. She could ask the court, preferably by way of an *ex parte* motion, to (1) waive the filing of the section 9 affidavit based on the violence; (2) permit her to file the section 9 affidavit without including any at-risk addresses or names, but with an affidavit attached stating the length of time that the child has lived in each state, what the history of violence has been, and that disclosure would endanger herself, another party and/or the child, so would not be in the child's best interest; (3) allow her to comply through an *in camera* proceeding outside of the presence of the abuser and his attorney; or (4) order that the court seal, impound, or sequester the affidavit so that it will only be available to the court.

Even if she successfully negotiates the section 9 requirements, she may be expected to include her address on the financial statement necessary for her to obtain child support, alimony or property division, especially if she has a financial interest in any property. Or discovery may force her to reveal the address and other information which she hoped to keep confidential. Her address probably appears on utility bills and her address and phone number on her telephone bills. It is very possible that her address, phone number, or credit card number may have been written on a check before a merchant cashed them. Her bank statements are likely to include her home address and checks which may show which neighborhood stores she frequents. If she is on public assistance, her welfare file, containing copies of her rent receipts, utility bills, verification from her children's schools, and social security numbers for herself and her children, may be produced to her abuser, very possibly without her knowledge. Sometimes the child support enforcement agency includes her address in its complaint to her abuser, again, often without her knowledge.

These problems could be solved by enacting major changes to the federal Parental Kidnapping Prevention Act (PKPA) because they would preempt state law. However, each state should change its own court practices and laws, including its version of the UCCJA. Other laws would have to be changed to protect victims of domestic violence in cases which do not involve custody proceedings, and for cases involving parties who have no minor children in common. Some of the needed changes would insure that confidential addresses, particularly those of

162. *Id.* at 51.

domestic violence programs, never be disclosed; shorten the time period necessary for disclosure of addresses in custody proceedings; require that courts make safety for domestic violence victims and their children a priority in any decision regarding custody, visitation, relocation, inconvenient forum, venue, and reprehensible conduct.¹⁶³

VI. The Need to be Able to Relocate with Her Children

Given how harmful domestic violence is to the intended victim and the children, many battered women will want to get away from their abusers by moving out-of-state. Unfortunately for the abused parent, many state's laws¹⁶⁴ and court decisions¹⁶⁵ limit the right of the custodial parent to move the child to wherever the custodial parent chooses. Sometimes the restrictions prohibit even a parent with sole legal and physical custody from relocating with her children. Short distance relocations, particularly if they do not involve crossing a state line are seldom a problem. But in most states, either the noncustodial parent or a court must consent to the move, particularly if the children are being relocated to another state. A noncustodial parent opposing the move may well request a change in custody.

The standards that courts use to decide whether to allow the move (or, to require the child to be returned after an unauthorized move) vary enormously among the states, but the standards for removal have become much more restrictive in the past fifteen years. Prior to the time when domestic violence statutes were being enacted, most states recognized that in the absence of a court order prohibiting relocation, the custodial parent had the right to move the child to another jurisdiction.¹⁶⁶ New York is probably the most restrictive state, requiring that the custodial parent meet the "exceptional circumstances" standard, one that is extremely difficult to meet.¹⁶⁷ West Virginia, probably the

163. The ABA REPORT, *supra* note 53, at Appendices B and C, suggests many of these recommendations.

164. *See, e.g.*, KAN. STAT. ANN. § 60-1620 (1994); MASS. GEN. L. ch. 208 § 30 (West Supp. 1995); N.J. STAT. ANN. § 9:2-2 (West Supp. 1995); N.C. GEN. STAT. § 50-13-2 (Michie 1994).

165. *See, e.g.*, Ziegler v. Ziegler, 691 P.2d 773 (Idaho App. 1985); Carlson v. Carlson, 661 P.2d 833 (Kan. App. 1983); Everett v. Everett, Nos. AV93000563 & AV93000597 (Ala. Civ. App. 1/6/95); Rowland v. Kingman, 629 A.2d 613 (Me. 1993), *cert. denied*, 114 S. Ct. 884 (1994); Halliday v. Halliday, 593 A.2d 233 (N.H. 1991); Wiles v. Wiles, 578 N.Y.S.2d. 292 (App. Div. 1991); Trudeau v. Trudeau, 822 P.2d 873 (Wyo. 1991).

166. Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993).

167. *See, e.g.*, Courten v. Courten, 459 N.Y.S.2d 464 (App. Div. 1983).

most liberal state, presumes that custody should be given to the prime custodial parent and continued with that parent in the absence of that parent's unfitness, even if the custodial parent moves.¹⁶⁸ In the majority of the states, however, the courts look to the best interests of the child,¹⁶⁹ sometimes coupled with one or both of the assumptions that it is in the child's best interests to have contact with both parents and there must be a change in circumstances besides the move to justify changing custody to the noncustodial parent. Presumably recognizing the custodial parent's constitutional right to travel, Wisconsin courts are only allowed to determine whether custody should be transferred, not whether the custodial parent can be prohibited from moving.¹⁷⁰ But although most courts concede that the interests of the child and the custodial parent are interrelated,¹⁷¹ a minority of courts have looked more to the best interests of the custodial family unit, recognizing that a happier, better adjusted custodial parent will benefit the whole family, including the child.¹⁷²

However, virtually all courts agree that if the custodial parent's purpose in moving is to interfere with the child's relationship with the noncustodial parent, then the relocation request should be denied.¹⁷³ This puts the battered woman who is escaping from her abuser to protect herself or her child in an impossible bind. Since her very purpose in fleeing is to escape contact with her abuser, she risks losing custody to the abuser for acting protectively. But if she fails to protect her child from direct abuse or from the emotional trauma of witnessing herself being abused, she risks losing her child to the custody of the state. Often she needs to get away because the abuse has so demoralized and exhausted her that her well-being and parenting abilities are seriously diminished, thereby adversely affecting her children. Yet most courts refuse to inquire into her motivation for relocating or opposing visitation. Further hurting her, most courts fail to blame the abuser for causing the mother's decreased parenting abilities and need to act protectively. Similarly, most courts refuse to decline jurisdiction over an abuser's custody modification claim based on his having come to court

168. Garska v. McCoy, 278 S.E.2d 357 (W. Va 1981).

169. Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993).

170. *In re Kerkvliet*, 480 N.W.2d 823 (Wis. App. 1992).

171. *See, e.g.*, Hale v. Hale, 429 N.E.2d 340 (Mass. App. Ct. 1984).

172. *See, e.g.*, D'Onofrio v. D'Onofrio, 365 A.2d 27 (N.J. Super. Ct. Ch. Div. 1976).

173. *See, e.g.*, Pergolski v. Pergolski, 420 N.W.2d 414 (Wis. Ct. App. 1988); Ducheneaux v. Ducheneaux, 427 N.W.2d 122 (S.D. 1988); Alfieri v. Alfieri, 733 P.2d 4 (N.M. Ct. App. 1987).

with unclean hands. Instead, courts usually respond by acting punitively against the abused mother, often rewarding the abuser by changing custody to him.

In an increasing number of states this punitive trend is actually encouraged by "friendly parent" provisions, statutes¹⁷⁴ and court decisions that direct courts to consider which parent will better foster a good relationship with the other parent. Friendly parent provisions effectively guarantee the abusive parent continued contact with his victim, subjecting the children to bad role models that increase the chance that they will grow up to repeat the cycle of violence.¹⁷⁵ The provisions also reinforce learned helplessness in the victimized parent by terrorizing her into suppressing complaints against her abuser for fear that she will lose custody to someone who is highly dangerous.¹⁷⁶ Not only do friendly parent provisions make battered women extremely vulnerable to losing custody, they actually encourage fathers to use the children as pawns in custody fights and to make false accusations that the mother is denying them visitation.¹⁷⁷

Further compromising the battered women's position, as various gender bias studies have found, women's claims are believed less often than are men's, their concerns are trivialized more often, they are held to a much higher standard of conduct and their desire to move is often seen as selfish or vindictive, all factors that penalize women in any court hearing.¹⁷⁸ Furthermore, their credibility is even less than that of women who are not abused. In contrast, abusers are seen as very credible, although they frequently deny, minimize, lie (particularly about their abusiveness), and manipulate others, including the courts to further control and punish their victims.¹⁷⁹ One court that did keep custody with the mother noted that although the relocation standard is supposed to be gender neutral, "no cases exist in which a father, custo-

174. See, e.g., CAL. CIV. CODE § 4600 (West Supp. 1995); COLO. REV. STAT. §§ 14-10-124(1.5)(f), (h), and (k) (West Supp. 1994); FLA. STAT. ch. 61.13 (West Supp. 1994); MO. REV. STAT. § 452.375 (Vernon Supp. 1994); MONT. CODE ANN. § 40-4-223 (1994); NEV. REV. STAT. § 125.480(3)(a) (Michie 1995).

175. Zorza, *supra* note 94, at 924-25.

176. *Id.* at 925.

177. *Id.*

178. See COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM, GENDER AND JUSTICE IN THE COURTS: A REPORT OF THE SUPREME COURT OF GEORGIA 227-40 and n.6 (Aug. 1991) (citing similar gender bias findings by the Arizona Coalition on Minorities and Women in the Law, Colorado Gender Bias Task Force, Florida Gender Bias Task Force, Maryland Special Joint Committee on Gender Bias in the Courts, Michigan Task Force in Gender Issues in the Court, and the New Jersey Supreme Court Task Force on Women in the Courts).

179. Adams, *supra* note 91, at 23-24.

dial parent or not, was denied the right to move wherever and whenever he pleased. It is the woman who was asked to submit to the scheduling needs of the father."¹⁸⁰

The practice of punishing protective parents has prompted the National Council of Juvenile and Family Court Judges to urge as early as 1990 that instead of changing custody, courts should protect the children and investigate whether the other parent's violence had any impact on why the mother fled the jurisdiction.¹⁸¹ Courts should weigh and consider any violent conduct in making relocation and other custody and visitation decisions, with no presumption that joint custody is in the child's best interests.¹⁸² In 1994, the Council recommended even stronger more protective provisions, including enacting a rebuttable presumption that it is not only in the child's best interest that a nonviolent parent have sole custody, once there has been a determination that family or domestic violence has occurred,¹⁸³ but that the child should reside in the location of the nonviolent parent's choosing, whether within or without the state.¹⁸⁴ Indeed, the Council would have courts "consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence" and the "perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person"¹⁸⁵ in every custody decision. In addition, relocation or being absent "because of an act of family or domestic violence by the other parent" should not count against "the parent in determining custody or visitation."¹⁸⁶ Furthermore, the National Council of Juvenile and Family Court Judges would make the occurrence of domestic or family violence a change in circumstances allowing the court to modify custody orders.¹⁸⁷

The report to the American Bar Association on how domestic violence affects children takes a very similar approach to that of the National Council of Juvenile and Family Court Judges. It recommends that:

State legislatures should amend custody and visitation codes, creating custodial protection for abused parents and their children. These might include presumptions that custody not be awarded, in whole or in part, to a parent

180. Michael G., 91 N.Y.L.J. 24 (N.Y. Fam. Ct. 3/26/91).

181. HERRELL & HOFFORD, *supra* note 98, at Recommendation II.12. (1990).

182. *Id.* at Recommendation II.11.

183. MODEL CODE, *supra* note 52, at § 401.

184. *Id.* at § 403.

185. *Id.* at § 402.

186. *Id.*

187. *Id.* at § 404.

with a history of inflicting domestic violence, that visitation be awarded to such parent only if the safety and well-being of the abused parent and children can be protected, and that all awards of visitation incorporate explicit protection for the child and abused parent.

State laws should direct the establishment of appropriate supervised visitation programs. Criminal custodial interference statutes should be amended to include flight from domestic violence as an affirmative defense.¹⁸⁸

In addition, the U.S. Congress enacted the International Parental Kidnapping Crime Act of 1993, which makes fleeing an incident or pattern of domestic violence a complete defense to international kidnapping.¹⁸⁹ It is most unlikely that Congress intended this defense to pertain only to international crimes, believing that it was merely codifying what is already allowed as a necessity defense to any custodial interference or abduction civil or criminal case.

Only a few court decisions have reflected these common sense safety measures.¹⁹⁰ Battered women are more likely to obtain favorable relocation trial court decisions when fleeing abusive situations in those states having favorable appellate law or statutes which direct courts to protect an abused child and/or parent from further harm when fashioning a custody or visitation award.¹⁹¹ Because relief may only be granted on appeal if the issues have been raised below, any battered women seeking to relocate with her children would be well-advised to raise every constitutional argument to support her move. That is, she should argue that she be allowed to relocate with her children because of the following constitutional arguments:

1. Her right to travel interstate is grounded on the U.S. Constitution, specifically the Privileges and Immunities Clause of Art. IV, § 2, the Privileges and Immunities Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, the Commerce Clause, and freedom of association under the First Amendment.
2. Denying the relocation would discriminate against her on gender bias grounds, on the basis of her marital status, on the basis of her being a parent of (a) minor child(ren), and on the basis of her being an abused person who is being denied the ability to protect herself and/or her child(ren), all based on Equal Protection grounds.

188. ABA REPORT, *supra* note 53, at 15.

189. 18 U.S.C. § 1204 (West Supp. 1995) (enacted December 2, 1993).

190. *See, e.g., Mize v. Mize*, 623 So. 2d 636 (Fla. Dist. Ct. App. 1993).

191. These states are Arizona, California, Colorado, Delaware, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, North Dakota, Rhode Island, Washington, West Virginia, and Wyoming, *as noted in State Custody Laws, supra* note 50.

3. A denial of the relocation would discriminate against the child(ren)'s right to interstate travel and [possibly] to be protected by their custodial parent from witnessing and/or experiencing further abuse.
4. [If she plans to marry someone else]: A denial of the relocation would deny the mother her fundamental right to (re)marry, to create a new family, and to enjoy the privacy of the familial association.
5. [If she is not moving to get away from the father]: The court could consider the alternative that the father could move to be near his child(ren) rather than restrict her from moving the child(ren).¹⁹²
6. The denial of the relocation deprives her of state constitutional rights (e.g., the state's equal rights amendment, if the state has one).

In addition, the abused woman needs to raise her best factual arguments. These are likely to include the following:

1. Any reasons why the move will be desirable/necessary for her, including what definite plans she has for herself and her child(ren).
2. Any ways that the move will benefit her child(ren), e.g., better work prospects; more emotional support from family; better child care options; better financial situation, especially if she will be able to be off public assistance; that her child(ren) used to live there and still have contacts with friends, church, doctor, etc.; better schools for herself or her child(ren); better medical situation.
3. Why other solutions are not possible or will only aggravate the situation, including why she can not remain; what other alternatives she has explored, and why they will not work or would involve no less hardship for the father; and that couples counseling or family therapy will not help, but actually endangers battered women and aggravates the situation.¹⁹³

192. *See, e.g., Rampolla v. Rampolla*, 635 A.2d 539 (N.J. Super. Ct. App. Div. 1993).

193. NATIONAL CENTER ON WOMEN AND FAMILY LAW, COUPLES COUNSELING AND COUPLES THERAPY ENDANGER BATTERED WOMEN, New York, 1993 [hereinafter COUPLES COUNSELING]; the American Medical Association's model medical protocol, DIAGNOSIS AND TREATMENT GUIDELINES ON DOMESTIC VIOLENCE, states on page 12: "Couples counseling or family intervention is generally contraindicated in the presence of domestic violence. Attempts to implement family therapy in the presence of ongoing violence may increase the risk of serious harm. *The first concern must be for the safety of the woman and her children.*" [Emphasis in original.]

4. [Possibly]: That her child(ren) are of sufficient age to give their consent and/or desire, or at least do not oppose, the move.
5. Anything which the abuser has done (e.g., abusing or harassing her, not paying support, etc.) that makes it harder for her to remain (e.g., that he has or will cause her to be evicted, lose her job, or function less effectively as a parent).
6. Whether and how visitation will still be possible after the move.
7. [If true, or to the extent true]: That the father has not had a very meaningful relationship with the child(ren) and/or only (or mainly) opposes the move to prevent her from getting on with her life, and hence has no legally permissible reason to prevent the relocation.
8. That the court must/should take domestic violence and safety concerns into account in any custody, including relocation, case.

The PKPA should be changed to include domestic violence as a ground for courts to assume emergency jurisdiction, require courts to consider safety and domestic violence in deciding whether to decline jurisdiction and in all relocation cases, make domestic violence a statutory defense to any interstate parental abduction civil or criminal case, and provide that the state loses PKPA jurisdiction for custody modification purposes as an inconvenient forum when the child has been gone with court permission, because of domestic violence or without challenge for, perhaps, two years.¹⁹⁴

VII. Security in the Courthouse

Battered women not only need good laws, they need safe courthouses so they will not be killed, abused, or followed home by their abusers. Assaults by their partners are not uncommon, even in courthouses. Family courts are the nation's most dangerous courts. According to one survey, former partners either physically or verbally assaulted at least seventeen of the 385 women granted protective orders in Colorado on the day that their orders were issued.¹⁹⁵ However, when a batterer or his friends and family harass an abused woman or her children in the courthouse,¹⁹⁶ especially when an order of protection is in effect,¹⁹⁷ court officers present seldom do more than try to keep the parties quiet

194. ABA REPORT, *supra* note 53, at Appendices B and C, suggests many of these changes.

195. Henry J. Reske, *Domestic Retaliations: Escalating Violence in the Family Courts*, A.B.A. J. 48, 49 (July 1993).

196. JOYCE KLEMPERER, *TWICE ABUSED: BATTERED WOMEN AND THE CRIMINAL JUSTICE SYSTEM* 40, 72 (1993).

197. Reske, *supra* note 195, at 49 (July 1993).

or suggest that one of them move, thereby trivializing the violence. This conveys the messages that (1) courtroom decorum is more important than the victim's safety, (2) even the court regards its own order as unimportant, (3) the victim is unworthy of protection, and (4) the abuser is justified in his behavior. The result is that the abuser is reinforced in his control of his victim, while she is left feeling more helpless and powerless, with little or no confidence in the court, thereby reinforcing the very cycle of violence that the court's intervention is meant to break.

But even having electronic security at the entrance to a courthouse may not guarantee safety for the battered woman. New York City's Coalition of Battered Women's Advocates complained that the city's criminal courts, although they do have electronic security,

are dirty, poorly maintained, overcrowded, and lacking in safe waiting areas for witnesses. There are no clean, secure bathrooms and the telephones for witnesses to use, and the hallways are poorly monitored. Witnesses are frequently ordered to come to court, not knowing when during the day they will have to testify. Most courthouses have no place for women to wait, to eat lunch, to change diapers, and some close entirely for an hour at lunchtime. . . .

[At the time of the report] only Brooklyn has child care facilities, so witnesses must either bring their children into court or find someone who can care for them. Witnesses frequently find themselves waiting outside courtrooms in close proximity to defendants and/or their friends.¹⁹⁸

The electronic security became a threat to the battered women who were forced to "wait in lengthy lines, often with the batterer or his family nearby, in order to gain admittance to the court."¹⁹⁹ Court officers were "less interested in protecting witnesses than in treating them as objects of suspicion when they enter the building,"²⁰⁰ although they allowed lawyers, law enforcement officers, and court employees to enter without being searched, even when they were involved in a case as a defendant.²⁰¹

The Coalition of Battered Women's Advocates also found that security was a far greater problem for non-English speaking victims. They had enormous trouble just figuring out where to go within the courthouse, because the only signs were in English, and many felt that the translators the court employed were inadequate, often seriously distorting whatever they were translating. Often the translators tried to mediate disputes, or altered testimony to keep their community from

198. KLEMPERER, *supra* note 196, at 33.

199. *Id.* at 33-34.

