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## PROTECTING BATTERED WOMEN AND THEIR CHILDREN

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## **Using the Law to Protect Battered Women and Their Children**

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### **I. Introduction**

Studies show that men are overwhelmingly the abusers in domestic violence cases; women are their victims. The U.S. National Crime Survey from 1973 to 1982 found that men were assaulted by their wives in only 4 percent of spousal domestic assault incidents. /1/ Even those women who are charged in the criminal courts for having perpetrated acts of domestic violence are seldom perpetrators. Batterer treatment programs have evaluated many of these women and concluded that more than 95 percent of women arrested for domestic violence and referred by the courts to them are actually victims wrongfully arrested or acting in self-defense. /2/ Because men are most often the perpetrators and women the victims, this article refers to women as victims and men as perpetrators even though in a small number of cases this may not be the case.

Although most domestic violence statutes protect victims only from physical and sexual abuse, domestic abuse can be physical, sexual, emotional, or economic. Statutes intended to protect victims from this abuse are a fairly recent phenomena.

Domestic violence and family law cases are notoriously problematical because the legal issues are particularly complex and frequently one or more of the parties are difficult individuals with whom to deal. Abusive men are far more difficult than other parties in family law cases. If they have minor children, they generally shift their focus to control of the children as a way to continue their terror and violence against their female partners after separation. /3/ Abusive fathers are far more likely than nonabusive parents to fight for child custody, not pay child or spousal support, and kidnap children. /4/ Compounding these problems are the difficulties that arise because of the court's unwillingness to recognize the abuse, its seriousness, or its profound effects on the children.

This article first discusses legal remedies available to battered women and their children in custody cases, describes outcomes of domestic abuse cases and proceedings involving orders of protection, and explains criminal actions that may be taken against batterers.

## **II. Custody Orders**

The vast majority of child custody cases arise in the context of divorcing or separating parents. If the parents were married, the custody dispute usually is part of a legal separation, divorce, or, very occasionally, annulment proceeding. In many states a parent may bring a custody case even if custody and visitation are the only matters to be decided by the court.

If a child's parents were never married to each other, custody is likely to be litigated in the context of a custody case or, in some states, paternity case. Many children today are born out of wedlock; in 1989, 27 percent of all newborns were born to unmarried mothers. /5/ The advantage of custody being decided in a divorce or paternity case is that paternity, child support, and in a divorce, alimony and property issues affecting the parents, can also be decided at the same time.

Custody disputes can also arise in other contexts. Any two or more people may seek a child's custody in a guardianship or an adoption proceeding. In virtually every state, custody may be awarded by a court in a domestic violence case if one parent alleges that the other parent abuses the first parent or one or more children. In addition, the state may move to take custody away from parents who are abusing, neglecting, or abandoning a child. While to report an abusive parent to the child protective service agency is common, equally common is for an abusive parent or his family falsely to accuse the protective parent of child abuse as part of his control over her. /6/

### **A. Nature of Custody**

Custody of a child includes both legal and physical custody. Physical custody is the right to possess the child physically. It also encompasses who has visitation with the child. Legal custody is the right to make major decisions about the child's upbringing (i.e., the child's education, medical care, religious upbringing, and discipline). Because courts are reluctant to become involved with the usual day-to-day decisions that the child's primary caretaker makes all the time (i.e., what the child should eat, wear, watch on TV, etc.), courts generally ignore such decisions unless they rise to the level of being a health, education, or religious issue.

Either or both physical or legal custody can be sole or joint (sometimes called shared). Under joint physical custody, the child physically lives with both parents, and, under joint legal custody, both parents have the right to make the major decisions about the child. Joint custody works best when both parents respect each other and cooperate in making decisions concerning the child. However, when one parent abuses or tries to control the other parent or child, joint custody--whether physical or legal--is unlikely to work and may endanger the abused parent and any children in the family. /7/

### **B. The Custodial Parent**

When a child is born during a marriage, the husband is presumed to be the father. Usually this means that any child born after the parties wed or who is conceived before the marriage was terminated by divorce or annulment is deemed to be a child of that marriage. In cases in which paternity is disputed concerning a child born of a marriage, a court must determine whether the

husband or another man alleged or claiming to be the child's father will be declared the legal father. In custody disputes between parents who are married to each other, each parent has equal rights to custody.

