At A Glance

In 1994 Congress finally passed, and President Clinton signed, the Violence Against Women Act as part of the Violent Crime Control and Law Enforcement Act of 1994 (Crime Bill). In addition to discussing the salient features of this new legislation, this article summarizes family law decisions and legislation of the past year that are of particular concern to advocates of battered women, AFDC recipients, and other low-income clients, including:

- civil protection statutes that define abuse to include emotional or psychological abuse
- cases upholding supervised visitation requirements when the noncustodial parent has abused the other parent or the child
- the International Parental Kidnapping Crime Act of 1993
- the Michigan day care custody case
- the Child Support Recovery Act of 1992
- proposed federal paternity establishment regulations
- child support orders against public assistance recipients
- child support provisions of President Clinton's welfare reform bill

This year the National Center on Women and Family Law (NCOWFL) expects that battered women and low-income women and their children will be most affected by implementation of the Violence Against Women Act, threatened changes in the AFDC program, and increased awareness of sex bias in custody decisionmaking. NCOWFL hopes to do work in many areas in 1995, including: "good cause" for AFDC applicants and recipients to decline to cooperate with child support enforcement efforts, teen-dating violence, restrictions on custodial parents relocating with their children, interstate custody jurisdiction, unwed fathers' rights in the context of infant adoptions, child support orders against low-income noncustodial parents, interstate child support enforcement, child support assurance, and federal requirements for wage withholding in all child support cases.
Annual Review of Family Law

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The priority areas of the National Center on Women and Family Law (NCOWFL), as determined by priority-setting questionnaires and by the board of directors, are battered women, child custody (including custody cases involving domestic violence or child sexual abuse), and child support. This article will cover 1994 developments in those areas.

I. Battered Women

A. Violence Against Women Act

After four years, the Violence Against Women Act (VAWA) cleared its final hurdle on August 25, 1994, when the Senate approved the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill"), /1/ clearing the measure for the President's signature on September 13, 1994.

One particularly helpful provision of the VAWA requires that full faith and credit be given to any protection order issued after reasonable notice and opportunity to be heard. In the past, some courts have refused to give full faith and credit to protection orders because they are injunctions, and the judges believed that such injunctions could have no effect outside the jurisdiction where entered. Some states -- such as Oregon and West Virginia -- already require their courts to give full faith and credit to other states' orders of protection. /2/ To discourage courts from issuing mutual orders of protection, however, the VAWA provides that an order against a petitioner is not entitled to be honored and enforced unless a cross- or counterpetition or other written pleading was filed seeking a protective order and the court made specific findings that each party was entitled to such an order. /3/

The VAWA makes it a federal crime for a person to travel across state lines to injure a spouse or intimate partner or to violate an order of protection. /4/ It will also be a federal offense to cause a spouse or intimate partner to cross a state line by force, coercion, duress, or fraud and, "in the course or as a result of that conduct," commit a violent crime against that person, causing bodily injury. The maximum penalties for these crimes range from life imprisonment, if death results, down to five years and a fine.

These cases, which must be brought in federal court, can be brought whether or not any crime was charged in state court. Because crossing a state line is one element of each of the federal offenses,
double jeopardy is not an issue if both state and federal charges are brought against the same defendant for the same incident. In addition to imposing criminal penalties, the court is required to order the full amount of the victim's losses as restitution for any of the federal offenses. Restitution orders may be enforced by either the U.S. Attorney or the victim.

The most controversial provision establishes the first federal civil rights remedy for victims of gender-based crimes. Victims of violent crimes motivated by gender bias will now be able to sue in federal or state court, and attorney fees can be recovered under the new law. Most instances of a man beating up a woman will meet the gender-motivation test, some attorneys believe, because "in almost every instance psychologists would say that animosity toward women was part of the motivation." /5/

Congress intended in creating this new tort to allow victims of violence to get abusers where it hurts -- in their wallets -- by taking their assets and income, even in cases when the state did not charge any crime or obtain any conviction. Because the preponderance of the evidence standard applies in tort cases, the failure to obtain a conviction in a criminal action will not necessarily prevent a victim from successfully recovering in the tort case. If the tort action is brought in state court, it may not be removed to federal court. If the action is brought in federal court, however, the court may not hear any divorce, alimony, custody, or equitable distribution of marital property issues, even though they involve the same parties.