200. *Id.* at 33.

201. *Id.* at 34.

appearing in an unfavorable light. Many women were advised by their translators to leave out or change crucial information.²⁰²

In addition, all battered women are put at much greater risk when they are sent to mediation or couples counseling, both of which are encouraged by many courts or custody evaluators. Both mediation and couples counseling are known to increase the violence, if not at the moment, then afterwards, and to aggravate the situation for both parties.²⁰³ As noted in footnote 189, the American Medical Association's model domestic violence protocol states that couples counseling is inappropriate in situations where one partner is abusive of the other, suggesting that those doing couples counseling, and possibly mediating, when the relationship is abusive may well be perpetrating malpractice.

Courts should develop protocols for minimizing the dangers to battered women, court personnel, lawyers, and the public,²⁰⁴ and for dealing with violent situations inside and near the courthouse. They should ideally use metal detectors or x-ray machines to screen for any weapons and have separate entrances, separate secure waiting rooms, and escape exits for victims. Courts should allow and encourage victims to come to court with advocates, particularly when they are not represented; their advocates are likely to know the layout of the courthouse so can minimize their risk when going, say, from the clerk's office to the courtroom, or to the rest room. Inside the courtroom the parties should be seated separately, with barriers (a table, if need be) separating the parties when their case is heard. Courts also need provisions for child care that insure that the children are protected from harm and abduction, and are not used by an abuser to gain access to the victim.

Courts should develop protocols that cover all situations, including those involving abusive law enforcement officers and even court personnel who are victimized by or are victimizing family or household members, because domestic violence can affect anyone.²⁰⁵ Court protocols should protect court personnel as well as parties, witnesses, jurors, and the public. An increasing number of courts use bullet proof barriers

202. *Id.* at 35.

203. MARY PAT TREUTHART & LAURIE WOODS, NATIONAL CENTER ON WOMEN AND FAMILY LAW, *MEDIATION—A GUIDE FOR ADVOCATES AND ATTORNEYS REPRESENTING BATTERED WOMEN* (1990); MYRA SUN & LAURIE WOODS, NATIONAL CENTER ON WOMEN AND FAMILY LAW, *A MEDIATOR'S GUIDE TO DOMESTIC ABUSE* (1989); *COUPLES COUNSELING*, *supra* note 193.

204. Barbara Salomon, *Guilty Until Proven Innocent: Representing the Alleged Abuser*, 17 *FAM. ADVOC.* 1, 30 (Winter 1995).

205. *See, e.g.*, Reske, *supra* note 195, at 48; Joseph M. Harvey, *Court Tells Judge to Vacate Home*, *Boston Globe*, Sept. 8, 1978, at 3; Kirk Johnson, [*Connecticut Governor*] *Rovland Asks for Privacy After Report of Disturbance*, *N.Y. TIMES*, Oct. 1, 1994, at 29.

and have protocols for opening suspicious packages. Some judges protect themselves by obtaining unlisted telephone numbers, omitting any address on their checks, having unmarked reserved parking spaces, and having home security.²⁰⁶ Victims of abuse deserve the same type of protection.

VIII. Conclusion

Abusive men terrorize their victims into fearing death or serious injury for themselves or their loved ones if they leave. These threats are carried out all too often. In addition, society has created many hurdles that further endanger, or at least fail to protect, battered women who want to leave their abusers. These hurdles reflect misinformation and gender biased notions about domestic violence, its perpetrators and victims, what men and women deserve, and what is good for families and children. We need to rethink our laws and practices to be realistic about the safety of battered women and their children. Until we offer battered women and their children true protection and hold their abusers accountable, it is unreasonable and counterproductive to fault them for failing to leave.

206. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *COURTS AND COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY CONFERENCE HIGHLIGHTS*, March 25-28, 1993, at 31, 72 (1994).

With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women

LESLYE E. ORLOFF, DEEANA JANG,
AND CATHERINE F. KLEIN*

Cecilia came to the United States from South America. Her husband José is a lawful permanent resident. Throughout their 18 year marriage, José has physically abused Cecilia. When she was pregnant he would hit her in the abdomen. He hit her with his fists leaving bruises all over her body, he grabbed her, shook her, threw her against the wall, and tried to physically restrain her from leaving their home. He constantly harassed Cecilia in front of the children. On one occasion, he attempted to sodomize her while one of their children was present. Frequently, he would threaten to kill her if she left him. José controlled all of the money in the household. Although he began the process of getting permanent resident status for Cecilia, he later withdrew the petition and never filed another. Cecilia speaks little English and because of her immigration status, she cannot obtain work authorization. Therefore, she has no legal means of supporting herself and her children.¹

* Leslye E. Orloff is Director of Program Development at Ayuda, Inc., founded its domestic violence programs, and assisted Congress in drafting the immigration relief provisions for battered immigrant women in the Violence Against Women Act. Deeana Jang is a staff attorney at the Asian Law Caucus and was formerly a staff attorney in the Domestic Relations Unit of the San Francisco Neighborhood Legal Assistance Foundation; Catherine F. Klein is Associate Professor and Director of the Families and the Law Clinic of Columbus School of Law, Catholic University of America. Special thanks to Maria L. Sepulveda, law student of Catholic University of America, for her assistance.

1. Robin L. Campo et al., *UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES*. Other cases illustrate that many times, the citizen or permanent resident spouse threatens his wife that he will report her to the INS to have her deported. When the threat is carried out, the immigrant wife is deported and may be indefinitely separated from her children.

This case narrative illustrates some of the unique legal, social, and economic problems suffered by battered immigrant women. The principal dynamics in a domestic violence relationship are power and control.² The batterer dominates his partner³ by using physical abuse, sexual violence, threats, emotional insults, harassment, and economic deprivation.⁴ For battered immigrant and refugee women in the United States, the typical problems of a battering relationship are further complicated by issues of gender, race, socioeconomic status, immigration status, and language.⁵ A battered woman who is not a legal resident or whose immigrant status depends on her partner, is isolated by cultural dynamics which may prevent her from leaving her husband or seeking assistance from an unfamiliar American legal system.

This article explains some of the unique problems faced by battered immigrant women and offers creative solutions for family lawyers and battered women advocates who have immigrant or refugee clientele. Because battered immigrant women who seek to flee violence need assistance with both family law and immigration law matters, we will discuss both areas and highlight their interrelationship.

I. Civil Domestic Violence Remedies: Protection Orders

All persons who are "residents"⁶ of a particular state, regardless of their immigration status, may obtain civil domestic violence remedies including orders of protection.⁷ A Civil Protection Order (CPO) is a form of injunctive relief which orders the offender to do or to refrain from doing certain acts for a specified period of time.⁸ If crafted carefully, a protection order can serve as one of the most important remedies

2. Deena L. Jang, *Caught in a Web: Immigrant Women and Domestic Violence*, 28 CLEARINGHOUSE REV. 397 (1994).

3. The authors refer to batterers as men because approximately 95% of the victims of domestic violence are women. Jang, *supra* note 2, citing BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA (1983).

4. *Id.* at 397, n.3 (citing SUSAN SCHECTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES (1987)). A description of the typical pattern of domestic violence is available from the National Coalition Against Domestic Violence, Washington, DC.

5. *Id.* at 397.

6. *Id.* at 398 (citing *In re Dick*, 15 Cal. App. 4th 144 (1993) explaining that state law, not federal immigration law, determines the definition of "resident" for family law purposes).

7. For purposes of this discussion, civil orders of protection will be referred to as CPOs.

8. LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS, Remedies 1 (2d ed. 1992).

available to victims of domestic violence.⁹ For battered immigrant women, however, a CPO can be of even greater importance because it can help end a cycle of violence. These orders must be carefully written in a manner that will not harm the victim's immigration status. In fact, if done properly a CPO and some of the relief available as part of a protection order may actually improve the battered immigrant woman's ability to legalize her immigration status. Thus, it is critical for advocates and family lawyers to formulate CPOs that meet the individual needs of their clients.

A. Unique Problems

In order to provide effective assistance, advocates, attorneys, police, and courts must be willing to understand and address the individual needs of battered immigrant women. This includes listening carefully to battered immigrant women and crafting creative legal solutions that consider each individual's cultural experience and needs. While domestic violence occurs in all communities and crosses race, socioeconomic, education, and language lines, culture will affect the excuses a batterer uses to justify his violence and will affect or complicate the barriers that a battered woman must overcome to successfully leave the violent relationship.

1. PERCEPTION OF LEGAL SYSTEM

Some of the obstacles faced by battered immigrant women include a distrustful attitude toward the legal system, language and cultural barriers, and fear of deportation.¹⁰ Some battered immigrant women do not seek legal assistance to free them from an abusive relationship because they fear the legal system.¹¹ This fear arises from their experiences with legal systems in their native countries.¹² Many immigrants come from countries which use a civil law system. In civil law systems,

9. *Id.*

10. Catherine E. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1020 (1993) [hereinafter *Providing Legal Protection*].

11. Testimony of Leslye E. Orloff, Director, Clinica Latina, Ayuda, Inc., Before the Round Table Forum on Hispanics in the Courts, at 4-5, November 2, 1991, found in *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination*, Vol. I: THE MOUNT PLEASANT REPORT, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, at 75, January 1993. [hereinafter *Orloff Testimony*]. "[T]he concept that justice can be obtained in the court system is not embraced by many Latino clients who must instead learn to trust our legal system through their experiences in courts. . . . Latinos seeking redress through the civil court process must initially overcome any fear and suspicion of the judicial system." [Italics omitted.]

12. See *Providing Legal Protection*, *supra* note 10, at 1020-21.

the courts primarily accept signed, notarized, and sealed affidavits as evidence.¹³ Because oral testimony is not a form of evidence to which civil law courts attach any significant weight, immigrant litigants in the United States may find it difficult to understand the common law system which uses oral testimony as the primary form of evidence.¹⁴ For battered immigrant women the fact that they can personally tell their story in court, and have a judge believe them is a baffling concept.

More significantly, many immigrants come from countries where the judiciary is not impartial and acts as an arm of a repressive government.¹⁵ Many believe that only those who are rich or who have strong ties to the government prevail in court.¹⁶ In domestic violence cases, batterers will manipulate these beliefs to coerce their partners into dropping charges or dismissing protection order petitions. The abusers may convince the battered woman that because the batterer is a citizen, has more money, and is a man, he is therefore more credible and will win in court.¹⁷ Family lawyers who are aware of these concerns can address them directly with the battered immigrant woman client. Discussing these issues with the client, explaining the American legal system, and directly addressing client fears and misconceptions can dramatically affect the quality of the battered immigrant client's testimony in court. When left unaddressed, the client's fears about the court process can cause her testimony, however truthful it may be, to sound tentative and less credible.

2. OVERCOMING LANGUAGE BARRIERS

Few court systems guarantee that a battered immigrant litigant will be provided with the assistance of a certified interpreter when she appears in court. Most police departments cannot ensure that non-English speaking domestic violence victims can report their complaints effectively, nor can they assure that battered immigrants learn about their rights as domestic violence victims.¹⁸ When these types of communication problems occur, batterers often go unprosecuted. One battered

13. *Id.* at 1021 (citing the UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY AND DISCRIMINATION 75 (1993)).

14. *Id.* at 1021.

15. *Id.*

16. *Id.*

17. *Id.*

18. Non-English speaking battered women have limited access to shelter. When non-English speaking women do seek shelter, shelter workers often deny their requests because of the shelter's general preference to offer limited numbers of slots to women who can theoretically make better use of shelter services. Nationally, few shelter programs provide bilingual access. *Id.* at 1021-22.

women's advocate reported that because a battered immigrant woman had difficulty communicating with police and prosecutors, and because courthouse information was only available in English, this particular victim arrived after the prosecutor decided not to prosecute, and the defendant and all other witnesses departed.¹⁹ Failure in communication due to insufficient bilingual personnel at all levels—911 operators, police, court personnel—may jeopardize the safety of non-English speaking battered women. Thus, family law attorneys must ensure that they have ready access to bilingual and bicultural staff and that a translator will be present at any court hearing.

To best represent battered immigrant women, domestic violence advocates and family law attorneys should create alliances with social service providers, immigrant rights organizations, and church workers who work with immigrants and refugees. These organizations can help advocates and attorneys develop cultural competence and can help provide their clients with shelter, financial assistance, and food. Family lawyers should exchange information with bilingual and bicultural individuals willing to work together with the family lawyer in assisting battered immigrant women who seek help from the court system.²⁰

3. INTERNATIONAL PARENTAL KIDNAPPING

In family law cases in which any of the parties are immigrants, parental kidnapping may have international significance.²¹ Advocates and family law attorneys must request orders which prohibit the removal of a child from the United States. A copy of such an order must be filed with the embassy of the batterer's home country. Clients who fear that the batterer will take the children out of the country, should be advised to keep the children's birth certificates, social security cards, passports, immunization records, and health insurance cards in their

19. *Orloff Testimony*, *supra* note 11, at 77. See also *Providing Legal Protection*, *supra* note 10, at 1021, nn.1365-66 (citing to various state statutes that require the provision of bilingual information in civil protection order cases). For example, in New Mexico, the statute mandates that law enforcement agencies, prosecutors and judges must make all reasonable efforts to provide victims with an interpreter or translator so that they can be informed of their legal rights. N.M. STAT. ANN. § 31-24-5(C)(7) (Michie 1990). In Rhode Island, a statute requires that law enforcement officers provide domestic violence victims with notice of their rights in English, Portuguese, Spanish, Cambodian, Hmong, Laotian, Vietnamese, and French. R.I. GEN. LAWS § 8-8.15(B) (1988).

20. *Providing Legal Protection*, *supra* note 10, at 1020, n.1360. An excellent resource for attorneys, social workers and advocates who seek to learn how to advocate for the rights of battered immigrant women is DOMESTIC VIOLENCE IN IMMIGRATION & REFUGEE COMMUNITIES: ASSERTING THE RIGHTS OF THE BATTERED WOMAN (Decana Jang et al. eds., 1991).

21. See Jang, *supra* note 2, at 398.

possession to prevent the issuance of visas for the children. In the alternative, counsel can assist the battered client in identifying a safe location, unknown and inaccessible to the batterer, where the documents can be stored.

The International Parental Kidnapping Crime Act of 1993 (PKCA) makes it a felony to abduct a child from the United States to another country.²² However, some battered immigrant women may be forced to leave the United States with their children in order to protect themselves and their children from further abuse. The PKCA provides battered women with an affirmative defense for fleeing domestic violence. Thus, advocates must familiarize themselves with state parental kidnapping laws, the federal Parental Kidnapping Prevention Act,²³ and the International Child Abduction Remedies Act²⁴ if there is concern that either parent may remove the children from the United States.²⁵

B. Sensitive and Creative Legal Assistance

1. ACCOMPANY CLIENT TO CPO HEARINGS

It is appropriate, helpful, and often essential for family lawyers to do everything in their power to ensure the physical safety of their clients. When a domestic violence victim seeks the assistance of a family lawyer for divorce, child custody or child support matters, the first course of action that the family lawyer should undertake is obtaining a protection order for his or her client. Litigation in a divorce or custody action against a batterer can exponentially raise the probability of continued violence against the client. Women who are divorced or separated from their batterers are at a higher risk of assault than those who stay with the abuser.²⁶

Family lawyers should not enter into stipulations with counsel for the batterer in which the parties agree not to present evidence of abuse in divorce and custody cases. Such stipulations can have disastrous consequences for the domestic violence victim and her children. Experts agree that judges must hear evidence regarding the history of abuse and the effect that witnessing or experiencing abuse has had on the children in order to craft custody and visitation decisions that will

22. *Id.* International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204 (1993).

23. Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1995).

24. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610.

25. See Jang, *supra* note 2, at 398.

26. *Providing Legal Protection, supra* note 10, at 815, n.42 (citing BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION 3 (1988), which reveals that 75% of all reported domestic abuse was reported by women who left their abusers).

protect the abuse victims and will enable the children to effectively recover from the effects of the violence.²⁷ Even when reviewing proposed consent orders, judges need to be made aware of the history of violence in order to ensure that the proposed agreements have not required the abused party to trade safety for poverty or safety for custody.

Battered women increasingly need to have legal representation in civil protection order proceedings.²⁸ Some states specifically provide for the petitioner's legal representation in civil protection cases.²⁹ A pro se system, which allows battered women to seek protection orders without the assistance of an attorney, is far from ideal. In most cases after a violent incident, the battered woman sees her batterer for the first time after a violent incident at the court hearing for the CPO. At this hearing, without counsel, "the victim is terrified, unclear of her legal rights, and highly susceptible to the batterer's influence and control."³⁰ Many judges interviewed by the National Institute of Justice in a study of CPOs found that:

[v]ictims who are not represented by counsel are less likely to get protection orders and, if an order is issued, it is less likely to contain all appropriate provisions regarding exclusion from the residence, temporary custody of children, child support, and protective limitations on visitation rights. . . .

Further, difficulties for victims in advocating effectively for their own rights may also stem from the climate of emotional crisis or fear that usually precipitates seeking a protection order . . . (thus) skilled legal assistance may be crucial in obtaining adequate protection orders.³¹

27. *Id.* at 983 (citing THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE PROJECT, FAMILY VIOLENCE: IMPROVING COURT PRACTICE, RECOMMENDATION FROM THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (1990), reprinted in 41 JUV. & FAM. CT. J. 25 (1990) [hereinafter FAMILY VIOLENCE PROJECT], in which the National Council of Juvenile and Family Court Judges strongly recommends that in cases of domestic violence, the court should consider violent conduct when entering custody and visitation orders).

28. *Providing Legal Protection, supra* note 10, at 1058 (citing Peter Finn & Sarah Colson, National Inst. of Justice, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 19 (1990)).

29. *Id.* Family law attorneys should check the relevant statutes of their jurisdiction for guidance.

30. *Id.* at 1059.

31. *Id.* at 1060-61. The D.C. Task Force has concluded that CPOs are more likely to be awarded after trial if the petitioner is represented by counsel. The Task Force reported that counsel should be appointed to represent petitioners in CPO contempt actions for enforcement, and that representation of petitioners by members of the private bar should be encouraged. *Id.* at 1061, n.1612 (citing TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, DISTRICT OF COLUMBIA COURTS, FINAL REPORT 146, 161 (May 1992)).

The need for legal representation at civil protection order hearings is even more compelling when the client is a battered immigrant woman. For these clients, an inability to communicate emotionally charged experiences effectively in English, compounded by fears and misconceptions of the legal system, makes it virtually impossible for her to obtain an effective protection order without legal assistance. Sending a battered immigrant woman into the court system to fend for herself against a batterer who is more fluent in English and more knowledgeable about the legal system can have disastrous results. Thus, family law practitioners must familiarize their battered immigrant clients with their legal rights and how the legal process works, and must be present at any protection order hearings.

