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Letter From the Editor

Linda Wold

This issue of the Family Law Forum focuses on the topic of Domestic Violence. An amazing array of authors, from diverse backgrounds, have written articles on both the substantive aspects of domestic violence, as well as some very interesting "twists" and dimensions that you may not have encountered. For example, pieces on the Hague Convention, the domestic abuse statute, domestic abuse and the military, police officers who abuse, what to do if your client is accused of domestic abuse and discussion of recent Appellate court cases, are certain to broaden your abilities to work with these types of situations. Other articles, like indirect ways domestic violence can affect a case, the immigrant experience with domestic abuse, safety in OFP hearings, domestic abuse in the ENE, Collaborative Law and mediation areas, and corporal punishment and domestic violence will surely expand your knowledge and broaden your thinking and possible application of domestic abuse information for the betterment of your clients.

This issue also contains numerous applicable resources that you surely will find helpful and which will assist you as you work with your clients. One of the items is the ABA tool for Attorneys to Screen for Domestic Violence. This tool is provided to assist you since screening for domestic violence can help you avoid malpractice and to alert you to your ethical duty to properly represent your clients. Please take the time to read it, and then use it in all your family law cases, as well as all other matters, since domestic abuse knows no bounds and can be part of any legal case.

One unique aspect of this issue is the great collaboration between professionals in the various fields who encounter and work with domestic abuse. Those professionals range from family law attorneys, directors and personnel of domestic abuse programs and organizations that work for and with victims, a social worker, and legal services programs. It is through our continued collaboration and willingness to share information, techniques, and to remain in close association with each other, that we can all serve our respective clients and their children, and the community as a whole, in safety and with competence.

A most sincere thanks goes to all these dedicated professionals for all their work and creative energy that went into producing their articles for this issue. Also we are grateful to the ABA Commission on Domestic Violence, Battered Women's Legal Advocacy Project (BWLAP), Family Law Section Domestic Abuse Committee and all attorneys who were willing to share and allowed us permission to reprint their copyrighted works. Please respect their grants of permission.

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Keeping Safety Front and Center in Order For Protection Hearings

Marna Anderson & Donna McNamara

Introduction

Filing an order for protection (OFP) is often the first time a woman has contact with the courts regarding her abuse.[1] Her experience can affect her level of trust in the justice system and may influence her future decisions about seeking protection in it. A knowledgeable attorney can make a significant difference in ensuring that a petitioner prevails and in tailoring an order to best meet her safety needs.

This article is meant to provide assistance to attorneys representing petitioners in OFP proceedings. Recommendations are based on WATCH's 2004 OFP report in Hennepin County (available at www.watchmn.org) and an article from the Winter 2006 *WATCH Post* newsletter. While procedures differ in counties throughout Minnesota, the themes outlined here can be adapted to guide attorneys in keeping victim safety the primary focus of the OFP hearing.

Legal basis

Minnesota's Domestic Abuse Act (MS §518B), passed in 1979, provides relief for victims of domestic violence through a civil OFP. The statute defines domestic abuse as the following between family or household members:

- Physical harm, bodily injury, and assault, including hitting, kicking, pushing, stabbing, and strangulation;
- The infliction of fear of imminent physical harm, bodily injury, or assault;
- Terroristic threats, such as threats to commit a crime of violence, bomb threats, or brandishing a firearm;
- Criminal sexual conduct, such as forced sexual contact or any other form of sexual contact with a minor; and
- Interference with an emergency call.

"Family or household members" include spouses and former spouses, parents and children, persons related by blood, persons who have a child or expected child in common, persons currently or formerly involved in a significant romantic or sexual relationship, and persons who share a household.

An individual seeking an OFP submits a petition to the court with a sworn affidavit stating the specific acts of abuse from which relief is sought, as defined by §518B. Based on this petition, a judge may sign an emergency *ex parte* order restraining the respondent from committing further acts of domestic abuse and from having contact with the petitioner. In Hennepin County, the respondent is personally served with the *ex parte* order, and both parties are notified of the initial hearing.[2]

At the hearing, the respondent is generally presented with three options: he may admit the allegations and agree to the order, deny the allegations but agree to the order, or deny the allegations and deny the order. If the respondent denies the allegations and denies the order, an evidentiary hearing is held to

determine whether domestic abuse occurred by a preponderance of the evidence. If the judicial officer finds domestic abuse, an OFP is issued.

The statute allows for the following relief: no domestic abuse, no contact, exclusion from a shared residence, exclusion from the petitioner's place of employment, temporary legal and physical custody of children in common, child support, spousal maintenance, and restitution. If a respondent violates an OFP, he may be charged in criminal court. Alternatively, a contempt of court proceeding may be initiated in family court, a viable option if violations of an OFP do not result in arrests or criminal charges.

Orders are in effect for one year unless the petitioner requests a longer time and the judge deems it appropriate. After the one-year period, a petitioner may request that an order be renewed; renewals are typically granted for two years.

Safety from violence

The primary motivation for a woman requesting an OFP is to safeguard herself from violence. A woman may file for an order because she is being threatened and is fearful the abuse may escalate to physical violence. Or, she may have suffered repeated assaults and is filing the order because her abuser has begun to target the children or because the violence has reached a more dangerous level. Thus, when preparing the petition it is important to thoroughly discuss the kinds of relief that would best provide each woman with the safety she seeks and include that relief in the petition.

The role of counsel is to compel the court to place the highest priority on petitioner safety. If, during the course of the hearing, the referee or judge fails to address an area important to the petitioner's safety, the attorney can bring these issues forward.
In some cases a respondent at an OFP hearing will insist that the petitioner refrain from contacting him and the judge may then consider granting a mutual order. It is not in the petitioner's best interest to agree to this. Her attorney can explain that if the respondent wants an OFP he must complete the proper forms and document domestic abuse that meets the statute. Subsequently, a hearing may be held to consider that order, but it should not be decided at her hearing.

In WATCH's 2004 study the court issued the requested order in 85% of cases, half of which were granted because the respondent agreed to them. Additionally, a study by Adelle Harrell found a 60% compliance rate for both *ex parte* and final orders. So, in many cases an OFP succeeds in cautioning the respondent against committing further violence.

But that is not always the case. Attorneys and victims should be aware that while an OFP makes subsequent acts of domestic abuse criminal, it cannot prevent such acts from occurring. In some cases, especially when petitioners are trying to leave their abusers, respondents react to the filing of an OFP with escalating violence. Of the nine homicides reviewed by the Hennepin County Domestic Fatality Review Team in 2002, three of the victims had OFPs in place. In one case, the respondent told his co-workers that his life was ruined as a result of the order and he believed he was going to jail. Three days later he murdered his ex-girlfriend and committed suicide.[3]

Violating an OFP can lead to criminal charges. It will be important to discuss this possibility with the petitioner in advance,

including what she can expect from law enforcement and the courts. For example, the federal Violence Against Women Act (1994) includes a Full Faith and Credit provision. This provision stipulates that all law enforcement agencies treat OFPs, regardless of where they were issued, as having the same force as one issued in their jurisdiction. However, this is not always followed, and it may be incumbent upon an attorney to remind local law enforcement of their obligation to do so.

Further, even when a respondent is arrested and charged with violating an OFP, sanctions may not be forthcoming. Charges may be dismissed or dropped, especially if the prosecutor expects the victim to testify in court and she is reluctant or fearful of doing so. Many times, numerous violations occur before the court takes action.

There will also be times when a petitioner asks for an OFP to be dismissed. This could be for a variety of reasons; she may want to reconcile with the respondent, it may ease the burden of arranging child care and visitation, or it may feel more dangerous to her to keep the OFP in place because of threats from the respondent. It is helpful to inform the petitioner at this point that an option besides dismissal is to amend the order to allow contact but not domestic abuse. It is also important the petitioner knows that she can request an order at another time if the abuse resumes.

Another consideration is safety at the courthouse. Some counties have established separate monitored waiting rooms for petitioners and respondents. This can be an effective way to separate parties waiting for hearings and prevent respondents from approaching or threatening petitioners. When the hearing is over, the judicial officer can release the petitioner first, allowing her time to get to the monitored area prior to allowing the respondent to leave the courtroom. Family law attorneys facing threatening respondents also find the monitored rooms helpful, and can use their position to encourage counties to make this type of space available.

Culture of disbelief

While much has changed in the courts' handling of domestic violence in recent decades, many judges still harbor myths about domestic violence and mistrust women's reports of abuse. A widespread myth is that petitioners seek OFPs to try to gain an advantage in divorce and child custody proceedings, a claim that has never been substantiated. WATCH monitors have seen judges who presume a divorce is underway when a woman seeks an OFP against her husband, when many times that is not the case. One Hennepin county judge frequently opens OFP hearings asking about divorce proceedings, ignoring the violence that led to the petition.

Suspicion of petitioners influences the tone of voice used by judges, their choice of words, the types of questions they ask, how they interpret the allegations in a petition, and whether an OFP is granted. It is not uncommon for WATCH monitors to document judges speaking harshly to petitioners, prohibiting them from consulting with their domestic violence advocates during a hearing, and showing impatience by rushing through hearings and even rolling their eyes.

Some of this demeanor may be mitigated simply by having representation. Many justice system personnel, in regard to court monitors' presence, have expressed sentiments such as "everyone is immediately

more accountable and more careful," and this can be true if an attorney is present as well. Attorneys can also prepare petitioners for facing harsh or disrespectful judicial demeanor, and may be able to dispel some myths by ensuring the evidence supports the allegations in the petition.

Understanding the proceedings

In WATCH's 2004 study, monitors observed that the family court offered minimal assistance to parties prior to the hearing and judicial officers seldom explained the proceedings in much detail. If parties do not understand the proceedings, it is less likely an order will be followed or a violation reported. Attorneys can play an important role in facilitating understanding of both the process and the outcome of the hearing. Pay particular attention to the following:

- If there are findings of abuse, request that the judicial officer read and explain them in court.
- If *no contact* is ordered, ask the judicial officer to clearly explain the specific behavior that is prohibited.
- If an order for protection is issued, the judicial officer should make clear to respondents that they, and not petitioners, can be arrested and charged with a crime for violating it.

In addition, counties should be encouraged to provide information to all parties that assist them in understanding the proceedings and their rights. In Hennepin County, for example, bi-lingual CDs and information sheets explaining the OFP process are available in the monitored waiting rooms. In many counties, battered women's community advocacy programs are available to provide the petitioner with information and offer her support. In addition to being of great help to the petitioner, advocates can augment the attorney's role by assisting the petitioner with non-legal concerns such as safety planning and arranging child care or housing if needed.

Language access

Women whose first language is not English face even greater challenges in understanding court proceedings. In 2000, 81 of Minnesota's 87 counties reported at least some households who speak a language other than English at home.[4] The issue of language access is no longer primarily an urban one.

In 2000, the Limited English Proficiency Act (LEP) was passed to enforce Title VI of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, color, and national origin. LEP specifically requires that federally funded programs develop and implement plans to provide equal access to government services for people with limited English proficiency. Attorneys should be knowledgeable about the LEP plan in their county, and if one exists but is not being enforced, they can become advocates for its effective implementation.

The Minnesota Supreme Court recently received funding to translate the state's "community generated" OFP forms—those used by petitioners and respondents—including the information sheet, request for extension, and request for hearing. The forms will be bilingual in English and nine target languages and available on-line in January 2008. These documents should greatly improve limited English speakers' understanding of the OFP process, but additional assistance is required at the hearing.

The local court is required to provide a trained interpreter, not a family member or

friend of the petitioner or respondent, at the hearing. Depending on the size of the county's interpreter pool, significant advance notice may be required to ensure that an interpreter is available when needed.

In addition, it is important that interpreters be sworn in so that court records reflect their presence at the proceeding and the record can be reviewed if a problem with interpretation arises. Further, some respondents who violate an order try to defend themselves claiming that they didn't understand it since nobody was there to interpret. This is another reason why, particularly in hearings involving limited English speakers, it is equally critical that orders be issued and explained from the bench. Expecting an interpreter to later translate a written order outside the courtroom is unacceptable as they do not have the expertise to do so and, most importantly, they lack the authority invested in the court.

Weapons

The federal Violence Against Women Act (1994) prohibits respondents from possessing a firearm of any kind while a protective order is in place. In addition, §518B prohibits defendants convicted of violating an OFP from possessing a pistol for three years and mandates the forfeiture of any firearm used during the violation of an OFP. It also allows the court to confiscate all weapons for a period of three years to life.

WATCH monitors found that in Hennepin County OFP hearings judicial officers almost universally failed to invoke the firearms prohibition. This may be, in part, because the county has not established a protocol among law enforcement agencies for confiscating firearms, nor is there a repository for guns that are forfeited.

The way firearms are handled by the courts varies widely across the state. Many counties do confiscate guns. However, hunting is a popular sport in Minnesota and in rural areas is also a primary source of food for many families. This presents a barrier for some women seeking OFPs as the respondent may be less likely to agree to an order, requiring an evidentiary hearing where the petitioner is required to give testimony against him. Some judges who are also avid sportsmen may be reluctant to issue orders, seeing the firearms statutes as violating a respondent's second amendment rights.

Attorneys should make a point of asking the petitioner whether or not the respondent possesses firearms, whether she has ever been threatened with a gun, and whether he has threatened to purchase a gun to harm or kill her. It is extremely important to inform petitioners of the firearms prohibitions, and discuss safety planning if the guns are not confiscated by the court.

Safety when the parties have children in common

When petitioners and respondents share children, as in the majority of hearings in WATCH's 2004 study, petitioners are often at greater risk for further abuse if the custody and visitation terms in the order do not prioritize petitioner and child safety. It is all too common for petitioners to be harassed, threatened, or harmed while exchanging children or when communicating about visitation arrangements.

Some respondents also use children as a tool to further torment petitioners, bringing repeated motions to the court to expand visitation, keeping children longer than allowed, and exposing them to unsafe

conditions. Others go so far as to harm or kill their children. The 2004 St. Paul case of five-year-old Mikayla Tester, murdered by her father, John Tester, is a cautionary example. Tester had a long history of abusing his wife Leigh Ann, whose 2002 OFP petition documented her fears that Tester would harm her or their daughter. In spite of this, Tester was granted unsupervised weekend visitation and it is during one of those weekends that he murdered his daughter and then killed himself.

The burden is on petitioners to document the basis for their fears, and it is important when preparing for hearings involving children to clearly articulate the threats and harm inflicted on children by the respondent. During the hearing, the petitioner's attorney can assist her to maintain her composure and assert her rights in the face of sometimes stern admonitions or seemingly unsympathetic questions from a judge.

In some cases, a respondent has had virtually no relationship with his children, but when an OFP is filed requests visitation in order to maintain contact with the petitioner and cause her greater fear. In others, the children have been abused, are fearful of the respondent, do not want contact with him, and contact is still allowed. Great care should be taken to prohibit unsupervised visitation and to ensure all visitation arrangements put the highest priority on safety for the woman and her children.

According to WATCH monitors, it was common for judges to encourage contact between a petitioner and respondent when there were children involved. Surprisingly, phone contact was suggested or urged in some cases where verbal threats were the primary form of abuse. In one Hennepin County case, the petitioner testified that the respondent called her incessantly, was verbally abusive, and said that she wanted nothing to do with him. The order was issued, but the judicial officer allowed phone contact to discuss their child. In effect, encouraging phone contact about the children when the petitioner is receiving verbal threats places the respondent's convenience above the petitioner's safety in a motion she initiated for her protection.

Counsel has the opportunity to speak privately with the petitioner prior to the hearing to discuss the types of visitation arrangements she feels would best protect her and her children from further harm. These discussions should include identifying friends or family members who could assist with third party exchanges, arranging exchanges in a public location rather than at her home, or using a supervised visitation center. Some battered women's advocacy programs provide this service and a listing of centers can be found at www.svdirectory.com.

Attorney resources

Minnesota offers many resources for attorneys to provide legal representation in the civil order for protection process. Advocacy services for women who are abused are available in most Minnesota counties. Advocates may have extensive experience in family court and may be able to assist the petitioner with safety planning, order filing, and services such as support groups or emergency shelter. If you are not aware of a program in your community, contact the Minnesota Coalition for Battered Women at www.mcbw.org or 1-800-289-6177 to find a program near you.

The Minnesota Coalition for Battered Women, 1-800-289-6177, also provides information for attorneys working with

battered women. Contact Liz Richards, Legal Program Coordinator, at lrichards@mcbw.org.

The Battered Women's Justice Project focuses on enhancing justice for battered women and their children in the civil legal arena by improving their access to civil justice options and quality legal representation in civil court processes. For technical assistance, contact the organization at www.bwjp.org; or 1-800-903-0111, x 1.

The Battered Women's Legal Advocacy Project provides legal information; consultation; training; litigation and legal resource support; and policy development assistance to battered women and to criminal justice, legal, and social service systems. The organization can be reached at www.bwlap.org; or 1-800-313-2666.

Chrysalis Center for Women provides pro bono representation for women petitioners in Ramsey and Hennepin Counties in addition to providing training to attorneys throughout Minnesota on the OFP process. Contact Heidi Rivkin, Safety Project Attorney or Liz Carlson, Family Law Attorney at 612-871-0118. The website is www.chrysaliswomen.org.

Need for representation

Family law attorneys play a key role in helping women find safe and effective routes out of domestic violence. Knowledgeable legal representation produces much better outcomes for OFP petitioners. Providing low cost or pro bono services through a local battered women's program is an important way to contribute to the well-being of women in your community.

About WATCH (sidebar to article)

WATCH is a volunteer-based non-profit organization founded in 1992 with a mission "to make the criminal justice system more effective and responsive in handling cases of violence, particularly against women and children, and to create a more informed and involved public." WATCH employs two primary strategies to achieve its mission: daily monitoring of court hearings combined with regular contact with justice system personnel about individual cases; and projects that closely review a particular court or type of hearing to document patterns that require a more systemic response.

WATCH began sending volunteers to monitor OFP hearings in family court in 1998, and in 2004, reviewed more than 300 OFP hearings in Hennepin County. We continue to monitor these proceedings on a daily basis. More information is available on WATCH's website at www.watchmn.org.

Regular court monitoring is an effective tool for holding the courts accountable to the public. There is growing evidence that the presence of monitors in court affects judicial demeanor and causes all parties to conduct themselves more professionally. In addition, advocacy with justice system representatives has spurred system-wide changes, such as improving safety for petitioners awaiting OFP hearings. If you are interested in learning more about how court monitoring works or in setting up a program in your county, please contact us for information and support at 612-341-2747, x 3 or watch@watchmn.org.

Notes

[1] In WATCH's 2004 study of Hennepin County OFP hearings, 89% of petitioners were female and 87% of respondents were male.

[2] §518B does not require that a hearing be held, and many counties, including Ramsey, allow the original *ex parte* order to remain in place for a year.

[3] Hennepin County Domestic Fatality Review Pilot Project Report, 2002.

[4] Minnesota Department of Human Rights.

Marna Anderson is the Executive Director of WATCH, a court monitoring organization dedicated to improving the justice system's handling of cases of violence, particularly against women and children. She began working on issues of violence against women in 1987 as an advocate with survivors of sexual violence. She has worked in domestic violence education programs in Central America and on human rights education in Minnesota.

Donna McNamara is the Development and Communications Director at WATCH. For three years, she was a volunteer community educator and board member for the sexual assault program in Cass County. She was the Education and Training Coordinator at the Sexual Violence Center of Hennepin County from 1987-1994 and while at the Victim Services Unit of the Minnesota Department of Corrections (1995-1998), developed the grants administration program for distributing federal Violence against Women Act Formula Grant funds in Minnesota.

A Lesson Learned from *Hilliker*

Rana SA Fuller

I bumped into a friend the other day that had some interesting insight in to the minds of the Court of Appeals panel who decided the *Hilliker* case.[1] She told me that the justices were very frustrated and upset with the decision that they had to make. She told me that the justices saw another way to have had a better outcome, a civil lawsuit. The justices felt that Ms. Hilliker should have filed a tort lawsuit against Mr. Miller BEFORE filing for child support.[2]

I find this idea interesting. When I first went to law school, I thought the idea of civil lawsuits against abusers was a good idea and something that more battered women should pursue. However, after learning more about what one gets from a civil lawsuit (money) and watching O.J. Simpson consistently dodge his responsibility to pay the judgment in his civil lawsuit, I became disenchanted. If someone like O.J. Simpson, who seemingly has the means to pay the judgment, can avoid paying after all these years, then how would anyone get Batterer Joe down the street to pay his judgment?

I have spoken to many battered women over the years who want to, "sue him!" I then explain that civil court is a place for money damages and that is about all you will get. I

would explain that if you win, you will have to get a court of law to say that the abuser abused you and that, within itself, may be good enough. However, lawsuits are expensive and if there is not much of an opportunity for money damages, hiring an attorney will be difficult. But now, thinking about this comment from the justices, I may have been missing the benefit of a civil finding of abuse could have in a family court arena.

Almost every exception in family law for domestic violence requires a "finding of domestic abuse." [3] However this "finding" is often unattainable. All counties, except for Hennepin, do not require a hearing on an Order for Protection (OFP) if the petitioner is: only asking for an order that restrains the respondent from further abusing the petitioner, excludes the respondent from the petitioner's home, excludes the respondent from the petitioner's place of employment and continues insurance coverage.[4] A hearing is, in general, only held when the respondent requests it or when the petitioner requests additional relief.[5] When an OFP is issued without a court hearing, the order does not qualify as a "finding of domestic abuse" and thus are not useful in obtaining the exceptions found in family law victims of domestic abuse. Even when a hearing is held, the respondent is given three opinions, agree to the order with a finding of abuse, agree to the order without findings of abuse or have an evidentiary hearing.[6] Many respondents chose to agree to the order without findings of abuse solely to avoid the implications it may have in family court. What all of this means is that the vast majority of OFPs are being issued without any type of "finding of domestic abuse."

Some victims of domestic abuse are able to obtain a "finding of domestic abuse" through a criminal conviction. However this is still problematic. First, domestic assault and rape are the crimes least likely to be reported to law enforcement in Minnesota. Most of those who experience these types of assaults say they let at least one incident go unreported.[7] The reasons victims do not call law enforcement are as varied as the individual. Some reasons can include fear of the perpetrator, fear the system will not take the incident seriously, the perpetrator is law enforcement, or the victim is simply physically not allowed to call or report the incident. Calling law enforcement does not always lead to a conviction or even a charge for domestic abuse. Domestic abuse cases are often not charged, plead down to disorderly conducts or the defendant is allowed to plead to a continuance without a finding, which means the defendant says he/she is guilty but if he/she follows all probation rules for the probationary period, the guilty plea is never entered and the case is dismissed. While all of these actions can be presented to the family court judge, rarely does it rise to the level of a "finding of domestic abuse."

So how does a victim of domestic abuse obtain the "finding" he/she needs to substantiate the exceptions available under the statute? Maybe one option is a civil lawsuit. The purpose of the lawsuit would not be for money damages, but simply for the "finding of abuse." Clearly a civil lawsuit for the purpose of a finding will not be an option for many victims of domestic abuse, but it should not be an option overlooked. The fact is these exceptions exist for a reason and we as attorneys need to be thinking of creative and innovative ways to get these exceptions to be applied. Many studies have found that witnessing domestic abuse can be damaging

to children.[8] Abusive intimate partners have inappropriate parenting styles and are 49% to 70% more likely to abuse the child if they abused their intimate partner.[9]

As attorneys we need to stop settling for court orders giving abusers joint custody because of the court's refusal to make their own "finding of domestic abuse." Civil lawsuits might be one of the solutions we are seeking. And if the victim of domestic abuse gets a little money and the attorney's fees paid from the suit, well that is just win, win, win.

Notes

[1] ***Hilliker v. Miller***, A05-1538 (Minn. Ct. App. May 9, 2006)(unpublished), ***review denied*** July 20, 2006, is a case that started as an action for child support, then included issues of custody and parenting time. At the crux of this case was Ms. Hilliker's assertion that Mr. Miller raped her and that is how Ms. Hilliker became pregnant. Ms. Hilliker argued that the court should have found that she was a victim of domestic abuse as defined under Minn. Stat. § 518B.01, subd. 2, because she was raped by Mr. Miller and they now have a child together. The lower court ultimately did not find that Ms. Hilliker was a domestic abuse victim as defined by statute and thus the protections available to abuse victims were not afforded to her.

[2] I would have argued that Ms. Hilliker should never have filed for child support in the first place.

[3] Domestic abuse exceptions exist in 3 forms, 1) alleged, 2) occurred and 3) finding. (emphasis in the following is mine)

Parent education classes, Minn. Stat. § 518.157, subd. 3. "If past or present domestic abuse, as defined in chapter 518B, is ***alleged***, the court shall not require the parties to attend the same parent education sessions and shall enter an order setting forth the manner in which the parties may safely participate in the program."

The best interests of the child, Minn. Stat. § 518.17, subd. 1(a)(12) "The effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has ***occurred*** between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent" and subd. 1(a)(13), "Except in cases in which a ***finding*** of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child."

Factors when joint custody is sought, Minn. Stat. § 518.17, subd. 2(d), "Whether domestic abuse, as defined in section 518B.01, has ***occurred*** between the parent." "However, the court shall use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has ***occurred*** between the parents."

Restrictions on creating parenting plans, Minn. Stat. § 518.1705, subd. 3(b), "If both parents do not agree to a parenting plan, the court may create one on its own motion, except that the court must not do so if it ***finds*** that a parent has committed domestic abuse against a parent or child who is a party to, or subject of, the matter before the court."

Restrictions on preparation of parenting plan, Minn. Stat. § 518.1705, subd. 6(a,) "Dispute resolution processes other than the judicial process may not be required in the preparation of a parenting plan if a parent is ***alleged*** to have committed domestic abuse toward a parent or child who is a party to, or subject of, the matter before the court. In these cases, the court shall consider the appointment of a guardian ad litem and a parenting plan evaluator."

Restrictions on preparation of parenting plan, Minn. Stat. § 518.1705, subd. 6(b), "The court may not require a parenting plan that provides for joint legal custody or use of dispute resolution processes, other than the judicial process, if the court finds that section 518.179 applies or the court ***finds*** that either parent has engaged in the following toward a parent or child who is a party to, or subject of, the matter before the court: (1) acts of domestic abuse, including physical harm, bodily injury, and infliction of fear of physical harm, assault, terroristic threats, or criminal sexual conduct;(2) physical, sexual, or a pattern of emotional abuse of a child; or (3) willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions."

Domestic abuse; supervised parenting time, Minn. Stat. § 518.175, subd. 1a(a), "If a parent requests supervised parenting time under subdivision 1 or 5 and an order for protection under chapter 518B or a similar law of another state is in effect against the other parent to protect the parent with whom the child resides or the child, the judge or judicial officer must consider the order for protection in making a decision regarding parenting time."