The VAWA adds new provisions to the Immigration and Nationality Act that will allow battered immigrant women, married in good faith to U.S. citizens or permanent residents, to petition for themselves and will require INS to consider any credible evidence to support their applications. INS must write new regulations pursuant to these new laws before it is clear exactly how these new protections will be implemented. Anything that documents the abuse of a battered woman or her child, such as records that she sought or obtained, police or shelter service records, or a protective order, can help her case. No longer can INS restrict her evidence to statements of licensed social workers or psychologists. /6/

Other key components of the new law include authorization of $1.62 billion over the next six years for state and local grants to reduce domestic violence and sexual assault crimes; funding to reestablish a national domestic violence hot line; increased funding for domestic violence shelters; increased federal penalties for repeat sex offenders; restitution provisions for victims of sexual assault; encouraging mandatory or proarrest policies for abusive partners; training money for state and federal judges to increase awareness and sensitivity about crimes against women; and funds for supervised visitation centers for use in cases of domestic violence, documented or suspected child abuse, or abduction.

The omnibus Crime Bill also prohibits gun sales to, and possession by, persons subject to domestic violence restraining orders. Additionally, sex offenders and child molesters will be required to pay restitution to their victims for necessary expenses related to the investigation or prosecution of the offense. The bill also permits the victim of a federal crime of violence or sexual abuse to address the court prior to the defendant's sentencing.
The Crime Bill also includes a compromise version of the Driver Privacy Act, legislation to allow individuals to protect the confidentiality of certain personal information kept by state motor vehicle departments with the aim of discouraging stalkers and other criminals from finding their victims.

B. Civil Orders of Protection

Recently, Delaware became the final state to offer civil orders of protection to abused women. /7/ Previously, protection was available in that state only through an unusual procedure to keep someone temporarily away while trying to reconcile by filing an "imperiling the family relations" petition.

The new Abuse Protection Act includes a much broader definition of abuse than do the laws of most states. It incorporates various concepts of emotional or psychological abuse, as well as the more traditional causing, placing, or attempting to place another in fear of physical or sexual injury; imprisonment; kidnapping; trespassing; and child abuse. Specifically included in the definition of abuse is "[i]nsulting, taunting or challenging another person or engaging in a course of alarming or distressing conduct in a manner which is likely to provoke a violent or disorderly response or which is likely to cause humiliation, degradation or fear in another person." /8/ In addition, the definition of abuse includes damaging or destroying property, interference with custody, and coercion.

II. Custody

A. Battered Women and Custody

One of the most frustrating problems faced by legal services family law attorneys is the difficulty of convincing some judges that a father who has abused the mother of his children is probably a danger to the children. Despite voluminous legal and psychological literature that demonstrates that abusive fathers usually abuse their children, /9/ some judges continue to bifurcate the issues in their minds: "Well, he only hit her -- not the children." Failing to recognize that abusive fathers often fight hard to get custody in order to control and hurt the mother further, judges sometimes give custody to the abuser.

Fortunately, policymakers and legislators are continuing to move toward a recognition that evidence of domestic violence is relevant and must be considered in custody determinations. /10/ Nearly 40 states now require courts to consider domestic violence when making custody orders. /11/ Some create a presumption that the abuser should not get custody, while others make it a factor in custody determinations. Louisiana's statute is the best to date in protecting children from spouse abusers (and child sexual abusers). The 1992 law creates a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of the children. The presumption can be overcome only by a showing, by a preponderance of the evidence, that the abusive parent has successfully completed a batterers' treatment program and is not abusing alcohol or drugs and that custody to the abuser is in the best interests of the child. The statute also provides that when a parent has a history of family violence, the court shall allow only supervised visitation.
until the parent fulfills certain requirements and the court determines that the parent poses no
danger to the child and that unsupervised visitation is in the best interests of the child.