2. FACT GATHERING AND INTERVIEWING TECHNIQUES

For battered women to flee violence successfully, they must be able to create a new life apart from their batterer. To do this, battered women must have a means to survive economically, must obtain child support, legal custody of their children, and must have a place to live with their children that can be made secure against continued violence by their batterer. Each battered woman will have unique needs which must be addressed if she is to be empowered to leave. The remedies she must ultimately seek from the legal system will be aimed at breaking the cycle of power and control in which her batterer has carefully locked her.

Advocates and attorneys should first discover the unique problems faced by each individual client. When a client who has been battered seeks assistance, the lawyer must first listen to her needs, concerns, and fears.³² The lawyer needs to ask the client what will help her leave the batterer before explaining what the legal, social service, and medical systems can offer. This technique helps to ensure the lawyer will craft solutions and safety plans that respond to each person's individual needs, instead of being guided by a fixed list of standard remedies. Using a standard list limits options and often misses creative, culturally sensitive remedies and self-help solutions.

There are, however, certain needs common to most battered women. These include:

32. Leslye E. Orloff, Remarks on Societal Issues and Family Violence, published in the American Medical Association's National Conference on Family Violence: Health and Justice, Conference Proceedings (Mar. 12, 1993, Washington, DC), at 67-72.

- Safe housing (a protection order evicting the batterer and prohibiting contact, shelter, or locating another residence the location of which is unknown to the batterer);
- Custody of children (if the parties have children, custody must be addressed);
- Visitation provisions which protect the client and the children (i.e., supervised visitation);³³
- Economic support for the abused spouse and children (including child support, mortgage or rental payments, payment of medical bills and insurance);
- Comprehensive no-contact provisions (including no phone calls or contact via third parties not authorized by the court).

3. CATCH-ALL REMEDY PROVISIONS

Family lawyers should rely on catch-all remedy provisions of state domestic violence statutes, rather than solely on an enumerated list of remedies.³⁴ This strategy will produce stronger civil protection orders that will directly address those aspects of the abusive relationship which, if left unaddressed, can serve as continuing arenas for conflict.³⁵ At least forty-two jurisdictions in the United States explicitly authorize judges great latitude to order *any* constitutionally defensible relief that is warranted to prevent continuing domestic violence.³⁶

Courts broadly interpret statutory catch-all provisions, using them as an opportunity to legally resolve outstanding issues of continuing conflict. For example, in Washington, D.C., the court has the authority to award monetary relief, such as child support, mortgage payments, and rental expenses.³⁷ If other remedies will decrease the potential for violence, advocates and attorneys should request that the court order this relief as well. The catch-all remedies that a lawyer can obtain on the client's behalf will be defined by the client's needs and will only be limited by the lawyer's own creativity and ability to demonstrate a nexus between the relief requested and the statutory purpose of preventing future violence. Effective use of catch-all provisions and enumerated statutory remedies will place the client in the best possible

33. Judicial authorities strongly prefer supervised visitation as the method of visitation in cases of domestic violence to lessen the risk of violence between the parties. *Providing Legal Protection*, *supra* note 10, at 983 (citing FAMILY VIOLENCE PROJECT, *supra* note 27, at 19-20).

34. See *Providing Legal Protection*, *supra* note 10, at 1020.

35. *Id.*

36. See ORLOFF & KLEIN, *supra* note 8, at Remedies 6.

37. *Id.* (citing *Powell v. Powell*, 547 A.2d 973 (D.C. 1988)).

4. ECONOMIC CONSIDERATIONS

Regardless of a battered woman's immigration status, when she leaves her abuser, she faces the intimidating task of financially sustaining herself and her family. The battered immigrant spouse rarely obtains the cooperation of her husband in obtaining a work visa; when she does, it is often at a high physical cost. In addition, virtually all public assistance programs bar undocumented immigrants from receiving benefits and limit the eligibility of legal residents.⁴⁹

For battered immigrant women whose spouses did assist them in obtaining permanent residence, their spouses were required under current law to certify that they would "sponsor" the alien spouse who is applying for permanent residence status. When a battered immigrant woman has been "sponsored" by her citizen or lawful permanent resident spouse, the sponsor's income will be deemed available for the support of the sponsored alien, and it will be unlikely that she will be able to receive Aid to Families with Dependent Children (AFDC) until three years after she has entered the United States.⁵⁰ Obtaining child support instead of AFDC is also difficult for battered immigrant women, as few batterers who are married to immigrants provide income information to their spouses. Without access to this information, the battered immigrant woman has difficulty cooperating with the information requirements of the state agency that assists with child support and awards AFDC payments. This leaves a battered immigrant woman whose husband will not provide her with access to this information without any financial support. Here again, the law requires the battered woman to obtain the cooperation of her batterer to free herself from an abusive relationship.

II. Immigration Law and The Violence Against Women Act

Immigration law has the most far-reaching consequences for battered immigrant women, because the assistance that advocates and family lawyers provide to immigrant domestic violence victims could potentially result in her deportation.⁵¹ Because an immigrant wife of a U.S. citizen or permanent resident often depends completely on her hus-

49. Jang, *supra* note 2, at 403 (citing to various programs that are not available or are available on a restricted basis to immigrants including food stamps, Medicaid, and Aid to Families with Dependent Children). See also NATIONAL IMMIGRATION LAW CENTER, GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS (2d ed. 1993). Further restrictions on access may occur in the future. See Family Self-Sufficiency Act of 1995.

50. *Id.*

51. *Id.* at 400.

band's cooperation to obtain permanent residence, her husband may use this power to trap her in an abusive relationship.⁵² Therefore, advocates and attorneys must carefully consider their clients' immigration status under new immigration laws before taking any action.

On September 13, 1994, President Clinton signed the Violence Against Women Act (VAWA).⁵³ The Violence Against Women Act contains provisions which are specifically intended to ensure that U.S. citizens and permanent resident batterers will no longer be able to use U.S. immigration laws to perpetrate physical, mental, emotional, or economic violence against their spouses and children.⁵⁴ These provisions of VAWA allow battered immigrant women and their children to obtain legal immigrant status without having to rely on the cooperation of their U.S. citizen or lawful permanent resident batterers.

Specifically, the Act provides two forms of relief for battered immigrant women: they may self-petition for permanent resident status or apply for suspension of deportation. These forms of relief are available to battered spouses, battered children, and the parents of battered children.⁵⁵ Battered women may file self-petitions directly with the INS without the commencement of deportation proceedings. Currently, however, a battered woman may only seek suspension of deportation by asking the INS to place her in deportation proceedings. Once deportation proceedings begin, battered women may receive either form of relief from the immigration judge.

A. Self-Petitioning for Permanent Resident Status

The self-petitioning provisions of VAWA became effective on January 1, 1995. In order for an undocumented battered woman to petition for a "green card" she must complete a two-step process. First, the applicant must be part of a group of people from whom the Immigration and Naturalization Service will accept the application. Second, the self-petitioner must apply for permanent residency and must prove that

52. *Id.* (citing to a survey conducted by AYUDA, Inc. of Washington, D.C. which revealed that 69% of the cases in which undocumented or recently documented Latino women were married to U.S. citizens or documented Latino women were married to U.S. citizens or permanent residents, the husband never filed a visa petition on behalf of his wife. In cases in which the husbands filed visa petitions, husbands delayed filing the petition from 1.5 to 9 years after marriage.)

53. The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C.A., 18 U.S.C.A., and 42 U.S.C.A.) [hereinafter VAWA].

54. H.R. REP. NO. 395, 103d Cong., 1st Sess. (1993), at 26-27, 37-38.

55. Although these VAWA provisions are applicable to children, we will only refer to the battered spouse in this discussion.

she meets all of the qualifications to attain that status.⁵⁶ Under the VAWA immigration provisions, battered immigrant women married to U.S. citizens and lawful permanent residents meet this first requirement and may file self-petitions.

The spouse of a U.S. citizen or permanent resident will qualify for self-petitioning and will be allowed to file for legal immigrant status without the sponsorship of the U.S. citizen or resident spouse if she is a person of good moral character and she has resided in the United States with the U.S. citizen or resident spouse.⁵⁷ Furthermore, she must demonstrate that: (1) she is currently residing in the United States; (2) she married her spouse in good faith; (3) during the marriage, her spouse battered her or subjected her to extreme cruelty; and (4) the Attorney General believes that deportation would result in extreme hardship to her or her children.⁵⁸

B. *Request for Suspension of Deportation*

The suspension of deportation provisions of VAWA came into effect on September 13, 1994. A battered spouse of a permanent resident or U.S. citizen who is undocumented and who is at risk of being deported by the INS can also apply for a waiver of deportation, which will result in lawful permanent residency if she meets the following requirements: (1) she has lived in the United States continuously for three years immediately preceding her filing of her suspension of deportation application; (2) her spouse subjected her to battering or extreme cruelty while she was in the United States; (3) she is determined to have "good moral character"; and, (4) the Attorney General believes that leaving the United States would cause her extreme hardship to herself or her children.⁵⁹

C. *The Extreme Hardship Requirement*

Applicants in both self-petitioning and suspension cases must prove that their deportation would result in extreme hardship to themselves and

56. For example, the self-petitioner must demonstrate that she has not engaged in criminal behavior, she is not a threat to national security, she is not likely to become a public charge in the future, she has no serious health problems such as HIV infection, drug abuse, or serious mental illness.

57. VAWA, 8 U.S.C.A. §§ 1154(a)(1)(A)(iii)(I), 1154 (a)(1)(B)(ii).

58. VAWA, 8 U.S.C.A. § 1154(a)(1)(A)(iii)(I) & (II). Battered immigrant children who are abused by their citizen or resident parent and the undocumented parent of a battered citizen or immigrant child can also apply for a green card in this way. The undocumented parent of an undocumented battered child must file an application together with the child's application. See VAWA, 8 U.S.C.A. § 1154(a)(1)(A)(iv).

59. VAWA, 8 U.S.C.A. § 1254(a)(3). Battered immigrant children who are abused by their citizen or resident parent and the undocumented parent of a battered citizen or immigrant can also apply for a green card in this way.

their children. Thus, it is absolutely imperative that attorneys and advocates make sure that any VAWA applicant consult an immigration attorney to assess the likelihood of proving extreme hardship in her jurisdiction. Although the INS has not yet promulgated regulations which determine what factors will be evaluated in determining extreme hardship, attorneys and advocates should carefully document the circumstances of each client's case. It is possible that INS may consider the following factors as probative of extreme hardship: the loss of protection from further abuse if deported; the applicant's children are subject to abuse and neglect proceedings; domestic violence laws in the country to which the victim will be deported will not provide her with protection from abuse; the batterer is economically able to travel to the country to which the applicant will be deported; the abuser's relatives in the applicant's country of origin pose a danger to her; and the applicant needs support services for battered women that are available in the United States, but are not available in her country of origin.

Advocates and attorneys should also consider whether their client can prove extreme hardship by traditional standards which do not take into account violence against the applicant. Because courts differ on what factors constitute extreme hardship in traditional suspension of deportation cases, advocates and attorneys must consult the law in their jurisdictions to determine what factors meet the extreme hardship test. For example, judges have considered the effects of deportation when they review suspension cases such as: how family separation will affect the mother and the child if the mother is deported and the children remain in the United States; the effect deportation will have on pre-existing custody, visitation, and child support orders; whether the abused victim or her children will lose counseling and support services needed to overcome abuse; the stress and deprivation that U.S. citizen children suffer if they are forced to leave the community in which they have been raised and to which they have adapted in terms of cultural values and education; health problems faced by the client or her children for which there is no treatment in her country of origin; human rights violations which will likely affect the client if returned to her country of origin; whether the client is an asset to her community; and the economic, standard of living, and political conditions in her country of origin.

D. *Appropriate Evidentiary Standard*

Prior to the enactment of the VAWA, immigration law had been amended to offer relief to a limited category of battered immigrant women. Battered immigrant women, usually married to U.S. citizens, who had obtained temporary "conditional" residency when their citizen spouse filed for them to obtain residency through the marriage

were allowed to file for a "battered spouse waiver" upon proving battering or extreme cruelty. This waiver allowed the battered spouse to obtain permanent residency without the abusive spouse's cooperation. Without this waiver, battered spouses with "conditional" residency were required as a matter of law to continue living with their abusive spouse for two years following the grant of the "conditional" residency. At the end of that two-year period she and her husband would have to jointly file a request for her permanent residency.

In cases in which the battered immigrant woman obtained a "battered spouse waiver" based on extreme cruelty, the INS had required an affidavit of a licensed mental health professional to prove that the battered spouse suffered "extreme cruelty." This requirement was misplaced because it focused the INS' inquiry on the effect the abuse had on the victim rather than the fact that the abuser's behavior constituted extreme cruelty. As a practical matter, this requirement was effectively out of reach to most battered immigrant women for a variety of reasons. Few mental health professionals have received any significant training on domestic violence, and of those who understand domestic violence, few have the language skills or cultural competence needed to work with battered immigrant women. Finally, even when an appropriate mental health professional can be identified, few battered women have the economic resources to undergo the needed examination. The Violence Against Women Act removes the requirement that battered women submit an affidavit of a licensed mental health professional. Instead, the Act requires the Attorney General to consider "any credible evidence" in granting all battered spouse benefits.⁶⁰

E. Gaps in VAWA and Solutions

The Violence Against Women Act promises safety and security for battered immigrant women. However, its actual effectiveness is still unknown. Although the self-petitioning and suspension of deportation provisions of VAWA were signed into law in September of 1994, the implementation of the legislation through regulations promulgated by the INS is not expected any sooner than August 1995. Until regulations have been

60. Advocates and attorneys who are assisting battered immigrant women should not apply for the new relief without working closely with an immigration advocate or attorney. At this point, very few immigration practitioners are familiar with the relief available under the immigration provisions of VAWA. Attorneys and advocates who have battered women clients who are in deportation/exclusion proceedings or have a case pending with the INS should contact one of the following: Leslye E. Orloff, Minty Siu Chung, AYUDA, Washington, DC, 202/387-0434, or Gail Pendleton, National Lawyer's Guild Immigration Project, Boston, MA, 617/227-9727.

promulgated providing direction to self-petitioners and applicants for suspension of deportation under VAWA, the safety of battered immigrant women can not yet be guaranteed.

Advocates and family law practitioners should therefore keep a watchful eye on the INS, which is imminently expected to provide intermediate procedures through interim regulations that would allow battered immigrant women to file their immigration applications under VAWA. In addition, attorneys and advocates should prepare all necessary documentation for immediate filing when the INS finally announces regulations on the new VAWA provisions. Thus, family lawyers should carefully document the abuse suffered by their clients (photographs, medical records, police reports, lists of witnesses who can supply affidavits) and should file detailed civil protection orders to bolster their clients' cases of abuse and "extreme hardship."

Another problem posed by the lack of INS regulations is the uncertainty of whether and how the filing of a divorce by either party will affect the immigrant's application under the VAWA provisions. Thus, clients should not file for divorce until after the INS issues regulations that provide direction about what effect divorce may have on the battered immigrant woman's immigration case. VAWA applicants should seek the assistance of family lawyers in asking for continuances of divorce cases. In cases in which the batterer successfully obtains a divorce, VAWA applicants who have been in the United States for over three years should be able to obtain suspension of deportation.

A major risk of filing a petition under the VAWA immigration provisions is that the client will be exposed to the INS. Therefore, no one should apply for any form of relief under these provisions without the assistance of an immigration advocate or an attorney who understands the new law. Poor representation of battered immigrant women may result in deportation.

III. Conclusion

Family lawyers and advocates who have battered immigrant women clientele must be keenly aware of the interrelationship between family law and immigration law matters to ensure effective representation of their clients. The unique cultural, economic, and social problems suffered by battered immigrant women and the uncertainty of how the immigration provisions under the Violence Against Women Act will be implemented by the INS undoubtedly complicates this endeavor. Thus, advocates and attorneys must be sensitive to each woman's individual needs and consider how any action taken may affect the client's immigration status.

Legal Responses to Teen Dating Violence

STACY L. BRUSTIN*

I. Introduction

The problem of domestic violence is not limited to adult relationships. In fact, the number of teenagers involved in abusive and violent relationships is alarming. Research suggests that approximately one out of ten high school students experiences physical violence in a dating relationship.¹

Around the country, gruesome stories of teen dating violence abound. Gretchen Wright, a sixteen year old in Washington, D.C., was shot point blank in the forehead allegedly by her seventeen year old boyfriend in January 1994.² Rosie Vargas, a fourteen year old from Santa Ana, California, was shot and killed by her sixteen year old boyfriend in June 1994. Shortly after, her boyfriend killed himself. Vargas was pregnant when she was killed.³ Malaya Flipping, a sixteen year old from Orange County, Florida, was shot and killed in 1994 by her ex-boyfriend, Fabian Hall, who was seventeen years old.⁴ After the

* Visiting Assistant Professor of Law, The Catholic University of America, Columbus School of Law, Families and the Law Clinic. The author is also the founder and community organizer for the Hermanas Unidas Community Education Project at AYUDA, Inc., a program for Latina battered women in Washington, D.C. The author would like to thank Liz Condos and Kristin Knuutila for their invaluable assistance with this article.

1. Denise Gamache, *Domination and Control: The Social Context of Dating Violence*, in *DATING VIOLENCE, YOUNG WOMEN IN DANGER* 73 (Barrie Levy, ed., 1991) [hereinafter *DATING VIOLENCE*].

2. Ruben Castaneda, *In a Split Second, A Bright Future is Threatened*, *WASHINGTON POST*, Jan. 5, 1994, at B1.

3. Bonnie Weston, *Date Violence, A Rough Reality for Teen Girls*, *BUFFALO NEWS*, July 12, 1994, at Lifestyles 1.

4. Luz Villarreal, *Friends Try to Understand Why 2 Young Lives Were Lost*, *ORLANDO SENTINEL*, Feb. 2, 1994, at C1.

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shooting, her ex-boyfriend committed suicide. In many ways the violence occurring between teenagers is similar to domestic violence occurring between adults. However, peer pressure and a reluctance to seek help from adults adds to the complicated dynamics of domestic violence when teens are involved.

Adolescents who experience violence in dating relationships face numerous obstacles when trying to access legal protection. While they can call the police against a juvenile or adult offender, the cases may not be charged or prosecuted. In addition, the juvenile delinquency system rarely addresses the specific problem of teen dating violence, but simply treats these cases as routine juvenile offenses. In the civil context, very few states authorize minors to seek civil protection orders unless they are married, living with their abuser, or have a child in common with the abuser. Without specific statutory authority, teens are legally incapable of initiating their own case and must have the assistance of an adult or guardian. Some protection order statutes expressly limit protection to adult victims of domestic violence.

Perhaps more importantly, few counseling and treatment services are available to help adolescents who are experiencing or perpetrating dating violence. There are even fewer prevention programs designed to help children develop nonviolent ways for resolving conflicts in their intimate relationships.

While the legal community is slowly responding to the problem of domestic violence among adults, few have focused attention on the violence plaguing teen relationships. Lawyers, through pro bono representation, legislative advocacy, and community legal education, can play a significant role in stemming the tide of teen dating violence.