In cases in which the parties have never been married, paternity is established if both parents acknowledge the child in writing (possibly filed in court) or a court declares that the man is the father of the child. If more than one man could be the child's father, these other men may have to be notified to have a valid paternity determination. HLA or DNA blood tests may be taken from the child, the mother, and any possible fathers to help determine who is the child's real father by excluding one or more men as the father. However, once paternity is established, courts usually consider custody disputes between unwed parents much as they do those between married parents, especially if the parents lived together with the child or the father was fairly involved in raising the child.

The standard that is used in almost every state for determining custody is the best interest of the child. Almost everything in each parent's life is considered relevant to determining what is in the child's best interest: reputation, life style, moral fitness, values, education, employment, credit record, economic ability, criminal record, health, ability to care for the child, the stability of the environment, and the ability of each parent to foster a good relationship between the child and the other parent. In addition, the court will usually consider the wishes of the parents and the child; the child's adjustment to the home, school, and community; and any special problems that the child or a parent may have. While none of these factors is considered to favor one parent over the other, virtually every factor favors fathers over mothers, if not in actuality, then in the way that courts apply them. Many states have done studies of their courts and found that courts treat women's custody claims far less favorably than men's. /8/ For example, a mother's new boyfriend is usually viewed suspiciously; he is perceived as a possible danger to the children or at least as deflecting the mother's time and energy from the children. In contrast, the father's new girlfriend is seen as bringing stability to his life, as being able to care for the children.

Women are often penalized for having less stability, although, if they lack stability, it is because society has long discriminated against women by making it harder for them to find decent jobs, receive adequate pay, and receive adequate child support. In addition, they have often been penalized for having given up employment opportunities to raise their children. /9/ A few appellate courts have reversed trial courts that have penalized mothers for economic inferiority. The trial courts' reasoning is that the court can always equalize the discrepancy by awarding more child support, alimony, or a greater share of the marital assets. /10/

Few courts recognize the role of the child's primary caretaker, and many courts do not even consider a mother's past child caretaking as relevant in future custody decisions. However, the West Virginia Supreme Court reversed a custody award to the better educated, brighter, wealthier father because those factors paled in comparison to the mother's love, affection, concern, tolerance, and willingness to sacrifice that she displayed as the child's primary caretaker. The court held that a primary caretaker parent must be awarded custody when that parent is even minimally fit. /11/

Courts also discriminate against mothers by trivializing or denying the seriousness of domestic abuse that fathers frequently perpetrate upon women. In recent years the vast majority of states (at

least 35 and the District of Columbia) have enacted statutes that make domestic violence at least a relevant factor in custody decisions. Yet some of these statutes limit relief to many victims of domestic violence, that is, they condition the statute's use on whether the abuser has been convicted in a criminal trial, whether the victim can prove a pattern of abuse, or whether there has been clear and convincing evidence of the abuse. Other courts have limited these statutes' use to cases filed under the domestic violence statute and excluded their use in any other custody case. /12/ Since it is the practice of many courts to dismiss or continue criminal domestic violence cases without any final conviction, the victim is often unable to prove that she was abused. Other judges assume incorrectly that domestic violence ends when the parties divorce or that the woman is greatly exaggerating the abuse because she would have left long before if the abuse had been serious. Moreover, some judges may conclude that the abuse was mutual when only one party was abusive or when the other parent was acting to defend herself.

Mothers are also judged particularly harshly when allegations of child sexual abuse are raised in custody cases. A widely believed myth exists that women frequently and falsely raise such allegations in custody cases to win tactical advantage. But the fact is that such allegations are raised in only 2 percent of all custody cases and are as likely to be true in custody cases as at other times. Even when they cannot be substantiated, they are usually made in good faith. But the myths are so widely believed that some child protective service agencies fail to investigate these allegations when custody is being litigated. /13/ A survey of over 100,000 women who used California domestic violence program services found that when the court knew that a father was physically or sexually abusing his children, the court was actually more likely to award him full custody than it was to award custody to fathers who are not abusing their children. /14/

Some court practices discriminate against women. Mediation generally favors men and harms women, but it particularly hurts abused women in cases against their abusive partners. /15/ However, the overall trend in America is to recognize the seriousness of domestic violence, including the detrimental effect it has on any children in the home. Despite this trend, men are still winning 70 percent of contested custody disputes in America, getting at least joint physical and legal custody or sole custody, primarily because mothers are held to a much higher standard than are fathers. /16/