Move to another state, Minn. Stat. § 518.175, subd. 3(b)(8), "The effect on the safety and welfare of the child, or of the parent requesting to move the child's residence, of domestic abuse, as defined in section 518B.01." and (c) "The burden of proof is upon the parent requesting to move the residence of the child to another state, except that if the court *finds* that the person requesting permission to move has been a victim of domestic abuse by the other parent, the burden of proof is upon the parent opposing the move.

Additional parenting time for child care parent, Minn. Stat. § 518.175, subd. 8(3), "Whether domestic abuse, as defined in section 518B.01, has *occurred* between the parties."

Exceptions to Parenting Time Dispute Resolution, Minn. Stat. § 518.1751, subd. 1a(1), "One of the parties *claims* to be the victim of domestic abuse by the other party" or (2) "The court *determines* there is probable cause that one of the parties or a child of the parties has been physically abused or threatened with physical abuse by the other party."

Person Convicted of Certain Offenses, Minn. Stat. § 518.179, subd. 1(3), "The victim of the crime was a family or household member as defined in section 518B.01, subd. 2. If this section applies, the court may not grant custody or parenting time to the person unless it finds that the custody or parenting time is in the best interests of the child. If the victim of the crime was a family or household member, the standard of proof is clear and convincing evidence. A guardian ad litem must be appointed in any case where this section applies."

[4] Minn. Stat. § 518B.01, subd 5(b)
[5] Minn. Stat. § 518B.01, subd 5(b)
[6] *Bunda v. Bunda*, C5-97-570 (Minn. Ct. App. Jan. 6, 1998) (UNPUBLISHED) (Though both parties in this case agreed to the issuance of an OFP, respondent appealed because there were no findings and no hearing was held. When respondent agrees to the issuance of an OFP, the court does not have to hold an evidentiary hearing or make findings of abuse.)
[7] *Safe At Home: 2002 Minnesota Crime Survey*, Criminal Justice Statistics Center December 2003, 12.
[8] *See generally*, Bancroft, Lundy and Silverman, Jay, *The Batterer as Parent*, Sage Publications (2002).
[9] *Id.* at 42-43.

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Domestic Violence Wish List

Pat Trask

As the seasons change and we move into the Fall season, I find myself thinking about what I personally have been thankful for in the past months and generally in my life. As an attorney at a legal aid office, I don't have to reach very far to know intimately about situations that are sometimes far worse than any I ever experienced. As a survivor of domestic violence working with clients who are currently in the clutch of the terror that such violence provides, I am offered frequent reminders of how fortunate I have been and how far I have come since my own experiences had me numbed like the all-too-cliché deer in the headlights and frightened to believe it was not all somehow my fault.

I believe domestic violence affects every household in America. Statistics support this insofar as one out of three women have experienced domestic violence in their lifetime. These women carry the emotional and behavioral scars, no matter how faint, of a world gone crazy. Many of them grow up, if they experienced it as children, or move away, if the experiences were in their adulthood, or struggle on, if they have not yet been fortunate to escape the aftermath of the experience. I write this to those who consider themselves free of the violence, whether it is far back in their history or whether they believe they never experienced it, to attorneys and support staff who may find a victim in their midst, and to those others in our communities who consider themselves capable of doing good things. I write this from my observational perspective, so I speak of the female victims, but, although they are the primary victims of domestic violence, I acknowledge that children are victims, rich people are victims, Caucasians and non-Caucasians are victims, and they are all important, including the ones not identified here.

As an attorney, I am not a mandated reporter. If a woman comes to me and tells me of the most heinous sexual assault by her husband, I must keep my hand off the phone and not call the authorities. I do counsel the woman. I refer her to people and agencies that can assist her with her non-legal issues. These referrals can be to the police and to the county prosecutor, but more than likely they are to domestic violence advocates, shelters, food shelves, clothes closets, and support groups. I speak to her of legal issues and how to prepare paperwork, and I walk her through, in discussion, the legal process and expectations of what lies ahead as she seeks freedom from the pain that domestic violence inflicts upon a person.

Often, the women drop from communication after a meeting or two. I do not take this personally. Especially when my client is married, I take it very seriously, as they have, that the marriage vows are solemn and not to be torn asunder by what they may, at their stage of experience, consider a knee-jerk reaction. These women need time to process what they have learned through association with me. My advice often counters everything their abusive partner has told them. Of course, their partner has no interest in their emotional strength or independence. Their partners seek only to exert systematic power and control over the woman, not to

help her be a strong, productive part of a society that might take her from them, thus diminishing their power and domination of what they consider a right or a possession.

As I counsel the woman, I often hear statements that must have been confusing her. She will refer to all nature of laws and experiences that other people have told her about. Usually, none of the stories she has been told have any relevance to her situation, but as she struggles to find her equilibrium in her fight for independence, she does not know what knowledge to cling to and what to set aside or refuse to hear.

As the year draws to a close, I would like to see some changes made in the lives of all people who are either experiencing domestic violence or who are recovering from such experiences.

1. I would like to see all people be more aware of how they speak of family dynamics. When we speak lightly within our family, work and societal groups about how other people should expect non-respectful treatment because those other people drink too much, talk too loud, run with the wrong crowd, or for any other reason, the message we send to our listeners is that some people, with certain identifiable character flaws or weaknesses, deserve to be treated badly. When we pause to think that the groups of people most likely to hear these comments are our families and close friends, we are sending a dangerous message to those we might otherwise claim to care the most about. We create an atmosphere that inhibits our children and other younger relatives from sharing their concerns for their own safety within their relationships. If we speak this way in the workplace or in public, we encourage those who are disrespectful of fellow humans to continue in their disrespect, justified by our very statements.

2. I would like to see all people limit how often they take the law into their own hands by openly and carelessly continuing the tales of other peoples histories with the law. Such tales generally misrepresent the law to the listener who may feel desperate to learn their rights as they anticipate a change in their own circumstances and can inhibit their ability to ask about issues that they feel are settled issues in the law (regardless of whether they consider them settled for or against them). Here are some examples of casual conversations that can be very misleading. (The names are fictional, as are the specifics.)

For instance, the story of Uncle Fred being screwed by his ex-wife into paying child support (so she could afford the rent for herself and their four kids) sends the message that custodial parents should be impoverished if they have the audacity to leave the good Uncle Fred. Minnesota law contains guidelines for setting child support. Uncle Fred might consider himself screwed, but, in Minnesota, child support is every child's right and every parent's obligation. Some people consider it preposterous that a custodial parent paying for food, shelter and clothing for the whole family, including the custodial parent, is a legitimate use of child support. However, whether or not that same custodial parent is working, they are providing for the upbringing of that child, and should not be demonized for doing the best she can with the tools available to her at the time.

Other stories might refer to Stephanie from the Post Office, who lost her kids because she was on welfare. Such stories suggest that poor people are not good parents and should lose their kids. It ignores that Minnesota has a best interest standard spelled out in its statutes that guides *all* decisions as to custody. There must have been something

else going on in Stephanie's case that lead to her losing her case. Chances are, the real facts are embarrassing, stigmatizing, and unknown to most people not intimately associated with the legal process that resulted in Stephanie losing her children. Lack of work is not the reason it happened.

Cousin Al, who got divorced ten years ago in Colorado and had no children, quite likely has no similarity in circumstances that will help Andrea in 2007 in Minnesota who has a child who was born before she married her husband, but who is the child of the husband. These differences seem to escape most story tellers.

3. I would encourage all people to become engaged in conversation within their families and within their communities, however they consider those communities to be constructed, on the issues facing victims of domestic violence. This may involve asking a speaker knowledgeable on the subject to speak to a group, or holding our tongues and our judgment when someone shares a difficult secret with us until we can ask what the speaker needs from us. This will involve new ways of observing and listening to other people. This may involve admitting we do not have the answer, but we might know someone who can help. This may involve speaking out when someone tells a bad joke that demeans any recognizable group of people or any activity, and telling the joke teller that we do not appreciate hearing that type of joke in our presence.

Help your clients and your communities find some peace in the coming year. Learn about one new resource in your community that understands domestic violence and works with victims of domestic violence. If you suspect someone you know has experienced domestic violence, and you feel helpless with the knowledge, have the courage to say to them, I would rather risk offending you than fail to refer you to someone who might help you. You might be surprised at the change you bring about within your community.

Pat Trask is an attorney who adopts a holistic approach to assisting victim-clients through her practice of law and who speaks openly on the subject of domestic violence in order to help enlighten those who hold negative stereotypes of victims and survivors of domestic violence.

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An Order for Protection is Only the Beginning

Elizabeth Henderson Shreve

An order for protection is only the beginning. That's what I used to tell domestic violence survivors who called the various crisis lines where I've worked over the years. I think I may have read it in a training manual somewhere. It's not exactly an original statement. After a short while, I had to change my words. An order for protection may not be the beginning at all. It may come in the middle of a survivor's journey through the legal system, or it may come at the end. Or it may not even be part of the journey, except as an option that is quickly rejected as unsafe, unattainable, unenforceable or just too complicated.

Realizing that an OFP may not help every survivor of domestic violence meant I had to change the focus of my advocacy. I worked primarily as a legal advocate, helping women navigate the criminal and civil justice systems. As Stephanie Avalon describes in her review of the limitations of advocacy within the legal system, being a legal advocate meant that I tended to see legal remedies to individual women's situations.[1] Like most of the attorneys I worked with, I had – and still have – faith in the legal system to provide a measure of justice and safety. What I had to change was not my admittedly limited faith in a limited system, but my understanding of how domestic violence and the legal system come together in survivors' lives. Whether or not they ever chose to file for an OFP, the survivors I worked with needed to know about those legal remedies that I could see so clearly, and they definitely needed the legal expertise and services of the attorneys I kept calling for legal advice. We needed to look beyond the OFP, beyond the formal remedies, to see that the domestic violence our clients survived would change the entire course of their interactions with attorneys, judges, courts and advocates.

Violence, power, and abuse

When advocates define domestic violence, we are talking about a pattern of controlling behavior, enacted over time. Physical violence and threats of physical violence such as those defined in §518B.01 are only part of the picture. They are some of the means by which an abusive partner maintains the power and control in the relationship. A host of abusive behaviors are legal and are not grounds for either criminal intervention or the issuance of an order for protection. Survivors frequently tell us that the emotional, psychological and spiritual abuse are the most damaging tactics used by their abusers. The effects can be long-lasting, and include everything from physical symptoms (gastrointestinal problems, chronic pain, headaches) to an eroded sense of self-esteem and difficulty trusting other people. The physical violence and the implicit or explicit threats of more violence to come may create fear for her physical safety, but the name-calling, belittling, mind games (for example, an abuser who rearranges all the furniture then insists that nothing has changed when his partner comes home from work) and threats to win custody of the children are all equally important to the survivor's experience of the abuse.

Each tactic, legal or illegal, maintains the imbalance of power in the relationship. Most survivors have been placed in a position of relative powerlessness as compared to their abusers. They have not surrendered power, but had some of it taken by physical force and have had to fight, sometimes literally and with varying degrees of success, to maintain the rest.

Risk

None of this happens in a vacuum. The imbalance of power and threat of physical violence create very specific risks – assault, injury, death – for a victim or survivor of domestic violence. These are the risks that Jill Davies, Eleanor Lyon and Diane Monti-Catania term batterer-generated risks.[2] They may also be the risks that the law is best equipped to address. The criminal and civil justice systems can hold a batterer accountable for physical violence and direct threats. In family law, this is where the OFP process comes in. It is clearly designed to address the risk the batterer poses to the survivor by providing a (relatively) safe home and minimizing or completely cutting off all contact with the abuser. There are, however, other risks, which Davies *et al* call life-generated risks.[3] These are the risks posed by poverty, neighborhood violence, clinical depression, lack of affordable and safe housing, substance abuse….It's a long list, and it probably looks familiar. Radhia Jaaber and Shamita Das Dasgupta categorize life-generated risks even further, looking at social risks at a personal level (poverty, language barriers, age or illness), an institutional level (negative involvement with the legal system, child protection, housing authorities) and at a cultural level (more amorphous risks posed by religious beliefs, cultural norms and standards, concepts of honor and unity within the family).[4] In this laundry list of social or life-generated risks, the legal system – both criminal and civil sides – is a risk, not a solution. An OFP may help minimize some social risks by mandating continued medical insurance or documenting a mother's efforts to protect her children from abuse, but it will offer little in the way of protection from other social risks such as estrangement from family members, the economic difficulties of finding a better-paying job, or the chronic insomnia of a worried mother.

An OFP could help or it could hurt an individual survivor, and so could any other legal interaction, including the first consultation with a family law attorney or the first intake conversation with a legal advocate. When a survivor walks into our offices, she's often not sure if we're going to help her or hurt her, or if the legal system itself holds any answers at all for her. When we focus solely on the legal problem at hand while minimizing the risk she is taking simply by talking to us, we won't address the full problem. We certainly won't understand her decision to forgo an OFP if we only look at the legal benefits it will give her, and overlook the social costs the process may have for the survivor. Will she risk separation from her community if she files this divorce petition? Will she lose too much sleep, making her job performance suffer and putting her livelihood in jeopardy? Will she risk alienating her abuser's mother, who could be a valuable ally and may be able to apply some familial pressure to get her son to end the relationship with a degree of dignity and minimum of abuse? What solution will the legal system offer her to address those fears?

Power, justice and the law

What do these social risks and considerations mean for your interactions with a family law client? The ongoing dynamics of abuse, including both the imbalance of power and the extensive risks faced by the survivor, will continue to shape her interactions with you, with me, and with every other helping professional she encounters. For one thing, as people working in and around the civil legal system, we are associated with the system itself – with its power, the risks it poses and with its elusive promise of justice. Most of the women I've worked with over the years have needed both power and justice. That's not in doubt. The tricky part is figuring out how the legal system – and how I – can help her feel in control of her own life, and like she's received some justice.

For some survivors, the mere fact of involvement in a legal case is unavoidable and feels like yet another requirement from an already demanding system. Many survivors don't get to choose to avoid the legal system. There are myriad ways survivors of domestic violence end up in family court, having completely bypassed the OFP option. Their batterers get arrested, a criminal no contact order is issued and the defendant is removed from the home, and suddenly survivors are faced with the practical necessity of getting some kind of child support. The only enforceable way to do that is through a court order. If a survivor is forced to receive public assistance, chances are good that the county will initiate a child support action against the father of her children. In other cases, the crime of domestic assault is never reported and the criminal side of the justice system is never involved. A survivor may simply choose to end her relationship and rely on her community to support and protect her. If she is legally or financially entangled with her batterer, she will likely find herself in family court at some point. If she doesn't file an action, her batterer can start proceedings. For those survivors, the family court is not just the last bastion of justice – it's the *only* one. That's a lot to take on in an initial case consultation.

Since domestic abuse is by definition a misuse of power, it's safe to assume that a survivor of domestic violence has felt powerless more than once. People react to powerlessness in many ways. Some are passive and wish you would simply take control of the case because they have too many other problems to manage. Others are aggressive in their pursuit of their rights and a sense of justice, looking for some legal recognition of the abuse they've survived. Some are irritating or defensive. Most are trying to minimize the risk of losing more power and may be unsure of the legal system's ability to help, especially if they've had negative experiences with prior court actions in family court, child protective services or criminal court. As family law practitioners (or in my case, as an advocate), we already have more perceived power than our clients, and our interactions with clients will be colored by survivors' past experiences of powerlessness. They may give us too much information (the entire story of their relationship, for example) or too little (such as not disclosing their use of alcohol or drugs to self-medicate) because they're not sure how much they can trust us.[5]

Each extreme can be a strategy for the survivor's own self-protection and is likely based on her assessment of the risks generated by her batterer, by life and by the legal system. Taken out of context, a survivor's strategy for seeking justice can

seem improbable and unreasonable, and can contribute to her loss of credibility with family law practitioners. Worse, her strategies may also contribute to her loss of credibility in the courtroom, which in turn contributes to her distrust of the legal system as a potentially positive factor in her life. A survivor (let's say she never filed an OFP but has told you about a history of abuse in her marriage) may call you every week to check on your progress on a fairly simple discovery motion you're preparing in her divorce. Not only are her constant calls expensive for her, it's tempting to view them as a sign that she lacks confidence in your abilities, or as a kind of borderline obsessive behavior that won't help her out at trial. Viewed in context of the abuse, however, the calls may be based in her fear that her ex will make good on his promise to hire a "better" attorney and make sure that he remains in the marital home. This batterer-generated risk converges with the life-generated risk of her inability to find new affordable housing near her job. She may see the divorce action as her only option for keeping her job and her home. Her fears may escalate with time, as might the mutual frustration between attorney and client. It's an example I offer up because advocates are not immune to similar scenarios. When we view the survivor's calls only in light of the legal action, they can certainly be annoying. When we view them in context of the survivor's *life*, they're understandable, if self-defeating, attempts at regaining power over her own destiny. As the practitioners in the case, we can offer empathy and some context, thereby defusing the situation and creating a more cooperative relationship with the survivor.

Understanding the context of a survivor's decisions – and the forces outside the scope of the family law system that exert pressure on a survivor – may not always change your legal strategy in the short run. But it can drastically change your relationship to family law clients who are survivors of domestic abuse. When I started to look beyond the formal remedies available to my clients, I found that they had unexpected resources as well as risks in their families and communities. I also found an increased level of trust with my clients, and when I did focus in on legal options, survivors could honestly evaluate those options and make informed choices. I hope and believe that by acknowledging the limitations as well as the promises of the legal system I can increase survivors' trust in that legal system. One way or another, with or without an OFP or even a divorce, I hope that survivors find a little less risk and some measure of justice.

Notes

[1] Avalon, Stephanie. "Remembering who we work for." *The A-Files*. Washington State Coalition Against Domestic Violence. October, 1999. This article examines the limitations and promise of advocacy from within the legal system. It can be downloaded under the revised title "Advocacy and the battered women's movement" from the Battered Women's Justice Project at https://data.ipharos.com/bwjp/documents/Advocacy%20and%20the%20Battered%20Women's%20Movement.doc

[2] Davies, Jill, Eleanor Lyon and Diane Monti-Catania. *Safety planning with battered women*. Thousand Oaks, California: Sage Publications, 1998. This is v.7 in the Sage Series on Violence Against Women. The authors propose a model of woman-centered advocacy that acknowledges battered women's concerns that do not directly originate from domestic abuse.

[3] *Ibid.*

[4] Jaaber, Radhia A. and Shamita Das Dasgupta.

Assessing the social risks of battered women. Published online at http://data.ipharos.com/praxis/documents/AssessingSocialRisk.pdf. This article provides an overview of how battered women's decisions are influenced by social risks, and how these risks interact with the domestic abuse itself.

[5] For more on specific ways traumatization can affect attorney-client interactions, see the *Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases of the ABA. While the standards are intended for protection order hearings, many of the standards and comments can be useful in general family law practice. Standards and commentary can be downloaded from http://www.abanet.org/domviol/home.html.*

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Prior to joining Alexandra House, Ms. Henderson Shreve worked in the Legal Assistance for Women Program at Chrysalis, where she collaborated with advocates and corporate attorneys to provide pro bono representation to low-income battered women seeking protective orders. Ms. Henderson Shreve worked as a legal and medical advocate in Minnesota and California, and is a member of the refugio relief staff at Casa de Esperanza, a Latina domestic violence agency in St. Paul. She is also involved in the arts, particularly modern dance, and she is learning the Argentine tango.

The Immigration/Refugee Experience in the Family Court System

Ana Lisa Peña

Introduction

The immigration system, its laws, and its regulations are extremely complex and change frequently. What is true today may not be true tomorrow. The goal of this piece is to assist family law and other non-immigration practitioners to develop an awareness of the issues facing immigrant and refugee clients, as well as some of the special relief available to them, so that we are all better able to provide effective services to this client group and thus increase access to the justice system for all individuals in Minnesota.

This article will first present a much-abbreviated overview of certain forms of special immigration relief available to immigrant victims of domestic violence and violent crimes to aid practitioners in screening clients for eligibility under these forms of petitions. The article will next address the barriers to immigrants and refugees that any interaction with the judicial system, law enforcement or agency may present. An understanding of these barriers and some of the motivations underlying them is key to identifying the specific services that immigrant and refugee clients require.

For the sake of ease, this article will use the term "immigrants" to refer to all those individuals who wish to become lawful permanent residents (LPRs), or green card holders, in the United States. Individuals entering or in the United States may seek to obtain LPR or green card status through many types of petitions or applications.

Among them, employment based petitions, applications as religious workers, applications as refugees or asylees, through family-based petitions, or any number of special categories such as NACARA (Nicaraguan Adjustment and Central American Relief Act), HRIFA (Hatian Refugee Immigration Fairness Act), and the Diversity Lottery Program.

In addition to the above-mentioned, there are four significant forms of specific relief, or visas, available those immigrants and refugees who have suffered domestic violence or some violent crimes. Immigration relief for victims of domestic violence and violent crime is one of the only areas within the spectrum of immigration law in which more relief has been created by Congress in recent years. In this area of immigration law, the Congress has indicated its intent to foster greater access to and encourage cooperation with and from law enforcement and prosecutorial authorities.

The *battered* (a term of art under the immigration laws) spouse, child, or parent of a United States citizen or Lawful Permanent Resident may seek lawful status under the Violence Against Women Act; a victim of certain types of violent crimes who has cooperated with law enforcement authorities may seek to regularize his or her status under the "U" visa statute; and victims of severe forms of trafficking in persons may be eligible for the "T" visa. Finally, juvenile immigrants or refugees who have suffered abuse or abandonment may qualify for special immigrant juvenile status (SIJS).

The VAWA Self-Petition

A "Self-Petitioning" process for victims of domestic violence was created under the Violence Against Women Act (VAWA) whereby victims of domestic violence whose immigration status is tied to the perpetrator of abuse may apply to continue through the immigration process independent of that abuser. In addition, The *Violence Against Women Act*, passed in 1994 and reauthorized in 2000 and 2005, provides numerous protections for battered immigrants (women, men, children, and in some instances, parents) related to safety and confidentiality.[1]

The Self-Petitioning immigrant must show the following to be eligible for relief: battery or extreme cruelty to one's self or one's child; good moral character (another term of art within the immigration law; a United States citizen or lawful permanent resident spouse or parent; good faith marriage to the abuser.[2] Note that to be eligible to Self-Petition, an immigrant does not have to have to be "in status" or "documented." Neither is an immigrant required to remain married to his or her abuser, in fact, no cooperation from the abusive spouse of any kind is required to file a Self-Petition.[3]

The "U" visa Statute

The "U" visa was created by Congress with passage of the *Victims of Trafficking and Violence Prevention Act of 2000* (TVPA).[4] The TVPA was intended to protect victims of serious crime who gathered the courage to come forward, report the crime, and assist in its investigation and prosecution.[5] Thus the purpose of the "U" visa, as expressed by Congress, is to (a) strengthen the ability of law enforcement to investigate and prosecute crimes, and (b) to provide humanitarian relief to crime victims and their family members in the United States.

Under the "U" visa statute, there is no requirement that an abuser is a U.S. citizen or lawful permanent resident, and there is no requirement that a victim is or was legally married to the abuser. Thus, the U visa is

accessible to all those victims of domestic violence, sexual violence, or certain other crimes, who are not eligible for the VAWA visa due to lack of a legal marriage to a U.S. citizen or lawful permanent resident.[6]

There are four basic requirements under the "U" visa statute. They are: that there be "substantial physical or mental abuse" to the crime victim arising from the criminal activity; that the crime victim possess information concerning the criminal activity; a Law Enforcement Certification; and that the crime victim "is being, has been or is likely to be helpful" in the investigation or prosecution of the crime.[7]

The "T" Visa

Victims of "severe forms of trafficking in persons" may be eligible to apply for the "T" visa. The "T" visa allows these victims the possibility of remaining in the United States so that they may assist federal authorities in the investigation and prosecution of human trafficking cases. The special "T" nonimmigrant status may be self-petitioned by the victim directly, or a victim of trafficking may be issued "continued presence," a process initiated by a federal law enforcement official.[8] The "T" visa and continued presence certification are only available "if the victim was subjected to a severe form of trafficking in persons." [9]

The "T" visa provides potential eligibility to individuals who have experienced trafficking in the commercial sex context, as well as in the context of forced labor. The statute states that eligibility hinges on activity in which a commercial sex act is induced by "force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age," **or** in which the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, "through the use of force, fraud, or coercion" occurs "for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." [10]

Special Immigrant Juvenile Petitions

Juvenile immigrants in the United States may be eligible for special immigrant juvenile status (SIJS) under the following circumstances: if they are or have been neglected, abandoned, or abused; if they are eligible for long-term foster care; if they are already a dependent or ward of the court or a state agency; if it is not in the best interests of the juvenile that he or she is removed from the United States; and if that court or state agency retains jurisdiction of the juvenile until obtains legal status.

Ushering an eligible juvenile through the SIJS process is generally extremely time consuming, littered with beaurocratic hurdles, and requires near constant collaboration with state or county officials, foster parents, social workers, prosecutors, and the courts.

These four forms of immigration relief are particularly important mechanisms as these reflect Congress's efforts to allow victims of domestic violence and violent crime (whether perpetrated by an intimate partner, a parent, or a child) to proceed legally through the immigration process independent of the perpetrator. They are potentially very complex, time-sensitive processes which generally require the expertise of an immigration practitioner.

Barriers and Fears

Immigrants face several potentially overwhelming barriers which frequently prevent them from asserting rights in the family law context, from accessing victim safety programs and services, and prevent perpetrator accountability in refugee and

immigrant communities in Minnesota and throughout the country.

> Language, culture and immigration status exacerbate the level of violence, block victims from access to information about legal remedies, and complicate their efforts to obtain the relief they need to end the violence. Culture, religion, socio-economic, and immigration status do not determine whether domestic violence will occur, but rather influence what barriers a battered immigrant women [sic] must confront, what relief she will need to obtain from the legal system and other sources, what should be included in her safety plan, what threats the abuser will use against her, and what excuses the abuser will use in an attempt to justify his violence.[11]

Minnesota Advocates for Human Rights' 2004 report entitled *The Government Response to Domestic Violence Against Refugee and Immigrant Women in the Minneapolis and St. Paul Metropolitan Area: A Human Rights Report*, clearly articulates key barriers and fears faced by immigrants.[12] They are: language barriers and inadequate access to interpretation services; barriers within immigrant communities that impede judiciary effectiveness; fear of government institutions and immigration authorities; obstacles in the law and implementation of the law (screening issues); and inadequate funding of necessary programs and services.[13]

Language barriers have historically presented the most significant obstacles to immigrants seeking protection from the judicial system and seeking services. Government agencies that receive federal funds are required, under Title VI of the Civil Rights Act, to provide trained, neutral interpretation services for those "limited English proficiency" (LEP) individuals that they serve.[14] However, the practical difficulty of having trained, neutral interpreters in a growing number of languages available within each agency prevents many immigrants from communicating safely and well with many types of officials. Anticipation that one will not be understood (or be able to understand forms, personnel, or processes) also serves as a deterrent to may immigrants and refugees who may be eligible for any number of services including medical care, safety planning, public assistance, or legal assistance.