II. What Is Teen Dating Violence?

In this article, the term "teen dating violence" is defined broadly as physical, psychological, or sexual abuse occurring between individuals, at least one of whom is under eighteen, who are married, living together, have children together or are involved in a dating relationship or in an attempted dating relationship. In other words, violence between neighbors, business associates, and strangers would not constitute dating violence unless there had been some type of intimate or attempted intimate relationship, not necessarily sexual, between the parties.⁵

Dating violence among individuals under the age of twenty-one is a pervasive problem. A study in one school district suggested that one

5. Authors and researchers have defined the term dating violence in differing ways. See DATING VIOLENCE, *supra* note 1, at 103 (suggesting that "'dating' or 'courtship' be conceptualized as a dyadic interaction that emphasizes mutually rewarding activities

in four high school students experienced violence in a dating relationship either as the recipient of the violence or as the perpetrator of the violence.⁶ Other surveys of high school and college students show that an average of 28 percent of the students experienced dating violence.⁷ Overall, studies indicate that anywhere from 9 percent to 39 percent of high school students experience dating violence at some point.⁸

A study looking at the incidence of abuse during teen pregnancy found that 26 percent of pregnant teens reported physical abuse from their boyfriends. Forty to 60 percent of these adolescents said that

that can enhance the likelihood of future interaction, emotional commitment and/or physical intimacy.") See also Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 426 (1994) (defining dating violence "as an act, or a threat, of physical abuse in the context of any interaction involved in the courtship or mate selection process.").

State statutes define dating violence in varying ways. In Illinois, for example, the Domestic Violence Act explains that "neither a casual acquaintanceship nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute a dating relationship." ILL. ANN. STAT. ch. 750, para. 60/103(6) (Smith-Hurd Supp. 1994). In Massachusetts, the statute applies to individuals who "are or have been in a substantive dating or engagement relationship." MASS. GEN. LAWS ANN. ch. 209A, § 1(e) (West 1994). In determining whether this type of relationship exists, a court is required to consider several factors including: "(1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship." *Id.*

6. Nona O'Keefe et al., *Teen Dating Violence*, SOCIAL WORK, Nov./Dec. 1986, at 466. In this study, slapping, pushing, and shoving were the most frequent types of physical violence used.

Statistics on the prevalence of dating violence vary, in part, because studies define dating violence in differing ways. The statistics will vary depending upon the type of behavior defined as violent. See Sugarman & Hotaling, *supra* note 5, at 101-02 (where the authors review research studies and literature on dating violence and identify a variety of risk factors for such violence). Some studies are limited only to incidents causing physical injury while excluding incidents of sexual and psychological abuse. Others analyze a broader range of incidents. For purposes of their analysis, Sugarman and Hotaling looked at research which defined violence as "the use or threat of physical force or restraint that has the purpose of causing injury or pain to another individual." This definition does not include sexual abuse. The authors acknowledged that this may cause lower prevalence rates of dating violence and may underestimate the gender differences in victimization since women are more frequently sexually abused than men.

7. BARRIE LEVY, IN LOVE AND IN DANGER: A TEEN'S GUIDE TO BREAKING FREE OF ABUSIVE RELATIONSHIPS 28 (1993) (citing Sugarman & Hotaling, *supra* note 5).

8. Lori B. Girshick, *Teen Dating Violence*, 3 VIOLENCE UPDATE 1 (1993). See also Sugarman & Hotaling, *supra* note 5, at 103. Several law students and I recently conducted workshops on teen dating violence with high school students from around the country. These students were attending the National Youth Leadership Forum in Washington, DC, in March 1995. At the beginning of each session we would ask how many of the students knew of high school age kids who were involved in a situation of dating violence. Approximately eighty teens attended the sessions and virtually every single one indicated they knew of such a situation.

the battering began or intensified once their boyfriends learned of the pregnancy.⁹ As the newspaper accounts discussed earlier suggest, teen dating violence can be lethal.¹⁰ FBI statistics indicate that 20 percent of female homicide victims are between the ages of fifteen and twenty-four and one out of three women killed in the United States is murdered by a husband or boyfriend.¹¹

Studies indicate that both males and females perpetrate adolescent dating violence.¹² Females, however, are more likely to experience heightened fear and more severe forms of physical and sexual violence than males.¹³ Teen dating violence occurs in gay and lesbian relationships and occurs across racial, ethnic, class, and religious boundaries.¹⁴

As in adult violence, teen dating violence manifests itself in the forms of physical violence, psychological abuse, and sexual violence.¹⁵ Studies of both high school and college students suggest that dating violence primarily occurs when the relationship is steady or more serious.¹⁶

9. Nancy Worcester, *A More Hidden Crime: Adolescent Battered Women*, THE NETWORK NEWS, July/Aug. 1993 (National Women's Health Network) (citing DATING VIOLENCE, *supra* note 1).

10. Levy, *supra* note 7, at 28 (citing S. AGETON, SEXUAL ASSAULT AMONG ADOLESCENTS (1983)).

11. *Id.* at 28. According to 1993 FBI statistics, out of 5,278 female homicide victims 1,531 were killed by a spouse, ex-spouse, or boyfriend. Conversation with Jim Omohundro, FBI, March 1995.

12. Gamache, *supra* note 1, at 73; O'Keefe et al., *supra* note 6, at 466 (whose survey results indicated that violence between girls and boys was reciprocal. However, the authors indicate that their survey did not take into account size differences between boys and girls or the severity of harm inflicted during the violent encounter. The study also did not examine gender differences in the type of violent conduct used.)

Sugarman & Hotaling, *supra* note 5, at 101-02 (review the literature and state that three studies report higher rates of males perpetrating violence, while the majority of studies cite higher rates of women inflicting violence. Nevertheless, teens also report in these studies that women more frequently are the recipients of violence. It is important to note that the studies reviewed do not analyze the severity of harm inflicted by gender nor do they measure incidence of sexual violence. The authors of the review suggest that these omissions may skew the results by underestimating the number of female victims of teen violence.)

13. Gamache, *supra* note 1, at 73 (citing K.E. Lane & P.A. Gwartney-Gibbs, *Violence in the Context of Dating and Sex*, 6 J. OF FAM. ISSUES 45-59 (1985)); B. Roscoe & J.E. Callahan, *Courtship Violence Experienced by Abused Wives: Similarities in Patterns of Abuse*, 34 FAM. REL. 419-24 (1985); and L.E. Jones, *Minnesota Coalition for Battered Women School Curriculum Project Evaluation Report*, St. Paul, Minnesota (1987).

14. Levy, *supra* note 7, at 28; O'Keefe et al., *supra* note 6, at 467.

15. Gamache, *supra* note 1, at 75. See also Levy, *supra* note 7, at 31-38.

16. Levy, *supra* note 7, at 29 (citing J. Henton et al., *Romance and Violence in Dating Relationships*, 4 J. OF FAM. ISSUES 467-82 (1983) (a study which showed that young men were more violent once they start to see themselves as part of a couple)). See also Gamache *supra* note 1, at 73 (citing Jones, *supra* note 13, and M.R. Laner & J. Thompson, *Abuse and Aggression in Courting Couples*, 3 DEVIANT BEHAVIOR

The power dynamics evident in many adult abusive relationships surface in adolescent dating relationships as well.¹⁷ As one author puts it, "adolescent batterers express similar beliefs in their right to control female partners and employ tactics similar to adult batterers to maintain this position."¹⁸

Studies surveying teens about dating violence indicate that adolescents perceive males as the aggressor in most violent incidents. In addition, studies demonstrate that there is a lack of social stigma attached to using violence to obtain a desired objective.

While women perceived that their violence results from uncontrollable anger, jealousy, self-defense and retaliation, they perceived that the male partner was motivated by sexual denial. Violent men reported findings consistent with this contention. Between a quarter to a third of men reported that their violence served the purpose to "intimidate," "frighten," or "force the other person to give me something."¹⁹

In addition, both male and female adolescents surveyed frequently cite jealousy and alcohol as causes of the violence.²⁰

The literature on teen dating violence cites various explanations for the violence. Some suggest that teens receive encouragement in the media and approval from friends for the belief that men should dominate women in relationships, including the right to use physically and sexually aggressive behavior.²¹ Others suggest that the violence is a learned

229-44 (1982)). See also Sugarman & Hotaling, *supra* note 5, at 113-115 (concluding that "... violence involvement tends to be more characteristic of longer relationships and relationships involving cohabitation." While the authors suggest that the cause and effect relationship between level of commitment and violence is not certain, they cite six studies in which the results indicated that men demonstrated increased rates of dating violence as the level of commitment increased. Only two studies of women demonstrated the same relationship between commitment and increased rates of inflicting or sustaining violence.)

17. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 836 n.171 (1993) (citing Anne L. Ganley, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, in CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION 22 (1992)).

18. Gamache, *supra* note 1, at 73. Some theorists suggest there are significant differences between marital violence and dating violence. See Suarez, *supra* note 5, at 433 (discussing James Makepeace's Theory of Dating Violence). See also Sugarman & Hotaling, *supra* note 5, at 110-11 (discussing the divergent findings in studies regarding the effect of sex role stereotypes in perpetuating dating violence).

19. Sugarman & Hotaling, *supra* note 5, at 106-07, 116 (pointing out that male adolescents are more forthright than many adult male batterers in explaining that it is their desire for control which motivates the violence).

20. Girshick, *supra* note 8, at 2.

21. Levy, *supra* note 7, at 52-53; Girshick, *supra* note 8, at 2; Worcester, *supra* note 9, at 5. See also Sugarman & Hotaling, *supra* note 5, at 115 (concluding that "... a more positive attitude toward the use of violence in intimate situations has been related to a greater likelihood of inflicting dating violence, especially for men.")

behavior. One study has demonstrated, for example, that high school students whose parents had been in violent relationships had a statistically higher rate of violence in their own relationships.²² Although the results of studies looking at the intergenerational cycle of violence for teens are not consistent, there seems to be a correlation between experiencing abuse as a child and later perpetrating violence in a relationship.²³ While alcohol and drugs may intensify the violence, they are not generally believed to cause the violence.²⁴

Teenage abusers act in manipulative and coercive ways in order to maintain control in the relationship. Teen victims of relationship violence report that their abusers use insults, humiliate them, monitor their every movement, isolate them from friends and family, threaten to commit suicide, threaten to harm family or destroy property, force them to commit illegal acts and then threaten to report them to the authorities, minimize the violence or blame the victim for the violence, use jealousy as an excuse, and physically and sexually abuse them.²⁵ To complicate matters, following a violent incident, some adolescent abusers manipulate their partners by apologizing profusely, making convincing promises to mend their ways, and acting in a loving manner.²⁶ Many of these methods of power and control mirror the tactics used by adult batterers.

One might find it difficult to comprehend why adolescents who are not married or do not have children with their batterer remain trapped in abusive situations. Presumably the teen is not under the abuser's economic control and the ties between the two are weaker than between married adults. Research on violent teen relationships, however, suggests that other powerful forces perpetuate cycles of violence.

22. O'Keefe et al., *supra* note 6, at 467. According to this study, more than 51 percent of students who saw their parents being abused were involved in violent dating relationships.

23. Levy, *supra* note 7, at 54; Worcester, *supra* note 9, at 7; NATIONAL CENTER ON WOMEN AND FAMILY LAW, *THE EFFECT OF WOMAN ABUSE ON CHILDREN 9-13* (1991). Cf. Sugarman & Hotaling, *supra* note 5, at 112 (indicating that studies more clearly indicate a positive relationship between being directly abused as a child and later perpetrating dating violence as opposed to witnessing violence as a child and later perpetrating violence. It is important to note that Sugarman and Hotaling do not disregard the theory of intergenerational cycles of violence but simply suggest that more research is needed.)

24. Sugarman & Hotaling, *supra* note 5, at 111. See also Levy, *supra* note 7, at 54 (stating that although alcohol and drugs are not the cause of violence, abuse of these substances can heighten the violence).

25. Gamache, *supra* note 1, at 74-80 (citing several studies in which teens report that disagreements around sexual issues led to the violent encounter). *Id.* at 78 (citing Lane & Gwartney-Gibbs, *supra* note 13, at 45-59).

26. Levy, *supra* note 7, at 45-48 (discussing the cycle of violence).

The pressure to conform to peer expectation, lack of experience with intimate relationships, a perceived need to adhere to female gender roles, low self-esteem,²⁷ and reluctance to seek assistance from parents or other adults make it difficult for many teens to break out of situations of abuse.²⁸ Teens mistake control, possessiveness, and jealousy for love.²⁹ Many teenagers believe that occasional violence is a normal part of relationships and that the violence is a sign of love.³⁰ Teens also have a very real fear that the violence will intensify if they try to end the relationship.³¹ Their fear is based in reality, for serious violence or homicide most frequently occurs when the teenager is attempting to end the relationship.³²

III. Current Legal Response to Teen Dating Violence

A. Legal Protection and Enforcement for Adults

Adult victims of domestic violence can seek civil remedies and press criminal charges under the law in every state.³³ The extent to which these civil and criminal statutes are enforced in situations of domestic violence varies. Civil restraining orders, sometimes referred to as civil protection orders,³⁴ offer a wide variety of protection to victims of domestic violence. In most states, for example, a judge has the authority to issue a temporary or long-term restraining order requiring that the offending party refrain from further abuse, vacate a residence, return or relinquish

27. See Sugarman & Hotaling, *supra* note 5, at 111 (reviewing studies which indicate that there exists an "association between lowered self-concept and being a victim of dating violence").

28. Gamache, *supra* note 1, at 74; Levy, *supra* note 7, at 53; Worcester, *supra* note 9, at 5.

29. Gamache, *supra* note 1, at 74; Worcester, *supra* note 9, at 5. See also Levy, *supra* note 7, at 57-61 (where the author discusses romantic, nurturing, and addictive love and provides teens with a checklist to determine if they are involved in an unhealthy, addictive love situation).

30. Sugarman & Hotaling, *supra* note 5, at 107, 117.

31. Gamache, *supra* note 1, at 81 (stating that many victims attend the same high school as their abuser and feel that they are subject to continual abuse if they try to end the relationship). See also Levy, *supra* note 7, at 75.

32. Luz Villareal, *supra* note 4 (discussing Malaya Flipping, sixteen years old, who was shot and killed by her ex-boyfriend, Fabian Hall, seventeen years old. Friends said the couple had recently broken up and Hall was jealous of Flipping's new relationship.). See also Courtland Milloy, *Finding the Faith for a Miracle*, WASHINGTON POST, Feb. 13, 1994, at B1 (discussing Gretchen Wright, sixteen years old, who was shot in the forehead allegedly by David Samuel Thomas, seventeen years old. Thomas was described in court records as an "enraged suitor" who shot Wright because she wanted to break up with him.)

33. Statutes also exist in D.C., Puerto Rico, and the Virgin Islands. See generally Klein and Orloff, *supra* note 17.

34. Throughout the article, I will use the term civil protection order.

personal property, and stay away from the victim. In addition, many civil protection order statutes enable the court to determine temporary custody, temporary child support, and temporary maintenance issues.³⁵

To qualify for a civil protection order, an individual must meet a relationship requirement. Most state statutes require that parties to a civil protection order be related by blood, marriage, or having a child in common. Other states also include couples who have lived together.³⁶ In a majority of states, however, adults in dating relationships where the parties have never lived together and do not have a child in common are not eligible to request a civil protection order. In these dating situations an individual must apply for a restraining order under state civil harassment/stalking statutes or tort law.³⁷ This can be a cumbersome and costly procedure and the remedies available under civil protection order statutes may not be available.³⁸

In the criminal context, an array of criminal statutes proscribing violent or threatening behavior are used against adult perpetrators of domestic violence. Victims can press criminal charges against their partner if there has been an act of physical violence or threats of physical violence.³⁹

More progressive jurisdictions around the country have developed special units within prosecutors' offices and police departments to address domestic violence.⁴⁰ In several of these units, law enforcement officials receive special training in the dynamics of domestic violence and its effects on families. They train on procedures for handling and investigating domestic violence cases.⁴¹ Perhaps most importantly, these units offer support services to adult victims of domestic violence.

35. Klein & Orloff, *supra* note 17, at 910-1019.

36. *See id.* at 814-32 for a listing of state statutes.

37. For example, a court in Wisconsin used a state harassment statute to protect an individual in a dating relationship. *Banks v. Pelot*, 460 N.W.2d 446 (Wis. Ct. App. 1990).

38. In Washington, D.C., for example, if a person does not qualify for a civil protection order, he or she must pay \$200 to initiate a civil complaint seeking a restraining order (under a tort theory) whereas filing for a civil protection order is free and much less complicated. *See also Suarez, supra* note 5, at 445 (for further discussion of the usefulness and limits of anti-stalking laws to protect victims of teen dating violence).

39. *See Klein & Orloff, supra* note 17, at 1142-48. *See also Levy, supra* note 7, at 85.

40. GAIL A. GOOLKASIAN, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: A GUIDE TO CRIMINAL JUSTICE ENFORCEMENT, at 31, 56 (1986) (discussing the task force set up within the Denver, Colorado, police department to help formulate a clear policy on domestic violence and generally discussing domestic violence units in prosecutor's offices).

41. *Id.* at 29-51.

These support and counseling services provide needed assistance to the survivor of domestic abuse and they often facilitate cooperation and follow through in both civil and criminal cases.

Similarly, judges in several jurisdictions receive specialized training on the issue of domestic violence.⁴² Special treatment programs for adult perpetrators of domestic violence exist in numerous states and offer an important component of civil and criminal post-adjudicatory relief.⁴³

The majority of civil protection order statutes and criminal statutes are not designed with teen dating violence in mind. In addition, criminal justice system training and special support services do not focus on the problem of domestic violence between or involving adolescents.

B. *Rights and Remedies in Cases of Teen Dating Violence*

The major legal obstacle that adolescents face in trying to obtain civil protection orders is the statutory relationship requirement. Thirty-one states specify that only individuals who are married, related by blood, have a child in common, or are living together qualify for civil protection order relief.⁴⁴ While some adolescents fit into these categories, many do not. Those teens involved in a violent dating relationship cannot access the protections provided under these restrictive statutes. Of these thirty-one states, twenty-three indicate that minors or children are covered by the statute or define adults to include persons sixteen

42. For example, in 1993 the National Council of Juvenile and Family Court Judges conducted a domestic violence training in San Francisco attended by judges, attorneys, and legislators from around the country.

43. *See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE* § 219 (1994) [hereinafter MODEL CODE]. *See also Goolkasian, supra* note 40, at 68-74.

44. *See* ALA. CODE § 30-5-2(4) (1975); ARIZ. REV. STAT. ANN. § 13-3601(A) (1994); ARK. CODE ANN. § 9-15-103(b) (Michie 1993); CONN. GEN. STAT. ANN. § 46b-38a(2) (West 1994); DEL. CODE ANN. tit. 10, § 1041(2) (1994); FLA. STAT. ANN. § 741.28(2) (West 1995); GA. CODE ANN. § 19-13-1 (1994); HAW. REV. STAT. § 586-1(2) (1993); IDAHO CODE § 39-6303(2) (1993); KAN. STAT. ANN. § 60-3102 (1993); KY. REV. STAT. ANN. § 403.720 (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 2132(4) (West 1995); ME. REV. STAT. ANN. tit. 19, § 762(4) (West 1994); MD. CODE ANN., FAMILY LAW § 4-501 (1994); MICH. COMP. LAWS ANN. § 600.2950a (West 1994); MINN. STAT. ANN. 518B.01(2)(b) (West 1995); MISS. CODE ANN. § 93-21-3(d) (1994); NEB. REV. STAT. § 42-903(4) (1993); NEV. REV. STAT. ANN. § 33.018 (Michie 1992); N.Y. FAMILY COURT ACT § 812(1) (McKinney 1995); N.C. GEN. STAT. § 50B-1(a) (1994); OHIO REV. CODE ANN. § 3113.31(A)(3) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 60.1(4) (West 1995); S.C. CODE ANN. § 20-4-20(b) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 25-10-1(2) (1994); TENN. CODE ANN. § 36-3-601(4) (1994); TEX. FAMILY CODE ANN. § 71.01(b) (West 1995); UTAH CODE ANN. § 30-6-1 (1990); VT. STAT. ANN. tit. 15, § 1101(2) (1994); VA. CODE ANN. § 16.1-279.1 (Michie 1994); and WYO. STAT. § 35-21-102(a)(iv) (1994).

and older.⁴⁵ Four states explicitly exclude minor petitioners from coverage,⁴⁶ and the rest are silent as to minors. An adolescent might try to bring an action under one of these silent statutes, arguing that the court should interpret the statute broadly to include minors.