### **C. *Interstate Custody Determinations***

Two laws determine which state must make custody decisions when families move to different states. Each state adopted its own version of the Uniform Child Custody Jurisdiction Act (UCCJA), and the federal government enacted the Parental Kidnapping Prevention Act (PKPA), /17/ which supersedes a state's UCCJA whenever they are incompatible. Although these laws are extremely complex, /18/ they require that if child custody has never been determined in any court, it must be decided, except in an emergency, in the child's home state--the state where the child lived in the six months preceding the filing of the custody case. When there is no home state, the state with the most significant connection to the child should make the determination. In addition, once custody has been decided properly according to these laws, all other states should recognize and enforce the custody order unless all of the parties have moved from the state. In limited situations an out-of-state court may issue a temporary modification to protect a particular child who has been seriously

abused, neglected, or abandoned, but even such a temporary order will probably require that the child be returned to the original state for final resolution of the case.

Unfortunately, the UCCJA was written before this country was aware of domestic violence and how it affects children. The PKPA, although it was written in the early 1980s, does not take domestic violence into account. Sometimes the court can issue protective measures to try to ensure the safety of any children and their protective caretaker. One goal of the UCCJA and the PKPA is to encourage courts to communicate with one another. This gives the judge who knows about the abuse an opportunity to persuade the other judge how great the danger is and what steps may be necessary to ensure safety. Sometimes a sympathetic judge can even persuade another to decline jurisdiction so that the sympathetic judge can continue to decide the custody case. Sometimes at least part of the case can be heard in the new state where experts who know about the abuse can testify about it.

#### ***D. Visitation***

Regardless of which court hears a case, the court will decide not only which parent gets custody but also under what terms the other parent will have visitation. "Reasonable visitation" is never appropriate for batterers because they are not reasonable and will use the visitation as a license to abuse the visitation and continue to control and abuse their former partners. Although most courts are reluctant to deny visitation to even the most abusive parents, courts may order supervised visitation, preferably done at a supervised visitation center where staff understand domestic violence, child abuse, and child development and will carefully monitor the visitation. Because so many parents of abusive spouses are also abusive, feel overly guilty about their child's abusive behavior, or feel afraid of their abusive child, it is generally unwise for the grandparents to supervise visitation. The same is true for friends and family, who are seldom willing to recognize an abuser's potential to hurt seriously either the mother or the child and, hence, cannot be relied upon to protect them.

#### ***E. The Right to Relocate***

Even when a parent has both sole legal and physical custody of a child, the parent may not be free to move the child to wherever the custodial parent chooses. Short distance moves that do not involve crossing state lines are seldom a problem. But in most states either the noncustodial parent must consent to the move (probably in writing) or a court must give its consent if the move is of any distance, particularly if it involves relocating to another state. Court cases to decide whether a parent can relocate the child or to require a child to return to the original state are becoming more frequent. These decisions are among the most gender biased that courts make. Only rarely are courts unwilling to let a father move his child to accept a new job or to remarry: courts view men's concerns as very legitimate. Yet courts have been very reluctant to let a mother move her child, particularly when the father has visitation rights. Women's concerns are seen as unimportant, and her desire to move is frequently attacked as being selfish or vindictive. /19/

Frequently an abused parent or the protective parent of an abused child wishes to move with the child to a place where regular visitation would be difficult or impossible. While the standard for relocating varies from state to state, trial courts have generally been upheld in prohibiting either the custodial or the noncustodial parent from removing the children to another state. /20/ Indeed, the laws of many states prohibit such moves. Courts are least sympathetic to permitting a relocation when the motive is to deny visitation to the other parent, particularly in states that have "friendly parent" provisions, directing courts to consider which parent will most foster a good relationship with the other parent. /21/

Every state punishes parental kidnapping. Some do so only when the nonkidnapping parent has custody or visitation rights. Frequently the state's law assumes that the rights of parents are equal unless a court has ordered otherwise. States punish by giving custody to the other parent, jailing, or fining the kidnapping parent or requiring the kidnapping parent to give extra visitation or makeup time to the other parent. /22/ Courts often punish a parent who even temporarily seeks refuge with a child in another state because of domestic violence. These practices of punishing protective parents show that most courts consider the children's best interests and even safety to be less important than the right of the noncustodial parent to have access to the children, even when the noncustodial parent uses visitation as a means of abusing the custodial parent or a child. The gender bias studies of various state courts have found courts to be particularly hostile to mothers in these relocation issues. /23/ A few states protect mothers who go to battered women's shelters and/or call the police quickly to report that they are fleeing from abuse.