In light of recent enforcement efforts, fear of deportation and reporting between government agencies and service providers to the Immigration Service (United States Immigration and Citizenship Services, or U.S.C.I.S.) may now be the most significant barrier to the justice system faced by immigrants. This fear alone prevents many eligible immigrants, or immigrant parents of eligible United States citizen children, from even attempting to apply for programs or services.

Given the current atmosphere in which these fears are heightened, facilitating confidential, fluent, and neutral communication with any potential client is vital. Without gaining the trust of an individual, and without the ability to literally understand his or her needs, important issues may go undetected and individuals may not receive the best legal advice given their circumstances; worse, they may not even seek it out.

Barriers within immigrant communities also sometimes impede access to legal services as well as the effectiveness of those services.

Many immigrant communities bring to the United States a fear of government institutions and authorities. Such trepidation, or even fear, may be well founded in an immigrant's country of origin, and may have served her well prior to emigration. There are also immigrant cultures in which the traditional manner of handling disputes, particularly domestic disputes, is within the community itself, for instance by a group of elders. Trust, time, and again, clear communication, will encourage members of these communities to seek to resolve disputes through the justice system.

In addition to these obstacles that present themselves from the "immigrant side" are those presented by the justice system, such as obstacles in the law and implementation of the law, screening issues within agencies, law enforcement and service programs, and inadequate funding of necessary programs and services.

I would add that there is also substantial fear of retaliation from employers and from opposing parties on the part of immigrants seeking assistance or to enforce rights through the justice system. I have learned anecdotally from clients over and over again that their opposing party has threatened to report them to immigration authorities (whether my client has legal immigration status or not). Clients have also frequently sought assistance where opposing parties have used these clients' lack of legal immigration status as leverage to coerce them into foregoing services or the assertion of certain rights, most frequently in the custody and child support context

Furthermore, both citizen and non-citizen abusers routinely misinform victims with respect to their rights in the United States. For instance, perpetrators often claim that a non-citizen cannot obtain child custody from a U.S. court and that an attempt to do so will result in a complete loss of custody "because I have more rights than you do – I am a U.S. citizen." Perpetrators often claim that an attempt to initiate a legal action for custody or a child support application will result in the non-citizen's deportation, or the child's deportation if the child is undocumented.

Counsel who raise the immigration status of a non-citizen in an inappropriate context legitimize fears that the civil system is not a source of justice for immigrants.
This is especially true given that immigration status has no direct bearing on parental rights. Though one's immigration status may be considered indirectly, for instance in the evaluation of the best interest factors when making a custody determination, that immigration status unto itself is not a detrimental factor under Minnesota law.

Similar dynamics apply to an immigrant victim's fear of the police and the judicial system. Abusers frequently tell victims that the police will not help them if they are undocumented, that police will not be able to understand them, or that calling the police will result in their deportation. Immigrants may come from countries where police are instruments of repression, respond only to bribes, or believe women should be subordinate to men. Reports of police helping to enforce the immigration laws by arresting, detaining, and referring immigrants to Department of Homeland Security (DHS) personnel undermine or eliminate any trust immigrant communities might have in the police.

Immigrants' Practical Experience in Minnesota Civil Courts

With respect to entering the law enforcement or judicial systems in Minnesota, all of the

above-referenced barriers are at play, together with a general lack of knowledge, on the part of immigrants, of the laws and forms of relief and assistance available from law enforcement and from the courts.

In my practical experience in the district and family courts throughout Southern Minnesota, judges and magistrates in the civil courts are not likely to pursue information about parties' immigration status unless an individual's status directly affects the issue before that judge or magistrate (for instance, in the child support context, discussed below). With some frequency, however, opposing parties and/or counsel will bring in individual's immigration status to the attention of the court through filings, oral arguments, or through testimony. Under these circumstances, one's immigration status is most likely irrelevant and beyond the scope of the matter before court. In addition, civil courts hearing family law matters generally do not have jurisdiction to make determinations regarding immigration status.

A clear explanation of these facts to immigrant clients often helps to assuage fears of reporting and deportation, in addition to a clear explanation – if confirmable – that I.C.E. (Immigration and Customs Enforcement) officers are not present in court rooms or court houses.

Common Family Law Issues

In the civil courts, immigrants are urgently in need of greater access to the justice system and to legal services both private and public, or non-profit, for the purpose of asserting rights in the areas of domestic abuse, custody and child support.

In addition to all of the deterrent barriers and fears addressed above, immigrant clients are becoming increasingly aware that a conviction under Minnesota law for domestic assault could very likely lead to the deportation of the perpetrator. Though many victims of abuse require safety, they are unwilling to seek a legal remedy that will likely lead to the deportation of the perpetrator for several very rational reasons. The perpetrator may be the primary source of income for the victim and her children, or be the only adult family member who holds legal immigration status, for example. Under such a circumstance, a victim of domestic abuse can achieve safety only by removing any legal source of income for herself and her children from the United States.

In the context of custody arrangements, individuals, as in the population in general, will often make agreements outside of court. However, in situations involving immigrants, perpetrators hold additional leverage derived from threats against a victim's immigration status. Custody arrangements are often driven by a perpetrator's desire not to pay child support.

In Minnesota, there is at least persuasive case law which stands for the proposition that individuals working extra-legally, or who are undocumented but working nonetheless, are still obligated to pay child support. It is the case under federal law that undocumented workers must pay taxes on income earned in the United States.[15] The obligation to support one's own children, it is argued, is at least as enforceable as the obligation to pay taxes. The courts have confronted and upheld this policy, requiring undocumented workers in Minnesota to pay child support. Judge Michael F. Fetsch of the Ramsey County District Court, on review from a Child Support Magistrate's decision, ruled that an undocumented worker should not be excused from his child support obligation based on his immigration status. This based upon the

rationale that one's official immigration status does not trump the reality that undocumented workers obtain and maintain employment in the United States quite regularly.

Conclusion

Working with immigrant clients in the family law context presents a range of nuanced issues of which to aware. The potential issues are complex, and often hinge on whether an opposing party will make a particular telephone call, or whether officials will perceive a United States citizen as more credible than an individual with limited English proficiency who more recently arrived in the United States.

A keen awareness of the barriers faced by many immigrants as they travel through agencies and service providers, the civil courts, and the justice system in general, can help practitioners build trust and understand the true needs and motivations of clients, and thus better serve them. Developing a working relationship with a local immigration expert who can answer questions about how best to assist immigrant clients is a crucial and invaluable first step for most practitioners.

Notes

[1] Pub. L. 103-322 (Sept. 13, 1994); H.R. 3402 (VAWA Reauthorization 2005, Signed into law Feb. 8, 2006); See, Comparison of VAWA 1994, VAWA 2000 and VAWA 2005 Reauthorization Bill, National Coalition Against Domestic Violence, Jan. 16, 2006.

[2] Spouses must file within two years of legal termination of marriage or the death of the United States citizen or lawful permanent resident.

[3] Pub. L. 103-322 (Sept. 13, 1994); H.R. 3402 (VAWA Reauthorization 2005, Signed into law Feb. 8, 2006); See, Comparison of VAWA 1994, VAWA 2000 and VAWA 2005 Reauthorization Bill, National Coalition Against Domestic Violence, Jan. 16, 2006.

[4] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 Division A, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 22 U.S.C.); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193. *See* at INA Sec. 101(a)(15)(U); 8 U.S.C. 1101(a)(15)(U).

[5] The VAWA Manual, Immigration Relief for Abused Immigrants, 2005 Ed., page 13-1, Catholic Legal Immigration Network, Inc., Immigrant Legal Resource Center, San Francisco, California, found at www. ilrc.org.

[6] The crimes included in the U visa statute at INA Sec. 101(a)(15)(U) are: Rape, Torture, Trafficking, Incest, Domestic violence, Sexual assault, Abusive sexual contact, Prostitution, Sexual exploitation, Female genital mutilation, Being held hostage, Peonage, Involuntary servitude**,** Slave trade, Kidnapping.

[7] *See* INA Sec. 101(a)(15)(U).

[8] 8 C.F.R. § 214.11(a). Refers to any federal law enforcement agency that has the responsibility and the authority for the detection, investigation or prosecution of severe forms of trafficking in persons. *See, Identification and Legal Advocacy for Trafficking Victims*, 2nd ed., March 2005, prepared by NYC Anti-Trafficking Network Legal Subcommittee, accessed July 2006, at http://www.nyc-anti-trafficking.com/assets/docs/trafficking_ manual_03_2005.pdf.

[9] *Overview of Department of Justice Procedures Regarding Cases Involving Trafficking in Persons*, U.S. Department of Justice, Civil Rights Division, July 29, 2003.

[10] INA § 101(a)(15)(T), 214(n), 245(l).

[11] Leslye E. Orloff and Rachel Little, *Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women* (1999), available at www.vawnet.org.

[12] Molly Beutz, Aviva Breen, Mary Ellingen, Robin Philips, Christine Tefft, Cheryl Thomas, *The Government Response to Domestic Violence Against Refugee and Immigrant Women in the Minneapolis and St. Paul Metropolitan Area: A Human Rights Report* (Dec. 10, 2004), available at www.mnadvocates.org.

[13] Id. At page 9.

[14] 42 U.S.C. § 2000(d); 28 C.F.R. § 42.104 (1964). Under Executive Order 13,166, recipients of federal funding are required to take reasonable steps to ensure meaningful access to their programs and activities by LEP individuals in order that such programs and activities "do not discriminate on the basis of national origin in violation of Title VI." Executive Order 13,166 65 Fed. Reg. 159 (Aug. 16, 2000). 67 Fed. Reg. 19237, 19240 (April 18, 2002) specifically discourages the use of family members, friends or neighbors as interpreters.

[15] *Zamora-Quezada v. C.I.R.*, 1997 WL 663164 (U.S. Tax Ct. 1997); James v. U.S., 366 U.S. 213 (1961).

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Representing Alleged Domestic Violence Perpetrators

Sonja C. Larson

In recent years, the family law community has sought to define zealous and ethical representation for victims of domestic abuse. However, questions remain surrounding the definition of zealous and ethical representation when defending alleged perpetrators of abuse. There is a growing belief in the field of family law that attorneys for abusers have a heightened duty to protect the victim by avoiding unnecessary litigation, managing their client's behavior in court, and warning the victim if the attorney believes there is a significant threat of harm. This article discusses these emerging beliefs and examines how an attorney can incorporate them into practice.

While an attorney representing an abuse victim has a duty to thoroughly address issues of domestic violence ranging by properly screening, taking steps to ensure safety, and determining how the abuse will affect other aspects of the case, all of the duties are clearly consistent with "zealous advocacy." An attorney representing the alleged abuser has a more complex role which includes not only zealous representation of the client, but a duty to understand the cycle of domestic violence and recognize how it may influence the client's behavior.[1] The issuance of an OFP is often the first step for the victim when he or she decides to leave an abusive relationship. This point is the most dangerous time for the victim as "more victims are killed in the process of leaving than at any other time." [2] Attorneys for the alleged abuser should be especially vigilant at this time to possible threats of harm to the alleged victim.

Domestic abuse is used as a mechanism for control. When the mechanism for control is

taken out of the relationship due to an OFP, the legal process, through the courts and attorney, is often the easiest available replacement. This can be accomplished though excessive use of the court and by communicating through the attorney.

While issues of domestic violence often arise out of larger family court cases involving dissolution and/or child custody, an attorney representing a person with a history of domestic violence has a heightened duty to examine the client's requests for motions and other court actions beyond the general frivolity standard. Compartmentalization of abuse or minimizing its effect on issues of custody and support occurs with victims' advocates when the attorney fails to address how the pattern of abuse affects the other issues in front of the court.[3] An attorney for the abuser or alleged abuser similarly compartmentalizes the abuse when he or she does not consider how the abusive pattern factors into the decision the client makes regarding the entire case.

For example, in child custody actions, men who batter are two times more likely to seek sole custody than those who do not.[4] While it is not unusual for a client without a history of abuse to seek full custody or fight for or against support out of anger or spite, or for a client with a history of abuse to seek full custody or fight for or against support for justifiable reasons, the attorney should be mindful of the influence of the abusive relationship when discussing options with the client and making decisions about the case.

While a client's motive may be based upon winning their motion in court, sometimes the motive is merely to elicit control. For example, additional motions result in additional court time, providing the abuser with the only opportunity to be near the victim without being in violation of the OFP. In addition, the abuser now has the ability to regain some control over the victim's life since the victim will be required to be in court for the proceedings and must expend financial resources by hiring an attorney and missing work. While an attorney should not immediately discount his or her client's wishes, an attorney should remain cognizant of the pervasiveness of the abusive relationship when making decisions about the case.

While protective orders may prohibit direct and indirect contact between the abuser and victim, they often direct that all communication go through the attorneys involved. Generally, this is the most pragmatic way for the parties to communicate about children, finances, and other pertinent issues in question. Most communication is innocuous, such as when to pick up the children at school or when a bank account will be accessed. Is there a point though, where communication, not abusive on its face , becomes a form of harassment thereby violating the OFP? While transmitting a message from the abuser to the victim through a third party such as a relative or friend would be an obvious violation of the OFP, at least one state, Hawaii has included attorney communication in this prohibition stating that "[t]he order shall not only be binding upon the parties to the action, but also upon their officers, agents, servants, employees, attorneys, or any other persons in active concert or participation with them." [5]

Most states, Minnesota included, do not expressly prohibit communication through the attorney and, in fact, expressly order that all communication transpire though the attorney. While obvious abusive language would not be permitted to pass between the parties through the attorney, is there a limit to

the frequency or to the degree that the communication could be perceived as abuse to the victim? While not required, communication should be carefully considered in these circumstances.

While an attorney has a duty to ensure that his or her actions do not perpetuate the abusive relationship of the parties, what duty does an attorney have if he or she learns from the client that client intends on harming the opposing party?

The Minnesota Rules of Professional Conduct Rule 1.6 (b) states: "A lawyer may reveal information relating to the representation of a client if: (6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm." In comparison to other states, such as Tennessee, that have adopted a mandatory reporting policy, Minnesota has no requirement to warn of serious danger, rather the option to do so.[6]

While the legal community continues to debate whether the necessity of protecting a person from harm outweighs the negative effects on the attorney/client relationship, many believe that a lack of a duty to warn leaves Minnesota attorneys open to potential tort liability. Critics argue that if attorneys are merely permitted, rather than required, to report, more attorneys will decline the decision to disclose. In states where a mandate to warn exists, studies confirm that lawyers are still more likely to adhere to the confidentiality of the client than to the safety of the third party.[7]

However, some suggest that, with or without mandatory reporting, attorneys should consider tort liability when deciding whether to warn a third party from harm.[8] The quintessential duty to warn case, *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), dramatically changed the confidentiality practices of the mental health profession which established a duty to warn third parties.[9] Extending such a standard to attorneys would require that attorneys develop adequate tools for recognizing imminent threats of harm and alert the appropriate people. The requirement, as defined in *Tarasoff*, would require attorneys to act within a reasonable standard for the profession when determining the necessity of reporting threats of harm.[10] Tailoring requirements to a professional standard would distinguish the requirements of attorneys from mental health professionals by allowing attorneys to alert opposing counsel in the case of represented parties instead of the opposing party directly, therefore not violating ethical rules.

However, with this increased liability, do attorneys, pursuant to Rule 1.6, now have a duty to inform the client at the onset of representation that if, at any time during the case, the attorney feels that the client is a threat to another, the attorney will report the threat to the opposing party or counsel? Minnesota Rules of Professional Conduct 1.4 require that an attorney "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Possible disclosure of information detrimental to the client is ostensibly an issue that would influence a client in making informed decisions. Critics of a duty to warn argue that such mandated disclosure would harm the attorney/client relationship and make adequate representation more difficult since clients would be less likely to disclose information relevant to the case if they perceived the possibility that the attorney would be forced to disclose it. The mental health field whose practitioners must inform the client at the

outset of the therapeutic relationship that they are mandatory reporters, has not experienced a dramatic interference with the client relationship. The argument can be made that the attorney/client relationship would similarly remain unaffected.

A family law attorney representing alleged abusers has an increased likelihood of facing the dilemma of disclosure of client information. While Minnesota remains neutral on the duty, an attorney for alleged abuser should have a policy and establish criteria for when and if he or she chooses to disclose.

While this article is not intended to suggest that abusers or alleged abusers should not be entitled to zealous representation by their attorneys, it is intended to suggest that there is a place for mindful consideration of the effects that decisions made in the representation will have on the on the abuse victim and the cycle of abuse. In addition, it is meant to suggest that in order to represent abusers and alleged abusers to the best of the attorney's ability, the attorney must understand the complexities of the domestic abuse and the various non-physical forms it may take.

Notes

[1] Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are we revictimizing our client?*, 39 Fam. L.Q. 7 (2005).

[2] Sarah M. Buel, *Domestic Violence and the Law: An impassioned exploration for family peace*, 33 Fam. L.Q. 719 (1999).

[3] Drew, *supra* n. i, at 12-13.

[4] Report of the American Psychological Association Presidential Task Force on Violence and the Family, *Violence and the Family*, 40 (1996).

[5] Haw. Rev. Stat. § 586-4(c).

[6] "A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm." Tenn. R. Prof. Conduct 1.6 (c) (1).

[7] Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev. 81 (1994). Finding that less than half of the attorneys surveyed reported believed imminent threats to a third party.

[8] Margaret Drew, Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases, 75 U. Cin. L. Rev. 447, 453 (2006).

[9] In Minnesota law a duty to warn a third part is established by two factors "(1) whether a "special relationship" existed between the defendant and the third person and (2) the foreseeability of the harm." *Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984).

[10] Margaret Drew, *supra* n. viii, at 455.

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Assessing the Status Quo: Domestic Abuse and International Child Abduction

Kimberly Robinson

Imagine the life of Jennifer Van De Sande. In 1999, Jennifer and her husband Davy were married in Illinois. But for Jennifer, the honeymoon was short.[1] Two weeks after their wedding, Davy began physically and verbally assaulting her.[2] The beatings occurred several times a week and typically consisted of Davy choking, kicking, and shoving Jennifer. One of these beatings occurred in Jennifer's seventh month of pregnancy with her first child, when Davy slammed her head against the wall, choked her, threw her towards the top of a flight of stairs and threatened to push her.[3] A few months later, Jennifer and Davy moved across the ocean—away from Jennifer's friends, family, and work—to Davy's native country, Belgium.

In Belgium, Davy's attacks against Jennifer increased in frequency and in violence. To make matters worse, these horrifying attacks were often conducted in the presence of their children.[4] Jennifer called the Belgian authorities numerous times but was told her she needed medical proof to verify her injuries.[5] Finally, after four years of unimaginable abuse, Jennifer had enough. She went home to the United States to visit her family and refused to return to Belgium with the children.

Is what Jennifer did wrong? According to a strict interpretation of the Hague Convention on the Civil Aspects of International Child Abduction, it is; she has wrongfully abducted her children.[6] The Convention is an international treaty that was adopted in 1980 and seeks to protect children from the harmful effects of abduction and retention across international borders.[7] Its purpose is to promptly return wrongfully removed or retained children to their pre-abduction status quo.[8] Removal is wrongful when it is in violation of another person's custody rights.[9]

In the 1980's, when the treaty was created, most of the world was naïve to the pervasiveness of domestic violence.[10] In reality, there were few resources discussing domestic violence at all.[11] Today, the shelves of our libraries and bookstores are full of domestic violence research; and the pages reveal that, for many women—more than most people would think—home is not a safe place.[12] In fact, the creators of the Convention never imagined a situation like Jennifer Van De Sande's. Instead, they expected the prototypical abductor to be a father who lost a custody contest to a mother.[13] The "situations envisaged" by the Convention were when the abductor, most likely the father,[14] kidnaps the child in order to gain a more favorable jurisdiction in determining custody.[15] Thus, the Convention would serve as an expedited procedure and remedy that would require a child to be returned to the home of habitual residence and most likely, in the minds of the drafters, back into the arms of the child's primary caretaker—the mother. The drafters were mistaken. More than seventy percent of the "abductors" subjected to the prompt return remedy outlined in the Convention are

mothers, who are fleeing across international borders with their children in an attempt to escape domestic violence and find a safe place to call home. [16]

The Convention's remedy of prompt return unfairly burdens domestic violence victims and their children. Part I of this article lays the foundation for understanding the Convention and analyzes the predominant case law that applies the Convention to mothers who "abduct" their children in an attempt to escape domestic violence.[17] Part II provides tactical considerations for defending a domestic abuse survivor, like Jennifer Van De Sande, in a Hague Petition proceeding.

I. Understanding the Hague Convention on the Civil Aspects of International Child Abduction

To set out a prima facie case under the Convention, a petitioner must establish that there was a "wrongful removal or retention" of the child from his or her "habitual residence." [18] If the prima facie case is made, the child is to be promptly returned to the country of habitual residence. The remedy of return is not absolute. Return can be denied if the abductor can prove by clear and convincing evidence that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." [19] If a grave risk of harm is shown, then the abductor has to show that the authorities in the habitual residence are unable or incapable of protecting the children if they were returned.[20]

A. Wrongful Removal or Retention

The Convention requires that for a removal or retention of a child to be "wrongful," it must be in breach of a person's rights of custody that "were actually exercised" at the time of the removal or retention.[21] The Convention recognizes that rights of custody may arise by operation of law, judicial or administrative decision, or by legal agreement of the parties.[22] Because the drafters hoped for a "flexible interpretation of the term's uses, which allows the greatest possible number of cases to be brought into consideration," courts generally define custodial rights broadly.[23] If a person has valid custody rights, "that person cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." [24] Nevertheless, the merits of any custody proceeding are not to be decided. The Convention explicitly prohibits Contracting States from deciding the merits of a custody dispute until it has been determined that a child is not to be returned.[25]

B. Habitual Residence

"Habitual residence" is not defined by the Convention. Therefore, courts are instructed to interpret the term based on the particular facts of each case.[26] Many U.S. courts decide habitual residence by analyzing the parents' intent.[27] Instead of only looking at the facts of geography and duration, they evaluate whether the parents had a shared intent to abandon the prior habitual residence, taking into consideration the parents' actions, as well as their declarations. [28]

In analyzing shared intent, courts have found that the physical abuse of one spouse by another is a relevant factor.[29] In *Tsarbopoulos v. Tsarbopoulos*, a Washington district court found that even though the Tsarbopoulos' had lived in Greece for over two years, they did not have a shared intent to abandon the United States as their habitual residence. The court found that Mrs. Tsarbopoulos did not

acclimatize to Greece because of the physical and emotional abuse caused by her husband and her intense isolation from anyone other than her family. In addition to her lack of acclimation, the court found the children did not acclimatize to Greece, Mr. Tsarbopoulos concealed his true employment status in the U.S. and in Greece, and there was no evidence presented contradicting the notion that the move to Greece was only for a two year sabbatical. The court reasoned that while Mr. Tsarbopoulos may have intended to have Greece become the family's habitual residence, his intent was not shared "and was in fact, concealed from his wife." [30] Accordingly, the court found that Mr. Tsarbopoulos failed to prove a prima facie case for return. Thus, physical attacks have some relevance in some situations in determining habitual residence issues. Habitual residence is a fact-based inquiry, and as demonstrated above, additional facts, in addition to spousal abuse, are most likely needed to support a finding like that found in Tsarbopoulos.

C. Exception to Return: Grave Risk of Harm

If a petitioner demonstrates a prima facie case, return may still be denied if the abductor raises one of the five limited exceptions under the Convention.[31] These exceptions are affirmative defenses to the remedy of return, and are strictly construed so that they do not invade the Convention's chief objectives.[32] Domestic violence victims most often respond to Hague petitions by claiming the "grave risk" defense. Article 13(b) allows a court to deny return of a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." [33] This defense must be established by clear and convincing evidence.[34]

In Friedrich v. Friedrich, the Sixth Circuit found that the harm must involve "war, famine, [or] disease," or risk the child's exposure to "serious abuse or neglect, or extraordinary emotional dependence." [35] Courts have traditionally followed this strict reading of the grave risk exception due to the underlying principle that the courts of the child's country of habitual residence are generally in the best position to assess the merits of the harm posed and provide adequate protection if necessary. Courts base their decisions on the assertion that violence against the mother does not mean that the children are harmed or exposed to serious abuse themselves.[36] For example, the Eighth Circuit held that domestic violence allegations concern the problems between a wife and her husband, not the child.[37] The court stated that it was not relevant to the grave risk of harm exception who the better parent was in the long run, whether the mother had good reason to leave her home in Mexico and terminate her marriage, or whether she would suffer abuse if the child she abducted was returned to Mexico.[38] The Eighth Circuit then remanded the case and instructed the lower court not to consider the best interests of the child.

A determination as to whether a child will experience a "grave risk of physical or psychological harm" or will be placed in an "intolerable situation" inevitably requires some deliberation over what is in the best interests of a child. Australia has noted this contradiction and stated that cases involving domestic violence are difficult "to come to grips with because of the very strong underlying message of the convention." [40] The legislative history of the Convention clearly establishes that it is not to be used to litigate the child's best interests.[41] The

United Kingdom has expressed concern that the law "may be failing" in abduction cases with allegations of domestic abuse because the "[a]uthorities do not permit the Judge at the [first] instance to give any proper consideration to the long-term psychological effects on a wife and child who have lived in traumatic, violent circumstances and are being returned to the country of origin." Courts around the world are concerned with the paradox that is created when balancing abuse cases with the Convention's express purpose of the prompt return of children to their pre-abduction status quo.

Fortunately, in response to this paradox, the majority of recent cases involving the Convention and domestic abuse are finding spousal abuse to be a factor for consideration in determining whether a grave risk exists.[43] These cases reason that the Convention's purpose is frustrated when the pre-abduction status quo is abusive.[44] The successful cases, however, are typically ones in which victims can show a strong connection between the abuse and resulting harm to the child.[45]

The First Circuit in Walsh v. Walsh, was the first court in the United States to specifically base its finding of grave risk on the fact that the children had witnessed their father beat their mother numerous times, even though the children themselves had not been physically harmed.[46] The court cited social science literature establishing that "serial spousal abusers are also likely to be child abusers" and that "children are at [an] increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser." [47]

Similarly, a South African court noted that, in the application of the grave risk of harm defense, "recognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction." The court found that "where there is an established pattern of domestic violence, even though not directed at the child, it may very well be that return might place the child at grave risk of harm." Additionally, the court reasoned that domestic violence "threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person." [48]

In Blondin v. Dubois, the United States Court of Appeals for the Second Circuit upheld a denial of return based on a psychological grave risk argument.[49] The court noted uncontroverted evidence that for children to witness there father's abuse of their mother, was so psychologically traumatic that to return the children to the country where the abuse occurred would re-traumatize them, so as to trigger post-traumatic stress disorder.[50] The court's affirmation is not without criticism, by emphasizing the uncontroverted expert testimony; Blondin suggests that expert testimony is essential to the grave risk of harm defense.[51] This is problematic considering the probability of extensive litigation and the expense of expert testimony. Extended litigation frustrates the Convention's objective of providing a prompt return mechanism and expensive expert testimony may close the door on this defense for many abuse victims.