Fifteen states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, authorize individuals in dating relationships to obtain civil protection orders.⁴⁷ These states recognize that domestic violence

45. See, e.g., CONN. GEN. STAT. ANN. § 46b-38a(2) (West 1994) (defines family or household members as "persons sixteen years of age or older . . . presently residing together or who have resided together"); MD. CODE ANN., FAMILY LAW § 4-501(i) (1994) (provides "the following persons . . . may seek relief from abuse on behalf of a minor . . . 1) the State's Attorney . . . , 2) department of social services . . . , 3) a person related to the child . . . , 4) an adult who resides in the home."); See also ALA. CODE § 30-5-5 (1989), ARIZ. REV. STAT. ANN. § 13-3602A (1994); ARK. CODE ANN. § 9-15-201(d) (Michie 1993); DEL. CODE ANN. tit. 10, § 1041(3), 1042(a) (1994); GA. CODE ANN. § 19-13-3(a) (Michie 1994); HAW. REV. STAT. § 586.3(b) (1993); IDAHO CODE § 39-6304(2), 6306(1) (1993); KAN. STAT. ANN. § 60-3104 (1994); KY. REV. STAT. ANN. § 403.725(3) (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 2133(4) (West 1995); ME. REV. STAT. ANN. tit. 19, § 764(1) (West 1994); MINN. STAT. ANN. § 518B.01(4)(a) (West 1995); MISS. CODE ANN. § 93-21-7 (1994); N.C. GEN. STAT. § 50B-2(a) (1994); OHIO REV. CODE ANN. § 3113.31(C) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 60.2(A) (West 1995); S.C. CODE ANN. § 20-4-40(a) (Law. Co-op 1976); TEX. FAMILY CODE ANN. § 71-04(b) (West 1995); UTAH CODE ANN. § 30-6-1 (1990); VT. STAT. ANN. tit. 15, § 1103(a) (1994); and WYO. STAT. § 35-21-102(a)(i) (1994).

46. See IND. CODE ANN. § 34-4-5.1-1 (Burns 1986) ("Person includes human beings aged eighteen [18] or older, and [emancipated] minors."); IOWA CODE ANN. § 236.2(4) (West 1994) ("Family or household members means spouses, persons cohabiting, parents, or other persons related by consanguinity or affinity, except children under eighteen."); MO. ANN. STAT. § 455.010(2) (Vernon 1994) (Adult means "any person eighteen years of age or older or otherwise emancipated"); and WIS. STAT. ANN. § 813.12(1)(a) (West 1994) ("act committed by an adult family member or adult household member against another adult family member or adult household member, by an adult against his or her adult former spouse or by an adult against an adult with whom the person has a child in common").

In addition, all four of these statutes specify that both the perpetrator of the abuse as well as the victim must be adults in order for the court to issue a protection order. Adolescent victims in these states must turn to the juvenile delinquency system or the child abuse and neglect system for relief. It seems that legislatures incorporated these distinctions between minors and adults to distinguish between domestic violence and child abuse and to ensure that cases of child abuse were not brought in the domestic violence context. Suarez, *supra* note 5, at 439.

47. See ALASKA STAT. § 25.35.200(4) (1994); CAL. FAMILY CODE § 6211(c) (Deering 1994); COLO. REV. STAT. § 14-4-101 (West 1994); D.C. Law 10-237 (1995); ILL. ANN. STAT. ch. 750, para. 60/103(6) (Smith-Hurd 1994); MASS. GEN. LAWS ANN. ch. 209A, § 1(e) (West 1994); MONT. CODE ANN. § 40-4-121(13)(c) (1993); N.H. REV. STAT. ANN. § 173-B:1(IV) (1994); N.J. STAT. ANN. § 2C:25-19(d) (1994); LEXIS; N.M. STAT. ANN. § 40-13-2(D) (Michie 1993); N.D. CENT. CODE § 14-07.1-01(4) (1993); OR. REV. STAT. § 107.705(2)(e) (1993); PA. STAT. ANN. tit. 23, § 6102(a) (1991); P.R. LAWS ANN. tit. 8, §§ 602(i), (k) (1990); R.I. GEN. LAWS § 15-15-1(5) (1994); V.I. CODE ANN. 16, § 91(c) (1994); WASH. REV. CODE ANN. § 26.50.010(2) (West 1994); and W. VA. CODE § 48-2A-2(b) (1994)

does not only occur among married couples or those living together, but is a prevalent problem among individuals involved in dating relationships.⁴⁸ Ten of these statutes expressly mention minors.⁴⁹ In the remaining seven states, and the Virgin Islands, it is not clear to what extent minor petitioners are covered, although one could argue that the statutes should be construed broadly to cover minors.

Some courts have interpreted civil domestic violence statutes which do not specifically refer to minors in dating relationships as providing protection in such situations. In Pennsylvania, for example, the statute covered "children" but did not specifically address the issue of teen relationship violence. Nevertheless, in *Diehl v. Drummond*⁵⁰ the court held that a civil protection order could be issued against the minor petitioner's sixteen year old boyfriend.⁵¹

In addition to those states allowing minors to petition for relief, ten states and the Virgin Islands expressly authorize civil protection order actions to be brought *against* minors.⁵² These statutes, however, do not clarify how the order is to be enforced if the defendant is a minor.

48. See Sugarman & Hotaling, *supra* note 5, at 103. See also Suarez, *supra* note 5, at 3.

49. See, e.g., N.H. REV. STAT. ANN. § 173-B:3 (I-a) (1994) ("[m]inority of petitioner shall not preclude the court from issuing protection orders."); W. VA. CODE § 48-2A-4(a) (1992) ("A petition for a protective order may be filed by . . . (2) An adult family or household member for the protection of . . . any family or household member who is a minor child."); See also CAL. FAMILY CODE § 6257 (West 1993); D.C. CODE ANN. § 16-1003(a) (1994); ILL. ANN. STAT. ch. 750, para. 60/214(a) (Smith-Hurd 1994); OR. REV. STAT. § 107.226 (1993); PA. STAT. ANN. tit. 23, § 6106(a) (1991); P.R. LAWS ANN. tit. 29, § 623 (1990); R.I. GEN. LAWS § 15-15-5(B) (1994); and WASH. REV. CODE ANN. § 26.50.020(2) (1994).

50. *Diehl v. Drummond*, 2 Pa. D. & C.4th 376 (Pa. C.P. 1989).

51. See DATING VIOLENCE, *supra* note 1; see also Klein & Orloff, *supra* note 17, at 823, 836.

52. See ALASKA STAT. § 25.35.010 (1991) ("The court may appoint a guardian ad litem or attorney to represent a minor who is subject to this chapter."); CONN. GEN. STAT. ANN. § 46b-38a(2) (West 1994) ("Family or household member means . . . (c) person sixteen years of age or older presently residing together or who have resided together"); IDAHO CODE § 39-6306(4) (1993) ("Relief shall not be denied because . . . respondent was a minor at the time of the incident of domestic violence."); ILL. ANN. STAT. ch. 750, para. 60/214(a) (Smith-Hurd 1994) ("Petitioner shall not be denied an order of protection because respondent is a minor."); MASS. GEN. LAWS ANN. ch. 209A, § 3(a) (West 1994) ([the court can order] "the defendant to refrain from abusing the plaintiff, whether the defendant is an adult or minor."); OKLA. STAT. ANN. tit. 22, § 60.1(1) (West 1995) ("Domestic abuse means any act of physical harm, or the threat of imminent physical harm which is committed by [a] minor age thirteen (13) or older."); R.I. GEN. LAWS § 15-15-5(B) (1994) ("[I]f . . . your attacker is a minor . . . you have the right to . . . request (1) an order restraining your attacker from abusing you."); UTAH CODE ANN. § 30-6-1(2) (1990) ("Cohabitant means a . . . person who is 16 years of age or older"); V.I. CODE ANN. 16, § 91(c) (1994) ("Victim includes any person who has been subjected to domestic violence by a . . . child."); WASH. REV. CODE ANN. § 26.50.020 (West 1994) ("No guardian or guardian ad litem need be appointed on behalf

There is no indication whether a minor can be held in criminal contempt, nor is there discussion of whether criminal contempt cases involving minors must be adjudicated in juvenile delinquency court.

Some courts have interpreted statutes which do not expressly authorize suit against minors to allow such action. In *Diehl v. Drummond*, for example, the court found that it had authority to issue a civil protection order against a sixteen year old respondent.⁵³ The court clarified that if the minor defendant violated the order, the enforcement proceedings would have to take place in juvenile court.⁵⁴ The court further noted that the violative behavior would not be treated as criminal contempt but would be charged as a separate offense (assault, attempted assault, etc.) under the juvenile delinquency statute.⁵⁵ Consequently, if the conduct which violated the order was not, in and of itself, a criminal act then there is no way to enforce a protection order against a minor. While not affording full protection to victims of domestic violence, the hybrid approach adopted in *Diehl* enables courts to curb dating violence while maintaining the protections that adolescents are afforded in the juvenile delinquency process.⁵⁶

Eight states expressly prohibit civil protection actions *against* minors.⁵⁷ It seems that the legislatures in these states have determined that these actions raise due process concerns which are more appropriately addressed in the juvenile delinquency system. In states where the statute is silent on the issue, some trial judges will restrict the use of civil protection order statutes *against* minors.⁵⁸

In the criminal context, when a perpetrator of domestic violence is under eighteen, the adolescent generally will be adjudicated through the juvenile court system.⁵⁹ In many states adolescents between the

of a respondent . . . who is under eighteen years of age if such respondent is sixteen years of age or older.''); and WYO. STAT. § 35-21-102(a)(i) (1994) (''Adult means a person who is sixteen (16) years of age or older.'').

53. *Diehl*, 2 Pa. D.&C. 4th at 378.

54. *Id.*

55. *Id.*

56. Klein & Orloff, *supra* note 17, at 823. *Diehl*, 2 Pa. D. & C.4th at 378.

57. See ARK. CODE ANN. § 9-15-203(b) (Michie 1994); COLO. REV. STAT. ANN. § 14-4-101(2) (West 1994); IOWA CODE ANN. § 236.2(4) (West 1994); MO. ANN. STAT. § 455.020(1) (Vernon 1994); OR. REV. STAT. § 107.726 (1993); N.J. STAT. ANN. § 2C:25-19(a) (1994 LEXIS) (Note that New Jersey's statute is a criminal statute that offers civil relief in the form of a protection order.); TENN. CODE ANN. § 36-3-602 (1991); and WIS. STAT. ANN. § 813.12(1)(a) (West 1994).

58. Klein & Orloff, *supra* note 17, at 822.

59. Kuehl, *supra* note 51, at 213-14. It is important to note that in most states juvenile delinquency proceedings are considered civil not criminal. However, the distinction is often illusory, for juveniles are afforded many of the same constitutional protections as adult criminal defendants. DONALD T. KRAMER, 1 LEGAL RIGHTS OF CHILDREN 258-60 (2d ed. 1994).

ages of fourteen and eighteen who commit serious violent offenses can be charged as adults and prosecuted through the adult criminal system.⁶⁰ A minor might be charged with traditional offenses such as assault, threats, assault with a deadly weapon, destruction of property, rape, and homicide. In some states a minor may be charged under a criminal domestic violence statute.⁶¹

It is interesting to note, however, that certain states define victims of domestic violence differently in civil and criminal statutes. These differences can have an impact on minors. A restrictive age or relationship requirement may be imposed in a civil protection order statute whereas a broader definition of age or relationship is incorporated in the criminal statute.⁶² In Washington State, for example, those in dating relationships, including teens sixteen and older, may obtain a civil protection order. Under the criminal code, however, a victim of domestic violence must be at least eighteen and there is no dating relationship provision.⁶³

In addition, juvenile proceedings can be more informal than adult criminal proceedings.⁶⁴ In most states juvenile proceedings are considered civil⁶⁵ and the goal of juvenile adjudication is rehabilitation, not punishment.⁶⁶

Prosecutors, defense attorneys, and judges often do not take note of the domestic violence nature of the offense and treat the situation as a routine juvenile offense. The court and prosecutors may fail to establish the types of detention or conditions of release in juvenile cases

60. Kuehl, *supra* note 51, at 201, 248-50. The age at which a child falls under the jurisdiction of the juvenile court rather than the adult criminal court varies by state.

61. See, e.g., ILL. ANN. STAT. ch. 725, para. 5/112A-14(a) (Smith-Hurd 1994); OKLA. STAT. ANN. tit. 22, §§ 60.4(A), 60.6(G) (West 1995); and UTAH CODE ANN. § 77-36-1 (1994).

62. Suarez, *supra* note 5, at 442-45.

63. *Id.* at 444. Similarly, in Pennsylvania, the civil code defines domestic violence as including individuals in a dating relationship, but the criminal code sets out a more limited definition of domestic violence which only includes spouses or individuals who are living together or have lived together in the past. In Minnesota, the civil domestic violence statute is more inclusive than the criminal domestic violence statute whereas in Alabama, the criminal statute is more inclusive than the civil statute. In Michigan, the civil domestic violence statute imposes a majority age requirement whereas the criminal statute does not. In South Dakota and Rhode Island, on the other hand, the criminal statutes impose a majority age requirement whereas the civil statutes do not. *Id.* at 444-45.

64. Kuehl, *supra* note 51, at 211. See also LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 261.

65. *Id.* at 258-59.

66. *Id.* at 246. Despite the informality, however, a reasonable doubt burden of proof is imposed at the adjudicatory phase of a juvenile delinquency hearing. This has particular ramifications in the dating violence context, for typically there are no witnesses to these crimes. It may be difficult to prove beyond a reasonable doubt that an offense occurred. *Id.* at 308-09.

which are more routinely imposed in adult criminal domestic violence cases. Juveniles are more likely to be released into the custody of their parents,⁶⁷ and specific conditions of release designed to protect the victim are not put into place.

Courts need to establish conditions of release for juveniles akin to those ordered for adults in which they are required to stay away from the victim and ordered not to communicate with the victim. The conditions of release issue can be complicated by the fact that the victim and perpetrator may attend the same school.

In addition, those juveniles found guilty of committing offenses involving dating violence do not generally receive a disposition which effectively deals with the problem. Adolescents are frequently placed on probation or home supervision without regard to the potential for contact between the victim and the offender. It is also significant to note that there are few targeted counseling or treatment services for adolescent perpetrators of dating violence. If the offender is an adult but the victim is a minor, the offender will be prosecuted through the adult criminal system. A minor can generally file a police complaint and testify in a criminal trial.⁶⁸

In summary, minors in most states can obtain civil protection order relief if they meet the relationship requirement set out in the statute. The relationship requirement remains a tremendous obstacle for teens in dating relationships. There is less consistency among the states as to whether a court can issue a civil protection order against a minor. Some trial judges believe that such actions are more appropriately dealt with in the juvenile delinquency system. However, it is questionable whether the problem of teen dating violence is adequately addressed in the juvenile delinquency system.

IV. Initiating or Defending a Claim for Protection

Under common law and statutory law, unemancipated minors⁶⁹ are considered legally incompetent.⁷⁰ Procedural rules and laws have devel-

67. *See id.* at 286. Majority of juveniles are not detained. Instead they are released to parents or guardians.

68. Kuehl, *supra* note 51, at 211.

69. If a minor has become legally emancipated, he or she does not need an adult to file suit on his or her behalf. In order to determine whether a minor is emancipated, a court generally analyzes whether the minor (1) is financially independent and (2) is living independently of his or her parents. State statutes may also delineate particular circumstances, such as marriage, under which a minor is considered emancipated. *See generally* LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 664-86.

70. Minors in most states cannot initiate a lawsuit or defend one without an adult representative. *See, e.g.,* Dye v. Fremont Cty. School Dist. No. 24, 820 P.2d 982 (Wyo. 1991) (unemancipated minor cannot sue or be sued.)

oped to overcome this disability which include providing for a guardian ad litem or preserving the child's right of action until the child reaches adulthood. Minors are not authorized to initiate or defend legal actions unless they are brought by a parent or guardian on the minor's behalf or by a next friend or guardian ad litem appointed by the court.⁷¹

In Connecticut, Oklahoma, Oregon, Utah, Washington, and Wyoming, the legislature has lowered the age at which individuals are typically eligible to initiate a civil protection order action on their own.⁷² The statutes suggest that in these states individuals sixteen and older may obtain civil protection orders without adult assistance.⁷³ These statutes recognize that adolescents who are sixteen and older are experiencing domestic violence and are mature enough to bring an action on their own. Only Washington State and Oregon cover dating relationships in their statutes. Therefore, adolescents who are sixteen or older and involved in an abusive dating relationship in the other four states cannot obtain a protection order.

In the majority of cases involving teen dating violence, an adult petitions on behalf of a minor.⁷⁴ In *Flurry v. Howard*,⁷⁵ for example, the trial court issued a protection order based on a petition filed by a minor girl's parents against the girl's minor boyfriend.

71. LEGAL RIGHTS OF CHILDREN, *supra* note 59, § 11.02, at 517-18. *See also* Kuehl, *supra* note 51, at 211. In a majority of states there is no distinction between the terms *guardian ad litem* and next friend.

72. *See* CONN. GEN. STAT. ANN. § 46b-38a(2)(D) (West 1994); OKLA. STAT. ANN. tit. 22, § 60.2(A) (West 1995); OR. REV. STAT. § 107.726 (1993); UTAH CODE ANN. § 30-6-1(2) (1990); WASH. REV. CODE ANN. § 26.50.020(2) (1994); and WYO. STAT. § 35-21-102(a) (1994).

73. *See* CONN. GEN. STAT. ANN. § 46b-38a(2)(D) (West 1994) ("Family or household member means . . . (D) persons sixteen years of age or older . . . presently residing together or who have resided together."); OKLA. STAT. ANN. tit. 22, § 60.2(A) (West 1995) ("[A]ny minor age sixteen (16) or seventeen (17) years may seek relief under the provisions . . . of this title."); OR. REV. STAT. § 107.726 (1993) ("A person who is under 18 years of age may petition the circuit court for relief . . . if (1) The person is (a) The spouse of the respondent; (b) The former spouse of the respondent; or (c) A person who has been in a sexually intimate relationship with the respondent and (2) The respondent is 18 years of age or older."); UTAH CODE ANN. § 30-6-1(2) (1990) ("Cohabitant means an emancipated person . . . or a person who is 16 years of age or older"); WASH. REV. CODE ANN. § 26.50.020(2) (1994) ("A person under eighteen years of age who is sixteen years of age or older may seek relief . . . and is not required to seek relief by a guardian or next friend."); and WYO. STAT. § 35-21-102(a)(i) (1994) ("Adult means a person who is sixteen (16) years of age or older, or legally married.")