A recent federal law that will help battered mothers fleeing abuse is the International Parental
Kidnapping Crime Act of 1993, which makes it a federal offense for a parent or other person to
abduct a child from the United States to another country. /12/ The law also criminalizes keeping a
child who has been in the United States from a person with parental rights to custody or visitation.
The Act creates three affirmative defenses. One protects a defendant who "was fleeing an incidence
or pattern of domestic violence." The language clarifying that only one incident of domestic
violence is necessary is extremely helpful since many courts have minimized even lengthy abusive
histories. /13/

B. A Bad Year for Good Mothers

Last year was a bad year for good mothers. This is not to say that any year has ever been a good
year for good mothers because there have always been cases in which judges have used dubious
reasoning to deny custody to good mothers who have been primary caretakers to their children. /14/
However, 1994 saw some highly publicized examples of such cases.

NCOWFL is now working with several other organizations on amicus briefs in the most highly
publicized of these cases, Ireland v. Smith, in which a Michigan court changed custody of a three-
year-old girl from her mother to her father (with whom she had never lived) because of the judge's
biased views that care by a grandparent (the father's mother) would have to be better than the
mother's day care arrangement and that a parent who was a full-time student could not possibly "do
justice to [her] studies and the raising of an infant child." /15/ In addition, the court dismissed as
"superfluous" Jennifer Ireland's allegations of domestic violence perpetrated by the child's father
against her. /16/

In another front-page custody case, a District of Columbia judge transferred custody of two boys
from their mother -- a counsel to Senator Orrin Hatch -- to their father, who also had a career. The
Women's Legal Defense Fund is alleging in an amicus brief that the trial judge held working
mothers to a higher standard than working fathers. Senator Hatch, who has opposed such protection
for working parents as the Family and Medical Leave Act, /17/ stated: "This judge ignores the
maximum effort that she made while rewarding the minimum effort that he made." /18/

Courts in the past have often punished mothers who were employed or attending school by
transferring custody to the father, /19/ but it is disturbing that such bias continues even into the
mid-1990s.

III. Child Support

Child support laws and proposals have continued to go in two predictable directions. First, the
federal government and the states have continued to accelerate and strengthen the assessment and
enforcement of child support orders, particularly on behalf of children who receive AFDC.
Although this is beneficial to many poor families with children, the absence of a well-thought-out strategy for dealing with low-income noncustodial parents is necessitating advocacy on behalf of such parents to avoid unfairness to those who truly cannot pay child support.

Second, the scapegoating of poor women persists. For example, the proposed paternity establishment regulations take the patriarchal stance that it is always in the best interests of children and their mothers to establish paternity and ignore the prevalence of domestic violence and other dangers to mothers and children. The Clinton Administration's welfare reform proposal also attacks poor women -- it contains a more draconian "cooperation" requirement for AFDC mothers than is found in current law.


The Child Support Recovery Act of 1992, /20/ which began to be implemented in 1994, imposes a criminal penalty on one who avoids child support payments while living in a state other than the child's state of residence. /21/ Flight from the child's state of residence is not an element of the crime. The law provides that a person who willfully fails to pay support arrears (unpaid for longer than one year or an amount over $5,000) for a child who resides in another state may be punished by a fine, imprisonment, or both, and by an order for restitution of the amount of child support due at the time of sentencing. /22/

B. OBRA-93 and Proposed Paternity Establishment Regulations

The Omnibus Budget Reconciliation Act of 1993 (OBRA-93), /23/ enacted August 10, 1993, contains, inter alia, requirements for state laws regarding medical support enforcement. /24/ OBRA-93 also contains a key amendment to the paternity requirements under title IV-D of the Social Security Act. Section 13721 of OBRA-93 /25/ requires states to have laws and procedures for simple civil process for voluntary acknowledgment of paternity, which must include a hospital-based program for voluntary acknowledgment of paternity around the time of the child's birth. Laws or rules to be enacted must deal with genetic testing for paternity establishment and provide that voluntary acknowledgments will have certain legal effects.