In Jennifer Van De Sande's case, the Seventh Circuit found that the gravity of a risk involves not only the probability of harm, but also the magnitude of the harm if the probability materializes.[52] The Seventh Circuit overruled the district court's

finding that there was not clear and convincing evidence of a grave risk of harm to the children because most of the physical and verbal abuse was directed to the wife rather than to the children. The Seventh Circuit found:

> "[G]iven Davy's propensity for violence, and the grotesque disregard for the children's welfare that he displayed by beating his wife severely and repeatedly in their presence and hurling obscene epithets at her also in their presence, it would be irresponsible to think the risk to the children less than grave." [53]

As demonstrated above, domestic violence survivors who are successful in using the grave risk of harm defense often prove a pattern of severe domestic abuse that is conducted in the presence of their children.

D. Undertakings

However, the grave risk of harm analysis does not end there. In an attempt to preserve international comity, courts have created an additional step to the grave risk defense. Instead of asking only whether a grave risk exists, judges around the world have begun to consider "the full panoply of arrangements that might allow children to be returned to the country of habitual residence." [54] These arrangements, called undertakings, can include restraining orders, payment of housing and transportation costs, and temporary custody arrangements. The purpose of undertakings is to balance the return principal of the Convention and protect victims and children of domestic violence. The concept of "undertakings" is not based in the Convention or in any contracting state's implementing legislation.[55] Rather it is a judicial construct, developed in British family law.[56]

Undertakings were given high priority and significance in the watershed case of *Blondin vs. Dubois.*[57] There, Dubois escaped with her children to the United States after living in France with her physically and emotionally abusive boyfriend Blondin.[58] Blondin filed a Hague Petition and the district court found that returning the children to France would present a grave risk of harm.[59] The Second Circuit upheld the district court's finding of abuse but remanded the case for a more complete analysis of the safety arrangements that would allow the children to return to France.[60] The court emphasized that undertakings might allow the children to be returned despite the risk of harm, and stressed the importance of trusting the children's habitual residence to protect them.

On remand, the district court made additional findings of fact regarding domestic violence social services and legal protections in France.[61] Despite these possibilities, the court gave weight to the expert testimony of a psychiatrist, who found that "even these arrangements—indeed any arrangements at all—would fail to mitigate the grave risk of harm to the children." [62] Thus, the court concluded, for the second time, that the children should not be returned.[63] Again, this decision was appealed. The Second Circuit accepted the district court's ruling and affirmed the denial of the child's return.[64] However, as discussed above, the court upheld the ruling based on the respondent's uncontroverted expert testimony, suggesting the end result could be different if the expert was rebutted. Thus, in many cases, despite the evidence of serious

abuse, mothers and children are often ordered to return to their abusers country as long as safety precautions are executed.

The courts' reliance on undertakings in abuse cases is problematic. There is no guarantee that safety precautions ordered in one country will be upheld in another.[65] The U.S. Department of State's comment on undertakings suggests they are less appropriate when unequivocal evidence is presented that the abducting parent is attempting to protect the child from abuse.[66] "The development of extensive undertakings in such context could embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception." [67]

The First Circuit in *Danaipour v. McLarey* found, "where substantial allegations are made and a credible threat of harm exists, a court should be particularly wary about using potentially unenforceable undertakings to try to protect a child." [68] Similarly, in Jennifer Van De Sande's case, the Seventh Circuit cautioned against relying on undertakings in cases of abuse. They opined, to place children in the hands of an abusive father "on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise." [69] Both the First and Seventh Circuits found that undertakings are most appropriate when "the goal is to preserve the status quo of the parties prior to the wrongful removal" and undertakings are inappropriate when the status quo is abusive.[70]

Not everyone is as lucky as Jennifer Van De Sande. Despite the Seventh Circuit's strong caution about the inadequacy of undertakings in abuse cases, courts are still considering them and the Convention is encouraging them. The Convention has concluded that undertakings are a useful tool to "facilitate arrangements for return" and are "keeping with the spirit of the convention." [71] However, they do advise courts to consider the enforceability of those measures within the return country.[72] In a very recent decision, the district court in Ohio found that a Mother failed to establish a grave risk of harm defense, despite serious allegations of spousal abuse, because she failed to prove that Mexican courts were unable or incapable of protecting her or her children from domestic violence if they were returned.[73] The court heard testimony from multiple experts. While all experts agreed that Mexican laws have improved in the protection of women and children, they gave conflicting testimony on how much protection was afforded women and children subject to domestic violence.[74] Because of the conflicting testimony of the experts, the court found the mother had failed to prove by clear and convincing evidence that Mexican Courts were unable to protect the children and therefore, she failed to prove a grave risk of harm defense.

The above case is an example of a decision that should be expected in Hague cases with allegations of serious domestic abuse. Despite the First and Seventh Circuits warnings, courts are likely to heed to the strong objectives of the Convention and give international comity considerable weight. Courts will likely recognize serious domestic abuse as a grave risk of harm but will still order the child's return as long as safety precautions are able to be implemented in the country of habitual residence.

II. Tactical Considerations: Applying the Convention to Domestic Abuse Cases

When representing a client like Jennifer Van De Sande in a Hague Petition proceeding, consider the following:

First, Hague petitions are predominantly brought in federal court,[75] where judges are less likely to be educated on domestic abuse and are inexperienced in family law matters.[76] It will be up to counsel to educate the court on the effects of domestic abuse on children.

Second, if undertakings are implemented attempt to ensure their enforcement. For example, request a mirror image order. Mirror image orders direct the parent who lives in the country of habitual residence to obtain an order from a court in the foreign country agreeing to recognize and enforce the undertakings.[77] Mirroring undertakings does not guarantee they will be honored but it may provide more protection than not.[78] The best guarantee of undertakings is a voluntary agreement between the parties.[79] Agreement, unfortunately, is improbable in contentious and abusive relationships.

Third, if undertakings are implemented discuss your client's options and the consequences to those options. As discussed above whether or not undertakings will be enforced in a foreign country is uncertain; therefore, so is your client's safety. Returning to the country of her abuser may jeopardize her own safety and also may subject her to criminalization. On the other hand, not returning may potentially harm her chances in the subsequent custody proceeding and even damage her relationship with her child.

The remedy of return may be dangerous and potentially fatal for a victim that decides to return with her child to her abuser's country. If she returns with her child, her probability of being in danger, being attacked, and even of being killed by her partner is high.[80] Further, not only is her life in increased danger, so is her child's. The post-separation abuse of her child will also likely increase after separation.[81]

In a number of countries, including Canada, Denmark, France, Germany, Israel, the United Kingdom, and the United States, international child abduction by a parent constitutes a criminal offence.[82] The United States criminalizes parental child abductions through the International Parental Kidnapping Crime Act of 1993 ("IPKA").[83] This law makes it a criminal offense for a parent to wrongfully remove or retain a child outside the borders of the United States. Luckily, IPKA recognizes "fleeing an incidence or pattern of domestic violence" as an affirmative defense.[84] However, not all Contracting States recognize this defense.[85]

On the other hand, if she does not return with her children, not only does she have to be separated from her children, but her likelihood of prevailing in a subsequent custody trial is slim. She already has the odds against her if she is involved in any subsequent custody contest because the act of abduction may prevent her from receiving custody, even if the abduction is for the safety of herself and her children.[86] Moreover, a custody evaluator or judge may be convinced that the mother does not want custody because if she did, she would be present during the trial.

Not returning may also affect her relationship with her child. A child's

perception of their mother may be shaped by their father. Without their mother present the child may be persuaded that Dad is the victim or that Mom's behavior causes the abusive incidents.[87] Moreover, the child may be influenced by a formally neglectful father's sudden interest in him or her. This may have a powerful impact on a child who has been craving attention from his or her father.

Fourth, retain an expert. As discussed above, expert testimony has become integral to proving the grave risk of harm defense.

Lastly, expect to be involved in extensive and intensive litigation which could negatively impact the children involved. Despite the Convention's purpose of prompt return, the confusion on how to apply the grave risk of harm defense, whether expert testimony is required, and whether to order undertakings, subjects children to lengthy litigation procedures.[88] Hague cases involving allegations of abuse move up and down the judicial ladder. Moreover, the Hague proceeding is only to determine whether children are to be returned to the country of habitual residence—a custody or parenting time contest will possibly require additional litigation. Extensive litigation between parents has numerous negative effects on children. Children in high conflict litigation are at risk for serious adjustment problems.[89] Specifically, they take on severe amounts of stress caused by the insecurity of where they will be living and who they will be living with.[90]

When faced with a client like Jennifer Van De Sande, it is important to remember there is not an exact science to her case and not everyone is going to have such a fortunate outcome. It is difficult for courts to grapple with the strong objectives of the Convention and the dangers of domestic violence. The Hague Convention has been reluctant to assist in interpreting the issues that arise when the Convention is applied to domestic abuse cases.[91] Instead, the special commission reports only reiterate the importance of restricting the interpretation of the grave risk of harm defense and the need for custody cases to be decided in the country of habitual residence.[92] Luckily, there is clearly a trend in courts recognizing domestic violence as harmful to children and also an acknowledgment that undertakings may not be appropriate in cases of domestic abuse. Hopefully, these trends continue.

Notes

[1] *Van De Sande v. Van De Sande*, 431 F.3d 567 (7th Cir. 2005).

[2] *Id.* at 569.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Hague Convention on the Civil Aspects of International Child Abduction*, ch. I, art. 1 (Oct. 25, 1980), T.I.A.S. 11670 [hereinafter Hague Convention]. The United States signed the Convention in 1981 but the implementing legislation, the International Child Abduction Remedies Act ("ICARA"), was not passed and the treaty not in effect in the U.S. until 1988. 42 U.S.C. §§ 11601-10 (2000).

[7] *Hague Convention, supra* note 6, at ch. I, art. 1. All countries that are signatories to the Convention are "Contracting States." For a list of contracting states see U.S. Dept. of St., *List of Hague Convention Countries*, http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html# (accessed September 25, 2007).

[8] *Id*; Elisa Perez-Vera, *Explanatory Report*, in 3 Hague Conference on Private International Law: Acts and Documents or the Fourteenth Session

426, 429, ¶ 16 (1982) ("The Convention… places at the head of its objectives the restoration of the status quo, by means of the prompt return of children wrongfully removed to or retained in any Contracting State.").

[9] *Hague Convention, supra* note 6, at ch. I, art. 3.

[10] Peter G. Jaffe et al., *Child Custody & Domestic Violence: A call for Safety and Accountability* 4 (Sage Publ. 2003).

[11] *Id.*

[12] *Id.* at 5 (A 1993 study in Canada found that 29% of women experienced physical or sexual abuse by an intimate partner. In the United States, a 2000 study found an estimated 1.3 million women are physically assaulted by an intimate partner. Similarly, in 1997 Australia found 23% of women experience physical abuse from a partner).

[13] Merle H. Weiner, *International Child Abductions and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593, 602 (2000).

[14] *Explanatory Report, supra* note 8, at 429, ¶ 13 ("Abductors" to whom the treaty pertains are within the "family circle of the child" and "in the majority of cases" is the "father or the mother."). The Explanatory Report recognizes that the abductor could be either a father or a mother but it assumes that it would likely be the father, the non-primary caregiver. This is evidenced by the sole use of male pronouns when describing the kidnapper. *Id.* at 429, ¶ 14 ("…the abductor will hold the advantage, since it is *he* who has chosen the forum in which the case is to be decided, a forum which …he regards more favorable to his claims.") (Emphasis added).

[15] *Id.* at 429, ¶ 16.

[16] Weiner, *supra* note 13, at 702; Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad*, 11 Am. U.J. Gender Soc. Pol'y & L. 749, 765 (2003) ("seven of the nine cases that reached the United States Courts of Appeals between July 2000 and January 2001… involved an abductor alleging that she was a victim of domestic violence."); Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention On International Child Abduction* 138 (Oxford U. Press 1999) ("the stereotype which inspired delegates in 1980" was "a child being snatched from its mother by a disenchanted father."

[17] Abusers can be mothers or fathers; however, the focus of this article is on men's violence towards women.

[18] *Hague Convention, supra* note 6, at ch. I, art. 3.

[19] *Hague Convention, supra* note 6, at ch. III, art. 13 (b).

[20] *See infra* notes 53-73 and accompanying text.

[21] *Hague Convention, supra* note 6, at ch. I, art. 3.

[22] *Id.*

[23] *Explanatory Report, supra* note 8, at 446, ¶ 67.

[24] *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996).

[25] *Hague Convention, supra* note 6, at ch.3, art. 19.

[26] *Explanatory Report, supra* note 8, at 445, ¶ 66.

[27] *Mozes v. Mozes*, 239 F.3d 1067, 1074-75 (9th Cir. 2001); *see also Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005); *Holder v Holder*, 392 F.3d 1009 (9th Cir. 2004); *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004); *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1056 (E.D. Wash. 2001).

[28] *Id.* Many courts have adopted some variation of the shared intent approach to determine habitual residence. See e.g. Koch v. Koch, 450 F.3d 703, 714 (7th Cir. 2006).

[29] *Tsarbopoulos*, 176 F.Supp.2d at 1056; *see also Koch*, 450 F.3d at 719.

[30] *Tsarbopoulos*, 176 F.Supp.2d at 1056.

[31] Article 12 asserts if one year has elapsed since the wrongful removal or retention and "the child is now settled in its new environment," then return is not required. *Hague Convention, supra* note 6, at ch. III, art. 12. Article 13(a) allows the court to refuse the return of the child if the petitioner "was not actually exercising the custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or retention." *Id.* at art. 13 (a). Article 13(b) does not require the return of the child if "there is a grave risk" that the "return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." *Id.* at art. 13 (b).

Article 13 includes the "child objection" exception that grants judicial power to refuse to order the return if the child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." *Id.* at art. 13. Article 20 states that a court is permitted to decline to return a child to a country that violates "human rights and fundamental freedoms." *Id.* at art. 20.

[32] 42 U.S.C. § 11601 (a) (4) ("Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.")

[33] *Hague Convention, supra* note 6, at ch. III, art. 13 (b).

[34] 42 U.S.C. § 11603 (e) (2). Only Article 13 (b) and Article 20 have a clear and convincing standard of proof, the other exceptions simply require proof by a preponderance of the evidence.

[35] *Friedrich*, 78 F.3d at 1069.

[36] *See e.g. Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (rejecting mother's argument that article 13(b) was satisfied, in part, by physical, sexual and verbal abuse by her husband, the child's father, because "[t]he evidence is general and concerns the problems between [the mother] [and] her husband," and the district court should not "consider evidence relevant to custody or the best interests of the child"); *see also Tabacci v. Harrison*, 2000 WL 190576, *13 (N.D. Ill 2000) (rejecting the mother's argument that her husband's history of repeated physical and verbal abuse towards her, sometimes in the child's presence, was sufficient to satisfy article 13(b) because primary risk of harm was to the mother and not to the child).

[37] *Nunez-Escudero*, 58 F.3d at 377.

[38] *Id.*

[39] *Id.* at 378.

[40] *State Central Authority, Secretary of the Department of Human services v. M* (Australia) (2003) (available at http://www.incadat.com) (International Child Abduction Database).

[41] *Explanatory Report, supra* note 8, at 430-31, ¶¶ 21-23.

[42] *W v.W* (United Kingdom) ------(2004) (available at http://www.incadat.com) (In this case the judge felt forced to return the child to South Africa even though there was a considerable amount of evidence showing Dad's aggressive behavior and abuse towards the mother).

[43] *See e.g. Van De Sande*, 431 F.3d at 570; *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000); *Sonderup v. Tondelli*, (South Africa) (2000), (*available at* http://www.incadat.com); *Blondin v. Dubois*, 189 F.3d 240 (2d Cir. 1999) [hereinafter Blondin II].

[44] *See supra* note 43.

[45] *See e.g., Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000) (court found the alleged instances of verbal abuse and physical abuse of mom were not severe enough to expose the child to grave risk of harm if returned to Mexico); *In re D.D.*, 440 F.Supp.2d 1283 (M.D. Fla. 2006) (mom's allegations of physical abuse not severe); *McManus v. McManus*, 354 F.Supp.2d 62 (D. Mass. 2005) (husband's alleged violence was isolated and remote in time, was allegedly directed at Wife and not the children); *Ciotola v. Fiocca*, 684 N.E.2d 763 (Ohio Misc. 2d 1997) (although mother testified that father had explosive temper and indicated that she had been victim of domestic violence, she did not seek medical attention or report any situations of abuse to local authorities and the social report concerning father and extended family concluded that there were no significant problems).

[46] *Walsh*, 221 F.3d at 220. John Walsh, an Irish national, and Jacqueline Walsh, a U.S. national, lived for several years in Massachusetts. During this time they married and had a daughter. John fled the U.S. because of criminal charges and absconded to Ireland with his family. John was physically abusive towards Jacqueline and the abuse continued throughout her pregnancy and for years afterwards. Jacqueline eventually obtained an Irish protective order against John. However, he violated the order by assaulting her and ransacking the family home. To escape John, Jacqueline fled back to Massachusetts with her children.

[47] *Id.* at 217. The district court held that the domestic abuse evidence did not "reveal an immediate, serious threat to the children's

physical safety" that could not be dealt with by the proper Irish authorities. Id. at 217. Jacqueline appealed and the Court of Appeals held that the district court "inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse." Id.

[48] *Sonderup v. Tondelli* (South Africa) (2000), (*available at* http://www.incadat.com).

[49] *Blondin II*, 189 F.3d 240; *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001)[hereinafter *Blondin IV*].

[50] *Id.* at 157.

[51] *Id.* at 163 (In a footnote the court stated: "Our interpretation of Article 13(b) by no means implies that a court must refuse to send a child back to its home country in any case involving allegations of abuse, on the theory that a return to the home country poses a grave risk of psychological harm. Rather, we reach our conclusion on the basis of the specific facts presented in this case and, in particular, on the absence of testimony contradicting Dr. Solnit's conclusions.").

[52] *Van De Sande*, 431 F.3d at 570.

[53] *Id.*

[54] *Blondin II*, 189 F.3d at 242.

[55] Beaumont & McEleavy, *supra* note 16, at 156-59.

[56] *Id.*

[57] *Blondin v. Dubois*, 19 F. Supp. 2d 123 (S.D.N.Y. 1998); *Blondin II*, 189 F.3d 240; *Blondin v. Dubois*, 78 F. Supp.2d 283 (S.D.N.Y. 2000)[hereinafter *Blondin III*]; *Blondin IV*, 238 F.3d 153.

[58] *Blondin II*, 189 F.3d at 242.

[59] *Id.*

[60] *Id.* at 248-49.

[61] *Blondin III*, 78 F. Supp. at 289. The court found that wife would be eligible for free legal and social services and husband agreed to assist wife with the financial costs of moving back to France.

[62] *Blondin IV*, 238 F.3d at 157.

[63] *Blondin III*, 78 F. Supp. at 294.

[64] *Blondin IV*, 238 F.3d at 163.

[65] *Danaipour v McLarey*, 286 F.3d 1, 23 (1st Cir. 2002) (citing the Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, ¶ 64 (1997), *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.publications&dtid=2&cid=24 [hereinafter *Third Special Commission Report*].

[66] Letter from Catherine W. Brown, Assistance Legal Adviser for Consular Affairs, United States Dep't of the State, to Michael Nichollsm Lord Chancellor's Dep't Child Abduction Unit, United Kingdom (Aug. 10, 1995), *available at* http://hiltonhouse.com/articles/Undertaking_Rpt.txt

[67] *Id.*

[68] *Danaipour*, 286 F.3d at 26.

[69] *Van De Sande*, 431 F.3d at 571.

[70] *Id.; Danaipour*, 286 F.2d at 25.

[71] Conclusions and Recommendations of the Fifth Meeting for the Special Commission to Review the Operation of the Hague Convetion of 25 October 1980 on the Civil Aspects of International Child Abduction, at 11, ¶ 1.8.1, (Nov. 2006), *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.publications&dtid=2&cid=24

[72] *Id.* at 12, ¶ 1.8.2.

[73] *Simcox v. Simcox*, 499 F.Supp 2d 946 (N.D. Ohio 2007).

[74] *Id.* (A Mexican judge testified, in the absence of bribes, it is difficult to get protection from police for abused women due to the machismo culture in Mexico. However, a Mexican attorney testified it is his experience as an attorney practicing in the area of family law that orders of protection can be obtained within two days and the police take the orders seriously and enforce them.)

[75] ICARA grants concurrent jurisdiction to state and federal courts. 42 U.S.C. § 11603 (a). *See* Thomas W. Tuft & Valerie Arnold, *Interstate & International Jurisdiction and Custody Issues, in* MINNESOTA CHILD SUPPORT AND CUSTODY DESKBOOK, 21-1, 21-27 (Gary A. Debele ed., 2006).

[76] *Elk Grove Unified School Dis. v. Newdow*, 542 U.S. 1, 13 (2004) ("While rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts").

[77] *See e.g. Tischendorf v. Tischendorf*, 321 N.W. 2d 405 (Minn. 1982) (Minnesota Supreme Court recognizes mirror order as appropriate condition

for visitation in foreign country.)

[78] *See* Reunite Research Unit, *The Outcomes for Children Returned Following an Abduction*, 31 (Sept. 2003), *available at*, http://reunite.org/WEBSITEREPORT.doc (Undertakings were broken in 66.6% (8) cases out of the 12 cases in which they were given.)

[79] *Id.* (referring to Background Document, available at http://www.hcch.net/upload/wop/prevmeas_backe.pdf.

[80] Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent* 29 (Sage Publ. 2002). (post separation violence is usually more violent and more severe than pre-separation violence); Emiko A. Tajima, *Correlates of the Co-Occurrence of Wife Abuse and Child Abuse Among a Representative Sample* 19 J. of Family Violence 399 (Dec. 2004) (in 1993, approximately 1300 women were murdered by their intimate partners).

[81] Bancroft & Silverman, *supra* note 80 at 43-44.

[82] Report On The 5th Meeting Of The Special Commission To Review The 1980 Hague Child Abduction Convention On And The Practical Implementation Of The 1996 Hague Protection Of Children Convention, at 70, 233-235 (March 2007), *available at* http://hcch.evision.nl/index_en.php?act=conventions.publications&dtid=2&cid=24 [hereinafter *Fifth Special Commission Report*].

[83] 18 U.S.C. 1204 (a).

[84] *Id.*

[85] The Commission expressed concern about criminalizing parental abduction but in the end they found that some countries need these laws to deter abductions. *Third Special Commission Report, supra* note 65, at 4, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.publications&dtid=2&cid=24.

[86] *See* Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad*, 11 Am. U.J. Gender Soc. Pol'y & L. 749, 785 (2003) (discussing the need for "effective storytelling" to get around the fact that abduction may be used against a domestic violence victim in a custody trial).

[87] Bancroft & Silverman, *supra* note 80, at 116.

[88] Article 11 of the Convention anticipates the judicial or administrative authorities to reach a decision within six weeks from the commencement of the proceedings. *Hague Convention, supra* note 6, ch. I, art. 11.

[89] Jaffe et al., *supra* note 10, at 14.

[90] Bancroft & Silverman, *supra* note 80, at 128.

[91] Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of A global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1084 (2005).

[92] Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of Child Abduction Held 18-21 January 1993, at 20, question 22 available at http://hcch.e-vision.nl/index_en.php?act=conventions.publications&dtid=2&cid=24 (Concerns were raised about abducting parents refusing to return because of fear of domestic violence but the experts agreed that the grave risk of harm defense should not be used to protect a child from a particular parent); Third Special Commission Report, supra note 65, at Annex III, working document 3, available at http://hcch.e-vision.nl/index_en.php?act=conventions.publications&dtid=2&cid=24; (Australia and other Contracting States expressed concern about the protections that mothers and children would receive when returned to the country of habitual residence. They wanted contracting states to ensure protection in order to avoid both adverse public reaction and a reluctance of judges to order the return of children where issues of violence arrive.); Fifth Special Commission Report, supra note 82, at 46, 165-166, available at http://hcch.evision.nl/index_en.php?act=conventions.publications&dtid=2&cid=24 (Defense should be interpreted narrowly but "greater cooperation and exchange" should occur between the countries to ensure cooperation with any protective measures ordered with return, "particularly in cases of domestic violence").

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Mission First, People Always: Domestic Violence and the Military

Johanna Clyborne[1]

While people are our most valuable asset, it has been long understood by leaders in the military that achieving ultimate victory dictates that the organization succeed in its mission even though it may cost the lives of some of its soldiers. A lot has changed in the military's view of the family unit. As the product of a military family, I understood at an early age the adage that "had the Army wanted you to have a wife they would have issued you one." Domestic violence in the past was just another unpleasantry to be ignored or swept under the rug. A training distracter, if you will. Much has changed in the last decade and significant shifts in policy and viewpoints have fortunately created a culture of intolerance of those who commit domestic violence as well as the development of a network of services and support for the victims. Families are no longer seen as assets that we are willing to dispense with in order to ultimately achieve victory.

Military service does not result in an increase in domestic violence.

Some argue that the military attracts those with a violent propensity or that military service inherently breeds violence and thus domestic violence by the nature of its purpose and its love for war. I have never agreed with this argument. I am constantly reminded of the quote from General Douglas MacArthur that it is the "[t]he soldier, above all other people, prays for peace, for he must suffer and bear the deepest wounds and scars of war." While military life is certainly difficult at time, the stressors are very similar to those in the civilian sector. Just like civilians, service-members have the stress of job performance, worries about promotion or lack thereof, relocation, separation, and financial constraints. While the military does use the incidents of domestic violence to gain how much a strain deployments are placing on families, military service in itself does not attract, breed or develop those that abuse. The propensity to abuse was present well before entering military service.

How the Military Handles Domestic Violence.

In most cases, the perpetrator is the male service-member; however, I've been involved in more than a few cases where the husband was the victim of physical and/or mental abuse. Several years ago a young Company Commander I knew very well made the mistake when a female soldier solemnly requested to speak to him about an "incident". Sensing the tension he replied "it can't be that bad, it's not like you beat up you husband last night." Unfortunately, she had been involved in a domestic altercation and she had been the perpetrator. Gender aside, the military now follows what we generally know as mandated reporter rules except that it applies to any act of domestic violence.