Courts are most sympathetic to requests to relocate if the custodial parent can demonstrate that the move will have real advantages both for the custodial parent and the children while providing the noncustodial parent with some kind of alternative visitation that approximates the prior visitation schedule in time or meaningful access. /24/ This means that any plan to move should be carefully thought out, with all possibilities explored, for example, where the custodial parent will work, where she will obtain emotional support, and the comparative financial situations; where the children will go to school, obtain medical care, be able to continue any religious education; and what reasonable alternative visitation arrangements are proposed.

In cases in which the real or a major argument for the move is to protect a parent or the child, the custodial parent should also try to show that no other reasonable alternative exists that would enable the family to continue the current situation without seriously jeopardizing the child's physical and/or emotional safety. Such arguments are more likely to be recognized in those states that have provisions in their statutes directing courts to protect an abused child and/or parent from further harm when fashioning a custody or visitation award. /25/ But even where such provisions exist, unless much documentation can be presented of how frequent and intense the abuse is, how seriously it is affecting the family, how prior court orders have been unable to protect the child and/or parent, and whether the custodial parent has assured the court that the child will not leave without the court's permission, the court is unlikely to grant permission for the move. While few written cases can be cited in which safety is the reason for allowing a parent to relocate the children, the National Council of Juvenile and Family Court Judges recommends that "credible evidence of family violence" should

create a rebuttable presumption that where relocation will serve the safety, community-support and/or employment interests of the abused party who is the custodial parent, it is in the best interest of the children to permit relocation of the custodial parent and the children. Any inconvenience caused to the abusing party by the relocation of the abused party and children should not weigh against the presumption. /26/

### **III. Domestic Violence Statutes**

In 1976, Pennsylvania enacted the first statute in the United States to protect victims of domestic violence. Until that time, no state offered any meaningful protection to battered women and their children. Those states that provided some protection through their divorce statutes or through peace bonds generally granted relief only to married persons, often only in rare instances and generally for short periods of time. That relief was without much likelihood that it would be or even could be enforced. What limited enforcement existed was slow, difficult, and frequently very expensive for the victim.

Traditionally, the law has ignored domestic violence. Roman law gave men absolute ownership rights over their wives and children. A man was even allowed to kill his wife or child if he wished. Christianity generally saw it as the husband's duty to chastise his wife if she misbehaved. The common law of England modified these laws by limiting the husband's authority to reasonable chastisement, allowing him to beat her with a rod not thicker than his thumb, known as the "rule of thumb." For centuries Europe stressed that wife beating was necessary for a happy marriage. /27/

North Carolina and Mississippi were the only states that followed English common law. /28/ Some states in colonial days actively prohibited spousal violence, seeing it as a way to woo women to emigrate from Europe to the colonies. Massachusetts forbade men to beat their wives unless attacked first, and even forbade men to desert or abandon them. /29/ At least two states--Tennessee in 1850 and Georgia in 1857--made wife beating a misdemeanor. /30/ It was not unusual for divorces to be granted because of marital rape. /31/ However, as a practical matter Puritan courts placed family preservation ahead of protecting battered women, denied divorces to most of them, and even forced runaway wives to return to their husbands. /32/

Yet even these few protective laws were strongly motivated with reducing the number of poor whom the community would have to support. /33/ Neither the laws that existed--nor later laws--to protect wives from violence were enforced, /34/ as courts largely believed that wife beating was a private matter. /35/

The term "wife beating" evolved in 1856 from the divorce reform in England that largely assumed alcohol caused men to beat women. We now know that alcohol does not cause men to batter women and that successfully treating a wife beater's alcohol problem will not end his battering. /36/ Indeed, many men still use alcohol as an excuse for their violence--an excuse that is often accepted by their wives, society, and the courts.

Meaningful police protection is needed for women and children to be safe from violence. Because state laws give police wide latitude in how they respond to abusive situations, abused women (and often their children) generally need courts to issue protection orders before the police will protect them.

#### **IV. Civil Protection Orders**

Domestic violence statutes now exist in every state to protect victims of domestic violence. They vary as to whom they cover, but in every state they protect married and formerly married persons, and in virtually every state they also protect persons who live together and close relatives.