74. *See generally* LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 534. Parents generally represent the interests of their children in legal proceedings. In many states parents can assume this role without any formal court appointment. A problem arises, however, if a conflict exists between the parent's interests and those of the minor.

75. *Flurry v. Howard*, 813 P.2d 1052, 1053 (Okla. 1991).

Twenty-six states, the District of Columbia, and Puerto Rico expressly allow a parent, guardian, guardian ad litem, or other interested party to bring a civil protection order action on behalf of a minor.⁷⁶ Some statutes limit the authority to a parent or guardian whereas other statutes simply state that anyone may bring an action on behalf of a minor.⁷⁷ Legislatures typically enacted these provisions to protect young children in households where one parent was abusing the other.⁷⁸ However, parents or other adults can use these same provisions to initiate actions on behalf of minor victims of dating violence so long as the minor meets the relationship requirement of the statute.

Some suggest that because children cannot litigate on their own behalf, parents cannot litigate for them but must hire an attorney.⁷⁹ Nevertheless, in practice, parents petition for protection orders on behalf of their children without obtaining counsel.

If the defendant in the protection order case is a minor, some courts refuse to proceed and transfer the case to the juvenile delinquency division. In other states, a case can proceed against a minor as long as the parents or guardian of the minor are served with notice of the matter and defend on the minor's behalf. Two domestic violence statutes

76. See ALA. CODE § 30-5-5 (1989); ARIZ. REV. STAT. ANN. § 13-3602A (1994); ARK. CODE ANN. § 9-15-201(d) (Michie 1993); CAL. FAMILY CODE §§ 6257 (West 1993); DEL. CODE ANN. tit. 10, § 1041(3), 1042(a) (1994); D.C. CODE ANN. § 16-1003(a) (1994); GA. CODE ANN. § 19-13-3(a) (Michie 1994); HAW. REV. STAT. § 586.3(b) (1993); IDAHO CODE §§ 39-6304(2), 39-6306(1) (1993); KAN. STAT. ANN. § 60-3104 (1994); KY. REV. STAT. ANN. § 403.725(3) (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 2133(4) (West 1995); ME. REV. STAT. ANN. tit. 19 § 764(1) (West 1994); MD. CODE ANN., FAMILY LAW § 4-501(i) (1994); MINN. STAT. ANN. § 518B.01(4)(a) (West 1995); MISS. CODE ANN. § 93-21-7 (1994); N.H. REV. STAT. ANN. § 173-B:5 (1994); N.C. GEN. STAT. § 50B-2(a) (1994); OHIO REV. CODE ANN. § 3113.31(c) (Anderson 1993); OKLA. STAT. ANN. tit. 22, § 60.2(A) (West 1995); PA. STAT. ANN. tit. 23, § 6106(a) (1991); P.R. LAWS ANN. tit. 29, § 623 (1990); S.C. CODE ANN. § 20-4-40(a) (Law. Co-op 1976); TEX. FAMILY CODE ANN. § 71-04(B) (West 1994); UTAH CODE ANN. §§ 30-6-3(3), (4) (1990); VT. STAT. ANN. tit. 15, § 1103(a) (1994); WASH. REV. CODE ANN. § 26.50.020(4) (West 1994); and W. VA. CODE § 48-2A-4(a) (1992).

77. For example, Georgia's statute is vague. It states: "A person who is not a minor may seek relief on behalf of a minor." GA. CODE ANN. § 19-13-3(a) (Michie 1994). Kentucky's statute is more restrictive. It states: "A petition . . . may be filed by . . . an adult family member or member of an unmarried couple on behalf of a minor family member." KY. REV. STAT. ANN. § 403.725(3) (Michie/Bobbs-Merrill 1994).

78. Suarez, *supra* note 5, at 454.

79. LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 541. Kramer states: "Although a litigant normally has the right to represent himself and to act as his or her own counsel, a minor child does not have such right; therefore, a nonattorney guardian ad litem, such as a parent, must hire an attorney to represent the minor's interests at trial." *Id.* at 544 (citing Cheung v. Youth Orchestra Foundation of Buffalo, Inc. 906 F.2d 59 (2d Cir. (N.Y.) 1990)). *But see* Aid Assoc. for Lutherans v. Knobel-Glasgow, 738 F. Supp. 1286 (Neb. 1989).

expressly authorize the court to appoint a guardian ad litem for minor defendants.⁸⁰ In the remainder of states, a court is likely to use its inherent authority to appoint a guardian ad litem and/or attorney to represent a minor defendant.⁸¹

If a minor does not have parents who can initiate or defend an action on his or her behalf or does not want to involve a parent or adult in the situation, then the court can appoint a guardian ad litem.⁸² Courts have a duty to insure that the interests of a minor are protected and have inherent authority to appoint a guardian ad litem for a child.⁸³

Most states have rules modeled after Federal Rule of Civil Procedure 17(c) which authorize a court to make such an appointment. Rule 17(c) states that:

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant. . . . An infant . . . who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant . . . not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.⁸⁴

State guardian ad litem rules may be found in general codes of civil procedure or may be codified in specific rules pertaining to family law matters.⁸⁵ The court may choose to hold a hearing on a motion for a guardian ad litem and may require that parents be notified of the hearing, however, there is no requirement that such notice be issued.⁸⁶

In some states guardians ad litem are attorneys and in others they are not. It is often unclear whether the guardian ad litem is to act as the child's advocate and represent the child's wishes or whether the guardian ad litem is to make decisions that he or she believes are in

80. See ALASKA STAT. § 25.35.010(a) (1994); and WASH. REV. CODE ANN. § 26.50.020(4) (West 1994).

81. See *infra*, note 83.

82. It is also possible that the interests of a parent and minor might conflict in the civil protection order context. For example, a parent and teen could disagree on the legal remedies the abused teen should seek. The court might appoint a guardian ad litem in this circumstance.

83. LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 531.

84. FED. R. CIV. P. 17(c).

85. See, e.g., FLA. R. CIV. P. 1.210(b) (1994) (requiring that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."). See also MASS. R. CIV. P. 17b; D.C. Ct. R. Ann. 17(c) (1994).

86. Suarez, *supra* note 5, at 467. The author states that while teens, unless emancipated, must have a guardian ad litem, the guardian does not have to be a parent and therefore, parental consent does not seem to be a prerequisite to obtaining a restraining order.

the best interests of the child regardless of the minor's views.⁸⁷ State rules and statutes often do not specify who should be appointed as guardian ad litem nor do they define the role of the guardian ad litem.⁸⁸

Courts may decide, particularly with an older child who is capable of understanding the proceeding, that the interest of the minor will be fully protected throughout the action and a guardian ad litem is not necessary.⁸⁹ However, the minor would still be required to have an attorney initiating or defending the action on his/her behalf.⁹⁰ If the minor does not have an attorney, then the court can appoint one.

An attorney contemplating representation of a minor in a civil protection order case must determine whether the governing statute places restrictions on minors. It is fairly easy in most states for an attorney to represent a parent who is bringing a petition or defending one on behalf of their teen.⁹¹ If the minor does not have an adult bringing or defending the case, then the court would have to make a determination as to whether a guardian ad litem and/or attorney needs to be appointed.

It is not clear whether a minor has the authority to retain an attorney on his or her own. Generally all contracts entered into by a minor are voidable.⁹² Therefore, any retainer agreement signed by a minor might be subject to disaffirmance.⁹³ Nevertheless, in one case in which a minor went ahead and retained an attorney on her own, the Alaska Supreme Court held that the attorney retained by the minor must be present at the juvenile delinquency hearing.⁹⁴ In *Wagstaff*, the court also stated that:

[w]here the parents' interests are hostile to the child's the parents may not select the child's attorney. The child may retain the attorney of his choice or, in the alternative, ask the court to appoint an attorney for him. If the child has retained counsel, the court must respect the child's choice.⁹⁵

The *Wagstaff* court did not address the contracts question of whether a juvenile has the authority to retain the services of an attorney or whether such a contract would be enforceable.⁹⁶ Therefore, an attorney might move to be appointed by the court rather than directly retained

by the adolescent. Attorneys should consult state contract law as well as local ethical boards on this issue.

The legal incapacity of minors to obtain civil protection orders without adult assistance is a particularly strong obstacle when one considers the dynamics of domestic violence and the interests/needs of adolescents. Most adult victims of domestic violence are deeply ashamed that they are embroiled in an abusive relationship. They frequently blame themselves and are too humiliated to seek help from family and friends. These reactions are magnified when experienced by teens. Adolescents are trying to establish their own identity and independence. They feel a great deal of confusion in general and a situation of violence intensifies the confusion.⁹⁷ While the victim wants the violence to stop, she may not want to report the problem and get her boyfriend into trouble.

Teens are very reluctant to go to their parents with these kinds of problems. Many fear that they will be compromising their independence, for they believe their parents will take complete control of the situation and make all necessary decisions without involving the minor. Others fear that their parents will be angry or unsupportive.⁹⁸ In fact, many teens are hesitant to seek assistance from any adult.⁹⁹ Research suggests that out of twenty-five teenagers involved in an abusive relationship, only one will seek help.¹⁰⁰

Perhaps most importantly, many minors do not know that legal remedies exist to protect them from abuse by a partner. As a result, those teens who might seek protection if they were aware of the law remain in danger.

V. Need for Law Reform

A. Expanding Coverage to Include Minors

State legislatures need to address the problem of teen dating violence. Cycles of abuse begin in teen relationships and continue into adulthood unless they are stopped.¹⁰¹ Therefore, it is imperative that states ensure that domestic violence statutes, both civil and criminal, protect teen

87. LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 542-45.

88. *Id.* at 533, 538-39.

89. *Id.* at 541.

90. *Id.* at 541, 544.

91. *See id.* at 534.

92. *See id.* ch. 10, *Children and the Law of Contracts*, at 501-06.

93. *Id.* at 501-06. Although if a court determines that the legal representation is a "necessary," then the minor cannot later nullify the contract. *Id.* at 504-06.

94. *Wagstaff v. Superior Court*, 535 P.2d 1220 (Alaska 1975).

95. *Id.* at 1227.

96. *Id.* at 1227.

97. Gamache, *supra* note 1, at 75. *See also* Sugarman & Hotaling, *supra* note 5, at 107.

98. Gamache, *supra* note 1, at 80. *See also* Kuehl, *supra* note 51, at 212.

99. Sugarman & Hotaling, *supra* note 5, at 107-08. A review of studies indicate that individuals who have experienced dating violence do not readily seek out teachers, counselors, clergy, or law officers. Victims will turn to friends, and to a lesser extent, members of their family, for assistance.

100. Suarez, *supra* note 5, at 428 (citing Shari Roan, *Abused Women May Be "Hostages,"* L.A. TIMES, Aug. 20, 1991, at E1).

101. Gamache, *supra* note 1, at 82-83.

victims of dating violence and deter teen perpetrators from future violence.

Specifically, civil and criminal statutes need to cover individuals involved in dating relationships. Requirements limiting relief to individuals who are married, living together, or who have a child in common, should be expanded to include those in dating relationships. In addition, civil protection order statutes should explicitly authorize minors to bring an action against other minors or against adults.

The National Council of Juvenile and Family Court Judges recently published a Model Code on Domestic Violence which incorporates these type of reforms.¹⁰² In its definitions section, the Model Code defines "domestic or family violence" as:

the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense: (a) Attempting to cause or causing physical harm to another family or household member; (b) Placing a family or household member in fear of physical harm; or (c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.¹⁰³

The Code then defines "family or household member" as:

(a) Adults or *minors* who are current or former spouses; (b) Adults or *minors* who live together or who have lived together; (c) Adults or *minors* who are dating or who have dated; (d) Adults or *minors* who are engaged in or who have engaged in a sexual relationship; (e) Adults or *minors* who are related by blood or adoption; (f) Adults or *minors* who are related or formerly related by marriage; (g) Persons who have a child in common; and (h) *Minor children* or a person in a relationship that is described in paragraphs (a) through (g).

The model statute does not limit protection to individuals who are married, related by blood, living together, or who have a child in common. The Model Code makes a strong policy statement about the existence of teen dating violence and the need to address the problem legislatively.¹⁰⁴

The Model Code does not, however, define at what age an individual would be considered a minor rather than an adult. The civil and criminal sections of the code do not specifically address the status or procedures to be used when dealing with minor parties and the sections discussing treatment do not differentiate between the treatment needs of minors

from those of adults. In addition, the Code does not address the issue of enforcement of civil protection orders against minors. A state statute might clarify, for example, that all criminal contempt actions involving minor defendants will be adjudicated in juvenile delinquency court.

States must also ensure that each actor in the criminal justice system (courts, police, probation, social services, prosecutors, defense attorneys) is trained and responds appropriately to the problem of teen dating violence. In addition, legislation and funding are needed to ensure that counseling, shelter, and treatment services are available to teens experiencing or perpetrating relationship violence.

B. *Allowing Adolescents to Seek Protection*

As the coverage of civil protection order statutes expands to include minor victims and perpetrators of teen dating violence, legislatures and courts must clarify the circumstances under which a minor needs an adult to initiate or defend the case on his or her behalf and then simplify the procedures for appointing a guardian ad litem or an attorney.

States might follow the lead of Connecticut, Oklahoma, Oregon, Utah, Washington, and Wyoming and specify that teens sixteen and older may initiate an action on their own.¹⁰⁵ This reform would recognize the reality that dating violence is a pervasive problem among adolescents and that older teens are mature enough to use available tools to protect themselves.

Some might argue that teenagers should not be able to file for civil protection orders on their own nor should they be able to obtain a guardian ad litem without notifying their parents. A minor might not be mature enough, the argument goes, to weigh the consequences of seeking a protection order. In addition, some might argue that parents should be notified when their children are in any type of danger.

These arguments mirror the larger legal debate between those advocating for increasing the autonomy of minors in a number of areas and those arguing that enhanced autonomy causes harm to the minor and infringes upon parental rights to control and guide children.¹⁰⁶ State legislatures have the authority to determine the age at which minors can or cannot undertake certain actions.¹⁰⁷ Across the country the behavior of adolescents is regulated in varying and inconsistent ways. Legisla-

102. MODEL CODE, *supra* note 43.

103. *Id.* at 1.

104. The Advisory Committee which drafted the Model Code was comprised of judges, prosecutors, police, defense attorneys, advocates for victims of domestic violence and legislators. *Id.* at i.

105. *Supra* note 73.

106. LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 590-91.

107. *Id.* at 589 ("Majority or minority is not considered a fixed or vested right, but rather is considered a status created by law and subject to statutory limitations or exceptions.").

tors and policymakers disagree about the extent to which and at what point adolescents are capable of making their own decisions.¹⁰⁸

On the one hand there are state statutes which enable minors at varying points in adolescence to consent to the adoption of their child, file for child support for their child, consent to emergency medical treatment, obtain a driver's license, and enter into binding contracts for student loans.¹⁰⁹ Yet in many states minors cannot marry without parental or court consent,¹¹⁰ cannot receive certain types of medical treatment without parental consent or judicial bypass, and cannot drink alcohol until age twenty-one.¹¹¹ Varying and sometimes inconsistent public policy rationales are used to justify the need to regulate minors in one context while giving them greater freedom in others.¹¹²

The public policy interest in protecting teenagers and preventing escalating injury and homicide outweighs the need for parental control in the area of teen dating violence. While it might be helpful for teens in violent relationships to have adult guidance, studies consistently show that adolescents are extremely reluctant to seek adult assistance.¹¹³ The law should afford protection to those teens who are in danger and are only willing to seek help if they can do so on their own.

This autonomy for adolescents would not go unchecked, for judges must review and sign protection orders before they are issued. As a result, teens who are emancipated for purposes of seeking a civil protection order would not be making unilateral decisions. The court would first determine whether an order is necessary and then would ensure that the relief awarded is appropriate. The judge would also have the authority to appoint an attorney for the teen if the judge believed such appointment was necessary. Finally, under many state statutes, protection orders are not irrevocable but can be modified.¹¹⁴

For teens under the age of sixteen, or in those states in which the legislature may be unwilling to take the step of lowering the age below eighteen, the civil domestic violence statute should explicitly state that a parent, guardian, or other representative may bring or defend an action on behalf of a minor or that the court may appoint a guardian

ad litem or attorney to do so. The Model Code on Domestic Violence suggests that legislatures adopt the following language: "A parent, guardian, or other representative may file a petition for an order for protection on behalf of a child against a family or household member who commits an act of domestic or family violence."¹¹⁵ The Washington State civil domestic violence statute offers a model for addressing the issue. It states: "A guardian or guardian ad litem can be appointed for either a petitioner or respondent."¹¹⁶

At a minimum, state laws should permit minors to obtain civil protection orders with the assistance of an adult.¹¹⁷ In addition, statutes and rules are needed to clarify and simplify the procedure for appointing a guardian ad litem and/or attorney in these cases.

VI. Nonlegal Remedies

Those in the legal community need to be aware of nonlegal remedies available to teens experiencing dating violence. Innovative programs have developed around the country to address the issue.¹¹⁸ In Hawaii, for example, the Alternatives to Violence Organization has a juvenile program coordinator and the organization offers a teen victims support group. They have programs designed for adult batterers in which teens can participate. They also conduct presentations on dating violence in local high schools.¹¹⁹ Similarly, in Minnesota,

115. MODEL CODE, *supra* note 43, at 22.

116. WASH. REV. CODE ANN. § 26.50.020(4) (West 1994). *See also* Suarez, *supra* note 5, at 455, for discussion of Alaska's statute.

117. Suarez, *supra* note 5, at 449 (suggesting that state legislatures should amend both civil and criminal domestic violence statutes to cover all individuals in violent dating relationships regardless of age. She proposes that a model statute would include the following definition: "'intimate violence' is defined as abuse between family and household members, and between intimate partners. 'Intimate partners' include persons of any age involved in a dating, courtship or engagement relationship.'").

118. The Women's Self Help Center in St. Louis, Missouri, has a curriculum called Project H.A.R.T. (Healthy Alternatives for Relationships Among Teens) that is presented to teens in the area's junior and senior high schools. Conversation with Joleene Unnerstall, Women's Self Help Center, 2838 Olive, St. Louis, MO 63103. The Women's Center and Shelter of Greater Pittsburgh has a three-day dating violence prevention program that it presents in local schools. Conversation with Deborah Krochka, Women's Center and Shelter of Greater Pittsburgh, P.O. Box 9024, Pittsburgh, PA 15224. LACAAW (Los Angeles Commission on Assault Against Women) provides advocates to accompany victims of dating violence to court and conducts a prevention program in local schools. Conversation with Francine Ocon, LACAAW, 6043 Hollywood Blvd., Ste. 200, Los Angeles, CA 90028.

119. Conversation with Momi Lopez, juvenile program coordinator, Alternatives to Violence, P.O. Box 909, Wailuku, HI 96793.

108. *See id.* at 585 (citing resources which discuss the intellectual, social, and moral development of children at different ages). *See generally id.* at 585-587.