Regulations ***require*** military and Department of Defense officials to report ***any*** suspicion of family domestic violence.[2] Additionally, if child abuse is involved local child protection agencies *must be notified* and participate in

the process.[3] A failure to report could result in punishment under the code of military justice for members of the military or other appropriate administrative disciplinary action if the person is a Department of Defense civilian.

Despite its new commitment to stopping domestic violence and holding perpetrators accountable, the military faces many challenges; the biggest one is the jurisdiction to act. Contrary to common belief the military has limits to its jurisdiction. If the abuser is a civilian, meaning not a member of the military, the military has no control over the matter. Generally, the military will provide the information to the local police for charging. What the military can do however is bar the non-military member from the installation. While a bar from the military base doesn't happen often because the order excluding the civilian must be exercised by the installation commander, which is usually at least a two star general, it is an option that can be utilized.

If the abuser is a Reserve or National Guard member and the abuse occurred while on military orders, the abuser will be subjection to the Code of Military Justice. If the Reserve or National Guard service-member is not on military orders at the time the domestic violence occurred, the military has few options to punish the service-member. This jurisdiction shortfall is an area of the military that needs further legal advocacy and review, especially if the military continues to advocate for the view that the Active component and the Reserve component are to be viewed as "one force". The only remedy the military has in these types of cases is an administrative separation of the service-member, and this remedy is generally only available if there is a criminal conviction. This separation can have negative ramifications if the discharge is labeled as "other than honorable." Unfortunately, because an "other than honorable" separation would have a significant negative financial impact on the family it can result in victims being afraid to report the abuse to the Chain of Command.

It is an entirely different story if the abuser is on active duty at the time of the incident. It is in this situation were the military excels and can intervene, treat and punish in the same way that the civilian authorities can. However in the military environment, a report of domestic violence while on active duty follows two entirely separate system tracks which apply to both the family and the abuser. The two systems are the family advocacy system and the military justice system.

The first track is the family advocacy track, which is the rehabilitative process. The Family Advocacy Program ("FAP")[4] is designed to identify, intervene, and treat all of the family members involved in a domestic violence situation.[5] When Family Advocacy receives a report of domestic violence, it immediately assigns a caseworker to the family. The caseworker directly works with the victim to assess the victim's safety and develop a safety plan. Previously a report of abuse was considered unrestricted reporting meaning there was limited confidentiality provided to a victim and the allegations of abuse were reported to the service-members Chain of Command whether the victim wanted it or not. Only in the last year have victims been given the option to do what is called restricted reporting meaning the Command in not notified of the abuse allegations.[6] It is critical to understand when restricted reporting can occur because t he option is not without exceptions. The change to allow restricted reporting was done to address need of the victim in getting the assistance they need without the fear of inaction by the military

and thus the potential for in increase in violence or retaliation or the fear financial hardship as discussed below in the event the abuse is reported.[7] Regardless of whether the victim elects restricted or unrestricted reporting, the confidentiality of their medical information is maintained.[8]

If the victim elects unrestricted reporting, the caseworker works directly with the abuser's Command, which give the caseworker the ability to ensure that the victim's physical and mental health, as well as their personal protection needs are met and enforced.

Unlike domestic violence advocates in the civilian sector, the FAP caseworker is also charged with investigating the incident. An interview is conducted with the alleged abuser. However, the alleged abuser is informed of his rights and that he does not have to speak to the investigation officials, if he chooses not to.[9]

Once the investigation is complete, the case is then presented to the Family Advocate Committee (FAC) that is comprised of several members. In addition to a representative of the FAP, it will almost always include a staff judge advocate (a military lawyer), a chaplain, a member of the military police, possibly a local law enforcement representative and a representative from the medical field and in the case of child abuse a representative from the local county social services agency. Once the committee convenes, it must make one of three decisions. Specifically, it must find the allegation of abuse to be unsubstantiated, suspected or substantiated.

If the abuse is unsubstantiated, it means that after investigating the allegations and reviewing all the evidence, they have determined that the abuse did not occur. The committee could also decide that abuse is suspected**.** This determination means that there is still a need to investigate further. The caveat is that once a case is given a "suspected" label the investigation may not take longer than 12 weeks. However, this can be a great way to keep a family and the abuser in contact with the services FAP provides while continuing to determine exactly what did happen. The third type of finding is that the allegation of abuse is substantiated. To have a finding of substantiated, it means the committee determined that after reviewing all of the available evidence that the preponderance of evidence indicated that abuse did in fact occur. What is unique to the military is that even verbal abuse alone qualifies as an act of domestic abuse. What is unfortunate, however, is that the definition of domestic abuse does not include couples that have a child in common but are not married, couples that cohabitate or couples in same sex relationships, thus those victims do not qualify for FAP services or protection. Once the committee makes its finding, it will also makes recommendation of treatment or other various options to the service-member's Chain of Command, usually the unit Commander.

The Commander, after receiving the committee's recommendations, then determines whether to order the service-member to comply with the committee's recommendations. The committee does not have the authority to order the service-member into treatment but the unit Commander does.

The second tract is the military justice system or the punitive system of the military. The commander can impose punishment on the abuser by invoking the Uniform Code of Military Justice. The commander may also seek to obtain the discharge of the service-member from the military. This punishment or discharge decision can occur before the

FAP committee makes its recommendations, as indicated above, because the FAP and the military justice system are separate components. Practically speaking, most Commanders will wait to see what the committee determines before make a decision on how to proceed.

It is important to note, however, that because the military justice track and the family advocacy track are not connected, it is possible that the military may find that it does not have enough evidence to allow punishment under the Uniform Code of Military Justice while simultaneously the FAC determines that "substantiated" abuse did occur.

Order for Protections versus a Military Order for Protection

Most practitioners are familiar with Orders for Protection (OFP), however, the vast majority don't know that the military has its own version of an OFP, called a Military Protective Order (MPO)[10]. The Department of Defense issued guidelines in 2004 stating that Commanders "shall issue MPOs when necessary to safeguard victims, quell disturbances, and maintain good order and discipline while victims have time to pursue protection orders through the civilian courts …." [11]

A MPO is similar to an OFP issued by a civilian state court. Like OFPs, MPOs generally include provisions to prohibit contact or communication with the victim and possibly vacate military housing. The deterrent to violating an OFP is criminal prosecution; the deterrent to violating a MPO is the Uniform Code of Military Justice. A violation of an MPO is equivalent to disobeying a direct order. Within the military environment, disobeying a direct order is a grave offense and is not dealt with lightly. Often the Commander will order the service-member will to reside in the barracks until the FAP investigation is completed. Additionally, at many bases, the Commander has the ability to place the family members in billeting under an assumed name. The MPO follows the service-member regardless of where they are, whether they are on or off post, or even deployed overseas. The caveat is that the MPO is only valid as long as the service-member remains assigned within the command that issued the MPO.

The downside to MPOs are that they are not recognized under the "Full Faith and Credit Clause" because they do not meet the requirements of Due Process. MPOs do not require a hearing and the unit Commander ordering the MPO does not meet the definition of "a neutral and detached magistrate." Whereas OFPs are good for one or two years, MPOs are generally issued for a short duration, ten days. Although, MPO's can be extended for more than ten days, usually the service-member will be given the right to be heard.

Because an MPO is of such short duration and it cannot be enforced by the local law enforcement or civilian courts, a victim of domestic violence should also pursue an OFP as well as the MPO. An OFP can include orders concerning custody and financial support that a MPO will not. Under the Armed Forces Domestic Security Act issued in 2003, an OFP is accorded the same force and effect on all military installations, both in the United States and overseas, in the same manner that the civilian court issuing the order does. MPOs are a great resource to victims because they are instantaneous, effective and will provide a little time for the victim and their family to get matters and evidence in order prior to applying for an OFP. Whenever possible, seek both.

Domestic Violence, OFPs and the Lautenberg Amendment

Sometimes the service-member will argue that because many OFPs contain a provision against carrying firearms under 18 U.S.C. § 922(g)(8), an OFP will effectively end their military career. However, unlike the Lautenberg Amendment as discussed below, there is an exemption for Active Duty, Reserve or State military personal such as the National Guard in 18 U.S.C. § 925(a)(1).

The 1996 Lautenberg Amendment to the Gun Control Act of 1968 prohibits those convicted of a domestic violence misdemeanor from shipping, receiving or possessing firearms or ammunition.[12] The Amendment does not have any exceptions for those serving in the military. A conviction that triggers the Lautenberg Amendment effectively ends the service-member's military career. While in theory, the military could reassign the service-member to a position that doesn't require access to a weapon, this rarely happens, especially since the inability to carry a weapon under most job position renders the service-member non-deployable. The one hope the service-member has is to seek expungement of the conviction, but the probability of the expungement being granted is low.

Financial Protection for Victim's of Domestic Violence

The effect of being kicked out of the military as a result of reported domestic abuse or as a result of a Lautenberg Amendment violation could result in financial hardship thus significantly less funds available for child support, loss of benefits and possibility loss of retirement if the service-member has not yet attained 20 years of creditable service which in turn means the spouse could likely lose out on her martial share as well. Even, if the service-member is not separated from the military, the service-member could be forfeiture of rank or pay; they may be promoted at a slower pace then their non-abusing peers, if they are selected for promotion at all. This financial impact has resulted in some victim's not reporting domestic abuse of it impact on the service-member's military career. This very realistic fear for the financial impact or the family is probably the biggest single deterrent to reporting the abuse or not seeking an OFP. This is why the restricted reporting option was added. Sadly what many spouses don't know is that there are some financial protections that are provided to them under federal law.

Every spouse, and especially their advocates and attorney, must know about transitional compensation under 10 U.S.C. §1059 and the protections found under the Uniform Former Spouses Protection Act under 10 U.S.C. §1408 (h). The key to these protections, as discussed below, is that the service-member is specifically discharged for an offense which "involves abuse of the then-current spouse or a dependent child." [13] Furthermore, the protections apply regardless if the service-member's discharge is a result of a punitive discharge imposed by a court-martial, or whether it was an administrative discharge initiated by the Commander.[14]

Transitional Compensation

Department of Defense Instruction 1342.24, Transitional Compensation for Abused Dependents, (Change 1, January 16, 1997), prescribes the procedures the military must use under 10 U.S.C §1059 for payments of monthly transitional compensation to dependents of service-members separated from the military as a result of dependent

abuse. To complicate matters, in addition to Instruction 1342.24, each branch of the Armed Forces has additional regulations or instruction specific to its branch that a practitioner must familiarize themselves with. To qualify for the transitional payments the abuse must be one that is a criminal offense[15] committed against the person of the spouse or against a dependent child.[16] The crimes that qualify as "dependent-abuse offenses" run the gambit from assault and battery to murder.

The current authorized payment amount for transitional compensation is $850.00 per month. Additionally, for each dependent child the spouse has custody of the base amount increases by $215.00. If there is no spouse or the spouse is not eligible they the compensation is paid to the dependent child. If there is more than one eligible child the payment is made in equal shares. The maximum amount of months that a spouse or dependent child can received compensation is 36 months. If the service-member remaining military service obligation was less than 36 months at the he was discharges or court-martialed, then the duration of payments is adjusted to the length of the service-member remaining service obligation or 12 months whichever is greater.

There are some factors that could terminate receipt of the transitional compensation. First, payments terminate if the spouse remarries. If the payments to the spouse terminate due to remarriage and there is a dependent child not living in the same household as the spouse or member, payments are made to the dependent child. Second, if the service-member, who committed the abuse, resides in the same home as the spouse or dependent child, payments terminate at the time the service-member moves back into the home. Lastly, compensation will not be paid to the spouse if the victim was a dependent child and the spouse was found to have been an active participant in the abuse or actively aided or abetted the service-member. However, if the dependent child does not live in the home with either the service-member or the spouse accomplice, payment will be made to the dependent child.

Marital Share of Pension Protection

In addition to transitional compensation, a former spouse that has been subject to domestic violence by the service-member is able to collect the service-member's retirement pay and other benefits they would have able to receive even if the service-member does not retire as a result of domestic abuse under the Former Spouses Protection Act.[17] For the former spouse to qualify:

1. There must be a court order awarding as property settlement a portion of disposable retired pay, and
2. The service-member is eligible by years for retirement but loses the right to retire due to misconduct involving dependent abuse, and
3. The person with the court order was either the victim of the abuse or the parent of the child who was the victim of the abuse.

If the requirements are met, then the former spouse receives the retirement pay as certified by the Secretary of the Service determined by the amount the service-member would have received if retired upon date eligible, continued base exchange and commissary privileges as well as medical, dental and legal assistance.

It is important to note that these benefits terminate upon remarriage but can be revived by divorce, annulment or death of the subsequent spouse.

Final Thoughts

Over the last decade, the military has made great strides in working to prevent and treat domestic violence but it still has far to go. That being said, civilian courts can take away many lessons on the holistic and rehabilitative team oriented approach the military uses in it FAPs. It would be refreshing to see programs, in the communities and courts, set up with similar resources and processes that would be available to victims, the abuser and their families. Despite jurisdiction restrictions and obstacles and due process concerns, the military as a whole has managed to stay focused and is slowly but surely learning that on one of the best methods to protect its assets; by protecting the families of it service-members.

Notes

[1] The opinions expressed in this publication are solely the responsibility of the author and do not represent the official views or policies of the Minnesota Army National Guard, Department of the Army or the Department of Defense and do not in any way constitute an endorsement by any organization named or not.

[2] Department of Defense Instruction 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, (August 21, 2007) .

[3] *Id.*

[4] Department of Defense Directive 6400.1 (1984) established the Family Advocacy Program to address family violence in military families.

[5] *Id.*

[6] Department of Defense Instruction 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, (August 21, 2007) at enclosure 3.

[7] *Id.*

[8] *Id.*

[9] Article 31 of the Uniform Code of Military Justice is the military equivalent to a *Miranda* warning to an accused however it provides far broader protections.

[10] Department of Defense Form 2873, ("DD Form 2273").

[11] Department of Defense Instruction 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, (August 21, 2007) at 6.1.2.

[12] 18 U.S.C. §922(g)(9)

[13] 10 U.S.C. §1408 (h).

[14] *Id.*

[15] "Crimes that may qualify as 'dependent-abuse offenses' are ones such as sexual assault, rape, sodomy, assault, battery, murder, and manslaughter. (This is not an exhaustive or exclusive listing of dependent-abuse offenses, but is provided for illustrative purposes only.)" Department of Defense Instruction 1342.24, Transitional Compensation for Abused Dependents, (Change 1, January 16, 1997) at 3.1.

[16] The military has a broader definition of who qualifies as a dependent than what family practitioners are used to. Id. at 3.2

[17] 10 U.S.C. §1408 (h).

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Defining Minnesota Statute §518B: An Overview of Caselaw Interpreting the Statute

Thomas Tuft and Lisa A. Jarosch

Minnesota's Domestic Abuse Act (Minn. Stat. §518B.01) passed in 1979 and has been amended in thirteen of the twenty-seven legislative sessions since it first came into being. These additions and changes frequently have focused on the definition section of the statute, subsection 2. These changes in addition to numerous appellate court cases have resulted in an intricate framework of definitions that can be as confusing as trying navigate around the Anoka County Courthouse. This article brings together, much, but by no means all of the law surrounding these definitions.

Under Minnesota Statute §518B.01, Subd. 2(a), "Domestic abuse" means the following, if committed against a family or household member by a family or household member;

(1) physical harm, bodily injury, or assault;
(2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
(3) terroristic threats, within the meaning of section 609.713, subdivision 1; criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, 609.345, or 609.3451; or interference with an emergency call within the meaning of section 609.78, subdivision 2.

"Family or household members" are defined as:

(1) spouses and former spouses;
(2) parents and children;
(3) persons related by blood;
(4) persons who are presently residing together or who have resided together in the past;
(5) persons who have a child in common regardless of whether they have been married or have lived together at any time;
(6) a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time; and
(7) persons involved in a significant romantic or sexual relationship. Under Minnesota Statute §518B.01, Subd. 2 (b).

While the definition of domestic abuse may seem evident from the statute, courts are continuously being presented with the question of whether the behavior presented before them qualifies as "domestic abuse." Clearly, any present physical bodily injury or assault is domestic abuse. However, the injury or assault must have been "present." For example, acts from over four years ago are not enough to warrant a "present harm or intention." [1]

Many questions also arise when Minn. Stat. §518B.01, Subd. 2(a)(2) comes into play. The phrase "infliction of fear" implies that the legislature intended that there be some *overt* [emphasis added] action to indicate an intent to cause fear of imminent physical

harm.[2] Leaving a ripped marriage certificate with a note stating "if this is what you want, this is what you will get," was enough to warrant infliction of fear of imminent bodily harm.[3] "With intent to" is defined as an individual that "has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." [4] Intent is a "subjective state of mind usually established only by reasonable inference from surrounding circumstances." [5] Therefore, the definition of "domestic abuse" requires either a showing of present harm or an intention on the part of respondent to do present harm.[6]

If a showing of present harm or intent to inflict present harm is the standard, then when are *past acts* on the part of the abuser admissible? When an extension of an Order for Protection is sought, the petitioner need only show that physical harm is imminent to obtain an extension of the present order. It is enough that the petitioner show that he or she is reasonably in fear of physical harm from the respondent.[7] A subjective fear rather than an objective fear standard is considered by the courts.[8] Courts may look at the past behavior that supported the previous Orders for Protection and conclude that in light of those circumstances, a reasonable fear of physical harm exists.[9] Past abusive behavior is a factor in determining cause for continuing an order for protection, although it is not dispositive.[10]

Minnesota Statute §518B.01, Subd. 2(a)(3), relies on the criminal statute when defining "terroristic threats." Such threats are defined as, "whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, vehicle or facility of public transportation or otherwise to cause serious public inconvenience, or in a reckless disregard of the risk of causing such terror or inconvenience." [11] Showing a gun during a heated argument was enough to constitute *an intent to frighten* and qualifies as a "terroristic threat." [12]

Once the act of "domestic abuse" has been defined, the next question courts routinely are faced with is upon whom domestic abuse can occur. While the definition of "family members" is self-explanatory, "household members" can be more complicated. Courts have held that renters who shared a common space constituted "household members, residing together." [13] Another common question is whether parties who have resided together in the past are considered "household members" for purposes of the domestic abuse statute. When parties who had in the past been involved in a relationship and had a common child together, courts have held them to be "household members" under the statute.[14] Even when at the time of the domestic occurrence, the parties no longer resided together, were not in a relationship, and the only contact they had with each other was during visitations with the child, the parties were considered "household members." [15] The court held that the parties were household members because they had periodically resided together and had a child in common. In determining whether persons are involved in a significant romantic or sexual relationship under clause (7), courts consider the length of time of the relationship, type of relationship, frequency of interactions between the parties, and if the relationship has terminated, length of time since the termination.[16]

Courts have been faced with numerous cases involving the interpretation of Minnesota Statute §518B, and we anticipate this will continue in the future.

Notes

[1] *Bjergum v. Bjergum*, 392 N.W.2d 604, 605-606 (Minn.Ct.App.1986).
[2] *Id.* at 605.
[3] *Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn.Ct.App.1989).
[4] Minn.Stat. § 609.02, subd. 9(4) (2000).
[5] State v. Schweppe, 306 Minn. 395, 401, 237 N.W .2d 609, 614 (1975).
[6] 392 N.W.2d 604, 605; *Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn.Ct.App.2005).
[7] Minn. Stat. §518B.01, Subd. 6(a).
[8] *Braend v. Braend*, 721 N.W.2d 924, 927-928 (Minn.Ct.App.2006).
[9] *Id.* at 928.
[10] *Bonick v. Bonick*, 443 N.W.2d 196, 198 (Minn.Ct.App.1989).
[11] Minnesota Statute §609.713, Subd. 1.
[12] *State v. Clark*, 2007 WL 2874412.
[13] *Elmasry v. Verdin*, 727 N.W.2d 163, 166 (Minn.Ct.App.2007).
[14] *State v. Auchampach*, 540 N.W.2d 808 (Minn.Ct.App.1995).
[15] *Id.* at 811.
[16] Minn. Stat. §518B.01, Subd. 2(a)(7).

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Corporal Punishment in Minnesota: It's Domestic and It's Violence but Is It Domestic Violence?

Stephen Arnott

I. Introduction

In a recent decision, the Court of Appeals reminded us that corporal punishment of children by parents seems to remain permissible in Minnesota, at least insofar as it does not involve the use of unreasonable force or cruel discipline that is excessive under the circumstances.[1] The case has generated some media commentary both for and against[2] and, interestingly enough, the Supreme Court granted review of the case on September 26, 2007. This article briefly canvasses the status of a parental right of corporal punishment and questions whether corporal punishment is domestic violence. Part II of the article focuses on the common law, constitutional, and statutory bases for a parental right of corporal punishment. Part III explores the possible interplay between corporal punishment and domestic violence statutes in Minnesota and other states. Part IV concludes that there may be practical reasons that corporal punishment has not been the subject of domestic violence actions in Minnesota. However, there is no necessary reason it should not be and the fact that corporal punishment appears not have been

subject to domestic abuse reflects the uncertain contours of the privilege in Minnesota.

II. Bases for a Parental Right to Corporal Punishment

The parental right to corporal punishment has bases in both common law and statutory law. Additionally, constitutional protections for parental corporate punishment are viewed as arising from parents' fundamental liberty and privacy interests in raising their children.[3] Additionally, states have provided statutory protection for parental corporal punishment by including it as an exception in a domestic violence statute;[4] interpreting a domestic violence statute to exclude reasonable corporal punishment;[5] or by characterizing it as an exception to what would otherwise be assault.[6]

A. The Common Law Permits Parents to Inflict Corporal Punishment on Their Children.

Children were originally viewed as a species of property and later on as individuals with duties but very little in the way of rights.[7] However, the early common law blended prevailing notions of parental rights with the perspective that there were reasonable limits on corporal punishment and that it was to be used for children's welfare. Thus, a parent ". . . may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education."[8] This reasonableness standard has persisted, though legislatures and courts employ a high threshold for corporal punishment to be unacceptable.[9] Nonetheless, a parent's disciplinary authority over a child becomes unreasonable and inhumane when it becomes vicious or is administered for other than disciplinary reasons.[10]

B. Parents Are Thought to Have a Constitutional Right to Inflict Corporal Punishment on Their Children.

It is now unremarkable to suggest that parents have a fundamental constitutional interest in raising their children. The United States Supreme Court has consistently held that parents have a liberty interest in their right to raise children as they see fit.[11] Thus, according to corporal punishment proponents, "[p]arents enjoy broad discretion with their children that has, at its heart, the recognition of the unique status and intimate relationship between a parent and child."[12] Moreover, court decisions regularly tolerate corporal punishment and, absent significant bruising or worse, corporal punishment generally does not constitute child abuse.[13]

On the other hand, the United States Supreme Court has never ruled on whether parental corporal punishment is part of a parent's right to raise children and contemporary analysis of the parental right to rear has given little deference to parental actions that may harm children.[14] Constitutional bases for regulation of corporal punishment may be states' inherent police powers or the state's *parens patriae* power to protect children.[15] For corporal punishment opponents, therefore, states have authority ". . . to ban corporal punishment . . . to decrease societal violence, *domestic violence*, psychological and mental illness, and drug abuse . . ." [16] Moreover, it is possible that state laws permitting corporal punishment may be susceptible to equal protection challenges.[17] Such challenges might also extend to explicit or inferred corporal punishment exemptions in domestic violence statutes. Against this background,

the exact federal constitutional parameters of any parental right to corporal punishment remain unclear.

C. Parents May Have a Statutory Privilege to Inflict Corporal Punishment on Their Children.

Minnesota, along with other states, appears to provide parents and those standing in loco parentis with a statutory privilege to inflict corporal punishment on children.[18] However, the extent of the statutory privilege is problematic. For example, in the case of school districts, the privilege is no longer one of corporal punishment but is limited to one of restraint.[19] Thus, teachers and school staff are permitted to use reasonable force without a child's consent only ". . . when necessary to restrain the child from self-injury or injury to any other person or property.[20] The statutory scheme becomes even more problematic when one considers that parents charged with assaulting their children may not have the defense of reasonable force because section 609.379 does not apply to assault.[21] This has led one commentator to conclude that Minnesota has effectively outlawed corporal punishment.[22] Indeed, where prosecutions involving persons standing in loco parentis, fifth degree assault charges have been upheld where a babysitter admitted spanking a child but denied inflicting bruises[23] and where a babysitter pushed or threw a child down some steps[24] though it should be noted that neither of these cases involved a "reasonable force" defense. Since assault is one of the bases for a domestic abuse action, however, there does appear to be support for the proposition that reasonable infliction of corporal punishment may not be a defense to an action under the domestic abuse statute.

III. Corporal Punishment and Domestic Violence in Minnesota

As noted above, Minnesota's corporal punishment privilege is subject to a reasonableness test.[25] Whether corporal punishment is reasonable or not has typically arisen in a child protection context, most recently in the N.F. case.

A. Physical Abuse in the Child Protection Context.

In N.F., a 13 year-old boy, G.F., left home without permission on numerous occasions and, when confronted by his parents, lied about it or refused to say where he had been or what he had done.[26] A social worker had apparently told the mother that "the law doesn't say that you can't use physical force, the law says you can't leave marks and bruises." [27] The parents discussed Bible verses supporting the use of corporal punishment with G.F. and told him he would be paddled – one paddling for each year of his age - if he left home without permission or was disrespectful. The parents left the Bible verses on the refrigerator as a reminder to him.[28] Later the same month, G.F. left home without permission and the father paddled the back of his upper thighs 12 times with a maple paddle, using "moderate force." At the time, G.F. was 5'2" and weighed 195 pounds.[29] When G.F. became disrespectful and had a temper tantrum, the father repeated the paddling. Subsequently, G.F. grabbed a kitchen knife and threatened to kill himself but the father was able to take it from him. The father then paddled G.F. a third time and sent G.F. to bed. G.F. again left home without permission and, when picked up by police, reported that his father had disciplined him.[30] Following a CHIPS petition by the county, the district court concluded that striking a child 36 times with a wooden paddle was

physical abuse rather than reasonable or moderate physical discipline and adjudicated G.F. and his sibling as children in need of protection or services.[31]

On appeal, the Minnesota Court of Appeals noted that the CHIPS statute[32] does not define "physical abuse" but that it does refer to a definition of "child abuse." [33] Based on its analysis of the statutory requirements for a finding of physical abuse, the appellate court agreed with the county's argument that the focus of the CHIPS statute is the protection of children but rejected the county's argument that physical abuse only requires physical pain.[34] Consequently, for CHIPS purposes "physical abuse" requires unreasonable force or cruel discipline that is excessive under the circumstances.[35] In applying the law to the facts before it, the court then concluded that the discipline was not excessive under the circumstances.[36] In doing so, the court did note that the third set of spankings administered after G.F. threatened to commit suicide was troubling and suggested, apparently without irony, that "[s]panking a child for wielding a knife and making a suicide threat is probably not an appropriate parental response." [37] Under certain circumstances, such discipline may be emotional maltreatment but there was no evidence in the record to support such a finding.[38]

Having decided the case on other grounds, the court in N.F. declined to address the parents' argument that section 260C.07 was unconstitutional as applied to them. However, the court did allude to a recent Minnesota Supreme Court opinion noting that parents have fundamental rights to raise their children.[39] This suggests that courts would be inclined to defer to a parent's decision to inflict corporal punishment on a child as long as it was not unreasonable, cruel, or excessive under the circumstances.