Approximately three-quarters of state codes specifically include children as eligible for protection. In most states parents may seek protection in the courts on behalf of their abused children. /37/ A few states allow children the right to seek relief on their own, particularly if they are married, over the age of 16, emancipated, or abused in a dating relationship. /38/

The most frequent protection available to victims of domestic violence, including the protection available to child witnesses, is for the court to exclude the abuser from the victim's household, /39/ to order the abuser not to abuse the victim or go near her, /40/ and to give custody of the victim's children to the victim. /41/ Even some states whose statutes are silent about custody awards permit these measures under general provisions ordering the court to grant other relief to protect a victim. /42/ Indeed, the domestic violence acts of about one-third of the states specifically mandate the court to protect the abused parent and/or the child from further harm in making its custody and visitation awards. /43/

Most courts permit the victim to receive child support from an abuser who has an obligation to pay such support. About half of the states authorize attorney fees and other costs, and one-fourth of the states permit monetary compensation to be awarded to the victim. /44/

Each state has its own definition of what constitutes abuse. Some states, such as Arizona, Georgia, New Jersey, and New York, define abusive behavior between protected individuals as conduct that violates certain sections of the state's criminal code. However, most states define their own prohibited acts, which typically include attempting to cause or actually causing physical or sexual harm. /45/ At least 38 states also protect victims against stalking, although usually in a separate, often criminal statute.

A few states, such as California, Massachusetts, New Hampshire, Oregon, Rhode Island, and Vermont, charge no fees for protection orders. While most domestic violence statutes require fees to obtain a protection order or for serving court papers on the defendant, all states but Hawaii allow the court to waive the fee if the victim is unable to pay it. A few states, such as Nevada and Arkansas, provide that the court, at the full hearing, may decide which party will pay the fee. /46/

At least 30 states allow victims of domestic violence to file for an order of protection without an attorney. /47/ Many of these states require that the court have special, simplified forms that a victim can easily complete without assistance. A few states, such as Florida and New Jersey, direct the clerks of the court to assist unrepresented petitioners in filing for orders of protection. A number of

states enable the victim to keep her address confidential, particularly when the address is a shelter for battered women. /48/

In every state, except Delaware and South Carolina, a victim can obtain an emergency, temporary order of protection, usually on the same day that she submits her petition to the court. About half of the states provide court access 24 hours per day for obtaining these emergency orders, although often the victim must return to court the next day during regular business hours for another order. /49/

Once the papers are filed with the court, every state requires that the abuser be given a copy of the papers and notified when he may come to court for a hearing. Most states require that the alleged abuser be handed the papers in person, but a few allow service by mail, publication, or as otherwise directed by a court. Often law enforcement officers must serve the alleged abuser, frequently without any fee. The full hearing must occur fairly quickly, typically within 10 to 30 days.

At the full hearing, the court decides what relief to grant if the victim can prove the abuse occurred. Orders may remain in effect indefinitely in Colorado, Michigan, Nebraska, Nevada, North Dakota, Oklahoma, and, for renewed orders only, in Massachusetts. California and Hawaii permit orders to remain in effect for three years, and Illinois and Wisconsin for two years. In Alaska, Connecticut, Idaho, Indiana, Louisiana, Missouri, New Mexico, and Utah orders expire in less than 180 days. In the remaining 30 states, orders after hearing can last from six months to one year. /50/

Victims should avoid mutual orders of protection because they greatly increase the danger to the victim and her children and seldom give the police any guidance in how to enforce them, thereby resulting in either both parties being arrested or in the police refusing to enforce the order. At least eight states prohibit mutual orders, but, even in states that prohibit these orders, it is not unusual for some judges to issue them or for mediators or attorneys to urge parties or the court that mutual orders be entered by the court. /51/

Of course, any protective order is useless unless police, prosecutors, judges, and others throughout the entire criminal justice system enforce it. Not only must the judiciary and law enforcement cooperate with each other, but they need the cooperation of the social service system and women's advocacy groups. /52/ Without laws and policies requiring enforcement, public pressure, and adequate training, the criminal justice system has not taken domestic violence seriously, leaving offenders unarrested, not prosecuted, unsentenced, or their probation or parole unsupervised. If children are at danger, police must be willing to enforce custody, visitation, or no-contact provisions and to use common sense to document and temporarily prohibit visitation when a defendant appears for visitation drunk or abusive.