109. *Id.* at 586.

110. *Id.* at 592-96.

111. *See id.* at 620-24 and 641-46.

112. *Id.* at 583-663.

113. Gamache, *supra* note 1, at 80; Kuehl, *supra* note 51, at 212; Sugarman & Hotaling, *supra* note 5, at 107-08.

114. Klein & Orloff, *supra* note 17, at 1081-82.

The Harriet Tubman Women's Center conducts programs on dating violence in the schools. The Center provides one-on-one counseling in the schools and shelter to teens sixteen or older who have children.¹²⁰

In most jurisdictions, however, as in the legal context, minors encounter many obstacles when trying to seek counseling, shelter, or educational services. Often minors cannot access the network of nonlegal services available to adult victims of domestic violence. Shelters for battered women are often prohibited by city or state law from housing minors. Youth shelters designed to house runaway teens do not adequately address the problem of domestic violence. The locations of youth shelters are known and therefore, do not provide the secured protection that teens fleeing from a situation of dating violence need.

Shelters and programs for battered women often do not provide specialized services for teens. Some states have begun to realize the need to provide services for teen victims and perpetrators of dating violence. In Illinois, for example, the state changed the licensing requirements for shelters to enable them to house abused teens. As a result, a battered women's shelter in Chicago began planning targeted programs for teen victims.¹²¹ Finally, treatment programs for batterers generally target adult perpetrators.¹²² Some jurisdictions are beginning to expand their treatment services so as to accommodate adolescents. In Washington, D.C., for example, the Domestic Violence Intervention Program allows adolescents who are sixteen and older to participate in adult batterer treatment groups.¹²³

Overall, while scattered educational programs, counseling services, and treatment options exist for adolescents involved in violent relationships, they are not as widespread as they need to be.¹²⁴ If adolescents do not have adequate information and support, legal

120. Conversation with Stephanie Ball, Harriet Tubman Women's Center, 310 East 38th St., Room 202, Minneapolis, MN 55409.

121. Suarez, *supra* note 5, at 463 (citing Paula Kamen, *Teen Victims: Little Being Done About Rampant Dating Violence, Researcher Claims*, CHI. TRIB., Nov. 3, 1991, § 6, at 5).

122. Suarez, *supra* note 5, at 439, n.103; nn.231, 244; and 463.

123. Discussions with Desiree Danson, Acting Supervisor, Domestic Violence Intervention Program (Mar. 1995).

124. See Gamache, *supra* note 1, at 82 (who urges communities to address the problem of violence in adolescent relationships through education). See also Sugarman & Hotaling, *supra* note 5, at 116 (who make similar recommendations about the need for high schools and universities to teach about relationship violence and offer ways for resolving conflict without violence).

remedies for addressing teen dating violence will remain underutilized and ineffective.

VII. What Lawyers Can Do

Lawyers can have a tremendous impact in the area of teen dating violence. Members of the bar, and law students, either as volunteers or in clinical law school programs, can make new and important legal precedent and help adolescents who desperately need assistance.¹²⁵

The magnitude of the problem of teen relationship violence is great, yet few lawyers represent teen victims. Serving as a guardian ad litem in one of these cases or representing a minor for whom the court has chosen not to appoint a guardian ad litem is a perfect way to fulfill pro bono obligations. There is a great need for lawyers who understand the dynamics of dating violence to represent perpetrators of teen dating violence in either civil or juvenile delinquency actions. An informed and concerned attorney can ensure that an adolescent's due process rights are protected while also assisting the adolescent in getting the treatment that he or she needs.

There are also interesting opportunities for law reform and legislative advocacy in this area. One might lobby for statutes which authorize minors to obtain civil protection orders. One might work with the courts to develop court rules and procedures for simplifying and clarifying the process by which (1) an adult can bring an action on behalf of a teenager needing a protection order, and (2) the court can appoint a guardian ad litem and/or attorney to represent an adolescent.

Others might advocate to ensure that local prosecutors and police develop special units or expertise in identifying and addressing teen dating violence. Attorneys can develop and participate in training for judges, the bar, court clerks, police, and school personnel on the issue of teen dating violence and legal remedies to stop it. Members of the bar can also work to ensure that there are support and shelter services for adolescent victims of dating violence and treatment programs available for adolescent offenders.

Finally, lawyers can play an integral role in community legal education. Lawyers and law students can participate in existing programs or implement new programs in elementary, junior high, and high

125. See generally LEGAL RIGHTS OF CHILDREN, *supra* note 59, at 19-20 (discussing the expanding opportunities for lawyers to represent children. Kramer states that "the presence of counsel will assure that children continue to receive greater due process protections before they may be deprived of important interests or rights.").

schools to teach students about the dynamics of and legal issues surrounding teen dating violence.¹²⁶ Through education, lawyers can provide invaluable information to youth who may be experiencing dating violence while at the same time preventing the insidious cycle of domestic violence from continuing into the next generation of adults.

126. Lawyers and law students in the Families and the Law Clinic at The Catholic University, Columbus School of Law, have developed a dating violence curriculum that it is using in two public high schools in Washington, D.C. Law students and attorney/supervisors discuss teen dating violence and legal and nonlegal options for addressing the problem. Educators and advocates have developed a number of curricula on teen dating violence including: *Helping Teens Stop Violence*, Allan Creighton and Paul Kivel (1990); *Preventing Teen Dating Violence: A Three-Session Curriculum for Teaching Adolescents*, Carole Sousa et al. (Dating Violence Intervention Project). See also Suarez, *supra* note 5, at 467 (stating that Minnesota has required that a dating violence prevention program become part of the curriculum across the state).

Child Abuse and Domestic Violence: Legal Connections and Controversies

HOWARD A. DAVIDSON*

I. Introduction

The complex web connecting child maltreatment and adult domestic violence was noted in an American Bar Association publication over fifteen years ago.¹ Since then, a national study of family violence has found a strong substantive correlation between adult partner abuse and child abuse. Both partners were found to be more likely to be abusive toward their children in homes where mothers were victims of domestic violence,² but the literature also indicates that children are three times more likely to be abused by their fathers or father-substitutes.³ When spouse abuse was severe, one study found 77 percent of the children in those homes had also been abused.⁴ A survey of battered women's shelters found that approximately 70 percent of the children who came to those shelters had been abused or neglected.⁵ In one review of medical

* Howard Davidson, J.D., is Director of the ABA Center on Children and the Law.

1. Howard Davidson, *Domestic Violence: Its Relation to Child Abuse*, 1 LEGAL RESPONSE: CHILD ADVOC. & PROTECTION 1 (1979). This article cites Lenore Walker's findings reported in her book, *THE BATTERED WOMAN*, that "as many as one third of all adult males who beat their spouses also abuse their children" and cites studies that child abuse is 129% more likely in families with domestic violence.

2. MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* (1990).

3. Mary McKernan. McKay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, 73 CHILD WELFARE 29, 30 (1994).

4. MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* (1980).

5. J. Layzer et al., *Children in Shelters*, 15 CHILDREN TODAY 5-11 (1986).

records, battered women were found six times more likely than nonbattered women to have their children reported for child abuse.⁶

The relationship between child abuse and domestic violence can be divided into four law-related topics. I will address each in this article and explore the implications for attorneys, judges, and lawmakers. Finally, based on my work on these issues,⁷ I will propose ten public policy reforms to help assure a more sensitive approach toward the children affected by domestic violence.

The first, and clearest, link between child abuse and domestic violence is that women battered by their adult male partners⁸ frequently report their batterers have also committed child physical and/or sexual abuse within their homes. Abusers often have been brutal in their treatment toward everyone in the family. Sometimes, children have been abused inadvertently—injured by blows or weapons meant to harm an adult in the home—or they have been hurt when intervening to protect a battered parent. Some children have even been killed in the “cross-fire” of adult domestic violence. While domestic violence and child abuse are commonly found in the same households, however, legal interventions for the two offenses have been quite distinct—and often at odds with each other.

Secondly, some battered women have been either unable or unwilling to shield their children from a batterer’s child maltreatment, and they may find themselves charged with violating laws governing failure to protect children from abuse. Therefore, a victim of domestic violence whose children also have been abused may find herself involved in multiple court proceedings, possibly at different courthouses, in which

6. Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT. J. HEALTH SERV. 97-119 (1988). In the cases of child abuse identified within this study, approximately 50% of the children were abused by the father or father-figure in the home, 35% were abused by the battered women, and the remainder were abused by others or by both father and mother.

7. I have expanded my understanding about the connections between child maltreatment and domestic violence by developing an *Annotated Bibliography Concerning the Correlation Between Child Abuse and Wife Battery* for the ABA Center on Children and the Law in 1991; by participating in the American Medical Association’s March 1994 National Conference on Family Violence: Health and Justice; attending an invitational conclave titled “Domestic Violence and Child Welfare: Integrating Policy and Practice for Families,” held in June 1994, at the Wingspread Conference Center in Racine, Wisconsin; and researching and writing a report for then ABA President, William Ide, titled *The Impact of Domestic Violence on Children*.

8. The overwhelming majority of adult domestic violence is committed upon women by men. Of spousal violence incidents reported in the National Crime Survey, 91% were victimizations of women committed by husbands or ex-husbands. PATSY A. KLAUS & MICHAEL R. RAND, FAMILY VIOLENCE: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (1984).

she is alleged to be both an assault victim and civilly,⁹ as well as criminally,¹⁰ responsible for her children’s abuse. The state may be seeking to remove the children from her care, place legal limitations on the care and custody of her children, terminate her parental rights, and hold her criminally liable or even imprison her as an accessory to her children’s abuse.

A third connection between child abuse and domestic violence is that, unfortunately, some parents who are the victims of violence are also the perpetrators of abuse upon their children. These abusive parents may face civil child protective judicial intervention, such as removal of their children by the state and/or termination of parental rights, and criminal child abuse prosecution while, at the same time, they are involved in the courts in protecting themselves from domestic violence.

Fourthly, merely witnessing repeated adult domestic violence, even in the absence of abuse directed against the children themselves, might appropriately lead to some exercise of authority to assure that such children receive therapy to help them overcome the trauma of having lived in a chronically violent home. Permitting children to be exposed to a perpetually brutal environment may itself be an act of psychological or emotional child abuse/neglect that alone, in extraordinary circumstances, could justify the intervention of child protection agencies and the courts. Thankfully, researchers have begun to pay special attention to the suffering of children who have lived in violent homes.¹¹ Attorneys, judges, and lawmakers must do the same.

Until recently, most social workers, law enforcement personnel, physicians, lawyers, and judges working in the field of child abuse have not devoted attention to the family connections between child maltreatment and domestic violence. Many still do not. Too often, government and private sector resources focused on prevention, intervention, and treatment specifically respond to either child abuse/neglect or domestic violence but not to situations where the two may be found in tandem.

States and communities typically have dual, separate systems charged with the protection of children and adult domestic violence victims. There has been little regard for addressing the family system in which

9. See Jill A. Phillips, *Re-Victimized Battered Women: Termination of Parental Rights for Failure to Protect Children From Child Abuse*, 38 WAYNE L. REV. 1549 (1992).

10. William W. Blue, *State v. Williquette: Protecting Children From Abuse Through the Imposition of a Legal Duty*, 12 AM. J. TRIAL ADVOC. 171 (1988).

11. See, e.g., PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN (1990); ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN (Einat Peled et al. eds., 1995).

violence may be pervasive. Formal protocols for coordination and joint training among those working in each arena (including foster care providers) are essential, but such protocols are still rare. Without adequate cross-system training and appropriate supportive services, there is justifiable fear among experts that simply increasing understanding of the links between domestic violence and child abuse may lead to higher levels of inappropriate and harmful intervention.

Generally, government social service agencies and courts are structured and organized in ways that treat child abuse and domestic violence as separate, categorical issues. State or local "protective service" agencies that combine authority and competency to address both child abuse and domestic violence are even more rare than "family courts" that have all-encompassing jurisdiction over civil and criminal aspects of child abuse and domestic violence, and related child custody, visitation, and support issues.¹² Federal, state, or local financing for intervention and treatment that addresses child maltreatment and adult domestic violence has almost always been provided for separate, rather than integrated, funding streams. The separation of these issues also affects legal professionals because, generally, lawyers who specialize in domestic violence cases are an entirely different group from those attorneys whose work focuses on child abuse. They have seldom been trained together.

II. When Batterers Abuse Both Adult Partners and Their Children

When a batterer abuses an adult partner, as well as physically, sexually, or emotionally abuses children, there should be one system capable of effectively responding to both sets of acts. Fragmentation of responses can lead to disjointed actions and harmful results for both children and the parents who are trying to protect them from abuse. For this reason, the 1994 ABA report, *The Impact of Domestic Violence on Children*, urged states to pass and enforce laws that require police and the courts to protect children during the domestic violence intervention process.

Proposed intervention reforms include training law enforcement officers who respond to domestic violence calls to see and speak with the children in the home to better address the immediate safety, shelter, and medical assistance needs of those children. It is also important that

12. In August 1994, the ABA House of Delegates passed a resolution reaffirming the Association's support for the creation of well-staffed and supported Unified Children and Family Courts.

relationships between police and state and local child protective services (CPS) agencies be improved so CPS can quickly be brought into a case, when appropriate, to protect the child and non-abusive parent as one unit. CPS investigators should be required by law to inquire about violent behavior of all those living in the households of reported victims of child maltreatment. The stereotypical, and erroneous, view that mothers alone are to be held accountable for their children's abuse (a position unfortunately reinforced by the sole focus of most child protective court proceedings being on the mother) must be replaced by holistic, household violence assessments and safety-oriented response plans.

Where intervention is deemed necessary to protect children from imminent harm due to abuse, the ABA report on *The Impact of Domestic Violence on Children* calls for actions that do not precipitously separate adult domestic violence victims from their children. Laws should be focused on keeping domestic violence victims with their children, unless doing so would subject those children to imminent risk of serious harm. The most common statutes relevant to this issue, which have emerged only in the past decade or so, grant juvenile court judges clear authority to order the removal of violent adults from a home and no longer rely on the more traditional "protection" available through foster care placement of abused children. Therefore, because state laws generally require that "reasonable efforts" be made to allow maltreated children to remain in their own homes so long as there is no imminent risk to their health and safety, such efforts, when taken by government CPS agencies and judges, should include removing perpetrators of violence from the home by the police and with a court order, where necessary.

The ABA report suggests that adult victims of domestic violence be given legal authority to seek court orders of protection that apply to both themselves and their children, as well as to receive information from police about how to access such court assistance. CPS case workers should be assisting domestic violence victims in obtaining that judicial help, and CPS agencies, in accord with the *Model Code on Domestic and Family Violence (Model Code)*,¹³ should be statutorily empowered to seek court-ordered removal of domestic violence perpetrators and the issuance of other protective orders. All such orders must be promptly carried out with the assistance of the police. For these protections to be effective, CPS case workers, supervisors, and their legal support personnel must become familiar with the applicable laws and court procedures for obtaining protective or restraining orders.

13. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 409 (1994).

In light of the link between adult and child battering, *The Impact of Domestic Violence on Children* states that courts hearing both criminal and civil child protection matters pertaining to child physical and sexual abuse and child neglect should always seek information about the existence of domestic violence in that family—and any court actions that have been taken in response to such violence. The report also calls for establishment of courthouse security measures to protect abused children and their protective parents from domestic violence perpetrators because when batterers realize, often in court, that they are losing power and control over their victims, they may react in a violent rage directed at their victims, families, and court personnel.

When courts and CPS agencies are considering removal and reunification of abused children, their deliberations also must address the need to promote the safety of the child's non-abusive parent. Agency and court actions should always be supportive of the goal of violence-free families and a parent should never be required to remain with an abusive partner as a condition of the child being returned home from foster care. Where case settlements are used to avoid child maltreatment adjudications, these settlements also should never compel parents to remain with, or return to, their batterers.

When making child placement and family re-integration decisions, CPS agencies and courts should use carefully constructed and thoroughly evaluated risk assessment instruments. These instruments should include an appraisal of the family's domestic violence history as well as the present ability of non-abusive parents to keep violence from erupting in the home. In accord with section 409 of the *Model Code*, CPS workers should have, and meticulously follow, protocols for determining whether abuse of adult household members has occurred and is likely to recur. This determination process should include the opportunity for direct worker access to criminal records, court protective orders, and offender probation information.

Even where batterers do not abuse their children, the nature of their domestic violence may be deemed sufficient to justify the termination of their parental rights. For example, courts have terminated a batterer's parental rights where his acts of domestic violence included stabbing the mother to death in front of the children¹⁴ and where a batterer had repeatedly abused the children's mother during the marriage, ultimately pleading guilty to her murder.¹⁵ In a nonhomicide spousal abuse case, the rights of both parents were terminated after the court found that

both had continually engaged in mutual domestic violence in front of the children for many years.¹⁶

III. Parental Failure to Protect Children from Abuse

Some CPS interventions against non-abusive parents begin when, for example, a mother refuses to allow a case worker investigating a report of child abuse or child neglect into her home. Such noncooperation may occur because the mother is afraid that if the worker sees the child, and the adult batterer in the home hears about it, she will be beaten up, possibly severely, and the abuser may also further retaliate by harming the child. Actions by CPS against a non-abusive parent may also begin because a case worker perceives that a mother was irresponsible toward her child in not leaving the abuser (or not leaving quickly enough). Those conclusions often disregard the fact that many batterers threaten to kill their partners, their children, or their partner's children if their partners leave the relationship. Some batterers have carried out such threats.

One advocate for domestic violence victims, in explaining why battered women remain with their abusive partners, has stated:

I want to highlight children as one of the most common reasons that many of us stay. We can better protect our children if we are there and can see the abuser than if we're on the run, and he has the opportunity and advantage of being able to track us down.¹⁷

If victims leave, batterers also threaten their victims with harm if they do not return home. Some carry out those threats. Many non-abusive domestic violence victims thus face a "catch-22" that would immobilize most parents without considerable financial resources to flee to a faraway destination and live independently, safely, and well.

Fortunately, there have been efforts to alter the attitudes that result in CPS "blame the victim" responses. In Massachusetts, Project Protect was a pioneering effort by the state's Department of Social Services to identify domestic violence as a risk factor for child abuse and to improve CPS coordination with police in the area of domestic violence. One adverse consequence of this program, however, was that some involuntary intervention took place in families where only domestic violence and, possibly, some child neglect were found but where previously there would not have been any CPS involvement.

14. *In re Sean H.*, 586 A.2d 1171 (Conn. App. 1991).

15. *Nancy Viola R. v. Randolph W.*, 356 S.E.2d 464 (W.Va. 1987). See also *Kenneth B. v. Elmer Jimmy S.*, 399 S.E.2d 192 (W.Va. 1990).

16. *In re Theresa "CC,"* 576 N.Y.S.2d 937 (App. Div. 1991).

17. Sarah Buel, *The Dynamics of Family Violence*, CONFERENCE HIGHLIGHTS, COURTS AND COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY 11 (1993).

The concern about CPS over-intervention led Massachusetts to institute three alternative CPS practices to Project Protect that should be widely replicated:

1. Use of CPS consultants and special staff for assistance in child maltreatment cases where domestic violence has occurred;
2. Use by CPS of a special multidisciplinary team to help integrate child abuse and domestic violence interventions; and
3. Creation by CPS of a Domestic Violence and Child Protection Advisory Board (Michigan has a similar body) that reviews proposed CPS training and policy initiatives for their impact on domestic violence victims. An alternative recommendation is to have CPS agencies create adult domestic violence victim panels to help better inform their work.