Proposed regulations to implement these paternity establishment provisions have been issued by HHS. /26/ Although these regulations have not yet been finalized, many states have enacted the laws required by OBRA-93 and are proceeding with implementation. The proposed regulations have serious faults. /27/ For example, hospitals must provide paternity-establishment services to virtually all unmarried parents, and no exceptions are being proposed with regard to mothers who are victims of domestic violence. Additionally, it is not recognized that in most states establishment of paternity without a custody order to the mother endangers the child's stability because the father gains custody rights equal to those of the mother that could enable him to kidnap the child with impunity. /28/
C. Child Support Orders Against Recipients of Means-Tested Public Benefits

Federal law requires that every state have child support guidelines to determine the amount of support a noncustodial parent (NCP) is required to pay. State guidelines base that amount either on the income of the NCP or on the combined parental income. /29/ This past year, NCOWFL wrote a manual on child support orders against recipients of means-tested public benefits: AFDC, GA, and SSI. /30/ NCOWFL's research revealed that two major problems occur with guidelines when applied to such parents.

First, although most guidelines do not count means-tested public benefits (MTPB) as "income," many state guidelines make inadequate provision for the NCP's own support needs. Aside from the four states that use the Melson formula (which contains a self-support reserve), and a few other states that have built self-support reserves into their guidelines, most states assess presumptive child support orders against parents with extremely low incomes -- even below public-assistance levels.

Some states require that some minimum amount of support be ordered, even if the NCP has no income. Most typically, this mandatory amount is $50 per month, which is the federal child support pass-through for custodial families receiving AFDC. /31/ In at least two states -- New York and Washington -- courts have held that an irrebuttable presumption that an obligor must pay the guidelines minimum ($25 per month) conflicts with federal law. /32/ The Family Support Act provides that there must be a rebuttable presumption that the amount of the order that would result from the application of the guidelines is the correct amount to be ordered, and that a written or specific finding on the record that the use of the guidelines would be unjust or inappropriate in a particular case should be sufficient to rebut the presumption in a particular case. /33/ Thus, if a state's guidelines provide for a presumptive minimum order, the NCP must be permitted an opportunity to rebut the presumption. When a client is receiving MTPB, the obvious argument is that such benefits are intended to provide the minimum level of support for that person that the legislature believes is necessary for subsistence, and that it would be unjust for the court to order -- in effect -- that the NCP live below subsistence level. /34/

The second major problem with child support guidelines when applied to recipients of MTPB has to do with recipients who receive such benefits to supplement small wages, social security disability benefits, or other income. Although the MTPB are not usually counted as income, the wages or other income may be counted. Consequently, a child support order may be made on the basis of the other income, and that income may be garnished, leaving the recipient with an income below public-assistance levels. Congress has not addressed this problem; in the meantime, advocates have attempted to alleviate it both by litigation and by legislative and administrative advocacy. /35/

D. Child Support Provisions of Clinton Administration’s Welfare Reform Proposals

Real reforms of the nation's system of establishing and enforcing child support orders are always welcome. However, it is disturbing that so-called reforms are tied to welfare rather than being
initiated as a positive step for all children. Such a tie is based on myths that poverty is caused by failure of (primarily low-income) fathers to pay child support and that child support will lift children out of poverty. Receipt of appropriate levels of child support would raise the standards of living of many children, but poverty is caused by many factors other than nonpayment of child support.

The Clinton Administration's welfare reform bill /36/ contains many child support proposals, most of which exist in some form under current law. Some of these proposals would be improvements, but some would be detrimental to poor mothers and their children. Of great concern is the proposal for a stricter definition of "cooperation" for purposes of AFDC eligibility. /37/

Under current law, a mother seeking AFDC is required to cooperate with efforts to secure child support for the child, including, when necessary, establishment of paternity. Sworn under penalty of perjury, and with the possibility of sanction for noncooperation looming in the background, she must provide all of the information known to her concerning the identity and whereabouts of the father. The Clinton bill proposes to replace this with a requirement that the mother must name a father (or possible fathers) and provide other "verifiable" information that could be used to locate him (or them). Aid would be denied to her if she were unable to provide this information, regardless of her willingness to cooperate and to do whatever was in her power. In addition, initial aid to the family could be delayed pending a decision as to whether the mother cooperated.