In order to make abusers fully accountable for their violence, courts must order them to pay for all their resulting damages. Monetary damage amounts are virtually never ordered, but they can be staggering. The average monthly cost to New York City domestic violence victims in just medical, counseling, and legal expenses was \$575. New York City spends at least \$500 million annually as a result of domestic violence--half of the cost born by New York City employers from reduced worker productivity, greater absenteeism, and high turnover. /53/ The average employed battered woman misses work 18 full days per year and is late for work 60 days a year because of the

violence. She must often take time off from work during the day to call attorneys or counselors whom she does not dare call from home, or to go to court or appointments. Three quarters of employed battered women are harassed by their lovers, causing 20 percent of employed battered women to lose their jobs because their abusers harass them in person or on the phone. /54/ Domestic violence adds at least \$77.5 million to emergency room costs at hospitals in New York City alone. /55/ Battered women seeking shelter report that their abusers destroyed an average of \$10,000 in family property prior to separation, including furniture, clothing, photographs, and toys. /56/ Domestic violence causes half the homelessness in America /57/ and costs the average victim who must move a minimum of \$5,000 to relocate. /58/ Because most abusers rationally decide whether they will batter using a cost-benefit analysis, /59/ restitution orders and swift, strict sentencing can make a major difference in making abusers stop their violence.

Batterer treatment programs have very limited success. Most success rates are calculated based upon those who complete the training, yet in reality the overwhelming majority of batterers drop out of these programs. One study of an eight-month program found that of the 200 men who contacted the program by telephone, only 50 appeared for the intake interview, 25 participated in at least one counseling session, 12 completed three months, and only 2 (or 1 percent of the original callers) completed the entire eight-month program. /60/

There is a movement to establish nationwide standards for batterer treatment programs. One of these standards would prohibit mandatory couples' counseling when there is domestic violence /61/ because it greatly adds to the danger of increased violence to the victim. /62/

## **V. Relief Through Criminal Actions**

In every state a victim can bring criminal charges against her assailant or the person who assaults her child. In the majority of states she can also bring criminal charges against the abuser if he violates an order of protection. In some instances, if the woman is raped by her husband, it is unlikely that criminal charges would be brought against her assailant unless marital rape is a crime in that state and she wants her husband charged.

Criminal prosecution can send a very powerful message to an abuser if the system treats the crime seriously. The major drawback to criminal charges is that the crime is seen as a violation against the state, not the victim. This means that the prosecutor has control over how aggressively to pursue the charges or even whether to pursue them at all. The prosecutor can negotiate directly with the assailant and/or the court to have the charges dismissed or "resolved" in a way that fails to convey the seriousness of the offense to the offender.

Even when the prosecutor wishes to pursue a criminal case aggressively, the judge also has the authority to direct an acquittal of the defendant or, in one of many ways, determine the outcome of the case in a manner that fails to treat the case seriously. Even when a prosecutor and judge treat the case aggressively, the probation, correction, or parole officer involved make crucial decisions that determine how a sentence is to be carried out and enforced.

Thus it is possible that the offender will be quickly released from jail or that no one follows up when he fails to participate in court-ordered treatment for his abusive behavior and/or any drug or alcohol problem that he may have. Curing his substance abuse problem will not stop him from battering, but it will make it easier for him to be treated for his violence. /63/ Likewise, couples counseling not only will be unlikely to cure a batterer's abusive behavior but actually increases the likelihood that he will reoffend. /64/ Similarly, batterer treatment that is primarily based on anger control is unlikely to work because men batter out of a need to control women, not because they are angry and out of control. /65/

In spite of the problems that the victim has, there is a real trend in this country to treat domestic violence more seriously. Furthermore, in some states the victim now has new rights to seek compensation for many of her unreimbursed losses as a result of domestic violence if she reports the crime promptly and cooperates with the prosecution. This is true even if the offender is never convicted of any crime. The victim cannot be denied compensation under the Victims of Crime Act because she is still married to or living with her abuser. Many of these acts allow her to seek reimbursement of her medical and treatment costs and attorney fees that resulted from the injuries inflicted on her by her assailant. In addition, the state version of the act probably allows her to seek recovery for lost wages, and most other out-of-pocket expenses, such as transportation and housekeeping, although few states permit compensation for replacement of property.

If her abuser is convicted, the victim, or her survivor, has the right to submit a victim-impact statement before the abuser is sentenced. In some states the victim may also submit a victim-impact statement to the court before the court decides whether to accept a plea bargain made by the prosecutor and defendant, or to the parole board before the offender is to be released from prison. Some states will now inform victims before releasing their assailant so that they can make plans for their safety and that of their children.