B. Corporal Punishment and Domestic Violence.

Family law practitioners are no doubt familiar with the definition of domestic abuse. For an act to qualify as domestic abuse, it must involve physical harm, bodily injury, or assault[40] or the fear of the same.[41] In addition, the act must be committed by a family or household member against a family or household member.[42] The term "family or household member" includes parents and children.[43] The statute does not define the terms "physical harm," "bodily injury," or "assault." In addition to the domestic abuse statute, Minnesota provides relief for children from domestic child abuse. Despite the reference to domestic abuse, however, this latter provision is in the child protection statute.[44]

In N.F., the court held that the corporal punishment inflicted on the child did not rise to the level of physical abuse required for a CHIPS adjudication; nor did it involve unreasonable force under the circumstances.[45] However, Minnesota's domestic abuse statute does not require a finding of physical abuse for an Order for Protection to issue. Rather, the court needs to find that the perpetrator has inflicted bodily harm or assault or caused a fear of imminent bodily harm or assault. While N.F. made it clear that the infliction of bodily harm that does not rise to the level of physical abuse is insufficient for a CHIPS adjudication, a plain reading of section 518B suggests that corporal punishment falls squarely within the statute's reach. Even proponents of corporal punishment concede that, by definition, it ". . . involves conduct on the

part of a parent that would constitute domestic violence in the absence of a legally recognized privilege or constitutional right." [46] Corporal punishment involves bodily harm and the infliction of pain. Presumably, it would be pointless for a perpetrator to inflict corporal punishment without pain since the punishment's purpose is for the child to somehow learn a lesson by suffering pain. However, for at least two reasons, domestic abuse proceedings appear not to have been used to address corporal punishment.

1. *Domestic Abuse Statutes were Aimed Originally at Addressing Violence Against Women.*

According to the Minnesota Supreme Court, "[t]he Domestic Abuse Act was enacted . . . to provide an efficient remedy for victims as an alternative to other available legal remedies such as criminal charges, tort claims, or dissolution that victims are sometimes reluctant, unable, or unwilling to use." [47] This would seem to include children who cannot avail themselves of such remedies but "[t]he main purpose of various domestic abuse statutes considered and enacted by the Minnesota Legislature was to protect battered women." [48] The Act certainly extends its reach to other household members including children[49] but there seems to be no reason to believe that drafters of the various domestic violence statutes intended them to supplant existing child protection statutes.

Nevertheless, there is a statutory overlap between the domestic abuse act and the domestic child abuse provisions of the child protection statute. The procedures are very similar in both statutes though "domestic child abuse" is defined as requiring physical injury[50] rather than physical harm, bodily injury, or assault or fear of the same.[51] Under these circumstances, and given the plethora of definitions affecting the infliction of pain on children, it is probably to be expected that courts would resort to a reasonableness test if faced with an allegation that corporal punishment amounted to domestic abuse. The key question is whether a reasonableness would be proper.

2. *Exempting "Reasonable" Corporal Punishment from Abuse Definitions.*

A further reason that domestic violence statutes have not been used to address corporal punishment is that, as indicated above, reasonable corporal punishment has been excluded from definitions of abuse.[52] If a parent has a right to inflict reasonable corporal punishment on a child, it would seem pointless to seek an Order for Protection to limit the parent from exercising that right even if the plain language of the statute permits such an action. Of course, the juxtaposition of a right to corporal punishment with sanctions against domestic abuse can suggest odd results. For instance, a father would be subject to an Order for Protection if he slapped his wife. However, if a court were to imply a corporal punishment exception into the domestic abuse act, he may not be similarly restrained if he turned around and slapped his child for watching the event.[53] If the parent's actions are unreasonable or cruel under the circumstances, then the child protection or malicious punishment statutes would presumably come into play.[54] However, as N.F. makes clear, a mere slap is probably insufficient to implicate the child protection statute.

IV. Conclusion

It seems reasonable to conclude that, on its face, Minnesota's Domestic Abuse statute does not preclude an action to restrain perpetrators of corporal punishment. That it has not been used for that purpose probably reflects a perception that domestic violence statutes are designed to deal with battered victims, predominantly women, and that children can be left to their protections under child protection and domestic child abuse statutes. However, relegating children to such protection runs the risk of devaluing the rights of children to be free from harm in favor of a parental right to inflict corporal punishment. It is possible that the Minnesota Supreme Court may provide further guidance as to the parameters of the parental privilege of corporal punishment in the N.F. case. Quite apart from the constitutionality of corporal punishment, the inherent unpredictability of a reasonableness test and the vast array of definitions that could apply to children subjected to corporal punishment suggest the need for this area of the law to be clarified. In the meantime, though, the multiple and confusing definitions of abuse concerning children means that the status of corporal punishment in Minnesota still remains unclearly defined.

Notes

[1] *In Re the Welfare of the Children of N.F. and S.F., Parents,* 735 N.W.2d 735, (Minn. Ct. App. 2007) (review granted, September 26, 2007).

[2] *See* Katherine Kersten, *Court Backs Dad Who Saw Upside to Punishment via the Backside*, Mpls. Star Tribune, July 30, 2007, at B1, B5 and Earl Beddow, Letter to the Editor, *Why is this OK?*, Mpls. Star Tribune, August 1, 2007, at A10.

[3] *E.g., Lassiter v. Dept. of Social Services of Durham Co., N.C.*, 452 U.S. 18, 27 (1981) (holding that a parent's right to care and management of his or her children was an important interest warranting deference and protection absent a powerful countervailing interest).

[4] *See e.g.,* Md. Code Ann. Fam. Law § 4-501 (2006) (excluding from the definition of "abuse" reasonable corporal punishment by either a parent or stepparent).

[5] *Ferri v. Ferri*, 854 A.2d 600, 604 (Pa.Super. Ct. 2004).

[6] Minn. Stat. § 609.77 defines "malicious punishment" as "unreasonable force or cruel discipline that is excessive under the circumstances" and Minn. Stat. § 609.379 provides that parents may use reasonable force to restrain or correct their children.

[7] Stephen R. Arnott, *Autonomy, Standing, and Children's Rights*, 33 Wm. Mitchell L. Rev. 807, 809 (2007).

[8] William Blackstone, 1 Commentaries *783.

[9] David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 Hous. L. Rev. 147, 151 (1998).

[10] *E.g., People v. Tomlianovich*, 514 N.E.2d 203, 204 (Ill. App. Ct. 1987).

[11] *E.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

[12] Richard Garner, *Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases – A Parental Perspective*, 30 U. Tol. L. Rev. 1, 12 (1998).

[13] Orentlicher, *supra*, note 9 at 148. *But see, Sweany v. Ada County*, 119 F.3d 1385, 1391 (9th Cir. 1997) (holding that parents have no more of an unlimited right to inflict corporal punishment on their children under the Fourth and Fourteenth Amendments than they do under the Free Exercise Clause).

[14] Deanna A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 Am. U. L. Rev. 447, 454 (2002). Proponents of corporal punishment also concede that the Court ". . . has never addressed the constitutional limits of state regulation of corporal punishment." Garner, *supra* note 12 at 12.

[15] Pollard, *supra* note 14 at 456.

[16] *Id*. at 458 (emphasis added). Debates over empirical data cited to support or oppose corporal punishment often generate much heat and little light. For an analysis of data suggesting corporal punishment is ineffective at best, *see generally*, Orentlicher, *supra* note 13. At the other extreme, it is argued that "[s]cience and history manifestly demonstrate that the link between lawful parental corporal discipline and any harm to children is the dubious concoction of political extremists." Garner, *supra* note 12 at 28.

[17] Pollard, *supra* note 14 at 471.

[18] Minn. Stat. § 609.379, subd, 1(a) (2006) provides that "[r]easonable force may be used upon or toward the person of a child without the child's consent when the following circumstance exists or the actor reasonably believes it to exist: (a) when used by a parent, legal guardian, teacher, or other caretaker of a child or pupil, in the exercise of lawful authority, to restrain or correct the child or pupil."

[19] Minn. Stat. § 121A.58, subd. 2 (2006) provides that "[a]n employee or agent of a district shall not inflict corporal punishment or cause corporal punishment to be inflicted upon a pupil to reform unacceptable conduct or as a penalty for unacceptable conduct."

[20] Minn. Stat. § 609.379, subd. 1(b) (2006).

[21] *See* Minn. stat. § 609.379, subd. 2 (2006) (enumerating the charges to which a defense of reasonable force applies).

[22] Victor I. Vieth, *When Parental Discipline is a Crime: Overcoming the Defense of Reasonable Force in an Investigative Stage*, American Prosecutors Research Institute, Vol. 16, No. 10 (2004) (http://www.ndaa-apri.org/publications/newsletters/update_volume_16_number_10_2004.html) (last visited Oct. 20, 2007). *See also*, Victor I. Vieth, *Corporal Punishment in the United States: A Call for a New Approach for the Prosecution of Disciplinarians*, 15 J. Juv. L. 22, 41-45 (1994). In analyzing, Minnesota's statutory scheme, Vieth concludes that the only protection afforded parents inflicting corporal punishment has been the sound exercise of prosecutorial discretion. *Id.* at 45.

[23] *State v. Nordstrum*, 358 N.W. 2d 348, 350 (Minn. Ct. App. 1986).

[24] *McConnell v. City of Mankato*, 456 N.W. 2d 278, 279 (Minn. 1990).

[25] *See supra* note 18 and accompanying text.

[26] *In Re the Welfare of the Children of N.F. and S.F., Parents*, 735 N.W.2d 735, 736 (Minn. Ct. App. 2007) (*review granted*, September 26, 2007).

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 736-37.

[31] *Id*. at 737.

[32] Minn. Stat. § 260C.007, subd. 6(2) (2006).

[33] 735 N.W.2d at 738. The court cited section 260C.007, subd. 5 (2006) defining "child abuse" as ". . . [a]ny act that involves a minor victim and violates statutes that criminalize assault . . . and malicious punishment of a child." The court then went on to note the "malicious punishment" standard in section 609.377, subd. 1.

[34] 735 N.W.2d 738. The court also observed that "domestic child abuse" as defined by Minn. Stat. § 260C.007, subd. 6(2) means any "physical injury to a minor." *Id.* For the court, therefore, it seems pain is alright as long as it is not accompanied by injury.

[35] *Id*.

[36] *Id*. at 739. *Cf. Tomlianovich*, *supra* note 10 at 204. In *Tomlianovich*, a stepfather denied his 11 year-old stepson's allegation that the stepfather had paddled him 20 times and the stepfather was acquitted. However, the mother, who admitted paddling her child six or seven times, was convicted after evidence was introduced that the child had been severely bruised. *Id*. at 242.

[37] *Id*.

[38] *Id*.

[39] *Id*. *citing SooHoo v. Johnson*, 731 N.W.2d 815, 823 (Minn. 2007) (stating that parents have a fundamental right to the care, custody, and control of their children that should not

be interfered with except for grave and weighty reasons).

[40] Minn. Stat. § 518B.01, subd. 2(a)(1).

[41] Minn. Stat. § 518B.01, subd. 2(a)(2). Though not directly relevant to this article, conduct including, *inter alia*, terroristic threats and criminal sexual conduct also qualifies as domestic abuse. Minn. Stat. § 518B.01, subd. (2)(a)(3).

[42] Minn. Stat. § 518B.01, subd. 2(a).

[43] Minn. Stat. § 518B.01, subd. 2(b)(2).

[44] Minn. Stat. § 260C.148.

[45] 735 N.W.2d at 738-39.

[46] Garner, *supra* note 12 at 17.

[47] *State v. Errington*, 310 N.W.2d 681, 682 (Minn. 1981).

[48] Mary E. Asmus, Tineke Ritmeester, and Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 Hamline L. Rev. 115, 126 (1991).

[49] Of course, Orders for Protection are often sought on behalf of children as well as the Petitioner in a particular action. *See, e.g., Chafin v. Rude*, 391 N.W.2d 882 (Minn. Ct. App. 1986). This has not occurred in situations involving corporal punishment, however.

[50] Minn. Stat. § 260C.007, subd. 13 (2006) defines "domestic child abuse" as (1) any physical injury to a minor family or household member inflicted by an adult family or household member other than by accidental means; or (2) subjection of a minor family or household member by an adult family or household member to any act which constitutes a violation of sections 609.321 [to] 617.246.

[51] *See supra*, notes 33 and 34 and accompanying text.

[52] *See* discussion at III.A., *infra*.

[53] *See* Jennifer A. Brobst, *The Parental Discipline Defense in New Zealand: The Potential Impact of Reform in Civil Proceeding*, 27 N.C. Cent. L.J. 178, 185 (2005).

[54] *See* Nancy Ver Steegh, *The Silent Victims: Children and Domestic Violence*, 26 Wm. Mitchell L. Rev. 775, 803-06 (2000) (noting that child abuse and domestic violence have been treated as separate legal issues and that domestic child abuse includes the abused minor but does encompass child witnesses to domestic violence).

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Should I or Shouldn't I?

An ADR Provider's View of Referring Victims of Domestic Abuse to Mediation, Collaborative Law and Early Neutral Evaluation*

Ellen Abbott

Much has been written concerning domestic abuse and alternative dispute resolution. The intent of this article is to remind attorneys and alternative dispute resolution providers that the dynamics involved in domestic abuse situations require a special consideration and careful evaluation before suggesting alternative dispute resolution ("ADR") to a victim of domestic abuse for resolution of her divorce, custody, parenting time issues or child support issues.

Distinguishing Violence

Learning to distinguish between types of abuse is critical in determining whether a victim of domestic abuse should participate in an ADR process. Not all incidences of domestic abuse are the same and they should not all be treated in the same fashion. There are isolated, situational circumstances of violence against one partner or between couples. In other cases there is an extensive history of control or domination by one partner of the other partner, with or without physical violence. In some cases there is a history of repeated physical abuse. The very worst being a battering relationship. But how does one know which type of victim and/or perpetrator may present in any particular case? The answer is, one may know immediately or one may never know. What could be the problem with sending the victim and her perpetrator into mediation or some other form of facilitative alternative dispute resolution? After all, the mediation process gives the parties control over their destiny and is designed to be empowering, even for victims of domestic abuse. The answer is that, among other things, if the person is a perpetrator of domestic abuse, one may be unwittingly providing him with another venue to engage in power and control over his victim. If the person is a victim of domestic abuse, one could be sending her into a situation which at "best" minimizes the domestic violence and at worst, puts the victim's life in further danger.

The context in which violence occurs is important. The violence may be truly isolated, absent intimidation and control, highly uncharacteristic and come during a period of extreme stress. The violence may be self-defensive or in response to battery. There are also individuals who are just "fighters" – those who problem solve with physicality with many people in addition to their intimate partner, but may not be batterers. In any of these circumstances, referral to mediation may be appropriate. The question for the lawyer and the ADR provider to ask is, "Can I answer the question about the context of the violence?" Screening for domestic abuse in every case is necessary. One may not get an answer, or get the answer one is

looking for, but it is necessary to screen in every case before proceeding with alternative dispute resolution.

The truly isolated violent act, without an attendant power and control dynamic, is of less concern in utilizing ADR processes. It is the existence of a battering relationship, complete with the power and control dynamic, that is of greatest concern when considering a referral to an ADR process. Although domestic abuse falls along a continuum, this article focuses on battering relationships and those relationships that exist closer to the battering end of the spectrum. References to "domestic abuse" and "batterer" are used interchangeably going forward to refer to those latter relationships.

Mediation and the Culture of Domestic Abuse

Domestic abuse or battering has specific characteristics. It involves a pattern of behavior used to establish power and control over another person through fear, intimidation and often threats or use of violence. Fear and intimidation are central aspects of the relationship. The batterer uses any combination of coercion and threats, emotional abuse, economic abuse, male privilege, isolation or the children in order to effect and maintain control.

A victim of battering is likely to exhibit one or more of the following characteristics: fear; lack of trust; passivity; subordination; learned helplessness; inability to believe that she has any control over outcomes; anger; shame; embarrassment; denial; depression or minimizing the abuse. The victim may have lived under the control of the batterer for so long that she is unable to recognize the now standard accommodation she engages in to the wishes of the batterer. The victim's socialization within the battering relationship requires her to pay careful attention to the abuser's needs. She is used to consistently being silenced and may deeply fear the consequences of speaking out. As a result, she may simply not be able to express her own desires. The batterer, on the other hand, believes he has the right to control the victim through fear, intimidation and violence. In addition to overt violence, obvious threats of violence and verbal abuse, he may use subtle phrases and modes of interaction to communicate his message.

Because of the dynamics of battering, there are several problems with placing a victim of battering in mediation or other facilitative ADR processes. Most attorneys and ADR providers grossly underestimate the effect of battering, particularly intimidation by the batterer. Not only is a victim afraid of being re-assaulted, she also fearful that the batterer will follow through with the repeated promises that he has made to make her life miserable. Often these promises include threats to financially ruin her, to call child protection and have her children taken away, and to ensure that her religious community and friends reject her. As a result of this underestimation or because of a failure to even screen for such battering, there is good reason to believe that a number of battering victims and their perpetrators are unwittingly diverted into the mediation process. There are a number of reasons why mediation may be both an inappropriate and harmful process for such victims.

The mediation model presumes that there is a conflict that needs to be resolved. It also

presumes that the participants have the ability to negotiate for their own interests. The following phrases are often used when describing mediation: self-determination; mutually agreeable outcomes; negotiate positive solutions; telling your story; conciliation; and durable agreements. Many victims of battering cannot come to the table with the basic pre-requisites for mediation -- telling their story, stating their own interests, negotiating on their own behalf. It would be highly unusual for a victim to suddenly become a different person at separation, a person able to articulate what she wants and needs in mediation when she has been socialized by the battering relationship to the contrary. Likewise, it would be extraordinary for a batterer to simply stop being abusive because he is involved in a mediation process. The culture of abuse continues regardless of the mediation process until the batterer takes steps to stop being abusive. Battering is not a dispute and it does not stem from conflict. Abuse is the responsibility of the abuser. Mediation is about not judging or taking sides. Rather, a mediation process avoids attaching or assessing blame to either party. Thus, a mediator being neutral in the face of domestic violence allows the batterer to avoid taking responsibility for his behavior and sends the message to the victim that the mediator is not to be trusted.

Mediation may also be an attractive choice for batterers. In fact, batterers may be highly supportive of mediation as it offers them an opportunity to exercise further intimidation and control, which might otherwise be mitigated in settings where the batterer and his victim are not required to be in close physical proximity found in most mediation settings. Likewise, victims may "choose" to participate in mediation to keep from further angering the batterer. In mediation sessions a batterer may use subtle signals, seemingly innocent to the mediator, to communicate the message to his victim that she is at risk unless she agrees to his wishes. Victims of battering have described actions as subtle as nose scratching, a finger movement, a look, a smile. Anyone who has been involved in a relationship knows that many couples develop unspoken communication known only to them. It is not difficult to imagine that a batterer can effectively use those signals during the relatively intimate setting of a mediation session to control and intimidate his victim.

The mediation process often pushes both participants to accept partial responsibility for the "problems." Because of a batterer's belief that his behavior is caused by influences outside himself, this focus has the undesired effect of allowing the batterer to compile a laundry list of the victim's "faults" as a way of excusing his behavior. A batterer willingly shifts the focus to the victim, the children, the relationship – anything but himself. Moreover, mediation focuses on "going forward" and otherwise effective mediators strongly suggest that the participants commit to agree to "change" their behavior. This approach, which may be quite beneficial in mediation settings involving non-abusive relationships, might also be good if the batterer really gave up his belief system of controlling the victim through fear, intimidation and violence. However, it is quite unlikely that the mere fact of participating in mediation will lead to a change in the batterer's long-standing pattern of control. More likely, the focus on "going forward" only denies the victim's past experience of

violence and otherwise invalidates her often unstated concerns about the batterer's behavior.

Using separate caucusing is also not a panacea to mediating disputes involving batterers and their victims. While having parties in separate rooms removes the immediate, "in-your-face" intimidation, it does virtually nothing to mitigate the years of fear experienced by the victim, including the fear of what may occur outside the mediation process. It would be wishful thinking to suggest that a lengthy history of battering could be surmounted in the context of a mediation caucus. Additionally, what basis would the victim have to trust the mediator? This is the same mediator who has said in the introduction to the mediation process that she must be neutral. Such inherent "rules" of the mediation process make it unlikely that the victim would disclose abuse to the mediator.

One of the primary goals of mediation, seeking a durable agreement between the parties, may also be misguided in violence-filled relationships. Although central to success in mediations without violence, in those involving batterers, successful settlements are more elusive. An important underlying assumption of a durable settlement is that each party is operating in good faith, a premise a victim may rightfully regard as untrue for her batterer. At the conclusion of a successful mediation process, the mediator assembles in the guise of a durable agreement, a new set of "rules" by which the parties have agreed to operate. However, the victim's past history tells her at best, she has no ability to enforce them, and at worst, creates a new set of circumstances, the violation of which provides to her batterer new reasons to justify his abuse.

Both Minnesota statutes and court rules exempt victims of domestic violence from required participation in mediation for good reason. Wise practitioners will carefully consider the importance of these exemptions before knowingly placing a victim or perpetrator into a mediation process. Likewise, mediators should proceed with caution to discern whether they are attempting to use their mediation skills to the detriment of victims of abuse.

Screening for Domestic Abuse

Attorneys and mediators may correctly identify and screen out of mediation cases where there is a documented history of domestic abuse. However, it is almost a certainty that given the prevalence of domestic abuse, a mediator will encounter a couple in which there is a culture of battering. It goes without saying that family law attorneys should be screening their clients to ascertain whether domestic abuse is present. In fact, the ABA Commission on Domestic Violence cautions that in order to ensure that a lawyer is ethically representing her client and to avoid malpractice, one should determine whether the client is a victim of domestic abuse and consider how that information affects representation. This screening should be done of both men and women. Generally, with heterosexual couples, one should screen their female clients for signs that they are victims of abuse and their male clients for signs that they are perpetrators of domestic violence. If an attorney is not knowledgeable in the subject, she should obtain some training to effectively screen clients in this regard or enlist the help of trained professionals.

There are also a number of pressures on the victim, not the least of which is financial. A victim may feel that she must at least try mediation because it may be less expensive than other alternatives to resolving disputes. Assuming that the victim has the benefit of counsel trained in domestic abuse issues, she should not at this juncture be prohibited by her counsel from participating in mediation.

There are some practical measures that a mediator can offer to assist with the power imbalance inherent when domestic abuse is present. A prudent mediation approach would be to allow a separate domestic abuse advocate to provide on-going assistance to a victim during a mediation process. Also, offering the victim separate arrival and departure times as well as a separate waiting area is advisable. Finally, mediators should develop a safety protocol for use in all cases.

Similar to attorneys representing their clients, mediators should be well-versed in detecting the presence of domestic abuse in their prospective and existing mediation caseload. The few hours of training dedicated to this topic in the standard family mediation training is insufficient. Mediators should have additional training in recognizing and addressing manipulation, intimidation, coercion, power imbalances and safety issues. Mediators should also carefully screen every case for domestic abuse, even when there is already evidence of domestic abuse being present. This important screening should optimally be done *before* any mediation sessions are scheduled. It may be done preliminarily over the telephone or with a written pre-mediation screening tool, with telephone follow-up if needed. When the mediation process extends over a period of time, periodic re-screening is recommended. There is no perfect screening tool. Simply asking whether there has been domestic abuse is insufficient. Rather, a series of questions that inquires about various dynamics present in relationships involving domestic violence is more appropriate. The screening tool should include questions focused upon power and control dynamics, including economic abuse and children, as well as safety issues. The scope of this article is not intended to provide in-depth domestic abuse training, but to encourage mediators to obtain the vital training in domestic abuse to avoid inadvertent harm to victims.

Dealing With Realities – There Will Be Cases Of Domestic Abuse In Mediation

The inquiry regarding abuse does not end with initial screening for its presence. Regardless of best efforts at screening by attorneys and mediators, there will be cases of battering that end up in mediation. Many women do not disclose abuse to anyone, and certainly not to a stranger. Recognizing it is often years before a victim will reach out to someone, it is incumbent upon the mediator to be watchful throughout a mediation process for signs of a possible battering relationship. Among such indicia, the mediator should be mindful of changes in the demeanor of one or both of the parties. A mediator should insist on a separate caucus if things just do not "feel right." Also, if mediation topics or discussions inexplicably do not seem to be going well, or if a party expresses fear, then stopping, or at least recessing the mediation at that point is appropriate. Importantly, what a victim of battering needs is to be safe and

for a mediator to send the message that the abuser's conduct is not okay. Such recessing or stopping of a mediation session may affirm to a victim that the batterer should be held accountable for his conduct. Continued mediation that ignores these indicators described above would not be appropriate. Nonetheless, mediation can be a valuable and appropriate mechanism to resolve matters for a victim when she has reached the point where she believes that she will not be physically harmed or otherwise punished by her batterer for asserting herself against his position.

In addition to the need for ongoing alertness to the presence of domestic violence in a mediation process, Rule III of the ADR Rule 114 Code of Ethics requires that "a neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties." It is, therefore, incumbent upon the mediator to have sufficient training in domestic abuse in order to effectively address the array of expectations of battering victims. A mediator should decline to mediate when she lacks the requisite domestic abuse training or is otherwise not competent to meet this standard.

Collaborative Law and Domestic Abuse

Central to a collaborative law process is the principle that parties to divorce and their attorneys agree to make a good faith attempt to reach a mutually acceptable settlement without going to court. The parties and their attorneys collaborate in four-way sessions. The Minnesota Collaborative Law organization describes the process on its website -- "Every issue – including property division, custody, and support – is put "on the table" in these sessions. Signing the agreement indicates their commitment to resolve all differences and issues related to the separation or divorce outside of court."

As with mediation, the underlying assumptions and structure of the collaborative law process are fraught with danger for a victim of domestic abuse. This process is premised on the assumption, false in domestic abuse circumstances, that the needs of all the parties can be met. The requirement that collaborative law meetings be four-way conferences also fails to recognize the reality of the extreme power imbalance in the victim-abuser relationship and creates another possible venue for an abuser to further victimize the victim in a face-to-face setting. Requiring a victim to participate in any process which requires such meetings is not conducive to meaningful settlement and may otherwise be a dangerous environment for the victim. Although presumably the victim would have an attorney present in such conferences, the mere presence of the attorney does virtually nothing to impede a batterer's ability to control and intimidate his victim.