This definition of cooperation is unreasonable. It is absurd to assume that all women know their male partners' identity and whereabouts, yet deliberately withhold the information from the state. Men in our society are not held to the standard of knowing detailed information about each of their female sexual partners. Income should not be reduced for a mother's failure to do what may be impossible. Even a delay in the provision of aid pending a determination on cooperation could hurt a family in need.

The Clinton bill would also authorize child support "assurance" /38/ demonstration projects in order to determine whether such a program should be instituted on a national basis.

**Louisiana Supreme Court Holds Unconstitutional Portions of New Domestic Violence Law**

Early in 1994, a panel of the Louisiana Supreme Court held that a trial court had erred in holding unconstitutional certain provisions of Louisiana's new law concerning domestic violence and custody. /39/ Those provisions require the suspension of all visitation and contact between a child and a parent after a court has found, by a preponderance of the evidence, that the parent sexually abused the child. The parent may regain supervised visitation when the court determines that the parent has successfully completed a "treatment program designed for such sexual abusers" and that supervised visitation is in the child's best interest. The supreme court panel held that the provisions involve only a "temporary" suspension of "some" parental rights and thus do not violate the constitutional proscription against deprivations of fundamental liberty interests without due process of law.
A few months later, however, the Louisiana Supreme Court withdrew that opinion and granted a rehearing en banc. Upon rehearing, the court held that before a court may constitutionally deprive a parent of all visitation and contact with a child, the court must find, by clear and convincing evidence, that the parent sexually abuse the child. /40/ Thus, the supreme court affirmed the judgment of the trial court declaring the statute unconstitutional. /41/

Footnotes


/2/ See Full Faith & Credit to Orders of Protection (Item No. 47; $1.50 from the National Center on Women and Family Law (NCOWFL).

/3/ See Mutual Orders of Protection (Item No. 27; $7.50 from NCOWFL).

/4/ This crime covers violations of orders of protection only when those orders prohibit violence, threats of violence, repeated harassment, or bodily injury to someone protected by the order.


/8/ Id.


/10/ See, e.g., The Impact of Domestic Violence on Children: A Report to the President of The ABA (ABA Center on Children and the Law 1994) (available from the ABA Service Center, (800) 285-2221 for $8).


/13/ For further discussion of this Act, including some problems with it, see New International Parental Kidnapping Federal Crime, Women's Advocate, Jan. 1994, at 8.

/14/ See Primary Caretaker (Item No. 115; $2 from NCOWFL) and Why are Mothers Losing Custody?: A Brief Analysis of Criteria Used in Child Custody Determinations (Item No. 102; $1.20 from NCOWFL).

/15/ Ireland v. Smith, No. 93-385DS (Macomb Co. Cir. Ct.), slip op. at 8.

/16/ Id. at 10.


/19/ See Confronting Economic Factors in Child Custody Disputes (Item No. 127; $5 from NCOWFL), and Trends in Child Custody: What They Mean for Women (Item No. 103; $5 from NCOWFL).


/21/ 18 U.S.C. Sec. 228.

/22/ The Act also authorizes grants to states and localities for interstate child support enforcement, and authorizes a National Commission on Child and Family Welfare, 42 U.S.C. Sec. 12301. An interim report from the Commission was due on January 1, 1994, with the final report due on January 1, 1995. Neither report is completed as of this writing.


/25/ Codified at 42 U.S.C. Sec. 666(a).


/30/ Nancy S. Erickson, Manual on Child Support Orders Against Recipients of Means-Tested Public Benefits (1994) [hereinafter Child Support Against Recipients of MTPB].