Section 409 of the *Model Code* rightfully suggests that a battered woman with children should not have to formally enter the CPS "system" and face a CPS agency or court finding that she is "at fault" for her child's abuse or has failed to protect the child from abuse in order to receive protective assistance from CPS, or elsewhere, for themselves and their children. Referrals for family support services should be available through domestic violence shelters, as has been promoted by Michigan's Families First Program. The shelters in Michigan now have access to flexible program dollars for clients whose immediate financial needs include emergency rental payments/security deposits, child care, transportation, etc.

On the other hand, the question of how the law should address the "passive partners" to child abuse has perplexed many child advocates. State laws specifically authorize children to be adjudicated as abused or neglected due to parents' omissions (i.e., failures to act or carry out parental duties, or permitting children to be endangered) as well as for the deliberate commission of unlawful acts themselves. Yet, one attorney reported what is clearly a reality throughout the country: In sixteen years of working in the courts, she had never seen a father even charged with "failure to protect" when the child abuser was the mother.¹⁸ In a classic example of legally sanctioned gender bias, it is mothers, not fathers, who find themselves facing such charges. Fathers who abandon their children rarely face criminal responsibility. As long as fathers do not live with their children's mothers, laws generally excuse them from any legal responsibility, other than for payment of child support, even when their failure to care for their children has been quite harmful.

Only a few state statutes provide affirmative defenses, such as duress or inability to act caused by fear of the abuser's reprisals, to a charge

of failure to protect children. One law, in Minnesota, provides a defense where ". . . at the time of the neglect there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect would result in substantial bodily harm to the defendant or the child in retaliation."¹⁹

In an article analyzing state codes on domestic violence, Barbara Hart recommended that, in raising a defense to a charge of failure to protect children, non-abusive parents be permitted to introduce evidence about the following factors: (1) domestic violence; (2) its impact on the parent's beliefs, perceptions, coping strategies, and behavior related to the "failure to protect" allegation; and (3) the reasonableness of the parent's apprehension (based on expert testimony) that acting to stop or prevent the abuse would be ineffective, or that such action would further endanger the targeted child or the non-abusive parent.²⁰ Another approach to remedy inappropriate failure to protect charges would be to permit battered mothers so accused to introduce expert testimony on "battered women's syndrome" that would aid judges and juries in understanding what limited her ability to insulate her children from the abuse.

In 1982 the ABA Center on Children and the Law published a series of *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases*.²¹ Section 2.1 calls for consideration of all the following factors by CPS agencies, prosecutors, and the courts in deciding whether to make parents who have not sexually abused their children parties to civil child protective proceedings, such as actions to place children in foster care, to compel parents to participate in treatment, or to terminate parental rights:

- Whether parents knew, or had reasonable cause to believe, their children had been abused and failed to take reasonable steps to prevent it;
- The actions parents took to protect, support, and care for their children following disclosure of the abuse; and
- Whether parents voluntarily agreed to participate in specialized counseling or treatment programs, and to accept other protective services.

These three factors are meant to serve as an alternative to the widespread state statutory provisions that allow parents to be civilly adjudi-

19. MINN. STAT. ANN. § 609.378 (Supp. 1995).

20. Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. No. 4, 80 (1992).

21. It should be noted that these are not formal ABA policies but were a product of the Center designed to help policymakers consider legislative reform in the area of intrafamilial sexual abuse of children.

18. *Id.* at 13.

cated for abuse or neglect of their children solely because they "allow" or "permit" their children's abuse at the hands of another adult. The commentary to the *Recommendations* additionally states that there should not be judicial intervention against any parent when children can be fully protected by that parent.

It has always been a controversial suggestion that some mothers may condone, consciously or unconsciously, their children's sexual abuse for fear of dissolution of the family unit if the abuse is disclosed. The commentary notes that non-abusive parents are often vulnerable to scapegoating and displaced anger from their abusers. In addition, some children are enlisted by their abusers in elaborate patterns to deceive non-abusive parents, or worse, children are threatened that disclosures will split up their families and lead to further violence.

Section 3.5 of the *Recommendations*, in accordance with the laws and court decisions of most states, suggests that parents not be held criminally responsible for abuse inflicted by another unless they either participated in committing that abuse or had actual knowledge of the abuse and intentionally failed to take reasonable steps to prevent it. Key to this element, as it relates to domestic violence victims, is how "reasonable steps" are defined within the context of a violent home environment. Generally, there are three types of cases in which mothers are held criminally liable for failing to protect their children from the abuse of another:

1. The mother was present when the abuse took place but did nothing to prevent it from happening;
2. The mother left the child alone with the abuser, knowing that he had in the past abused the child; and
3. The mother discovered her child's abuse but failed to seek medical attention for the child.

In one criminal case that addressed the failure to protect issue, an appellate court found no statute or common law principle to impose a legal duty on a parent for failing to prevent a child's father from abusing her.²² A Wisconsin case, however, ruled to the contrary in upholding a parent's conviction related to the physical abuse of children by another, based on a failure to protect charge, even in the absence of a statute specifically imposing such a parental duty. The court held there was a special relationship, under common law, between parent and child that imposed an affirmative obligation to prevent child abuse by another.²³

Historically, civil child protective court actions have outnumbered criminal prosecutions of parents for child abuse. Appellate decisions

22. Knox v. Commonwealth, 735 S.W.2d 711 (Ky. 1987).

23. State v. Williquette, 385 N.W.2d 145 (Wis. 1986).

imposing civil sanctions, such as the termination of parental rights, against parents who fail to protect their children from abuse also outnumber cases holding non-abusive parents criminally responsible for their children's abuse. However, in recent years child homicide prosecutions against parent (or parent-substitute) perpetrators have increased, and as a consequence the charging of non-abusive parents as accessories to these crimes, or under failure to protect principles, is becoming more common.

One civil decision affirmed termination of a non-abusive mother's parental rights based on her failure to take proper measures to protect her children from her husband's abuse even though there was evidence that the mother had been abused by, and was fearful of, her husband and despite her claim that this abuse and fear prevented her from protecting the children or leaving the home with them.²⁴ The court noted that the mother had returned to the abusive environment of her own volition, and that, after the serious abuse of her children, the mother stated she would not leave her husband because she loved him.

Two additional appellate decisions on termination of a mother's parental rights approached the domestic violence issue quite differently. In a Michigan case the court affirmed a trial court's termination action based on the mother's failure to prevent her husband from physically and sexually abusing the children and on the risk that she would be unable to protect them in the future.²⁵ One judge, in dissent, objected to the trial court's conclusion that the mother would be at risk of entering into another abusive relationship—the view that "once a battered woman, always a battered woman." That dissenting judge also cited a publication illustrating the "catch-22" situation that domestic violence victims too often find themselves in:

If the [battered] woman fears that she will be blamed for failure to protect her children from the abuser, she may be reluctant to cooperate, fearing the [CPS] agency will take her children away from her. If the agency's personnel is untrained in domestic violence, its personnel may indeed blame the mother for failure to leave her children's abuser.²⁶

On the other hand, a West Virginia court reversed the termination of the mother's parental rights where the decree had been based on the mother knowingly allowing her husband to sexually abuse the children even though the mother's delay in reporting the abuse had centered

24. State v. G.P., 453 N.W.2d 477 (Neb. 1990).

25. *In re Farley*, 469 N.W.2d 295 (Mich. 1991).

26. *Id.* at 301 (citing National Council of Juvenile and Family Court Judges, *Spousal Assault: A Probation/Parole Protocol For Supervision of Offenders*, at 16 (1989)).

on her inability to get away from the abusive spouse.²⁷ The trial court erroneously assumed that the mother would reconcile with her husband, thereby exposing her children to further abuse by him, and she was not given a chance to show that she could safely provide for her children.

Appellate decisions also have addressed the issue of whether formerly battered spouses are, for purposes of child custody, unfit parents. A Texas court held that evidence of a parent's spousal abuse victimization, by itself, cannot be considered relevant to the issue of whether awarding custody to that parent would significantly impair the child.²⁸ The court concluded that to hold otherwise would deter battered spouses from reporting their own abuse out of concern that they might then lose their children. The court, noting the state's child custody statute, indicated that previous spousal abuse could, in custody proceedings, be heavily weighted against the batterer.

IV. When Domestic Violence Victims Also Abuse Their Children

Government child protective services agencies must always try to determine whether abuse of children is a manifestation of a parent's coping with her own violent environment and whether domestic violence is a causal factor in a parent's neglect. Some mothers, for example, may be frozen by fear or focusing their energy on their batterer's demands. Others may use excessive corporal punishment in efforts to control children's behavior in order to appease a volatile mate and to prevent any disturbances that might cause the violent partner's wrath and abusive behavior to escalate. Other parents may withdraw from their family, and their children, in a single-minded effort to protect themselves. Of course, there are abusive parents whose maltreatment of their children has no justification whatsoever.

CPS agencies must have policies to ensure that all their cases are adequately screened for the presence of domestic violence in the child's family home, foster home, or kinship care placement. Those personnel assigned to reporting hotlines, and those sections of CPS that conduct intake assessments of reports, should be required to inquire about the existence of domestic violence in the homes of children reported for abuse or neglect. CPS policies should also provide for a prompt, effective, and sensitive response when CPS learns, through referrals from the courts, police, shelters, or other sources, that a family experiencing domestic violence has also been suspected of child abuse.

27. *In re Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988).

28. *Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990).

Supportive services to rehabilitate parents who have abused their children must include a focus on *all* the violence that has been part of those parents' home environments. Abusive parents who have themselves been battered in adult intimate relationships require special therapeutic attention. Courts involved in those parents' lives should work closely with treatment providers to gauge, as best as possible, when an abusive parent is ready to resume full, unmonitored protective care of their children in a home devoid of any violent interactions.

V. Meeting the Needs of Children Who Have Been Exposed to Domestic Violence

Estimates are that between 3.3 million and 10 million children annually observe domestic violence within their homes.²⁹ An estimated 87 percent of children in homes with domestic violence witness that abuse.³⁰ Children who are victims of child abuse, as well as those who are only exposed to the abuse of others, tend to be more aggressive and punitive toward their own children or to be violent and demonstrate a general disregard for the rights and welfare of others.³¹ Boys who witness parental violence during their childhoods are at a much higher risk of becoming physically aggressive in later dating and marital relationships. Also, some children may have been living in a home where actual physical battering of a parent was rare but where they constantly felt fearful and threatened due to the possible flare-up, at any moment, of interparental violence.

Addressing the needs of children who have lived in a violent household, whether they were abused or not and whether severe physical violence between their parents was frequent or not, is a critical factor in reducing future violence. The literature clearly shows that children who witness domestic violence exhibit symptoms similar to those of abused children generally, including the perpetuation of violence. Since state laws do not explicitly define children exposed to domestic violence as children in need of legal protection, those who work within the legal process must exercise responsibility to see to it that such children receive the help they need in order to avoid perpetuating the cycle of violence so harmful to families and society as a whole.

29. Bonnie E. Carlson, *Children's Observations of Interpersonal Violence*, BATTERED WOMEN AND THEIR FAMILIES 160 (1984); Murray A. Straus, *Children as Witnesses to Marital Violence: A Risk Factor for Life-Long Problems Among a Nationally Representative Sample of American Men and Women* (unpublished paper, 1991).

30. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 59 (1984).

31. Brandt F. Steele, *The Psychology of Child Abuse*, 17 *FAM. ADVOC.* 21 (1995).

Lawyers involved with violent families must be vigilant to help assure that custody, visitation, and other parenting arrangements do not add to such a child's sense of endangerment.³² Child protection and securing therapeutic assistance for children who have been emotionally affected by domestic violence must be predominant concerns of judges hearing cases involving such children, of the attorneys who represent their parents' interests, and of children's court-appointed guardians *ad litem*. To help assure children's interests are fully considered in adult battering cases that warrant special concerns about their safety, courts and child advocacy programs should consider appointment of specially trained guardians *ad litem* in civil and criminal domestic violence proceedings.

There is also much that government can do to promote accessibility of therapeutic help for children exposed to violence in their homes. The following is a proposed ten-point policy agenda for assuring a more child-centered response to family violence cases generally:

1. Congress and state legislatures should require that all government-supported family violence programs have a significant amount of funds earmarked for enhanced public and private agency responses to the children of domestic violence victims, including services for children who are living with their parents in shelters.
2. Legislation should specify, and provide adequate funding for, child protective services, law enforcement, prosecution, and judicial training and technical assistance on how to address the needs of children and their protective parents as part of the law's response to child abuse and domestic violence cases.
3. To provide funding for the first two items, lawmakers should consider earmarking crime victim funding (or other penalty assessments imposed in criminal proceedings) for use by programs providing services to children of domestic violence victims and for education programs for social services personnel, police, prosecutors, and judges that are focused on such children's needs.
4. Government human services and justice personnel should be prodded by legislatures to focus on methods (such as coordinating councils) by which they can improve coordination between, and services provided by, social workers, police, and the courts that will help better address the needs of children of domestic violence victims.

32. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

5. Where courts deem it necessary for children's protection, they should order abusive parents to stay away from their children (and the places their children frequent) as part of custody decrees or restraining orders, and the law should permit mandatory arrest by the police, without the necessity of a warrant, of parents who violate such provisions.
6. Legislators should fund the development of supervised visitation centers, programs that can be used to safely facilitate parent-child contact where there is concern about a parent's violent or other abusive behavior, or where there is risk of a parental abduction of the child.
7. Government support for child protective services and domestic violence programs should include a mandate for the development of inter-agency protocols, action plans, research, and program evaluations that address how children in violent homes can be better served.
8. Public aid to community mental health programs should be conditioned on state and local studies of how the mental health needs of children exposed to violence within their homes, including situations where children have experienced *both* domestic violence and child abuse, can be better addressed.³³
9. Elected prosecutors should be encouraged to organize family violence units, rather than separate child abuse and adult domestic abuse units, so as to promote an integrated and coordinated response to families experiencing multiple forms of violence.
10. Funding should be provided for studying the ways in which the legal system and the courts respond to battered women whose children also have been abused.

VI. ABA Report

The 1994 ABA report, *The Impact of Domestic Violence on Children*, carefully titled the section addressing the connections between child maltreatment and domestic violence as "Explore the Child Abuse Nexus," which reflects the anxiety among many who work in the domestic violence arena that harmful policies may be initiated without an appropriate study of their anticipated impact. Advocates for battered women have appropriately expressed great concern about cases where

33. An excellent overview of the research on the therapeutic needs of children exposed to domestic violence can be found in B.B.R. Rossman, *Children in Violent Families: Current Diagnostic and Treatment Considerations*, 10 FAM. VIOLENCE & SEXUAL ASSAULT BULL. 29 (1994).

mothers finally get up the courage, and secure the means, to flee with their children from a violent mate, only to find themselves charged with child neglect for either remaining in that violent home too long, or in replacing that home (as many women must) with a temporary shelter-type residence that is not conducive to the health and welfare of their children.

The response to abused mothers by child protective services agencies and the courts has, too often, been inherently punitive. It has been too common for those intervening in the lives of such women and their children to only be apprised of, and to act on the basis of, part of the family's overall problems.

The 1994 ABA report urged extreme care "so that . . . interventions do not become unintentional bludgeons used against children and their battered parents" and that responses "not pit battered parents and children against each other."³⁴ It promoted legal action—judicial promotion of a safety plan—that would exclude abusers from the households of children where necessary to secure a safe sanctuary for children and their nonabusive parents. It suggested that parents not be labelled or punished simply for having lived with an abuser.

To put these concepts into practice will require a very different approach to community "protective services" work, and possibly new laws as well. Attorneys and judges, as well as human services personnel, will need to be trained in a more holistic approach to family violence intervention. There should be no requirement of "substantiated" CPS agency findings of child abuse or neglect, or court adjudications that fault parents for their behavior, as a precondition to delivery of services to children and families that have experienced domestic violence.

As this article was nearing publication, the U.S. Advisory Board on Child Abuse and Neglect issued its fifth report, entitled *A Nation's Shame: Fatal Child Abuse and Neglect in the United States*. The report noted³⁵ that:

- Domestic violence is the "single major precursor to child abuse and neglect fatalities in the United States";
- Many battered women are deterred from reporting their abuse, and their children's maltreatment, by fears of losing custody; and
- Many child abuse prevention programs direct their attention to mothers, failing entirely to focus on the men who batter.

34. *The Impact of Domestic Violence on Children*, *supra* note 7, at 17.

35. U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, *A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES* (Apr. 1995), at 124.

This report recommended,³⁶ and this author concurs, that state and local agencies design (with use of federal Family Preservation and Support funds, as well as other public and private monies) child abuse and neglect prevention programs *specifically for men*. It also urged, and I endorse, the *integration of services and training* on child abuse and domestic violence.

VII. Conclusion

Violence in American homes is a fundamental societal ill, one that is linked with the much larger problems of crime and violence generally. We must, as attorneys, judges, and others who have influence in changing government policies related to violence and in altering the legal system's response to violence, better recognize and address the inherent links between child abuse, domestic violence, dating violence, juvenile delinquency, and violent crime in general. Assuring that we improve our understanding of and reactions to violence in the home must become one of our top priorities.

36. *Id.* at 142.

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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

04-Jun-1996 09:36pm

TO: (See Below)

FROM: Deborah L. Fine
 Domestic Policy Council

SUBJECT: domestic violence

FYI:

Cong. Lowey is introducing legislation tomorrow on domestic violence prevention. (I think Morella may be co-sponsoring it). It is a tax credit for businesses with workplace safety programs to combat domestic violence.

They apparently did a press conference in NY on it yesterday with The Body Shop, Liz Claiborne and Polaroid.

I have not seen any text, but wanted to make sure you all knew.

Distribution:

TO: Jeremy D. Benami
TO: Dennis Burke
TO: Jennifer L. Klein
TO: Elena Kagan
TO: Christa T. Robinson
TO: Betsy Myers
TO: Janet Murguia
TO: Lisa Ross
TO: Paul J. Weinstein, Jr

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

28-May-1996 06:38pm

TO: Victoria L. Radd
TO: Elena Kagan

FROM: Jennifer L. Klein
Domestic Policy Council

SUBJECT: Violence Against Women

Just wanted to make sure that you both knew that we are providing \$42 million through the COPS program to law enforcement agencies to address domestic violence. We have not yet made the announcement so it might be a good opportunity in the next few weeks.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

06-Jun-1996 08:37pm

TO: (See Below)

FROM: Deborah L. Fine
Domestic Policy Council

SUBJECT: fyi on budget amendment

FYI:

Yesterday we sent up an amendment to the 1997 budget proposal asking for full funding as authorized to the HHS side of the Violence Against Women Act--including the Runaway Youth program.

(Our original proposal asks for funding at 96 appropriated levels on the HHS programs, and did not ask for any funding of Runaway Youth.)

This is good news for Women's Caucus and groups...

Distribution:

TO: Betsy Myers
TO: Jennifer L. Klein
TO: Dennis Burke
TO: Janet Murguia
TO: Elena Kagan
TO: Karen L. Hancox
TO: Lisa Ross
TO: Victoria L. Radd

CC: Jeremy D. Benami