Moreover, the collaborative law process envisions a system that advocates for, or supports, the entire family system, thereby assuming that parents will be able to engage in effective co-parenting and develop a parenting plan. Assuming that a victim and her abuser must develop a co-parenting plan may also be yet another well-intentioned, but highly counterproductive, effort that further threatens the victim participant. Additionally, treating the victim and abuser similarly in this process further allows the

batterer to not be accountable for his actions.

Like mediation, the collaborative law process assumes that the parties will freely and fully exchange financial information. However, financial abuse and intimidation is a frequent tactic of the batterer. It is illogical to assume that the batterer will simply cease financial abuse and freely deliver the financial information that the abuser may have been withholding for years. Collaborative law requires both parties to fully disclose a broader array of information as well. Such disclosure may have the unintended result of placing a victim at even greater risk.

Moreover, the involvement of a domestic abuse advocate in the collaborative law process also does not meaningfully address the needs of the victim. Advocates are trained to support the victim and may be able to help her articulate some issues and concerns during any process. However, as with the use of separate caucuses in mediation, the presence of the advocate does very little to mitigate a lengthy history of fear endured by many victims, including the fear of what will occur outside the collaborative process.

Finally, of greatest consequence to a victim of battering is the underlying assumption key to the collaborative law process that participants are ***prohibited*** from going to court. One should be exceedingly wary of participating in a process which restricts a victim's right to seek court-ordered protection from her abuser. In this regard, collaborative law directly collides with policy initiatives of the past several decades in the realm of the justice system response to domestic violence.

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* Author's note. I wish to thank and acknowledge all of the individuals who have educated me regarding domestic abuse over the past two decades. The education has come from academics, attorneys, advocates, my own work in representing and working with batterers and the victims too countless to name and too countless to forget. I use the pronoun "she" to refer to victims of domestic abuse and "he" to refer to perpetrators of domestic abuse because 95% of the reported domestic abuse is abuse perpetrated by men against women.

RESOURCES Section

Programs Providing Services to Battered Women and Their Children

Courtesy of Rana Fuller and the Battered Women's Legal Advocacy Project

Statewide

Program	City	County(s) Served	Business	Crisis
Battered Women's Legal Advocacy Project	Minneapolis	Statewide	612-343-9842	800-313-2666
Brian Coyle Community Center: Immigrant Women's Advocacy Project	Minneapolis	Statewide	612-338-5282	
*Casa de Esperanza	St. Paul	Statewide	651-646-5553	651-772-1611
Centro Legal	St. Paul	Statewide	651-642-1890	
Day One		Statewide	866-223-1111	
Deborah's Place	Richfield	Statewide, primarily Twin Cities metro	612-716-9553	612-716-9553
Korean Family Enrichment Program	Minneapolis	Statewide	612-342-1344	
Minnesota Coalition for Battered Women	St. Paul	Statewide	651-646-6177	800-289-6177
Minnesota Network on Abuse In Later Life	St. Paul	Statewide	651-636-5311	
OutFront Minnesota	Minneapolis	Statewide	612-822-0127 ext. 101	800-800-0350
Praxis International	St. Paul	National, does not provide direct services	651-699-8000	

Twin Cities Metro Area: Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington Counties

Program	City	County(s) Served	Business	Crisis
African American Family Services	Minneapolis	Twin Cities Metro Area	612-813-0782	612-871-7878
*Alexandra House	Blaine	Anoka	763-780-2332	763-780-2330
*Asian Women United of Minnesota	St. Paul	Twin Cities Metro Area	651-646-2118	612-724-8823

Program	City	County(s) Served	Business	Crisis
Aurora Center	Minneapolis	University of Minnesota - Twin Cities	612-626-2929	612-626-9111
*B. Robert Lewis House	Eagan	Dakota	651-452-7288	800-336-7233
*B. Robert Lewis House	Hastings	Dakota	651-437-1291	800-336-7233
Battered Women's Justice Project	Minneapolis	Twin Cities Metro Area	612-824-8768	
Battered Women's Legal Advocacy Project	Minneapolis	Statewide	612-343-9842	800-313-2666
Breaking Free	St. Paul	Twin Cities Metro Area	651-645-6557	651-645-6557
Brian Coyle Community Center: Immigrant Women's Advocacy Project	Minneapolis	Statewide	612-338-5282	
*Casa de Esperanza	St. Paul	Twin Cities Metro Area and Statewide	651-646-5553	651-772-1611
Centro Legal	St. Paul	Statewide	651-642-1890	
Chrysalis Center for Women	Minneapolis	Twin Cities Metro Area	612-871-0118	
Community/University Health Care Center	Minneapolis	Twin Cities Metro Area	612-638-0700	612-639-6363
*Cornerstone Advocacy Services	Bloomington	Hennepin	952-884-0376	952-884-0330
CSD of MN Deaf Domestic Violence Program	St. Paul	Twin Cities Metro Area	651-487-8867 (TTY)	
Deborah's Place	Richfield	Statewide, primarily Twin Cities	612-716-9553	612-716-9553
Division of Indian Work Greater Minneapolis Council of Churches	Minneapolis	Minneapolis	612-722-8722	
Domestic Abuse Project	Minneapolis	Hennepin	612-874-7063	612-874-7063
Domestic Abuse Project: Little Earth Advocacy Office	Minneapolis	Hennepin	612-728-5874	612-874-7063
Domestic Abuse Project: Minneapolis City Hall Advocacy Office	Minneapolis	Hennepin	612-673-3526	612-874-7063
Domestic Abuse Project: North Point Outreach Advocacy Project	Minneapolis	Hennepin	612-529-7477	612-874-7063

Program	City	County(s) Served	Business	Crisis
Fairview Domestic Abuse Services: Fairview Ridges Hospital	Burnsville	All Surrounding Areas	952-892-2505	
Fairview WomanKind - Fairview Southdale Hospital	Edina	Twin Cities Metro Area	952-924-5775	952-924-8200
Fairview WomanKind - Fairview University Hospital	Minneapolis	All surrounding Areas	612-672-2701	612-672-2700
Family & Children's Service-PRIDE Program	Minneapolis	Minneapolis, St. Paul	612-729-0340	612-728-2062
Freeport West, Inc.	Minneapolis	Twin Cities	612-824-3040	612-874-1936
Hennepin County Domestic Abuse Service Center	Minneapolis	Hennepin	612-348-5073	
Hennepin County Medical Center Domestic Violence Intervention Program	Minneapolis	Hennepin	612-873-2636	612-336-0850
*Home Free	Plymouth	Northwest Hennepin	763-559-9008	763-559-4945
Home Free Community Program	Plymouth	Northwest Hennepin	763-545-7080	763-559-4945
Immigrant Women's Advocacy Project	Minneapolis	Twin Cities Metro Area	612-338-5282	
International Self- Reliance Agency for Women	Minneapolis		612-692-8840	
Jewish Domestic Abuse Collaborative: Jewish Family Services of St. Paul	St. Paul	Twin Cities Metro Area	651-698-0767	
Korean Family Enrichment Program	Minneapolis	Statewide	612-342-1344	
Lighthouse Program- Ridgeview Medical Center	Waconia		952-442-2191	
Lighthouse Program - St.Francis Medical Center	Shakopee		952-403-2258	
Minnesota Coalition for Battered Women	St. Paul	Statewide	651-646-6177	800-289-6177
Minnesota Indian Women's Resource Center	Minneapolis	Twin Cities Metro Area	612-728-2000	
Minnesota Network on Abuse in Later Life	St. Paul	Statewide	651-636-5311	
OutFront Minnesota	Minneapolis	Statewide	612-822-0127 ext. 101	800-800-0350

Program	City	County(s) Served	Business	Crisis
Park Nicollet Health Services AdvoCare	St. Louis Park	Park Nicollet and Methodist Hospital patients, general community	952-993-6907	952-993-6670
Phyllis Wheatley Community Center	Minneapolis		612-374-4342	612-384-0804
Praxis International	St. Paul	National, does not provide direct services	651-699-8000	
Project PEACE	Brooklyn Center	Brooklyn Center, Maple Grove, Robbinsdale and Crystal	763-533-0733	763-536-1850
Safe Journey-North Memorial Hospital	Robbinsdale	North Memorial Hospital patients, Northwest Hennepin County suburbs, Northside Minneapolis	763-520-2639	763-520-7070
SEWA-AIFW (Asian Indian Family Wellness)	Fridley	Twin Cities	763-234-3491	763-234-3491
*Sojourner Project	Hopkins	West Hennepin	952-933-7433	952-933-7422
Sojourner Project - Community Advocacy Project	Hopkins	West Hennepin	952-935-1004	952-933-7422
Sojourner Project - Intervention Project	Hopkins	West Hennepin	952-935-7007	952-933-7422
Southern Valley Alliance for Battered Women	Belle Plaine	Scott and Carver	952-873-4214	952-873-4214
Southern Valley Alliance for Battered Women - I'm O.K Children's Visitation Center	Belle Plaine	All surrounding Areas	952-873-4216	
Southern Valley Alliance for Battered Women-Scott County Criminal Intervention	Belle Plaine	Scott	952-873-4233	952-873-4214
St. Paul Domestic Abuse Intervention Project	St. Paul	St. Paul and Ramsey	651-645-2824	651-645-2824
*Tubman Family Alliance Anne Pierce Rogers Shelter	Cottage Grove	Hennepin, Ramsey, and Washington	612-768-0216	612-825-0000
*Tubman Family Alliance Harriet Tubman Shelter	Minneapolis	Hennepin, Ramsey, and Washington	612-825-3333	612-825-0000
Tubman Family Alliance Hennepin County Legal Program	Minneapolis	Hennepin, Ramsey, and Washington	612-673-2244	612-825-0000

Northwest Minnesota: Becker, Beltrami, Cass, Clay, Clearwater, Hubbard, Kittson, Lake of the Woods, Mahnomen, Marshall, Norman, Pennington, Polk, Red Lake, and Roseau Counties

Program	City	County(s) Served	Business	Crisis
Community Resource Alliance	Detroit Lakes	White Earth Reservation and surrounding areas	218-844-5762	
Community Violence Intervention Center	Grand Forks, ND	East Grand Forks, MN, surrounding areas and Grand Forks County, ND	701-746-0405	701-746-8900
Crisis Resource Center	Baudette	Lake of the Woods	218-634-3233	218-634-3134
Down On Violence Everyday (DOVE) White Earth Tribal Victim Services	Nay-tahwaush	White Earth Reservation, Becker, Clearwater, Mahnomen	218-935-5554	800-543-0629
*Equay Wiigamig (Women's Shelter)	Red Lake	Red Lake Reservation, Beltrami	218-679-3443	800-943-8997
Family Advocacy Center of Northern Minnesota	Bemidji	14 counties and 3 reservations in northern Minnesota	218-333-6011	
Family Safety Network of Cass County	Walker	Cass	218-547-1636	800-324-8151
Headwaters Intervention Center	Park Rapids	Clearwater and Hubbard	218-732-7413	800-939-2199
Headwaters Intervention Center Family Crisis Center	Bagley	Clearwater and surrounding area	218-694-2831	888-551-6572
Lakes Crisis and Resource Center	Detroit Lakes	Becker	218-847-8572	218-847-7446
Leech Lake Family Violence Program	Cass Lake	Leech Lake Reservation, Beltrami, Cass and Itasca	218-335-8070	877-766-0977
Mahnomen County Sheriff's Victim-Witness Service	Mahnomen	Mahnomen	218-935-9319	800-474-9319 800-435-4119 evenings/weekends
Marshall County Sheriff's Department Marshall/ Kittson Victim Assistance Program	Warren	Marshall	218-843-8080	
Migrant Health Service Hispanic Battered Women and Children's Program	Crookston	Clay, Kittson, Marshall, Norman, Pennington, Polk, Red Lake, and Wilkin	218-281-3552	800-342-7756
Migrant Health Service	Moorhead	Clay, Kittson, Marshall, Norman, Pennington, Polk, Red Lake, and Wilkin Counties	218-236-4879	800-556-9661

Program	City	County(s) Served	Business	Crisis
Mujeres Unidas del Red River Valley	Moorhead		218-236-9884	
*Northwoods Coalition for Battered Women	Bemidji	Beltrami, Cass, Clearwater, Hubbard, Lake of the Woods and Mahnomen	218-444-1393	800-588-6229
Norman County Victim Assistance Program	Ada	Norman	877-233-5642	800-510-9967
Pennington/Red Lake County Victim Services	Thief River Falls	Pennington and Red Lake	218-681-0773	
Polk County Attorney's Office Coordinated Victim Services	Crookston	Polk	218-281-4347	877-625-8092
Rape and Abuse Crisis Center of Fargo-Moorhead	Fargo, ND	Clay and Norman	701-293-7273	800-344-7273
Roseau County Victim Services	Roseau	Roseau	218-463-4215	877-302-8075
*Violence Intervention Project	Thief River Falls	Pennington, Polk, Kittson, Marshall, Norman, Red Lake, and Roseau	218-681-5557	800-660-6667
Women's Network of the Red River Valley	Moorhead	Red River Valley	218-233-2737	
*Annamarie's Alliance	St. Cloud	Stearns, Benton, Sherburne, Wright, Mille Lacs, Isanti, Kanabec, Chisago and Pine	320-253-6900	800-950-2203
Advocacy for Victims of Abuse	Buffalo	Wright	612-839-8459	763-682-1470
Hands of Hope Resource Center	Little Falls	Morrison	320-632-1657	888-454-4878
Hands of Hope Resource Center	Long Prairie	Todd	320-732-2319	800-682-4547
Listening Ear Crisis Center	Alexandria	Douglas	320-763-6638	800-854-9001
*Mille Lacs Band of Ojibwe Women's Project	Mille Lacs Reservation	Mille Lacs Reservation and all other areas	320-495-3517	866-867-4006
Mille Lacs Band of Ojibwe Women's Project - District I Advocate	Onamia	Mille Lacs, Crow Wing, and Kanabec	320-532-7396	877-290-2677
*Mille Lacs Band of Ojibwe Women's Project - District II Advocate	McGregor	Mille Lacs Reserva-tion and all other areas	218-768-4412	866-867-4006

Program	City	County(s) Served	Business	Crisis
Mille Lacs Band of Ojibwe Women's Project--District III Advocate	Sandstone	Pine, Carlton, Isanti, Burnett and Polk	320-384-0149	877-229-2678
Pearl Crisis Center	Milaca	Mille Lacs	320-982-2901	800-933-6914
The Refuge Network	Cambridge	Isanti	763-689-3532	800-338-7233
The Refuge Network-The Refuge East	Chisago City	Chisago	651-257-2890	800-338-7233
The Refuge Network-The Refuge North	Mora	Kanabec	320-679-1737	800-338-7233
Rivers of Hope	Monticello	Wright and Sherburne	763-295-3433	763-295-3433
*Shelter House	Willmar	18 county area in Southwest Minnesota. Community collaboration for Chippewa, Kandiyohi, Lac Qui Parle, Meeker, Renville and Swift	320-235-0475	866-223-1111
Shelter House: Swift County Outreach	Benson	Swift	320-842-3206	866-223-1111
Shelter House: Swift County Intervention Project	Benson	Swift	320-842-3207	866-223-1111
*Someplace Safe	Fergus Falls	Big Stone, Grant, Otter Tail, Pope, Stevens, Traverse, and Wilkin	218-739-3486	800-974-3359
Someplace Safe-Big Stone	Ortonville	Big Stone	320-839-2331	800-974-3359
Someplace Safe: Fergus Falls Parenting Time Center	Fergus Falls	All surrounding areas	218-739-3132	800-974-3359
Someplace Safe: Glenwood	Glenwood	Pope	320-634-3483	800-974-3359
Someplace Safe: Grant	Elbow Lake	Grant	218-685-4203	800-974-3359
Someplace Safe: Otter Tail Criminal Justice Intervention	Fergus Falls	Otter Tail	218-739-2853	800-974-3359
Someplace Safe: Perham	Perham	Otter Tail	218-346-7276	800-974-3359
Someplace Safe: Stevens	Morris	Stevens	320-589-3208	800-974-3359
Someplace Safe: Traverse	Wheaton	Traverse	320-563-4121	800-974-3359
Someplace Safe: Wilkin	Breckenridge	Wilkin	218-643-3109	800-974-3359
*Women's Center of Mid-Minnesota	Brainerd	Crow Wing and surrounding areas	218-828-1216	888-777-1248

Southeast Minnesota: Dodge, Goodhue, Fillmore, Freeborn, Houston, Le Sueur, Mower, Olmstead, Rice, Steele, Wabasha, Waseca, and Winona Counties

Program	City	County(s) Served	Business	Crisis
CADA: LeSueur/Sibley County Victim Services	Gaylord	Sibley	507-237-5977	800-477-0466
CADA: Waseca County Victim Services	Waseca		507-835-7828	800-477-0466
Crime Victims Resource Center	Austin	Mower	507-437-6680	507-437-6680
Crisis Resource Center of Steele County	Owatonna	Steele	507-451-1202	800-451-1202
Fillmore Family Resources	Preston	Fillmore	507-765-2316	800-500-2316
Freeborn County Crime Victim's Crisis Center	Albert Lea	Freeborn	507-377-5460	507-373-2223
HOPE Center	Faribault	Rice and surrounding areas	507-332-0882	800-607-2330
Houston County Women's Resources	Hokah	Houston	507-894-2676	866-367-4297
LeSueur County Victim/ Witness Program	LeCenter	LeSueur	507-357-8512	800-477-0466
Mayo Clinic Social Services	Rochester	Mayo Clinic patients	507-266-8389	
*Red Wing Area Coalition for Transitional Housing	Red Wing	Goodhue and surrounding areas	651-388-9360 ext. 11	800-369-5214
Women's Resource Center of Winona	Winona	Winona	507-452-4440	507-452-4453
*Women's Shelter, Inc.	Rochester	Southeastern Minnesota	507-285-1938	507-285-1010

Southwest Minnesota: Blue Earth, Brown, Cottonwood, Chippewa, Faribault, Jackson, Lac Qui Parle, Lincoln, Lyon, Martin, McLeod, Murray, Nicollet, Nobles, Pipestone, Redwood, Renville, Rock, Sibley, Watonwan, and Yellow Medicine Counties

Program	City	County(s) Served	Business	Crisis
*Committee Against Domestic Abuse	Mankato	Blue Earth, Faribault, LeSueur, Nicollet, Sibley, and Waseca	507-625-8688	800-477-0466
Committee Against Domestic Abuse-Faribault County Victim Services	Blue Earth	Faribault	507-526-5275	800-477-0466

Program	City	County(s) Served	Business	Crisis
*Tubman Family Alliance Hill Home	Lake Elmo	Hennepin, Ramsey, and Washington	651-653-6305	612-825-0000
Tubman Family Alliance North Point Office	Minneapolis	Hennepin, Ramsey, and Washington	612-521-0240	612-825-0000
*Turningpoint for Victims of Domestic/Sexual Violence	River Falls, WI	Pierce and St. Croix Counties in Wisconsin	715-425-6751	800-345-5104
*Women of Nation's/ Eagle's Nest Shelter, Community Advocacy Program	St. Paul	Twin Cities Metro Area	651-251-1603	651-222-5836
*Women's Advocates	St. Paul	Twin Cities Metro Area	651-227-9966	651-227-8284

Northeast Minnesota: Aitkin, Carlton, Cook, Itasca, Koochiching, Lake, Pine and St. Louis Counties

Program	City	County(s) Served	Business	Crisis
Advocates Against Domestic Abuse	Aitkin	Aitkin, and portions of surrounding Area	218-927-2327	800-950-1242
Advocates for Family Peace	Grand Rapids	Itasca	218-326-0388	800-442-8565
*American Indian Community Housing Organization Dabinoo'igan Shelter	Duluth	All Areas	218-722-7225	218-722-2247
Bois Forte Victim Services	Nett Lake	Bois Forte Reservation	218-757-0111	866-362-2982
Cook County Attorney's Office General Crime Victim Services	Grand Marais	Cook	218-387-3669	
Domestic Abuse Intervention Project	Duluth	St. Louis and Carlton	218-722-2781	
Fond du Lac Reservation	Cloquet	Fond du Lac Reservation	218-879-1227	218-348-1817
Friends Against Abuse	International Falls	Koochiching	218-285-7220	866-778-6059
Grand Portage Reservation Tribal Council	Grand Portage	Grand Portage Reservation	218-475-2453	218-387-3030
North Shore Horizons	Two Harbors	Lake and Cook	218-834-5924	800-834-5923
Range Women's Advocates	Virginia	Northern St. Louis County (exclusive of Duluth area)	218-749-5054	800-345-5054
Rural Women's Advocates (Carlton County Sexual and Domestic Abuse Program)	Carlton	Carlton	218-384-8927	218-384-8927
*Safe Haven Shelter for Battered Women	Duluth	St. Louis County and surrounding area	218-728-6481	218-728-6481
Violence Prevention Center	Grand Marais	Cook	218-387-1262	218-387-1237

Program	City	County(s) Served	Business	Crisis
Committee Against Domestic Abuse - LeSueur/ Sibley County Victim Services	Gaylord	LeSueur and Sibley	507-237-5977	800-477-0466
Committee Against Domestic Abuse - Waseca County Victim Services	Waseca	Waseca	507-835-7828	800-477-0466
Committee Against Domestic Abuse - Watonwan County Victim Services	St. James	Watonwan	507-375-3040	800-477-0466
Crime Victim Services, Inc.	New Ulm	Brown, Nicollet and Sibley	507-233-6664	800-630-1425
McLeod Alliance for Victims of Domestic Violence	Hutchinson	McLeod County and surrounding areas	320-234-7933	320-234-7933
Shelter House: Chippewa and Lac Qui Parle County Outreach	Montevideo	Chippewa and Lac Qui Parle	320-269-2140	866-223-1111
Shelter House: Renville County Outreach	Olivia	Renville	320-523-1015	866-223-1111
Southwest Crisis Center	Worthington	Nobles	507-376-4311	800-376-4311
Southwest Crisis Center - Jackson	Jackson	Jackson	507-847-4202	800-376-4311
Southwest Crisis Center- Luverne	Luverne	Rock	507-283-9917	800-376-4311
Southwest Crisis Center - PEACE Agency	Windom	Cottonwood	507-831-2244	800-376-4311
Southwest Crisis Center - Pipestone	Pipestone	Pipestone	507-825-5688	800-376-4311
Women's Rural Advocacy Programs - Lincoln/Lyon County and Criminal Justice Investigation	Marshall	Lincoln and Lyon	507-532-9532	800-639-2350
Women's Rural Advocacy Programs - Redwood County	Redwood Falls	Redwood	507-637-3056	888-637-3040
Women's Rural Advocacy Programs - Yellow Medicine County	Granite Falls	Yellow Medicine	320-564-2524	800-295-2422

* Denotes a battered women's shelter

Supervised Child Safety Chart

I have prepared the following Child Safety Center chart as a service to the family law community. Please feel free to copy and distribute the chart or use it on your firm's website as a resource to your clients so long as you properly cite me as the author of the chart as you would cite any other legal resource. I would like to thank Ashley Yauch, an intern at my office from Crown College in St. Bonifacius, Minnesota, who spent a significant amount of time calling ***each*** resource listed so as to provide the most accurate and current information. Finally, I have taken great effort to be as exhaustive as possible by including all known safety centers both in the Twin City Metro and Greater Minnesota areas. However, I acknowledge that I may have missed some safety centers or supervised visitation services. If so, please email or call me with any Safety Center which may have been inadvertently omitted and I will update the chart accordingly and email you an updated copy.