/32/ See Rose v. Moody, 83 N.Y.2d 65, (N.Y. 1993), cert. denied, 114 S. Ct. 1837 (1994) (Clearinghouse No. 48,836), and N.R. v. Soliz, No. C93-5333B (W.D. Wash. Feb. 4, 1994) (Clearinghouse No. 49,996). These cases are discussed in Mandatory Minimum Child Support Orders Held to Violate Federal Law, Women's Advocate, Mar. 1994, at 1. The Alaska Supreme Court upheld the application of a mandatory $50 per month order against an indigent imprisoned mother, despite her lack of income. Douglas v. Alaska, 1994 WL 407290 (Aug. 5, 1994). However, the mandatory minimum order was not challenged as a violation of federal law until after Moody was decided. At that point, Douglas's attorney made a motion for a rehearing, which was denied. Discussion with James Gasper, Esq., of Anchorage, Alaska, on Oct. 5, 1994.


/34/ If the client receives SSI and the children for whom support is sought receive AFDC, however, this argument is not likely to succeed because AFDC levels for a family of three in many states are lower than SSI levels for an individual. See Child Support Against Recipients of MTPB, supra note 31.

/35/ See Moore v. Sharp, 532 N.Y.S.2d 811 (N.Y. App. Div. 1988) (trial court decision that recipient of Social Security disability (SSD) and SSI should pay child support should be reversed; recipient needed his SSD and SSI income to cover his own basic needs); Proudfit v. O'Neal, 484 N.W.2d 746 (Mich. Ct. App. 1992) (trial court decision that all income of recipient of SSI and SSD may be considered, and ordering $48 per month child support, was reversed and remanded with directions to consider only the SSD income) (Clearinghouse No. 48,077); Wisconsin v. Rose, 492 N.W.2d 350 (Wis. Ct. App. 1992) (order holding recipient of AFDC in contempt for failing to pay child support out of her wages for part-time work was upheld). These cases are discussed in Child Support Against Recipients of MTPB, supra note 31, at sec. V C


/37/ The Welfare Reform Network Task Force on Federal Welfare Reform (of which NCOWFL is a member), coordinated by Don Friedman of Legal Services of New York, drafted some of the language which is used in the following critique of the stricter "cooperation" requirement. See also the September 1994 issue of Women's Advocate, which contains two major articles on women and welfare "reform."

Early in 1994, a panel of the Louisiana Supreme Court held that a trial court had erred in holding unconstitutional certain provisions of Louisiana's new law concerning domestic violence and custody. Those provisions require the suspension of all visitation and contact between a child and a parent after a court has found, by a preponderance of the evidence, that the parent sexually abused the child. The parent may regain supervised visitation when the court determines that the parent has successfully completed a "treatment program designed for such sexual abusers" and that supervised visitation is in the child's best interest. The supreme court panel held that the provisions involve only a "temporary" suspension of "some" parental rights and thus do not violate the constitutional proscription against deprivations of fundamental liberty interests without due process of law.

A few months later, however, the Louisiana Supreme Court withdrew that opinion and granted a rehearing en banc. Upon rehearing, the court held that before a court may constitutionally deprive a parent of all visitation and contact with a child, the court must find, by clear and convincing evidence, that the parent sexually abused the child. Thus, the supreme court affirmed the judgment of the trial court declaring the statute unconstitutional.

On its face, this holding does not affect other provisions of the statute, most importantly the prohibition on granting custody to a parent with "a history of perpetrating family violence" except under specified conditions, and the prohibition on permitting unsupervised visitation with such a parent unless the parent proves, among other things, treatment program completion and that unsupervised visitation would be in the child's best interest. The difference between the sexual abuse provision (held unconstitutional) and the domestic violence provisions (not held unconstitutional) is that even if domestic violence is proven, the abuser does not lose all visitation and contact with the child -- supervised visitation is still permitted.

/1/Louisiana in re A.C., 631 So.2d 407 (La. 1994), withdrawn and rehearing granted May 12, 1994.