Many states have enacted victim intimidation laws to protect victims and witnesses during the pendency of a criminal case from anyone, including the defendant, who attempts to interfere with their participation in the criminal matter. The court may order the defendant to stay away from and/or not intimidate or harass the victim and any witness. Such protection generally makes it considerably more likely that a battered woman and her witnesses will be willing to cooperate in prosecuting the case. The protection usually ceases if the case is dropped, dismissed, or otherwise concluded. Hence, the victim will probably need a civil protection order in addition to victim-intimidation protective orders.

In many states police must inform any victim of domestic violence of her right to seek a civil protection order and/or bring criminal charges against her assailant. In increasing numbers of states a police officer must arrest any offender when the officer has probable cause to believe that he has violated a civil order of protection or has committed any domestic violence offense, especially a felony, even when there is no civil order of protection in force.

Some states have enacted laws to make statements made to domestic violence and/or rape counselors privileged so that defendants cannot have access to them or can have access only to anything that might indicate his innocence. Such laws are usually more protective in civil cases in which defendants have fewer constitutional rights. /66/

## VI. Conclusion

It is only when women and children are free from further abuse that they can begin to heal. With help from lawyers, advocates, and other professionals, police and courts will be more responsive to the needs of battered women and their children.

footnotes

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/2/ Tina Busey, *Women Defendants and Reactive Survival Syndrome*, 1 *CATALYST* 4, 6 (Winter 1993).

/3/ Marsha B. Liss & Geraldine Butes Stahly, *Domestic Violence and Child Custody*, in *BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE* 175, 179, 181 (1993).

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/5/ Demarius U. Miller, *Advance Report of Final Natality Statistics, 1989*, in *MONTHLY VITAL STAT. REP. SUPP.* (1991) at 40.

/6/ David Adams, *Identifying the Assaultive Husband: You Be the Judge*, 33 *BOSTON B.J.* 33, 23, 24 (1989).

/7/ Nancy D. Polikoff, *Joint Custody: Only by Agreement of the Parties*, 8 *WOMEN'S ADVOC.* 1, 3 (1987). For further information on joint custody, see Joan Zorza, *"Friendly Parent" Provisions in Custody Determinations*, 26 *CLEARINGHOUSE REV.* 921 (Dec. 1992), and National Center on Women and Family Law, *Joint Custody Resource Packet* (1993).

/8/ Ruth I. Adams & John M. Greaney, *Report of the Gender Bias Study of the Supreme Judicial Court 59-77* (1989).

/9/ See, e.g., *Porter v. Porter*, 274 N.W.2d 235 (N.D. 1979).

/10/ See, e.g., *Dempsey v. Dempsey*, 292 N.W.2d 549 (Mich. 1980).

/11/ *Garska v. McCoy*, 278 S.E. 357 (W. Va. 1981). For further information on the primary caretaker factor, see National Center on Women and Family Law, *The Primary Caretaker Factor* (1993).

/12/ National Center on Women and Family Law, *State Custody Laws with Respect to Domestic Abuse* (1993).

/13/ J. Melbourne McGraw & H. A. Smith, *Child Sexual Abuse Allegations Amidst Divorce and Custody Proceedings: Refining the Validation Process*, 1 *J. CHILD SEXUAL ABUSE* 49-62 (1992); Liss & Stahly, *supra* note 3, at 178; H. Joan Pennington & Laurie Woods, *Legal Issues and Legal Options in Civil Child Sexual Abuse Cases: Representing the Protective Parent* 11-12 (1990) (available from the National Center on Women and Family Law).

/14/ Liss & Stahly, *supra* note 3, at 183.

/15/ Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 2, 441-523 (1992); Mary Pat Treuthart & Laurie Woods, *Mediation--A Guide for Advocates and Attorneys Representing Battered Women* (1990) (available from the National Center on Women and Family Law).

/16/ Adams & Greaney, *supra* note 8, at 62-63.

/17/ Parental Kidnapping Prevention Act, 28 U.S.C. Sec. 1738A (1980).

/18/ For a full discussion of these laws and how to represent clients in interstate child custody disputes and parental kidnapping cases, see NATIONAL CENTER ON WOMEN AND FAMILY LAW, *INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW* (1988 Supp.)

/19/ *Id.* at 71.