Thank you,

Daniel J. Van Loh
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Maple Grove Business Lofts
12912 63rd Ave. North
Maple Grove, Minnesota 55369
(763) 587-7100
dan@deckertvanloh.com

SUPERVISED CHILD SAFETY CENTERS

TWIN CITIES METRO

FACILITY	CONTACT INFO	NOTES
Genesis II 3036 University Ave. SE Minneapolis, MN 55414	Phone: (612) 617-0191 Fax: (612) 617-0193 Email: Genesis2@genesis2.org Website: Genesis2.org Contact: Jill Helgemoe.	**Times:** Monday, Wednesday, Thursday, and Friday: 5:30 to 7:30 PM Saturday and Sunday: 10AM-12PM, 12-2 PM, 2-4 PM **Services:** Exchanges, in home supervision, Monitored visits **Cost:** No fee if referred through Hennepin County Family Court Services. If not referred through HCFCS, $45.00 per session with an initial $20.00 one-time intake fee. Parents are encouraged to split the cost of the session, however, if the custodial parent does not wish to pay, the non-custodial parent is responsible for the cost.
Pillsbury House 3501 Chicago Ave. S. Minneapolis, MN 55407	Phone: (612) 824-0708 Email: thomask@pucmn.org Contact: Erica Esquivel	**Times:** Mon-Thurs 8AM-8PM; Friday 8AM-6PM; Sat-Sun 10AM-2PM **Services:** Supervised visits, Exchanges, Parenting classes **Cost:** $50/Visit; $10/Exchange; no intake fee **Requirements:** Court order
Alpha Human Services 1516 W Lake St Minneapolis, MN 55408	Phone: (612) 822-1357 Website: www.alphaservices.org Contact: Doug Williams	**Times:** M-Sun 7AM-9PM **Services:** Chaperone/Monitored training
Katahdin, Inc. 2318 Park Ave. Minneapolis, MN 55404	Phone: (612) 872-4701 Website: www.KatahdinWorkshops.com Contact: Laurie Metzler	**Times:** Thursday 6PM-8PM; Saturday 10AM-2PM **Services:** Supervised visits **Cost:** covered by Hennipen County **Requirements:** Hennepin County Resident
Perspectives 3381 Gorham Avenue St. Louis Park, MN 55426	Phone: (952) 926-2600 Website: www.perspectives-family.org Contact: Jeffrey Postuma	**Times:** Friday Supervised Visits 6PM-8PM/ Exchanges 5:30PM-8:15PM; Saturday Supervised Visits 9AM-11AM; 12PM-2PM; 3PM-5PM; Exchanges 8:30AM, 11:30AM, 2:30PM, 5:30PM
Children's Safety Centers 281 Maria St. Paul MN 55106	Phone: (651) 748-4990 Website: www.childrensafetycenters.org Contact: Kelley Hempel	**Services:** Supervised Visits, Exchanges **Cost:** $30/parent

GREATER MINNESOTA

Alex & Brandon Child Safety Center PO Box 602 Brainerd, MN 56401	Phone: (218) 828-0022 Email: anblouise@qwest.net Website: www.womenscenteronline.org Contact: Ann Drevlow	**Times:** Tu-Sat 9AM-8PM; flexible on Sundays for exchanges **Services:** Supervised Visitations and Exchanges **Cost:** $20/hr for supervised visits; $7/ Exchange **Requirements:** Court order for exchanges
Listening Ear Crisis Center -Plus Kids 818 Elm St. Alexandria MN 56308	Phone: (320) 762-4100 Email: Pluskids@rea-alp.com Contact: Sharon Sherroneggermont	**Times:** Tu-Sun 3:30PM-8PM; Sat-Sun 8AM-6PM; Exchanges Tu-Fri **Services:** Exchanges, Supervised visits, Monitored visits **Cost:** $20 intake fee; $3/Exchange; pay on a sliding scale **Requirements:** must have court order, must know why parent is on probation and who their probation officer is
Family Service Rochester, Family Access Center 1110 6th St NW Rochester, MN 55901	Phone: (507) 287-2010 Email: jbuffie@familyservicerochester.org Website: www.familyservicerochester.org Contact: Joan Jefferies	**Times:** M-W 8AM-5PM; Th 8AM-9PM; Fri 8AM-3PM **Services:** Counseling, Supervised Visits and Exchanges **Cost:** Sliding fee scale
Kids Konnection-Family Crisis Center PO Box 3 Bagley, MN 56621	Phone: (218) 694-2831 Contact: Bonnie Paquin	**Times:** Open 2 weekends a month on Sat 8AM-2PM **Services:** Supervised Visitation and Exchanges **Cost:** $20/hr for non-custodial parent; pay on arrival **Restrictions:** Must have intake interview with parent or guardian prior to visitation
J.O.Y. Visitation Center PO Box 485 225 West Broadway Monticello, MN 55362	Phone: (763) 295-0992 Fax: (763) 295-0179 Email: joy-center@hotmail.com Website: www.joycenteronline.com Contact: MaryAnn Peterson	**Times:** M-F 1PM-8PM; Sat 8AM-4PM; Sun 1PM-5PM **Services:** Supervised Visitation 1-3 hrs; Supervised Exchanges, Parent Education **Cost:** Intake fee $45, sliding fee based on personal income for supervised visits, supervised exchanges $11/parent **Restrictions:** Must have court orders and protection copies, no talking about the other parent during the visit, parent education before and after visit, one on one with monitor

Positive Connections P.O. Box 394 Detroit Lakes, MN 56502	Phone: (218) 847-7343 Email: vickiet@arvig.net Contact: Vickie Tate	**Times:** M-F 10AM-8PM; Sat 10AM-6PM; Sun 12PM-6PM **Services:** Supervised Visitations and Exchanges **Cost:** Intake fee $20/parent, $3.75/ Exchange, $12/hr for Supervised Visits
Duluth Family Visitation 202 E. Superior St. Duluth MN 55802	Phone: (218) 722-2781 Website: www.duluth-model.org	**Times:** Tu 12PM-7PM; Wed 12PM-7PM, Fri 12PM-7PM; Sun 9AM-7PM **Services:** Supervised and Monitored Visits and Exchanges, onsite minimum monitoring, onsite continuous monitoring
Advocates for Family Peace Wellstone Family Safety Center 1611 NW 4th St. Grand Rapids, MN 55744	Phone: (218) 256-4052 Fax: (218) 327-4052 Website: www.stopdomesticabuse.org Contact: Laura Connelly	**Times:** Tu-Fri 9AM-7PM; Sat 9AM-5PM; Sun 4PM-6PM Exchanges no visitation **Services:** Supervised Visitations, Therapeutic Supervised visits, Supervised exchanges **Cost:** free
Hope Connection Safety Center 107 Second St. SE PO Box 67 Little Falls, MN 56345	Phone: (320) 632-5748 Contact: Bonnie	**Times:** M-F 5PM-8PM; Sat 8AM-8PM; Sun 12PM-8PM **Services:** Supervised Visitation, Exchanges **Cost:** Sliding fee scale
Keep Me Safe PO Box 466 Mankato, MN 56002	Phone: (507) 625-8688 Email: saras@inspire-hope.org Website: www.inspire-hope.org Contact: Sara Swanson	**Times:** Weekends, availability based on when intake forms are submitted. **Services:** Supervised Visits (2 hrs), Monitored Exchanges **Cost:** If court ordered no fee, sliding fee for no court order **Restrictions:** Court order.
New Horizons Crisis Center 109 S 5th St 40 Marshall, MN 56258	Phone: (507) 532-5764 Email: visitations@iw.net Website: www.newhorizenscrisiscenter.org Contact: Joyce Arands	**Times:** M-F 8:30AM-4:30PM **Services:** Supervised Visits and Exchanges **Cost:** County Pays, for Guardians $20/hr **Restrictions:** Court order.

Rainbow Bridge 715 N 11th St Suite 101 Moorhead, MN 56560	Phone: (218) 299-7694 Website: www.rainbowbridgekids.net Contact: Christa Evert	**Times:** Mon 9AM-5PM; Tu-Th 9AM-9PM; Fri 9AM-7:30PM; Sat 9AM-2:30PM; Sun 2:30PM-7:30PM **Services:** Supervised Visits, Exchanges **Cost:** Visits $7.50/ hr; $5/Exchange; sliding fee scale **Restrictions:** must agree with the guidelines of Rainbow Bridge
Shellie Campbell 1065 5th Ave SE Hutchinson, MN 55350	Phone: (320) 587-9740 Contact: Shellie Campbell	**Times:** M & W 5PM-7PM; Fri 4PM-7PM; Sat 9AM-12AM; Sun 10AM-12PM, 4PM-7PM with appointment **Services:** Supervised Visitation and Exchanges **Cost:** Visits $20/hr; $8/Exchange
Someplace Safe 125 W Lincoln Suite 10 Fergus Falls, MN 56538	Phone: (218) 739-3132 Website: www.someplacesafe.info Contact: Jeanne Jacobs	**Times:** on demand Tuesday-Sunday **Services:** Supervised Visits, Exchanges, Monitored, Parenting class, Informative literature **Cost:** $15/intake; Visits and Exchanges sliding scale fee
St. Cloud Area YMCA Supervised Visitation Program 1530 Northway Drive St. Cloud, MN 56303	Phone: (320) 253-2664 Website: www.socialservices@sc@ymca.org Contact: Michelle Dick	**Times:** M-F 9AM-8PM; Sat 9AM-6PM; Sun 2PM-6PM Labor Day-Memorial Day **Services:** Supervised Visits, Exchanges, Visitations **Cost:** $28/hr, scholarships available based on income, pay on day of visit, county referred bill **Restrictions:** Only low risk cases
Harmony Visitation Center 321 SW 5th St Wilmar, MN 56201	Phone: (320)-214-0799 Website: HVC@harmonyvisitation.org Contact: Elaine Bollande	**Times:** Flexible times **Services:** Exchanges on Mondays; Supervised Visits **Cost:** sliding scale
Visitation Exchange Center **1065 5th Ave. SE** **P.O. Box 364** **Hutchinson, MN 55350**	Phone: (320) 587-9740 Email: mtprules@.mcleodtreatmentprograms.org Contact: Melissa Brower	**Times**: Mon and Wed flexible hours/ Fri 3:45PM-7PM/ Sat 8:45AM-12AM/ Sun 3:45PM-7PM **Services**: Monitored Visits and Exchanges **Cost**: Visits $20/hr; $8/Exchange

SOUTH DAKOTA / NORTH DAKOTA

Family Connection-Safe Visitation Center PO Box 808 Dickenson, ND 58602	Phone: (701) 483-7233 Email: famconn@ndsupernet.com Website: www.lovewithoutfear.org	**Times:** M-F 9AM-6PM; Sun 1PM-6PM–>Summer/ M-F 11AM-6PM; Sun 1PM-6PM–>Winter **Services:** Supervised Visits and Exchanges **Cost:** Court ordered or Parents split cost evenly
Family Visitation Center 3928 S. Western Ave. Sioux Falls, SD 55901	Phone: (605) 322-4095 Website: www.familyvisitationcenter.org Contact: Aaron Wimmer	**Times:** M-F 8AM-8PM; Sat 9AM-5:30PM; Sun 1PM-7PM **Services:** Supervised Visits; Intermittent Visits; Exchanges **Cost:** Sliding fee scale
Wishing Well Child Visitation Program 211 S. 4th St Grand Forks, ND 58201	Phone: (701) 787-5806 Email: embracepeace@cviconline.org Website: www.civiconline.org	**Services:** Supervised Visitation and Exchanges; Parenting feedback **Cost:** Sliding fee scale

Last Updated: September 12, 2007

Supervised Visitation Network: Minnesota Chapter web address: http://www.svnetwork.net/mn/

Daniel J. Van Loh *is a founding partner of Deckert & Van Loh, P.A. in Maple Grove, Minnesota. Dan is a Rule 114 Qualified Family Law Neutral. He currently serves as a Co-Chair for the Ramsey County Bar Association Family Law Section and is an adjunct professor in the trial skills program at William Mitchell College of Law where he graduated in 1999. Dan has been selected as a Rising Star by Minnesota Law & Politics. He has been a speaker on family related issues both at CLE's and in non-legal settings.*

Dan would like to thank ***Ashley Yauch*** *for her assistance with preparing the Child Safety Center chart. Ashley is a senior at Crown College in St. Bonifacius, Minnesota. She is an intern with Deckert & Van Loh, P.A. and plans on attending law school in the fall of 2008.*

Minnesota and Federal Statutory Provisions:
Domestic Abuse, Criminal Law and Firearms Restrictions[1]

The following chart was prepared in conjunction with an October 25, 2007 CLE seminar: "When a Quasi-Civil Proceeding Becomes Criminal" for the Ramsey County Bar Association co-presented by Charles A. Ramsay of Ramsay, DeVore & Benerotte, P.A. of Roseville, MN. I would like to thank Mr. Ramsay for his criminal defense expertise in reviewing this chart.

As you may have experienced, the civil side of domestic abuse cases often moves very quickly, much faster than the criminal side if there are corresponding criminal charges. Decisions must be made quickly, often with little thought to the ramifications of "stipulating" to a domestic order for protection, particularly related to firearms possession. The chart is not meant to be exhaustive, but to be a summary list of the most common statutory provisions related to domestic violence, crimes of domestic violence and firearms restrictions. If your clients are facing criminal charges, it is advisable to confer with an experienced criminal defense attorney as the outcome of the criminal or civil case can have a significant impact on the outcome of the other corresponding case. I hope that you find the attached chart to be helpful as you wade through these often complicated issues.

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Minn. Stat. '518B.01	**Domestic Abuse Act**	Physical harm, bodily injury, or assault • the infliction of fear of imminent physical harm, bodily injury, or assault; or • terroristic threats[2] • 1st, 2nd, 3rd, 4th and 5th Degree Criminal Sexual Conduct[3] • committed against a family or household member by a family or household member:
Minn. Stat. '609.748	**Harassment** May or may not qualify for firearms prohibition. See Qualifying Restraining Order discussion below.	**Harassment**: • A single incident of physical assault; • A single incident of sexual assault; or, • Repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.; • Targeted residential picketing; and • A pattern of attending public events after being notified that the actor's presence at the event is harassing to another.
Minn. Stat. '518B.01, Subd. 15	Admissibility of Testimony in Criminal Proceeding	• Testimony offered by **Respondent** in OFP hearing is inadmissible in a criminal proceeding.
18 United States Code '' 921, 922, 925	**Federal Gun Control Act of 1968**	

18 United States Code '922(g)(8)	**Violence Against Women Act of 1994, amending 1968 Federal Gun Control Act.** Makes it a federal crime to possess a firearm or ammunition if there is a Qualifying Protection Order in place.	**Qualifying Protection Order** 1. ***Hearing***: Defendant/Respondent received **actual notice** and had an **opportunity to participate.** ***AND*** 2. ***Intimate Partner***: Plaintiff/Petitioner is an **intimate partner** of the Defendant/ Respondent. • A **spouse** or Defendant/Respondent • A **former spouse** of Defendant/ Respondent • An individual who is a **parent** of a child of Defendant/Respondent; **or** • An individual who **cohabitates or has cohabitated** with Defendant/Respondent. ***AND*** 3. ***Restrains Future Contact*** • The Order **restrains** Defendant/ Respondent from **harassing, stalking or threatening** the intimate partner, child of the Defendant/Respondent or child of the Defendant/Respondents intimate partner; or • The order **restrains** Defendant/ Respondent from engaging in other conduct that would place the intimate partner in **reasonable fear of bodily injury** to the partner or child. ***AND*** 4. ***Credible Threat or Physical Force.*** • The order includes a finding that Defendant/Respondent is a credible threat to the physical safety of the intimate partner or child, **or** • The order, by its terms, explicitly prohibits the use, attempted use, or threatened use of **physical force** against the intimate partner or child that would reasonably be expected to cause bodily injury.

18 United States Code '922(g)(9)	**Omnibus Consolidated Appropriates Act of 1997, amending 1968 Federal Gun Control Act.** Makes it a federal crime to possess a firearm or ammunition if there is a AQualifying Misdemeanor Crime of Domestic Violence (MCDV). Retroactive to MCDV convictions AT ANY TIME prior to September 30, 1996 enactment.	**A Qualifying MCDV is an offense that.** • Is a federal, state or local offense that is a misdemeanor under federal or state law. • Has an element the use or attempted use of physical force, or the threatened use of a deadly weapon, and, • At the time the MCDV was committed, the defendant was: · A current or former spouse, parent or guardian of the victim; · A person with whom the victim shared a child in common; · A person who was cohabiting with or had cohabitated with the victim as a spouse, parent or guardian; or, · A person who was or had been similarly situated to a spouse, parent, or guardian of the victim. ***EXCEPTIONS: A person has NOT been convicted of a qualifying MCDV: or*** • IF the person was not represented by counsel--unless he or she knowingly and intelligently waived the right to counsel; • IF the person was entitled to a jury trial AND the case was not tried by a jury--unless the person knowingly and intelligently waived the right; or, • IF the conviction was set aside or expunged; the person was pardoned; or, the person= civil rights--the right to vote, sit on a jury, and hold elected office-were restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such offense). ***But*:** This exception does NOT lift the federal firearms prohibition if: · the expungement, pardon or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms; or, · the person is otherwise prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms.

Minn. Stat. '609.2242, Subd. 3	**Domestic Assault With Firearms**	• The court will order that firearms be surrendered · if it determines that the assault was of a family or household member; and, · that the offender owns or possesses a firearm; and, · used it in any way during the commission of the assault. • The court may order that the accused is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of the person's life • Court is required to provide firearm prohibition and penalty information to a defendant for the firearm possession prohibition or the gross misdemeanor penalty to apply.
Minn. Stat. '609.224, Subd. 3	**Assault in 5th Degree**. Prohibition against possessing a pistol.	Prohibition against possessing a pistol if: • Potential prohibition if there have been two (2) assault convictions within three (3) years of each other.
Minn. Stat. "518B.01, Subd. 14, 14a and 14b.	**Penalties for OFP Violation.**	An OFP violation is a misdemeanor and punishable as contempt by court. • Notice or knowledge of Order required. • Upon an alleged violation, a peace officer may arrest without a warrant an individual whom the officer has probable cause to believe has violated an Order. • **Misdemeanor:** imprisonment of up to 90 days, a fine up to $700, or both. • **Contempt:** A peace officer or the Petitioner may also file an Affidavit with the court alleging a violation, after which the court may require the Respondent to appear within 14 days to show cause why he/she should not be found in contempt of court. • **Gross Misdemeanor:** The violation of an OFP within five years after being discharged from sentence for a previous conviction. • **Sentencing Requirements:** three days minimum imprisonment and participate in counseling or other appropriate programs selected by the court. • If the court stays imposition or execution of the jail sentence and the defendant fails to comply with the court's treatment order, the court must impose and execute the stayed jail sentence. • A minimum of ten days imprisonment and participation in counseling or other appropriate programs selected by the court if convicted of a violation within two years of a previous conviction. • **Felony:** Violation of OFP during the time period between the first of two or more previous qualified domestic violence- related offense convictions and the end of the five years following discharge from sentence for that offense, or while possessing a dangerous weapon • **Felony Penalties**: Possible imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minn. Stat. '518B.01, Subd. 22 & '518B.02, Subd. 1	**Violation of Criminal No Contact Order**	**Misdemeanor**: A person who knows of a criminal domestic abuse no contact order (an order issued by a court against a defendant in a criminal proceeding for domestic abuse) issued against the person and violates the order. **Probation/Conditions of Stay of Imposition**: If the court stays imposition or execution of a sentence for a domestic abuse offense and places the offender on probation, the court must order that, as a condition of the stayed sentence, the offender must participate in and successfully complete a domestic abuse counseling program or educational program.
Minn. Stat. '609.749, Subd. 8	**Harassment; stalking; penalties**	When a person is convicted of a harassment or stalking crime and the court determines that the person used a firearm in any way during commission of the crime: • The court may order that the person is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of the person's life. • A person who violates this paragraph is guilty of a gross misdemeanor. • Court is required to provide firearm prohibition and penalty information to a defendant at the time of the conviction or the firearms restriction and subsequent penalties does not apply.
Minn. Stat. '624.713, Subd. 1	**Ineligible persons to possess firearms**	The following persons are prohibited from possessing a pistol or semiautomatic military• style assault weapon or, any other firearm: • A person under the age of 18 (with exceptions for military use, use under adult supervision, after marksman/safety course completed or for target practice); • Individual convicted of a crime of violence · Includes convictions, juvenile delinquency adjudications and extended juvenile jurisdiction for crimes of violence. · A crime of violence includes crimes in other states or jurisdictions which would have been crimes of violence as defined in Minnesota law and as if committed in Minnesota. • Mentally ill, mentally retarded or adjudicated incompetent. • Individuals convicted of misdemeanor or gross misdemeanor controlled substance use or have been hospitalized or committed for treatment for the habitual controlled substance use or marijuana (unless medically certified to have not abused during previous 2 years);

- Individuals who have been confined or committed to CD treatment facility unless treatment is completed;

- Peace officers who have been informally admitted to CD treatment facility unless treatment is completed.

- Juveniles charged with committing a crime of violence, in a pretrial diversion program by the court before disposition, until the juvenile has completed the diversion program and the charge is dismissed;

- Individuals convicted of DA in another state unless 3 years have elapsed since the date of conviction and the person has not been convicted of any other DA violations in Minnesota or a similar law of another state since.

(i) a person who has been convicted in this state or elsewhere of assaulting a family or household member and who was found by the court to have used a firearm in any way during commission of the assault is prohibited from possessing any type of firearm for the period determined by the sentencing court;

(j) a person who:

(1) has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice as a result of having fled from any state to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding;

(3) is an unlawful user of any controlled substance as defined in chapter 152;
(4) has been judicially committed to a treatment facility in Minnesota or elsewhere as a person who is mentally ill, mentally retarded, or mentally ill and dangerous to the public, as defined in section 253B.02;

(5) is an alien who is illegally or unlawfully in the United States;

(6) has been discharged from the armed forces of the United States under dishonorable conditions; or

(7) has renounced the person's citizenship having been a citizen of the United States; or

(k) a person who has been convicted of the following offenses at the gross misdemeanor level, unless three years have elapsed since the date of conviction and, during that time, the person has not been convicted of any other violation of these sections: section 609.229 (crimes committed for the benefit of a gang); 609.2231, subdivision 4 (assaults motivated by bias); 609.255 (false imprisonment); 609.378 (neglect or endangerment of a child); 609.582, subdivision 4 (burglary in the fourth degree); 609.665 (setting a spring gun); 609.71 (riot); or 609.749 (harassment and stalking). For purposes of this paragraph, the specified gross misdemeanor convictions include crimes committed in other states or jurisdictions which would have been gross misdemeanors if conviction occurred in this state.

A person who issues a certificate pursuant to this subdivision in good faith is not liable for damages resulting or arising from the actions or misconduct with a firearm committed by the individual who is the subject of the certificate.

The prohibition in this subdivision relating to the possession of firearms other than pistols and semiautomatic military• style assault weapons does not apply retroactively to persons who are prohibited from possessing a pistol or semiautomatic military style assault weapon under this subdivision before August 1, 1994.

The lifetime prohibition on possessing, receiving, shipping, or transporting firearms for persons convicted or adjudicated delinquent of a crime of violence in clause (b), applies only to offenders who are discharged from sentence or court supervision for a crime of violence on or after August 1, 1993.

Minn. Stat. '629.715, Subd. 2	**Surrender of Firearms for Crimes Against the Person**. Conditional release in criminal proceedings.	The judge may order as a condition of release that; • The person surrender to the local law enforcement agency all firearms, destructive devices, or dangerous weapons owned or possessed by the person; • The person may not live in a residence where others possess firearms. • Surrendered firearms must be inventoried and retained, with due care to preserve its quality and function, by the local law enforcement agency. • Firearms must be returned to the person upon the person's acquittal, when charges are dismissed, or if no charges are filed. • Upon conviction, the firearm must be returned when the court orders the return or when the person is discharged from probation and restored to civil rights. • The firearm may be subject to forfeiture in an instrumentality of the crime.

18 United States Code '925 (a)	**Exceptions to firearms Restriction**.	• Law enforcement personnel (includes military) exempt from restraining order law (922(g)(8)) for ***department issued firearms***. • 922(g)(9) MCDV crimes ***not*** exempt
18 United States Code '921 (a)(3)	**Firearm Defined** (See statute for more detailed definitions)	• any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; • the frame or receiver of any such weapon; • any firearm muffler or firearm silencer; or • any destructive device. • Such term does not include an antique firearm. (Black Powder Rifles)
Minn. Stat. '609.165	**Restoration of Civil Rights; possession of firearms**	• The order of discharge felony or criminal offense must provide that a person who has been convicted of a crime of violence (see MSA ' 624.712, subdivision 5) is not entitled to ship, transport, possess, or receive a firearm for the remainder of the person's lifetime.
		• Relief from this restriction possible under United States Code, title 18, section 925 (law enforcement/military personnel) or by judicial order.
	Violation and Penalty of firearm prohibition for convictions of crimes of violence. (Subd. 1b)	• The discharge may be: · By order of the court following stay of sentence or stay of execution of sentence; or · Upon expiration of sentence. • Imprisonment of not more than 15 years or payment of a fine of not more than $30,000, or both.
	Judicial Restoration of Rights to Possess Firearms (Subd. 1d)	• A person subject to firearms restriction may petition a court to restore the person's ability to possess, receive, ship, or transport firearms and otherwise deal with firearms. · The court may grant the relief sought if the person shows good cause to do so and the person has been released from physical confinement. · If a petition is denied, the person may not file another petition until three years have elapsed without the permission of the court.
	Exclusion for Bribery/Public Office	• This section does not apply to a forfeiture of and disqualification for public office for persons holding public office who are convicted of bribery.

Notes

[1] Not intended to be an exhaustive list, but a list of the most common statutory provisions related to domestic violence, crimes of domestic violence and firearms restrictions.

[2] 609.713, subdivision 1

[3] M.S.A. 609.342, 609.343, 609.344, 609.345, or 609.345.

Brochure: A Domestic Violence Victim's Guide to Getting a Good Attorney

Courtesy of the Domestic Abuse Committee of the MSBA Family Law Section.

The Family Law Section Domestic Abuse Committee Attorney Brochure "A Victim's Guide To Getting A Good Attorney" was developed after hearing repeatedly expressed frustration by victims with finding an attorney who understood the dynamics of domestic abuse. Through the use of focus groups, which included victims, attorneys, domestic violence advocates and judicial officers, as well as members of the Family Law Section Domestic Abuse Committee, the brochure hones in on specific, practical steps that a victim can take to try to find and work with an attorney who understands the many ramifications of domestic abuse in varying legal matters. The brochure is also available to guide attorneys who may want to become the knowledgeable attorney victims need to have.

You can access this brochure on the main page of the Family Law Section website:

http://www2.mnbar.org/sections/family-law/index.asp

Casa de Esperanza
Website Information

Casa de Esperanza is a Latina agency that is grounded in commitments to its community and to ending domestic violence. Casa de Esperanza's website contains many useful resources, but new children's materials are the most recent highlights to the organization. Maria Pabon developed "tool kits" for families to assist parents, teachers, and people working with the families and children about domestic violence. The tool kits were created to be used in the home, are culturally appropriate and thus in both Spanish and English, and fun to use. There is a workbook, a storybook, and flash cards that use art to empower children and they all offer a bridge to conversations about feelings. These tools can be purchased on the website.

http://www.casadeesperanza.org/

Point to Ponder…

The *Link* Between Abuse of People and Abuse of Animals

Sonja C. Larson

- 71% of pet-owning women entering women's shelters reported that their batterer had injured, maimed, killed or threatened family pets for revenge or to psychologically control victims; 32% reported their children had hurt or killed animals.[1]

- Between 25% and 40% of battered women are unable to escape abusive situations because they worry about what will happen to their pets or livestock should they leave.[2]

An emerging connection between domestic violence and animal abuse has sparked attention from domestic violence advocates, mental health professionals, veterinarians, and attorneys. This connection is called the *Link*. In March 2007, Partners for Violence Prevention, The University of Minnesota College of Veterinary Medicine, Minnesota's Department of Human Services, and the American Humane Association sponsored a conference examining the connection between the abuse of people and animals and interdisciplinary intervention strategies. In addition, Partners for Violence Prevention sponsored **"**Pets Caught in the Crossfire of Family Violence," a program taped at the conference and featured on TPT Channel 17.

At this year's Criminal Justice Institute, Ramsey County Attorney Susan Gaertner spoke about the connection between animal abuse and domestic violence and highlighted the efforts of a local interdisciplinary group headed by Jane Hunt of Partners for Violence Prevention. The Family Violence and Animal Abuse Working Group is a local interdisciplinary group working on issues related to the Link such as domestic violence screening at veterinary clinics, early identification of violent offenders when an offender is convicted of animal cruelty and emergency shelters that provide housing for pets. For more information about the group please contact Jane Hunt at jane.hunt@spps.org or at (651) 298-4566.

For more information on the connection between domestic violence and pet abuse visit:
http://www.animaltherapy.net/Bibliography-Link.html
http://www.americanhumane.org/site/PageServer?pagename=lk_home

Notes

[1] Ascione, F.R., Weber, C. V. & Wood, D. S. (1997). The abuse of animals and domestic violence: A national survey of shelters for women who are battered. *Society & Animals* 5(3), 205-218.

[2] Arkow, P. (2003). *Breaking the cycles of violence: A guide to multi-disciplinary interventions. A handbook for child protection, domestic violence and animal protection agencies*. Alameda, CA: Latham Foundation.

McIntosh, S. (2001). Calgary research results: Exploring the links between animal abuse and domestic violence. *The Latham Letter 22*(4), 14-16.

Arkow, P. (1994). Animal abuse and domestic violence: Intake statistics tell a sad story. *Latham Letter 15*(2), 17.

See Sonja Larson's bio on page 40.