/20/ See *Halliday v. Halliday*, 593 A.2d 233 (N.H. 1991); *Trudeau v. Trudeau*, 822 P.2d 873 (Wyo. 1991). For further information on moving restrictions, see National Center on Women and Family Law, *Moving Restrictions on Custodial Parents* (1994).

/21/ See "Friendly Parent" Provisions in Custody, *supra* note 7.

/22/ See, e.g., *Pearson v. Caudle*, 593 So. 2d 619 (Fla. Ct. App. 1992).

/23/ *Id.* at 68.

/24/ See, e.g., *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27 (1976).

/25/ These states are Arizona, California, Colorado, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, North Dakota, Rhode Island, Washington, West Virginia, and Wyoming.

/26/ Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 *JUV. & FAM. CT. J.* 4, 35 (1992).

/27/ SELMA R. WILLIAMS & PAMELA W. ADELMAN, RIDING THE NIGHTMARE: WOMEN & WITCHCRAFT FROM THE OLD WORLD TO COLONIAL SALEM 133-34 (1978).

/28/ ANN JONES, WOMEN WHO KILL 301-2 (1980).

/29/ *Id.* at 36-37; WILLIAMS & ADELMAN, *supra* note 27, at 134.

/30/ WILLIAMS & ADELMAN, *supra* note 27, at 63.

/31/ *Id.* at 92.

/32/ ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 23 (1987).

/33/ JONES, *supra* note 28, at 36.

/34/ *Id.* at 302.

/35/ PLECK, *supra* note 32, at 33.

/36/ RICHARD A. STROEDEUR & RICHARD STILLE, ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS: ONE ROAD TO PEACE 46-47 (1989); EDWARD GONDOLF, MEN AGAINST WOMEN: WHAT EVERY WOMAN SHOULD KNOW ABOUT VIOLENT MEN 33 (1989).

/37/ Hart, *supra* note 26, at 3, 5.

/38/ ALASKA STAT. Sec. 25.35.060; CAL. CIV. PROC. CODE Sec. 542(b)(1); ME. REV. STAT. ANN. tit. 19, Sec. 762.4; MASS. GEN. LAWS ch. 209A, Sec. 1(e); N.D. CENT. CODE Sec. 14-07.1-0.1.4; 23 PA. CONS. STAT. Sec. 6102; WASH. REV. CODE Sec. 26.50.010; W. VA. CODE Sec. 48-2A-2.

/39/ Delaware is the only state that does not provide this protection.

/40/ Arkansas and Wisconsin are the only states that do not mandate such an order.

/41/ Only the Arizona, Connecticut, Delaware, Indiana, Nebraska, Oklahoma, Virginia, and Wisconsin statutes are silent as to custody and visitation.

/42/ Peter Finn & Sarah Colson, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 38-39 (1990)(available from the National Institute of Justice).

/43/ Hart, *supra* note 26, at 31.

/44/ Finn & Colson, *supra* note 42, at 38-39.

/45/ *Id.*, at 12-13, notes that at least 43 states protect against threats of physical abuse.

/46/ *Id.* at 19-21.

/47/ *Id.* at 20-21.

/48/ SUSAN H. RAUCH, PROTECTING CONFIDENTIALITY OF VICTIM-COUNSELOR COMMUNICATIONS pt. 3, ch. 1 (1993).

/49/ Finn & Colson, *supra* note 42, at 29-30.

/50/ Hart, *supra* note 26, at 17.

/51/ National Center on Women and Family Law, Mutual Orders of Protection (1993).

/52/ Peter Finn, Civil Protection Orders: A Flawed Opportunity for Intervention, in WOMAN BATTERING: POLICY RESPONSES 155, 188 (Michael Steinman ed., 1991).

/53/ Domestic Violence: The Hidden Crime: Hearings Before the N.Y. Senate Comm. on Investigations, Taxation, and Government Operations, 102d Cong., 2d Sess. (1992) (statement of Roy M. Goodman).

/54/ These figures were published by the New York City Victim Services Agency (1987).

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/61/ *Id.* at 113.

/62/ JEFFREY L. EDELSON & RICHARD M. TOLMAN, INTERVENTION FOR MEN WHO BATTER: AN ECOLOGICAL APPROACH 103-4 (1992).

/63/ *Id.* at 40.

/64/ *Id.* at 103-5.

/65/ Edward W. Gondolf & Diane D. Russell, The Case Against Anger Treatment Programs for Batterers, 9 *RESPONSE* 2, 3 (1986).

/66/ RAUCH, *supra* note 48, at Appendix IV.